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The Two Dismissal Rule

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it may well overrule the motion. However, the plaintiff is not limited to rule 35 in determining the defendant's physical condition; hospital and laboratory reports and records are available to him under rule 34 dealing with discovery of records and documents.

If the plaintiff constantly refuses to submit to a physical examination, contending that such an examination would be too painful or dangerous and the court feels that the refusal is but a calculated suppression of evidence, the court may order an examination of a party with reasonable restrictions, upon penalty of dismissal or other sanctions outlined in Wyoming Rule 37 (b) (iii). In this respect Wyoming Rule 37 is broader in scope than the federal rule to conform to the wider application of rule 35 (a). The sanctions heretofore applicable for failure to submit to a mental or physical examination apply also to a failure to submit to a blood test. These same penalties apply to a party who fails to produce his agent or a person under his custody or legal control unless he shows that he is in good faith unable to produce such a person.[22]

It is the duty of the courts, and it is the purpose of the Wyoming Rules of Civil Procedure to bestow upon litigants full and exact justice. This cannot be done until the court obtains the truth touching all matters in issue, so far as the same can be obtained. Rule 35 is in complete harmony with the spirit and purpose of the new procedure to bring to light all of the available evidence without regard to the traditional superstition that any party has a proprietary right to conceal his physical condition from the court. Within the limits outlined here it should serve its purpose well.

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THE TWO DISMISSAL RULE

Rule 41 (a) of the Wyoming Rules of Civil Procedure was adopted from and is substantially the same as Federal Rule 41 (a). For this reason, the interpretation by the federal courts of the federal rule is used as a basis for this note interpreting the new Wyoming rule.

As the federal rule limits dismissals in some instances, so also does Wyoming now limit them. One limitation is stated as an exception and comprises the last sentence of Rule 40 (a) (1).[1] This exception has been responsible for frequent reference to 41 (a) as the "two dismissal rule." After stating that a dismissal is without prejudice unless the notice or stipulation shows otherwise, the exception sets forth that once a plain-

22 Wyo. Rules of Civil Procedure, Rule 37.

1. Wyo. Rules of Civil Procedure, Rule 41 (a) (1): 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 on the merits when filed by a plaintiff who has once dismissed in any court an action in which service was obtained based on or including the same claim.

tiff has dismissed an action and later started another based on the same claim, a dismissal by notice of the second action operates as an adjudication on the merits.

Two methods are provided by which an action may be dismissed without an order by the court. The first of these requires the plaintiff to file a notice of dismissal before the defendant has served his answer or has moved for summary judgment.[2] Filing of the notice with the clerk of the court is sufficient to effectuate the dismissal and the defendant need not be served with the notice.[3] The second method is utilized by having all parties who have appeared in the action stipulate that it be dismissed.[4] This stipulation is a matter of right and may occur before or after the defendant has filed his answer or his motion for summary judgment. Dismissal by either of these methods is without prejudice to future action based on or including the same claim, unless the notice of dismissal or stipulation states otherwise, or unless there has been a prior dismissal.[5]

The exception stated in Rule 41 (a) (1) is worthy of particular consideration as its wording may raise some questions. Since it states that ". . . a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed. . . .," it will be seen that the parties may stipulate for dismissal without prejudice as many times as they wish. The case of *Cornell v. Chase Brass & Copper Co.*[6] furnishes an excellent illustration of this. That case involved an alleged patent infringement and had been before the court three times previously. Each time the parties had stipulated to dismiss without prejudice. When the action was brought on the same claim for the fourth time, the defendant endeavored to assert Rule 41 (a) as a bar, alleging the three prior dismissals. As it happened in this particular case, the plaintiff in the fourth action was not the same as in the first three. However, the court said that even assuming he was the real party in interest in the first three suits, and that the previous dismissals would operate against him, this fact would not bar the fourth action because the parties had stipulated that the previous dismissals were wihout prejudice and the rule does not forbid such a stipulation.[7]

2. Rule 41 (a) (1): an action may be dismissed 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.
3. Silver v. Idemnity Ins., 80 F.Supp. 541 (D.Conn. 1948).
4. Rule 41 (a) (1): an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. . . . Contra, Ingold v. Ingold, 30 F.Supp. 347 (S.D.N.Y. 1939), in which a stipulation to dismiss was not allowed because it woud have been against the interest of the attorneys.
5. Rule 41 (a): Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. . . .
6. 48 F.Supp. 979 (S.D.N.Y. 1943).
7. Id. at 981: Assuming that the present plaintiff was the real party in interest in the American Radiator Company suits and that the previous suits were operative against him, the defendant has still failed to bring this suit within the scope of the language of Rule 41 (a). That rule distinguishes between dismissals by notice and dismissals by stipulation. A notice or a stipulation of dismissal which is silent

The phrasing of the exception clause of Rule 41 (a) (1) does not indicate clearly whether both dismissals must be by notice in order that the second operate as an adjudication. If the first is by notice, the second definitely will bar another action on the same claim. There seems to be a question, however, whether a dismissal by notice following a dismissal by stipulation would be prejudicial. The vagueness of the rule may be resolved by looking to the philosophy upon which it is based. The purpose of the rule is to prevent the delay of litigation and to avoid harassment and expense to defendants by limiting dismissals without prejudice.[8] This would seem to indicate that the drafters of the rule felt two dismissals by either procedure were all that should be allowed, and that the second should operate as an adjudication on the merits unless stipulated to the contrary. This would account for the language that a dismissal by notice is prejudicial when filed by a plaintiff who has once dismissed. If this is the proper interpretation, a dismissal by notice of an action once dismissed should be with prejudice even though the first dismissal was by stipulation. On the other hand, the wording of the Rule, taken of itself, may be interpreted to mean that both dismissals must be by notice in order that the second operate as an adjudication on the merits.[9] This, of course, is the more liberal construction of the rule, as it allows for more dismissals. It is supported in a roundabout fashion by the holding set forth in the *Cornell* case to the effect that the parties may stipulate for dismissal without prejudice as many times as they wish.[10] This interpretation, however, is less effective in limiting the number of dismissals. Since the intent of the committee that drafted this rule apparently was to prevent an excessive number of dismissals, this purpose seems to be frustrated by the latter interpretation. The purpose of the state civil procedure rules is to "secure the just, speedy and inexpensive determination of every action."[11] Thus it appears this purpose is best accomplished by interpreting Rule 41 (a) to mean that a notice of dismissal operates as an adjudication on the merits whenever the action has been dismissed previously, whether by notice or by stipulation.

Another problem conceivably may arise from the indefinite wording of Rule 41 (a). The rule sufficiently indicates that the plaintiff must be the same in both cases in order that the rule will apply to the second

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on the question of prejudice is made to operate without prejudice. After one dismissal by plaintiff the rule provides that only a dismissal by notice shall operate as an adjudication. There is nothing in the rule to indicate the parties may not, in such event, expressly stipulate that the dismissal shall be without prejudice. . . .

8. Cleveland Trust Co. v. Osher & Reiss, Inc., 31 F.Supp. 985, 1009 (E.D.N.Y. 1939): The purpose of Rule 41 was to prevent the delays in litigations by numerous dismissals without prejudice. . . . The case was reversed, on ground unimportant to this observation by the district court, in 109 F.2d 917 (2d Cir. 1940); McCann v. Bentley Stores Corp., 34 F.Supp. 234 (W.D.Mo. 1940).

9. 5 Moore, Federal Practice 1016 (2d ed. 1951). Professor Moore feels that Rule 41 should not apply unless both dismissals have been by notice.

10. Cornell v. Chase Brass & Copper Co., 48 F.Supp. 979 (S.D.N.Y. 1943).

11. Wyo. Rules of Civil Procedure, Rule 1.

dismissal. And the rule has been so construed.[12] However, any mention of the necessity of the defendant being the same in both actions is omitted from this part of the rule. In the case of *Robertshaw-Fulton Controls Co. v. Noma Electric Corp.*,[13] the plaintiff had filed complaints three times previously, twice in a New York federal district court against the parent corporation, and once in the Maryland district against a subsidiary. It dismissed all these by notice, the notice each time reciting that the dismissal was without prejudice and without costs. The fourth time the action was brought, which was the second begun in Maryland, the plaintiff filed notice of dismissal again. The defendant moved to strike out the plaintiff's notice, or in the alternative, for an order dismissing the action with prejudice under Rule 41 (a) (1). The plaintiff urged that this rule did not apply since the defendants in all the actions had not been the same; but the court said that identical defendants were not required under the rule, and it was only necessary that the action had been previously dismissed in order that Rule 41 (a) (1) would make the second dismissal by notice operate as an adjudication on the merits. The court discussed the significance of the different wording in 41 (a) and 41 (d). The latter subdivision of the rule provides for the awarding of costs of a previously dismissed action "based on or including the same claim against the same defendant." Since the language "against the same defendant" does not appear in 41 (a), the court in the *Robertshaw-Fulton* case held that this omission showed that the rule was not meant to be limited to actions against the same defendant. The theory back of the rules as whole, that is, fast and inexpensive achievement of justice, would seem to support this holding.

On the other hand, one of the purposes of 41 (a) is to prevent harassment and expense to defendants.[14] Even if an action had been brought on the same claim previously, but against a different defendant, it would be no harassment nor expense beyond that contemplated by the rule, to allow the plaintiff to dismiss once without prejudice as against the new defendant. However, reason favors the opposing view as stated in the *Robertshow-Fulton* case. An action dismissed a second time by notice should be barred in the future regardless of whether the defendants were the same in both dismissed actions. If this construction is placed upon Rule 41 (a), actions once brought should proceed quickly to trial, and crowding of court dockets may be at least partially avoided.

The Wyoming rule contains a phrase that is not included in the federal version.[15] It is the qualification that service must have been ob-

12. Huskey v. United States, 29 F.Supp. 283 (E.D.Tenn. 1939).
13. 10 F.R.D. 32 (D.Md. 1950).
14 Supra note 8.
15. Wyoming rule 41 (a) (1) reads: a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action *in which service was obtained,* based on or including the same claim. Federal Rule 41 (a) (1) states: 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.

tained in the first action before dismissal by notice of the second operates as an adjudication on the merits. This is within the general philosophy of Rule 41 (a). If service had never been obtained, the defendant would have suffered no harassment nor have been put to any expense. The insertion of this qualification in the Wyoming adaptation of the federal rule indicates that the framers were desirous of making improvements where they were necessary, expanding or limiting the effect of the rule as was thought best. The addition of this phrase strengthens the view that Rule 41 (a) (1) should make any second dismissal by notice prejudicial no matter by what method the first was accomplished. If the committee had thought that the rule was not definite enough in this respect, it seems reasonable to assume that they would have rephrased this part while they were in the process of redrafting and improving upon the rule. The addition of the requirement that service must have been obtained in the first action is the only addition made, however, and so indicates that it is the only requirement not stated in the federal rule that need be satisfied in order that a second dismissal by notice operate as an adjudication on the merits.[16]

The Rules of Civil Procedure severely limit what was formerly a plaintiff's unqualified right to dismiss an action without prejudice at any time before the cause was finally submitted to the court or jury.[17] The plaintiff's right to dismiss without court order or stipulation is now restricted by Rule 41 (a) (1) to the short time before the defendant answers or moves for summary judgment. Unless the defendant will stipulate to voluntary dismissal, the plaintiff can dismiss without prejudice only once. Dismissal of an action for the second time should operate as an adjudication on the merits regardless of whether the first dismissal was by notice or by stipulation, and without regard to whether the defendants were the same in both actions. Rule 41 will prevent plaintiffs from harassing defendants and causing them undue expense in the preparation and trial of actions that, under the code, could have been dismissed before they were decided.

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SPECIAL VERDICTS AND INTERROGATORIES TO JURY

Practice and procedure under Rule 49, Federal Rules of Civil Procedure, from which the corresponding Wyoming rule was taken, has been well established since its adoption in 1938. This note is therefore restricted to a brief historical discussion of Federal Rule 49 and practice under the

16. If the committee had wanted to make the rule applicable to actions against the same defendant only, it could have phrased it thus: A notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action *against the same defendant* in which service was obtained, based on including the same claim.

17. Wyo. Comp. Stat. § 3-3505 (1945): An action may be dismissed without prejudice to future action: (1) By the plaintiff, before the final submission of the cause. . . . For a comparison of the new procedural rule and the superseded statute, see note, 6 Wyo. L.J. 296 (1952).