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Plaintiff's Right to Dismiss under the Code and the Proposed Rules

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the property to the lessor on the theory of abandonment.[17] Vesting title in the lessor by abandonment is much more difficult than vesting title by forfeiture, because to constitute an abandonment in order to give another party the right to assume title and control of the property, certain elements must exist. There must be an actual act of abandonment, coupled with the intention to abandon.[18] Thus, in those jurisdictions following the abandonment theory, failure to remove the machinery within a reasonable length of time, while it may be evidence of abandonment, is not sufficient to divest the lessee of his rights to the property without proof of the intention to abandon.

Should the lessor and lessee litigate the question pertaining to the termination date of the lease, it must be understood that the lessee will not lose title to his property upon the ground that it remained on the lessor's land an unreasonable lengfh of time.[19] In such a situation, the period constituting reasonableness of time would begin from the date on which the adverse judgment was rendered and would not relate back to the court determined date of expiration.[20] If the lessor prevents removal before a reasonable length of time has passed, the lessee may seek injunctive relief in the courts.[21]

In closing, it might be noted that the trend of some courts is to hold that the parties may stipulate as to when the machinery and equipment may be removed, and such stipulations will be binding.[22] In effect, these courts are giving validity to the "any time" provisions, and should the trend continue, future suits over the right to remove equipment may be governed by express contract provision, rather than by that resilient commodity, time.

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17. Standard Oil v. Barlow, 141 La. 52, 79 So. 627 (1917); Michauls v. Pontius, 83 Ind. App. 66, 137 N.E. 579 (1922); Rennie v. Red Star Oil Co., 78 Okla. 208, 190 Pac. 391 (1927); Bain v. Graber, 271 Ky. 393, 112 S.W.2d 66 (1937).
18. Rennie v. Red Star Oil Co., 78 Okla. 208, 190 Pac. 391 (1927); Bickham v. Bussa, 152 So. 393 (1934).
19. Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049 (1907); Bird v. American Surety Co., 175 Cal. 625, 166 Pac. 1009 (1917); Yoakham v. Hogan, 198 Cal. 16, 243 Pac. 21 (1921).
20. Terre Haute v. Hudnut, 112 Ind. 542, 13 N.E. 686 (1887); N.Y. Cent. R. R. Co. v. Reidenbach, 71 Ind. App. 370, 125 N.E. 55 (1919); Maddox v. Yocum, 114 Ind. 380, 52 N.E.2d 636 (1844); Oceana Oil v. Portland Silo Co., 100 N.E.2d 895 (1951).
21. Myers v. Bradford, 54 Cal. App. 157, 201 Pac. 471 (1921).
22. Hughes v. Kershow, 42 Colo. 40, 93 Pac. 1116 (1908); VanHoozer v. Gattis, 139 Ark. 390, 219 S.W. 44 (1918); Newland v. Eldis, 131 Kan. 419, 292 Pac. 754 (1930); Smith v. U.S., 113 F.2d 191 (1940).

PLAINTIFF'S RIGHT TO DISMISS UNDER THE CODE AND THE PROPOSED RULES

Like a woman privileged to change her mind, a plaintiff has in the past been given a right to bring to a halt an action without prejudice to a later suit during trial.[1] However, the Federal Rules of Procedure and

1. Wyo. Comp. Stat. 1945 sec. 3-3505; Fed. R. Civ. P. 41(a); Proposed Rules 41(a), 41(b).

the Proposed Rules of Civil Procedure for Wyoming have recognized the "right" as only a privilege, and except for the relatively short time between filing the petition and the answer date, the plaintiff can dismiss only by permission of the trial court. The present Wyoming statute gives the plaintiff an unqualified right to dismiss at any time before final submission of the cause to the court or jury.[2] Our statute is typical of many and the cases tell us that "final submission" means the time at which the issues are given to the jury, after argument and charge[3] or at any time before the court directs a verdict for the defendant.[4] The result is that the plaintiff may make a pretty good guess at his chances of surviving a motion for a directed verdict or a jury decision, and postpone a determination on the merits at the last possible moment. A few courts go even further and say that after there has been a final submission of the issues to the court or jury, the plaintiff's right to dismiss is not cut off entirely but that it remains in the discretion of the trial court to grant a motion to dismiss or to withdraw the submission so as to reinstate the plaintiff's original right to dismiss.[5]

The code gives an absolute right to dismiss no matter what the frustration to the defendant. The lawmakers have felt that it is in the best interests of justice to allow a plaintiff to dismiss an action once started, and there is undoubtedly much value in a policy which says, "Once you have begun an action, you are not absolutely bound to prosecute it in this particular suit or forever forfeit your claim." Giving the plaintiff such an unqualified right, however, produced the result that a plaintiff could try again and again until he finally found the trial atmosphere and jury to his liking best calculated to bring success. On the other hand, defendant again had to plead, gather witnesses and present his case at a new trial, or else bring an action himself for a declaratory judgment, thereby assuming the burden of proof.

If a counterclaim or set-off is pleaded before the motion to dismiss, plaintiff cannot prevent the defendant from prosecuting his claim to final judgment.[6] In Wyoming the right to dismissal before a counterclaim is pleaded or before final submision is an absolute right over which the trial court has no discretion.[7] In determining whether or not a motion for dismissal is made before the counterclaim the mere filing of the motion

2. Wyo. Comp. Stat. 1945 sec. 3-3505 (1).
3. Harris v. Beam, 46 Iowa 118 (1877).
4. State of Ohio Ex Rel. Strong v. Cook, 124 Ohio St. 478, 179 N.E. 352 (1931); See annotation 79 A.L.R. 690.
5. Bee Bldg. Co. v. Dalton, 68 Neb. 38, 93 N.W. 930, 4 Ann. Cas. 508 (1903); St. Louis S.W. Ry. Co. v. White Sewing Mach. Co., 69 Ark. 431, 64 S.W. 96 (1901); Ashmead v. Ashmead, 23 Kan. 262 (1880); 17 Am. Jur. 71.
6. Wyo. Comp. Stat. 1945, sec. 3-3506. Whether the defendant has pleaded a counterclaim or an affirmative defense is a sticky question in itself. See Clark, "Trial of Actions Under the Code," 11 Corn. L. Q. 482 (1926). Most decisions are concerned with the right to a jury trial on issues raised by defendant's plea.
7. State ex rel. Tibbals v. District Court, 42 Wyo. 214, 292 Pac. 897, 71 A.L.R. 993 (1903).

establishes priority without an order of the court[8] even if the plaintiff has notice that the defendant intends to make such a claim.[9]

Federal Rules 41 (a) and (d) take the "right" out of the picture and leave the plaintiff only a privilege to dismiss. Plaintiff has an absolute right of dismissal until an answer or motion for summary judgment[10] is filed and from that time on he may dismiss only with the permission of the trial court. Permission is discretionary and subject to conditions imposed for the protection of the defendant.[11] The most usual condition is that the plaintiff pay defendant his costs and expenses in the action, and in the eighth circuit it is error for the trial court not to make such an award to the defendant as a condition to dismissal without prejudice.[12] "Cost and expenses" of an action include court costs, reasonable attorneys' fees, and reasonable expenses in preparing for trial.[13] If these conditions are not complied with, the dismissal then becomes prejudicial and a bar to a later action without further formalities.[14] In a second suit, if plaintiff has not paid the costs and expenses of the first, the court may require them paid before a second action may be maintained.[15] This applies to any court and would be broad enough to include dismissal in a state court.[16]

Unless the plaintiff can get the defendant to stipulate otherwise, there can be no second dismissal under any circumstances without prejudice. ". . . a notice of dismissal operates as an adjudication on 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."[17]

Dismissal after answer or motion for summary judgment lies in the discretion of the court. This is so because of a desire to relieve the defendant of wasted effort in preparation; the usefulness of which would depend upon the whim or vacillation of the plaintiff.[18] This practice originated in the pre-Rules equity practice of the federal courts. That practice was essentially the same as 41 (a) and was interpreted to mean that a plaintiff could dismiss so long as the defendant would lose no sub-

8. Ibid.
9. Ibid.
10. This absolute right is limited also by rule 66 when a receiver has been appointed and by 23 (c) preventing dismissal of a class action. The right is also subject to "existing laws of the United States" which refers to dismissal in immigration cases and prosecutions against persons making false claims against the United States, 28 U.S.C.A. 380.
11. Evans v. Teche Lines, 112 F.2d 933 (5th Cir. 1940); Fed. R. Civ. P. 41 (a) (2).
12. Home Owners Loan Corp. v. Huffman, 134 F.2d 314 (8th Cir. 1943).
13. Federal Savings and Loan Ins. Corp. v. Reeves, 148 F.2d 731 (8th Cir. 1945); M. Welters v. E. I. DuPont DeNemours Corp., 1 F.R.D. 551 (D. Minn. 1941).
14. DeFillipis v. Chrysler Sales Corp., 116 F.2d 375 (2nd Cir. 1940).
15. Fed. R. Civ. P. 41 (d).
16. But when the plaintiff cannot afford to pay those costs, the trial court may waive them. Huskey v. U.S., 28 F. Supp. 283 (E.D. Tenn. 1939).
17. Fed. R. Civ. P. 41 (a) (1).
18. Rules Advisory Committee, Note 28 U.S.C.A. 380.

stantial rights; at that point the court's discretion ended.[19] The mere prospect of further litigation or litigation in a state court was not substantial,[20] though there is some authority to the effect that loss of the federal forum in exchange for a trial in a state court could very well be substantial.[21]

Because of this similarity the limits placed on the trial court's discretion should be applicable under 41 (a). In drawing the boundaries and defining the vague term "discretion," the courts have said a dismissal must be with prejudice to a later action when the motion is made at the end of the plaintiff's case,[22] when much expense has been caused by taking evidence and the defendant has obtained a favorable report from a master in chancery,[23] or when a matter has merely been referred to a master.[24] In two cases it was decided that if the verdict is for the defendant, or if the plaintiff's evidence is not sufficinet to withstand a motion for directed verdict, he may not dismiss without showing why he couldn't produce missing elements of his case at the trial land that he could at a later time.[25]

As is to be expected there are many cases which agree with the trial court's denial of dismissal; for example, when the purpose is to prolong litigation depriving the defendant of substantial rights,[26] when a case has been long pending and required much preparation,[27] or when the defendant pleaded estoppel which would amount to a defeasance of a lien claimed by a plaintiff and the defense would be endangered by a transfer after a dismissal.[28]

In granting dismissal the court has no authority to assess anything in the way of special damages as was pointed out in *United Motors Service v. Tropic-Aire*.[29] To recover damages other than losses incurred by reason of preparing for the trial, such as injury to business reputation or loss of profits, a defendant must rely upon an action for malicious prosecution or the bond given by a plaintiff seeking an injunction.[30]

At the other end of the field, few cases were found holding the trial court must grant a dismissal without prejudice. Conceivably a court could abuse its discretion in failing to dismiss, but since "discretion" is a word

19. Pullman's Palace-Car Co. v. Central Transportation Co., 171 U.S. 138, 18 S.Ct. 808, 43 L.Ed. 108 (1898).
20. Ibid.
21. Young v. Southern Pacific Co., 25 F.2d 630 (2nd Cir. 1928). See, however, M. Welter v. E. I. DuPont DeNemours Corp., 1 F.R.D. 551 (D. Minn. 1941).
22. International Shoe Co. v. Cool, 154 F.2d 778 (8th Cir. 1946).
23. Smith v. Carlisle, 228 F. 666 (5th Cir. 1916).
24. American Bell Telephone Co. v. Western Union Tel. Co., 69 F. 666 (1st Cir. 1895); Cert. Denied 166 U.S. 721.
25. Boaz v. Mutual Life Ins. Corp., 53 F.Supp. 97 (E.D. Mo. 1943); Western Union Telegraph Co. v. Dismang, 106 F.2d 362 (10th Cir. 1939).
26. Henjes v. Aetna Ins. Co., 39 F.Supp. 418 (E.D. N.Y. 1941).
27. Rollison v Washington Nat. Ins. Co., 176 F.2d 364 (4th Cir. 1949); Walker v. Spencer, 123 F.2d 347 (10th Cir. 1941).
28. Stephens v. The Railroads, 4 F.97 (C.C.W.D. Tenn. 1880), Aff'd. 114 U.S. 663 (1885).
29. 57 F.2d 479 (8th Cir. 1932).
30. M. Welters v. E. I. Dupont DeNemours Corp., 1 F.R.D. 551 (D. Minn. 1941).

which has little meaning in the absence of a fact situation, there is little profit in trying to form a rule in the abstract. The district court in Minnesota has said that a defendant cannot keep a plaintiff from dismissing just because defendant has discovery proceedings pending and would lose his right to discovery if the action were brought in the state court.[31]

The Federal Rules set the pattern from which the Proposed Wyoming Rules were cut, and from that fact comes the chief value in a discussion of this sort. The Proposed Rules differ only in that the provision of 41 (a) (2) permitting the court no discretion in dismissing when a counterclaim is pleaded which cannot remain pending for independent adjudication is omitted. This proviso was not necessary for it was designed to solve a problem which could only come up in a federal court. Without it a plaintiff with a claim within the jurisdiction of the federal courts could dismiss and deprive the court of jurisdiction over a counterclaim that did not have within itself grounds for federal jurisdiction.

To review the difference between the Code and the Proposed Rules is to point out the advantages of the later. At present plaintiff can drop out at any time whether or not that inconveniences the defendant and the court. If controlled by rule 41 (a), the absolute right to dismiss exists only until an answer has been filed; thereafter there is no inflexible rule but one which is applied by the court to fit the circumstances in arriving at a fair answer to the problem of conflicting rights. Under our present code the plaintiff may dismiss any number of times while the rules limit him to one unless the defendant agrees to second without prejudice. Plaintiff may now dismiss regardless of the cost he imposes on the defendant at each attempt without having to pay these expenses, but a court guided by the Rules would be authorized, and in most cases compelled, to make him pay costs to the defendant.

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THE CONSTITUTIONALITY OF WYOMING'S OIL AND GAS COMPULSORY POOLING PROVISION

Lack of understanding of the nature of oil and gas in the early history of its production has led to some seemingly difficult propositions in reconciling common law property concepts with conservation and regulation of the production of oil and gas. The old rule of capture laid down in 1907[1] that the owner of a tract could drill as many wells wherever he wished without regard to others and the consequent competitive drilling resulted in such waste and expense that need for some regulation became imperative. Stemming from this need a variety of conservation statutes

31. Fed. R. Civ. P. 41 (a) (1).

1. Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 A. 801 (1907).