

master has rendered, the time which he has devoted to it, the interruption to his own business, the interference with opportunities for other earnings, the amounts involved, and the assistance he has given to the court and to the parties interested in the fund, and upon all the facts, many of which are generally within the knowledge of the judge from his dealings with the cause, to increase the master's compensation. It was just this class of facts which it appears the circuit judge took into account in deciding that the appellant had been sufficiently compensated. He considered the small amount of work which the special masters were called upon to do for some time before they were discharged, the trifling nature of the claims which, towards the last, they were required to pass upon, the fact that the appellant's regular occupation was not interfered with, the fact that he had been most liberally paid for other services in the same case, and the fact that the special masters might have been earlier discharged without detriment, and should have been discharged, but still were paid \$125 per month each until discharged; and, considering these facts, it is, we think, impossible to say that the circuit judge did not do right in refusing to decree that any party to the cause should pay the appellant any further compensation. Affirmed.

PATTING v. SPRING VALLEY COAL CO.

(Circuit Court, N. D. Illinois. March 7, 1899.)

No. 23,932.

POWER OF FEDERAL COURT TO DIRECT VERDICT—FAILURE OF PLAINTIFF TO APPEAR.

Involuntary nonsuits not being allowed in the federal courts where a plaintiff fails to appear when his case is called for trial and the state practice in such case is to enter an involuntary nonsuit, the proper procedure is to impanel a jury, and to direct a verdict for defendant for want of evidence to sustain plaintiff's cause of action.

On Motion to Vacate Judgment.

J. D. Springer, for plaintiff.

Alfred A. Greenwood and Henry S. Robbins, for defendant.

SEAMAN, District Judge. When this cause was reached for new trial under the mandate from the circuit court of appeals, the plaintiff failed to appear. Counsel for defendant announced that he had personally notified one of the counsel for plaintiff that the case was about to be called, and that a trial would be demanded, and was informed, in effect, that the plaintiff would probably not appear, in view of the mandate and decision by the circuit court of appeals. Thereupon the plaintiff was called, and, not appearing, a jury was impaneled on demand of the defendant, and on motion a verdict of not guilty was directed in favor of the defendant for want of evidence in support of the declaration. Counsel for plaintiff now moves to vacate the judgment entered thereupon on the ground "that the court had no jurisdiction or power to submit the case to a jury, or to render any judgment other than that of dismissal or nonsuit." Coun-

sel for defendant offered consent to such order if the plaintiff would take a voluntary nonsuit instead, but such offer was not accepted, for the reason stated that submission to a voluntary nonsuit would subject the plaintiff to the bar of the Illinois statute of limitations. No authorities have been brought to my attention which indicate the procedure to be observed in a federal court where the plaintiff fails to appear at the trial after issue joined. The doctrine is well established, however, that peremptory or involuntary nonsuits cannot be allowed in such courts. *Elmore v. Grymes*, 1 Pet. 469; *De Wolf v. Rabaud*, Id. 476; *Crane v. Morris' Lessees*, 6 Pet. 598; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172; *Insurance Co. v. Folsom*, 18 Wall. 250; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. As stated in *Crane v. Morris' Lessees*, 6 Pet. 598, it is "not now open to controversy" that the court "had no authority whatever to order a peremptory nonsuit against the will of the plaintiff." *Coughran v. Bigelow*, 164 U. S. 301, 17 Sup. Ct. 117, is not applicable, as it relates to the provisions of a territorial statute, and the question arose on error to the territorial supreme court. In view of the rule thus settled, I am of opinion that the numerous decisions cited by counsel for the plaintiff from the state courts, and from the English courts, to the effect that the judgment in such case must be "as of nonsuit," and not upon verdict, are not applicable here. This distinction is pointed out by Mr. Justice Field in *Oscanyan v. Arms Co.*, 103 U. S. 261-264, remarking: "Had the case been pending in a court of some of the states, or in an English court, a nonsuit would have been ordered."

* * * Involuntary nonsuits not being allowed in the federal courts, the course adopted [directing a verdict] was the proper proceeding." The contention that the failure of the plaintiff to appear and prosecute his action constitutes an election to take a voluntary nonsuit, is not consistent with the avowed purpose of the plaintiff to avoid such effect by nonappearance, and is not in accord with the definitions of the two classes of nonsuit recognized in the state practice, as given in *Holmes v. Railroad Co.*, 94 Ill. 439-443, namely: "A voluntary nonsuit is said to be an abandonment of a cause by a plaintiff, and an agreement that a judgment for costs be entered against him. But an involuntary nonsuit is where a plaintiff, on being called when a case is before the court for trial, neglects to appear, or where he has given no evidence upon which the jury could find a verdict." The nonsuit is imposed because of the plaintiff's failure, and is not by consent, but compulsory. In the absence of some controlling statutory provision, I can find no ground for distinction between the case of entire failure to produce proof and the failure to furnish sufficient proof. The declaration is unsupported in either event, and the defendant seems equally entitled to a verdict. So, in *Oscanyan v. Arms Co.*, supra, a verdict was sustained when it was directed upon the opening statement of counsel for plaintiff, without permitting the introduction of the proposed evidence. The question is important, and I should feel disposed to leave it for determination by the circuit court of appeals on this simple record, even if doubtful as to the proper practice. Under the English practice it has been held in such

case that the error was not jurisdictional, and that it was within the discretion of the court, on an application to set aside the verdict, to permit it to stand, unless the plaintiff "consent to a nonsuit being entered." *Hodgson v. Forster*, 1 Barn. & C. 110. Following that precedent, the offer was made and refused in the case at bar. I am satisfied that it would be unjust to afford advantage to the plaintiff upon this motion which he would not have had if present at the trial. The motion is denied.

HOLMES et al. v. CLEVELAND, C. & C. R. CO. et al.¹

(District Court, N. D. Ohio. July 17, 1861.)

1. CORPORATIONS—ACTS AMOUNTING TO DISSOLUTION.

The Connecticut Land Company was organized in 1795 for temporary purposes, the object being to obtain and perfect the title to the lands known as the "Western Reserve," and to survey and partition the same in severalty between the stockholders. In 1809 the objects of the company had been accomplished, and on final partition and division of the property a resolution was adopted at the stockholders' meeting that such partition should be conclusive, and "no after-allowances claimed on account of any error in cost, measure, or otherwise," and should be final, "unless further property belonging to the company be discovered." The meeting then adjourned without day, and no further meeting was ever held, either of stockholders or directors. *Held*, that such action must be regarded as practically a dissolution of the company and a final settlement of its affairs, and that a suit could not be maintained in its behalf or in behalf of its stockholders, 50 years later, to recover a small parcel of land on the lake shore in Cleveland, the town having been laid out by the company, which parcel was of little or no value at the time and for many years thereafter, until the making of improvements by the defendants and the public authorities rendered it valuable; that the company must be presumed to have known of the land, and to have intended to abandon it to the use of the public, or as worth too little to be taken into account.

2. DEDICATION OF STREET—REVERSION—ABANDONMENT BY PUBLIC.

There is no abandonment of the rights of the public in a street which has been dedicated to public use by reason of a temporary interruption of its use by an outside cause, such as the washing away of a portion of it.

3. SAME—NATURE OF USE.

Where a use made by a city of a street is by express legislative authority, it is presumed to be for the benefit of the public.

4. EVIDENCE—PRESUMPTIONS FROM LAPSE OF TIME—RECORDING OF CITY PLAT.

Where it is shown beyond question that a plat of a town or city was made and left for record in the proper office, and was always recognized and used, whenever required, as the official map of the survey, its proper recording will be presumed after the lapse of 50 years.

5. DEDICATION—STREET BORDERING ON SHORE LINE OF NAVIGABLE WATER—ACCRETIONS.

When the town of Cleveland was laid out by the proprietors of the land, the Connecticut Land Company, in 1796, Bath street was laid out as bounded on the north by the lake, and was so shown on the plat, which was always recognized by the company. The street was used by the public to a greater or less extent; and after a number of years, owing mainly to improvements made in the harbor, the shore line was extended

¹ Erroneously reported in 8 Am. Law Reg. (O. S.) 716, as a decision of the "supreme court of Ohio."