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Miller v. Stewart: Voluntary Dismisssal by Less Than All Plaintiffs Under the Federal Rules

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MILLER v. STEWART: VOLUNTARY DISMISSAL BY LESS THAN ALL PLAINTIFFS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

In *Miller v. Stewart*,[1] the United States District Court for the Eastern District of Illinois held that the voluntary dismissal by some but less than all plaintiffs is permissible under Rule 41(a) of the Federal Rules of Civil Procedure.[2] This decision focuses attention on the conflict in the federal courts as to whether 41(a) dealing with voluntary dismissal is applicable to voluntary dismissal by less than all plaintiffs, or whether Rule 21 concerning midjoinder of parties, or Rule 15(a) dealing with amendments is the proper tool to effect this type of dismissal. This Note will analyze the decision of the *Stewart* case and evaluate the soundness of the decision in light of Rules 41(a), 21, and 15(a) of the Federal Rules with a view towards determining which rule is most proper in cases where less than all plaintiffs wish to dismiss.

Miller v. Stewart[3] arose out of an automobile accident in which a truck driven by plaintiff Icy Miller, with plaintiffs Harold Miller, Gerald Miller, and Kimberly Ann Miller as passengers, collided with an automobile driven by defendant Donna Stewart, an employee of defendant John Pate. The truck was allegedly owned by plaintiff Owen Miller.

The case was originally instituted in the Circuit Court of Harden County, Illinois, but was later removed to the United States District Court for the Eastern District of Illinois. Federal jurisdiction was based on diversity of citizenship, the plaintiffs being citizens and residents of Illinois and the defendants being citizens of North Carolina. The amounts in controversy as to plaintiffs Icy Miller and Harold Miller each exceeded the sum of $10,000. The amounts claimed by the other three plaintiffs were less than the requisite jurisdictional amount.[4]

Plaintiffs Icy Miller and Harold Miller filed notice of dismissal pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.[5] Up to that time no answer or motion for summary judgment had been filed.[6] Plaintiffs Gerald Miller, Owen Miller, and Kimberly

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1. 43 F.R.D. 409 (E.D. Ill. 1967).
2. 28 U.S.C. § 2072 (1964).
3. 43 F.R.D. 409 (E.D. Ill. 1967).
4. In C. WRIGHT, FEDERAL COURTS § 32, at 90 (1963) the author writes:

> There has been a requirement, in some classes of cases, that more than a certain minimum amount be in controversy to bring cases to the federal trial courts. The Judiciary Act of 1789 fixed this sum at $500, and it was increased to $2,000 in 1887, $3,000 in 1911, and to the present figure of $10,000 in 1958. For jurisdiction to exist, where the requirements are applicable, the amount in controversy, exclusive of interest and costs, must exceed the stated sum.

Id. at 90.
5. See p. 152 *infra*.
6. Rule 41 (a) (1) of the FED. R. CIV. P. dismissal can be effected

Ann Miller moved that their claims be remanded to the state court. Defendants moved to vacate the notice of dismissal, on the contention that voluntary dismissal under Rule 41(a)(1) does not authorize dismissal by less than all plaintiffs.

The district court denied defendants motion on the grounds that: (1) there had been no answer or motion for summary judgment and, therefore, Rule 41(a)(1) was applicable to this dismissal; and (2) defendants would suffer no prejudice or hardship if Icy Miller and Harold Miller were dismissed.

Since, after dismissal, the amounts in controvery no longer exceeded the requisite jurisdictional amount, the defendants had no right to retain federal jurisdiction.[7] Therefore, the suit as to the remaining three plaintiffs was remanded to the Circuit Court of Harden County.

BACKGROUND

Prior to the adoption of the Federal Rules of Civil Procedure, procedure in the federal courts was governed by the Practice Conformity Act.[8] Under that statute federal practice in civil actions at law was generally controlled by the practice of the courts of the state where the court was sitting.[9] It was hoped that the federal courts would be prevented from reaching different substantive results through the use of different procedural methods.

The adoption of the Federal Rules was not intended to completely change the existing procedural rules and thereby institute an entirely new method of practice. Rather, the purpose of the Rules was to establish a uniform procedure for all federal courts and to state rules plainly in order to eliminate as much surprise as possible from litigation.[10] Thus in analyzing Rules 41(a), 21,

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by mere notice if it is given before an answer or motion for summary judgment is filed. See notes 17 and 18 *infra* and accompanying text.

7. The court has a choice whether or not to remand when, in an action removed to a federal court from a state court, the jurisdictional amount is destroyed. St. Paul Indemnity Co. v. Cab Co., 303 U.S. 283, 294 (1938).

8. Act of June 1, 1872, ch. 924, 17 Stat. 196.

> That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary not withstanding: Provided, however, that nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

9. Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 394 (1937).

10. *Cf.* Merrill v. United Air Lines, 151 F. Supp. 105, 105 (S.D.N.Y. 1957).

and 15(a) it is necessary to look at not only the actual wording of the rules and their judicial interpretation, but also pre-Federal Rule procedure to see what was done in the fields of voluntary dismissal, misjoinder, and amendments.

RULE 41(a)

Rule 41(a) of the Federal Rules of Civil Procedure reads:

> (a) Voluntary dismissal: Effect Thereof
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> (1) By plaintiff; By Stipulation. Subject to the provisions of Rule 23(e),[11] of Rule 66,[12] and of any statute of the United States,[13] an action may be dismissed by the plaintiff without order of the 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.
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> (2) 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 an 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 an independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Prior to the adoption of the Federal Rules a plaintiff could generally dismiss an action voluntarily up to the time the case was delivered to the jury.[14] Furthermore, the plaintiff could dismiss the action as often as he desired.[15] The results of this practice are

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11. FED. R. CIV. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Thus, Rule 23(e) deals with dismissal of a class action and is not applicable to this discusion.

12. FED. R. CIV. P. 66 in part provides: "An action wherein a receiver has been appointed shall not be dismissed except by order of the court." This rule applies to dismissal of receivers and is not applicable to this discussion.

13. This refers primarily to two statutes: (1) 8 U.S.C. § 1329 (1964) which deals with dismissal of a suit brought against an alien; and (2) 31 U.S.C. § 232 (1964) dealing with dismissal of a bankruptcy suit. Neither is applicable to this discussion.

14. Barrett v. Virginian Ry., 250 U.S. 473, 476 (1919); American Electrotype Co. v. Kerschbaum, 105 F.2d 764, 767 (D.C. Cir. 1939); Derick v. Taylor, 171 Mass. 444, 445, 50 N.E. 1038, 1039 (1898).

15. Poplarville Sawmill Co. v. Driver, 17 Ga. App. 674, 88 S.E. 36 (1916); *cf.* Mintz v. Soule, 200 Mich. 9, 11, 166 N.W. 491 (1918).

readily apparent. Dismissal was used as a harassing technique; a defendant was brought to court and then repeatedly dismissed. The defendant would offer to settle out of court just to finish the action. The dismissal rule was both prejudicial and costly to defendants. Federal Rule 41(a) had a two-fold corrective purpose. First, it set forth and simplified a practice which, prior to enactment of the Federal Rules, had never been clearly explained.[16] Before the rule, state statutes and the common law governed in the federal courts by virtue of the Conformity Act. In the case of voluntary dismissal there was a great variance in the rules. Secondly, Rule 41(a) limited dismissal to an early stage of the proceeding.[17] This virtually eliminated prejudice to the defendant. Even if he had to prepare for a second law suit his expenses for the first suit would be at a minimum. This was emphasized by the 1946 amendment to the rule which added the phrase, "or of a motion for summary judgment." Thus, the service by the adverse party of a motion for summary judgment was given the same effect as service of an answer in preventing unlimited dismissal by the plaintiff.[18]

Viewing the historical background of the rule, it is not apparent whether the authors of the Federal Rules planned to allow this rule to cover situations where less than all plaintiffs wished to dismiss an action voluntarily. Court decisions must therefore be analyzed to obtain a true interpretation of the rule.

The majority of circuit court decisions[19] hold that Rule 41(a) may be used to dismiss voluntarily as to less than all parties. The court in *Young v. Wilky Carrier Corp.*[20] held the plaintiff could

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16. Ingold v. Ingold, 30 F. Supp. 347, 348 (S.D.N.Y. 1939).

17. *Cf.* Engelhardt v. Bell and Howell Co., 299 F.2d 480, 482 (8th Cir. 1962); Stevenson v. United States, 197 F. Supp. 355, 357 (M.D. Tenn. 1961).

18. MOORE, *Federal Rules Pamphlet* 820 (1968). A motion for summary judgment is often made before answer is filed. A large amount of work can be involved since affidavits and interrogatories are usually filed to build support for the case. Therefore if voluntary dismissal were allowed after a defendant made a motion for summary judgment, the defendant could be prejudiced.

19. Of the circuits which have ruled on the question the first, third, and seventh circuits and at times the second circuit have ruled that less than all parties to an action may dismiss voluntarily. *See*, Young v. Wilky Carrier Corp., 150 F.2d 764 (3d Cir. 1945); Lyman v. United States, 138 F.2d 509 (1st Cir. 1943), *cert. denied*, 320 U.S. 800 (1944); Broadway and Ninety-Sixth Street Realty Corp. v. Loew's, 23 F.R.D. 9 (E.D.N.Y. 1958); Fair v. Trans World Airlines, 22 F.R.D. 60 (E.D. Ill. 1957); United States v. E.I. DuPont De Nemours and Co., 13 F.R.D. 490 (N.D. Ill. 1953).

20. 150 F.2d 764 (3d Cir. 1945). The action arose out of an automobile accident. Plaintiff brought suit against Wilky Carrier Corporation and

voluntarily dismiss one of the two defendants under Rule 41(a)(2). The only reasoning offered was that such a dismissal was within the discretion of the trial court. The concurring opinion in *Young*, citing *Lyman v. United States*,[21] came to the same conclusion; that is, dismissal was within the discretion of the court. However, an investigation of the *Lyman* case shows that once again no reasoning is given for the use of 41(a). There the court allowed plaintiff to dismiss voluntarily the first of four causes of action. This situation is analogous to one where less than all plaintiffs dismiss an action against a defendant.[22] The court in *Lyman* held a motion by plaintiff to dismiss after an answer had been filed was within the sound discretion of the trial judge.[23] It appears that both *Lyman* and *Young*, by allowing dismissal by less than all parties under Rule 41(a), were not concerned about the entire scope of the rule and were willing to focus attention only on the words in Rule 41(a)(2) reading: "an action shall not be dismissed save upon an order of the Court and upon such terms and conditions as the Court deems proper."[24] The interpretation of this rule by the *Lyman* and *Young* courts appears to be that since Rule 41(a) is entitled "Voluntary Dismissal", if a plaintiff moves for this type of dismissal and it fits no other part of the Rule, the court should use its discretion to either allow or deny the motion and no further reasoning is necessary.

In *Fair v. Trans World Airlines*[25] the court similarly reasoned that when less than all parties move for voluntary dismissal, dismissal or non-dismissal of the action must be determined through the exercise of the court's discretion, citing the *Young* case. The court added the condition that "in the exercise of this discretion the court is duty bound to consider the rights of the respective

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Earl L. Welty. Plaintiff asserted her inability to prove liability as to Welty and voluntary dismissal was granted under 41(a)(2). Wilky appealed since a Pennsylvania law provides for contribution between defendants in a negligence case.

21. 138 F.2d 509 (1st Cir. 1943), *cert. denied*, 320 U.S. 800 (1944).

22. The courts in both Lyman v. United States, *supra* note 21, and Establissements Neyrpic v. Gardner, 175 F. Supp. 355 (S.D. Texas 1959), looked to Rule 41(a) to see if they could dismiss less than all claims. The *Lyman* case decided Rule 41(a) was applicable while the *Gardner* case found Rule 41(a) inapplicable. The decisions point to the fact that whether dismissing less than all parties or less than all claims, many of the same considerations are present. In both instances there is a chance that the parties to the action will have to defend against two lawsuits—the one they are involved in at present and a possible later suit involving the party or claim that was dismissed from the original action. Also in both situations, the amount of time that the opposing party has spent preparing for their case against either the party or claim which is being dismissed is taken into consideration. In other words a party can be prejudiced just as easily by dismissal of one of several parties or one of several claims. Therefore in the field being covered by this paper, dismissal of less than all parties and dismissal of less than all claims is analogous.

23. Lyman v. United States, 138 F.2d 509 (1st Cir. 1943).

24. *See* p. 152 *supra*.

25. 22 F.R.D. 60 (E.D. Ill. 1967).

parties to the litigation."[26] Although the decision expressly states that prejudice to other parties is to be taken into consideration, the basic reasoning for allowing this type of dismissal under Rule 41(a) remains the same as in the above cases: that the court has the discretion to grant voluntary dismissal as to less than all parties.

Upon examination it is possible to see the underlying factor in the majority rationale. These courts feel it is inconceivable that the Federal Rules would not allow for voluntary dismissal as to less than all parties.[27] Since the authors of the Federal Rules must have wished to allow this type of dismissal, what better place to allow for it than under Rule 41(a) which allows for voluntary dismissal? Approaching the rule in this way, however, and using such terms as "it is in the court's discretion," without looking at the words of the rule and without interpreting the rule is not necessarily sound legal reasoning.

A final observation should be made concerning the reliance in the *Young*, *Lyman* and *Trans World* cases on the use of discretion in dismissing an action as to less than all plaintiffs. Each of these decisions state that under Rule 41(a)(2) the court can use its discretion to dismiss one of several parties.[28] In this way it can determine the status of any of the parties remaining in the action and refuse to dismiss if prejudice will result. Since these courts have decided that Rule 41(a)(2) applies to voluntary dismissal of less than all parties, however, it is submitted that if an answer or motion for summary judgment has not been filed they must allow Rule 41(a)(1) to control; and these parties could voluntarily dismiss without order of the court simply by filing a notice of dismissal. In other words, less than all the parties could dismiss without the court ever determining whether there is any prejudice to the remaining parties. If this were allowed the whole purpose of Rule 41(a) would be defeated. Allowing less than all parties to dismiss would further the chances of a second lawsuit; and it is no longer

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26. *Id.* at 63.

27. The *Young*, *Lyman*, and *Trans World* courts all decided that it was in their power to dismiss as to less than all parties or less than all claims. They then seized on the use of Rule 41(a) to effect this dismissal. The court in Broadway and Ninety-Sixth Street Realty Corp. v. Loew's, Inc., 23 F.R.D. 9 (E.D.N.Y. 1950) specifically stated that it was in the power of the federal courts to dismiss less than all parties and it would allow the motion under 41 (a). The *Miller* court relied heavily on the *Loew* case to support its decision that Rule 41(a) could be used to effect this type of dismissal.

28. Young v. Wilky Carrier Corp., 150 F.2d 764 (3d Cir. 1945); Lyman v. United States, 138 F.2d 509 (1st Cir. 1943); Fair v. Trans World Airlines, 22 F.R.D. 60, 63 (E.D. Ill. 1957).

the case, as it was before the inception of the Federal Rules, that the annoyance of a second litigation furnishes insufficient grounds for denying the plaintiff permission to dismiss his complaint.[29]

A minority of the circuit courts have held that 41(a) is not applicable to dismissal of less than all parties. They have looked to the actual construction and wording of the Rule itself to decide its inapplicability. The leading minority case is *Harvey Aluminum v. American Cyanamid.*[30] Plaintiffs attempted to voluntarily dismiss one of the three defendants without a court order under Rule 41(a)(1). The court would not allow this stating, "rule 41(a)(1) provides for the voluntary dismissal of an 'action' not a 'claim'; the word 'action' as used in the Rules denotes the entire controversy, whereas 'claim' refers to what has traditionally been termed 'cause of action'."[31] Court interpretations of the Federal Rules independent of Rule 41(a) also sustain this distinction between claim and action. The court in *Windelman v. General Motors*[32] gave its opinion on the definition of "action" as used in the Federal Rules by saying the following:

> The term "action" does not mean a "cause of action" under the Federal Rules of Civil Procedure. Indeed, the expression "cause of action" is avoided in the Rules and the word "claim" is used instead. Pleadings set forth the "claims" and defenses of the parties. Rule 8.[33] Rule 2[34] provides that there shall be one form of action to be known as "civil action," which is commenced by filing a complaint

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29. Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942, 946 (4th Cir. 1954).

30. 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964 (1953). The facts of this case were: On December 5, 1952, Harvey Aluminum brought suit against American Cyanamid. At the time they filed the complaint Harvey received a preliminary restraining order against Cyanamid, and Harvey Machine Co. and Berbice were added as parties plaintiff and defendant respectively. On December 15, 1952 the temporary order was dissolved and an amended complaint added Reynolds as a defendant. On January 19, 1953 the plaintiffs filed a notice of voluntary dismissal as to all defendants under Rule 41(a)(1). The court would not allow this, stressing that the purpose of 41(a)(1) was to limit dismissal to an early stage of the proceeding and in this case a large amount of work was done by defendants in research and preparation for plaintiff's motion for preliminary injunction. Plaintiffs then tried to dismiss Reynolds since Reynolds did not participate in the proceeding relative to the motion for preliminary injunction.

31. *Id.* at 108; *accord*, Robertson v. Limestone Mfg. Co., 20 F.R.D. 365 (W.D.S.C. 1957).

32. 48 F. Supp. 490 (S.D.N.Y. 1942)

33. FED R. CIV. P. 8(a) provides:

> A pleading which sets forth a claim for relief whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the court needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

34. FED. R. CIV. P. 2.

> with the court. Rule 3.[35] We are advised in Note 2 under Rule 2 that "reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules."[36]

Furthermore, in *Original Ballet-Russe v. Ballet Theater*[37] it was held: "[F]or the traditional and hydra-headed phrase 'cause of action' the Federal Rules of Civil Procedure have substituted the word 'claim.' It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts."[38]

The authors of the Federal Rules were particular in their choice of words as seen by their disregard of the phrase "cause of action" and their substitution of "claim," and the use of the word "action" to designate the entire litigation. It is not likely that they made an inadvertant slip when writing Rule 41(a) and used the word "action" intending its interpretation to mean that less than all parties to a litigation could dismiss their claim, leaving the remaining parties to litigate their indivdual clams. And even if a mistake of this nature had been made when the Rule was originally promulgated, the advisory committee could have corrected the mistake on any one of the four occasions when Rule 41 was amended[39] by either correcting or adding other provisions.

In light of the foregoing discussion, it is submitted that the court in *Miller v. Stewart* was in error in refusing to allow defendant's motion to vacate the notice of dismissal which plaintiffs Icy Miller and Harold Miller filed pursuant to Rule 41(a)(1). The court based its opinion on three grounds. First, the fact that in *Fair v. Trans World Airlines*[40] and *Broadway and Ninety-Sixty Street Realty Corporation v. Loew's Inc.*[41] it was held that Rule 41(a) governed and allowed voluntary dismissal of less than all parties. The *Trans World* case has been discussed and found inappropriate since the court relied solely on its discretion and failed to use any other reasoning. The *Loew* court based its decision on the idea that the Federal Courts must be allowed to dismiss as to less than all parties. This being true, they felt it made no difference if Rule 15(a), 21, or 41(a)(2) was used. The *Miller* court considered these cases sufficiently well-reasoned to serve as precedent in allowing

35. FED. R. CIV. P. 3.
36. 48 F. Supp. 490, 494.
37. 133 F.2d 187 (2d Cir. 1943).
38. *Id.* at 189.
39. Rule 41(a) was amended in 1946 when the phrase "summary judgment" was added and in 1968 to change the reference from 23(c) to 23(e). Furthermore Rule 41(b) was amended in 1946, 1963, and 1966.
40. 22 F.R.D. 60 (E.D. Ill. 1967).
41. 23 F.R.D. 9 (E.D.N.Y. 1958).

Rule 41(a)(1) to dismiss less than all parties. Considering the minority finding that the word "action" limits the scope of the rule, it appears that the *Miller* court should not have allowed *Trans World* and *Loew* to control their thinking. Secondly, the court in *Miller* stated:

> Each plaintiff in the suit has a separate and distinct cause of action from each of the other plaintiffs. There is no question but if plaintiff had filed separate actions, the notice of dismissal would have been effective under Rule 41(a)(1) and dismissal would have been effected upon the filing of the notice. It is also true that if all plaintiffs had filed notice of dismissal, the notice under the facts here presented would not be subject to contest.[42]

Taken alone, what the court says is correct. If each of the plaintiffs had filed a separate action based on his own claim, then the rule would allow the individual to voluntarily dismiss his claim against the defendants. Furthermore, if all the plaintiffs moved to dismiss the action against all the defendants, their action would have been within the scope of the rule. In each of these situations, however, the entire action or controversy is being dismissed. These situations do not lead to the conclusion that some of the plaintiffs can dismiss the defendants since this is dismissal of only part of the action or controversy, and Rule 41(a) should not cover this situation.

Finally, the court based its decision on the belief that defendants would suffer no prejudice, hardship or burden by dismissing plaintiffs Icy Miller and Harold Miller.[43] Examining the case, we see that it was originally brought in a state court.[44] Defendants moved the action to a federal court and began preparation for the trial there. If the two plaintiffs are dismissed the case will once again be removed to the state court. Once there, even after the litigation is ended, the defendants face actions by the two plaintiffs who were dismissed.

The purpose of the Federal Rules is to allow a just, speedy and inexpensive end to the litigation.[45] This being the case, a court once possessing jurisdiction over all the parties-in-interest, should not grant a motion made for the purpose of destroying federal jurisdiction.[46] As a consequence, defendants then spend more time waiting for the outcome of their litigation and also face the possibility of a second lawsuit.

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42. Miller v. Stewart, 43 F.R.D. 409, 412 (E.D. Ill. 1967).
43. *Id.* at 413.
44. *Id.* at 409.
45. FED. R. CIV. P. 1. The Rule provides:
These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law, or in equity, or in admiralty, with exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.
46. See note 7 *supra.*

RULE 21

Dicta in *Harvey Aluminum v. American Cyanimid*[47] indicated that although Rule 41(a) could not be used to effect dismissal of less than all parties, Rule 21 could. Rule 21 says:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be served and proceeded with severally.[48]

At common law misjoinder[49] was cause for dismissal.[50] It was an extremely harsh rule. Under the code system in some states the rule remained as harsh as at common law, while in many others the rule was mollified by permitting the party to amend his complaint so that the action would not have to be dismissed.[51] Thus there appeared to be a trend in the code system to soften the rule on misjoinder.

Rule 21 of the Federal Rules continues this trend. It allows a party who has been misjoined to be dropped from the action without dismissal of the entire complaint.[52] This concession is in line with modern pleading which recognizes that a person should not be put out of court on a technicality.

This background should help answer the question whether dicta in the *Harvey* case indicating that Rule 21 is the proper means of voluntarily dismissing less than all parties is correct. *Harvey* cited two major cases in support of this proposition. First, in *Weaver v. Marcus*[53] the court found that one of several defendants could be dropped on the motion of a party under Rule 21. The motion was made by plaintiffs in order to perfect federal jurisdiction. The court focused its attention on the following language: "Parties may be dropped or added by order of the court on motion of any part, or of its own initiative at any stage of the action and on such terms as are just."[54] It decided that Rule 21 was applicable to

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47. 205 F.2d 105, 108 (2d Cir. 1953).
48. FED. R. CIV. P. 21.
49. "Misjoinder is the improper joining together of parties to a suit, as plaintiffs or defendants, or different causes of action." BLACK'S LAW DICTIONARY 971 (4th ed. 1968).
50. Rhoads v. Booth, 14 Iowa 575, 577 (1863); Gerry v. Gerry, 77 Mass. (6 Gray) 381 (1858); *cf.* Tully v. Triangle Films Corp., 229 F. 297, 299 (S.D.N.Y. 1916).
51. CLARK, CODE PLEADING § 58 at 368 (1947).
52. Eliot v. Geare Marson, Inc., 30 F. Supp. 301, 307 (E.D. Pa. 1939).
53. 165 F.2d 862 (4th Cir. 1948).
54. FED. R. CIV. P. 21.

dismissal by the plaintiff of one but not all defendants, but it was within the court's discretion whether to allow this dismissal. The court reasoned that the defendant who would be dropped was a necessary party but not an indispensable party to the action[55] since the action could have been originally maintained without this defendant. The defendant, therefore, could be dropped under Rule 21.

The second case cited by *Harvey* was *Savoia Film S.A.I. v. Vanguard Films*.[56] The facts were essentially the same as in *Weaver*. Plaintiff wished to drop one of two defendants from the action. The *Savoia* court based its decision on a discussion of the same part of Rule 21 relied on in *Weaver* and held that the defendant who was to be dropped was a necessary but not an indispensable party, and therefore allowed him to be dropped.

There are two basic faults with the rationale in these two cases. First, they are in effect allowing voluntary dismissal by a plaintiff as to less than an entire action without attendant safeguards. Even Rule 41(a)(1) dealing with a voluntary dismissal not only involves dismissal of an entire action but also establishes other safeguards dealing with voluntary dismissal; and the background of the rule suggests factors for a judge to consider when he is using his discretion under Rule 41(a)(2). These are: (1) dismissal should occur at an early stage of the proceeding; and (2) a judge should consider the prejudice to the party who may be dismissed. Rule 21 does not provide any of these safeguards and allows a party to be dropped "at any stage of the action."[57] In light of the safeguards under Rule 41, the "Voluntary Dismissal Rule," it is not likely that the authors of the Federal Rules wished to allow for voluntary dismissal under Rule 21 where a party could be dropped at any stage of the proceeding with a great likelihood that he would be prejudiced thereby.

Secondly, a look at the whole scope of the Federal Rules and particularly Rule 21 points to the real purpose of this rule. Rule 18[58] of the Federal Rules deals with joinder of claims, Rule 19[59]

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55. In Sternburg v. American Bantam Car Co., 76 F. Supp. 426 (W.D. Pa. 1948) the court said:

> A necessary party is a person having an interest in the controversy, and who ought to be made party so that the court may act on the rule which requires it to decide on, and finally determine, the entire controversy, and to complete justice by adjusting all the rights involved in it.

Id. at 438. Matthies v. Seymoor Mfg. Co., 23 F.R.D. 64 (D. Conn. 1958), *rev'd on other grounds*, 270 F.2d 365 (2d Cir. 1959) provided: "An indispensable party is one whose joinder in a suit is compulsory." *Id.* at 74.

56. 10 F.R.D. 64 (S.D.N.Y. 1950).

57. FED. R. CIV. P. 21.

58. FED. R. CIV. P. 18. This rule deals with joinder of claims and remedies.

59. FED. R. CIV. P. 19. This rule describes persons to be joined if feasible and determination by the court where joinder is not feasible. It thus deals with indispensable parties.

with a joinder of indispensable parties and Rule 20[60] with permissive joinder. It appears that the court in *United States v. E.I. DuPont De Nemours and Company*[61] was correct in its determination that in light of Rules 18, 19 and 20, Rule 21 provides for any difficulty that might arise because of the wide possibility of joinder under these preceding rules. Moreover, the first sentence in Rule 21 states, "Misjoinder of parties is not ground for dismissal of an action,"[62] indicating that the rule deals explicitly with misjoinder. In *Weaver* and *Savoia* the courts completely disregarded this first and controlling sentence of the rule. In *Kerr v. Compagnie De Ultramar*[63] the court ruled contra to the *Weaver* and *Savoia* cases. *Kerr* denied plaitiff's motion to dismiss under Rule 21 and recognized the interpretation made in the *DuPont* case by stating:

> Technically there has been no misjoinder of parties here. From all that appears thus far the parties are correctly joined as joint tortfeasors or as liable in the alternative; the dimensions of the action are no larger than the rules permit. Because however of the limitations on federal jurisdiction, such otherwise proper joinder destroys the jurisdiction of the court. Rule 21 was adopted to obviate the harsh common law adherence to the technical rules of joinder and not to deal with problems of defective jurisdiction. Here the plaintiff is not seeking to drop a party in order to cure defects of misjoinder or non-joinder.[64]

Kerr recognizes that Rule 21 deals with misjoinder; it does not act to effect voluntary dismissal which could cure jurisdictional defects, provide jurisdictional defects or perform any of the other uses to which voluntary dismissal is put. Therefore Rule 21 should not be used to dismiss a party unless there has been a misjoinder of the parties.

RULE 15(a)

State courts, which under the Conformity Act established procedural guidelines for the federal courts before the existence of the Federal Rules, allowed amendment of the pleadings to act as a voluntary dismissal.[65] In the absence of a specific statute, such dismissal is reached in the following manner. After an amendment

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60. FED. R. CIV. P. 20. This rule deals with permissive joinder of parties thereby describing necessary but not indispensable parties.
61. 13 F.R.D. 490, 493 (N.D. Ill. 1953).
62. See p. 159 *supra*.
63. 250 F.2d 860 (2d Cir. 1957).
64. *Id.* at 864.
65. Green v. Ellis, 145 Cal. 241, 88 S.E. 976 (1916); *see* H.S. Leyman Co. v. Piggley-Wiggley Corp., 45 Abs. 528, 68 N.E.2d 486 (Ct. App. 1944); *cf.* Dingman v. Spengler, 371 S.W.2d 416, 424 (Tex. Civ. App. 1963).

to a pleading is filed and accepted, the new pleading governs the case. Thus, if a person who appeared in the original pleading is eliminated from an amended pleading, that person is no longer a party to the case.[66]

Rule 15(a) of the Federal Rules, which clarifies when amendments may be made and what rules must be followed in amending, reads:

> A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading whichever period may be longer, unless the court otherwise orders.

Looking at the rule and its background, it appears that amendments could be used for voluntary dismissal by less than all the plaintiffs. Dismissal was allowed by amendment before the rule;[67] and under the Federal Rules the tendency of the federal courts has been consistently in favor of great liberality in the allowance of amendments to pleadings.[68]

The *Kerr* case in dicta[69] indicated that although Rule 21 could not be used for dismissal of less than all the parties, amendment of the pleading under Rule 15(a) would be the proper means of effecting this type of dismissal. The best reasoned case reaching this result is *Establissements Neyrpic v. Gardner*.[70] There plaintiffs wished to amend their complaint to drop the second and third claims against defendants and continue the case solely on their first claim. This situation is analogous to the case where two of three plaintiffs would seek voluntary dismissal against a defendant, leaving one plaintiff to continue the action.[71] In the first situation the two claims could be refiled at a later date and defendants would face a second litigation; in the second situation the two plaintiffs who dismissed voluntarily could file an action at a later date and defendants would have a second litigation. The court explained that Rule 41(a)(2) was not applicable since plaintiff re-

66. *Cf.* Speckels v. Speckels, 172 Cal. 789, 158 P. 543 (1916).
67. See cases cited note 65 *supra*.
68. Commissioner v. Finley, 265 F.2d 885, 888 (10th Cir. 1959), *cert. denied*, 361 U.S. 834 (1959); Brown v. Dunbar and Sullivan Dredging Co., 189 F.2d 871, 875 (2d Cir. 1951); Int'l Ladies' Garment Workers' Union v. Donnelly, 121 F.2d 561 (8th Cir. 1941); Rosen v. Rex Amusement Co., 14 F.R.D. 75, 78 (D.D.C. 1952).
69. Kerr v. Compagnie De Ultramar, 250 F.2d 860, 864 (2d Cir. 1957).
70. 175 F. Supp. 355 (S.D. Tex. 1959).
71. See note 22 *supra*.

tained one claim and thus it was not a dismissal of an entire action. It then reasoned that amendment to eliminate two claims has the effect of voluntary dismissal. In this case the amendment was allowed, but the claims were dismissed with prejudice to prevent them from being retried.[72]

Therefore, we see that amendment of the complaint under Rule 15(a) has the effect of voluntary dismissal. The judge in his discretion can refuse to allow amendment if defendant will be prejudiced. Analysis of the rule shows that it has the same safeguards as are allowed in Rule 41(a). It would limit voluntary dismissal without order of the court to an early stage of the proceeding since a party may only amend his pleading once as a matter or course before a responsive pleading is served. Other than this, a party must ask permission of the court to be allowed to amend and must provide reasons for the request.[73] The court in its discretion can refuse to grant the leave to amend. Finally, as seen by the *Gardner* case,[74] the party or claim can be dismissed with prejudice which will insure that voluntary dismissal is not used as a harassing technique.

Conclusion

The use of Rule 15(a) to effect dismissal by less than all plaintiffs against a defendant is the best way to keep within the spirit of the Federal Rules. Although the Rules are to be liberally construed, this does not mean they are to be misconstrued.

Rule 41(a) specifically refers to dismissal of an *action* as this term is used throughout the Federal Rules. Unless the entire controversy is to be dismissed, Rule 41(a) should not be used to dismiss by less than all plaintiffs. When there is only one plaintiff in the case or when the entire action is being dropped, there will be no further lawsuit after dismissal; courts favor disposal of litigation in this manner. Where less than all plaintiffs dismiss, however, the courts which allow Rule 41(a) to control make dismissal almost automatic if it occurs early in the proceeding. Not only will the lawsuit continue but there is a strong possibility of a second lawsuit.

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72. "A dismissal with prejudice implies a decision on the merits, either after an adjudication of right or pursuant to an agreement of the parties." Pueblo De Taos v. Archuleta, 64 F.2d 807, 812 (10th Cir. 1933).

73. *See* Feddersen Motors, Inc. v. Ward, 180 F.2d 519, 523 (10th Cir. 1950); Rossi v. McCloskey and Co., 149 F. Supp. 638, 641 (E.D. Pa. 1957).

74. Establissements Neyrpic v. Gardner, 175 F. Supp. 355, 358 (S.D. Tex. 1949).

Similarly, Rule 21 should not be used to effect a dismissal by less than all parties. It is a misjoinder rule. Courts which allow parties to be dropped or added indiscriminately under this rule have not considered it in its entire context. The Federal Rules are meant to be a clear and precise set of procedural standards; and to a large degree they succeed in this purpose. There is no reason to read something into a rule on the basis of a partial reading of that rule out of context. When emphasis is placed on only a portion of a statute improper interpretation can result. This occurs when the court disregards the first and controlling sentence of Rule 21 which states that it is a misjoinder rule, and focuses only on the sentence allowing parties to be dropped or added upon the order of the court.

By using the amending process of Rule 15(a), voluntary dismissal of less than all plaintiffs can be allowed without misconstruing the rule or without reading anything into the rule. It also contains the safeguards which keep the power to dismiss voluntarily from being abused.

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