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Procedure -- Federal Rules -- Voluntary Dismissal

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feels the record justifies."[8] Justice Jackson expressed a third view to the effect that no lower federal court should entertain a habeas corpus petition from a state prisoner unless there is a jurisdictional problem whereby there is no adequate remedy available.[9]

Since the denial of certiorari means only that the Supreme Court did not deem the questions presented therein of sufficient importance for their consideration, it seems harsh that this should be the last appeal to the courts by a man condemned to die. Denial of certiorari should be given effect only when an opinion is expressed.

Larry J. Hoffman

PROCEDURE—FEDERAL RULES—VOLUNTARY DISMISSAL

Plaintiffs filed suit for specific performance of a contract of sale and moved for an injunction *pendente lite*, which was denied. Plaintiffs then filed a notice of appeal and applied for a stay pending appeal. This stay was also denied. After an order to show cause why plaintiffs should not be enjoined from instituting an action in another jurisdiction based on the same subject matter, had been directed to them, but before the return day of the order, plaintiffs filed their notice of voluntary dismissal.[1] Upon a denial of defendant's motion to vacate the notice of dismissal, defendant appealed. *Held*, although neither an answer nor a motion for summary judgment had been filed, a literal application of the rule would defeat its purpose of preventing arbitrary dismissal after an advanced stage of the suit had been reached. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), *cert. denied*, 73 Sup. Ct. 949 (1953).

Before the adoption of the Federal Rules of Civil Procedure a plaintiff had an absolute right to discontinue or dismiss his action at law at any time prior to verdict or judgment.[2] By virtue of the Conformity Act[3] federal courts were bound in matters of practice in actions at law, including questions of voluntary dismissal, by the practice of the state courts in the territories in which the respective federal courts had jurisdiction.[4] The plaintiff's right

8. *Id.* at 407.
9. *Id.* at 423.

1. FED. R. CIV. P. 41 (a) (i), as amended (1946). Florida rule provides for similar dismissal under FLORIDA COMMON LAW RULE 3 (a)(i). ". . . 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 of a motion for summary judgment, whichever first occurs* . . . ."

2. *In re* Skinner & Eddy Corp., 265 U.S. 86 (1924); Barrett v. Virginian R.R., 250 U.S. 473 (1919); McGowan v. Columbia River Packer's Ass'n, 245 U.S. 352 (1917); Confiscation Cases, 7 Wall. 454, 457 (U.S. 1869); Veazie v. Wadleigh, 11 Pet. 55 (U.S. 1837); Prudential Ins. Co. v. Stack, 60 F.2d 830 (4th Cir. 1932).

3. REV. STAT. § 914 (1874), 28 U.S.C. §724 (1948).

4. Barrett v. Virginian R.R., 250 U.S. 473 (1919); Nudd v. Burrows, 91 U.S. 426 (1875).

to a voluntary nonsuit was emphasized by cases holding that the right still existed even after the trial court had announced its intention to direct a verdict in favor of the defendant.[5] In equity practice, prior to the rules, the plaintiff had the absolute right to dismiss[6] unless some "plain legal prejudice" would "result to the defendant,"[7] and this right could be exercised at any time prior to an interlocutory or final decree.[8] This right, however, was subject to district court rules,[9] and permission of the court was necessary.[10]

With the advent of the new rules, the distinction between actions at law and suits in equity was abolished and dismissal could be effected by merely filing a notice of dismissal at any time prior to service of an answer.[11] In 1946, Rule 41(a)(1)(i)[12] was amended so as to give the same effect to service of a motion for summary judgment as to service of an answer.[13] In interpreting the rule the courts have applied it literally, and in so doing have held that neither a notice of appearance,[14] nor a motion to dismiss,[15] nor a motion for stay[16] are answers or motions for summary judgment within the meaning of the rule. In the case of *Fleetwood v. Milwaukee Mechanics' Ins. Co.*,[17] in which various motions had been filed, the court, in commenting on plaintiffs' right to dismiss before service of an answer, even though the motions were pending, said, "It is obvious that if the Supreme Court had intended to limit the right of a party to enter a voluntary dismissal, the conditions would have been enumerated in this amended rule."[18]

In the present case the court, in interpreting the rule, implies that any activity on plaintiffs' part which advances the stage of a suit may preclude him from exercising his right of voluntary dismissal by notice, although there has been no service of an answer or a motion for summary judgment. The

5. Knight v. Illinois Central R.R., 180 Fed. 368 (6th Cir. 1910); Meyer v. National Biscuit Co., 168 Fed. 906 (7th Cir. 1909); C. M. & St. P. R.R. v. Metalstaff, 101 Fed. 769 (8th Cir. 1900); Wolcott v. Studebaker, 34 Fed. 8 (N.D. Ill. 1887).

6. *In re* Skinner & Eddy Corp., 265 U.S. 86, 93 (1924).

7. Jones v. Sec. & Exchange Comm'n, 298 U.S. 1, 19 (1936).

8. *In re* Skinner & Eddy Corp. 265 U.S. 86 (1924); McGowan v. Columbia River Packer's Ass'n, 245 U.S. 352 (1917).

9. Bronx Brass Foundry, Inc. v. Irving Trust Co., 297 U.S. 230 (1936); Young v. So. Pac. Co. 25 F.2d 630 (2d Cir. 1928).

10. Dooley v. Fritz, 38 F.2d 123 (D. Mass. 1930).

11. ". . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."

12. See note 1 *supra*.

13. See criticism of original Rule 41(a)(1)(i), 3 MOORE'S FED. PRACTICE 3037-3038 (1938).

14. Compania Plomari de Vapores, 8 F.R.D. 426 (D.C.N.Y. 1948).

15. Kilpatrick v. Texas & P. R.R., 166 F.2d 788 (2nd Cir. 1948), *cert. denied*, 335 U.S. 814 (1948).

16. Wilson & Co. v. Fremont Cake & Meal Co., 83 F. Supp. 900 (D. Neb. 1949).

17. 7 F.R.D. 680 (D.C. Mo. 1947).

18. *Ibid.* at 681.

plaintiffs were given leave to dismiss[19] under Rule 41(a)(2),[20] which provides for dismissal by order of court upon motion, and specifically provides that such dismissal will be without prejudice in the absence of an order to the contrary.

Requiring plaintiffs to proceed under Rule 41(a)(2) will necessitate further time and expense on the part of both plaintiff and defendant, apparently conflicting with the spirit of Rule 1 of the Federal Rules of Civil Procedure, calling for construction of the rules to secure a just, *speedy and inexpensive* determination of every action. The Court's decision in this case creates the necessity for a further interpretation of Rule 41(a)(1) in each new case that arises as to what is an "advanced stage of a suit."

Charles R. Carman.

REAL PROPERTY — EMINENT DOMAIN— APPORTIONMENT OF AWARD BETWEEN LESSOR AND LESSEE

The plaintiff's leased property was taken by the City of Miami Beach under eminent domain. An offer by the City of $50,000 was accepted by landlord and tenant, but no express agreement was made as to the apportionment. *Held*, payment of the award is to be made to the lessor as substitution for the land. The lessee's interest is satisfied by a reduction of the rent equal to the return an investment would bring of the award in the highest grade securities. *Raleigh Operating Co. v. Naglo Corp.*, 3 Fla. Supp. 111 (1953).*

Although the Florida Constitution guarantees full compensation for the taking of land by condemnation proceeding,[1] there have been no reported cases in Florida determining the apportionment of the award between lessor and lessee. It cannot be doubted that the lessee has a definite property interest in the condemned land,[2] but there is no uniform rule applied by all jurisdictions to determine the exact amount to be granted in the absence of an apportionment agreement in the lease. Full

19. Harvey Aluminum, Inc. v. American Cynanimid Co., 203 F.2d 105, 108 (2d Cir. 1953).

20. "By Order of Court. Except as provided in 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. If a counter claim 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."

*Editor's note: This case is on appeal.

1. FLA. CONST. Art. XVI § 29; see Adell v. Boynton, 95 Fla. 984, 117 So. 507 (1928); WEED, FLORIDA LAW OF REAL ESTATE 94-95 (1st ed. 1926).

2. Kohl v. United States, 91 U.S. 367 (1875); United States v. 26,699 Acres of Land, 174 F.2d 367 (5th Cir. 1949); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1934).