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Merrill N. Johnson
University of Michigan Law School

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FEDERAL COURTS—FEDERAL RULES OF CIVIL PROCEDURE—DUTY OF COURT IN NON-JURY ACTION ON MOTION TO DISMISS UNDER RULE 41 (b)—The federal government brought an action to restrain the United States Gypsum Company and thirteen other corporate and individual defendants from alleged violations of the Sherman Anti-Trust Act. Most of the government's evidence came from defendant's officers, employees, and documents with the result that evidence favorable to both the plaintiff and defendants was presented. The government's case required over five months to present and 10,000 pages to record. The defendants then moved to dismiss the complaint with prejudice under Rule 41 (b).[1] In the hearing on this motion, the government contended that the sole question presented was one of law, namely, whether the evidence made out a prima facie case. The defendants asserted that under Rule 41 (b) the trial judge must weigh the evidence, draw inferences therefrom and, if the facts were found insufficient to support the plaintiff's complaint, render a decision for the defendants on the merits and make findings of fact and law. *Held*, the defendant's position was correct. The court then proceeded to dismiss the government's action with prejudice. *United States v. United States Gypsum Company*, (D. C. D. C. 1946) 67 F. Supp. 397.

The problem under discussion may appear at first blush to be academic, but substantial issues of trial convenience and litigant's procedural rights are involved. The Third Circuit Court of Appeals has been instrumental in formulating the view [2] advanced by the government in the principal case.[3] This view may be supported by a literal interpretation of the Notes of the Advisory Committee on Rules of Civil Procedure [4] and by federal practice prior to the adoption of the Federal Rules. At English common law the defendant might attack the legal sufficiency of the plaintiff's evidence by a demurrer to the evidence.[5] The trial judge faced with this demurrer, or with the motion for nonsuit or motion for directed verdict which gradually in modern practice supplanted the de-

[1] ". . . After the plaintiff has completed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits." Rule 41 (b), Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C. (1940) following § 723.

[2] Federal Deposit Ins. Corp. v. Mason, (C.C.A. 3d, 1940) 115 F. (2d) 548; Schad v. 20th Century-Fox Film Corp., (C.C.A. 3d, 1943) 136 F. (2d) 991.

[3] United States v. United States Gypsum Co., (D. C. D. C. 1946) 67 F. Supp. 397.

[4] Note to subdivision (b). "This provides for the equivalent of a nonsuit. . . . Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50." Notes of Advisory Committee on Rules, 28 U.S.C. following § 723. It may be significant that Judge Clark, who was on the Advisory Committee and assisted in drafting the Federal Rules and Notes, is on the third circuit bench. However, Judge Clark did not take part in the decisions which formulated the circuit's interpretation of Rule 41 (b).

[5] Gibson v. Hunter, 2 H. Bl. 187 (1793); Fowle v. Common Council of Alexandria, 11 Wheat. (24 U.S.) 320 (1826); STEPHEN, PRINCIPLES OF PLEADING, 3d Am. ed., 122 (1900).

murrer,[6] was required to rule solely upon the legal effect of the plaintiff's evidence, "for only the jury could have the right to decide to the contrary upon that material." [7] Probably by the unnoticed process of generalization, this same procedure was applied to non-jury actions in federal courts before the Federal Rules,[8] and at the present time many state courts treat a demurrer to the evidence or its statutory successor in the same manner whether used in a jury or a non-jury action.[9] But this analogical reasoning of the third circuit is, it is submitted, in the teeth of the express provisions of Rule 1 and 41 (b). Such a construction does not fit into the tenor of the Federal Rules "to secure the just, speedy and inexpensive determination of every action," [10] as apparent in the principal case.[11] The motion is specifically made "on the ground that upon the facts and the law the plaintiff has shown no right to relief." [12] Logically, the word "facts" should refer to the actual facts as found by the trier of facts, rather than the artificial procedure of considering the facts favorable to the plaintiff and ignoring the facts favorable to the defendant. A differentiation should be made between the duty of the trial judge in jury and non-jury actions. In a non-jury action, where the trial judge has plenary power over both issues of fact and law, to defer the weighing of evidence until the defendant has presented his case when the plaintiff's evidence fails to support his complaint is highly artificial, expensive, and a waste of time. The plaintiff has no substantive or procedural right to demand presentation of the defendant's case.[13] Moreover, under the Federal Rules [14] the plaintiff has opportunity to discover all pertinent information prior to trial and to examine adverse parties during presentation of his case, and thus the plaintiff cannot hope to better his case by attack on the defendant's evidence. The Sixth, Seventh, and Ninth Circuit Courts of Appeals have previously reached [15] substantially the conclusions of the principal case.[16] The Report of Proposed Amendments to the Federal Rules would amend Rule 41 (b) so as

[6] Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24, 11 S. Ct. 478 (1891); SHIPMAN, COMMON-LAW PLEADING, 3d ed., 527 (1923); 64 C.J., Trial, §§ 365-369, pp. 371 et seq.

[7] 9 WIGMORE, EVIDENCE, 3d. ed., § 2495 (1940).

[8] Maryland Casualty Co. v. Jones, 279 U.S. 792, 49 S. Ct. 484 (1929); Jefferson Electric Mfg. Co. v. United States, 291 U.S. 386, 54 S. Ct. 443 (1934).

[9] Spahn v. Mandell, 111 N.J.L. 144, 167 A. 663 (1933); Ace-High Dresses, Inc. v. J. C. Trucking Co., Inc., 122 Conn. 578, 191 A. 536 (1937).

[10] Rule 1, Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C. (1940) following § 723.

[11] Supra, note 3.

[12] Rule 41 (b), Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C. (1940) following § 723.

[13] Porter v. Wilson, 239 U.S. 170, 36 S. Ct. 91 (1915).

[14] Rules 26 to 37 make liberal provision for pre-trial depositions and discovery. Rule 43 (b) allows interrogation of hostile persons during presentation of a party's evidence. Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C. (1940) following § 723.

[15] Bach v. Friden Calculating Machine Co., (C.C.A. 6th, 1945) 148 F. (2d) 407; Gary Theatre Corp. v. Columbia Pictures Co., (C.C.A. 7th, 1941) 120 F. (2d) 891; Young v. United States, (C.C.A. 9th, 1940) 111 F. (2d) 823.

[16] Supra, note 3.

to adopt this majority view.[17] It would appear, therefore, in a non-jury action that upon a motion to dismiss under Rule 41 (b) the court should decide whether the plaintiff has established a right to relief by a preponderence of the evidence presented. If so, the motion should be overruled and the defendant proceed with his case; if not, the motion should be granted, the action dismissed with prejudice, and findings of fact and conclusions of law filed as provided by Rule 52 (a).

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[17] The addition of the following two sentences is recommended: "In an action tried by the court without a jury the court as trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a)." REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, submitted to the Supreme Court of the United States June 14, 1946, by the Advisory Committee on Rules of Civil Procedure, adopted by the Supreme Court of the United States December 27, 1946, and placed before the 80th Congress January 3, 1947. If no unfavorable action is taken by Congress this term, the adopted amendments will then become effective as law by authority of 28 U.S.C. (1940) § 723; 6 F.R.D. 229 et seq. (1947); 9 FED. RULES SERV. 986 (1946).