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Pleading and Practice--Nonsuit after Motion to Direct a Verdict

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Judge Kenna concurred in the result, in the instant case, because defendant alone, not plaintiff or the court, had the duty to limit the effect of the evidence, and he failed to ask for an instruction, the general objection alone not barring the evidence since it was admissible to show the balance due. He did not argue however that the colloquy between the trial judge and the attorneys as to the purpose of the evidence prevented the jury's being misled, but asserted that such a proposition is "a wide departure from well settled principles of jury deliberation and that if followed hereafter, the consequence will be quite confusing."[8]

The jury may occasionally but frequently and indeed usually, it does not understand the effect of objections and statements of attorneys. It depends upon the court's instructions to learn the effect of the claims and arguments of counsel. No authority has been cited or found in support of the majority opinion that objections and statements of counsel may sufficiently apprise the jury as to the effect of evidence. It is submitted that the approach of the concurring opinion is more reasonable than that of the majority opinion.

H. L. W., JR.

PLEADING AND PRACTICE — NONSUIT AFTER MOTION TO DIRECT A VERDICT. — Issue was joined on a plea of *"not guilty"* in an action of trespass on the case, and a jury was impaneled to try the case. After the plaintiff had introduced his evidence, the court retired to chambers where the defendant moved for a directed verdict. Before the court directed the jury to return the verdict for the defendant, but after it had sustained the motion, the plaintiff moved for a nonsuit, but was denied. *Held,* that this was an error, thus permitted a nonsuit to be taken after the court had sustained a motion to direct. *Lykens v. Jarrett.*[1]

At common law a party could take a nonsuit at any time before the verdict.[2] The West Virginia statute has limited the time for a nonsuit,[3] requiring it to be taken before the jury retires from the bar. Where the case is heard by the court in lieu of a jury, this statute has been construed to mean that the nonsuit must be

MORE, EVIDENCE § 13. *Contra*: Harrison v. Garrett, 132 N. C. 172, 43 S. E. 594 (1903).

[8] Leftwich v. Inter-Ocean Casualty Co., 17 S. E. (2d) 209, 213 (W. Va. 1941).

[1] 17 S. E. (2d) 328 (W. Va. 1941).

[2] Daube v. Kuppenheimer, 272 Ill. 350, 112 N. E. 61 (1916).

[3] W. VA. CODE (Michie, 1937) c. 56, art. 6, § 25.

taken before the case has been submitted to the court for decision.[4] However, a problem arises where there is a hybrid procedure involving both the jury and the court, as where a demurrer to the evidence or a motion to direct has been interposed. Our court has held that where there is a demurrer to the evidence and a jury is impaneled to assess the damages, the nonsuit cannot be taken after the jury retires from the bar.[5] There is a conflict of authority as to whether the party may take a nonsuit after the court has ruled on the motion to direct. Some courts, as did the court in the instant case, treat this as a jury trial, and a nonsuit may be taken any time before the jury retires.[6] Other courts feel that a motion to direct takes the case from the jury, and a nonsuit cannot be taken after the motion is submitted to the court for a decision.[7] These courts reason that after the motion is sustained, the function of the jury is purely ministerial, and serves no purpose other than registering the will of the trial judge and giving form to the record.[8] Our court has previously stated that a finding in a directed verdict is just as surely a finding of the court as if the matter had been heard by the court in lieu of a jury. The jury's action is mere form, brought about by the fact that it had been impaneled to try the case, and does not amount to a verdict in the common acceptation of trials by jury.[9] It would seem to follow that if the court had applied this reasoning, the nonsuit would not have been allowed

[4] Commonwealth Pipe & Supply Co. v. Nitro Products Corp., 95 W. Va. 13, 120 S. E. 174 (1923).

[5] Frymier v. Lorama R. R., 86 W. Va. 519, 103 S. E. 366 (1920).

[6] Barrett v. Virginian Ry., 250 U. S. 473, 39 S. Ct. 540, 63 L. Ed. 1092 (1919); West Coast Fruit Co. v. Hackney, 98 Fla. 382, 123 So. 758 (1929); Sweet-Orr & Co. v. E. G. Hendrickson Co., 248 Ill. App. 624 (1928); Van Sant v. Wentworth, 60 Ind. App. 591, 108 N. E. 975 (1915); Darby v. Pidgeon Thomas Iron Co., 144 Tenn. 298, 232 S. W. 75 (1921); dissenting opinion of Ritz, J., in State v. Damron, Judge, 85 W. Va. 619, 622, 102 S. E. 238, 239 (1920).

[7] Marion v. Home Mutual Ins. Ass'n of Iowa, 205 Iowa 1300, 217 N. W. 803 (1928); Schaffer v. Deemer Mfg. Co., 108 Miss. 257, 66 So. 736 (1914); Bee Bldg. Co. v. Dalton, 68 Neb. 38, 93 N. W. 930 (1903); Weaver v. Whalen, 56 Ohio App. 35, 9 N. E. (2d) 1016 (1937); Turner v. Pope Motor Co., 79 Ohio St. 153, 86 N. E. 651 (1908); Cherniak v. Prudential Ins. Co., 339 Pa. 73, 14 A. (2d) 334 (1940).

[8] Marion v. Home Mutual Ins. Ass'n of Iowa, 205 Iowa 1300, 1303, 217 N. W. 803 (1928); Cherniak v. Prudential Ins. Co., 339 Pa. 73, 75, 14 A. (2d) 334 (1940). After the judge states he will have to direct a verdict, "it would be absurd to hold that in the instant that elapses between the judge's declaration as to what direction he has decided to give and his actual giving of that direction, a plaintiff may take a voluntary nonsuit. This would reduce the trial of cases, in this feature of them at least, to a mere game of verbal 'base running'."

[9] Breedlove v. Galloway, 109 W. Va. 144, 166, 153 S. E. 298 (1930).

after the court had ruled on the motion to direct, for a nonsuit cannot be taken after the case has been submitted to the court for decision.

B. D. T.

REAL PROPERTY — NUISANCE — ABATEMENT AGAINST REVERSION. — Injunction proceedings against a former tenant and a landlord were instituted in the name of the State under a statute,[1] designed to prevent the use of premises for purposes of prostitution, therein defined to constitute a nuisance, and to provide for collecting penalties from occupants and owners of such premises. *Held,* that injunction and an order padlocking the building should issue even though the owner did not know of this nuisance maintained by his tenant. *State v. Navy.*[2]

Is a judicial construction of such statutes, which imposes a penalty upon the owner of the premises on which the nuisance is maintained, despite the owner's ignorance of the nuisance a proper one? Some courts permit abatement of the nuisance by injunction against the owner to restrain continuance, although he had no knowledge of its existence.[3] Others expand the operation of the statute to allow abatement of the nuisance and also closing of the house for a definite period regardless of the owner's lack of knowledge.[4] Liability thus divorced from knowledge ordinarily rests upon the theory that the action is *in rem.*[5] As an incident to abatement property so used as to bring it within the nuisance statute, may if personal, be confiscated, and if real, subjected to the consequences of reasonable forfeitures, without reference to the owner's unawareness of its use for the unlawful purpose.[6]

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[1] W. VA. CODE (Michie, 1937) c. 61, art. 9, §§ 1-11.

[2] 17 S. E. (2d) 626 (W. Va. 1941).

[3] Martin v. Blattner, 68 Iowa 286, 25 N. W. 131 (1886); State v. Fanning, 96 Neb. 123, 147 N. W. 215 (1914); Moore v. State, 107 Ten. 490, 181 S. W. 438 (1915).

[4] People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454 (1917); People v. Barbiere, 33 Cal. App. 770, 166 Pac. 813 (1917); *cf.* Tenement House Dept. v. McDevitt, 215 N. Y. 160, 109 N. E. 88 (1915) (penalty sustained against owner of tenement house).

[5] People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812 (1917).

[6] People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454 (1917) (the suppression of a nuisance is essentially a proceeding *in rem* operating upon the property used in the maintenance of the nuisance, and while the owner having no actual knowledge of the character of the business carried on in his building might not personally be bound for costs, the building and furniture may be proceeded against and subjected to forfeitures prescribed by the state); State v. Chambers, 131 Minn. 349, 154 N. W. 1073 (1915).