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Taking the Case from the Jury

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TAKING THE CASE FROM THE JURY

See West's S. C. Digest, Vol. 18, Trial, Secs. 134-181.

Demurrer to Evidence: This is mostly of historical significance now, as its use was too dangerous by way of admission on the part of a plaintiff, since he had to join in the demurrer and, unless he had a very careful and good attorney, his case could easily be lost thru his attorney's error. For all practical purposes "directed verdict" has taken its place, where no such admission by a party is necessary.

Involuntary Nonsuit and Directed Verdict: At this point attention is called to Circuit Court Rule 30 with reference to a plaintiff being nonsuited or his complaint being dismissed in an *equity* action. As to an *administrative body* there is technically no such step as one being nonsuited. Instead there is only a motion to dismiss. As said in *King v. Wesner* (1941), 198 S. C. 49, 16 S. E. 2d 289, at page 53 by Circuit Judge Lide, whose order in that particular was affirmed on page 61:

> While perhaps a motion for a nonsuit is not technically the sort of motion that can be made at a hearing of this kind, yet it may be properly construed as a motion to dismiss the claim on the ground that the claimant had failed to produce evidence tending to establish such claim. But even if the same rules applicable to the trials of actions at law before a jury are followed, it is quite clear that a refusal of a motion for a nonsuit may be sustained although the testimony in chief did not make out a case, where the evidence offered by the defendant or other evidence later introduced in the case tended to support the allegations on which the claim was based. But upon a careful consideration of the evidence offered in chief here, without regard to other evidence, I do not think Commissioner Todd was in error in overruling the motion . . . .

Can a judge of his own motion grant a nonsuit? Yes, but he should exercise that power with caution. *McCall v. Cohen* (1881), 16 S. C. 445.

At this point, and as it were by way of parentheses, one is cautioned as to the third paragraph of Rule 18, which says that a motion to dismiss a complaint or answer because of lack of sufficient allegations of fact can be made *orally.* It is utterly inconsistent with Sec. 10-647, which requires as to identically the same step "at least five days notice in

writing." Since that portion of the Rule is inconsistent with a statute, it is of no legal force. The court should do away with that paragraph.

An involuntary nonsuit can sometimes be a waste of time, as, for instance, where it is granted in a suit that alleges both negligence and wilfulness. *Eargle v. Sumter Lighting Co.* (1918), 110 S. C. 560, 96 S. E. 909, at page 565 points how such waste can occur:

> At the conclusion of plaintiff's testimony, defendant moved generally for a nonsuit, which was refused. During the taking of defendant's testimony, plaintiff's attorney sought to bring out, on cross-examination of defendant's witnesses, testimony which he thought would tend to show wilfulness and wantonness on the part of defendant. The trial Judge excluded it, saying that he had intended, when the motion for nonsuit was heard, to rule that there was no evidence of wilfulness and grant a nonsuit as to punitive damages, and that he would direct the jury to that effect. Plaintiff's attorney insisted that he had the right to prove facts entitling plaintiff to recover punitive damages, if he could, on cross-examination of defendant's witnesses; but the Court ruled otherwise and held, as to that issue, that defendant might consider a nonsuit granted. This was error. We have held in numerous cases that, even though a nonsuit should have been granted at the conclusion of plaintiff's testimony, yet, if the deficiency of evidence was supplied either on direct or cross-examination of defendant's witnesses, neither a nonsuit nor a directed verdict could be granted at the conclusion of all the testimony. It is immaterial from whose witnesses — whether plaintiff's or defendant's — the evidence in support of an element of damage or of the cause of action or defense may come. Either party has the right to make out or to strengthen his case or defense on the examination of the witnesses of his adversary. And even if the defendant's motion had been specifically for a nonsuit as to punitive damages, and it had been granted, nevertheless, if sufficient evidence to carry that issue to the jury had been brought out on direct or cross-examination of defendant's witnesses, it would have been the duty of the Court to submit it to the jury.

See also *Allen v. Atlanta etc. Co., post.*

In South Carolina one can move for a nonsuit or directed verdict only as to a separate cause of action. Whether wilfulness is a distinct, separate cause is a puzzling problem under the S. C. cases, in view of Sec. 10-678, which allows negligence and wilfulness to be "jumbled" or pled together.

The cases are so at variance with no one case saying it is overruling or modifying any former case, that one is left up in the air.

In *Piper v. Am. etc. Casualty Co.* (1930), 157 S. C. 106, 154 S. E. 106, *Benn v. Camel City etc. Co.* (1931), 162 S. C. 44, 160 S. E. 135, *Hallman v. Cushman* (1941), 196 S. C. 402, 13 S. E. 2d 498, we are told that they are separate causes of action.

Whereas in *Barnes v. Ins. Co.* (1942), 201 S. C. 188, 22 S. E. 2d 1, we are informed that they are not "independent" causes.

But in *Allen v. Atlanta etc. Co.* (1950), 216 S. C. 188, S. E. 2d the Court said:

"While the cause of action for punitive damages under our decisions may be an independent cause of action it is nevertheless a dependent cause of action in that such damages can be recovered only after verdict awarding plaintiff actual damages." And yet the older case of *Bethea v. Western Union Tel. Co.* (1914), 97 S. C. 385, 81 S. E. 675, would appear to hold to the contrary but was not mentioned in the *Allen* case.

So there is still grave danger in South Carolina as to making a motion for a nonsuit or for a directed verdict as to punitive damages. In the event neither of them can be made, the only other recourse is a request to charge the jury that they cannot find a verdict for punitive damages and defendant's attorney better be present when the jury comes in to see that proper steps are taken should they bring in a verdict for such damages. As to the attorney's duty see *Bethea v. Western Union Tel. Co., ante.*

Is there a Yardstick for Determining When a Nonsuit or Directed Verdict should be Granted? There is one but exactly what it is at present gives rise to difficulty. It used to be the "scintilla rule" which our court in *Bethea v. Floyd* (1935), 177 S. C. 521, 181 S. E. 721, defined to be "a spark", "a glimmer", or "the smallest trace". If there was that glimmer for the plaintiff, the motion had to be refused. But whether

we have the glimmer still or something more definite and reasonable is another puzzle in South Carolina since about every other case says we have it, while the intermediate cases, beginning with *Plowden v. Wilson* (1938), 186 S. C. 285, 195 S. E. 847, tell us we have the "reasonable inference" rule, which the Court then said was "more founded on common sense." As said on page 289:

> The matter is thus treated in the case of *National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.*, 173 S. C., 1, 174 S. E., 581, 582: "If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence that John C. Jones was the agent of John F. Clark & Co. in relation to the transactions of G. C. Swetenburg, nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury."
>
> Judged by either, or both, of these rules, we think his Honor was in error when he granted the motion for a directed verdict in favor of the respondent . . . .

However, "scintilla" seemingly has recently been defined as "a reasonable inference." *Cox v. McGraham* (1947), 211 S. C. 378, 45 S. E. 2d 595, while in the more recent case of *Woodle v. Brown* (1953), 223 S. C. 204, 74 S. E. 2d 914, we are told that the "Scintilla Rule" prevails, but it is defined "not as a glimmer" but that which would "establish the issue in the mind of a reasonable juror." It seems here that scintilla is defined by reasonable inference. So, can it now be said that the yardstick is either rule, provided one is defined by the other? See *Howle v. Woods* (1957), 231 S. C. 75, 97 S. E. 2d 205, which seems to bear out this conclusion. The writer always used "reasonable inference" and a number of trial judges in the State have said they solve the legal puzzle by doing likewise.

In a criminal case the yardstick appears to be the reasonable inference rule. *State v. Brown* (1945), 205 S. C. 515, 32 S. E. 2d 825. As declared therein at page 519:

> It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and that

which raises only a suspicion or possibility of the fact in issue; and it may readily be conceded that this is one of the border line cases. But, viewing the evidence, and the inferences which may reasonably be drawn therefrom, in its most favorable light for the State, which is the accepted position on a motion to direct a verdict — [cases cited] — we are of the opinion that it is of sufficient probative value to warrant its submission to the jury.

The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. [cases cited]

The office and function of the Court when considering a motion for a directed verdict in favor of the defendant, is, not to pass upon the weight of the evidence, but to determine its sufficiency to support the verdict. Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury. [cases cited]

In a criminal case there is no such thing as a nonsuit by defendant at the close of the state's evidence. It is either termed a dismissal of the indictment or a direction of verdict. No matter what the characterization is, the legal effect is the same as directing a verdict as the matter is res adjudicata since the state cannot bring the charge again because of the second jeopardy principle.

State v. Parler (1950), 217 S. C. 24, 59 S. E. 2d 489, does not change the rule. There, after all evidence was in from both sides, the defendant should have again moved for a directed verdict, as required by Circuit Court Rule 76. This he didn't do, but since it was a criminal case involving human liberty, the court waived the Rule, and considered the case on its merits.

As to rule in *Equity* cases, see *Wyman v. Davis*, 223 S. C. 172.

As to the rule in Workmen's Compensation cases, see *Crawford v. Winnsboro,* 205 S. C. 72, where the court in 1943 said the yardstick for the Industrial Commission as to a finding of fact was the "reasonable inference" rule.

See *Nichols v. Congaree Fertilizer Co.* (1929), 151 S. C. 417, 149 S. E. 162.

In South Carolina where both parties move for a directed verdict, neither one waives his jury right if both motions should be refused. The South Carolina practice differs from that in some of the other jurisdictions.

However, an attorney should know that, if he asks that his client's case be withdrawn from the jury and be decided by the judge, he thereafter waives his client's right to a jury. *Stepp v. Nat'l Assoc.* (1892), 37 S. C. 417.

CIRCUMSTANTIAL EVIDENCE:

South Carolina follows the current of authority in Workman's Compensation cases by adopting the rule that circumstantial evidence needn't exclude every other reasonable conclusion or hypothesis, but a finding of fact can be based on a clear or reasonable inference. *Whitfield v. Daniel etc. Co.,* 226 S. C. 37.

The same rule has recently been adopted in court trials of civil cases, *Morrow v. Evans,* 223 S. C. 288, thus leaving the old rule applicable only to criminal cases, where such evidence must exclude every other reasonable hypothesis. *State v. Edwards,* 194 S. C. 410.

Therefore, in this state now when a motion is made for a nonsuit or directed verdict, the *Morrow* case rule should be kept in mind, as it necessarily integrates with the yardstick for either of those motions.

Since the treatises on evidence and the ones on this subject do not go sufficiently into circumstantial evidence, it should be called to mind that such evidence is like a chain that is no stronger than its weakest link.

What is the Rule When the Jury Refuses to Follow the Judge's Direction? There is no case in South Carolina directly in point. The writer, as a young court judge, was placed in a rather awkward position when a jury foreman, one of the county's outstanding farmers, arose and said: "Your Honor, I can't sign a verdict for the defendant as I can't agree with Your Honor."

As the writer saw it, the juror was entitled to his opinion, and one certainly did not want to adjudge him in contempt of court, so the thought occurred to the writer that there was a very practical way out of the dilemma so he said: "Mr. Foreman, will you have any objection to signing a verdict in the following form: Under the direction of the court, we find for the defendant?"

He said: "No, Your Honor, because the record will then always show that it was not my verdict as a juror, but one directed by you."

He used that form and thereafter the writer always gave the jury that form to use as to a directed verdict, and had no more trouble. Several circuit judges heard about it and the writer is informed they began using the form also.

The case of *Chartrand v. So. Ry.* (1909), 85 S. C. 479, 67 S. E. 741, points out on page 483 that there are times when even uncontradicted testimony must go to the jury and in such instances it would be error to direct a verdict. In this connection see *Anderson v. Hampton & B. R. & L. Co.* (1926), 134 S. C. 185, 132 S. E. 47.

Trial by Court Without a Jury: Where the judge tries a law case without a jury Section 10-1510 provides that the judge "shall" state "the facts found and the conclusions of law, separately," but in *May v. Cavender* (1888), 29 S. C. 598, 7 S. E. 489, the Supreme Court reduced it to "may", saying the section was merely directory. The result necessarily follows that the requirement is waived unless the attorney requests a separate finding of facts and conclusions of law. That the decision "shall" be filed within sixty days was also held to be merely directory. However, society doesn't place the attorney in the embarrassing position of "hurrying up" a judge, hence if judge runs over the time limit, his decision is nevertheless valid. *Koon v. Munro,* 11 S. C. 139. See also West's S. C. Digest, Vol. 18, Trial, Secs. 387-405.