that may rebut Allegations of Fraud and Cajolery: Evidenciary Value of Letters written long before a Suit is filed or even contemplated. (*Evangeline Wenzel Preston, et al., vs. Surigao Consolidated Mining Co., Inc., G.R. No. L-3832, Nov. 21, 1952*) .....

BOOK REVIEWS

Men and Measures in the Law ..... *Arthur T. Vanderbilt*

The Tenure of Office of Civil Service Officers and Employers ..... *Abelardo Subido*

Lectures in Remedial Law ..... *Mario Bengzon*

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THE "TWO-DISMISSAL" RULE IN THE RULES OF COURT

by Augusto Kalaw *

INTRODUCTION

THE "two-dismissal" rule is new in our system of procedure. It was introduced by our Rules of Court which took effect on July 1, 1940 [1] and was not contained in our former Code of Civil Procedure.[2] Our Supreme Court has not yet had occasion to apply, construe or interpret this rule. It may be well, therefore, to make a study of it and see how this rule has been interpreted by the courts of other jurisdictions where it is also enforced.

THE RULE STATED

The "two-dismissal" rule in the Philippines is embodied in the later portion of Section 1, Rule 30 of the Rules of Court in the Philippines which reads:

> "*Dismissal by the plaintiff.*—An action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service of the answer. Unless otherwise stated in the notice, the dismissal is without prejudice, except that a notice operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in

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1 Rule 133, Rules of Court.

2 Act No. 190.

a competent court an action based on or including the same claim."

SOURCE

Former Chief Justice Moran says that the provision just above-quoted, is "taken from Rule 41(a) of the Federal Rules of Civil Procedure, and is similar in part to Section 127, No. 1, of Act No. 190.[3] More particularly its source is paragraph (1) of said Rule 41(a) of the Federal Rules of Civil Procedure which, when Section 1, Rule 30 of our Rules of Court was copied from it, originally provided as follows:

"(a) *VOLUNTARY DISMISSAL; EFFECT THEREOF.*

"*By Plaintiff; by Stipulation.*—Subject to the provisions of Rule 23(c) and of any statute of the United States, an action may be dismissed by the plaintiff without order or court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally 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."

This provision of the Federal Rules of Civil Procedure was amended, effective March 19, 1948, to read as follows:

"(a) *VOLUNTARY DISMISSAL; EFFECT THEREOF.*

"(1) *By Plaintiff; by Stipulation.*—Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, 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." [4]

[3] I Moran, Comments on the Rules of Court, 500.

COMPARED WITH ACT NO. 190—

The provision in our former Code of Civil Procedure, Act No. 190, which corresponds to Section 1, Rule 30 of our Rules of Court, stipulates:

"SEC. 127. *Dismissal of Actions.*—An action may be dismissed, with costs to the defendant, in the following cases:

"1. By the plaintiff himself, by written request to the clerk filed among the papers in the case, at any time before trial, upon payment of the costs; provided a counterclaim has not been made, or affirmative relief sought by the cross complaint or answer of the defendant, or provided the judge shall not decide that the defendant has made such preparation for trial that it would be unjust to permit a dismissal without a trial on the merits;"

It will thus be noted that Act No. 190 did not contain the "two-dismissal" rule. In his comments under Section 1, Rule 30 of the Rules of Court, Chief Justice Moran states:

"At any time before the service of the answer, plaintiff may dismiss his action, even without order of the court, by merely filing a notice of dismissal. This was also the rule under section 127, No. 1, of Act No. 190, only that dismissal could be made 'at anytime before trial.' Under both the old and the new procedure, the dismissal is without prejudice; but under the new, plaintiff, in his notice, may make a dismissal without day, which is equivalent to a waiver of his cause of action (Estate of Yangco v. De Asis, 22 Phil. 201), or a retraxit (9 R. C. L., pp. 191-192). Under the new procedure, the dismissal is also without day, that is, an adjudication upon the merits, if the plainttiff has once filed an action for the same cause and has dismissed it. This is to avoid vexatious litigation." [5]

PURPOSE

We have quoted former Chief Justice Moran as stating that the purpose of the "two-dismissal" rule "is to avoid vexatious litigation." Construing Rule 41 of the

[4] See 10 Fed. Rules Serv. 6 x 1.
[5] I Moran, supra, 500.

Federal Rules of Civil Procedure which was the source of our rule on "two-dismissals", an American court held in the case of Cleveland Trust Co. v. Osher & Reiss,[6] that "the purpose of Rule 41 was to prevent the delays in litigations by numerous dismissals without prejudice." In a very recent case promulgated on January 23, 1950, Robertshaw-Fulton Controls Co. v. Noma Electric Corp.,[7] the United States District Court of D. Maryland stated "that the 'two-dismissal' rule aims to discourage and prevent" "duplicative, wasteful and harrassing litigation."

There is procedural abhorrence to vexatious suits. "A party will not be permitted to maintain an action which is merely vexatious" [8] and "courts have the inherent power to dismiss groundless, vexatious and harrassing litigations." [9] Successive dismissals without prejudice have been considered to give rise to vexatious litigations and even before the advent of the "two-dismissal" rule, there were already rulings "that a second action between the same parties for the same cause will be presumed to be vexations",[10] although there were also holdings "that this presumption may be overcome by slight evidence".[11]

All in all, however, before the effectivity of the rulings of the different courts as to the number of successive suits that would give rise to the presumption of a vexatious litigation and the conclusiveness or degree of disputability of such presumption. Mason's Minnesota Statute, 1927, Sec. 9322, for example, provided "that an action to the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown." Construing this said provisions, it was

6 31 F. Supp. 985.
7 10 F.R.D. 32.
8 1 C.J.S. 1062, citing Patterson v. Northern Trust Co., 207 Ill. App. 355, judgment affirmed 122 N.E. 55, 286 Ill. 564; Stewart v. Butler, 59 N.Y.S. 573, 27 Misc. 708; Petition of Fant, 143 S.E. 34, 147 S.C. 167.
9 27 C.J.S. 214, citing Pueblo de Taos v. Archuleta, C.C.A.N.W., 64 F. 2d. 807; Cunha v. Anglo California Nat. Bank of San Francisco, 93 F. 2d 572, 34 Cal. App. 2d 383; Rhea v. Mackney, 157 Sc. 190, 117 Fla. 62; Patterson v. North Trust Co., 907 Ill. App. 355, affirmed 122 N.E. 55.
10 1 C.J.S. 1062, citing Wait v. Westfall, 68 N.E. 271, 161 Ind. 648; Carrothers v. Carrothers, 8 N.E. 563, 107 Ind. 530; Harless v. Petty, 98 Ind. 53; Kitts v. Willson, 89 Ind. 96.
11 1 C.J.S. 1062, Lake Agricultural Co. v. Brown, 114 N.E. 755, 186 Ind. 30; Citizens' St. R. Co. v. Shepherd, 62 N.E. 300, 89 Ind. App. 412.

held in the case of Rineline v. Minneapolis Honeywell Regulator Co.,[12] that:

> *"Having taken a voluntary dismissal of his first action against the defendant company before trial, the plaintiff could not, over the protest of that defendant, take another arbitrary dismissal as to it of his second action, except upon the merits.* * * * We are satisfied that, under the practice in Minnesota, when a plaintiff who has lost his right to dismiss without prejudice, and who, under the pleadings, has the burden of proof, fails or refuses to proceed to trial, the proper course for the court to pursue is to enter a judgment of dismissal of the case with prejudice. There is nothing for a jury to determine. The calling of a jury and the taking of a verdict are mere gestures, under such circumstances. Section 9322 requires a judgment upon the merits. Such a plaintiff, by withdrawing from the case, waives a trial and impliedly consents to a judgment of dismissal with prejudice; that being the only kind of dismissal then possible. A dismissal, under such circumstances, does no violence to the constitutional right of trial by jury." (Emphasis supplied)

It was apparently because of these divergent rulings that the "two-dismissal" rule was promulgated in order to definitely settle by procedural regulation the presumption of the vexatiousness of successive suits. It would seem that the "two-dismissal" rule became a compromise, liberalizing the old rulings which presumed a second action between the same parties as vexatious by permitting a second suit and placing the presumption of vexatiousness only in the third action but at the same time making that presumption undisputable. In other words, by providing that a second dismissal "operates as an adjudication upon the merits", the Rules of Court have in effect decreed that a third suit on the same claims is *per se* or conclusively vexatious and will, therefore, not prosper.

This presumption being undisputable, whether the plaintiff really intended to harrass or vex the defendant by filing three successive actions or did so simply because of ignorance of the rules of procedure, the Rules of Court conclusively assumes that the defendant has been unduly vexed and entitled to the relief of a dismissal operating as an adjudication on the merits.

12 78 F. (2d) 854, 856-857.

DISMISSALS BEFORE THE RULES OF COURT—

We have mentioned that the "two-dismissal" rule became part of our rules of procedure only with the effectivity of the Rules of Court on July 1, 1940. An interesting question would, therefore, be whether two or more dismissals, had before the Rules of Court, operated as an adjudication of the merits upon the effectivity of the "two-dismissal" rule. This was answered in the negative by the District Court E. D. New York in the case of Cleveland Trust Co. v. Osher & Reiss,[13] which held that "these dismissals (before the Rules) did not on the rule taking effect cause a dismissal on the merits." Although the court did not so state, the reason for that holding must be the prospective effect that is generally given to the rules of procedure.

The rule provides "that a notice (or dismissal) operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in a competent court an action based on or including the same claim." Viewed prospectively, therefore, to operate as an adjudication upon the merits, the notice of second dismissal must be filed after the effectivity of the rule. As also held in the Cleveland Trust Co. v. Osher case, above-quoted, "there cannot be a dismissal on the merits unless subsequent to the date the rule went into effect a notice of dismissal was given."

It should be noted from the wordings of the "two-dismissal" rule, however, that while it is required that the notice of second dismissal, operating as an adjudication upon the merits, be filed after said rule went into effect, that condition is not required of the first or previous dismissal as long as the same was had in a competent court on "an action based on or including the same claim." Cleveland Trust Co. v. Osher case has also clearly stated this construction:

> "The prior dismissals gave the opportunity to make the rule effective, if, subsequent to the effective date of the Rule, the notice was given. This does not change the effect of the action of the plaintiff in dismissing the action prior to the effective date of the Rule, but would make the notice given subsequent to the effective date of the Rule a voluntary action on the part of the moving party, with notice, on which the Rule would be applied."

[13] 31 F. Supp. 985.

Two American cases have had occasion to pass upon the applicability of the "two-dismissal" rule in dismissals before the Rules of Court as follows:

> A second voluntary dismissal of an action does not operate as an adjudication upon the merits if both dismissals took place prior to the effective date of the Rules of Court [14] but, while two voluntary dismissals of the same claim, both of which were had previous to the effective date of the Rules, do not bar an action on the claim after such date, a second dismissal after the effective date of the Rule is a bar to further action, even though the first dismissal was had before such date.[15]

EFFECT OF SECOND DISMISSAL AUTOMATIC—

The "two-dismissal" rule forms part of Section 1, Rule 30 of the Rules of Court which gives the plaintiff the right to dismiss the action at any time before service of the answer. [16] This right of the plaintiff is "absolute."

> "The right to a nonsuit, if it exists, is absolute. It does not depend upon the reasons which the plaintiff offers for his action, or upon the fact that, as here, no reasons are offered." [17]
>
> "The right of a plaintiff to take a voluntary nonsuit in the federal courts of South Carolina has been before this court, for consideration, in three cases, Prudential Insurance Company v. Stack (C.C.A.) 60 F. (2d) 830, New York Life Insurance Co. v. Driggs (C.C.A.) 72 F. (2d) 833, and Aetna Life Insurance Co. v. Thomas Thurston Wilson, et al, (C.C.A.) 84 F. (2d) 330, 331. In these cases we held that the right of a plaintiff to a nonsuit 'is absolute unless the defendant had acquired some right that would be prejudiced by the nonsuit. Aetna Life Insurance Co. v. Wilson, supra." [18]

[14] Reconstruction Finance Corp. v. Barnett, 118 F. (2d) 190 (C.C.A. 7th, 1941).
[15] Cleveland Trust Co. v. Osher & Reiss, Inc., supra.
[16] Albin v. Mulhorn, 7 F. R. Serv. 41(a), 111, Sase 1 (D.C.S.D. Iowa, 1943).
[17] Prudential Ins. Co. of America v. Stack, 10 F. (2d) 830, 831; August 1, 1932; New York Life Ins. Co. v. Driggs, 78 F. (2d) 833, 834, Oct. 2, 1934.
[18] Pilot Life Ins. Co. v. Habis, 90 F. (2d) 842, 843, June 14, 1937.

The right of the plaintiff to dismiss under Section 1, Rule 30 of the Rules of Court is so absolute that the Rule expressly provides that it may be done "without order of court" by merely "filing a notice of dismissal." Upon the filing of such notice, the "dismissal is immediately effective without any order of dismissal being made by the court."

> "By virtue of section 665, C.O.S. 1921, the plaintiff, without leave of court, * * *, may dismiss his civil action at any time before judgment has been rendered therein, provided his adversary has filed no pleading therein seeking affirmative relief. This the plaintiff may do by filing in such case his written and signed statement that he does so dismiss, and thereupon such dismissal is immediately effective without any order of dismissal being made by the court." [19]

> "The dismissal was made by the plaintiff under section 581 of the Code of Civil Procedure and it was accomplished with any intervention or action by the court, and by simply filing with the clerk of court a dismissal of the action by the clerk of court a dismissal of the action as to those three defendants as is expressly authorized by that section. The effect was, ipso facto, to dismiss the case as to said defendants. Huntington Park Imp. Co. v. Superior Court, 17 Cal. App. 692, 121 P. 701." [20]

The plaintiff's absolute right to dismiss under Sectional, Rule 30 of the Rules of Court may, however, result in one of three kinds of dismissals; namely, voluntary nonsuit, retraxit or res judicata. Generally, the dismissal is without prejudice or a *voluntary nonsuit.* [21] Two exceptions are, however, provided. First, when it is "otherwise stated in the notice". In other words, if the plaintiff expressly states that he is making the dismissal "with prejudice", then it becomes a *retraxit,*[22] or "a formal and voluntary renunciation in open court of a cause of action therein pending".[23] The other exception is when the plaintiff "has once dismissed in a competent court an action based on or including the same claim", in which case,

19 Naylor v. Eastman Nat. Bank, 232 F. 73.
20 Rogers v. Transamerica Corporation, 44 F. (2d) 635, 636.
21 Sgobel & Day v. Craven, 13 F. (2d) 364, 365).
22 I Moran, supra, 500.
23 Savery v. Moseley, 76 F. (2d) 902, 904).

the second dismissal "operates as an adjudication upon the merits" or *res judicata.*[24]

Because of the unilateral action affecting dismissal of a case by the plaintiff before service of the answer, it is evident that the effect of such dismissal attaches from the moment notice thereof is filed. This automatic effect is even more patent in the case of a second dismissal for in the words of the rule itself, notice thereof "operates as an adjudication upon the merits."

Plaintiff Can Not Defeat Effect of Second Dismissal by Reservation—

It is plain from the wordings of Section 1, Rule 30 of the Rules of Court that in the exercise of his right to dismiss before service of answer, the plaintiff has the additional privilege of determining the effect of such dismissal when it is the first one. The question may, however, be raised whether the plaintiff may also properly choose an effect other than that of the "two-dismissal" rule when it dismisses an action for the second time. In other words, can a second dismissal by the plaintiff be also without prejudice if he makes a reservation to that effect in his notice thereof?

In the construction of the second sentence in Section 1, Rule 30 of the Rules of Court, the phrase, "unless otherwise stated in the notice", precedes the general rule that "the dismissal is without prejudice"; after which, the exception is stated "that a notice operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in a competent court an action based on or including the same claim". It would seem, therefore, that the phrase "unless otherwise stated in the notice" only qualifies the general rule that "the dismissal is without prejudice" and the statement of the "two-dismissal" rule is an exception not only to the general rule that the dismissal is without prejudice but also to the privilege granted the plaintiff to state otherwise in his notice. This interpretation has the sanction of former Chief Justice Moran who, in his comments comparing Section 1, Rule 30 of

24 Mars v. McDougan, 40 F. (2d) 247, 249; see also I Federal Rules Service, 427.

the Rules of Court with Section 127, No. 1 of Act No. 190, which we have already quoted, states:

> "Under both the old and the new procedure, the dismissal is without prejudice; but under the new, plainttiff, in his notice, may make a dismissal without day, which is equivalent to a waiver of his cause of action, or a retraxit. Under the new procedure, the dismissal is also without day, that is, an adjudication upon the merits, if the plaintiff has once filed an action for the same cause and has dismissed it."

This issue of whether the plaintiff may vary the effect of the "two-dismissal" rule by making a reservation, without prejudice, in his notice for a second dismissal, is now before the Supreme Court of the Philippines in the case of "National Coconut Corp. v. Maximo M. Kalaw, et al.", G. R. No. L-5412. The question has, however, already been decided in the United States by the U.S. District Court of D. Maryland in recent decision promulgated on January 3, 1950 in the case of Robertshaw-Fulton Controls Co. v. Noma Electric Corp.,[25] wherein it was ruled that "plaintiff could not, by reciting in its notice of dismissal, that notice was without prejudice and without costs, defeat language of rule providing that notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim." Because of the importance of this ruling, we quote from the text of the decision itself:

> "We find no ambiguity in the words employed in Rule 41(a) (1) and we have no doubt that the Rule applies to the present situation. This part of the Rule relates to voluntary dismissal of actions, that is, by plaintiff or by stipulation, without order of Court. After describing the two ways in which such dismissal may take place, namely, (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, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action, the Rule provides that '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.*' (Emphasis supplied.) It is clear from this language that the plaintiff in the present case could not, by the mere recital in its notice of dismissal of July 22, 1949 that such notive is 'without prejudice and without costs,' defeat the express language of the Rule above quoted. The present plaintiff had, prior to July 22, 1949, that is, November 19, 1948, dismissed the action which it had filed in the District Court for the Southern District of New York 'based on or including the some claim' as that involved in the present suit in this court."

[25] 10 F.B.D. 32.

We submit that the above ruling is good law and the only logical solution to the issue. We have seen the absoluteness of the plaintiff's right to dismiss before service of the answer. Flowing from this right is his unrestricted freedom to dismiss the case. Because there is no compulsion for him to dismiss, it follows that when he chooses to exercise that right, he must accept the consequences thereof. If the dismissal is a second one, he is forever barred from reinstituting the same claim. To allow the plaintiff to avoid the effect of the "two-dismissal" rule by simply making a reservation in his last dismissal would lead to the absurd conclusion that he has authority to dismiss and then reinstate the same action repeatedly without end provided that at each dismissal he makes the statement reserving his right to refile the same claim or claims. We have learned that one of the purposes of the "two-dismissal" rule is precisely "to prevent the delays in litigation by numerous dismissal without prejudice." Another purpose "is to avoid vexatious litigations." The vexation does not become less odious when the plaintiff, every time he dismisses makes a reservation without prejudice.

It would be different if the successive dismissals are by stipulation of the parties expressly stated to be without prejudice. The District Court of S. D. New York, has clearly made this distinction in Cornell v. Chase Brass & Copper Co., Inc.,[26] from which we quote:

> "Defendant's plea that the claim for patent infringement is barred under Rule 41(a) (1) is without merit. The facts briefly are these: The patent here in suit has thrice before been the subject matter of a bill of complaint in this court.

[26] 48 F. Supp. 979-981.

In the first of these, the plaintiff was American Radiator Company and the defendant was a corporation bearing a name similar to that of the present defendant. The action was dismissed on consent on March 13, 1936. Clearly, that dismissal has no relationship to the present action with the scope of Rule 41(a). On March 17, 1936, another action was commenced by American Radiator Company as plaintiff against the present defendant. That action was dismissed pursuant to a settlement agreement between the parties thereto and the present plaintiff, dated June 18, 1937. On September 23, 1938, American Radiator Company instituted a third suit against the defendant herein. The action was discontinued on April 16, 1940, by a stipulation between the parties to the effect that such discontinuance should be "without prejudice to the bringing of another action based on any of the claims and matters included in the above-entitled action."

"Assuming that the present plaintiff was the real party in interest in the American Radiator Company suits and that the previous dismissals 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 on the question of prejudice is made to operate without prejudice. After one dismissal by the 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. This view of the Rule makes it unnecessary to determine at this stage whether in fact the plaintiff herein was the real party in interest in the prior actions."

It should be noted, however, that a dismissal had by stipulation of the parties without any reservation constitutes a bar to a subsequent action. As stated in the case of Westbay v. Gray: [27]

"In the case last cited,[28] the former cause had been, by agreement of the parties, dismissed the judgment reading as follows: 'By agreement it is ordered by the court that the cause be dismissed, each party paying his own costs.' In upholding this judgment as a retraxit and bar to a subsequent action, the court, speaking by Wallace, C.J., said: 'We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even

27 48 P. 800, 802.
28 Merritt v. Campbell, 47 Cal. 542.

entered by consent, would have that effect, but only that a judgment of dismissal, when based upon, and entered in pursuance of, the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action.' Crossman v. Davis, 79 Cal. 603, 21 Pac. 963, is to like effect."

COURTS CAN NEITHER DEFEAT THE "TWO-DISMISSAL" RULE BY ORDERIHG A DISMISSAL WITH PREJUDICE--

After we have established that the plaintiff can not, by making a reservation in a second dismissal, defeat the effect of the "two-dismissal" rule, it may be well to resolve whether, in order to avoid such effect, the plaintiff may, in lieu of exercising his right to dismiss on a simply notice, apply to the court for an order of dismissal without prejudice and whether the court may properly grant such an order.

It is well settled that the procedural right to dismiss an action by merely "filing a notice of dismissal" does "not preclude plaintiff from making his application for discontinuance to the court,[29] and, "if the plaintiff so desires, he may obtain the dismissal by making the motion to the court",[30] for the mode pointed out in subsection 1 (Sec. 1, Rule 30 of our Rules of Court) is (not) exclusive or mandatory".[31] But when the plaintiff files a motion to dismiss in lieu of a mere notice, the rulings are just as consistent that it becomes "effective as dismissal when filed without court's granting motion."

"Plaintiff's ex parte motion for dismissal, so far as it related to plaintiff's demand, became effective as dismissal when filed, without court's granting motion." [32]

"Article 491 of the Code of Practice says that:

" 'The plaintiff may, in every stage of the suit previous to judgment being rendered discontinue the suit on paying the costs.'

"The motion to discontinue takes effect the moment it

29 27 C.J.S. 191, 192.
30 Graham v. Superior Mines, 49 P. (2d) 433, 444).
31 Richard v. Bradley, 62 P. (2d) 316, 317).
32 Person v. Person, 135 Sc. 225, April 27, 1931.

is filed without an order or dismissal by the court. Person v. Person, 172 La. 740, 135 So. 225." [33]

"Under the express provisions of Article 491 of the Code of Practice, 'The plaintiff may, in every stage of the suit previous to judgment * * * discontinue the suit on paying the costs,' and, as expressed in the syllabus of the case of Shreveport Long Leaf Co. v. Jones, 188 La. 519, 177 So. 592, 'A motion to discontinue a suit takes effect the moment it is filed, without an order of dismissal by the court.' See Person v. Person, 172 La. 740, 135 So. 225".[34]

In other words, the submission of a motion for dismissal is deemed equivalent to the filing of the notice thereof authorized by Section 1, Rule 30 of the Rules of Court and, if the Court should issue an order pursuant to such motion, the same "relates to the filing of the motion" and "is to be regarded as having been made at that date."

"The above section of the Code gave to the plaintiff the right to have the action dismissed upon the mere filing of the dismissal, and to have judgment entered thereon accordingly. The defendants could not, by filing a cross-complaint after receiving this notice, deprive the plaintiff of this right. The mere fact that before the motion was heard by the court the defendants filed a cross complaint did not impair the right of the plaintiff to have the motion determined according to the facts as they existed when the notice of the motion was given. The order when made, and the judgment entered in pursuance of the order, related to the first step taken in its procurement, and is to be regarded as having been made at that date." [35]

Since, when the plaintiff chooses to file a motion to dismiss before service of answer, it becomes "effective as dismissal when filed without court's granting motion", and the court's order of dismissal "relates to such filing" and is to be "regarded as having been made at that date", it will be readily seen that what may be stated in the court's order is of little or no consequence. The effect of the dismissal must naturally attach at the filing of the motion and the court's order cannot add thereto or detract therefrom. Necessarily, if the dismissal is a second one, it must operate as an adjudication on the merits notwithstanding any reservation that may be contained in the court's order.

[33] Shreveport Long Leaf Lumber Co. v. Jones, 177 So. 593, 594, Nov. 2, 1937.
[34] Interdiction of Escat, 21 So. (2d) 43, January 15, 1943.
[35] Hinkel v. Donohoe, 27 P. 301, 302.

It has been held that the court's discretion to dismiss begins only "when plaintiff has begun trial of the cause" (service of answer under our Rules).

"The granting of a nonsuit ceases to be a matter of right and becomes a matter for court's discretion where plaintiff has began trial of the cause." [36]

Any action which the court may, therefore, take in a dismissal by the plaintiff before answer, may be said to be in the nature of a ministerial act in the same manner that, it has been held, where the plaintiff has an absolute right to dismiss his action, "the act of the clerk in filing the request with the papers of the case was merely a ministerial act."

"Under the situation which existed, the plaintiff had an absolute right under said section to dismiss his action as to these defendants, and the act of the clerk in filing the request with the papers of the case was merely a ministerial act." [37]

It is plain, therefore, under the circumstances we are considering, that the court may not, in its order, impose terms and conditions to the dismissal other than that provided in the Rules of Court. This has been the ruling in the recent case of White v. Thompson,[38] promulgated on October 13, 1948, which we quote insofar as is pertinent:

"The plaintiff has moved the court to dismiss the cause and, therefore, should, it is assumed, be held to be preceeding under Rule 41(a) (2). But, upon consideration of the question as to what 'terms and conditions' should be imposed on the dismissal, it is proper that the court consider the terms of Rule 41(a) (1) Sec. 1, Rule 30 of our Rules of Court). No answer has been filed in this case, neither has a motion for summary plaintiff probably had the right to file a notice of dismissal under Rule 41(a) (1). Since she had this right,

[36] Pilot Life Ins. Co. v. Habis, *supra*, citing "Cunningham v. Independence Insurance Co., 182 S.C. 520, 189 S.E. 800 and cases there cited.
[37] Rogers v. Transamerica Corporation 44 P. (2d) 635, 636.
[38] 80 F. Supp. 411, 413.

it seems to the court that terms and conditions should not be imposed upon the dismissal.

If, inspite of the want of discretion to grant reservations to the dismissal when the same is made by the plaintiff before answer, the court makes reservations, it is the uniform decision of our Supreme Court that such reservations "are a mere surplusage, for, whenever the law gives a party the right to bring an action, he may do so without the necessity of any judicial reservation" and "if, on the contrary, the law gives him no such right, the court cannot give it to him by attempting to reserve it."

> "Oftentimes courts, in their judgments make reservations in favor of some of the parties as to the right of doing something in a separate or future proceeding. Such reservations are a mere surplusage, for, whenever the law gives a party the right to bring an action, he may do so without the necessity of any judicial reservation. If, on the contrary, the law gives him no such right, the court cannot give it to him by attempting to reserve it." [39]

Quoting from the very decisions of the cases most in point, we have the following rulings:

> "This reservation, however, produces no effect. Except in special cases where it is otherwise distinctly provided, such a reservation can produce no effect. If, where the counterclaim is dismissed, the law gives the party the right to maintain another action, he has such right whether the first judgment contains a reservation to that effect or not. If, on the contrary, the law gives him no such right, then the court can not give it to him by attempting to reserve it. (Belzunce v. Fernando, 10 Phil. Rep. 452; Almeida v. Abaroa, 8 Phil. Rep. 178.)" [40]
>
> "It is useless in a judgment to make reservations of actions in connection with alleged or supposed rights, for whoever believes himself to be entitled to bring an action may do so without the necessity of any reservation thereof." [41]

All the above, we submit, lead to but one inescapable

[39] Moran, supra, p. 566, citing Almeida v. Abarca, 8 Phil. 178, affirmed in 218 U.S. 476; 54 L. ed. 1116, 31 Sup. Ct. Rep. 34, 40 Phil. 1056; Belzunce v. Fernandez, 10 Phil. 452; Remigio v. Rigata, 11 Phil. 307; Cabardo v. Villanueva, 44 Phil. 186; Marella v. Agoncillo, 44 Phil. 844.

[40] Remigio v. Rigata, 11 Phil. 307, 309.

[41] Marella v. Agoncillo, 44 Phil. 844.

conclusion; that is, that the court cannot order a dismissal with reservation to defeat the consequences of the "two-dismissal" rule and, if it attempts to do so, such reservation is a mere surplusage and the action is considered dismissed as if such reservation does not exist.

Application of the Rule

As enunciated in Section 1, Rule 30 of the Rules of Court, the "two-dismissal" rule applies upon "notice" * * * filed by a plaintiff who has once dismissed in a competent court an action based on or including the same claim." This will need an examination of the following terms: (a) "notice" (b) "filed" (c) "by plaintiff" (d) "once dismissed" (e) "competent court" and (f) "action based on or including the same claim".

(a) *What is "Notice"*

Because it is contained in Section 1, Rule 30 of the Rules of Court, the "notice" that "operates as an adjudication upon the merits" in the "two-dismissal" rule must be the "notice of dismissal" which the plaintiff may file to dismiss an action before service of the answer. There is no definite form for this "notice" for a dismissal or nonsuit "may be made in an informal manner by any conduct indicating an intention not to proceed with the cause." [42] In Jough v. Reserve Gold Mining Co., [43] a mere "telegram instructing clerk of court to 'discontinue' case" was held to entitle "plaintiff to dismissal before trial" or the equivalent of a notice of dismissal.

In Wilson & Co., Inc. v. Fremont Cake & Meal Co., [44] it was held that a document which states itself to be a notice of dismissal and which states that plaintiff "does hereby dismiss the above-entitled action" is sufficient to constitute a notice of dismissal even though it was labelled a motion and even though a court order of dismissal was entered on it. We have cited authorities to the effect that in lieu of simply filing a notice of dismissal the plain-

[42] 27 C.J.S. 192

[43] 274 P. 192

[44] 83 P. Supp. 900, D.C.D. Neb. 1949

tiff under Section 1, Rule 30 of the Rules of Court, may make a motion to the court and it becomes "effective as dismissal when filed without the court's granting motion". The motion is, therefore, in effect a notice of dismissal.

When we discuss dimissals, we will find that amendments to the complaint or other pleadings excluding or dropping part of a cause of action or one or more codefendants have the effect of dismissals. The motion to amend, exclude or drop or other pleadings to that effect may, therefore, also be considered notices of dismissals as to the claims of defendants excluded or dropped.

It has even been held that unless required by statute, the notice need not be in writing.[45] Although there is no express requirement in our Rules that the notice of dismissal be in writing, it is, however, submitted that the ruling allowing notices of dismissals not to be in writing does not apply in this jurisdiction. Section 1, Rule 30 of the Rules of Court requires that the notice of dismissal be filed and this can only be done if said notice is in writing. It has been held that a written petition to dismiss must be signed by the plaintiff or his attorney of record.[46]

(b) *When Properly "filed"*

Section 1, Rule 30 of the Rules of Court makes no mention of service of the notice of dismissal to the adverse party. It is the general rule that "notice of application to discontinue, nonsuit, or dismiss should be given to defendant"[47] but an exception has been made when the right to dismiss is absolute.[48] We have found that the plaintiff's right to dismiss under the rule in consideration is absolute. In the case of Silver v. Indemnity Inc. Co. of North America,[49] it was held that a notice to dismiss under Rule 41(a), the counterpart of our Section 1, Rule 30, is effective upon filing, regardless of service and in Wilson & Co., Inc. v. Fremont Cake & Meal Co.,[50] it was ruled that no service is necessary. A notice of dismissal under Section 1, Rule 30 of the Rules of Court may, therefore, be properly

45 Ballou v. Ballou, 26 Vt. 673; Hill v. Dunlap, 15 Vt. 645
45 Ballou v. Ballou, 26 Vt. 673; Hill v. Dunlap, 15 Vt. 645.
46 De Armond v. Fine, 72 So. 145.
47 27 C.J.S. 193.
48 Blevins v. Blevins, 226 N.Y.S. 553.
50 83 F. Supp. 900; D.C.D. Neb., 1949.

filed and the dismissal take effect even without service on the adverse party.

Because it is contained in the rule granting the plaintiff the absolute right to dismiss, it would seem that the notice of the second dismissal operating as an adjudication upon the merits must be filed before service of the answer. To be properly "filed", therefore, it must be done so before service of the answer. It behooves us, therefore, to find out what, within the contemplation of Section 1, Rule 30 of the Rules of Court, is considered an "answer".

In the case of Butler v. Denton,[51] promulgated in 1945, it was held that the plaintiff may not dismiss as of right after the petition for intervention has been filed which raises justifiable issues, but dismissal is in the discretion of the court. It was thus in effect ruled that a petition for intervention raising justifiable issues is equivalent to the "answer". We quote from the decision itself:

> "With an exception which has no material bearing here, Rule of Civil Procedure 41(a), 28 U.S.C.A. following section 723c, provides among other things that an action may be dismissed by plaintiff by the filing of a notice of dismissal at any time before service of the answer, and that otherwise, an action shall not be dismissed at the instance of plaintiff save upon order of the court and upon such terms and conditions as the court may deem proper. No answer had been filed or served at the time of the filing of the motion for leave to dismiss. But the United States had intervened on its own behalf and on behalf of the restricted Indians involved in the action. It was alleged in the plea of intervention that the fund involved in the action originally constituted a part of the estate of Adam Scott, a full-blood Creek Indian; that it was in the possession of the Secretary of the Interior at the time of the enactment of the Act of January 27, 1933, 47 Stat. 777; that the court should determine that the restrictions on the fund be continued; and that the court should further determine that the Secretary continue to hold the fund for the use and benefit of the rightful owners. The original petition and the amended petition were completely silent in respect to the fund being restricted and as to it being in the custody of the Secretary of the Interior. No reference was made to its restricted status or to its custody. Both pleadings impliedly indicated that it was free of restrictions and was in the custody of the defendant Denton, as executor. It therefore is clear that the plea of intervention tendered justifiable

51 150 F. (24) 687.

issues for determination. And in that posture of the case plaintiff was not vested with the absolute right of dismissal either by the filing of a notice of dismissal or by the filing of a motion in the nature of such notice. She could dismiss only upon order of the court, and upon such terms and conditions as the court deemed proper. Under the rule, the court is vested with a reasonable discretion in the matter of dismissal after the filing and service of a plea of intervention which tenders one or more justiciable issues, and the action of the court in respect of dismissal will not be disturbed on appeal unless the discretion has been abused. Walker v. Spencer, supra."

In Sahs v. Italia, Societa Anonima Di Navigazione,[52] it was held that the plaintiff may dismiss the action as of right at any time before answer, even if the defendant had previously made a motion to dismiss on the ground that the language of Sec. 1, Rule 30 "is too clear to permit any limitations upon it."

In the case of Kilpatrick v. Texas & Pacific Ry. Co.,[53] the District Court of S. D. New York, however, relying in the case of Butler v. Denton above, ruled that "notices of motions to dismiss the actions on grounds of lack of jurisdiction over it (the defendant) and insufficiency of service of process" "should be treated as the equivalent of answers and that it should be held that plaintiffs had no right under Rule 41(a) (1) (Sec. 1, Rule 30 of our Rules) to file notices of dismissal while these motions were still pending undetermined." This decision was reversed by the Circuit Court of Appeals, Second Circuit, on March 4, 1948 and, in upholding that the plaintiff is entitled as of right to dismiss his action even when the defendant had filed a mere motion to dismiss for lack of jurisdiction of the person, that court stated:

"Moreover, he was also wrong in vacating the plaintiff's notice of dismissal of the action. Butler v. Denton, on which he relied, was altogether different: the United States had there intervened, and had filed a 'plea of intervention', setting up affirmative matter which the court construed to be an answer because it introduced issues not raised by the plaintiff's amended petition. In the case at bar the defendant's motion not only did nothing of the kind, but being a challenge to

[52] 30 F. Supp. 442.
[53] 72 F. Supp. 632.

'jurisdiction over the person,' was a 'defense' which under the rules may at the option of the pleader be made by motion.' On what theory in the fact of that provision it can be supposed that the 'notice of dismissal' was not filed 'before service of the answer' we cannot comprehend." [54]

In the case of Wilson & Co., Inc. v. Fremont Cake & Meal Co., already cited, the holding was made that the filing of a motion for a stay pending arbitration does not constitute the filing of an answer so as to prevent voluntary dismissal and entry of an order staying proceedings would not bar plaintiff from dismissing.

In Compañia Plomari de Vapores, S. A. v. American Hellenic Corporation,[55] the ruling was that a plaintiff may dismiss his complaint before an answer has been filed, even though defendant has filed an "appearance" and the defendant cannot thereafter require him to accept an answer.

We have pointed out earlier that Rule 41(a), paragraph 1 of the Federal Rules of Civil Procedure, which is the counterpart of our Section 1, Rule 30, Rules of Court, was amended effective March 19, 1948, to require that a notice of dismissal by the plaintiff must be filed not only before service by the adverse party of an answer but also of a motion for summary judgment, whichever first occurs.

Even before the effectivity of such amendment, however, the District Court of W. D. Louisiana, on July 29, 1946, in the case of Love v. Silas Mason Co.,[56] the plaintiff's right to dismiss without prejudice was denied after a plea of prescription and motion for summary judgment had been filed by the defendant for the reason that, although they were not technically answers, they were "defenses directed to the merits, which, if sustained, would entitle defendant to a judgment in its favor, rejecting plaintiff's demands either in whole or in part" and "places the matter within the discretion of the Court." Portion of the decision in point reads:

"The question presented is as to whether plaintiff is entitled to dismiss as a matter of right, after the filing of these pleas (plea of prescription and motion for summary judg-

[54] Kilpatric v. Texas & P. Ry Co., 166 F. 2d 788.
[55] 8 F.R.D. 426; 1948.
[56] 66 F. Supp. 753.

ment), and if not, whether the court should exercise its discretion to allow dismissal. The plea of prescription, for purposes of its disposition admits all well pleaded allegations of fact, and is a peremptory defense, which claims that the demand is barred by the lapse of time. Such a plea, necessarily, puts at issue under the facts so pleaded and admitted defendant's right to judgment, and involves a determination of the matter completely, if sustained, as if an answer had admitted the allegations of fact and simply denied the conclusions of law. Foster & Glassel v. Knight Bros., 152 La. 596, 93 So. 913; Warn v. Mexican Petroleum Corporation, 6 La. App. 55; Carpenter v. E. I. Dupont de Nemours & Co., La. App., 194 So. 99."

"The motion for summary judgment is likewise based on the contention that on its face and the proof offered, the Fair Labor Standards Act does not apply. If sustained it also puts an end to the case. * * *. Here again is presented an issue on the merits of the right of plaintiff, as a matter of law, in view of the contract and mode of operating the plant, to the benefits of the Fair Labor Standards Act.

"With the record in the shape thus shown the motion to dismiss was admittedly filed for the purpose of permitting plaintiff to file the suit in Delaware, the domicile of defendant, to take advantage of a longer period of limitations and to escape the bar of the Louisiana law. In such circumstances, while technically the pleadings filed by defendant are not answers, they are defenses directed to the merits, which, if sustained, would entitle defendant to a judgment in its favor, rejecting plaintiff's demands either in whole or in part. It would seem therefore that this is the type of appearance which was intended by subsection (a) of Rule 41, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, and places the matter within the discretion of the court under subsection (b) of that rule. See White et al. v. E. L. Bruce Co., D.C., 62 F. 2d 577. * * *."

On the other hand, in Tar Asphalt Trucking Co., Inc. v. Fidelity & Casualty Co. of New York,[57] is was ruled that the defendant has an absolute right to dismiss a counterclaim without leave of court, at any time before a reply is filed or evidence is introduced at the trial or hearing and the filing of a motion for summary judgment by plaintiff does not deprive him of such right.

"* * *. To my mind, a pending motion for summary judgment unargued or not submitted to the court for decision, subject to withdrawal by the moving party at any time prior to argument or submission to the court, clearly cannot be considered as 'introducing evidence evidence at a hearing.'

"Under the circumstances, the failure of the plaintiff to file a responsive pleading (reply) to the first counterclaim gives the defendant an absolute right to voluntarily dismiss its counterclaim."

[57] 1 F.R.D. 330 (District Court, S.D. New York, April 15, 1940).

It was probably to settle the conflict between these two last cited cases that Section 41(a) paragraph 1 of the Federal Rules of Civil Procedure was amended. Such amendment, however, seems to imply that without it, the correct construction of the Rule is that given in the Tar Asphalt Trucking Co., Inc. v. Fidelity & Casualty Co. of New York case. That would be true if a strict construction of the Rule is made for the reason stated in the case of Sachs v. Italia Societa Anonima Di Navigazione, that the language of the Rule "is too clear to permit any limitations upon it."

From the point of view of consistency in theory, however, it is submitted that the case of Love v. Silas Mason Co. is better law. The principle that the plaintiff loses his absolute right to dismiss after service of the answer seems to be that with the answer, the defendant has completely controverted the issues raised by the complaint. The same holds true when a motion for summary judgment is served. The nature of a summary judgment has been stated thus:

"A motion for summary judgment assumes that scrutiny of the facts will disclose that the issues presented by the pleadings need not be tried because they are so patently insubstantial as not to be genuine issues, although a judge must often come near to trying the issues before he can decide whether there are any issues to try." [58]

It is, therefore, submitted that Section 1, Rule 30 of our Rules of Court should be amended in the same manner its source in the Federal Rules of Civil Procedure was modified and that the amendment include Section 5 of the same Rule on "dismissal of counterclaim, crossclaim, or third-party claim". Although in this last section ser-

[58] I Moran, supra, 584, citing Cohen v. Eleven West 42nd Street, Inc., 4 Fed. Rules Service, p. 737; U.S. Circuit Court of Appeals, Second Circuit, Nov. 25, 1940.

vice of "responsive pleading" is the limit made and "responsive pleading" seems a broad term which may be interpreted to include a motion for summary judgment, it will be noted that the case of Tar Asphalt Trucking Co., Inc. v. Fidelity & Casualty Co. of New York, precisely dealt with the dismissal of a counterclaim and it was expressly held in said case that a responsive pleading is just the equivalent of a "reply".

As to the effect of a voluntary dismissal upon prior motions by the plaintiff himself, in Sperry Products, Inc. v. Association of American Railroads,[59] no answer having been filed, plaintiff's motion for voluntary dismissal without prejudice was treated as an abandonment of his prior motion for leave to take oral deposition before answer.

As to the manner of filing, there are decisions that, after defendant has been notified of plaintiff's intention to dismiss, "lodging" of the notice of dismissal with the clerk of court or tender upon the clerk's refusal to accept it should be regarded as equivalent to filing. In Moffatt v. Provorse,[60] the holding was that where plaintiff prior to the filing of the transcript in a removed case had notified defendant that she intended to dismiss, and "lodged" her notice of dismissal with the clerk of a district court pending filing of the transcript, plaintiff should be regarded as having filed her notice of dismissal prior to the service of the answer; and, in Flaig v. Yellow Cab. Co. of Missouri,[61] it was sustained that where plaintiff prior to the filing of the transcript in a removed case had notified defendant that she intended to dismiss but the clerk refused to accept the notice of dismissal until transcript was filed and the defendant filed his answer along with the transcript, the case should be regarded as one where the notice of dismissal was filed prior to answer so that plaintiff was entitled to dismiss as of right.

Although there would seem to be little chance to apply the doctrine of the above decisions, last cited, in the Philippines because of the absence of "removed" cases here, there may still be remote cases when we could use the equitable interpretations given therein. If the clerk

[59] 2 F.R.D. 48; D.C.D.C. 1941.
[60] 8 F.R. Serv. 41a. 111, Case 3.
[61] 4 F.R.D. 174; D.C.W.D. Mo., 1944.

of court, for example, misplaces the notice of dismissal after it has been handed to him by the plaintiff without yet registering it in his records and, in the meantime, the defendant serves his answer, under the authority of the above decisions, the handing of the notice to the clerk may be considered as filing thereof so as not to defeat the plaintiff's right to a voluntary dismissal. In the same way, if the clerk refuses to receive for filing a notice of dismissal in order to give the defendant an opportunity to serve his answer and thus defeat the plaintiff's right to dismiss, the tender of the notice to the clerk will be deemed as sufficient filing in accordance with the above decisions.

(c) *When Considered Filed by Plaintiff*

"The right voluntarily to take a discontinuance, dismissal, or nonsuit of an action ordinarily is in the party who commenced it or his successor in interest." [62] A petitioner for intervention may dismiss as against his petition,[63] and a defendant seeking affirmative relief by cross action is "plaintiff" within the statute providing for voluntary dismissal of the case. [64] Our Rules of Court, however, contain a separate provision for "dismissals of counterclaim, cross-claim or third-party claim", [65] which stipulates:

> "The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to section 1 of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing."

The plaintiff may also effect the dismissal or nonsuit through his duly authorized attorney; [66] and, where authority is given by power of attorney to one to discontinue a suit, it must be strictly pursued and the discontinuance should be by him personally and not by another.[67]

It has been logically held that an action cannot be

[62] 27 C.J.S. 167.
[63] Dunitz v. Braver, 233 N.W. 347.
[64] Fox v. Pinson, 34 S.W. (2d) 459.
[65] Section 5, Rule 30, Rules of Court.
[66] Commonwealth for Use and Benefit of Clay County v. Seizmore, 108 S.W. 2d. 733.
[67] Mechanics' Bank v. Fisher, 1 Rawe, 341.

said to have been discontinued by plaintiff where it has been dismissed at the instance of defendant,[68] and it has also been recently ruled that plaintiff's concurrence in defendant's motion to dismiss does not make dismissal voluntary on the part of the plaintiff, and consequently, Rule 41(a) (1), which is Section 1 of Rule 30 in our Rules of Court, does not apply.[69]

We have already quoted the case of Cornell v. Chase Brass & Copper Co. which made a distinction "between dismissals by notice and dismissals by stipulation." It was the ruling therein that "after one dismissal by the plaintiff the Rule provides that only a dismissal by notice shall operate as an adjudication" and "there is nothing in the Rule to indicate that the parties may not, in such event, expressly stipulate that the dismissal shall be without prejudice."

It should be particularly noted, however, that while the said case of Cornell v. Chase Brass & Copper Co. excludes a second dismissal by stipulation from the "two-dismissal" rule, the holding therein is only that such dismissal by stipulation is without prejudice where it is expressly so stipulated. We have the authority of the case of Westbay v. Gray, which we have also already quoted, that a dismissal by agreement of the parties even though a first one when no reservation is made, constitutes *res adjudicata,* for it "must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy by the parties themselves."

Special attention should also be made of the fact that under Rule 41(a), paragraph 1 of the Federal Rules of Civil Procedure, besides the filing of the notice of dismissal by the plaintiff before service of the answer, an action may be dismissed without order of court "by filing a stipulation of dismissal signed by all the parties who have appeared in the action." This latter provision does not appear in Section 1, Rule 30 of our Rules of Court and so, any stipulation of dismissal, under our jurisdiction, must necessarily fall under Section 4, Rule 30 which provides that "unless otherwise ordered by the court, any

[68] Dreyfuss v. Process Oil & Fuel Co. 77 So. 283.
[69] Sanderson v. Postal Life & Casualty Insurance Co., 2 F.R.D. 203.

dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits."

It is submitted that a dismissal by the plaintiff which is concurred or agreed to by the defendant is also not a dismissal by the plaintiff within the contemplation of Section 1, Rule 30 of the Rules of Court. The agreement or concurrence of the defendant to such dismissal makes it the equivalent of a dismissal by stipulation or agreement which has already been discussed.

On the other hand, it is submitted that when the defendant simply expresses no objection to the dismissal by the plaintiff, the same remains a voluntary dismissal by said plaintiff which, if made before service of the answer, falls within the provisions of Section 1, Rule 30 of the Rules of Court. We believe this is so, for the reason that when the defendant expressly offers no objection to a dismissal by the plaintiff before service of the answer, he is merely recognizing the legal fact that he cannot validly object thereto because of the plaintiff's absolute right to such dismissal.

(d) *What Claims are Deemed "Once Dismissed"*

We have quoted the ruling in the case of Cleveland Trust Co. v. Osher & Reiss to the effect that dismissal by the plaintiff before the effectivity of the Rules of Court may be made the basis of the "two-dismissal" rule when the second dismissal is had after such effectivity. In said case a motion to dismiss was also considered one for dismissal. A claim withdrawn from an action may, therefore, be deemed to have been "once dismissed."

In the case of U.S. v. Edward Fay & Son [70] and Aringtonton et al v. Pelphs,[71] it was held that "a motion to strike may be treated as a motion to dismiss." Thus, claims stricken out from a previous action may also be properly deemed "once dismissed" for the application of the "two-dismissal" rule in the event of a second dismissal.

In the case of Hydraulic Press Bfg. Co. v. Wilsons, White & Co.,[72] "the record discloses that prior to trial

[70] 31 F. Supp. 413.
[71] 79 F. Supp. 295.
[72] 165 F. 2d 489, 495.

plaintiff designated that at the trial it would rely upon fifteen claims of the first patent and twenty-two claims of the second patent" but, "after the trial had commenced plaintiff announced that it would rely only on the six claims of each patent" and it was ruled that "in effect this was a motion to dismiss its complaint as to the twenty-five of the claims."

Most dismissals are, however, made in the form of an amendment to the pleadings and here are some decisions:

> "Plaintiff, in action on fire policy, wishing to discontinue her action as to two of her three counts, had the right to amend complaint by striking out such counts or withdrawing them, which could have given result similar to that obtained by voluntary nonsuit.[73]
>
> "Plaintiff of course had the right to amend the complaint by striking out these counts, or withdrawing them, which in Southern Railway Co. v. McEntire, 169 Ala. 42, 53 So. 158, was held to be in effect the same as having them stricken, and a like result as a nonsuit, so far as these counts were concerned, would have followed."
>
> "Amended or supplemental pleadings which change the substance of the issue to be adjudicated, are, in legal effect, a dismissal of the existing, and the commencement of a new, action." [74]
>
> "The filing of an amended complaint omitting defendants who were named in the original complaint operates as a dismissal of the action as to the abandoned parties, * * *. Achlake v. MacConnell, 69 Cal. App. 207, 230, P. 974, 975; Brittan v. Oakland Bank of Savings, 112 Cal. 1, 44 P. 339; Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537.
>
> "In the case of Achlake v. MacConnell, supra, it is said: 'The filing of an amended complaint, omitting a defendant named in the original complaint, operates as a dismissal of the action as to such defendant. 18 C.J. 1166; MacLachlan v. Pease, 171, Ill. 527, 49 N. E. 714; San Antonio & A. P. By. Co. v. Mohl (Tex. Civ. App.) 37 S. W. 22." [75]
>
> "The order allowing the amendment was, in effect, a dismissal of the complaint against the defendant, Southern Railway, Carolina Division, and was not prejudicial to its rights. Therefore the exception assigning error in this respect is overruled. But, as the order was practically a dismissal of the complaint, the defendant was entitled to its costs, and there was error in refusing to allow the defendant to tax them against the plaintiff." [76]
>
> "The filing of the amended petition in which the James Stanton Construction Company was omitted as a defendant, was, in legal effect, a discontinuance of plaintiff's action against the construction company * * *." [77]

[73] Code 1923, Sec. 6431. Deal v. Camden Fire Ins. Co., 160 So. 225, 226.

[74] Wortham v. Boyd 1 S.W. 109.

[75] Butchart v. Moorhead, 282 P. 23, 25.

[76] Hambright v. Southern Ry., Carolina Division, 82 S.E. 416.

[77] National Surety Co. v. United Brick & Tile Co., 71 S.W. 2d 937, 939.

[78] 145 F. 2d. 715.

That an amendment to the complaint is a proper dismissal for the application of the "two-dismissal" rule was squarely sustained in the case of Freidman v. Washburn Co.[78] In said case, the plaintiff had previously dismissed an action against a corporation and two of its agents and in a second action, amended its complaint omitting the two agents and stating its cause against the corporate defendant alone. While the U.S. Circuit Court of Appeals of the Seventh Circuit held that there was no second dismissal as to the corporate defendant, it expressly ruled that the amendment to the complaint omitting the two agents constituted a second dismissal as to them as would protect them from further suit on the same claim. We quote part of the decision in point:

> "[11-14] Appellee raises another issue before this court, namely, that it was entitled to judgment under the 'two-dismissal' rule. To support this contention, it points to an exhibit attached to its motion for judgment showing that suit was originally brought in the United States District Court for the Southern District of New York against appellee here and two of its agents and employees, which suit was voluntarily dismissed under Rule 41(a) (1) (i) following the defendants' motion to dismiss for lack of jurisdiction and improper venue. The action here involved was originally brought against the same three defendants, and on their motion to dismiss, appellant, by leave of court, amended its complaint, omitting the two agents and employees as parties and stating its complaint against appellee, the corporate defendant, alone. Defendants' motion to dismiss was denied. The rule involved provides 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. We think the matter was improperly made a part of the record, a motion for judgment on the pleadings being no place to attach exhibits,

stipulations or other evidential matters. Snowhite v. Tide Water Associated Oil Co., D.C., 40 F. Supp. 739; Cf. United States Trust Co. v. Sears, D.C., 29 F. Supp. 861. However, apart from that, we do not agree with appellee's contention that the action here taken constitutes a dismissal as to it, even though the individual defendants would be protected by the rule from further suit on the same claim."

In the case of Huskey v. United States,[79] it was held that "the voluntary dismissal of action on war risk policy was no bar under procedural rule to subsequent action on policy where first action was not instituted for benefit of actually beneficially interested plaintiff in subsequent action." This case may raise the issue of whether it is absolutely necessary for the application of the "two-dismissal" rule that the defendant in the first action be the same defendant in the second suit dismissed. It will be noted that no such requirement is expressly mentioned in Section 1, Rule 30 of our Rules of Court. Contrary to the Huskey v. United States case is the case of Robertshaw-Fulton Controls Co. v. Noma Electric Corp., elsewhere already quoted, where the ruling was made that "under rule providing that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim, defendants in both actions need not be the same."

A reading of the pertinent portion of the decision in the last case will, however, give us a better import of its ruling and we quote:

> "[4] It is argued on behalf of plaintiff that before Rule 41(a) (1) can be given the interpretation which we place upon it, the defendants in both suits must be the same. With this we do not agree. It is true that subdivision (d) of Rule 41 provides for the awarding of costs in a previously dismissed action 'based upon or including the same claim against the same defendant'. However, there is no such qualification in subdivision (a) of the Rule, of the words 'the same claim', and this omission, we believe, is to be treated as indicating that no such qualification was intended. These two different paragraphs of Rule 41 deal with different subject matter. Apart from this construction which we believe is required, at the time the notice of dismissal was filed in this Court, the real defendant in this suit was actually the same defendant as in the previously dismissed New York suit by reason of the merger of the wholly owned Maryland subsidiary corporation into the New York parent corporation, under the statutes of both Maryland and New York, pursuant to which the merger was accomplished. Rule 25(c) expressly provides that the court may direct the substitution of one corporation for the other."

[79] 29 F. Supp. 283.

It will be seen from the above quotation that the court's ruling that the defendant in both actions need not be the same was an *obiter dicta* not required for the resolution of the issue therein presented; for as the court itself found, "the real defendant in this suit was actually the same defendant as in the previously dismissed New York suit by reason of the merger of the wholly owned Maryland subsidiary corporation into the New York parent corporation, under the statutes of both Maryland and New York, pursuant to which the merger was accomplished.

In view of these conflicting decisions, it is submitted that the better view is to apply the rules in *res adjudicata* of which the "two-dismissal" rule is a form. It is well settled that "a judgment rendered in one case is conclusive in a subsequent case if there is, between the two cases, identity of the parties, of subject matter, and of cause of action".[80] As to the "identity of the parties", the rule in *res adjudicata* is that "the parties in the second case must be the same as the parties in the first case, or, at least, must be successors in interest by title subsequent to the commencement of the former action or proceeding."[81] Heirs[82] or purchasers[83] who acquire title after the commencement of the former action or proceeding are thus considered identical parties with their predecessors-in-interest.

Former Chief Justice Moran gives the classic example that "if an action is filed against the vendor after he had parted with his title in favor of a third person, the latter is not bound by any judgment which may be rendered

[80] I Moran, Comments on the Rules of Court, 708.
[81] Moran, supra.
[82] Chua Tam v. Del Rosario, 57 Phil. 411; Martinez v. Graño, 51 Phil. 287; Ramiro v. Graño, 54 Phil. 744.
[83] Baguinguito v. Rivera, 56 Phil. 423; Barretto v. Cabanguis, 37 Phil. 98; Fetalin v. Sanz, 44 Phil. 291.

against the former".[84] In the same way, if an action is brought against the vendor after he had parted with his title in favor of a third person and is dismissed by the plaintiff precisely because of the already want of interest of such vendor and another action is brought against the third person or purchaser, which is also subsequently dismissed, the latter dismissal cannot be considered a second dismissal of the same claim operating as an adjudication on the merits.

All other rulings as to the identity of the parties in *res adjudicata* should also apply under the "two-dismissal" rule, such as "that there is still identity of parties although in the second action there is one party who was not joined in the former action, if it appears that such party is not a necessary party either in the first or in the second action", and "although, in the second action, there are joined necessary parties who are not joined in the first action, there is still *res adjudicata* if the person against whom the judgment is offered in a subsequent case, was a party in the first case".[85]

The question may arise whether the first dismissal under the "two-dismissal" rule must also be a dismissal under Section 1, Rule 30 of the Rules of Court which must be made before service of the answer. If we read carefully the statement of the "two-dismissal" rule, we will find that all that is required is that the same claim be once dismissed by the plaintiff. Dismissal by the plaintiff is not limited to Section 1, Rule 30 of the Rules of Court. Under said section, the plaintiff is given absolute right to dismiss but under Section 2 of the same Rule 30, dismissal is also by the plaintiff although not as a matter of absolute right but subject to the court's discretion. Thus, the first sentence of said section provides:

> "Except as provided in the preceding section, 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." (Emphasis supplied)

In fact, under Rule 41 of the Federal Rules of Civil

[84] Moran, supra.
[85] Moran, supra, 708-709.

Procedure, the provision corresponding to Sections 1 and 2 of our Rule 30 are classified under the term "voluntary dismissal", while dismissals not held at the instance of the plaintiff are termed "involuntary dismissal."

It is, therefore, submitted that as long as a dismissal is voluntary on the part of the plaintiff, whether as a matter of right under Section 1 or upon application to the court under Section 2 of Rule 30, the dismissal is properly one upon which the "two-dismissal" rule may be applied if a second dismissal is had by the plaintiff on an action based on or including the same claim.

In the case of Huskey v. United States already cited, the first dismissal was had for the plaintiff after the evidences were all in for the plaintiff and defendant, and it was still properly considered in the determination of the applicability of the "two-dismissal" rule although the said rule was held inapplicable in said case for the reason that the "first action was not instituted for benefit of actually beneficially interested plaintiff in subsequent action."

(e) *Competent court*

In stating the "two-dismissal" rule, Rule 41(a) paragraph 1 of the Federal Rules of Civil Procedure requires that the second dismissal must be "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." On the other hand, the rule, as embodied in Section 1, Rule 30 of our Rules of Court, states that the plaintiff who files the second dismissal must have "once dismissed in a competent court an action based on or including the same claim.

Under the rule in the United States, it is clear that the first dismissal must have been made in an American court whether federal or state in order that a second dismissal, under the Federal Rules of Civil Procedure, may be considered an adjudication upon the merits. Under the rule in the Philippines, however, there is no qualification as to the nationality of the court in which the first dismissal may be obtained. The only requirement is that it be a "competent court". It would seem, therefore, that if an action was before a competent court in a foreign

country and then dismissed by the plaintiff who reinstitutes the same in a court of the Philippines and dismisses it also here, the "two-dismissal" rule will be applicable to the claim.

Another question that may arise is whether an action dismissed by a plaintiff in a court without jurisdiction constitutes sufficient dismissal to place the second dismissal of the same claims under the application of the "two-dismissal" rule. We submit that a distinction should be made as to whether the want of jurisdiction of the court is over the subject matter of the action or over the person of the defendant. If the court has no jurisdiction over the subject matter of the action, such as if a claim for ₱100 is originally instituted in the Court of First Instance, the dismissal of that action by the plaintiff, in our opinion, does not constitute dismissal in a "competent court" within the contemplation of the "two-dismissal" rule for the court is totally incompetent to try the case.

On the other hand, if the want of jurisdiction of the court is over the person of the defendant and the plaintiff dismisses the action before that jurisdiction is acquired, such dismissal is, we submit, a dismissal "in a competent court." For example, if an action for ₱10,000 is brought in a Court of First Instance but is dismissed by the plaintiff before service of the summons is served upon the defendant, the dismissal is from "a competent court" because the Court of First Instance could have competently tried the case even if jurisdiction was not obtained over the person of the defendant, the only effect being that the judgment, although competently arrived at, would not be binding upon said defendant.

As a corollary to this opinion, we submit that, even if the defendant has not yet been served with summons, a dismissal of the action by the plaintiff is sufficient within the contemplation of Section 1, Rule 30 of the Rules of Court to constitute either a first or a second dismissal, as the case may be, for the purposes of the "two-dismissal" rule. We believe this is further supported by Section 2, Rule 2 of the Rules of Court which provides that "a civil action is commenced by filing a complaint with the court." Even without service of summons on the defendant, therefore, as long as a complaint has been filed with the court, a civil action exists and any withdrawal of such action already commenced necessarily constitutes a dismissal thereof.

(f) *Action Based on or Including the Same Claim*

The phrase, "action based on or including the same claim", implies that the second action dismissed may include only some or part of the claims in the first case and that said first case may only have been dismissed as to such part. "It is generally held that the plaintiff may withdraw, dismiss, or enter a *nolle prosequi* as to a part of his demand or cause of action.[86] We have quoted the decision in the case of Deal v. Camden Fire Insurance Co., where it was held that by striking out or withdrawing two of her three counts, the plaintiff obtained a voluntary nonsuit as to them.

Here again we submit that the rules for *res adjudicata* as to "identity of subject matter" and "identity of cause of action or issue" should govern. Thus, the subject matter of the second case dismissed must be the same as, or included in, the subject matter of the first dismissed action.[87] The following test for "identity of causes of action" in *res adjudicata* may well serve to determine if the first action dismissed is based on or includes the same claim as the second dismissed action to make the "two-dismissal" rule applicable:

> "Would the same evidence support and establish both the present and the former causes of action?" [88]

The "Two-Dismissal" Rule When the Second Dismissal Is After Answer

Strictly, the "two-dismissal" rule wherein the second dismissal "operates as an adjudication upon the merits" would apply only when the second dismissal is made by the plaintiff before service of the answer although, as we have discussed, the first dismissal may have been made after service of the answer and with court order. This

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86 27 C.J.S. 187.
87 Tan Suyco v. Javier, 21 Phil. 82.
88 Black on Judgments, par. 726, cited in Peñalosa v. Tuason, 22 Phil. 303, 302.

is so because, not only is the "two-dismissal" rule embodied in Sec. 1, Rule 30 of the Rules of Court, but its effect is automatic upon the filing of the notice of the second dismissal without any court order. The question is, however, worthy of study whether a second dismissal, had at the instance of the plaintiff after service of the answer, does or does not operate as an adjudication upon the merits.

A dismissal by the plaintiff after the service of answer, even if it be a second one of the same claim must fall under Sec. 2, Rule 30 of our Rules of Court which provides:

> "*By order of the court.*—Except as provided in the preceding section, 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 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 independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph shall be without prejudice. A class action shall not be dismissed or compromised without the approval of the court."

It would seem, therefore, that the effect of a dismissal after service of the answer, even if it be a second one by the plaintiff, must depend upon the discretion of the court. It is submitted, however, that in the exercise of that discretion the court must take into account the principle of the "two-dismissal" rule. In other words, unless there are strong and potent reasons to justify granting the plaintiff a second dismissal without prejudice, the court, following the principle of the "two-dismissal" rule, should order the dismissal without day.

Reference is made to the fact that while Section 2 above quoted gives the court wide latitude in the manner of dismissals after service of the answer, it provides that "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 independent adjudication by the court." In other words, if the counterclaim cannot remain pending for independent adjudication and the defendant objects to the plaintiff's

motion to dismiss, the court cannot grant the dismissal. In the same manner, in view of the procedural acceptance reflected in the "two-dismissal" rule that a third suit on the same claims is *per se* or conclusively vexatious, the court cannot, we submit, over the objection of the defendant, dismiss without prejudice a second action based on the same claims as a former one already dismissed. If it does so, it commits, in our view, an abuse of discretion, in the same way that in the case of International Shoe Co. v. Cool,[89] where the action had been pending for nine years, the complaint had been amended three times, there had been ample opportunity to prepare the case for trial, plaintiff had submitted his case and the court had announced its decision to direct a verdict for defendant, it was held that it was an abuse of discretion for the court to permit plaintiff to dismiss without prejudice. Under such circumstances, we believe the plaintiff should be made to go through with the litigation or suffer the dismissal of the case with prejudice.

We believe we have support for this theory in the case of Cleveland Trust Co. v. Osher & Reiss, we have often quoted. In that case a "motion to withdraw the Frenier Patent No. 1,379,009, one of the patents on which this suit was originally brought, was made by the plaintiff, at the opening of the trial", or after the court had acquired discretion over the dismissal. It was held:

> "The purpose of Rule 41 was to prevent the delays in litigations by numerous dismissals without prejudice. Prior to the time when the rules went into effect, there had been dismissals without prejudice on motion of the plaintiff, an action based on or including the same claim in the Frenier Patent in suit having been so dismissed. These dismissals did not on the rule taking effect cause a dismissal on the merits, but actions based on or including the same claim having been dismissed without prejudice on the plaintiff's motion before the rule went into effect, the motion subsequently made on the trial of this case by plaintiff is and must be considered as made under and covered by Rule 41 supra.
>
> "The motion for leave to withdraw or dismiss, made by the plaintiff in this case as to the claims alleged in this suit as to the Frenier Patent No. 1,379,008 is granted, but is so granted as an adjudication on the merits." [90]

[89] 154 F. (2d) 778.
[90] Pp. 1009-1010, April 17, 1939.

Conclusion

The "two-dismissal" rule is new in our system of procedure but it evidences progress in that field. It is a rule based on fair play. No doubt, it will be criticized by those who will be prejudiced by its application that it is a technicality which prevents a trial on the merits. That it will prevent a trial on the merits, we admit, but that it is a technicality we cannot agree. Even if a rule be procedural, if it results in the final adjudication of certain claims, it cannot be a technicality.

The nature of the "two-dismissal" rule is like that of the law of prescriptions. When an action has prescribed, trial upon the merits is prevented. But the law is based on sound public policy.

One of the express objects of the Rules of Court is "to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding." [91] A thorough examination of the Rules of Court will show that in order to accomplish this objective, it has sanctioned the forfeiture of trial on the merits as a penalty for plaintiffs who unnecessarily delay proceedings. A good example is, of course, the "two-dismissal" rule. To discourage and stop numerous dismissals without prejudice, the Rules provide that a second dismissal "operates as an adjudication upon the merits." And this is not an isolated instance.

If we glance over Rule 30 alone, we will find that the Rules are more prone to declaring cases adjudicated upon the merits without formal trial than our old Code of Civil Procedure. Thus, under Sec. 3 of said Rule 30, a dismissal for "failure to prosecute" "shall have the effect of an adjudication upon the merits, unless otherwise provided by the court", while "under the old procedure, the dismissal is without prejudice".[92] Our Supreme Court has applied this rule in the cases of Ouye v. American President Lines, Ltd.,[93] and Gorospe, et al. v. Millan, et al., supra, with the statement that "the dismissal of a case, upon defendant's motion, for plaintiff's failure to appear, has the

[91] Sec. 2, Rule 1, Rules of Court.
[92] I Moran, supra, 515, quoted in Gorospe, et al. v. Millan, et al., 48 Off. Gaz. 572, 576.
[93] 44 Off. Gaz., 29.

effect of an adjudication upon the merits, if the court fails to provide otherwise."

Again, under Section 4 of the same Rule 30, a "dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits." There was no such provision in Act No. 190 and, in applying it, our Supreme Court in the case of Florendo v. Gonzales, et al.,[94] held that "unless otherwise ordered by the court, a dismissal upon motion of defendant based on the ground that the complaint does not allege facts sufficient to constitute a cause of action, is an adjudication upon the merits."

That these provisions forfeiting all rights to a trial on the merits are aimed to accomplish the express object of the Rules of Court "to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding" has been affirmed by our Supreme Court when, in sustaining a dismissal, for failure to prosecute, as an adjudication upon the merits in the case of Gorospe, et al. v. Millan, et al., above cited, it declared:

> "La innovación acelera el despacho de asuntos. Los demandantes deben presentar sus pruebas sin dilación y no deben entretener a los demandados y a los Juzgados en mociones de transferencia de vista."

Under authority of said case, we can say that the introduction of the "two-dismissal" rule speeds up the disposition of cases and the plaintiffs should not harrass the defendants and burden the court with dismissals without prejudice.

While the rules should be liberally construed, "strict compliance" with them is "mandatory" and of "imperative necessity",[95] for "substantial justice", as the aim of liberal construction, must "be ascertained and determined by fixed rules and positive statutes" [96] of which the "two-dismissal" rule, contained in Section 1, Rule 30 of the Rules of Court, is one.

[94] 48 Off. Gaz. 1323.
[95] Alvero v. De la Rosa, 42 O.G. 3161.
[96] Stevens v. Ross, 1 Cal. 95.