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# Federal Civil Procedure - Rule 41(b) - Dismissal of a Cause of Action with Prejudice for Failure to Appear at Pre-Trial Conference

Ronald G. Schmidt

executive head has ever been cited for contempt in such circumstances.[16]

Although the 1958 Congressional amendment to the "housekeeping" statute[17] apparently intended to terminate the agencies' power to withhold information from the public under the authority of the statute,[18] this aim has not yet reached fulfillment. At least one federal case[19] since the amendment allowed a subordinate to withhold documents under an agency regulation. Thus the rule of *Boske v. Comingore* appears to continue untrammeled.

MIKLOS L. LONKAI

FEDERAL CIVIL PROCEDURE—RULE 41(b)—DISMISSAL OF A CAUSE OF ACTION WITH PREJUDICE FOR FAILURE TO APPEAR AT PRE-TRIAL CONFERENCE—The plaintiff had gained an earlier reversal from an order of a judgment on the pleadings,[1] in an action arising out of an automobile-train collision. The case was remanded after several interrogatories and two continuances were granted, one for each party. These facts alone made this the oldest civil case on the court's calendar. A pretrial conference was then set. The plaintiff's counsel attempted to obtain a rescheduling because he was out of town on a matter before the state supreme court. Nevertheless, the court exercised its inherent power of dismissal. The court felt that the plaintiff's excuse was not legitimate. On appeal the United States Court of Appeals, Seventh Circuit, *held,* one justice dissenting, that the district court did not abuse its discretion in dismissing the case. *Link v. Wabash R.R. Co.,* 291 F.2d 542 (1961).

A dismissal under rule 41(b), unless otherwise specified,

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that the Attorney General is empowered to forbid his subordinates, though within the court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle."

16. But see in Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir 1951) The Secretary of Commerce, a party defendant, was held in contempt for refusing to obey a court order directing him to endorse and deliver corporate stock certificates held by him to certain parties adjudged to be the rightful owners. The Supreme Court subsequently vacated the judgment and ordered the proceedings dismissed as moot.

17. Note 5 **supra.**

18. See Hearings on Availability of Information from Federal Departments and Agencies Before a Sub-committee of the House Committee on Government Operations, 84th Cong., Ist Sess., pt. 1, at 26 (1955); H.R. Rep. 1461, 85th Cong., 2d Sess. 28 (1958); 104 Cong. Rec. 6551 (1958).

19. Hubbard v. Southern Railway Company, 179 F. Supp. 244 (M.D. Ga. 1959).

1. Link v. Wabash R.R. Co., 237 F.2d 1 (7th Cir. 1956). **cert. denied,** 352 U.S. 1003 (1957).

operates as an adjudication upon the merits[2] and raises the bar of *res judicata*.[3] Dismissals, including a dismissal with prejudice, being within the discretion of the court are reversible only on abuse of discretion.[4] Therefore, the main point of contention in the instant case is whether or not the court has abused its judicial discretion in rendering a dismissal under the rules.[5]

While it is difficult to define what is meant by abuse of legal discretion, one of its essential attributes is that it must plainly appear to effect injustice.[6] Although the expedition of business and the full utilization of the court's time are highly desirable, the duty of administering justice in each individual case must not be lost sight of as the paramount objective.[7] Just as a matter of sound public policy, litigation should be disposed of upon substantial rather than technical grounds.

While many cases can be found which justify a dismissal as a matter of sound judicial discretion, they are cases in which plaintiff's, or his counsel's, actions were willful and unjustified,[9] injurious and prejudicial,[10] wanton and dilatory,[11] or de-

2. Bowles v. Biberman Bros., 152 F.2d 700 (3rd Cir. 1945), rev'd. 61 F. Supp. 614 (E.D. Pa. 1945); American Nat. Bank & Trust Co. v. United States, 142 F.2d 571 (D.C. Cir. 1944); Rules F.C.A. 446.

3. Olsen v. Muskegon Piston Ring Co., 117 F.2d 163 (6th Cir. 1941; cf., Tulsa v. Southwestern Bell Telephone Co., 75 F.2d 343 (10th Cir. 1935), **cert. denied,** 295 U.S. 744 (1935); Mitchell v. David, 52 A.2d 125 (D.D.C. 1947); see generally, 149 A.L.R. 553.

4. Peardon v. Chapman, 169 F.2d 909 (3rd Cir. 1948); see generally, 17 Am. Jur. Dismissal. § 119 et seq.

5. Fed. R. Civ. P. 16; In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference.... (Authorizes pre-trial conferences).

Fed. R. Civ. P. 41 (b); for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right of relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Fed. R. Civ. P. 83; Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . .(Rules have the force of law. Weil v. Neary, 278 U.S. 160, 169 (1929).

6. Jepson v. Sherry, 99 Cal. App. 2d 119, 220 P.2d 822 (The discretion to be exercised is one controlled by legal principles and is to be exercised in accordance with the spirit of the law with a view to serving justice).

7. Allegro v. Afton Village Corp., 9 N.J. 156, 87 A.2d 430 (1952).

8. Ordway v. Arata, 150 Cal. App. 2d 71, 309 P.2d 919 (1957).

9. First Hydro Electric Co-op v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir. 1957), **cert. denied,** 355 U.S. 871 (1957).

10. Refior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir. 1942), **cert. denied,** 316 U.S. 671 (1942); Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940).

11. See Dalrymple v. Pittsburgh Consolidated Coal Co., 24 F.R.D. 260 (W.D. Pa. 1959); (The congestion of a court's calendar seems to greatly influence the exercising of a court's judicial discretion. This factor makes

liberate and contumacious,[12] such as to interfere with due administration of justice.[13] None of these grounds were present in the instant case and in fact counsel manifested his good faith by attempting to reschedule the hearing. However, there are cases which, while distinguishable, have held reversals for abuse of discretion under situations analogous to the instant case.[14] Where a reasonable excuse is offered for failure to comply with a rule or an order the court should, in the exercise of its discretion, either refuse to dismiss or provide in its order of dismissal that it does not constitute an adjudication upon its merits.[15]

Only one case was discernable that could support the holding in the instant case,[16] but it can be distinguished in that no attempt of rescheduling was made. Therefore, the implication of the instant case is that a court has a pre-emptive right to arbitrarily dismiss merely for non-appearance at a pre-trial conference. This gives rule 41(b) a mandatory rather than a permissive construction contrary to its specific language.[17]

In the instant case the defendant would have suffered no loss by a further short adjournment as the delay would not have been injurious or legally prejudicial to the defendant, which should be prerequisite to invoking the drastic sanction of a dismissal with prejudice.[18] A defendant might also be estopped from claiming injury if he consents to a continuance.[19]

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a dismissal under these facts very arbitrary, rather than judicial.) See also, 44 A.B.A.J. 552, wherein a statistical analysis of federal district court calendars shows that at the time of the Dalyrmple case the median time from filing to disposition was 34 months).

12. See Jameson v. DuComb, 275 F.2d 293 (7th Cir. 1960); **cf.** Joseph v. Norton Co., 24 F.R.D. 72 (S.D.N.Y. 1959), **affirmed,** 273 F.2d 65 (2nd Cir. 1959).

13. See Barger v. Baltimore & Ohio R. Co., 130 F.2d 401 (D.C. Cir. 1942).

14. Peardon v. Chapman, 169 F.2d 909 (3rd Cir. 1948), (Other trial work and illness of counsel held excusable); Maresco v. Lambert, 2 F.R.D. 163 (N.Y. 1941), (Failure to comply with court order held excused); Brown v. Haymore, 43 Ariz. 466, 32 P.2d 1027 (1934), (Plaintiff not personally notified of setting); Craft v. Cannon, 58 Ariz. 457, 121 P.2d 421 (1942), (Reversed for lack of want of diligence); Eaton v. Harrison, 100 Fla. 1668, 132 So. 635 (1931), (No want of diligence found(; Allegro v. Afton Village Corp., 9 N.J. 156, 87 A.2d 430 (Sup. Ct. 1952), (No injury suffered by defendant); Cambridge State Bank v. Nyberg, 72 N.W.2d 345 (Minn. 1955), (Failure to appear at preliminary call of calendar excused); Shaw v. Universal Life & Accident Ins. Co., 123 S.W.2d 738 (Tex. 1938), (Punishment personal to counsel available, client should not suffer from negligence of attorney).

15. Producer's Releasing Corp. de Cuba v. P.R.C. Pictures, 176 A.2d 93 (2nd Cir. 1949). See also, 5 Moore's Fed. Prac. 1040. (This statement seems to weaken the court's construction of authority if the word "reasonable" were to be construed in its legal sense).

16. Wisdom v. Texas Co., 27 F. Supp. 922 (N.D. Ala. 1939). (The court in the instant case cites Moore's Fed. Prac. to the effect that the Wisdom dismissal was for the disobedience of a court order, but although this is the issue squarely before this court it was not adjudicated or even mentioned in dictum in the Wisdom case).

17. See rule 41(b), **supra** note 5.

18. Reflor v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir. 1942), **cert. denied,** 316 U.S. 671 (1942).

While a litigant is generally bound by the action or inaction of his counsel, there is authority for the proposition that when a plaintiff places his case in the hands of reputable counsel he should not be turned out of court if the action complained of was almost entirely on account of neglect or oversight of his counsel.[20] This presents another ramification of rule 41(b) that should be noted in that it has serious implications for the attorney as well as the client. An attorney is liable to the client for his ignorance or non-observance of the rules of the court in which he practices[21] and the client who has suffered by this negligence may recover therefor in an action at law.[22]

Rule 41(b) has directly reversed equity's traditional doctrine that a dismissal without consideration of the merits is also without prejudice to the complainant.[23] However, the spirit of the rule is equitable in nature and the court in its application may preserve this by specifying in its order that the dismissal is without prejudice.[24] Nevertheless, the rule as now written allows a court this discretion whereby, through oversight, innocent mistake, or for other reasons, a highly prejudicial result may be reached. As a solution, this writer advocates the amendment of rule 41(b) of both the Federal and North Dakota Rules of Civil Procedure. The form of the amendment could follow that of a proposed, but yet unadopted, amendment made in 1955,[25] which was somewhat parallel in that it would have made a dismissal for "lack of an indispensable party" similarly without prejudice. This would resolve undue hardships and unnecessary litigation exposed by the rule as now written and would restore the guarantees of the law that litigation will be adjudicated upon its merits. It is to be noted that this writer realizes that there are instances where an attorney's actions are contumacious or flagrantly disobedient in nature, however, the court is not without re-

19. Grass v. Rindge Co., 84 Cal. App. 750 258 Pac. 673 (1927).
20. Manson v. First Nat. Bank of Indiana, 366 Pa. 293, 77 A.2d 399 (1951).
21. Citizens Loan Fund & Savings Assn. v. Friedly, 123 Ind. 143, 23 N.E. 1075 (1900), See generally, 5 Am. Jur., Attorney and Client, § 128.
22. Weekly v. Knight, 116 Fla. 721, 156 So. 625 (1934).
23. Peardon v. Chapman, 169 F.2d 909 (3rd Cir. 1948).
24. See, rule 41(b), **supra** note 5.
25. MOORE'S FED. PRAC. 648 (1961 Supp.); 1 MOORE'S FED. PRAC. 5301 **et seq.** (The Original Advisory Committee on Rules for Civil Procedure, which proposed this amendment consisted of 50% of the original draftors of the Fed. R. Civ. P. The Committee felt that their proposal would remedy the situation where the court did not specifically provide that the dismissal was without prejudice; and thus expressly provide a result which the courts, of necessity, would have to reach even if the dismissal did not specify that it was without prejudice. That proposition coincides precisely with the problem at hand).

course since the attorney is an officer of the court and other personal sanctions are available against him. Also, if the statute of limitations has run on the action and the counsel's negligence results in the dismissal, with or without prejudice, the client may sue the attorney as pointed out earlier.[26]

RONALD G. SCHMIDT

HOMICIDE—MANSLAUGHTER—CASUAL CONNECTION BETWEEN ACT AND DEATH UNDER MISDEMEANOR-MANSLAUGHTER RULE—The defendant gave the keys of his automobile to an intoxicated person who, while driving the car, became involved in a collision with another car, killing both drivers. Defendant was found guilty of involuntary manslaughter. On appeal, the Supreme Court of Michigan *held,* the defendant was not guilty of the crime charged because the death was not counselled by him, nor accomplished by another acting jointly with him, nor did it occur in the attempted achievement of some common enterprise. He was, however, found guilty of a misdemeanor for allowing an intoxicated person to drive his car.[1] *People v. Marshall,* 106 N.W. 2d 842 (Mich. 1961).

The courts have been concerned with the applicability of the misdemeanor rule in two types of cases; those in which the defendant participates in the act causing death and those in which he is not present when the death occurs.

Illustrative of the former is *Story v. United States*[2] on which the prosecution relied. This case was one of direct participation for the defendant was a passenger in his own car and permitted an intoxicated person to drive. A pedestrian was killed and a conviction of manslaughter was upheld. Because of his degree of participation, the defendant in *Ex Parte Liotard*[3] was convicted on substantially the same reasoning. Further exemplification of conviction where the defendant participated in the very act which resulted in death is *State v. Hopkins.*[4] In that case the defendant was convicted of the offence for aiding and abetting its commission.

Similarly, the courts find no difficulty in convicting a defendant on the rationale of the misdemeanor-manslaughter rule in cases where someone is killed while the defendant is

26. See, **supra** note 22.
1. Mich. Comp. Laws § 625(b).
2. Story v. United States, 16 F.2d 342 (D.C. Cir. 1926).
3. **Ex Parte** Liotard, 47, Nev. 169, 217 Pac. 960 (1923) (Riding on running board).
4. State v. Hopkins, 147 Wash. 198, 265 Pac. 481 (1928).