RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e) and of any statute, an action may be dismissed by the plaintiff without order of court (A) 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 (B) by filing a stipulation of dismissal signed by all parties that have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, plaintiffs, or defendants. 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 that has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(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 order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant before the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) *On Court's Own Motion.* The court, on its own motion, after notice to the parties, and in the absence of a showing of good cause to the contrary, shall dismiss an action for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance.

(2) *On Motion of Defendant.* For failure of the plaintiff to prosecute for 2 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) *Effect.* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff that has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Advisory Note – November 2023

Subdivision (a)(1) of Rule 41 is amended to allow for dismissal under this paragraph as to fewer than all plaintiffs or defendants.

The rule is also amended to make numbering consistent and to make stylistic changes not affecting the substance of the rule.

Advisory Committee's Notes
1989

Rule 41(a)(l) is amended to provide that the plaintiff may unilaterally dismiss an action only prior to the filing of the answer or a motion for summary judgment, rather than at any time prior to trial, as formerly.

The amendment adopts the language of Federal Rule 41(a)(1). The Maine Rule as promulgated in 1959 departed from the Federal Rule in deference to prior Maine practice. *See* Reporter's Notes to M.R. Civ. P. 41(a); 1 Field, McKusick, and Wroth, *Maine Civil Practice* § 41.1 (2d ed. 1970). The development of extensive pretrial discovery practice and the recent emphasis on expedited pretrial procedure in Maine mean that plaintiffs should no longer have the tactical ability to impose expense and delay on other parties or avoid

rule- or court-imposed deadlines by dismissal after extensive pretrial proceedings have taken place. The amendment will change the result of *Hall v. Norton,* 549 A.2d 372 (Me. 1988), in which the Law Court upheld a voluntary dismissal filed without prior notice to the court or defendant at 9:00 on the morning on which jury selection was to begin.

Advisory Committee's Note
February 1, 1983

Rule 41(b)(2) is amended by deleting the last three sentences, which are to be incorporated for clarity in new Rule 50(d), added by simultaneous amendment. See Advisory Committee's note to that amendment.

Advisory Committee's Note
November 1, 1969

Under existing Rule 41(a)(1) it is unclear whether a plaintiff may voluntarily dismiss without order of court as to fewer than all claims involved in the complaint or as to fewer than all defendants and whether one of several plaintiffs may take a voluntary dismissal without order of court. Although the language of the rule reading "an *action* may be dismissed by the plaintiff" would seem to exclude such partial dismissals, 5 Moore § 41.06-1 argues that voluntary dismissals as to one party or one claim should be permitted under Federal Rule 41(a). Moore also points to Rule 21 and Rule 15 as bases for motions to dismiss as to one party and as to one claim, respectively, but dismissal under both rules of course requires the court's approval upon motion.

It is thought undesirable policy to permit free withdrawal of one of several plaintiffs or free dismissal as to one of several defendants, because this makes for piecemeal litigation. Federal Rule 41(a) permits voluntary dismissal without court approval only up until the filing of the answer or a motion for summary judgment; in Maine such voluntary dismissal may come as late as the eve of trial, at a time when other parties may have expended great time and effort as to the plaintiff or the defendant involved in the partial dismissal. For this policy reason it is thought that a court order under Rule 21 or 41(a) (2) should be required for dismissing as to a party.

Some of the same policy considerations militate against permitting voluntary dismissal as to one or more but fewer than all claims. However, there

is a contrary policy favoring any action that the parties may take to delimit the issues between them and thus simplify and expedite the litigation. Weighing these policy considerations in the balance, the Committee believes that voluntary dismissal as to less than all of the claims should be permitted without court approval.

Subject to the provisions of the last sentence of Rule 41(a)(1), a dismissal as to fewer than all the claims would be without prejudice.

Existing Rule 41(b)(1) relating to involuntary dismissal for want of prosecution permits by its terms such dismissal "without notice". In contrast Rule 41 of the District Court Civil Rules has from the beginning provided notice to the parties. Furthermore, in practice, notice is currently given at each term of court of those cases in which no action has been taken for more than two years and dismissal is ordered by the presiding justice only after the list of such cases, of which the counsel involved had been notified, is called in open court. This is done out of a feeling that such notice is required by common fairness, if not by the requirements of constitutional due process. The amendment expressly requires notice to be given.

Explanation of Amendments
November 1, 1966

These amendments to subdivisions (b) (2) and (b) (3) were taken respectively from 1963 and 1966 amendments to F.R. 41(b). The changes in Rule 41(b) (2) were to make clear that it applies only to actions tried without jury; the appropriate motion in a jury case is for a directed verdict under Rule 50(a). The previous overlap between the two rules had caused some confusion. The change in Rule 41(b) (3) was simply to substitute a reference to the amended Rule 19 for the present provision referring to dismissal for lack of an indispensable party.

Reporter's Notes
December 1, 1959

This rule substantially modifies Federal Rule 41. It continues the existing Maine practice which allows the plaintiff to take a voluntary nonsuit as of right at any time before the commencement of the trial. *Hayden v. Maine Central R. R. Co.*, 118 Me. 442, 108 A. 681 (1920). It is intended that "commencement of

the trial" shall refer to the same time as "opening his case to jury, or to the court, when tried before the court without the intervention of a jury," the language used in the *Hayden* case, 118 Me. at 447, 108 A. at 683. The rule is couched in terms of "voluntary dismissal" instead of "nonsuit" to conform to the federal terminology.

A voluntary dismissal, like a nonsuit, is without prejudice the first time, but the rule provides that a second voluntary dismissal of the same claim operates as an adjudication on the merits.

Rule 41(a) (2) deals with a dismissal by order of the court, which may be upon such terms as the court deems proper. It further provides that voluntary dismissal cannot defeat a counterclaim already pleaded. A dismissal under this paragraph is without prejudice unless otherwise specified in the order.

Rule 41(b) (1) incorporates the present Maine rule for dismissal for want of prosecution for two years either at law (Revised Rules of Court 41) or in equity (Equity Rule 42) unless good cause is shown. Rule 41(b) (2) permits a defendant to move for dismissal at the close of the plaintiff's case without waiving the right himself to produce evidence if the motion is denied and with res judicata effect if the motion is granted. This is contrary to Maine practice, *Pendergrass v. York Mfg. Co.*, 76 Me. 509, but the change seems wise, particularly in the light of the court's discretionary power to dismiss without prejudice if it appears that the plaintiff deserves a chance to remedy the defect in his proof.

Rule 41(b) (3) makes it clear that any dismissal under this subdivision, whether by the court for want of prosecution or on motion of the defendant, operates as an adjudication on the merits. As indicated above, this is a change from the present law with respect to a nonsuit at the close of the plaintiff's case, but it appears to be in accord with existing law with respect to dismissal for want of prosecution. *Cf. S. D. Warren Co. v. Fritz,* 138 Me. 279, 25 A.2d 645 (1942); *Davis v. Cass*, 127 Me. 167, 142 A. 377 (1928).

Rule 41(d) is designed to prevent vexatious litigation. It is comparable to but less severe than R.S.1954, Chap. 113, Sec. 164 (amended in 1959) [now 14 M.R.S.A. § 1510]. The rule is permissive, whereas the statute is mandatory. In one respect, however, the rule is broader than the statute, since it in terms covers a prior action brought in another state or a Federal court, whereas the statute does not. *Folan v. Lary*, 60 Me. 545 (1872).