4-1-1935

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Recommended Citation
R. M. Albright, Nonsuit -- Waiver of Motion by Cross-Examination of Codefendant, 13 N.C. L. Rev. 343 (1935).
Available at: http://scholarship.law.unc.edu/nclr/vol13/iss3/15

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cases on the facts, yet the court reaches opposite results in each and both are amply supported by authority. However, the cases may be reconciled by a theory which does not appear in the opinions. In the Brannon case, the reservoir was useless and abandoned, and could easily have been made safe for children. In the Boyd case, the property in question served a very useful purpose which might have been wholly or partly destroyed had the decision of the court been any different, since children could hardly be kept off the bridge without a complete barricade of it. At any rate, the safe-guarding of the premises would have been attended with great expense and inconvenience to the owner, and every railroad bridge in North Carolina which is near a small settlement would necessarily have to be altered. Thus the court appears to have invoked public policy in balancing the utility of the object with the danger to trespassing children. It is submitted that the two principal cases, though apparently conflicting, are correctly decided.

MAURICE V. BARNHILL, JR.

Nonsuit—Waiver of Motion by Cross-Examination of Codefendant.

In a damage suit against the driver of an automobile and the driver's employer, both defendants moved for nonsuit at the close of the plaintiff's evidence and entered exceptions to the order overruling their motions. The driver then introduced evidence including his own testimony. The employer cross-examined the driver and witnesses introduced by him, but offered no evidence himself. Plaintiff offered

...Liability was established under substantially the same circumstances in the following: Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450 (1897); Howard v. City of Rockford, 270 Ill. App. 155 (1933); Comer v. Winston-Salem, 178 N. C. 383, 100 S. E. 619 (1919); cf. Davoren v. Kansas City, 308 Mo. 513, 273 S. W. 401 (1925). Recovery was denied in the following: McCall v. McCallie, 48 Ga. App. 99, 171 S. E. 843 (1933); Gurley v. Southern Power Co., 172 N. C. 690, 90 S. E. 943 (1916). But see comment in note 13, supra; Fiel v. City of Racine, 203 Wis. 149, 233 N. W. 611 (1930).

This was originally a primary consideration. In the Stout case, infra, it was said that the turntable might have been made safe by the addition of a simple and inexpensive lock. The omission of such simple safe-guards is negligent in comparison with the unreasonable risk to children, but where such further safe-guards are required as to interfere with the utility of the condition maintained by defendant, then it cannot be said that the defendant is negligent in not rendering the condition safe. See Sioux City S. Pac. R. R. Co. v. Stout, 84 U. S. 657, 21 L. ed. 745 (1873); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896); Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379 (1901); Brown v. Salt Lake City, 33 Utah 222, 93 Pac. 570 (1908); RESTATEMENT, TORTS (1934) §339 Comment (d) (A landowner is liable for injuries to children trespassing on his land caused by a structure or other artificial condition thereon, if "the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein"); Bauer, The Degree of Danger and the Degree of the Difficulty of Removal of the Danger as Factors in "Attractive Nuisance" Cases (1934) 18 MINN. L. REV. 523.
evidence in rebuttal. Both defendants then renewed their motions for nonsuit and upon denial again excepted. After judgment against both defendants, employer contends that on appeal he is entitled to the benefit of his first exception. Held, employer's motion for nonsuit should have been granted whether evidence taken after his first exception be considered or not.¹

Under the North Carolina statute,² a motion to nonsuit must be made at the close of plaintiff's evidence.³ If refused, defendant may except and go to the jury upon the evidence;⁴ or he may introduce evidence⁵ and renew his motion for nonsuit at the close of all the evidence.⁶ If he introduces no evidence, his exception to his first motion is heard upon appeal; but if he elects to introduce evidence he waives the benefit of his first exception and only his second exception is heard upon appeal.⁷ The instant case presents, but without the necessity for an answer, the interesting question of whether defendant's subsequent cross-examination of his codefendant and codefendant's witnesses constitutes a waiver of his previous motion for nonsuit.⁸

²N. C. CODE ANN. (Michie, 1931) §567; Riley v. Stone, 169 N. C. 421, 86 S. E. 348 (1915) (the power to grant an involuntary nonsuit is altogether statutory and did not exist prior to the Hinsdale Act of 1897).
³McKellar v. McKay, 156 N. C. 283, 72 S. E. 375 (1911) (reversible error to sustain a motion to nonsuit upon plaintiff's evidence before he has rested his case).
⁴Penland v. French Broad Hospital, Inc., 199 N. C. 314, 154 S. E. 406 (1930) (where defendant has not moved at close of plaintiff's evidence he cannot avail himself of the statute by motion to dismiss at the end of all the evidence).

Under the statute, defendant may introduce evidence as a matter of right; formerly it was a matter of discretion with the court. Means v. Carolina Cent. R. R. Co., 126 N. C. 424, 35 S. E. 813 (1900); cf. Stith v. Lookabill, 71 N. C. 25 (1874); McIntosh, N. C. Practice and Procedure (1929) 612, N. 94.


Debnam v. Rouse, 201 N. C. 459, 160 S. E. 471 (1931). The original act, P. L. 1897, Ch. 109, was construed to change the common law so as to allow defendant the benefit of both exceptions on appeal. Purnell v. Raleigh & Gaston R. R. Co., 122 N. C. 332, 29 S. E. 953 (1896). But this result was criticised by the court, Cox v. Norfolk & Carolina R. R. 123 N. C. 604, 31 S. E. 848 (1898), and the act was amended, P. L. 1899, Ch. 131 and P. L. 1901, Ch. 594, to make subsequent introduction of evidence by defendant a waiver of his first motion and exception.

The question may be important to a defendant, for a nonsuit will be denied if there is more than a scintilla of evidence to go to the jury, and on the first motion the court considers only plaintiff's favorable evidence introduced before that motion was made, while on the second motion the court looks at the whole case and considers all evidence favorable to plaintiff whether introduced by plaintiff, defendant, or elicited from any of the witnesses on direct or on cross-examination. Gates v. Max, 125 N. C. 139, 54 S. E. 266 (1899); Smith v. Cumberland
Where a coparty testifies for himself at his own instance and is cross-examined by his coparty, he does not become the latter's witness. Evidence elicited on cross-examination is generally regarded as testimony of the party calling the witness and not of the party cross-examining. Thus, at first glance, it would seem that defendant has not "introduced evidence" within the rule of the statute, and therefore has not waived his right to stand on the motion made at the conclusion of plaintiff's evidence. But the case should be decided on broader grounds.

After a defendant has had the benefit of two rulings by the court and one by the jury, should he be given still another "bite at the cherry" by appellate review of his first position when only part of the evidence was before the court? Even if defendant took no affirmative action whatever, why should not all the evidence in the case be considered on appeal? If there is but a single defendant in the case and he elects to introduce no evidence after his motion for nonsuit is denied, the case goes immediately to the jury. Where there are codefendants, the court may enter a nonsuit as to one and permit the action to proceed against the other. But where nonsuits are denied codefendants and either of them elects to introduce evidence, the other defendant cannot appeal until the whole case goes to the jury and verdict is rendered against him. Suppose in the meantime other parties and witnesses present evidence sufficient for a jury verdict against both defendants. Should the appellate court ignore the additional evidence, the verdict and the judgment, and nonsuit a plaintiff who has obtained a just judg-

County Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925).

Wigmore, Evidence, (2nd ed. 1923) §916 (4); See McKelvey, Evidence (4th ed. 1932) §283.

Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697 (1919); Smith v. Atlanta & Charlotte Air Line R. Co., 147 N. C. 603, 61 S. E. 575 (1908). North Carolina follows the so-called "orthodox rule," which permits a party to cross-examine as to every issue in the case, whether presented by the direct examination or not, without making the witness his own. McIntosh, N. C. Practice and Procedure (1929) §366 (2); See Wigmore, Evidence (2nd ed. 1923) §1885.

At common law, the court disapproved of defendant's having "two bites at a cherry" by "fishing for the opinion of the court" by a demurrer to the evidence and afterwards introducing evidence if his demurrer was overruled. Stith v. Lookabill, 71 N. C. 25 (1874); State v. Graves, 119 N. C. 822, 25 S. E. 819 (1896). The court criticised the rule of the statute before the "waiver" amendment was added. Cox v. Norfolk & Carolina R. R., 123 N. C. 604, 31 S. E. 848 (1898) cited note 7 supra. The present statute must be strictly complied with before defendant can avail himself of it. Penland v. French Broad Hospital, Inc., 199 N. C. 314, 154 S. E. 406 (1930); see note (1931) 9 N. C. L. Rev. 320.

ment? Such procedure would be a departure from the court's progressive policy of reversing only for prejudicial error and of settling litigation in one suit wherever possible.

The court is authorized by statute "to render such sentence, judgment and decree as on inspection of the whole record it shall appear to them in law ought to be rendered thereon." It is submitted that this statute should be invoked to prevent useless nonsuits when sufficient evidence for a judgment on the merits has been presented while the defendant is still before the court.

R. Mayne Albright.

Real Property—Disposition of Real Property of Eleemosynary Corporation upon Its Dissolution.

In 1912 Rosa Campbell conveyed for nominal consideration a lot to "Rose Campbell Mission." The deed was in the usual form of deeds of conveyance, and it contained no recitals as to the object or purpose of the conveyance and no provisions as to trusts to be set up. Rosa died in 1915, and the work of the Mission ceased. In 1931 the lot was condemned as a site for a high school, and an award was made to the owners. Heirs of Rosa Campbell filed a petition claiming an interest in the fund. A trustee, acting in behalf of the Mission, filed an exception to the auditor's report which directed the funds to be paid to the heirs. The lower court overruled the exception. Held, since the Mission was an unorganized society (it had not complied with the statute providing for incorporation of such organizations) and had wholly disbanded, the title to the land remained in the donor and accrued to her heirs. Further, if the Mission had been organized and had dissolved, the land would have reverted to the said heirs either under a District of Columbia statute or at common law.

The question presented by the principal case is, what (in the absence

20 This is the "old-fashioned and mechanical way" not the "modern and progressive way" of dealing with technical errors of the trial court. WIGMORE, Evidence, Impeachment of Witness on Cross-examination (1932) 26 ILL. L. REV. 686, 687. See Cox v. Norfolk & Carolina R. R., 123 N. C. 604, 31 S. E. 848 (1898).


26 N. C. CODE ANN. (Michie, 1931) §1412; McINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §694; N. C. CODE ANN. (Michie, 1931) §658. Cf. Amendment to Section 269 of Judicial Code, 28 U. S. C. A. §391. It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or error which results in no substantial prejudice to appellant. In re Ross, 182 N. C. 477, 109 S. E. 365 (1921).

2 Rose Campbell Mission v. Richardson, 73 F. (2d) 661 (App. D. C. 1934). A District of Columbia statute provides that the property in this situation shall revert to the donor or his heirs. D. C. CODE (1929) Tit. 5 §321.