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VOLUNTARY AND INVOLUNTARY NON-SUITS IN MISSOURI

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At common law a plaintiff could not be nonsuited without his consent. That meant merely that in every case the plaintiff had the right to have the jury return a verdict. He could not be made to suffer an involuntary nonsuit because of any failure on his part to sustain the burden of proof.[1] However, the practice developed in some states of nonsuiting a plaintiff on defendant's motion where at the close of plaintiff's evidence it was found his evidence was insufficient to make a case for the jury.[2] This device, called "involuntary nonsuit", differs from the practice of directing a verdict in that after a nonsuit a plaintiff can begin another action,[3] whereas when a verdict is directed and found against the plaintiff, the matter therein litigated is *res adjudicata*.[4] Another difference is that a plaintiff can be made to suffer an involuntary nonsuit only at the close of his evidence,[5] whereas a verdict can be directed either at the close of

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1. Castle v. Bullard, 23 How. 172 (U. S. 1859); Pochin v. Pawley, 1 Black W. 670 (K. B. 1769). In an action on a contract against a surveyor, there being no evidence of any contract with the surveyor, the court would have nonsuited the plaintiff, but he refused to be nonsuited.

2. Petrillo v. Connecticut Co., 92 Conn. 235, 102 Atl. 607 (1917); Culberson v. Everett, 152 Ga. 497, 110 S. E. 275 (1921); Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353 (1918); Wittemann Bros. v. Forman Bottling Co., 178 App. Div. 674, 165 N. Y. Supp. 811 (1917); Sanders v. Atlantic Coast Line R. R., 201 N. C. 672, 161 S. E. 320 (1931). See also Smith, *Power to Direct Verdict* (1924) 24 COL. L. REV. 111, 115.

3. Johnson v. Elwood, 56 N. Y. 614 (1874); Cleary v. Quaker City Cab Co., 285 Pa. 241, 132 Atl. 185 (1926); Crocker v. Howland, 144 Ore. 223, 24 P. (2d) 327 (1933).

4. McElroy v. Board of Education, 184 Minn. 357, 238 N. W. 681 (1931); Standard Baking Co. v. Hi-Grade Coal & Fuel Co., 115 N. J. L. 265, 179 Atl. 308 (1935).

5. Dunbar v. Fant, 170 S. C. 414, 170 S. E. 460 (1933) (where directed verdict was held proper only at close of all the evidence, while an involuntary

plaintiff's evidence,[6] or at the close of all the evidence,[7] although in a few jurisdictions a verdict can be directed only at the close of all the evidence.[8] The practice of dismissing a plaintiff's case on motion of the defendant for failure or lack of evidence never gained a foothold in Missouri.[9] Hence, the device of an involuntary nonsuit as described above is not a part of the Missouri practice. Furthermore, it has been abolished in several states in which it formerly prevailed.[10]

Since *English v. Mullanphy*[11] was decided in 1827, Missouri courts have permitted a plaintiff to appeal after having taken what would in other jurisdictions be regarded as a voluntary nonsuit—one from which an appeal in those states would not lie[12]—provided his nonsuit is taken as the result of an adverse ruling of the trial court of such character as to

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nonsuit was held proper only at close of plaintiff's evidence); Nowell v. Basnight, 185 N. C. 142, 116 S. E. 87 (1923). But see Toutle Logging Co. v. Hammond Lumber Co., 78 Wash. 568, 139 Pac. 625 (1914), holding an involuntary nonsuit proper at either close of plaintiff's evidence, or at close of all the evidence.

6. Callahan v. Warne, 40 Mo. 131 (1867); Weaver v. Benton-Bellefontaine Ry., 60 Mo. App. 207 (1895); and Stierman v. Meissner, 253 S. W. 383 (Mo. App. 1923).

7. Day v. Weinstein, 148 Md. 104, 128 Atl. 897 (1925); State *ex rel.* Dunklin County v. McKay, 330 Mo. 33, 49 S. W. (2d) 125 (1932); Right Way Cleaners v. Knappenberger, 90 Okla. 277, 217 Pac. 399 (1923).

8. Clarke v. Order of United Commercial Travelers, 79 F. (2d) 564 (C. C. A. 5th, 1935) (holding it was error to direct a verdict at close of plaintiff's case, where plaintiff has failed to make out a *prima facie* case); DiBiase v. Garnsey, 104 Conn. 447, 133 Atl. 669 (1926); Cantor v. Reserve Loan Life Ins. Co., 161 S. C. 198, 159 S. E. 542 (1931).

9. Wells v. Gaty, McGune & Glasby, 8 Mo. 681 (1844); Clark v. Steamboat Mound City, 9 Mo. 146 (1845); Perrin v. Wilson, 9 Mo. 148 (1845); Clark's Adm'x v. Hannibal & St. Joseph R. R., 36 Mo. 202 (1865) (where defendant moved for nonsuit at close of plaintiff's evidence, it was held that the plaintiff cannot be nonsuited without his consent). In Marshall v. Wolfe, 11 Mo. 608 (1848), defendant's request for an instruction that the jury find as in the case of a nonsuit if they find that the work was performed under a special contract, was refused. On appeal the court said, "We do not know that we comprehend the instruction. If it was intended by the draftsman to obtain a non-suit of the plaintiff at the hands of the court then the court committed no error in refusing it, for neither the court nor the jury have the power to non-suit a plaintiff who is pursuing his remedy according to the rules of law and the practice of the court. He has an undoubted right to have his case passed upon by a jury. . ." See also, Martin v. Henley, 13 Mo. 312 (1850).

10. In McElroy v. Board of Education, 184 Minn. 357, 238 N. W. 681 (1931), the court granted defendant's motion to nonsuit the plaintiff at the close of plaintiff's evidence for failure to establish his case. On appeal it was held that dismissals were regulated by statute; dismissal for failure of proof is not included within the statute, and the court should have directed a verdict. However, since the taking of a verdict is a mere formality, the motion will be considered as a directed verdict and the decision is *res judicata*.

11. 1 Mo. 780 (1827).

12. Schotis v. North Coast Stevedoring Co., 24 F. (2d) 592 (D. C. Wash. 1928); State *ex rel.* Brown v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919).

preclude him from a substantial recovery.[13] Before a plaintiff can appeal, however, he must first file a motion to set aside the nonsuit taken by him[14] and urge as the grounds for setting aside the nonsuit the adverse ruling of the trial court which he contends precludes him from obtaining such recovery.[15] In the event this motion is overruled and final judgment of nonsuit or dismissal entered, the plaintiff may appeal.[16] On appeal the plaintiff may obtain a review of the ruling against him in the lower court.[17] If the judgment of the lower court is reversed a new trial will be ordered.[18] On the other hand, if the judgment of the lower court is affirmed, the plaintiff stands nonsuited and may still bring another action for the same cause.[19]

A nonsuit taken by the plaintiff as the result of an adverse ruling of the trial court which prevents a recovery is called an "involuntary nonsuit" in Missouri.[20] A nonsuit taken by the plaintiff but not as the result of an adverse ruling which prevents a substantial recovery is called a "voluntary nonsuit." A plaintiff may appeal from an involuntary nonsuit in Missouri, but not from a voluntary nonsuit.[21] Thus in Missouri the question as to whether a nonsuit is "voluntary" or "involuntary" does not depend upon who is the moving party, as it does in other jurisdictions, for in Missouri in both instances the plaintiff is the party who moves to be nonsuited. An involuntary nonsuit as it is known in this state can only be regarded as involuntary in the sense that the adverse ruling of the trial court prevents any possibility of the plaintiff obtaining a verdict and judgment in his favor. Because of the adverse ruling it is useless for

13. Kelly-Goodfellow Shoe Co. v. Prickett, 84 Mo. App. 94 (1900); Stith v. Newberry Co., 336 Mo. 467, 79 S. W. (2d) 447 (1934); Arky v. Swift & Co., 270 S. W. 438 (Mo. App. 1925). See Mo. REV. STAT. (1929) § 1018, when appeals will be granted.

14. Whitfield v. Union Electric Light & Power Co., 271 S. W. 52 (Mo. 1925) (motion to set aside nonsuit is a motion for a new trial).

15. In Atkinson v. Lane, 7 Mo. 403 (1842), it was held that plaintiff cannot appeal after taking an involuntary nonsuit without first filing a motion to set the nonsuit aside. See also note 14, *supra*.

16. Boggess v. Cox, 48 Mo. 278 (1871); Bonanomi v. Purcell, 287 Mo. 436, 230 S. W. 120 (1921); Stith v. Newberry Co., 336 Mo. 467, 79 S. W. (2d) 447 (1934) (where the court refuses to set aside a nonsuit, plaintiff cannot appeal until final judgment of dismissal is entered against him).

17. Yankee v. Thompson, 51 Mo. 234 (1873).

18. McElroy v. Ford, 81 Mo. App. 500 (1899); Leesley Bros. v. Rebori Fruit Co., 162 Mo. App. 195, 114 S. W. 138 (1912).

19. Chouteau v. Rowse, 56 Mo. 65 (1874); Chouteau v. Rowse, 90 Mo. 191 (1886).

20. Hogan-Sunkel Heating Co. v. Bradley, 320 Mo. 185, 7 S. W. (2d) 255 (1928); Diamond Rubber Co. v. Wernicke, 166 Mo. App. 128, 148 S. W. 160 (1912).

21. Segall v. Garlichs, 313 Mo. 406, 281 S. W. 693 (1926).

him to proceed further with the trial; consequently he is forced to take a nonsuit.[22]

A plaintiff in Missouri need not move to set aside a nonsuit taken by him even though his nonsuit was taken as the result of an adverse ruling of the trial court which prevented a substantial recovery on his part.[23] He may elect to sue over again without moving to set it aside. Thus it may be said that every involuntary nonsuit includes a voluntary nonsuit in so far as a plaintiff can begin a new action.

In some cases the trial court has sustained the plaintiff's motion to set aside the nonsuit, and when this is done the trial court will order a new trial. An appeal by the plaintiff is then unnecessary.[24] However, the Missouri statutes permit either party to appeal from a ruling of a trial court ordering a new trial.[25] In those cases where the trial court sustains plaintiff's motion to set aside a nonsuit, the defendant may elect to appeal from this ruling rather than to submit to a new trial.[26]

Even though the defendant appeals, the plaintiff is assured of a new trial, for in the event the appellate court affirms the judgment of the lower court a new trial will be ordered,[27] while if the appellate court reverses the judgment of the trial court it will set aside the order for a new trial and affirm the judgment of nonsuit. The plaintiff may bring another action for the same cause after the judgment of nonsuit is affirmed on appeal.[28]

Of course, the plaintiff need not take a nonsuit even though the ruling of the trial court does prevent him from recovering in that action. He may choose to permit the proceedings in the lower court to proceed to

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22. Wonderly v. Haynes, 159 Mo. App. 122, 139 S. W. 813 (1911) (holding a nonsuit forced on plaintiff by an adverse ruling of the court is an involuntary nonsuit).

23. Mason v. Kansas City Belt Ry., 226 Mo. 212, 125 S. W. 1128 (1910); Thompson v. Farmers Exchange Bk., 333 Mo. 437, 62 S. W. (2d) 803 (1933).

24. State *ex rel.* Cass County v. Missouri Pac. Ry., 149 Mo. 104, 50 S. W. 278 (1899); Wonderly v. Haynes, 159 Mo. App. 122, 139 S. W. 813 (1911); Thaler v. Niedermeyer, 185 Mo. App. 257, 170 S. W. 378 (1914).

25. Mo. REV. STAT. (1929) § 1018, "Any party to a suit aggrieved by any judgment of any circuit court in any civil cause from which an appeal is not prohibited by the Constitution, may take his appeal to a court having appellate jurisdiction from any order granting a new trial, . . ."

26. Turr v. Terminal R. R. Ass'n, 277 Mo. 235, 209 S. W. 908 (1919). However, a defendant cannot appeal from an order of the trial court reinstating a cause after the plaintiff has taken a *voluntary nonsuit*, McFarland v. O'Reilly, 272 S. W. 692 (Mo. 1925); Segall v. Garlichs, 313 Mo. 406, 281 S. W. 693 (1926); Holdridge v. Marsh, 28 Mo. App. 283 (1887).

27. State *ex rel.* Cass County v. Missouri Pac. Ry., 149 Mo. 104, 50 S. W. 278 (1899); Wonderly v. Haynes, 159 Mo. App. 122, 139 S. W. 813 (1911).

28. Woods v. Missouri Pac. Ry., 149 Mo. App. 507, 130 S. W. 1123 (1910); Woods v. Missouri Pac. Ry., 192 Mo. App. 165, 179 S. W. 727 (1915).

final judgment, move for a new trial, and, if this is denied, appeal.[29] However, when this course is followed and results in the appellate court affirming the judgment of the lower court on its ruling, the plaintiff cannot sue over again. The judgment will then be *res adjudicata*.[30]

Missouri Statutes Regulating Nonsuits

To understand more fully the Missouri statutes regulating nonsuits, it is necessary to review briefly nonsuits as they existed at common law. Before 1400 a plaintiff in England had the right to take a nonsuit even after general verdict. In *Keat v. Barker*,[31] it was said ". . . for if he did not like his damages he might be nonsuit." This practice was altered in England in 1400 by a statute[32] which provided that a plaintiff could not be nonsuited after verdict. After the passage of this statute it became established that a plaintiff could take a nonsuit at any time before a general verdict, but not afterwards. In *Price v. Parker*,[33] plaintiff moved for a discontinuance after general verdict. His motion was denied. The court gave as its reason, ". . . for that would be having as many new trials as the plaintiff pleases . . ." However, the practice did continue of permitting a plaintiff to take a nonsuit after special verdict, but this was within the discretion of the court, and was permitted only in hard cases.[34]

Nonsuits were regulated by statute in Missouri as early as 1807. The original statute passed by the territorial legislature provided, "That no plaintiff shall be permitted to suffer a non-suit after the jury have retired from the bar to make up their verdict." The present Missouri statute provides, "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards." Minor changes from time to time in this statute have not resulted in changes in its interpretation.[35]

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29. Johnson v. United Railways Co., 227 Mo. 423, 127 S. W. 63 (1910); Johnson v. United Railways Co., 243 Mo. 278, 147 S. W. 1077 (1912).
30. See note 29, *supra*.
31. 5 Mod. 208 (K. B. 1697).
32. 2 Hen. IV, c. 7 (1400).
33. 1 Salk. 178 (K. B. 1696).
34. Earl of Oxford v. Waterhouse, 1 Cro. Car. 575 (K. B. 1639).
35. The original statute appears in TERR. LAWS OF MISSOURI, p. 123, enacted 1807. The original act was continued in the Revision of 1825; MO. REV. STAT. (1825) 632.
The statute was altered in the Revision of 1835; MO. REV. STAT. (1835) 464, "No plaintiff shall suffer a non-suit, after the cause upon a hearing of the

The Missouri statute has been held to apply to voluntary as well as involuntary nonsuits.[36] Does the plaintiff have the right in Missouri to take a nonsuit, or may the trial court in its discretion refuse to permit a nonsuit? The courts have interpreted the statute to mean that the plaintiff does have the right to take a nonsuit.[37] However, the Supreme Court of Missouri, in *State ex rel. Big Bend Quarry Co. v. Wurdeman*,[38] held that a plaintiff could not dismiss during term time so as to injuriously affect the rights of the defendant. The court also held that the words of the statute, *shall be allowed to dismiss*, indicated that the plaintiff cannot dismiss without an order of court. In *Derrington v. Poplar Bluff*,[39] the court held that it was necessary for the plaintiff to ask permission to take a nonsuit during term time in order to ascertain whether he would meet with opposition of the court if he elected to exercise his statutory right.[40] Again in *State ex rel. Hahn Bakery Co. v. Anderson*,[41] the trial

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parties, shall have been finally submitted to a jury, or to the court setting to try the issue, for their decision." This wording of the statute was continued in the Revision of 1845, and 1855; Mo. REV. STAT. (1845) 821; Mo. REV. STAT. (1855) 1269.

However, in the revision of 1855 a new section was added, Mo. REV. STAT. (1855) 1238, "The plaintiff shall be allowed to dismiss his suit, or take a nonsuit, at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court."

The present statute appeared for the first time in 1865, and has remained unchanged since then, see Mo. REV. STAT. (1865) 662; Mo. REV. STAT. (1879) § 3556; Mo. REV. STAT. (1889) § 2084; Mo. REV. STAT. (1909) § 1980; Mo. REV. STAT. (1919) § 1410; Mo. REV. STAT. (1929) § 960.

36. Owens v. Washington Fidelity Nat. Ins. Co., 85 S. W. (2d) 193 (Mo. App. 1935); McCormack v. Dunn, 232 Mo. App. 371, 106 S. W. (2d) 933 (1937).

37. Lawrence v. Shreve, 26 Mo. 492 (1858); Templeton v. Wolf, 19 Mo. 101 (1853), where a judgment was reversed and remanded for refusal of the trial court to permit plaintiff to take a nonsuit before his case was finally submitted.

Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515 (1907), defendant can take a nonsuit on his counterclaim. See also Klaiber v. Jorcke, 239 S. W. 880 (Mo. App. 1922).

Kelly-Goodfellow Shoe Co. v. Prickett, 84 Mo. App. 94 (1900), interpleader can take involuntary nonsuit as to his interplea.

Plaintiff can take either a voluntary or involuntary nonsuit as to one or more defendants when their liability is joint and several, Berkson v. Kansas City Cable Ry., 144 Mo. 211, 45 S. W. 1119 (1898); Flenner v. Southwest Missouri R. R., 221 Mo. App. 160, 290 S. W. 78 (1926); Keyes v. Chicago, B. & Q. R. R., 326 Mo. 236, 31 S. W. (2d) 50 (1930).

However, in a statutory proceeding to contest a will, it is the duty of the court to enter judgment either establishing or rejecting the instrument purporting to be the will, and plaintiff does not have the right to take a nonsuit. Benoist v. Murrin, 48 Mo. 48 (1871); McMahon v. McMahon, 100 Mo. 97, 13 S. W. 208 (1889).

38. 309 Mo. 341, 274 S. W. 380 (1925).

39. 186 S. W. 561 (Mo. App. 1916).

40. In the case of Stith v. Newberry Co., 336 Mo. 467, 79 S. W. (2d) 447 (1934), the court said, "The taking of a nonsuit is essentially the act of the plaintiff rather than of the court, which records and gives sanction to the plaintiff's act."

41. 269 Mo. 381, 190 S. W. 857 (1916).

court set aside a verdict for the defendant, ordered a new trial, and thereafter the plaintiff took a nonsuit. The defendant moved to reinstate the cause to the end that he could appeal from the order granting a new trial. This motion was denied, and the defendant brought an action of *mandamus*, wherein it was held that the right of the plaintiff to take a nonsuit cannot be exercised so as to deprive the defendant of his right to appeal from the order granting a new trial. The court said:

> "These considerations make it fairly manifest that . . . we must construe the statute (*when invoked after one trial and one successful motion for a new trial in the same term*) as if it read "provided, such dismissal will not operate to deprive the defendant of the right to appeal during the term." For surely when the defendants won before a jury, and the court cut the victory from under his feet . . . defendants had the right by a solemn statute to appeal to this court . . ."

Since 1839, a plaintiff has been permitted by our statutes to dismiss his suit in vacation upon the payment of all costs that may have accrued therein.[42] In *Atkison v. Dixon*,[43] plaintiff had a judgment in the lower court in an action of ejectment, but on appeal the case was reversed and remanded with directions to enter judgment for the defendant. Plaintiff thereafter in vacation dismissed his cause, and at the next term the court refused to reinstate the case. The defendant sued out a writ of *mandamus*, *State ex rel. Dixon v. Givan*,[44] to compel the trial judge to reinstate the case. The court in construing the statute permitting dismissals in vacation held that this statute, comprehensive as it is, was never designed to enable a plaintiff to evade or balk the mandate of an appellate court.

A trial court cannot, in its discretion, deny the right of the plaintiff to

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42. MO. SESSION LAWS (1838) 98, reads as follows, "It shall be lawful for the plaintiff or complainant in any suit at law or in chancery, in any court in this State, to dismiss his suit in vacation of such court." This enactment was approved Jan. 14, 1839.

This statute was revised in the year 1845, see MO. REV. STAT. (1845) 832, which reads as follows, "The plaintiff in any suit at law in any court of record, may dismiss such suit in the vacation of the court, upon the payment of all costs that may have accrued therein." See also MO. REV. STAT. (1855) 1290, and MO. REV. STAT. (1865) 686.

The statute was again revised in the year 1879, see MO. REV. STAT. (1879) § 3724, which reads as follows, "The plaintiff in any suit in any court of record may dismiss such suit in the vacation of the court, upon the payment of all costs that may have accrued therein; and no exhibit or other paper filed in any case shall be withdrawn without the order of the court, and upon depositing in such court a copy thereof."

No further alterations in the statute have taken place since the revision of 1879, and that section is now in force. See MO. REV. STAT. (1929) § 959.

43. 70 Mo. 381 (1879).

44. 75 Mo. 516 (1882).

take a nonsuit. However, when a nonsuit is taken during the term time, it is necessary to apply for and obtain permission of the court, or when taken during vacation the trial court may ignore the attempt to take a nonsuit when not taken as authorized by statute.[45] Furthermore, the statutory right of the plaintiff to take a nonsuit must be construed in the light of existing circumstances, and this right cannot be exercised so as to affect injuriously the rights of the defendant, to evade the mandate of an appellate court, or to deprive the defendant of his right to appeal.

Time For Taking Nonsuit

Until 1835 the Missouri statute on nonsuits provided that a plaintiff should not be permitted to take a nonsuit, ". . . after the jury have retired from the bar to make up their verdict." The present statute provides that a plaintiff shall be allowed to dismiss his suit or take a nonsuit, ". . . at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards." The words, "at any time before the same is finally submitted" were adopted for the first time in the revision of 1835, and have been continued since.[46] The words, "and not afterwards" appearing at the end of the present statute, appeared for the first time in the reenactment of the statute in 1875. In *Mayer v. Old*,[47] these words were held to have added nothing to the statute, but were merely intended to emphasize the thought already expressed.

The question as to how late in the proceedings a plaintiff may take a nonsuit has been before the appellate courts on numerous occasions. In *Lawrence v. Shreve*,[48] the court held that when a case is tried by a jury, it is the uniform construction of this statute to allow a party to get the opinion of the court upon the law of his case in the form of instructions and then withdraw his suit if that opinion is unfavorable to him. The court further held that the same opportunity should be afforded the plaintiff when the case is tried by the court. In *Mayer v. Old*,[49] the stat-

45. In Martin v. Richmond Cotton Oil Co., 194 Mo. App. 106, 184 S. W. 127 (1916), the question arose as to whether the defendant could complain when the plaintiff dismissed during vacation without paying the costs. The court held that the provision in the statute for the payment of costs was for the protection of the court and its officers and not for the defendant. But see, State *ex rel.* Dixon v. Givan, 75 Mo. 516 (1882).

46. See note 35, *supra*.

47. 51 Mo. App. 214 (1892).

48. 26 Mo. 492 (1858).

49. 51 Mo. App. 214 (1892).

ute was interpreted, so far as it regulates the time within which the plaintiff may take a nonsuit, as follows:

> "The case is not *finally submitted* until the evidence is in, and the instructions (if any offered) are passed on, and then in the *interim* between the settling of instructions and final submission to the court or jury, the plaintiff has the undoubted right to submit to a nonsuit. The rule is the same whether the case is being tried by the jury or by the court sitting as a jury."

In *Suess v. Motz*,[50] the court held that it was too late to take a nonsuit after the jury had retired. The trial court had permitted the plaintiff to be nonsuited, and the appellate court could not aid the defendant because the jury had not returned a verdict. Consequently, the court found it necessary to order a new trial. In *Templeton v. Wolfe*,[51] the court held that it was proper to permit the plaintiff to take a nonsuit after the instructions had been read to the jury, but before the jury had retired.

It is well established that a plaintiff cannot take a nonsuit after verdict or judgment,[52] nor can a verdict or judgment be set aside for the sole purpose of enabling a plaintiff to take a nonsuit.[53] However, when a verdict or judgment is set aside for any other reason and a new trial ordered, a plaintiff may then take a nonsuit.[54]

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50. 220 Mo. App. 32, 285 S. W. 775 (1926).

51. 19 Mo. 101 (1853).

52. Reed v. Reed, 39 Mo. App. 473 (1890); Thompson v. Wendling, 219 S. W. 671 (Mo. App. 1920); Nordquist v. Armourdale State Bank, 225 Mo. App. 186, 19 S. W. (2d) 553 (1929). However, in Wood v. Nortman, 85 Mo. 298 (1884), it was held proper to take a nonsuit in an action of ejectment where the judgment had been prematurely entered.

In Klaiber v. Jorcke, 239 S. W. 880 (Mo. App. 1922), plaintiff sued to enjoin a foreclosure sale. Defendant filed a cross bill for foreclosure. Defendant had judgment on both the petition and cross bill. On the same day the trial court entered an order that the defendant waives his right to judgment of the cross bill, and same is dismissed without prejudice. The court on appeal held that the statute was not intended to prevent a successful party from waiving by dismissal the benefit of a favorable judgment which the court has announced it will enter.

In Stauffer v. Stauffer, 200 Mo. App. 477, 207 S. W. 240 (1918), the court dismissed plaintiff's divorce action because plaintiff was not the innocent party. Thereafter, the court amended the judgment to read, "dismissal without prejudice." The court on appeal held the amendment amounted to a nonsuit, and the court had no power to permit a nonsuit after judgment.

It was held, in Allen v. Hickam, 156 Mo. 49, 56 S. W. 309 (1900), to be too late to take a nonsuit after the court had refused to set aside the report of arbitrators. In Ivory v. Delore, 26 Mo. 505 (1858), the court held that plaintiff may take a nonsuit after the report of the commissioners, but before approval of the commissioners' report.

53. Lawyers' Co-op. Publishing Co. v. Gordon, 173 Mo. 139, 73 S. W. 155 (1903); Thompson v. Wendling, 219 S. W. 671 (Mo. App. 1920).

54. State *ex rel.* Hahn Bakery Co. v. Anderson, 269 Mo. 381, 190 S. W. 857 (1916), but a nonsuit taken after a new trial is ordered cannot be taken before the time allowed defendant to appeal so as to deprive him of his right to appeal.

Several cases have appeared before the appellate courts in which the case has been submitted to either the court or to the jury, and then withdrawn in order to enable either party to present additional declarations of law. In these cases the plaintiff took a nonsuit before the case was again submitted. The Missouri statute provides that the plaintiff may take a nonsuit at any time before the case is *finally submitted*. What constitutes final submission is the question in these cases.

In *Hensley & Wright v. Peck & Barnett*,[55] the jury, after deliberating one evening, informed the court that they could not agree, whereupon the court gave the jury a new set of instructions. The plaintiff took a nonsuit before the jury again retired. On appeal the court held the nonsuit was properly granted. In *Wilson & Co. v. Stark*,[56] it was held proper to permit a plaintiff to take a nonsuit in an action at law tried before the court sitting as a jury where the judge withheld the announcement of his verdict in order to permit the plaintiff to file declarations of law, some of which were refused. The plaintiff at that time took a nonsuit. However, in *McCauley v. Brown*,[57] the trial court refused to permit a nonsuit after the jury had deliberated for a day, and the trial judge then instructed them that any nine of them could return a verdict. The appellate court in affirming the ruling of the lower court held that when an instruction, though merely formal, is given after a case has been once submitted, and involves or affects some issue in the cause, or might affect the mind of the jury in arriving at conclusions on any of the issues submitted to them, there might then be reason for holding the case is not finally submitted until then. In *National Bank of Commerce v. Butler*,[58] it was held proper to permit a plaintiff to take a nonsuit, after a motion to set aside submission of the case has been sustained in order to permit the plaintiff to introduce additional evidence.

In several cases tried before the court sitting as a jury, or before the court in equity proceedings, the trial judge has announced his verdict or judgment at the same time as he has announced which instructions or declarations of law were accepted and refused. The Missouri appellate courts have held that a plaintiff has the right to have an opportunity to take a nonsuit even after the court has ruled on the declarations of law presented by the parties. It is error for the trial court to announce the

55. 13 Mo. 587 (1850).
56. 42 Mo. App. 376 (1890).
57. 99 Mo. App. 625, 74 S. W. 464 (1903).
58. 168 Mo. App. 280, 142 S. W. 1117 (1912).

verdict or judgment of the court at the same time at which it announces its rulings on the declarations of law tendered by the parties so as to deprive the plaintiff of his opportunity of taking a nonsuit after he has heard the ruling of the court on the declarations of law.[59]

Effect of Counterclaim on Plaintiff's Right to Take Nonsuit

Before 1889 a dismissal or nonsuit taken by a plaintiff also resulted in the dismissal of defendant's counterclaim or set-off.[60] The legislature remedied this situation in that year by expressly providing that "the dismissal or any other discontinuance of plaintiff's action, in which such set-off or counterclaim shall have been filed, shall not operate to dismiss or discontinue such set-off or counterclaim. . . ."[61] In *Lanyon v. Chesney*,[62] the question arose as to whether this statute prevented the plaintiff from taking a nonsuit after a counterclaim had been filed. The court held that prior to the revision of 1889 the defendant could not have proceeded with his counterclaim if the plaintiff took a nonsuit, but in order to remedy this injustice to the defendant a new section had been added to the statute. This new section was not intended to limit the right of the plaintiff to take a nonsuit, but merely to permit the defendant to proceed with his counterclaim after the plaintiff had dismissed.[63]

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59. Piatt v. Heim & Overly Realty Co., 342 Mo. 772, 117 S. W. (2d) 327 (1938); Lawrence v. Shreve, 26 Mo. 492 (1858).

60. Nordmanser v. Hitchcock, 40 Mo. 178 (1867) (counterclaim); Fink v. Bruihl, 47 Mo. 173 (1870) (set-off); Martin v. McLean, 49 Mo. 361 (1872).

61. MO. REV. STAT. (1889) § 8172. This section of the statute is still in effect in its original form, and appears in MO. REV. STAT. (1929) § 849, which reads as follows: "Whenever a set-off or counterclaim shall be filed in an action, as provided in this article, it shall be deemed in law and treated as an independent action begun by the defendant against the plaintiff, except in the cases enumerated in section 838 of this article; and, the dismissal or any other discontinuance of the plaintiff's action, in which such set-off or counterclaim shall have been filed, shall not operate to dismiss or discontinue such set-off or counterclaim, but the defendant so filing such set-off or counterclaim may, notwithstanding such discontinuance or dismissal of the plaintiff's action, prosecute the same against the plaintiff in the same manner and with the same force and effect as if he had originally begun the action on his set-off or counterclaim against the plaintiff; and, in such case, the defendant so prosecuting such set-off or counterclaim shall be subject to all the rules applicable to plaintiffs in civil actions and other procedure, and the set-off or counterclaim shall be proceeded with, in all respects, as if the action had been originally been begun by the defendant against the plaintiff."

62. 209 Mo. 1, 106 S. W. 522 (1907).

63. Defendant has the right to take a nonsuit under this statute as to his counterclaim, set-off, or interplea, Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 S. W. 515 (1907) (counterclaim); Klaiber v. Jorcke, 239 S. W. 880 (Mo. App. 1922) (counterclaim); Kelly-Goodfellow Shoe Co. v. Prickett, 84 Mo. App. 94 (1900) (interplea).

Involuntary Nonsuits in Missouri.

The right of a plaintiff to appeal from a judgment of nonsuit in a proceeding at law was recognized as early as 1827 in Missouri.[64] The contrary was true of proceedings in equity and it was not until 1889 that a plaintiff could appeal from a judgment of nonsuit in an equity proceeding even though his nonsuit was taken as the result of an adverse ruling of the trial court which prevented a substantial recovery.[65] In *Sachse v. Clingingsmith,*[66] the Supreme Court of Missouri expressly overruled its former decisions by holding that an appeal would lie in an equity suit where the plaintiff had taken a nonsuit after an adverse ruling which prevented a recovery on his part. The court said:

> "A non-suit with leave is not, strictly speaking, an appropriate mode to secure a review of exceptions in a suit of this nature. Indeed, it has been expressly ruled that it cannot be resorted to. *Gill v. Clark,* 54 Mo. 415. But a majority of the court are adverse to adhering to that ruling. The distinction it makes is regarded as of form rather than of substance and one that should now be abandoned. It is thought best to treat all civil actions alike in this regard."

Since *Sachse v. Clingingsmith,* no distinction has been made between actions at law and suits in equity in so far as the right of the plaintiff to appeal from a judgment of nonsuit is concerned.

It should be pointed out that an appeal will not lie from all judgments of nonsuit taken by plaintiff, but only in those cases where the nonsuit

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64. English v. Mullanphy, 1 Mo. 780 (1827).

65. In Gill v. Clark, 54 Mo. 415 (1873), it was said, "But the plaintiff did not let the court pass upon the case so as to bring it before us for review. In equitable suits no declarations of law can be made, and if made, will be disregarded in this court.

"The plaintiff by taking a non-suit, in effect, voluntarily dismisses his petition without prejudice. A non-suit with leave to move to set it aside can only be taken in a case at law so as to bring before us the question of law and fact passed on by the court. In suits in equity, the court below must be allowed to adjudicate on the facts and law so as to authorize us to pass upon them on appeal or writ of error.

"And in such suits this court will examine into all the evidence, and decide the case according to the preponderance of testimony and the law arising thereon."

In Conn v. Ferree, 60 Mo. 17 (1875), the court held plaintiff's appeal from a judgment of nonsuit premature, but said, "It is also doubtful whether a nonsuit with leave to set the same aside can be taken on a suit in equity so as to bring the case before this court to be reviewed."

But see, Schulter's Adm'r v. Bockwinkle's Adm'r, 19 Mo. 647 (1854), in which the court held plaintiff could not appeal after taking a voluntary nonsuit in an equity proceeding, but that had the nonsuit been taken as the result of an adverse ruling which precluded a recovery, an appeal could have been had.

66. 97 Mo. 406, 11 S. W. 69 (1888).

is taken by the plaintiff as the result of an *adverse ruling* of the trial court.[67] In addition, the adverse ruling of the trial court must *preclude the plaintiff from a substantial recovery.*[68] Nonsuits taken by the plaintiff, but not as the result of an adverse ruling are voluntary and no appeal lies as to them.[69] Even though the plaintiff takes his nonsuit as the result of an adverse ruling it will, nevertheless, be regarded as voluntary unless the adverse ruling is regarded as precluding a substantial recovery on his part. Merely calling a nonsuit "involuntary" will not make it so.[70]

What is an *adverse ruling?* A nonsuit taken after the trial judge has indicated that he will rule against the plaintiff, but before he actually rules, is a voluntary nonsuit. In *Graham v. Parsons,*[71] the trial judge indicated that he would give a peremptory instruction for the defendant, but before he actually gave the instruction the plaintiff took a nonsuit. On appeal it was held that this was not an adverse ruling for there was time and opportunity for the trial court to have changed its opinion before it made a formal ruling, and it might have done so, had not the plaintiff deprived it of that opportunity by taking a nonsuit. The court further held the nonsuit taken was voluntary, and that nonsuits were

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67. Gray v. Ward, 234 Mo. 291, 136 S. W. 405 (1911); Hogan-Sunkel Heating Co. v. Bradley, 320 Mo. 185, 7 S. W. (2d) 255 (1928); Kane v. Kaysing Iron Works, 89 S. W. (2d) 532 (Mo. App. 1936).

In addition to the requirement that there be an adverse ruling, the court in Adamson v. Metropolitan St. Ry., 126 Mo. App. 127, 103 S. W. 1097 (1907), held the plaintiff must also take an exception to the ruling. The court said, "But even if it could be suggested that there was an adverse ruling in this case, as there must be in order to make an involuntary nonsuit, yet there was no exception taken to such supposed ruling and therefore plaintiff must be regarded as acquiescing in the ruling and his subsequent nonsuit must be regarded as voluntary."

But see Thaler v. Niedermeyer, 185 Mo. App. 257, 170 S. W. 378 (1914), which is *contra* to the Adamson Metropolitan St. Ry. case. In the Thaler case the court said, "We think that the absence of an exception, under the circumstances, cannot affect plaintiff's case before us; nor do we perceive how it could have the effect of turning the involuntary nonsuit into a voluntary one, though it would have precluded plaintiff from having the court's action reviewed here had the nonsuit not been set aside and had plaintiff appealed—for the absurd rule of appellate practice still prevails that, no matter how much one may object below, or how plain it may be that he does not assent to or acquiesce in a ruling which his counsel has used every means within his power to prevent, nevertheless if the record does not show an 'exception' saved to the court's action, and this too in the proper place in the record, to-wit, the bill of exceptions, he may not complain of the ruling on appeal."

The Thaler case seems to be the better reasoned case because in Missouri a court may order a new trial even though no exception was taken. See, Green v. Terminal R. R. Ass'n, 211 Mo. 18, 109 S. W. 715 (1908); Heitland Grate & Mantel Co. v. Culver, 181 Mo. App. 691, 164 S. W. 708 (1914).

68. See note 13, *supra.*

69. See note 21, *supra.*

70. Owens v. Washington Fidelity Nat. Ins. Co., 85 S. W. (2d) 193 (Mo. App. 1935).

71. 88 Mo. App. 385 (1901).

voluntary unless the court's action is such as to preclude the plaintiff from a recovery. The same result was reached by the Supreme Court in *Segall v. Garlichs,*[72] decided in 1926.

Considerable confusion has existed in those cases in which the plaintiff has taken a nonsuit after the trial judge has marked a peremptory instruction as "given" and before it was read to the jury.[73] The Missouri statutes require the trial judge to give or refuse instructions presented in writing by either party.[74] Until recently there was some confusion as to whether an instruction marked "given" was a ruling of the court, or whether an instruction was *given* only when read to the jury. However, both divisions of the Supreme Court in 1936, in *Boonville National Bank v. Thompson*[75] and *Arp v. Rogers,*[76] held that an instruction when marked "given" was a ruling of the court, and a nonsuit taken at that time was taken as the result of an adverse ruling. These two cases should eliminate the confusion which formerly existed in this regard.

What adverse rulings of the trial court *preclude the plaintiff from a substantial recovery?* The early Missouri cases permitted a plaintiff to appeal from any adverse ruling of the trial court after he had taken a nonsuit. It was not at first necessary that the adverse ruling *prevent or preclude a substantial recovery.*[77] It was not until 1854 that the right

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72. 313 Mo. 406, 281 S. W. 693 (1926).

73. McClure v. Campbell, 148 Mo. 96, 49 S. W. 881 (1899); Lewis v. Center Creek Mining Co., 199 Mo. 463, 97 S. W. 938 (1906); Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717 (1903); Stephenson v. American National Ins. Co., 229 Mo. App. 480, 78 S. W. (2d) 876 (1935).

74. Mo. REV. STAT. (1929) § 967, "When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused."

75. 339 Mo. 1049, 99 S. W. (2d) 93 (1936).

76. 99 S. W. (2d) 103 (Mo. 1936). See note (1937) 2 Mo. L. REV. 253.

77. In English v. Mullanphy, 1 Mo. 780 (1827), a regularly subpoenaed witness of the plaintiff failed to appear, and the plaintiff applied for and obtained an attachment returnable to the next term. The plaintiff also asked for a continuance on the ground the witness was material for plaintiff's cause. A continuance was denied, whereupon plaintiff took a nonsuit. The plaintiff, after first unsuccessfully moving to set the nonsuit aside, sued out a writ of error. The supreme court reviewed the lower court's decision although there was no showing that the witness could not have been attached to the next term. See also Collins v. Bowmer, 2 Mo. 195 (1830).

In Howell v. Pitman, 5 Mo. 246 (1838), the plaintiff took a nonsuit after a survey of land he had introduced in evidence was rejected. The plaintiff appealed without first moving to set aside the nonsuit, and the court held his appeal would not lie for this reason. The court also held that it would have reviewed the decision of the lower court had the plaintiff first moved to set aside the nonsuit in the lower court, although no showing was made that the plaintiff could not have obtained a less objectionable survey of the land.

In Darne v. Broadwater, 9 Mo. 19 (1845), it was held that a writ of error would lie after a nonsuit was taken as the result of a refusal of the trial court

of the plaintiff to take a nonsuit and appeal was restricted to cases where the adverse ruling of the court prevented a recovery by the plaintiff. In *Schulter's Adm'r v. Bockwinkle's Adm'r*,[78] Judge Gamble, in expressing this restriction, said:

> "This court has entertained jurisdiction in cases where the Circuit Courts have, upon the trial of causes, decided questions which covered the plaintiff's case and obliged him to submit to a non-suit. But when parties voluntarily suffer non-suits, we do not interfere. If it was allowed to plaintiffs to take non-suits on every motion they might make and which the court might overrule, and then bring the case here to test the correctness of the decision upon the motion, this court would be filled with cases, in all different stages of progress, and every question of practice might be brought here to be settled before the merits of the case were reached. Although the court refused to give judgment on the answer, on the motion made by the plaintiff, there was still to be a hearing of the cause, and until that hearing, there could be no decision by which the plaintiff was obliged to take a non-suit."

Judge Ryland, in *Dumey v. Schoeffler*,[79] expressed the limitation on plaintiff's right to obtain a review on appeal of an adverse ruling of the trial court after plaintiff has taken a nonsuit in this manner:

> "Here a motion was made by plaintiff to strike out a part of the defendant's answer. This motion was overruled, and thereupon the plaintiff takes voluntarily a non-suit. He was not compelled to this course: he could have had the decision of the court upon the legal effect of that part of the answer, upon asking proper instructions. His case was not decided by the court below upon this motion to strike out, and we will not suffer the parties to come here upon every motion which is overruled or sustained followed by a voluntary non-suit."

In *Hageman v. Moreland*,[80] Judge Dryden expressed the distinction between voluntary and involuntary nonsuits in these words:

> "In the present posture of the case, we can give no opinion upon the merits. The plaintiff was under no necessity to take a nonsuit. The court has made no decision which necessarily precludes him from a recovery, for if it be admitted that the answer which the court refused to strike out presented a complete bar to the action, yet it by no means follows that the defendant could or would have sustained the same by proof on the trial of the

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to grant a continuance asked for on the ground that a witness material to plaintiff's cause was not present, and that the facts expected to be proved by this witness could not be proved by any other witness. No reason was given why the witness could not be attached forthwith.

78. 19 Mo. 647 (1854). See also McDermott v. Doyle, 11 Mo. 443 (1848).

79. 20 Mo. 323 (1855). See also Louisiana & Middletown Plank Road Co. v. Mitchell, 20 Mo. 432 (1855).

80. 33 Mo. 86 (1862). See also Layton v. Riney, 33 Mo. 87 (1862).

cause. If he had not, the answer could have done the plaintiff no harm.

"It is only where the action of the court, on the trial, is such as to preclude the plaintiff from a recovery that it is proper to suffer a nonsuit."

The most frequent use of the procedural device called "involuntary nonsuit" has been in those cases in which the trial court has given a peremptory instruction for the defendant. It is well established that a peremptory instruction given for the defendant at either the close of plaintiff's evidence,[81] or at the close of all the evidence,[82] is an adverse ruling of the trial court which precludes the plaintiff from a substantial recovery. A nonsuit taken as the result of such ruling is an involuntary nonsuit from which the plaintiff may appeal.

Several cases have been considered by the Missouri appellate courts in which the plaintiff has taken a nonsuit after the trial court has ruled that his petition did not state a cause of action. A nonsuit taken as the result of such a ruling is an involuntary nonsuit. In *State ex rel. Cass County v. Missouri Pac. Ry.*,[83] an action was brought against the railroad for a penalty as provided for by statute. The trial court refused to permit the plaintiff to introduce evidence to show that the defendant operated the railroad on the ground that the penalty was against the owner of the railroad, and not the operator. In addition the court permitted the defendant to introduce evidence tending to show that it was not the owner of the railroad. On appeal, the court held the nonsuit taken by plaintiff after these rulings was involuntary, ruled the evidence was admissible, and ordered a new trial.

In *Ready v. Smith*,[84] the trial court refused to receive any of plaintiff's evidence on the ground that he was not the proper party to sue. Plaintiff had sued to recover money alleged to have been embezzled from plaintiff's debtor. On appeal the court held the nonsuit taken after the

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81. Segall v. Garlichs, 313 Mo. 406, 281 S. W. 693 (1926); Hogan-Sunkel Heating Co. v. Bradley, 320 Mo. 185, 7 S. W. (2d) 255 (1928); Trabue v. United Railways Co., 154 Mo. App. 86, 133 S. W. 102 (1910); Armstrong v. Dunn, 180 Mo. App. 123, 167 S. W. 1197 (1914); Bank of Rockville v. Corbin, 276 S. W. 880 (Mo. App. 1925).

82. Gray v. Ward, 234 Mo. 291, 136 S. W. 405 (1911); Bonanomi v. Purcell, 287 Mo. 436, 230 S. W. 120 (1921); Stith v. Newberry Co., 336 Mo. 467, 79 S. W. (2d) 447 (1934); Boonville Nat. Bank v. Thompson, 339 Mo. 1049, 99 S. W. (2d) 93 (1936); Arp v. Rogers, 99 S. W. (2d) 103 (Mo. 1936); Kelly-Goodfellow Shoe Co. v. Prickett, 84 Mo. App. 94 (1900); Leesley Bros. v. Rebori Fruit Co., 162 Mo. App. 195, 144 S. W. 138 (1912); Arky v. Swift & Co., 270 S. W. 438 (Mo. App. 1925).

83. 149 Mo. 104, 50 S. W. 278 (1899).

84. 141 Mo. 305, 42 S. W. 727 (1897).

court had refused to receive any evidence was involuntary. In *Nivert v. Wabash R. R.*,[85] the plaintiff took a nonsuit after the trial court refused to receive any evidence because plaintiff's petition failed to state a cause of action. The Supreme Court on appeal held this was an involuntary nonsuit.

In those cases in which there is more than one count in plaintiff's petition a different problem is presented. In *Schneider v. Kirkpatrick*,[86] plaintiff's petition contained three counts, one in equity and two at law. The court required the plaintiff to elect on which count he would *proceed to trial.* He elected to proceed on the law counts, and as to these the defendant's request for a peremptory instruction was granted. The plaintiff then took a nonsuit. On appeal, the court held the nonsuit was voluntary since the plaintiff was still entitled to a hearing on the equity count. In *Wonderly v. Haynes*,[87] the trial court, believing that the two counts of plaintiff's petition were inconsistent and that they could not be pursued at the same time, required him to elect upon which count *he would stand.* Plaintiff elected to stand on the first count and took a nonsuit as to the second count. The defendant had judgment on the first count. The plaintiff successfully moved for a new trial on the second count, and the defendant appealed. After the plaintiff took a nonsuit in *Wonderly v. Haynes* as to the second count of his petition he could and did proceed to trial on the first count. There was no reason existing at that time to prevent him from recovering on the first count. The nonsuit should have been regarded as voluntary. The court would have reached that conclusion had it followed *Schneider v. Kirkpatrick.* It is submitted that the theory of *Schneider v. Kirkpatrick* that a ruling of a trial court which prevents a recovery on one or more counts of plaintiff's petition, but which leaves other counts of his petition undisposed of, is not a rul-

85. 232 Mo. 626, 135 S. W. 33 (1911).

86. 72 Mo. App. 103 (1897). The court said, "The plaintiff did not suffer a nonsuit on the law counts of his petition but suffered it as to the whole case and from the judgment of nonsuit has appealed. If he had suffered a nonsuit as to the law counts and then proceeded to trial on the equity count and had a final decree entered therein, or if he had dismissed the equity count and then suffered a nonsuit as to the law counts, there would have been a final disposition of the entire case from which an appeal would lie . . . As long as the equity count had not been stricken out or otherwise disposed of he was not 'at the end of his row' for he still was entitled to a trial on that. The rule is well settled in this state that if anything substantial is left in a case on which a party can stand he must proceed to final hearing of the whole."

87. 159 Mo. App. 122, 139 S. W. 813 (1911). The court said, "While it is stated that the non-suit was voluntary as to the second count, it is evident that that is not a fact; it was a non-suit forced on plaintiff by the adverse ruling of the court, compelling him to elect, to which ruling exception was duly saved."

ing which will prevent a recovery by plaintiff, is the better view. This case and *Wonderly v. Haynes* also illustrate the established rule that an appeal cannot be had until the whole case is disposed of in the lower court.

Where the plaintiff takes a nonsuit as the result of a refusal by the trial court to strike out the defendant's answer, his nonsuit is voluntary, and he cannot appeal. In *Hageman v. Moreland*,[88] the trial court refused to strike out defendant's answer on motion of the plaintiff. On appeal a nonsuit taken by plaintiff as a result of this ruling was held voluntary. The court pointed out that even though the answer was a complete bar to plaintiff's petition, still there was no showing that the defendant would or could sustain his burden of proof, and the plaintiff might have recovered had he not taken a nonsuit. In *Wonderly v. Haynes*, the court would have held the nonsuit voluntary had it followed the theory of the court in *Hageman v. Moreland*.

The cases are not in accord as to what rulings of the trial court preclude the plaintiff from a substantial recovery where the plaintiff has taken a nonsuit after the trial court excludes evidence offered by the plaintiff, or where the trial court rejects testimony of one or more of plaintiff's witnesses. The early case of *Howell v. Pitman*[89] held that in an action of ejectment a writ of error would lie after the plaintiff took a nonsuit after the trial court excluded a survey of the land offered in evidence by the plaintiff. No showing was made by the plaintiff that he could not have obtained another survey of the land which the court would have received in evidence.

Twenty-four years later, in *Layton v. Riney*,[90] the testimony of two of plaintiff's witnesses was excluded, whereupon the plaintiff took a nonsuit. On appeal the court said:

> "It is only where the ruling of the court is such as strikes at the root of the case and precludes the plaintiff from a re-

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88. 33 Mo. 86 (1862). See also Louisiana & Middletown Plank Road Co. v. Mitchell, 20 Mo. 432 (1855); Koger v. Hays, 57 Mo. 329 (1874). In Dumey v. Schoeffler, 20 Mo. 323 (1855), Judge Ryland gives this additional reason why the plaintiff was not forced to take a nonsuit on a set of facts identical to that in the Hageman case, "Here a motion was made by plaintiff to strike out a part of the defendant's answer. This motion was overruled, and thereupon the plaintiff takes voluntarily a non-suit. He was not compelled to this course: he could have had the decision of the court upon the legal effect of that part of the answer, upon asking proper instructions. His case was not decided by the court below upon his motion to strike out, and we will not suffer the parties to come here upon every motion which is overruled or sustained followed by a voluntary non-suit."

89. 5 Mo. 246 (1838).

90. 33 Mo. 87 (1862). See also Kennedy v. Ballard, 39 Mo. App. 340 (1890).

> covery that he will undertake to review the action of the court below after a voluntary nonsuit. A contrary practice would encourage parties to appeal upon every trivial decision of the court and thus keep the matter in controversy in endless litigation."

The witnesses whose testimony was rejected were to testify in regard to undue influence practiced upon the testator. No showing was made in either the trial court or the appellate court that the plaintiff could not have secured other witnesses who could testify to the same facts.

In *Yankee v. Thompson*,[91] the trial court in an action of ejectment excluded a tax deed relied upon by the plaintiff in his chain of title. The defendant had pleaded the general issue. This exclusion was held on appeal to preclude a recovery on the part of the plaintiff. In *Yankee v. Thompson* it is apparent without an additional showing that the plaintiff could not recover unless his tax deed was permitted to be introduced in evidence, whereas this was not true in *Layton v. Riney* and *Howell v. Pitman*. In these latter cases it would have been necessary for the plaintiff to show that he could not prove the matters sought to be proved in some other manner. No such showing was made in *Layton v. Riney*, and consequently the court held the nonsuit was voluntary. *Howell v. Pitman* did not require that there be a showing by the plaintiff that he could not recover without the evidence offered, and to that extent is in conflict with the *Layton* case. *Howell v. Pitman* was decided in 1838. This was before the Missouri courts clearly defined the limits of plaintiff's right to appeal after a nonsuit. Consequently this case cannot be considered as representing the rule in Missouri today. At least the result reached in *Layton v. Riney* is more desirable.

The next important case to come before the Supreme Court was *State ex rel. Meramec Iron Co. v. Gaddy*.[92] In this case the court in holding the nonsuit voluntary said:

> "In respect to the evidence offered through the witness Smith, there is nothing to show that this was the only source of

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91. 51 Mo. 234 (1873). A similar situation was presented in Roeder v. Shryock, 61 Mo. App. 485 (1895). Here plaintiff sued as assignor of a dissolved firm of attorneys for legal services rendered defendant. The trial court excluded the dissolution agreement offered in evidence to prove the assignment. The St. Louis Court of Appeals held a nonsuit taken as the result of this ruling involuntary.

In Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69 (1888), the plaintiff sued to set aside a deed as fraudulent. The answer of the defendant was a general denial, and a plea of a prior existing equity good against plaintiff's legal title. At the trial the court excluded all documentary evidence of plaintiff's offered to show his legal title. A nonsuit taken as a result of this ruling was held involuntary.

92. 83 Mo. 138 (1884).

> evidence open and available to the plaintiff to establish the fact sought. On the contrary it was disclosed that there were other witnesses, as also book entries and accounts kept, from whom and by which the amount of such coal might very properly and easily have been shown and exhibited to the triers of the fact."

In this case the plaintiff's own testimony showed that the fact sought to be proved could have been proved with testimony and book entries other than that which had been offered by the plaintiff and rejected by the trial court.

Subsequently in *Pettis County v. DeBold*,[93] the plaintiff, the wife of a drunkard, brought a statutory action against a dramshop keeper and his sureties on their bond for furnishing intoxicating drinks to her husband. The only issue presented was whether the defendant had supplied the plaintiff's husband with drinks after receiving a statutory notice not to do so. In order to prove this issue, plaintiff offered the deposition of her husband which was excluded by the trial court on the ground that he was an interested party. The plaintiff excepted to this ruling and stated, ". . . we have no further evidence at hand by which we can prove that the defendant sold liquor to the plaintiff's husband." Defendant suggested that they use Mr. Moss, another witness, but plaintiff replied. "He would not testify so as to support the action, and she is unable to proceed further and would take a nonsuit." On appeal this was held to be an involuntary nonsuit. The court further held the evidence was improperly rejected and ordered a new trial.

Pettis County v. DeBold is in conflict with *Layton v. Riney*, *Yankee v. Thompson* and *State ex rel. Meramec Iron Co. v. Gaddy*. The test devised in the latter of these cases was not whether a plaintiff had any other witnesses or evidence immediately accessible, but whether the facts sought to be proved by the witness or evidence rejected could have been proved in any other manner. In the *DeBold* case the only reason the plaintiff could not proceed with his case was his own negligence in failing to provide himself with witnesses which the trial court thought competent. In any event the rule applied in the *Meramec Iron Co.* case is much to be preferred.

A different problem was presented in *Gentry County v. Black & Scat*,[94] an action on a bond. The answer admitted the bond, but denied

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93. 136 Mo. App. 265, 117 S. W. 88 (1909).

94. 32 Mo. 542 (1862).

In Williams v. Finks, 156 Mo. 597, 57 S. W. 732 (1900), plaintiff sued on a promissory note. The answer admitted the execution of the note. The court

the happening of the condition. The plaintiff took a nonsuit after the court excluded the bond offered in evidence by the plaintiff. On appeal the court held the nonsuit taken was voluntary because the plaintiff could recover without introducing the bond in evidence. The effect of this case is that where plaintiff takes a nonsuit after the trial court has excluded evidence which is not necessary or relevant to plaintiff's case, the nonsuit is voluntary.[95]

The majority of cases in which a plaintiff has taken a nonsuit as the result of rulings of the trial court on instructions have been in cases where the trial court has given a peremptory instruction for the defendant at either the close of plaintiff's evidence, or at the close of all the evidence. These cases have been previously discussed.[96] There have been cases in which a plaintiff has taken a nonsuit after the trial court has given or refused instructions other than a peremptory instruction for the defendant.

In *International Harvester Co. v. McLaughlin*,[97] plaintiff requested a peremptory instruction which the court refused to give, whereupon he took a nonsuit. On appeal the court held the nonsuit voluntary because it did not preclude the plaintiff from a recovery. He could have proceeded by offering instructions on the merits and perhaps obtain a verdict in his favor. In answer to this the plaintiff contended, and the appellate court agreed with him, that had he proceeded with the trial in the lower court and lost, he would have waived his right to a review on appeal of the ruling of the lower court. In Missouri a plaintiff, by offering instructions on the merits, waives his right to complain of a ruling of the trial court refusing to give a peremptory instruction for the plaintiff.

Overall v. Ellis[98] presents another problem. In this case two issues of fact were in dispute. The plaintiff could not recover unless the jury

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refused to receive the note in evidence. The Supreme Court of Missouri held a nonsuit taken by plaintiff as a result of this ruling was voluntary for the reason that the plaintiff could recover without the note being admitted in evidence.

95. For cases dealing with the situation where the trial court has refused to receive any evidence because the petition does not state a cause of action see notes 83-85 inclusive.

96. Pages 146, 147.

97. 227 Mo. App. 221, 52 S. W. (2d) 227 (1932). For cases in which the plaintiff was held to have waived his right to a review on appeal of the trial court's ruling refusing to give a peremptory instruction for the plaintiff by submitting instructions on the merits see: Everhart v. Bryson, 244 Mo. 507, 149 S. W. 307 (1912); Kincaid v. Estes, 218 Mo. App. 109, 262 S. W. 399 (1924); Fawkes v. National Refining Co., 341 Mo. 630, 108 S. W. (2d) 7 (1937).

98. 32 Mo. 322 (1862).

found both in his favor. The trial judge directed the jury to find for the defendant as to one issue and gave the case to the jury with proper instructions as to the other issue whereupon a nonsuit was taken. On appeal the nonsuit was held involuntary since the plaintiff could not recover on the instructions given.

In *Rainey v. Edmonson*,[99] the trial court instructed the jury that the burden of proof was on the plaintiff. The court also informed the jury that the defendant's answer admitted the allegation of title in plaintiff's petition. The plaintiff then took a nonsuit. On appeal it was held that there was nothing in the issues or the evidence to justify the giving of the former instruction, yet the giving of the instruction could do the plaintiff no harm. There was no reason why the plaintiff could not have recovered had he permitted the case to go to the jury. Therefore the nonsuit was voluntary.

In *Martin v. Fewell*,[100] the trial court gave one set of instructions which permitted a recovery by the plaintiff as well as other instructions which contradicted these. After taking a nonsuit the plaintiff appealed. On appeal it was held that the contradictory instructions neutralized each other and prevented a recovery. Therefore the nonsuit was involuntary. This case is *contra* to the result reached in *Rainey v. Edmonson*. In *Martin v. Fewell*, the jury could not have followed both sets of instructions, but they may have followed those instructions favorable to the plaintiff, and had they done so, the plaintiff could have recovered.

In *Netzow Manufacturing Co. v. Baker*,[101] it was held a nonsuit taken by plaintiff after the trial court had refused instructions offered by plaintiff, but had given instructions of its own by which he could recover *substantial* damages was a voluntary nonsuit. The court took the position that this would be so even though the instructions offered by the plaintiff were correct, and those given by the court were erroneous.

An interesting problem was presented in *State ex rel. Mackey v. Thompson*.[102] At the close of the evidence the trial court ruled there could be no recovery against Keating's estate, and only nominal damages could be recovered against the other defendants. After these rulings plaintiff

99. 33 Mo. 375 (1863).
100. 79 Mo. 401 (1883).
101. 137 Mo. App. 670 (1909). See also Loring v. Cooke, 60 Mo. 564 (1875), in which a nonsuit taken by the plaintiff was held voluntary where the trial court refused to give instructions which entitled plaintiff to substantial damages.
102. 81 Mo. App. 549 (1899).

took a nonsuit. On appeal it was held that no *substantial* cause of action was left after the trial court had given such instructions. Hence the nonsuit was involuntary.

With the *Thompson* case compare *Meramec Iron Co. v. Gaddy.*[103] Here the trial court excluded certain tax receipts offered in evidence by the plaintiff. The exclusion of the tax receipts reduced the amount the plaintiff could recover, but he was still entitled to more than nominal damages. Upon appeal by the plaintiff after a nonsuit, it was held that the nonsuit was voluntary since he could still recover substantial damages.

From these cases we may conclude that a nonsuit is always voluntary when taken after the trial court has refused to give instructions offered by plaintiff. A nonsuit will be regarded as voluntary even when the instructions given by the court are erroneous, provided the instructions given, whether they be correct or erroneous, permit a recovery of more than nominal damages. A nonsuit is involuntary when taken after the trial court has given instructions which prevent a recovery, or which permit the recovery of only nominal damages.

In addition to the pleading, evidence, and instruction cases there have been some miscellaneous cases. These will be considered separately.

Recently the Kansas City Court of Appeals, in *Pilkington v. Pilkington,*[104] held a nonsuit involuntary in a divorce action where the trial court refused to permit a nonsuit to be taken after the court had sustained defendant's demurrer to the evidence, whereupon the plaintiff purported to take a nonsuit. A refusal to permit the plaintiff to take a nonsuit can hardly be regarded as precluding a substantial recovery, but it was so considered in this case. Had the nonsuit been regarded as taken because of the ruling of the court sustaining the demurrer to the evidence the case would be in accord with those cases in which a nonsuit was taken after a verdict had been directed for the defendant, but this was not the case.

In *Darne v. Broadwater,*[105] the plaintiff moved for a continuance. In support of his motion for a continuance he filed an affidavit stating that one of his duly summoned witnesses had failed to appear, and that the

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103. 83 Mo. 138 (1884).
104. 230 Mo. App. 569, 93 S. W. (2d) 1068 (1936).
105. 9 Mo. 19 (1845). The court said, "The refusal to grant a continuance is a matter of error, as has been repeatedly adjudged by this court; and though it has been suggested that these adjudications have been made in cases where a trial was had, no good reason is perceived why the principle is not equally applicable to cases where a nonsuit is submitted to, and the consequent expense of a useless investigation saved to the parties."

facts sought to be proved by this witness could not be proved in any other way. Plaintiff took a nonsuit after the continuance was refused. On appeal the court held this was an involuntary nonsuit. No reason was given why the witness could not have been attached forthwith.[106] This case is of particular interest in connection with the method employed by the plaintiff to show that the ruling of the court prevented him from proceeding further when it is not apparent from the record, or the nature of the ruling itself. Here the plaintiff used an affidavit to supply this information.

In *Poc v. Dominic*,[107] the defendant took a change of venue. Thereafter the plaintiff moved to remand the case because the proceedings in making the transfer were irregular. This motion being denied, plaintiff took a nonsuit and appealed. The appellate court held the nonsuit was voluntary because this ruling did not prevent plaintiff from recovery in the lower court.

In at least seven cases appearing before the Supreme Court of Missouri and the Courts of Appeals the courts have held the nonsuit taken by the plaintiff was voluntary and not appealable, but have, nevertheless, reviewed the lower court proceedings. In a few of these cases the appellate court has found the trial court in error, but has affirmed the judgment of nonsuit, or dismissed the appeal because an appeal cannot be had after a voluntary nonsuit.[108] The result has been that the plaintiff in these

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106. Compare English v. Mullanphy, 1 Mo. 780 (1827). In this case the plaintiff did apply for and obtained an attachment, but not to the same term.

107. 46 Mo. 113 (1870).

108. Sone v. Palmer, 28 Mo. 539 (1859), the Supreme Court in this case reviewed certain rulings of the trial court on questions concerning the admissibility of evidence, at the same time holding that the nonsuit taken was voluntary.

In Gentry County v. Black & Seat, 32 Mo. 542 (1862), the trial court excluded from the evidence the bond sued on. The answer admitted the execution of the bond. On appeal it was held the bond was properly excluded; the court at the same time held the nonsuit taken by plaintiff was voluntary.

In Rainey v. Edmonson, 33 Mo. 375 (1863), the trial court instructed the jury that the burden of proof was on the plaintiff. On appeal it was held that a nonsuit taken as a result of this ruling was a voluntary nonsuit, but the court also held that the instruction was improper.

Chiles v. Wallace, 83 Mo. 84 (1884). In this case the appellate court reviewed instructions given by the trial court, at the same time holding that the nonsuit taken by plaintiff as a result of the instructions was voluntary.

In State *ex rel.* Meramec Iron Co. v. Gaddy, 83 Mo. 138 (1884), the Supreme Court reviewed rulings of the trial court as to the admissibility of evidence offered by the plaintiff, but at the same time holding the nonsuit taken by plaintiff was voluntary.

Schulter's Adm'r v. Bockwinkle's Adm'r, 19 Mo. 647 (1854). In this case the Supreme Court reviewed a ruling of the trial court refusing to strike out defendant's answer, but held the nonsuit taken by the plaintiff was voluntary.

In Williams v. Finks, 156 Mo. 597, 57 S. W. 732 (1900), the appellate court

cases obtained the benefits of a review of the lower court proceedings which will be useful when he institutes a second suit, although he has had to pay the cost of the first suit.

Thus in *Scott v. American Zinc, Lead & Smelting Co.*,[109] the plaintiff took a nonsuit after the trial court had refused to give the instructions presented by him. The appellate court held the nonsuit was voluntary, but nevertheless held that the trial court erred in refusing to give the instructions. Judge Farrington, in affirming the judgment of the lower court on the ground that the nonsuit was voluntary said:

> "No substantial injustice can result to him from this enforcement of the rule laid down by the Supreme Court for our guidance. He is substantially in the same position so far as ultimately securing a trial on the merits of his case as if he had secured an order here remanding the cause, having taken a nonsuit and his cause of action not being barred by limitation."

The plaintiff in this case would have to pay the cost of the first suit, whereas, had his nonsuit been regarded as involuntary and a new trial ordered, the taxation of cost would have abided the ultimate outcome of the second trial.

There is a still larger group of cases in which the appellate courts have held that the nonsuit was voluntary and refused to review the proceedings of the lower court on the ground that an appeal could not be had after a voluntary nonsuit has been taken.[110] No reason can be found why the appellate courts have on occasion reviewed the lower court proceedings after a voluntary nonsuit has been taken, or why they have refused to do so in other similar cases. It may be that the appellate court, knowing that the plaintiff could sue over again, thought that considerable time would be saved in rendering its opinion on the erroneous rulings made, to the end that in the second suit the trial court would not again commit the same errors, and thus make necessary a third trial. However, if this is admitted to be a valid reason, then why doesn't it apply to all cases?

In a few of these cases it was necessary to review the lower court

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reviewed a ruling of the trial court excluding the promissory note sued on from the evidence, but held the nonsuit taken was voluntary.

109. 187 Mo. App. 344, 173 S. W. 23 (1915).

110. Dumey v. Schoeffler, 20 Mo. 323 (1855); Louisiana & Middletown Plank Road Co. v. Mitchell, 20 Mo. 432 (1855); Hageman v. Moreland, 33 Mo. 86 (1862); Layton v. Riney, 33 Mo. 87 (1862); Poe v. Dominic, 46 Mo. 113 (1870); Koger v. Hays, 57 Mo. 327 (1874); Loring v. Cooke, 60 Mo. 564 (1875); Netzow Mfg. Co. v. Baker, 137 Mo. App. 670 (1909); International Harvester Co. v. McLaughlin, 227 Mo. App. 224, 52 S. W. (2d) 227 (1932).

proceedings to determine whether or not the ruling of the court prevented a recovery. Thus a review of the lower court proceedings is had for the purpose of ascertaining whether or not the nonsuit taken was involuntary and therefore appealable.[111] This result is awkward and suggests that the distinction made between voluntary and involuntary nonsuits in Missouri is not a practical one.

Statute of Limitations

The Missouri statute of limitations provides that a plaintiff who has taken a nonsuit may commence a new action from time to time, within one year after such nonsuit has been suffered.[112] This statute does not shorten the period within which the plaintiff might otherwise sue, but extends the time within which he can sue over in those cases where his second suit would otherwise be barred by lapse of time. This statute is essentially a "saving clause," and as such, it gives to plaintiff an ad-

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111. Gentry County v. Black & Seat, 32 Mo. 542 (1862); Williams v. Finks, 156 Mo. 597, 57 S. W. 732 (1900).

112. Mo. REV. STAT. (1929) § 874, "If any action shall have been commenced within the times respectively prescribed in article 8 and 9 of this chapter, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff, or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him." This statute in its present form has been in effect in Missouri since 1845. See Mo. REV. STAT. (1845) 718; Mo. REV. STAT. (1855) 1051; Mo. REV. STAT. (1865) 748; Mo. REV. STAT. (1879) § 3239; Mo. REV. STAT. (1889) § 6784; Mo. REV. STAT. (1919) § 1329.

The original statute was enacted in 1825. The wording of that statute differed from the present statute. See Mo. REV. STAT. (1825) 510, "That if in any of the above mentioned cases, any plaintiff obtain a judgment, which upon appeal or writ of error shall be reversed; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his writ; or if any plaintiff shall suffer non-suit,—such plaintiff, his heirs, executors or administrators, as the case may require, may commence a new action or suit, from time to time, within one year after such judgment recovered, or arrested, or non-suit suffered, as aforesaid. . . ."

The act of 1825 was revised in 1835, see Mo. REV. STAT. (1835) 395, which reads as follows: "If any action shall have been commenced within the times respectively prescribed in the preceding articles of this act, and the plaintiff therein suffer a non-suit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such non-suit suffered, or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff."

No attempt will be made to discuss the operation of this statute as it relates to matters other than nonsuits.

ditional year in which to file a second suit. However, to receive the benefit of this statute the first suit must be filed within the period allowed by the general statute of limitations.

Thus in *Thompson v. Farmers Exchange Bank*,[113] the plaintiff sued for damages for false imprisonment within two years after his cause of action accrued. The two year statute of limitations applied to actions of this nature. A demurrer to the petition was sustained, and a nonsuit taken. Plaintiff led a second suit within one year after the nonsuit, but more than two years after his cause of action had first accrued. A demurrer was sustained to plaintiff's petition on the ground that it showed on its face that the statute of limitations had run. On appeal the judgment of the lower court was reversed, the court holding that the plaintiff could sue over within one year after a judgment of nonsuit.

Again in *Estes v. Fry*,[114] the Missouri Supreme Court held that a suit on a note begun within one year after the plaintiff had taken a nonsuit in a former action, which was itself begun within ten years after the last payment thereon, is not barred by the statute of limitations. Here the second action was begun more than ten years after the last payment. It was admitted that the ten year statute of limitations ordinarily applied to actions of this kind.[115]

When either party appeals after a nonsuit, does the one year statute begin to run from the time of the judgment of nonsuit in the lower court, or from the time the judgment of nonsuit is affirmed on appeal? In Missouri it is uniformly held that the one year statute in such cases begins to run from the time the judgment is affirmed on appeal. In *Chouteau v. Rowse*,[116] plaintiff filed suit in October, 1868, to recover back money paid to the tax collector, but not applied for the payment of his taxes. This action resulted in a directed verdict for the defendant, whereupon plaintiff took a nonsuit and appealed. The Supreme Court affirmed the judgment of the lower court April 20, 1874. Afterwards on June 22, 1874, a

113. 333 Mo. 437, 62 S. W. (2d) 803 (1933).
114. 166 Mo. 70, 65 S. W. 741 (1901).
115. For other cases involving the same problem as Estes v. Fry, see, Shaw v. Pershing, 57 Mo. 416 (1874); Mason v. Kansas City Belt Ry., 226 Mo. 212, 125 S. W. 1128 (1910); Seewald v. Gentry, 220 Mo. App. 367, 286 S. W. 445 (1926).
116. 56 Mo. 65 (1874), first suit, and 90 Mo. 191 (1886), second suit. For other cases involving the same questions, see, Woods v. Missouri Pac. Ry., 149 Mo. App. 507, 130 S. W. 1123 (1910); Woods v. Missouri Pac. Ry., 192 Mo. App. 165, 179 S. W. 727 (1915). Wetmore v. Crouch, 55 Mo. App. 441 (1893); Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738 (1899); Wetmore v. Crouch, 188 Mo. 647, 87 S. W. 954 (1905).

second suit was filed for the same cause. The defendant in his answer to the second suit pleaded the five year statute of limitations. Plaintiff replied that he filed his second suit within one year after the judgment of nonsuit was affirmed on appeal, but more than one year after a judgment of nonsuit was entered in the lower court. The defendant contended the reply was bad because the one year statute began to run from the time the nonsuit was taken in the lower court. The Supreme Court denied defendant's contention and held that the one year statute does not begin to run in those cases in which an appeal is taken until the appeal is determined.

From these decisions it is clear that the one year statute of limitations begins to run from the time the lower court enters a judgment of nonsuit, unless an appeal is had, in which case the operation of the statute is suspended until the appeal is determined, and the plaintiff may sue over within one year after the judgment of nonsuit is affirmed on appeal.

In several cases it has been argued that the one year statute of limitations *requires* the plaintiff to file his second suit within one year, or be forever barred. To give to the statute this interpretation would be to shorten the time within which the plaintiff might file suit in many cases. This view has been definitely rejected in Missouri. Thus in *Tate v. Jacobs*,[117] the plaintiff brought an action for damages. He took a nonsuit in this action, and then brought a second suit for the same cause within five years from the time his cause of action accrued, but more than one year after his nonsuit in the former action. In the second action the defendant pleaded the one year statute of limitations. Plaintiff contended the five year general statute of limitations applied. The lower court ruled in favor of defendant's contention, and plaintiff appealed. On appeal the court held that the one year statute of limitations does not require that a plaintiff who has taken a nonsuit must bring his second suit within one year, for the one year statute does not apply where the second action instituted by the plaintiff was commenced within the period otherwise allowed by the general statutes of limitations.[118]

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117. 47 Mo. App. 218 (1891).

118. No attempt has been made to make an exhaustive study of the operation of the one year statute of limitations. Other problems arise which I thought best not to consider in detail, but to which I will briefly refer.

(A) The one year statute does not apply where the plaintiff begins a second suit before he dismisses the first suit, Missouri & S. W. Land Co. v. Quinn, 172 Mo. 563, 73 S. W. 184 (1903); but see Briant v. Fudge, 63 Mo. 489 (1876).

In *Karnes v. American Fire Ins. Co.*,[119] the Supreme Court of Missouri had before it the same problem as that presented in *Tate v. Jacobs*. In the *Karnes* case the court said:

> "The time for bringing plaintiff's suit under the general provisions of the limitation law had not expired when she commenced the present action. The claim is that, having brought the defendant into court, and then having suffered a nonsuit, she could not, under section 6784, *supra*, begin a new proceeding after one year from the date of the nonsuit, notwithstanding the general statute of limitations had not run against her claim. In other words, that, although a cause of action might not be barred for ten years, yet if suit should be commenced and a nonsuit taken within one year after the cause arose, plaintiff must bring her action within one year thereafter. We do not so understand the statute. The section under consideration was not intended to *shorten* the time given by the general provisions of the limitation act, but is a *saving* clause to prevent the bar which would *otherwise* be applicable. It does not purport to limit the time for bringing suits, but to save from the statute, for one year after nonsuit, actions which, but for its provisions, would be barred."

Conclusions

Does the device of an involuntary nonsuit as known in Missouri serve any useful purpose? In answering this question it may be asked whether the plaintiff appeals from a judgment of nonsuit in order to obtain a new trial? He can obtain a new trial with less trouble and delay by simply instituting a new suit. Then it may be asked, why does he seek an order for a new trial on appeal? When he sues over without moving for

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(B) Where a special statutory right has been created which contains its own statute of limitations, the one year statute permitting an action to be brought within one year after a nonsuit is taken does not apply, Gerren v. Hannibal & St. J. R. R., 60 Mo. 405 (1875); State *ex rel.* Mackey v. Thompson, 81 Mo. App. 549 (1899).

(C) The wrongful death statute contains its own period of limitations, but also contains a section permitting the plaintiff to file a second suit within one year after he has taken a nonsuit. Clark v. Kansas City, St. L. & C. R. R., 219 Mo. 524, 118 S. W. 40 (1909); Boyd v. Logan Jones Dry Goods Co., 335 Mo. 947, 74 S. W. (2d) 598 (1934).

(D) The one year statute of limitations does not apply unless the cause of action is the same in both suits. St. Charles Sav. Bank v. Thompson, 284 Mo. 72, 223 S. W. 734 (1920); Stevens Lumber Co. v. Kansas City Lumber Co., 72 Mo. App. 248 (1897); Kissane v. Brewer, 208 Mo. App. 244, 232 S. W. 1106 (1921).

(E) Where the plaintiff begins his first suit in the courts of another state, or in the federal courts, then takes a nonsuit, and files a second suit in the courts of Missouri within one year the one year statute applies. Shaw v. Pershing, 57 Mo. 416 (1874); Clark v. Kansas City, St. L. & C. R. R., 219 Mo. 524, 118 S. W. 40 (1909).

(F) Query: Does the one year statute of limitations apply where the court in the first suit had neither jurisdiction over the person or subject matter of the action? Mertens v. McMahon, 115 S. W. (2d) 180 (Mo. App. 1938).

119. 144 Mo. 413, 46 S. W. 166 (1898).

a new trial the costs of the first suit will be taxed against him; whereas, if he can obtain an order for a new trial from either the trial court or on appeal, the taxation of costs will abide the ultimate outcome of the action. The decision of the reviewing court disposes of no greater question than who should pay the cost of the first trial.

Those who would defend this procedural device argue that by permitting an appeal the parties to the action obtain a review of the proceedings of the lower court which will be beneficial to both the trial court and the parties in a second trial or suit. There is some force in this contention. However, it is not necessary to permit an appeal from a judgment of nonsuit in order to obtain a review of the lower court proceedings. A review may be had by appealing after a verdict and judgment have been rendered on the merits. Why then, does the plaintiff choose to take a nonsuit as the result of an adverse ruling and appeal from a final judgment of nonsuit rather than participate in the remainder of the trial, and appeal from a judgment on the merits? By taking a nonsuit after an adverse ruling the plaintiff is saved the trouble and expense of proceeding with the trial in the lower court. The weight to be given to this consideration depends upon how early in the trial the nonsuit is taken. Very little, if any, time or expense is saved when the nonsuit is taken as the result of a verdict having been directed for the defendant, and it is in these cases that the practice of taking a nonsuit is used most frequently.

What little advantage there is in permitting an appeal by a plaintiff from a judgment of nonsuit is easily offset by other disadvantages. When an appeal is taken from a judgment on the merits, the appellate court will have before it for review all the errors which it is contended were committed by the trial court. When a nonsuit is taken only those errors committed up until the time that the plaintiff took a nonsuit will be before the court for review. If it is one purpose of an appeal to aid the trial court and the parties in a second suit or trial, then it cannot be denied that a review of the entire proceedings in the lower court will offer greater advantages than a review of only part of the proceedings leaving the remainder to be reviewed on a subsequent appeal. More time and expense will be consumed than would have been the case had an appeal been taken from a final judgment on the merits. Then, too, the appellate court can more efficiently dispatch its business if it can review the entire proceedings of the trial court rather than review the alleged errors of the trial court piecemeal on two or more occasions.

A judgment on the merits rendered against the plaintiff in the lower

court, and subsequently affirmed on appeal is *res adjudicata*. A judgment of nonsuit affirmed on appeal is not *res adjudicata*, and consequently the plaintiff may bring another action. Why should the plaintiff be permitted to sue over after both the trial court and the appellate court have found against him? The doctrine of *res adjudicata* is designed for the very purpose of preventing a party who has had one fair trial before a court having jurisdiction from relitigating the same question. There should be some end to litigation. A decision of an appellate court affirming a judgment of nonsuit is in effect a declaration that the plaintiff had a fair trial up until the time he took a nonsuit. The plaintiff should not be heard to complain on appeal that the nonsuit he asked for was given him. The Missouri courts permit him to do this.

The plaintiff has the right to take a nonsuit at any time before the case is submitted to the court or jury and then file a second suit. This is a very great privilege in itself, and one which can be abused so as to harass his adversary. The right to take a nonsuit and sue over is given to the plaintiff because even the most righteous cause may fail now and then from unforeseen contingencies, accidental omissions, mistakes in procedure, or other circumstances unconnected with the merits.[120] The continued existence of this right is justified, even though an opponent is harassed thereby, for even greater hardship would result to the plaintiff should the right to take a nonsuit and sue over be destroyed absolutely. By permitting an appeal after a nonsuit is taken, the Missouri courts have extended this privilege and have enabled the plaintiff not only to sue over, but to shift the payment of costs, both of the first trial and on appeal, to the defendant in the event the appellate court orders a new trial in which the plaintiff ultimately prevails. This gives the plaintiff another tool with which to harass the defendant,[121] and in addition requires the

120. Houston's Adm'r v. Thompson's Adm'r, 87 Mo. App. 63 (1901).

121. The following cases illustrate how the plaintiff can keep the same action alive for an extended period of time through the use of this device: (1) Chouteau v. Rowse, 56 Mo. 65 (1874); Chouteau v. Rowse, 90 Mo. 191 (1886). (2) Wetmore v. Crouch, 55 Mo. App. 441 (1893); Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738 (1899); Wetmore v. Crouch, 188 Mo. 647, 87 S. W. 954 (1905). (3) Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440 (1893); Hewitt v. Steele, 136 Mo. 327, 38 S. W. 82 (1896). (4) Conn. Fire Ins. Co. v. Manning, 160 Fed. 382 (C. C. A. 8th, 1908); Conn. Fire Ins. Co. v. Manning, 177 Fed. 893 (C. C. A. 8th, 1910); Manning v. Conn. Fire Ins. Co., 176 Mo. App. 678, 159 S. W. 750 (1913). (5) Mason v. K. C. Belt Ry., 226 Mo. 212, 125 S. W. 1128 (1910). (6) Johnson v. United Railways Co., 227 Mo. 423, 127 S. W. 63 (1910); Johnson v. United Railways Co., 243 Mo. 278, 147 S. W. 1077 (1912). (7) Woods v. Missouri Pac. Ry., 149 Mo. App. 507, 130 S. W. 1123 (1910); Woods v. Missouri Pac. Ry., 192 Mo. App. 165, 179 S. W. 727 (1915). (8) Boyd v.

appellate court to consume its time in hearing the appeal for the sole purpose of determining who should pay the cost of the first trial, while at the same time increasing the total cost and personal expenses of both parties.

Should the plaintiff be permitted to shift the cost to the defendant? It is the plaintiff who brought the defendant into court, and it is not necessarily his fault that the trial court erroneously ruled so as to prevent the plaintiff from recovering. By permitting the plaintiff to take a nonsuit and sue over, the defendant is compelled to defend himself twice. It seems only just to require the plaintiff to bear the cost of this first wasted effort to recover from the defendant.

Alabama,[122] Florida,[123] and North Carolina[124] are the only other states employing a procedural device similar to our involuntary nonsuit. Judge Sanborn, speaking for the United States Circuit Court of Appeals for the Eighth Circuit in *Francisco v. Chicago & A. R. R.*,[125] severely criti-

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Logan Jones Dry Goods Co., 335 Mo. 947, 74 S. W. (2d) 598 (1934); Boyd v. Logan Jones Dry Goods Co., 340 Mo. 1100, 104 S. W. (2d) 348 (1937).

122. Berlin Machine Works v. Ewart Lumber Co., 184 Ala. 272, 63 So. 567 (1913); Bush v. Russell, 180 Ala. 590, 61 So. 373 (1913).

123. Mizell Live Stock Co. v. McCaskill Co., 57 Fla. 118, 49 So. 501 (1909).

124. Collins v. Swanson, 121 N. C. 67, 28 S. E. 65 (1897); Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551 (1907).

125. 149 Fed. 354 (C. C. A. 8th, 1906). In this case Judge Sanborn said, "It has been a fixed rule of practice of the appellate courts of the United States for almost 100 years that no writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit which has been rendered at his request or with his consent, and that no judgment will be reversed for an error which the plaintiff in the writ has invited the court to commit, and the fact that the Supreme Court of Missouri calls such a nonsuit 'involuntary' and reviews it presents no persuasive reason why one of the national appellate courts should depart from this salutary rule while there are many reasons why it should abide by and enforce it. Courts are established and maintained to settle and terminate controversies between citizens and to enforce their rights, not to furnish debating societies for the trial of legal experiments. The chief reason for their being is to end, not to perpetuate, disputes. 'Interest reipublicae ut sit finis litium.' A practice which permits a plaintiff to experiment with the courts and to harass the defendant interminably at will runs counter to the basic purpose of legal tribunals and of all civilized governments, and, instead of assisting to wisely administer justice, it inflicts and perpetuates wrong. Yet this is the practice which a grave review of such nonsuits as that in hand would establish. Under it a plaintiff could introduce his evidence and try the Circuit Court to see whether or not it would sustain his action. If it granted a motion to instruct a verdict against him, he could procure from the court an involuntary nonsuit then sue out a writ of error and try the appellate court, and. if it would not sustain his action, he could pay the costs, bring another action for the same cause, and continue his actions and experiments interminably. The federal courts ought not to permit themselves to be made the subjects of such experiments. The only material interests involved in the review of such judgments are the costs of the actions, for the plaintiffs may try their causes again whatever the decisions of the appellate courts, and the demands upon these courts for the decision of real and important issues are too grave and pressing to permit them to devote their time to litigation so frivolous.

"There is a more compelling reason why proceedings of this nature should not be sustained. The plaintiff is not the only party to a lawsuit who has rights. The defendant has some, and one of them is the right, not only to a fair and

cized this device. Federal courts sitting in Missouri, though required by the Conformity Act to follow our Code of Civil Procedure have refused to permit an appeal after a nonsuit and no hardship has resulted.

The device of involuntary nonsuit as known in Missouri is a judicial invention. Its existence cannot be traced to any statutory origin. It could and should be destroyed by the same hand which created it. Thus the judiciary may contribute to remove some of the law's delay.

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impartial trial of the action against him, but to a final adjudication of the alleged cause which the plaintiff presents and to a termination of the litigation upon it. This right he can never enforce, this termination he can never secure under the practice here proposed, for there is no limit to the number of actions on the same cause, or on the want of it, which the plaintiff may bring, review, and dismiss under it.

"The conclusion is that a writ of error will not lie in a national appellate court at the suit of the plaintiff to review a judgment of nonsuit or dismissal which has been rendered at his request or with his consent after the court has held at the close of the trial that the defendant is entitled to a verdict."