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Domestic Relations -- Voluntary Nonsuit in Custody Action

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Contractual limitations of liability have their place in the law as when the promisee accepts the additional risks and is compensated for them. But the freedom of contract should not exist for only one party to the contract.

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Domestic Relations—Voluntary Nonsuit in Custody Action

In a civil action in North Carolina the plaintiff may obtain a voluntary nonsuit if the defendant has not asserted some claim or cross-action arising out of the same transaction entitling him to affirmative relief.[1] In *Griffith v. Griffith*,[2] the North Carolina Supreme Court has held that the plaintiff should be allowed a nonsuit in a proceeding involving the custody of a child when the defendant does not answer the complaint.

The plaintiff instituted an action for alimony without divorce under section 50-16 of the General Statutes[3] and requested custody

[1] *E.g.*, Ashley v. Jones, 246 N.C. 442, 98 S.E.2d 667 (1957); McLean v. McDonald, 173 N.C. 429, 92 S.E. 148 (1917); Francis & Brother v. W. J. & J. G. Edwards & Co., 77 N.C. 271 (1877). A counterclaim is defined by N.C. GEN. STAT. § 1-137 (1953) and is "broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured on the same state of facts." Aetna Life Ins. Co. v. Griffin, 200 N.C. 251, 253, 156 S.E. 515, 516 (1931). The rule had a counterpart in equity where the plaintiff was not allowed to have his rule dismissed when the defendant claimed a set-off. March v. Thomas, 63 N.C. 87 (1868). The counterclaim must arise out of the same transaction as the plaintiff's cause of action in order to bar the nonsuit. Olmsted v. Smith, 133 N.C. 584, 45 S.E. 953 (1903). See generally 2 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1645 (2d ed. 1956).

[2] 265 N.C. 521, 144 S.E.2d 589 (1965).

[3] In a proceeding instituted under this section, the plaintiff or the defendant may ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this section.

N.C. GEN. STAT. § 50-16 (Supp. 1965). In addition to this statute, custody may be determined in North Carolina by way of habeas corpus proceedings when the parents are separated but not divorced under N.C. GEN. STAT. § 17-39 (1953); by habeas corpus proceedings generally under N.C. GEN.

of the two children of the marriage. The defendant did not answer the complaint, but appeared in court pursuant to a show cause order and testified as a witness. The court found that each parent was a suitable custodian for the children, but in their best interest ordered that they be placed in the custody of the plaintiff.

The request for alimony pendente lite was denied, but the defendant was required to pay 450 dollars per month for support of the children and 500 dollars for attorney's fees.

After these orders had been entered, the plaintiff moved for a voluntary nonsuit that was denied, and she appealed. The court reversed the judgment, holding that since the defendant had asserted no claim for affirmative relief, the nonsuit should have been allowed.

Section 50-16 authorizes the court to make orders respecting custody "as might be entered upon a hearing on a writ of habeas corpus" under section 17-39 where "at any time after the making of such orders the court or judge may, on good cause shown, annul, vary, or modify the same." Adjudications for custody are never final,[4] but the court retains jurisdiction until the child reaches his majority.[5] Another superior court may not alter the order, however, unless a change in circumstances is shown.[6] To allow the plaintiff

STAT. § 17-39.1 (Supp. 1965); as an incident to a divorce action under N.C. GEN. STAT. § 50-13 (1950); by the juvenile branch of the superior court when neither of the parents is seeking custody under N.C. GEN. STAT. § 110-21 (1960); or by a domestic relations court under N.C. GEN. STAT. § 7-103 (1953). See generally LEE, 3 NORTH CAROLINA FAMILY LAW § 222 (3d ed. 1963); LIGON, NORTH CAROLINA CASES AND MATERIALS ON FAMILY LAW 203-13 (1962).

[4] Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964). *Cf.* Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958). There it was held that a custody decree in another state does not preclude a North Carolina court from determining custody rights. See Blankenship v. Blankenship, 256 N.C. 638, 124 S.E.2d 857 (1962).

In Weddington v. Weddington, 243 N.C. 702, 92 S.E.2d 71 (1956) the plaintiff instituted a divorce action and filed a motion for custody of one of the children. After receiving notice of the motion, the defendant took the child out of the jurisdiction. The court held that since any proceeding involving the custody of a child is in rem, the court is without power to make an order awarding the child's custody if he is not within the jurisdiction. See generally 3 LEE, *op. cit. supra* note 3, § 226.

[5] Weddington v. Weddington, note 4 *supra*. *Cf.* Blankenship v. Blankenship, note 4 *supra*, where it was held that the court in which an action for alimony pendente lite is brought retains jurisdiction to award custody of the children over another court in which the husband has brought an action for absolute divorce.

[6] A judgment awarding custody is based upon the conditions found to exist at the time it is entered. The judgment is subject to such change as is necessary to make it conform to changed conditions when

to take a voluntary nonsuit after a custody order has been made as in the instant case is to contravene the policy of the statute, since there is nothing to prevent the plaintiff from trying another court if he does not like the custody or other interlocutory orders of the first. Meanwhile the ultimate status of the child has not been determined and a showing of good cause or change in circumstances will not be necessary since the nonsuit erases the proceedings of the first court, including any orders requiring support of the child.

Our court in *Cox v. Cox*[7] held that in an action for absolute divorce, the plaintiff could not take a voluntary nonsuit when the defendant has filed an answer requesting custody of the child. The opinion in the instant case made no reference to *Cox,* but presumably the court would have distinguished the two cases on the grounds that in *Griffith* there was no answer and, indeed, the defendant admitted in his testimony that his wife was a suitable custodian for the children. This distinction may be more apparent than real. The court in *Cox* and in other cases[8] has held that once jurisdiction is invoked in a question of custody, the child becomes a ward of the court and his welfare becomes of primary concern. Recognizing the danger that the child, who has no one to represent his interests, may become a pawn in the battle between his parents, the court is sensitive to his well-being and becomes his champion.

It would seem that the basic policy considerations reflected in the rule forbidding a voluntary nonsuit when the defendant requests affirmative relief are present in a greater degree in a custody case. A child, who unlike one of the parties cannot come back into court in his own right, should have his custody determined in the original action, subject only to a showing of changed circumstances as provided by statute. It should make no difference that there has been no answer to the complaint, since it is the rights of the child that are being protected.

In *Caldwell v. Caldwell,*[9] an action for divorce where custody was not involved, our court said:

> they occur. In a bitter controversy between separated parents over the custody of children, one is usually dissatisfied with the award. The aggrieved party, however, must appeal to the Supreme Court, or must wait for a more favorable factual background in which to demand another hearing by motion in the case.

Stanback v. Stanback, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965).

[7] 246 N.C. 528, 98 S.E.2d 879 (1957).

[8] *E.g.,* Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962).

[9] 189 N.C. 805, 128 S.E. 329 (1925).

> The better rule seems to be that a motion by the plaintiff for judgment dismissing his action for divorce upon a voluntary nonsuit will not be allowed by the court as a matter of right, but is addressed to the sound discretion of the court, which will be exercised in the interest not only of the plaintiff, but of the defendant and the State. The State and defendant, each, have an interest in the status of plaintiff and defendant, and the purpose of an action for divorce is to change or alter this status.[10]

This position was labeled as dictum and the court reversed itself in *Scott v. Scott*,[11] a case cited as precedent for the decision in the principal case. The *Scott* case did not involve custody, and even if it be conceded that the court was justified in its conclusion that "in the long view, we do not perceive that public policy requires that divorce actions be excepted from the general rule with reference to nonsuits,"[12] the case furnishes no authority for a proceeding involving custody. The court's jurisdiction to award custody is not lost when a divorce is not granted under section 50-13,[13] nor presumably when alimony pendente lite is denied under section 50-16.[14] The plaintiff should not be allowed to destroy the court's jurisdiction by taking a voluntary nonsuit as a matter of right. The parties should be permitted to get out of court if a reconciliation is achieved and therefore a voluntary nonsuit should not be strictly prohibited, but when a question of custody is to be decided, the interest of the state is considerable, and it is to be hoped that the judge will be given discretion to deny the motion when the welfare of the child warrants doing so.[15]

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[10] *Id.* at 812, 128 S.E. at 333.

[11] 259 N.C. 642, 131 S.E.2d 478 (1963).

[12] *Id.* at 648, 131 S.E.2d at 482.

[13] Bunn v. Bunn 258 N.C. 445, 128 S.E.2d 792 (1963).

[14] See 3 LEE, note 3 *supra*, § 222, at 11 n.20. The language of N.C. GEN. STAT. § 50-16 (Supp. 1965) suggests that the determination of custody rights is not dependent on a favorable ruling on the request for alimony without divorce.

[15] Of the cases found in other jurisdictions that dealt with the question, the most nearly in point is Ford v. Superior Court, 340 P.2d 296, 171 Cal. App. 2d 288 (Dist. Ct. App. 1959). There plaintiff and defendant were divorced, and the suit was for custody of the child. The defendant filed a demurrer to the complaint and a motion for an order to pay attorney's fees and costs. Thereafter the plaintiff requested a dismissal of the action, and the defendant moved the court to vacate the dismissal and was successful. The defendant then filed an answer and a cross-complaint by which she sought to establish a Nevada decree as a domestic judgment. The court held that "when the complaint was filed, the child for whose benefit the