

ANGLIN, J.

NOVEMBER 2ND, 1904.

CHAMBERS.

ARMSTRONG v. ARMSTRONG.

Costs—Discontinuance of Action—Depriving Defendant of Costs—Discretion—Good Cause—Rule 430 (4)—Appeal.

Appeal by defendant from order of Master in Chambers (ante 223) allowing plaintiff to discontinue the action without costs.

Shirley Denison, for defendant.

J. H. Spence, for plaintiff.

ANGLIN, J.—. . . I have carefully considered all the English authorities upon which counsel for defendant relied, and my view is . . . that the English Rule No. 290 (Order xxvi., r. 1) confers on the Court or a Judge full power and discretion to deal with the costs of an action upon permitting it to be discontinued, as the learned Master has done in this case.

The Master in his written opinion obviously assumes the wording of the English Rule to be identical with our present Con. Rule 430 (4) as to discontinuance by leave, and the argument before me proceeded upon the same assumption. A difference which if designed would be of the greatest significance seems to have escaped attention. The English Rule reads: "Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may before, or at, or after the hearing, upon such terms as to costs, and as to any other action and otherwise (as may be just), order the action to be discontinued or any part of the alleged cause of complaint to be withdrawn."

Rule 430 (4), though otherwise substantially the same, omits the words "as may be just." Construing this Rule as if this omission were intended, I would, in view of the retention of the word "such," read it as enabling the Court to order discontinuance only upon the terms as to costs mentioned in clause 1 of Rule 430, which would absolutely entitle defendant to his costs. I do not think Rule 1130 applicable, in view of the express provisions as to costs in Rule 430, which forms a complete code of procedure governing discontinuance.