

there be debts of them unpaid, it would be more equitable that the separate income of each should be applied to the payment of its separate indebtedness. But, aside from this, the provisions of the will are that the shares and interest of the testator in them should be continued, not generally, but until they could be most advantageously disposed of and settled up. And, although the term "kept up" is used by the testator, it does not seem from the will that it was the intent of the testator that they should be kept up by his general estate, or by taking the profits and dividends arising from either and appropriating them to the payment of the losses and debts of the other. And, unless it was his intent that this should be done, I do not think that the mere fact that there had been some dividends received by the estate of a deceased partner from one or more of these partnerships would entitle a creditor to a judgment against his estate upon an indebtedness contracted by another partnership long after his death. Parsons on Part. 454; *Ex parte Garland*, 10 Vesey, 109-110. Persons dealing with partnerships are presumed to look to the partnerships themselves, and not to the estates of its deceased members, for the payment of debts contracted after such decease.

I think, therefore, that upon this ground the demurrer cannot be sustained.

The demurrer is therefore overruled.

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HAMMERGEN v. SCHURMEIER and others.

(Circuit Court, D. Minnesota. ———, 1880.)

1. NONSUIT—JUDGMENT.—An involuntary nonsuit does not constitute a judgment on the merits.

Motion for judgment for defendant on the pleadings.

MILLER, C. J. This motion is founded on the idea that the former adjudication in the state court was on the merits of the case, and, therefore, a bar to the action. The case was,

and is now, an action for personal injuries. It was submitted to the state court, the jury sworn, the proof submitted to the jury, and when the plaintiff got through with his \* \* \* \* evidence the defendant moved the court to dismiss the action because the plaintiff had not made out a sufficient case, and the record states that the judge, for that reason, dismissed it. Now, that is an ordinary case of nonsuit. Nonsuit is voluntary or involuntary. Voluntary nonsuit is where a party submits to the court and says, "I have not made out a case," and asks that it be dismissed; involuntary nonsuit is just this case: when the case is before the jury, and the plaintiff having introduced all of his evidence, the defendants say, "It is not sufficient to go to the jury, and we ask for a nonsuit," and the court says, "You shall have it." All such cases, from time immemorial, have been considered as not being judgments on the merits. The court says: "As far as you have gone you have not made out a case. That does not say that you cannot go any further some other time, and taking the facts you cannot make a case, but says up to this time you have not made out a case; you have not made a case which requires that judgment on the merits should be rendered; you simply have not made a case up to the present time." General Cole says, in this particular case the judge of the state court based the decision on the ground that the plaintiff has himself shown by his testimony that he was in fault, and that he was guilty of some contributory negligence, and he cannot recover if that has been shown on the trial, and that had been so found by the jury. If he had gone to the jury, and the court had so instructed the jury, it would have been a trial on the merits. But the only way that we find this is in the opinion of the court. That opinion, in my judgment, is no part of the record. I doubt very much whether that opinion can be produced in this case—that is, to show it to the jury. I don't wish to preclude the question, but I don't see how you can produce that as a decision on the merits. Defendants say that the plaintiff had shown his own contributory negligence. It is very obvious that contributory negligence is a defence. That has been decided

over and over, and it was no part of the plaintiff's case. It was part of the defendants' case. If there was any proof of it he must have drawn it out by cross-examination in some way. I have no doubt but that the plaintiff in this case had a right to go to the jury on the question of contributory negligence, but the judge took it away from them. There was no trial on the merits, and, therefore, no bar to the action.

Motion for judgment on the pleadings is overruled.

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NUGENT v. WANN.

(Circuit Court, D. Minnesota. ———, 1880.)

I. NEGLIGENCE—EXCAVATION IN DRIVE-WAY—POLICE OFFICER.

McCrary, C. J., (*charging the jury.*) The court instructs you in this case as follows: The plaintiff sues the defendant to recover damages resulting to him from injuries received by falling into an excavation made by the defendant in a place alleged by the plaintiff to have been a public alley or drive way over certain premises described in the petition.

Defendant denies that said alley or drive way was public; alleges that it was purely private, and was never used as a public way; that he was not bound to warn plaintiff of the danger of passing over it, and that he had a right to make, in the alley, the excavation into which the plaintiff fell, and was not bound to notify plaintiff, or the public, of its presence therein, or of the danger of falling into the same.

The duty of the defendant with respect to the alley way, at the time of the accident, depends upon the character of the way as to being public or private, and upon the purposes for which it had been used. It appears in evidence that this alley way was laid out under a written contract between the adjoining proprietors, and the court, having considered that contract and construed it, instructs you that it constituted the alley way in question, as originally laid out, and, so far as opened, a private way for the use of the owners of the