1892) 51 F. 506; *In re Shults* (D. C. W. D. N. Y. 1904) 132 F. 573; *Bank of Anderson v. Majeski* (1929) 149 S. C. 178, 146 S. E. 815; but *cf. Bank v. Armstrong* (1893) 146 U. S. 499 (where the set-off was denied because the note did not mature until after the insolvency of the bank). A similar result was reached in an early Missouri case on the ground that the subsequent insolvency of the bank should not be allowed to impair a right which had vested in the indorser prior thereto. *Stephens v. Schumann* (1883) 32 Mo. App. 333. These cases seem largely oblivious of the fact that by allowing the indorser such a right of set-off when the maker is solvent, the indorser can obtain the full value of his deposit while the other depositors may receive liquidating dividends equal to only a small proportion of theirs. It is true that there may be a similar preference even where the maker is insolvent if he pays a greater proportion of his liabilities than the bank, but the amount of the preference involved will probably be much less than if the maker was solvent. However, it would unduly delay the administration of justice to postpone the allowance of the set-off until it could be ascertained exactly what proportion of his debts the maker was able to pay.

It is fair to conclude that the modern and realistic tendency is towards the adoption of the rule laid down by the present case. It may be hoped that when the question is again presented to them the Missouri courts will refuse to follow the undesirable rule of the *Stephens* case. P. R., '34.

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DISMISSAL AND NONSUIT—TIME LIMIT FOR A VOLUNTARY DISMISSAL.—During the course of argument on a demurrer to the evidence, the counsel for the plaintiff decided that the trial judge was about to sustain the demurrer to the evidence. The plaintiff then attempted to take a voluntary nonsuit, so as to avoid a ruling which would have been res adjudicata and would prevent the bringing of another suit. The Supreme Court of Oklahoma held that this motion was made too late under an Oklahoma statute which restricted the right to take a nonsuit to any time before the case is "finally submitted to the jury, or to the court where the trial is by the court". *Chicago, Rock Island & Pacific Railway Co. v. Reynolds* (Okla. 1932) 12 Pac. (2d.) 208; C. S. Okla. (1921) sec. 664.

At common law the plaintiff could take a nonsuit at any time, even after the jury had reached a verdict against him, but if the plaintiff took a nonsuit he must pay costs and was theoretically liable to be amerced to the King. 3 Bl. Comm. *376-377. This right has been greatly limited by modern statutes, which, however, vary considerably in their terminology. Missouri and many other states have statutes which are substantially identical with the quoted language from the Oklahoma act. R. S. Mo. (1929) sec. 960. In New York the statute is more definite in jury cases, since it allows such a motion at any time before the case is "committed to the jury to consider the verdict". Since all these statutes are in derogation of the common law they should not be extended beyond their express terms. *National Bank v. Butler* (1912) 163 Mo. App. 380. 143 S. W. 1117; *Crane v. Leclere* (1927) 204 Iowa 1037, 216 N. W. 622.

Under the type statute existing in Missouri, there is hopeless conflict as to the last moment at which a nonsuit may be voluntarily taken. 18 C. J. 1156; note (1932) 79 A. L. R. 688. As the principal case states it can certainly be taken at any time before a demurrer to the evidence or a motion for a directed verdict has been filed. Equally clearly, it cannot be taken after the jury has retired to consider its verdict. *Suess v. Motz* (1926) 220 Mo. App. 32, 285 S. W. 775; *De Phillips v. Neslin* (1930) 155 Wash. 147; 283 Pac. 691. In Ohio it has been ruled to be too late after a motion for a directed verdict has been made, even though the judge has not yet even considered the motion. *Jacob Lamb Baking Co. v. Middleton* (1928) 118 Ohio St. 106, 160 N. E. 629. Kansas agrees with Oklahoma in holding that the question depends whether the judge has intimated how he will rule on the motion. *Cott v. Baker* (1922) 112 Kan. 115, 210 Pac. 651. However, the weight of authority is that a motion to dismiss may be made even after the judge has ruled on the motion for a directed verdict or the demurrer to the evidence. *Segall v. Garlichs* (1926) 313 Mo. 406, 281 S. W. 693; *Pitt v. Abrams* (Fla. 1931) 139 So. 152; *Daube v. Kuppenheimer* (1916) 272 Ill. 350, 112 N. E. 61; *Darby v. Pidgeon Thomas Iron Co.* (Tenn. 1921) 232 S. W. 75; *Fentress & Co. v. Young* (C. C. A. 8, 1931) 55 F. (2d) 53 (applying a Wisconsin statute).

If a trial judge should grant a motion to dismiss which was made too late, there is no effective remedy available to the defendant in a jury case unless the jury has already brought in a verdict for the defendant. The jury will have disbanded and cannot be reconvened. *Suess v. Motz, supra.* Obviously when a verdict has once been rendered, the trial judge cannot grant a motion for a new trial merely to allow the plaintiff to file a motion for a nonsuit. *Lawyers' Cooperative Publishing Co. v. Gordon* (1903) 173 Mo. 139, 73 S. W. 155.

It would seem that the ruling in the present case unduly restricted the right to take a nonsuit. The arguments on a motion for a directed verdict or a demurrer to the evidence may show the plaintiff's counsel how to remedy the fatal weakness in his case by securing additional evidence. Yet, the lawyer may easily not discover this until the judge has intimated how he will rule on the motion for a directed verdict or the demurrer to the evidence. The moral of this case is that if the plaintiff must have a stupid lawyer, he might just as well have a stubborn one, for the lawyer will not be allowed to correct his mistakes after they have been pointed out to him. It would also seem very difficult in practice, particularly on appeal, to determine whether or not the trial judge had given some intimation of how he was going to rule on the motion for a directed verdict or the demurrer to the evidence.

G. W. S., '33.

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NEGLIGENCE—HUMANITARIAN RULE—DUTY OF WATCHFULNESS—The plaintiff, a member of the St. Louis Police force, was run over by a steam roller. It was admitted that he was contributarily negligent in standing in the area being rolled while directing traffic so as to keep it off of the part of the street being repaved. The driver of the roller did not see the plaintiff. An in-