No. 11821

Supreme Court of Illinois

Dyer, et al

vs.

City of Chicago

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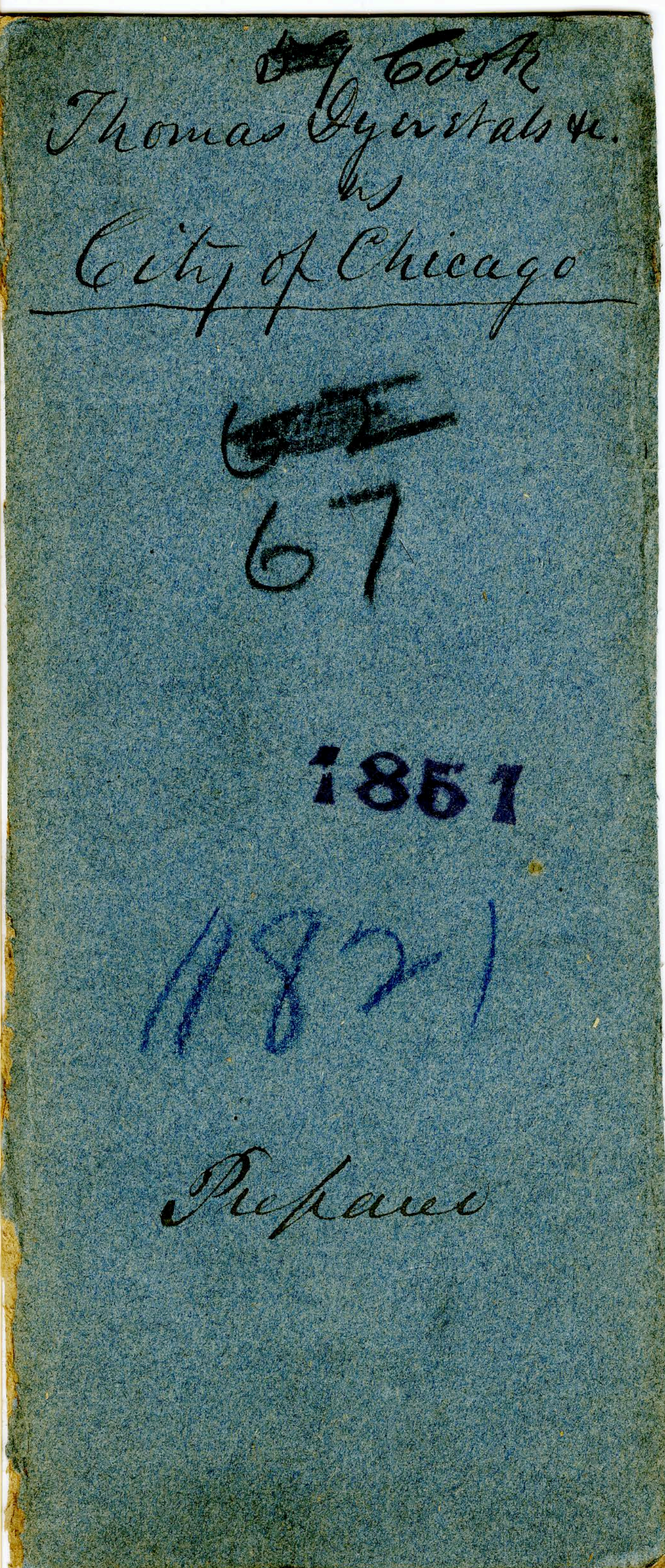

Pleas before the Honorable Hugh T Dickey Judge of the Seventh Judicial Circuit of the State of Illinois at a term of the Circuit Court began and held at the Court House in the City of Chicago in and for the County of Cook in said Circuit on the third Monday being the Nineteenth day of November in the year of Our Lord One thousand Eight hundred and forty nine and of the Independence of the United States the Seventy fourth

Present the Hon Hugh T Dickey Judge
Daniel McElroy States attorney pro tem
Isaac Cook Sheriff
Attest L L Howard Clerk

City of Chicago
v
Richard C Ross, Thomas Dyer
William Jackson Thomas Hoyne
George Manierre, Alonzo Huntington
Andrew Getzler and Samuel McKay

Covenant

Be it remembered that heretofore to wit on the 20th day of November AD 1849 Came the said plaintiff by Giles Spring Esq City attorney and filed its Certain declaration herein which is in the words and figures following to wit—

Cook County Court of the October Term AD 1848.
State of Illinois
Cook County ss The City of Chicago plaintiff in this suit by Giles Spring its attorney complains of Richard C Ross Thomas Dyer, William Jackson Thomas Hoyne George Manierre, Alonzo Huntington Andrew Getzler and Samuel McKay, defendants of a plea of breach of Covenant

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1st Count For that Whereas the said defendants heretofore to wit on the twelfth day of March in the

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year of Eighteen hundred and forty Seven at Chicago in said County made Executed and delivered to the said plaintiff their certain Bond or writing obligatory sealed with their seals and now shown to the Court in and by which said bond or writing obligatory the said defendants then and there acknowledged themselves to be held 300 and firmly bound unto the said plaintiff in the penal sum of Five thousand dollars, for the payment of which said sum of money well and truly to be made they bound themselves their heirs Executors, and administrators jointly and severally firmly by said presents. Which said Bond or writing obligatory was and is subject to the following condition in substance to wit.

Whereas the said Richard C. Ross was on the second day of March 1847 duly Elected Marshal of the City of Chicago for one year. Now if the said Richard C. Ross should 400 faithfully Executed the duties of his said Office and should account for and pay over all moneys collected or received by him as such marshal then the said obligation was to be void Else to remain in full force and effect as by the said bond or writing obligatory reference being thereunto had will (amongst other things) more fully and at large appear.

Nevertheless the said plaintiff in fact saith that after the making of the said writing obligatory to wit on the Nineteenth day of September A.D. 1848 to wit at the County aforesaid the said Richard C. Ross had received and collected 100. as Marshal of the said City of Chicago a large sum of money to wit the sum of One thousand dollars which he then and there refused

and neglected to account for and pay over to said plaintiff although requested and required so to do contrary to the form and effect of the said writing obligatory and of the said condition thereof

And so the said plaintiff in fact saith that the said defendants although often requested so to do have not kept the said covenant so by them made aforesaid but have broken the same, and to keep the same with the said plaintiff have hitherto wholly neglected and refused and still do neglect and refuse. to the damage of the said plaintiff of One thousand dollars and therefore he brings his suit &c.

2^d Count. And also for that whereas the said defendants heretofore to wit on the twelfth day of March in the year Eighteen hundred and forty seven at Chicago in said County made executed and delivered to the said plaintiff their certain other Bond or writing obligatory sealed with their seals, and which said writing obligatory having been lost the said plaintiff cannot produce the same to the said Court here, in and by which said Bond or writing obligatory the said defendants then and there acknowledged themselves to be held and firmly bound unto the said plaintiff in the penal sum of Five thousand dollars for the payment of which said sum of money well and truly to be made they bound themselves their heirs Executors and administrators jointly and severally firmly by said presents which said Bond or writing obligatory was subject to the following condition in substance to wit.

That whereas the said Richard C. Ross was on the second day of March A.D 1847. duly

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Elected Marshal of the City of Chicago for one year Now if the said Richard C. Ross should faithfully Execute the duties of his said Office, and should account for and pay overall moneys collected or received by him as such Marshal, then the said obligation was to be void Else to remain in full force and effect

Nevertheless the said plaintiff in fact saith that after the making of the said writing obligatory to wite on the Nineteenth day of September A D 1848. to wit at the County aforesaid the said Richard C. Ross had received and collected as Marshal of the said City of Chicago a large sum of money. to wite the sum of One thousand dollars which he then and there refused and neglected to account for and pay over to said plaintiff although requested and required so to do. Contrary to the form and effect of the said writing obligatory and of the said Condition thereof

And so the said plaintiff in fact saith that the said defendants although often requested so to do have not kept the said Covenant so by them made as aforsaid but have broken the same, and to keep the same with the said plaintiff have hitherto wholly neglected and refused and still do neglect and refuse to the damage of the said plaintiff of Five thousand dollars & therefore he brings his suit &c

Giles Spring Atty
for City of Chicago

(Copy of Bond or writing obligatory)

Know all men by these Presents that We Richard C Ross, Thomas Dyer, William Jackson Thomas Hoyne, George Manierre, Alonzo Huntington

Andrew Getzler and Samuel McKay of the County of Cook. and State of Illinois are held and firmly bound unto the City of Chicago in the penal Sum of Five Thousand dollars for the payment of which sum of money well and truly to be made. we bind ourselves our heirs Executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated this Eighth day of March AD 1847

The Condition of the above obligation is such that Whereas the above bounden Richard C. Ross was on the second day of March AD 1847. duly Elected Marshal of the City of Chicago for one year.

Now if the said Richard C. Ross shall faithfully Execute the duties of his said office, and shall account for, and pay over all moneys. Collected or received by him as such marshal. then the above obligation is to be void Else to remain in full force and effect.

(Signed) Richard C. Ross (LS)
" Thomas Dyer (LS)
" William Jackson (LS)
" Thomas Hoyne (LS)
" George Manierre (LS)
" Alonzo Huntington (LS)
" Andrew Getzler (LS)
" Samuel McKay (LS)

Also on the same day and year to wit the 20th day of September AD 1849 came the said defendants Alonzo Huntington. George Manierre. Thomas Hoyne and Thomas Dyer by George W. Meeker Esq their attorney and filed their certain plea herein which is in words and figures as follows to wit.

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In Cook County Court
Of Oct. Term 1848

Alonzo Huntington, George Manierre
Thomas Hoyne and Thomas Dyer
impleaded with Richard C. Ross & others
ads
City of Chicago

Covenant.

And the said defendants Thomas Hoyne. Alonzo Huntington George Manierre & Thomas Dyer. impleaded with Richard C. Ross and others as aforesaid Come and defend the wrong and injury when &c and say that the bond or writing obligatory above declared on is not their deed, and of this they put themselves upon the Country &c

And the said defendants Alonzo Huntington Thomas Hoyne. George Manierre. and Thomas Dyer impleaded as aforesaid. Come and say. that said plaintiff ought not to have or maintain her aforesaid action against them because they say that after the Making of the said Bond or writing obligatory the said Richard C. Ross did faithfully account for and pay over all moneys. Collected and received by him as Marshal of the said City of Chicago according to the form force and effect of said writing obligatory, and of the said Covenants of the said defendants by them in that behalf made to wit at &c aforesaid and of this put themselves on the Country &c.

And the said defendants Alonzo Huntington George Manierre and Thomas Dyer & Thomas Hoyne impleaded as aforesaid further say. that before the Commencement of this Suit to wit. the day & year aforesaid, at the place aforesaid the said defendants, paid to the said plaintiff One

thousand dollars in full satisfaction and discharge of the said sum of One thousand dollars in the said breach of Covenant mentioned and of all damages by the said plaintiff sustained by reason of the non performance of the said Covenant Which said sum of One thousand dollars the said plaintiff then and there Excepts and received of and from the said defendants in full satisfaction and discharge of said sum of money and of the damages of the said plaintiff by him sustained by reason of the said breach of Covenant. and this said defendants are ready to verify and pray judgment &c

George W Meeker
Atty for said defts Huntington
Manierre & Dyer.

And afterwards to wit on the 30th day of November A D 1849 Came the said defendant Andrew Getzler by P. Ballingall. and filed his certain plea herein which is in words and figures as follows to wit.

Getzler impleaded &c
ads. } Covenant
The City of Chicago

And the said Getzler says that the said writing obligatory in the said declaration mentioned and set forth is not his deed and of this he puts himself upon the Country &c.

Ballingall for Getzler

And the plaintiff doth the like

Chickering & Lull

And afterwards to wit on the 14th day December A D 1849 Came the said Samuel McKay by P Ballingall his attorney and filed his Certain plea herein which is in words and figu[illegible]

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follows to wit:

And the said Samuel McKay impleaded as aforesaid says that the said writing obligatory in the said several Counts of the said declaration mentioned and set forth is not his deed and of this he puts himself upon the Country &c &c

and plff doth the like

Ballingall for McKay

Lull for plff

Also on the same day and year last aforesaid came the said defendant William M. Jackson by George W. Meeker his attorney and filed his certain plea herein which is in words and figures as follows to wit:

In Cook Circuit Court Of November Term 1849

William M. Jackson impd with Richard C. Ross & others ads City of Chicago

And the said defendant impleaded &c as aforesaid comes and defends the wrong and injury when &c. and says that the bond or writing obligatory above declared on is not their deed. and of this he puts himself upon the Country &c.

And the plaintiff doth the like &c

Lull for plff

Geo W Meeker defts atty

Also on the 20th day of September A D 1849 came the said plaintiff by Giles Spring her attorney and file the following Replications to wit:

The City of Chicago vs. Richard C. Ross Et al.

Cook County Court In Covenant

And the said plaintiffs

by Giles Spring its attorney comes and says for a replication to the plea of Alonzo Huntington, George Manierre & Thomas Dyer & Thomas Hoyne prostatoria pleadid precludi non because they say, that the said bond or writing obligatory above mentioned is the deed of said Defendants & of this they put themselves upon the Country &c

and the said defendants (Giles Spring, pltffs atty) above impleaded do the like

Geo W Meeker their atty

And the said plaintiffs as to the second plea of said defendants above pleaded say precludi non because they say that the said Richard C Ross did not faithfully account for and pay over all monies collected & received by him as Marshal of the City of Chicago according to the force and Effect of said writing obligatory and of the said covenants of the aforsaid defendants by them in that behalf made — and of this they pray may be Enquired of by the Country &c

And the said defendants (Giles Spring pltffs atty) Alonzo Huntington, George Manierre, Thomas Hoyne and Thomas Dyer above impleaded do the like by Geo W Meeker their atty

And the said plaintiffs as to the plea of the said plea of the said defendants thirdly above pleaded says precludi non because they say that the said defendants did not pay to the said plaintiffs One thousand dollars in full satisfaction and discharge of the said sum of One thousand dollars in said breach mentioned nor did said defendants pay all damages by the said plaintiffs sus-

[1851-5]

caused by reason of the non performance of the said Covenants Nor did said plaintiffs accept the same of or from the said defendants in full satisfaction and discharge of said sum of Money, and of this they pray may be inquired of by the Country &c

And the said Alonzo Huntington, George Manierre, Thomas Hoyne and Thomas Dyer impleaded as aforesaid do the like

Giles Spring plffs atty

Geo W. Meeker

And afterwards to wit on the 14th day of December A.D. 1849 it being one of the days of the November term of said Circuit Court of Cook County the following among other proceedings were had to wit:

The City of Chicago

v

Richard L. Ross, Thomas Dyer, William Jackson, Thomas Hoyne, George Manierre, Alonzo Huntington, Andrew Folger, Samuel McKay

Covenant

And now come the parties by their attorneys and the issue being joined. It is ordered that a jury come thereupon to try the issue joined as aforesaid came the jurors of a jury of good and lawful men to wit Edward Curtis, Thomas Cooney, J. D. Aymer, J. L. Carpenter, D. A. Howard, James Patten, John Ward, C. J. Jenks, Thos Kelly, Michael Ragan, E. D. Robinson and James Lease who being elected tried and sworn well and truly to try the issue joined as aforesaid according to law and the evidence after hearing a portion of the testimony adduced. It is ordered that the further hearing of this Cause be postponed until tomorrow morning

and afterwards to wit on the 15th day of November AD 1849 it being one of the days of the November term of the Cook Circuit Court the following among other proceedings were had to wit:

The City of Chicago

v

Richard C. Ross Thomas Dyer William Jackson. Thomas Hoyne George Manierre Alonzo Huntington Andrew Getzler and Samuel McKay

Covenant

And now Come the parties by their attorneys and the jurors aforesaid also Come. And after hearing the testimony adduced as well on the part of the plaintiff as the defendant. It is Ordered that the further hearing of this Cause be suspended until Monday morning at ten O'clock

And afterwards to wit on the 17th day of December AD 1849 it being one of the days of the November term of the Cook Circuit Court the following among other proceedings were had to wit:

The City of Chicago

v

Richard C. Ross. Thomas Dyer. William Jackson. Thomas Hoyne. George Manierre. Alonzo Huntington. Andrew Getzler and Samuel McKay

Covenant.

And now again Come the parties by their attorneys and the jurors aforesaid also Come. And after hearing the arguments of Counsel and Instructions of the Court. Retire under Charge of an officer of the Court to Consider of their verdict and afterwards Come into Court and Say we of the Jury find all of the issues for the defendants

Therefore it is Considered that the said defendants do have

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and recover of the said Plaintiff their Costs and Charges by them about their defence in this behalf expended and have Execution therefor

And afterwards to wit on the 19th day of of December AD 1849. Came the said Plaintiff by Thomas, Chickering & Lull her attorneys and filed their motion for a new trial herein which is in words and figures as follows to wit
State of Illinois
Cook Circuit Court } Nov. term 1849
City of Chicago
v
Richd C. Ross Et als
And the said plff moves the Court to grant a new trial in this Cause for the following reasons
1st The verdict was against Law
2nd The verdict was against Evidence
3rd The Court Erred in giving the instructions asked by the defts
4th The Court erred in refusing the instructions asked by the Pltf
5th The verdict is against Law & Evidence
Thomas, Chickering & Lull for plff

also on the same day and year last aforesaid it being one of the days of the November term of the Cook Circuit Court the following amoung other proceedings were had to wit
The City of Chicago
v
Richard C Ross Thomas Dyer William Jackson Thomas Hoyne George Manierre Alonzo Huntington Andrew Getzler & Samuel McKay) Covenant and

Now at this day again Came the parties by their attorneys and the Court having heard the arguments of Counsel upon the motion of the said plaintiffs for a New trial filed herein and being fully advised thereon. It is Ordered that said Motion be overruled to which decision of the Court in overruling said motion the Plaintiff by his counsel excepts and thereupon Moves the Court to set aside the verdict of the Jury entered herein and for leave to submit to a Non Suit. Which said Motion is allowed by the Court. Whereupon the said plaintiff Comes and says she will no further prosecute this suit against the said defendants. It is therefore ordered that the said defendants go hence without day and recover of the said City of Chicago their Costs and charges by them herein Expended and have Execution therefor. to which decision of the Court in allowing the said last mentioned motion to set aside the verdict with leave to submit to a non suit the said defendants by their counsel Except. and thereupon the said defendants Dyer Hoyne, Manierre. Getzler. McKay, & Huntington pray an appeal Which is granted upon their filing bond within Sixty days from the date hereof in the penal sum of Three hundred dollars with Norman B Judd as security

And afterwards to wit on the 19th day of January AD 1850 Came the said defendants George Manierre, Thomas Hoyne, Thomas Dyer Andrew Getzler, Samuel McKay, and Alonzo Huntington and filed their certain appeal bond herein which is in words and figures as follows to wit—

[1821-7]

Know all men by these presents That We

Thomas Dyer. Thomas Hoyne. George Manierre. Andrew Getzler. Alonzo Huntington. Samuel McKay and Norman B. Judd of the County of Cook in the State of Illinois. are held and firmly bound unto the City of Chicago. in the penal sum of Three hundred Dollars. Lawful money of the United States for the payment of which well and truly to be made we do hereby bind ourselves our heirs Executors and administrators Jointly and severally firmly by these presents

Given under our hands and seals. and dated at Chicago. this 16th day of January. A D 1850.

Whereas lately in the Circuit Court of the County of Cook in the State of Illinois in a Certain suit therein determined on the Nineteenth day of December A D 1849 wherein the City of Chicago was plaintiff and the above bounden Thomas Dyer. Thomas Hoyne. George Manierre. Andrew Getzler. Alonzo Huntington. & Samuel McKay and William Jackson & Richard C. Ross were defendants. the said defendants. Dyer. Hoyne. Manierre. Getzler. Huntington and McKay. prayed an appeal from the decision of the said Circuit Court in said Cause to the Supreme Court of the State of Illinois which was allowed upon the said last named defendants giving Bond within Sixty days from the date of said appeal. in the penal sum of Three hundred dollars with Norman B. Judd as security

Now therefore the Condition of the above obligation is such: That if the said above bounden Thomas Dyer Thomas Hoyne. George Manierre. Andrew Getzler Alonzo Huntington and Samuel McKay shall prosecute their said appeal with Effect. and in Case of a failure thereof shall well and truly pay. and satisfy the said City of Chicago all such Judgments. interests. costs and damages. which may be rendered against them in the supreme Court in Case

said decision shall be affirmed. then this obligation to be void. otherwise to be and remain in full force and effect.

A. Getzler (Seal) Geo. Manierre (Seal)
Saml McKay. (Seal) Th. Hoyne (Seal)
A Huntington (Seal) Thos Dyer. (Seal)
N. B. Judd (Seal)

State of Illinois
Cook County Ss. I L. D. Hoard Clerk of the Cook County Circuit do hereby Certify the above and foregoing to be a true and perfect transcript of the pleadings orders of the Court and appeal bond in the above entitled cause as appears by the records of said Court on file in my office

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Chicago this 16th day of June 1850

L. D. Hoard Clerk

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Cook Circuit Court

City of Chicago

versus

Richard C Ross Etal

Transcript

Filed June 12. 1850
L. Leland Clk.

$5. pd. Clk. on this

Fees $4.00

In Supreme Court

Of June T. A.D 1850.

Thomas Dyer & others, appellants vs City of Chicago. } Appeal from Cook.

And the said appellants by Manierre their attorney come and allege that there is manifest error in the records and proceedings in this cause, in this to wit:

1st. The Court erred in sustaining the motion for a new trial to enable the plaintiff in the Court below to enter a nonsuit.

2nd. The Court erred in permitting the plaintiff below to submit to a non-suit after the finding of the jury and the judgment of the Court had been entered thereon.

3rd. Said judgment of nonsuit was contrary to law.

Wherefore the appellant prays said judgment be reversed.

Geo. Manierre
pro appellants

And now come the said appellee by their attorneys Chickering & Gale & say there is no error in the record & proceedings aforesaid or in the rendering of said Judgment & prays that the Judgment may be in all things affirmed & for their costs.

Chickering & Gale
Atty for appellee

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In Supreme Court
Of June T. 1850

Thomas Dyer & others
vs
City of Chicago.

Assignt. of Errors
& Joinder

Filed June 17. 1850.
L. Leland Clerk

Geo. Manierre
pro applts.

State of Illinois
Supreme Court

Dyer et als
vs
City of Chicago } on Appeal

Argument by Chickering Atty for Appellees

The Appellees in this case submit on their behalf — that the only point presented in this cause is the right of the Court to allow the Plaintiff to become nonsuit after one trial had & the verdict rendered therein set aside by the Court, for it has frequently been decided by this Court that the allowance of a new trial or what is the same thing the setting aside of a verdict is a matter of discretion and cannot be assigned for error — and the fact that in this case the Court below overruled the motion first made & allowed it to be withdrawn & renewed in the form in which it was allowed cannot it is conceived make any difference —

If then the court did not err in setting aside the verdict — the parties were then in Court as if no trial had been had — with all the rights and privileges belonging to them

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before a Jury had been empanelled — (among which is the right to become nonsuit) unless some of them are taken away ~~before~~ by Law —

and this brings us to the consideration of the 29th Section of the Practice Act upon which it is supposed the appellants rely — Now it is conceived that this provision only applies to proceedings "on trial" & not to those subsequent thereto & after a verdict set aside & new trial granted, or after the discharge of one Jury in consequence of a disagreement — for if the position taken by the appellants is correct — the monstrous doctrine is assumed, that after a cause has once been submitted to a Jury & they have retired — even although they may not agree — or their verdict has been set aside for irregularity or evil practice by, or with them, or for any other cause, yet the Plaintiff may not become nonsuit, even if when the cause shall be again called for trial and a material witness shall be found accidentally absent, or when, from any cause the Plaintiff deems it impossible at that time to succeed, the Plaintiff cannot become nonsuit — it is supposed that it is only necessary to indicate the great injustice that might thus be done, to cause the court to hesitate long, before establishing such an injurious doctrine —

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again it is argued that the object & intention of this act is to debar the Plaintiff from the right he had, to become nonsuit at any time before the verdict was received and recorded — and in no way interferes with the discretion allowed to courts over causes before they are finally disposed of — and courts at their discretion may allow a nonsuit — where the Plaintiff cannot claim it as a right —
Haskell vs Whitney 12 Mass Rep 47
Lock vs Wood 16 do do 317 —

again it is conceived that the submission by a Plaintiff to a nonsuit is not such a "final judgment or decree" as to authorize the defendant to assign error thereon, for it can in no way prejudice the rights or interests of such defendants; at least in that suit. for he recovers all his costs therein — and any effect thereof to such defendant can only appear upon a subsequent action should such be brought — a circumstance of which the court cannot now take notice —

again the foregoing considerations are strengthened by the peculiar language of the 29th section of the Practice act — which is confined to proceedings "on trial" that is if at any one trial the Plaintiff when such case is "on trial" shall not be permitted

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Supreme Court

Dyer et als

vs

The City of Chicago

Argument of J. W. Chickering for appellee

to suffer a non suit as of right unless he do so before the Jury retire — thus confining its provisions to the particular trial & not extending them to subsequent proceedings where there has been from any cause a mistrial — or an erroneous verdict —

The Court below (as well it might) set aside an unjust verdict, (or what it conceived was such) — and for this exercise of discretion error is not & cannot be assigned — the Court exercised this discretion notwithstanding the Plaintiff at the Courts suggestion indicated their then determination to suffer a non suit, this latter, afterwards they might or might not have followed out — the Court might have granted the first part of the motion & denied the latter — in which case the latter might have been renewed at a subsequent stage of the proceedings — and if the Plaintiff had subsequently discontinued his action, we do not see how the defendant could have obtained a judgment upon the issues, If the Plaintiff had failed to answer upon a subsequent call of the case the Court could not have rendered judgment for the defendant — the utmost it could have done would have been to dismiss for want of prosecution or give the defendant judgment for costs as on a discontinuance —

J. M. Chickering
for appellees —

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Supreme Court

Dyer et als
vs
City of Chicago

Argument of
J. M. Chickering
for appelees

In Supreme Court
3rd Grand Division

Richard C Ross & others
ads
The City of Chicago.

On appeal from
Cook County.

The appellants by ~~Manierre~~ Judd, Meeker
would respectfully state, that

By the record it appears that several issues of fact were submitted to a jury and by them found for the appellants, the defendants below: That a motion was then made for a new trial on the grounds assigned, and overruled; that a motion was then made for a new trial to enable the appellee to submit to a non-suit, which motion was granted and ~~the~~ a non suit thereupon entered.

The question arising on the record, therefore is, has the court power to set aside a verdict with a view to enable a party to take a nonsuit?

The 29 Sec. of the revised laws of 1845 entitled Practice, page 417, provides

That every person desirous of suffering a non-suit on trial, shall be barred therefrom unless he do so before the jury retire from the bar.

Now, it would seem that if the party does not avail himself of this privilege that the judge cannot grant it to him by setting the verdict aside for the sole purpose, — if he may grant the privilege then the party is not barred. Suppose, for the purpose of illustration no motion for a new trial had been made, and a verdict had been given

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for the defendant, would it have been competent for the judge to suffer the plaintiff to take a nonsuit? Clearly not; that would have been contrary to the express letter of the law. Does the circumstance that the nonsuit was sought for under color of a motion for a new trial, change the question. We think not. The ~~only~~ power of the judge to grant new trials is a discretionary one growing out of some injustice done by the jury on the merits, and is never granted except in the plainest cases. It is never allowed in cases where the party has manifestly submitted a case on weak or insufficient evidence — where he should have suffered a nonsuit. In other words it is not allowable under our statute for the mere purpose of a nonsuit. Now, that no injustice was done by the jury is manifest from the fact that the new trial was refused on the merits. The verdict was therefore right, or a new trial would have been given, and the verdict was set aside without any pretense of right only for the purposes of a nonsuit.

This judgment was evidently wrong involving as it does a palpable evasion of the statute. It is in effect a repeal of the statute, for if a nonsuit may be obtained by a party under color of a new trial in a case where he should have suffered nonsuit before the jury retired, then a party is not barred as the statute declares he shall be.

From the consideration we have been able to give the question, it appears clear to us that the fact that the motion for nonsuit was coupled with a motion for a new trial should make no difference. For though the new trial was granted it was granted expressly to enable the party to suffer a nonsuit after the jury had retired, and after the motion for a new trial had been distinctly overruled on the merits.

The authorities cited on the other side the court will find do not apply in this case for the reason that the States in which the decisions were made had no statute similar to ours and the whole question was one of discretion in the judge. Our statute leaves the court no discretion but deprives the party wholly of the right.

Judd, Manierre & Meeker
pro Appellants.

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In Supreme Court

Richard C Ross & others

vs

The City of Chicago.

Argument for appellant.

Clerk please file.

Manierre & Meeker & Judd. pro appellant

Chicago June 27. 1857.

Lorenzo Leland Esq
Clerk of Sup Ct

Dr Sir

There is a written argument on file in the case of The City of Chicago v D. C. Ross et al. on the part of the City will you do us the favor to see that it is not overlooked - as we are desirous of having the matter disposed of at the present Term -

Your obdt Servts
Chickering & Bull
Attys for
City Chicago

[11821-16]

Richard C Ross et al
vs
The City of Chicago } Appeal from Cook

Manniere & Meeker & N B Judd for applts

Chickering & Lull for appellee

Submitted on written arguments

[11821-17]

3 Division

Richard C Ross

v

The City of Chicago

Memo