Practice and Procedure -- Judgment of Nonsuit as Bar to Subsequent Action

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These factors are of only superficial value in the rationalization of the rule; they do not eliminate any of the inherent objections. A more satisfactory and stable result might be reached if the courts would recognize the pendency of the appeal from the judgment offered as a defense as a valid basis for a continuance.\textsuperscript{13} It should be mentioned, however, that in view of the crowded condition of the appellate calendar in Oklahoma\textsuperscript{14} the continuance suggested might have to be of extraordinary duration.

N. A. Townsend, Jr.

Practice and Procedure—Judgment of Nonsuit as Bar to Subsequent Action.

The Supreme Court affirmed a judgment of nonsuit on the ground that plaintiff by her own testimony had shown that she was guilty of contributory negligence.\textsuperscript{1} Within one year thereafter she brought another suit on the same cause of action. A motion to dismiss for the reason that the first suit was \textit{res adjudicata} was granted. On appeal this judgment was reversed. It was error to dismiss the second suit unless it appeared from an examination of the pleadings and hearing

Sutton v. Dunn, 176 N. C. 202, 96 S. E. 947 (1918) (appeal from a magistrate's court to the Superior Court); Moss v. Taylor, 73 Utah 277, 273 Pac. 515 (1928) (appeal from a Municipal Court to the District Court). \textit{Contra:} Spokane Ry. Co. v. Spokane County, 75 Wash. 72, 134 Pac. 688 (1913) (appeal from a ruling of the Public Service Commission to the District Court). Second, the rule is applicable where the judgment was rendered by the trial court of general jurisdiction and the appeal is to the general appellate court. Ransom v. City of Pierre, 101 Fed. 665 (C. C. A. 8th, 1900); E. I. Du Pont Co. v. Richmond Guano Co., 297 Fed. 580 (C. C. A. 4th, 1924) (judgment rendered by a Federal District Court sitting in North Carolina); Boynton v. Chicago Mill & Lumber Co., 84 Ark. 203, 105 S. W. 77 (1907); Bank of North America v. Wheeler, 28 Conn. 433 (1859); Reese v. Damato, 44 Fla. 692, 33 So. 462 (1902); Cain v. Williams, 16 Nev. 426 (1882); see Sharon v. Hill, 26 Fed. 337 (C. C. D. Cal. 1885); see also the dissent of Lord, C. J., Day v. Holland, 15 Ore. 464, 15 Pac. 853 (1887). \textit{Contra:} Watson v. Richardson, 110 Iowa 698, 80 N. W. 416 (1899) (where a supersedeas bond is posted the judgment will be \textit{res adjudicata} regardless of the fact that the appeal will result in a hearing \textit{de novo}).

\textsuperscript{23} Robinson v. El Centro Grain Co., 133 Cal. App. 567, 24 P. (2d) 554 (1933); McCusker v. Commonwealth Casualty Co., 106 N. J. L. 116, 148 Atl. 897 (1930); Paine v. Schenectady Insurance Co., 11 R. I. 411 (1876) ("We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be good ground for delaying the judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time").

\textsuperscript{14} (1934) 20 A. B. A. J. 148.

\textsuperscript{1} Batson v. City Laundry Co., 205 N. C. 93, 170 S. E. 136 (1933). On a previous appeal in the same case it was held that the trial court was without authority to set aside a verdict for insufficiency of the evidence as a matter of law and then grant a motion for nonsuit made at the close of all the evidence and renewed after the verdict had been set aside. Batson v. City Laundry Co., 202 N. C. 500, 163 S. E. 600 (1932).
the evidence on the trial that it was substantially the same as the first suit.2

The courts have generally held that a judgment of nonsuit, voluntary or involuntary, does not operate as a bar to another action.3 North Carolina adhered to the general rule until the case of Hampton v. Rex Spinning Co.,4 where it was held that a former judgment of nonsuit will operate as a bar to a second action if in the second action the plaintiff introduces substantially the same pleadings and substantially the same evidence as that offered in the first suit.

This departure from the general rule is commendable in that it carries out the policy against a multiplicity of suits. As applied in the instant case, however, the rule is subject to this criticism: the plaintiff can omit the evidence of her contributory negligence in a subsequent suit. Thus her evidence will be substantially altered, and the former judgment will not be res adjudicata. In doing so she has avoided the effect of having shown in the first suit that she was not entitled to recover as a matter of law. This would not be prejudicial to the defendant but for the fact that there was no practical way for the defendant to get a final judgment in the first action. Since the plaintiff’s evidence did not entitle her to go to the jury, the defendant had only a choice between a motion for nonsuit or motion for a directed verdict. A motion for a directed verdict would usually be unavailing, since plaintiff can always take a nonsuit to avoid the effect of a directed verdict.5 The result might be that the plaintiff will eventually win a suit which at one time she has shown as a matter of law that she was not entitled to win.6

It is submitted, therefore, that in addition to holding a judgment of nonsuit res adjudicata when in a second suit the plaintiff fails to introduce a substantially different case from the one previously presented, our court should also hold a nonsuit res adjudicata when it has been granted because of plaintiff’s showing as a matter of law that he was

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4 198 N. C. 235, 151 S. E. 266 (1930).
5 McIntosh, North Carolina Practice and Procedure (1929) §574.
6 Of course, testimony of her contributory negligence given by plaintiff as a witness in the first trial would be competent evidence in the second trial, since it was clearly an admission. 2 and 3 Wigmore, Evidence (2d ed. 1923) §§1048, 1387(3). And there is some authority that testimony given by any other of plaintiff’s witnesses might also be admissible under this theory. Keyser Canning Co. v. Klots Throwing Co., 98 W. Va., 487, 128 S. E. 280 (1925); 2 Wigmore, Evidence (2d ed. 1923) §1075. Also the pleadings on the former trial are admissible; 2 Wigmore, Evidence (2d ed. 1923) §1066.
not entitled to recover. This view is supported by authority in other jurisdictions.\footnote{Ordway v. Boston R. Co., 69 N. H. 429, 45 Atl. 243 (1899); Morrow v. Atlanta & C. A. L. R. Co., 84 S. C. 224, 66 S. E. 186 (1909); Bartert v. Seehorn, 25 Wash. 261, 65 Pac. 185 (1901).}

FRANKLIN T. DUPREE, JR.

Practice and Procedure—Judgment by Default and Inquiry—Evidence Relevant to Damages.

The plaintiff's car was demolished by defendant's truck in an accident due to the alleged negligence of the truck driver. Judgment was by default and inquiry; evidence offered to prove that the accident resulted from plaintiff's negligence was ruled inadmissible. Held, A judgment by default admits the cause of action, but on the inquiry defendant is entitled to establish facts in mitigation of damages. Evidence showing how the accident occurred is competent, therefore, not as a bar to liability, but to show the amount of damages properly assessable on the inquiry.\footnote{DeHoff v. Black, 206 N. C. 687, 175 S. E. 179 (1934).}

In North Carolina, the rule is well settled that a judgment by default and inquiry establishes a cause of action of the kind properly pleaded in the complaint;\footnote{Graves v. Cameron, 161 N. C. 549, 77 S. E. 841 (1913); Plumbing Co. v. Hotel Co., 168 N. C. 579, 84 S. E. 1008 (1915).} plaintiff's right at least to nominal damages;\footnote{Parker & Gatling v. Smith, 64 N. C. 291 (1869); Osborn v. Leach, 133 N. C. 428, 45 S. E. 783 (1903); Stockton v. Mining Co., 144 N. C. 595, 57 S. E. 335 (1907); Mfg. Co. v. McQueen, 189 N. C. 311, 127 S. E. 246 (1925).} and precludes defendant from offering any evidence in bar of the action.\footnote{Gerrard v. Dollar, 49 N. C. 175 (1856); Lee v. Knapp, 90 N. C. 171 (1882).} Other state courts are in accord with the North Carolina view,\footnote{Parker & Gatling v. Smith, 64 N. C. 291 (1869). See also Graves v. Cameron, 161 N. C. 549, 77 S. E. 841 (1913).} but this court is not clear in declaring what constitutes evidence in bar. For instance, in an action for goods sold and delivered the defendant was allowed to prove non-delivery;\footnote{Lee v. Knapp, 90 N. C. 171 (1882).} but in another similar action, the defendants' evidence that the goods were not delivered to themselves as individuals but as officers of a buying corporation was inadmissible.\footnote{Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 328 Mo. 782, 41 S. W. (2d) 1049 (1931); Smithers v. Brunkhorst, 178 Wis. 530, 190 N. W. 349 (1922); Loellke v. Grant, 120 Ill. App. 74 (1905). Iowa denies the defendant any right beyond the cross-examination of the plaintiff's witnesses; Iowa Code (1931), §11591; Elwell, Lyman & Co., v. Betchell & Ross, 68 Iowa 755, 12 N. W. 273 (1882).}

In the instant case, while saying that the judgment admits the cause