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Trial—Nature of Rebuttal Evidence Admissible in Nebraska

Arthur Vanderbilt once stated that “the right to a fair trial in both civil and criminal cases” is “the most fundamental right of all.”²⁷ No matter how just the rules of substantive law may be, the interests of justice might often be thwarted if there were no procedural rules controlling presentation of evidence at trial; and it is with this in mind that certain procedural limitations have been placed upon the introduction of rebuttal evidence. If the plaintiff could withhold certain shreds of evidence or testimony until the last possible moment, the resulting surprise and dramatic effect upon the jury might very easily amount to an advantage for the plaintiff far greater than that merited

²⁷ 157 Neb. 927, 62 N.W.2d 131 (1954).

²⁸ Niles, Pleading Res Ipsa Loquitur, 7 N.Y.U.L.Q. 415 (1929).

²⁹ Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn. L. Rev. 241 (1936).

by the probative value of the evidence so withheld. Since a trial should be an orderly search for truth in aid of administration of justice rather than a battle of wits between counsel, surprise tactics and unfair manipulation of evidence should be guarded against.

Though a general reading of Nebraska cases might seem to indicate uncertainty as to the nature of admissible rebuttal evidence, the Supreme Court of Nebraska has followed certain standards. *McCleneghan v. Reid*,² decided in 1892, is the basis of broad discretionary power on the part of the trial court. The court there decided that "The order in which proof is introduced is largely within the discretion of the trial court, and, unless a party has thereby been deprived of a substantial right, or there has been an abuse of discretion, it is not subject to review." For example, it has been held where the plaintiff was seeking to replevy goods allegedly seized improperly on execution by the defendant sheriff, that the failure by the plaintiff to show title to the goods in his case in chief could not be corrected upon rebuttal.³ Refusal to admit such evidence was within the discretion of the trial court. However, when the trial court admits rebuttal evidence which was withheld for clearly unjustified reasons, the trial court has abused its discretion.⁴ Harmless error will not justify reversal, but where material evidence is withheld without justification and the dramatic or surprise effect of such evidence might have influenced the decision reached by the jury, prejudice will be assumed.

What constitutes a justified reason for withholding evidence until rebuttal presents a problem. Generally the plaintiff need not anticipate affirmative defenses and may rightfully reserve any answer to them until rebuttal.⁵ In fact, even where the plaintiff in his case in chief has failed to make out a prima facie case, if the defendant fails to take advantage of the defect and goes on to present an affirmative defense, the plaintiff may then rebut such affirmative defense.⁶

Where rebuttal is directed at evidence toward which an objection of incompetency would have been sustained if made, such rebuttal is proper. However, the court has ruled that ". . . the admission of improper evidence on one side furnishes no warrant to the other to meet it by that which is equally bad."⁷ Hence, the plaintiff cannot rebut hearsay evidence through the admission of further hearsay.⁸

² 34 Neb. 472, 51 N.W. 1037 (1892).

³ *Mutz v. Sanderson*, 94 Neb. 293, 143 N.W. 302 (1913).

⁴ *McClellan v. Hein*, 56 Neb. 600, 77 N.W. 120 (1898).

⁵ *City of McCook v. Adams*, 76 Neb. 1, 114 N.W. 496 (1906).

⁶ *Crockett v. Miller*, 2 Neb. (Unof.) 292, 96 N.W. 491 (1902). However, see *Seiber v. Weiden*, 17 Neb. 582, 24 N.W. 215 (1885) saying that the plaintiff has no absolute right to rebut in his case in chief a defense which he anticipates the defendant will raise.

⁷ *McCartny v. Territory*, 1 Neb. 121 (1871).

⁸ See note 6 supra.

By statute, however, if the defendant introduces in evidence “. . . part of an act, declaration, conversation or writing . . .,” the door is thereby opened for the plaintiff to inquire into the whole conversation or writing on the same subject.⁹

Cases involving cumulative evidence or evidence which merely negatives a denial raised by the defendant present largely the same problem.¹⁰ In *McClellan v. Hein*¹¹ the plaintiff, in an action for damages for loss of support attempted to prove that her husband had purchased liquor in the defendant's tavern. The defendant introduced evidence that the husband had not. In rebuttal the plaintiff sought to bring in two more witnesses to testify concerning the same point. The court concluded that although it was within the discretion of the trial court to admit such cumulative evidence, failure to do so was not error. Similarly in *Watson v. Roode*¹² the court decided that where the plaintiff brought action against the defendant for breach of warranty that the defendant's stud horse was a “sure foal-getter,” the defendant's denial that a warranty had been given was but a negative defense. The court affirmed the decision of the trial court saying that the plaintiff was properly denied the right to introduce evidence in rebuttal for the purpose of showing what the parties had meant by “foal-getter.”

The rationale of these cases appears to be that there is no absolute right to admit such evidence upon rebuttal. But on the other hand should the court exercise its discretion and admit the evidence, that admission by the court does not constitute reversible error unless the plaintiff was clearly unwarranted in withholding the evidence and the defendant has thereby been prejudiced.¹³ It should go almost without saying that when the court does exercise its discretion and allows rebuttal evidence to be admitted which might properly have been declined, the defendant must be allowed an opportunity to reply to such evidence.¹⁴

• The most recent pronouncement on the scope of rebuttal in general was laid down in *Conley v. Hays*,¹⁵ decided in 1951. There the plaintiff was seeking to recover a down payment on a contract for the purchase of some sheep. The defendant introduced evidence to show the plaintiff's motive for repudiating the contract. The trial court admitted rebuttal evidence by the plaintiff on that point. The Supreme Court affirmed stating that “. . . the plaintiff may meet by rebuttal evidence

⁹ Neb. Rev. Stat. § 25-1215 (Reissue 1948).

¹⁰ *Kansas Manufacturing Co. v. Wagoner*, 25 Neb. 439, 41 N.W. 287 (1889); *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439, 150 N.W. 193 (1914); *Jensen v. Omaha & C.B. Street Ry.*, 128 Neb. 21, 257 N.W. 257 (1934).

¹¹ 56 Neb. 600, 77 N.W. 120 (1898).

¹² 30 Neb. 264, 46 N.W. 491 (1890).

¹³ *Metcalf v. Chicago, R.I. & P. Ry.*, 103 Neb. 431, 172 N.W. 246 (1919).

¹⁴ *Gandy v. Early*, 30 Neb. 183, 46 N.W. 418 (1890).

¹⁵ 153 Neb. 733, 45 N.W.2d 900 (1951).

any admissible evidence adduced by the defendant by evidence which is not a part of the evidence of the plaintiff in chief."

This statement, read with previous Nebraska decisions, indicates that the plaintiff has an absolute right to rebut (1) any affirmative defenses advanced by the defendant¹⁶ and (2) any issue on which the defendant has the burden of going forward with the evidence. And the plaintiff of course may impeach in rebuttal any witnesses presented by the defendant.¹⁷ Moreover, the trial court may in its discretion admit such additional rebuttal evidence as it deems necessary in the interests of justice.¹⁸

In allowing the plaintiff to rebut affirmative defenses and those wherein the defendant has the burden of going forward with the evidence, the plaintiff need not anticipate the defenses which might be raised against him. He is not forced to alert his opposition to all possible lines of defense. On the other hand, since the plaintiff is precluded from introducing of right evidence which he should have presented in his case in chief, he may not intentionally withhold such evidence and be assured that it will be admitted upon rebuttal. This provides a strong deterrent against unfair reservation of evidence, and yet does not compel the plaintiff to rebut in his case in chief all possible defenses and testimony. By thus limiting the scope of rebuttal evidence the parties' rights to a fair trial should be adequately protected.

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¹⁶ See note 5 supra.

¹⁷ *Campion v. Lattimer*, 70 Neb. 245, 97 N.W. 290 (1903).

¹⁸ *Mutz v. Sanderson*, 94 Neb. 293, 143 N.W. 302 (1913); *McClellan v. Hein*, 56 Neb. 600, 77 N.W. 120 (1898); *McCleneghan v. Reid*, 34 Neb. 472, 51 N.W. 1037 (1892).