ABSOLUTE DISMISSAL UNDER FEDERAL RULE 41(a): THE DISAPPEARING RIGHT OF VOLUNTARY NONSUIT*

AT common law a plaintiff had an absolute right to dismiss his suit without prejudice at any time before verdict or judgment.[1] Under strict common law pleading this rule prevented loss of legitimate claims because of technical errors.[2] Abuse of the right, however, led to highly inequitable results.[3] Plaintiffs would put defendants to the expense of a lengthy trial, only to dismiss when an adverse judgment seemed imminent, with the obvious purpose of trying their chances again with a different judge or jury. Various state statutes attempted to avoid abuses by restricting absolute dismissal to specific points in the proceeding, such as before the completion of trial,[4] before the introduction of defendants' evidence,[5] or before the actual commencement of the trial.[6]

Rule 41(a) of the Federal Rules of Civil Procedure limits absolute dismissal to an earlier point than most states. The Rule deals separately with two situations.[7] 41 (a)(1) grants the plaintiff an absolute right to dismiss without prejudice and without an order of the court at any time before ser-

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*Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953).

1. *Ex parte* Skinner & Eddy Corp., 265 U.S. 86 (1924) (judgment); Barrett v. Virginian Ry., 250 U.S. 473 (1919) (judgment); Confiscation Cases, 7 Wall. 454 (U.S. 1868) (verdict); United States v. Norfolk & Western Ry., 118 Fed. 554 (4th Cir. 1902) (judgment).

2. For a general analysis of the common law background, see Head, *The History and Development of Nonsuit*, 27 W. VA. L.Q. 20 (1920); McKay, *Voluntary Dismissals and Non-suits in Tennessee*, 15 TENN. L. REV. 787 (1939); Notes, 26 TEXAS L. REV. 91 (1947); 37 VA. L. REV. 969 (1951).

3. See note 2 *supra*.

4. ALA. CODE ANN. tit. 7, § 254 (1940); FLA. STAT. ANN. § 54.09 (1943); IND. ANN. STAT. § 2-901 (Burns, 1946); TEX. R. CIV. P. 164 (Vernon, 1942); VA. CODE ANN. § 8-220 (1950). Almost three-quarters of the states allow absolute dismissal rights up to the time of final submission or before the jury retires. See Note, 37 VA. L. REV. 969 (1951).

5. MICH. STAT. ANN. § 27.1081 (Henderson, 1938); WASH. REV. CODE § 4.56.120 (1951).

6. CAL. CODE CIV. PROC. ANN. § 581 (Deering, 1953); CONN. GEN'L STAT. § 7801 (Rev. 1949); ILL. REV. STAT. c. 110, § 176 (Smith-Hurd, 1948); ORE. REV. STAT. c. 18.230 (1953).

7. "41(a)(1) *By Plaintiff; By Stipulation.* . . . an action may be dismissed by the plaintiff without order of court (1) by filing a notice of dismissal at any time before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs, or (11) by filing stipulation of dismissal signed by all parties who have appeared in the action. . . .

"41(a)(2) *By order of Court.* Except as provided by paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . ."

vice of an answer or motion for summary judgment;[8] 41(a)(2) provides that after such service the court, in its discretion, may refuse to allow dismissal without prejudice or may permit withdrawal on "terms and conditions."[9] Such "terms and conditions" usually include reimbursement of defendant's expenditures, including attorney's fees.[10] But, despite the Rule's clear line between unconditional and conditional dismissal, defendants have argued that arbitrary dismissal is sometimes barred even before filing of an answer.[11]

In the recent Second Circuit decision of *Harvey Aluminum, Inc. v. American Cyanamid Co.*,[12] defendant succeeded in narrowing a plaintiff's right to dismissal under 41(a)(1). In a suit for specific performance of an alleged contract for sale of a factory, plaintiff filed a complaint and at the same time moved for a preliminary injunction *pendente lite* to restrain defendant from selling the assets in question to a third party. After a lengthy hearing the district court denied the injunction.[13] Thereafter, no answer having been served, plaintiff dismissed under 41(a)(1). Plaintiff seemingly feared that the New York Statute of Frauds barred the action and planned to sue again in British Guiana.[14] Defendant moved to vacate the notice of dismissal but the lower court held that until an answer or motion for summary judgment had been filed plaintiff's right was absolute.[15] The appellate court reversed this order. It noted that the hearing had consumed four days and 420 pages of record at great expense to defendant, that the merits of the controversy had been squarely raised, and that the trial judge had decided plaintiff's chances of success were "very remote if not completely nil."[16] Reasoning that literal compliance here with Rule 41(a)(1) would conflict with the Rule's purpose of limiting unconditional dismissal to an early stage in the proceedings, the court of appeals denied absolute dismissal and remanded to the dis-

8. See generally, 5 MOORE, FEDERAL PRACTICE 1001 (2d ed. 1951); 7 CYCLOPEDIA OF FEDERAL PROCEDURE 366 (2d ed. 1943).

9. Grivas v. Parmelee Transportation Co., 207 F.2d 334 (7th Cir. 1953); International Shoe Co. v. Cool, 154 F.2d 778 (8th Cir.), *cert. denied*, 329 U.S. 726 (1946); Evans v. Teche Lines, Inc., 112 F.2d 933 (5th Cir. 1940).

10. New York, C. & St. L.R.R. v. Vardaman, 181 F.2d 769 (8th Cir. 1950); Federal Savings & Loan Ins. Corp. v. Reeves, 148 F.2d 731 (8th Cir. 1945); Welter v. E. I. Du Pont De Nemours & Co., 1 F.R.D. 551 (D. Minn. 1941); McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940). 41(a)(1) makes no provision for the imposition of any "terms or conditions." White v. Thompson, 80 F. Supp. 411 (N.D. Ill. 1948).

11. See note 20 *infra*.

12. 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953).

13. Transcript of Record, p. 116, Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953).

14. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14, 17 (S.D.N.Y. (1953).

15. Transcript of Record, p. 5, Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953).

16. 203 F.2d 105, 107-108 (2d Cir. 1953).

trict court to decide if dismissal under 41(a)(2) should be allowed.[17] On remand, the trial court denied dismissal after a detailed weighing of the equities.[18]

Harvey's narrowing of plaintiff's absolute dismissal rights is in direct conflict with the clear language and history of 41(a)(1).[19] Previously, defendants argued for a broad definition of the term "answer" as used in the Rule to include various defense motions. However, on the theory that the Rule should be strictly construed because in derogation of a common law right, courts have consistently refused to stretch the concept of answer beyond its commonly accepted interpretation.[20] And the Second Circuit itself was apparently committed to a literal reading of 41(a)(1).[21]

However, *Harvey*'s reading of the Rule finds some support in two earlier cases.[22] In both instances the courts held that since pre-answer pleadings raised the merits of the controversy, the equivalent of an answer had been

17. *Ibid.*

18. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953). The court stated that denial of a motion for preliminary injunction has no effect on a trial on the merits, and that, since proceedings had progressed to an advanced stage here and defendant had already expended $84,000, a new suit in British Guiana would be burdensome.

19. See note 20 *infra*.

20. "The employment of the term 'answer' in Rule 41(a)(1) cannot be assigned to inadvertence or to unconsidered selection of the word. It signifies an answer as that expression is used in the rules, and, thus used, it does not include a motion . . . Rule 41(a)(1) somewhat narrowed the right as formerly exercised. It ought not still further be narrowed by unindicated judicial construction and application." Wilson & Co. v. Fremont Cake and Meal Co., 83 F. Supp. 900, 904 (D. Neb. 1949).

Courts allowed absolute dismissal in the following situations: Penn. R.R. v. Daoust Const. Co., 193 F.2d 659 (7th Cir. 1952) (after motion to dismiss for failure to state a claim upon which relief can be granted); Robertshaw-Fulton Controls Co. v. Noma Elec. Corp., 10 F.R.D. 32 (D. Md. 1950) (after motion to dismiss for lack of jurisdiction); Wilson & Co. v. Fremont Cake and Meal Co., 83 F. Supp. 900 (D. Neb. 1949) (after stay pending arbitration); White v. Thompson, 80 F. Supp. 411 (N.D. Ill. 1948) (after motion to transfer to another jurisdiction); Compania Plomari De Vapores v. American Hellenic Corp., 8 F.R.D. 426 (S.D.N.Y. 1948) (after "appearance"); Flaig v. Yellow Cab Co., 4 F.R.D. 174 (W.D. Mo. 1944) (after removal).

21. Kilpatrick v. Texas & P. Ry., 72 F. Supp. 632 (S.D.N.Y. 1947), *rev'd*, 166 F.2d 788 (2d Cir. 1948). Defendant moved to dismiss the complaint for lack of jurisdiction and for improper service. After a lengthy hearing, but before decision, plaintiff moved to dismiss under 41(a)(1). The lower court held that since, under Rule 12, defendant's objection could have been made either by answer or by motion before answer, the court would consider that the motions were equivalent to answers and deny dismissal. The Second Circuit reversed, stating that a motion under Rule 12(b) was a "defense" and could not conceivably be called an "answer." Since Rule 12(b) includes seven different motions, there seemed to be little else the defendant could file that would be compared to an answer.

22. Butler v. Denton, 150 F.2d 687 (10th Cir. 1945); Love v. Silas Mason, 66 F. Supp. 753 (W.D. La. 1946).

In *Butler* plaintiff filed notice of dismissal after the United States had filed a plea of

filed.[23] But *Harvey* goes even further than these cases. Here, the defendant had filed no pleadings at all and the court examined a preliminary hearing to determine if the merits were raised. Furthermore, the decision relied on not only the raising of the merits, but on other factors such as pre-trial expense to defendant and the plaintiff's chances of ultimate success in the litigation.

Harvey's pessimistic evaluation of plaintiff's chances of winning the lawsuit seems unnecessary to the decision. That determination is crucial in Rule 41(a)(2) cases.[24] Under this Rule, when plaintiff's chances of winning appear slight, courts will deny any voluntary nonsuit on the theory that defendant has acquired "substantial rights."[25] But when the issue is whether or not to apply 41(a)(2), factors which would bar dismissal completely should be irrelevant. If the Second Circuit took the prophecy of plaintiff's chances seriously, it would have denied dismissal at once instead of remanding for independent decision by the trial court.[26]

If, on the other hand, the raising of the merits is essential to *Harvey*'s result, the case can be restricted to motions for preliminary injunctions or for dismissal for failure to state a claim upon which relief can be granted.[27] Only these motions are likely to entail discussion of the basic legal issues in the case. However, defendants may well argue for a broad interpretation of "merits" to include any defense motions which would bar the action.[28]

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intervention. The court denied dismissal on the grounds that the plea of intervention had tendered justiciable issues.

The *Love* case arose before the 1946 amendment to 41(a)(1) which added the motion for summary judgment. Nevertheless the court denied dismissal after defendant filed a plea in prescription alleging the statute of limitations and a motion for summary judgment.

23. See note 22 *supra*.

24. Evans v. Teche Lines Inc., 112 F.2d 933 (5th Cir. 1940) (court had announced intention of directing verdict for defendant); Bowles v. South Pittsburg Coal Co., 7 F.R.D. 139 (E.D. Tenn. 1945) (rule denying motion for preliminary injunction would bar the action on the merits); Colonial Oil Co. v. American Oil Co., 3 F.R.D. 29 (E.D.S.C. 1943) (after plaintiff's verdict reversed on appeal); Roth v. Great Atlantic and Pacific Tea Co., 2 F.R.D. 182 (S.D. Ohio 1942) (defendant entitled to a verdict).

25. See note 24 *supra*.

26. 28 U.S.C. § 2106 provides: "The Supreme Court or any other court of appellant jurisdiction may . . . modify or . . . reverse any judgment, decree or order of a court . . . and may remand the cause and direct the entry of such appropriate judgment. . . ." See, *e.g.*, Red Warrior Coal & Mining Co. v. Boron, 194 F.2d 578 (3d Cir. 1952); International Shoe Co. v. Cool, 154 F.2d 778 (8th Cir. 1946).

27. FED. R. CIV. P. 65 (preliminary injunction); FED. R. CIV. P. 12(b) (failure to state claim).

28. Acceptance of such an argument would in effect overrule Wilson & Co. v. Fremont Cake & Meal Co., 83 F. Supp. 900 (D. Neb. 1949) (stay pending arbitration), and Kilpatrick v. Texas & P. Ry., 166 F.2d 788 (2d Cir. 1948) (lack of jurisdiction), and reopen the questions decided in the cases in note 20 *supra*. At the very least, a motion to dismiss for failure to state a claim, accompanied by affidavits, should be treated as a motion for summary judgment within 41(a)(1). 5 MOORE, FEDERAL PRACTICE 1013 (2d ed. 1951).

However, the emphasis the Second Circuit placed on the cost factor indicates that substantial outlays by defendant may alone be enough to bring a case within the scope of 41(a)(2). The courts stressed that the drafters of 41(a)(1) intended to forbid absolute dismissal when the defendant had incurred significant expenses in preparing his case.[29] It seems likely that preparation for any hearing or motion which costs the defendant more than a nominal sum would call for application for 41(a)(2). Perhaps even the expense of interrogatories or discovery procedures would be sufficient.[30] Then, unless the equities weigh so heavily against the plaintiff as to bar dismissal completely, dismissal would be granted on condition that defendant's expenses be paid.[31]

The *Harvey* decision obviously produces a major change in existing law, but it is in line with the desirable trend away from plaintiff's common law right of unrestricted dismissal.[32] However, the conflict between 41(a) and the *Harvey* decision will doubtless cause confusion. The Advisory Committee on the Federal Rules should meet the problem by redrafting 41(a). In view of the Federal Rules' liberal policy towards continuances [33] and amendments of pleading,[34] the primary reasons for any absolute right to dismiss have disappeared. Thus, the plaintiff has remedies other than voluntary nonsuit if he is surprised by new evidence or if he errs in the pleadings.[35] In line with *Harvey*'s emphasis on the cost factor, any change in the Rule should be directed towards protecting the defendant from wasted expenditure. The preparation and filing of any motion involves considerable expense.[36] Similar-

29. Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 107 (2d Cir. 1953). The Committee Note reads: "A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal without court approval." ADVISORY COMMITTEE'S NOTE TO FED. R. CIV. P. 41 (a)(1), 5 MOORE, FEDERAL PRACTICE 1005 (2d ed. 1951).

30. Pre-trial preparation often involves great expense. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953) ($84,000); Federal Savings & Loan Ins. Corp. v. First National Bank 4 F.R.D. 313 (W.D. Mo. 1945) ($6,700); Derman v. Stor-Aid, Inc., 7 F.R.Serv. 637 (S.D.N.Y. 1943) ($5,000); Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co., 25 F. Supp. 322 (D. Del. 1938) ($12,000).

31. See notes 10 and 24 *supra*.

32. For general discussion see commentators cited in note 2 *supra*.

33. FED. R. CIV. P. 15(b) and FED. R. CIV. P. 56(f) govern continuances in specific situations and FED R. CIV. P. 83 grants district courts the right to regulate their own practices in regard to other situations. See 7 CYCLOPEDIA OF FEDERAL PROCEDURE 352 (2d ed. 1943).

34. FED. R. CIV. P. 15.

35. Plaintiffs may also want to dismiss because they discover, subsequent to their complaint, that more favorable law exists elsewhere. Courts split on whether 41(a)(2) dismissal should be allowed in this situation. Dismissal was allowed in Klar v. Firestone Tire & Rubber Co., 14 F.R.D. 176 (S.D.N.Y. 1953) (statute of limitations), but denied in Love v. Silas Mason, 66 F. Supp. 753 (W.D. La. 1946) (statute of limitations).

36. See note 30 *supra*.

ly, where the plaintiff files a motion requesting affirmative relief, such as a preliminary injunction, the defendant must still prepare for a hearing, though he need file no particular pleading. In response to these considerations, the Rule could be amended to deny absolute dismissal at any time after defendant filed a motion or after plaintiff petitioned the court for affirmative relief.

However, an even further-reaching amendment seems desirable. The actual court cost of filing a motion is nominal compared to the expense of research involved in preparing the motion. But, the latter expense might well go uncompensated, since plaintiff would be free to dismiss just before defendant actually filed the motion. Furthermore, the above solution would retain the difficult problems of the borderline case, inherent in drafting any arbitrary cut-off point. A better result can be obtained by complete abolition of 41(a)(1), placing dismissal in the discretion of the court from the time the complaint is filed.[37] 41(a)(2) decisions will then become precedent, and courts could balance the equities in each case to adequately protect both parties.

37. Rule 41(a), *as amended*, would read as follows: "An action shall not be dismissed at the plaintiff's instance save by filing a stipulation of dismissal signed by all parties who have appeared in the action, or upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."