3) The last paragraph of Uniform Jury Instruction No. 520.8 (relating to O.M.V.U.I.) is an unconstitutional application of the *Code* section 321.281 so-called "presumption" of intoxication arising from the presence of a specified percentage of alcohol in the accused's blood. (Iowa Sup. Ct.).

4) The "Allen" or "dynamite" verdict-urging charge to a deadlocked jury does not *per se* deny a fair trial. (Iowa Sup. Ct.).

5) Trial courts must instruct *sua sponte* that "consideration of defendant's previous felony convictions must be limited to defendant's credibility as a witness." (Iowa Sup. Ct.).

F. *Sentencing*

1) "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." (U.S. Sup. Ct.).

2) The abovementioned rule is to be applied prosepectively only by Iowa trial courts. (Iowa Sup. Ct.).

3) Default imprisonment as the only alternative to immediate, albeit non-wilful, *in toto* payment of a fine denies equal protection to an indigent. (Iowa Sup. Ct.).

4) Express legislative authority for deferred sentencing is granted effective August 15, 1973, following Iowa supreme court ruling that there was no such prior legislative authority, nor inherent power to do so. (Iowa Sup.Ct.).

5) Sentencing must be done on an individualized basis rather than pursuant to sentencing pacts. (Iowa Sup. Ct.).

6) The general bar on harsher punishment after a retrial on remand to the same trial court is not applicable to trials de novo on appeal to a higher trial court. (Iowa Sup. Ct.).

G. *Posttrial Matters*

1) The conditional exception "or not raised" in the non-relitigation clause in *Code* section 663A.8 does not permit the use of postconviction relief as a substitute for the requirement of lodging objections at trial. (Iowa Sup. Ct.).

2) Iowa's no-hearing parole revocation procedure violates due process. (U.S. Sup. Ct.).

3) States also must provide a two-stage hearing in their probation revocation proceedings. (U.S. Sup. Ct.).

4) There is no *absolute* sixth amendment right to counsel in either parole revocation hearings or in probation revocation hearings; instead the need for counsel must be determined on a case-by-case basis. (U.S. Sup. Ct.).

5) The requisite degree of the State's proof for revocation of probation (and presumably parole) is "a preponderance of the evidence." (Iowa Sup. Ct.).

Notes

IOWA RULE 215.1—MANDATORY DISMISSAL FOR WANT OF PROSECUTION—THE FLEXIBLE TRAP

The number and diversity of local mandatory dismissal rules designed to expedite litigation and clear dockets of stale cases[1] led to the adoption of Rule 215.1 in 1961.[2] The rule is intended to discourage dilatory tactics and require reasonable diligence to see that actions are brought to trial promptly[3] in a manner that is uniform throughout the state.[4]

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1. Fischer v. Hauber, 257 Iowa 793, 134 N.W.2d 918 (1965); Seela v. Haye, 256 Iowa 606, 128 N.W.2d 279 (1964); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963).

2. IOWA R. CIV. P. 215.1 provides:

> It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.
>
> All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in Rule 82 of:
>
> (a) the docket number,
> (b) the names of parties,
> (c) counsel appearing,
> (d) date of filing petition,
>
> and the notice shall state that such case will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte. This rule shall not apply to cases (a) pending on appeal from a court of record to a higher court or under order of submission to the court; (b) in which proceedings subsequent to judgment are pending; (c) which have been stayed pursuant to the Soldiers and Sailors Civil Relief Act; (d) which have been filed but in which plaintiff has been unable by due diligence to obtain service of original notice; (e) where a party is paying a claim pursuant to written stipulation on file or court order; and (f) awaiting the action of a referee, master or other court appointed officer; provided, however, that a finding as to "a" through "f" is made and entered of record.
>
> No continuance under this rule shall be by stipulation of parties alone but must be by order of court. Where appropriate the order of continuance shall be to a date certain.
>
> The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

3. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966); McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964). *See also* Annot., 5 A.L.R. FED. 897 (1970) (treatment of the federal rule).

4. Rule 215.1 now constitutes "the sole method for dismissing a case for want of prosecution, thus eliminating any and all prior local court rules upon this proposition." Seela v. Haye, 256 Iowa 606, 609, 128 N.W.2d 279, 280 (1964).

There are several requirements for cases which come within the rule. The rule applies to all cases in which the petition has been on file for more than one year on any July 15.[5] The clerk is required to give notice to counsel of record[6] in those actions prior to August 15, informing them that the case must be tried prior to the following January 1 or be subject to dismissal. All such cases must be assigned and tried or dismissed without prejudice at plaintiff's costs unless "satisfactory grounds for continuance be shown."[7] A continuance can only be secured by a stipulation of the parties or a hearing after due notice *and* a court order continuing the case obtained prior to the mandatory dismissal date.[8] An amendment to the rule in 1965 expressly provided for reinstatement of the action on a showing of "oversight, mistake, or other reasonable cause" to be made within six months of the date of dismissal.[9] The trial court is given jurisdiction to reinstate any cause so dismissed,[10] and is directed to reinstate those where there is a showing of "oversight, mistake, or other reasonable cause."[11] Although the rule gives the trial court some discretion in dealing with grounds for continuance and reinstatement,[12] its terms are otherwise mandatory and give the court no discretion when a plaintiff has not complied with the terms of the rule.[13]

Any analysis of this rule must consider the five most litigated elements involved: (1) the notice by the clerk; (2) the option to assign and try the case before January 1; (3) the option of securing a continuance; (4) the resulting dismissal; and (5) the application for reinstatement. The nature, timing, and effect of each is not always clear since the court has, in recent situations, chosen a more lenient approach than it had in earlier interpretations of the rule.[14] The amendment allowing for discretionary (and in some cases mandatory) reinstatement as well as the court's abhorrence of using the rule to "trap a diligent party"[15] have begun to bend the former hard-line stand on the "positive and definite"[16] terms of Rule 215.1.

I. Notice by the Clerk

Perhaps the clearest element of the rule is the clerk's notice that brings a lawsuit within its terms. On each July 15, all cases at law or equity[17] where

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5. There are six exceptions listed in Rule 215.1 that are exempt from its operation. *See* note 2 *supra.*
6. *See* note 18 *infra.*
7. Iowa R. Civ. P. 215.1.
8. *Id.*; *see also* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).
9. *See* note 79 *infra.*
10. Johnson v. Linquist, 184 N.W.2d 681 (Iowa 1971).
11. Rath v. Sholty, 199 N.W.2d 333 (Iowa 1972).
12. *See* text accompanying notes 45 and 80 *infra*, and note 79 *infra.*
13. *See* note 46 *infra.*
14. *See* notes 40, 48, 51 and 96 *infra.*
15. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).
16. *See* Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963).
17. There are six exceptions listed in the rule. *See* note 2 *supra.*

the petition has been on file more than one year are subject to such notice. Rule 215.1 imposes a mandatory duty upon clerks of trial courts to give notice to counsel of record[18] by mail or delivery[19] prior to August 15.[20] Failure to mail the notice before August 15 satisfies the "mistake, neglect, or omission of the clerk" requirement for reinstatement of a dismissed action under Rule 252(a).[21] It could also come within the provision of Rule 215.1 allowing for reinstatement on application within six months for "oversight" or "mistake."[22] The clerk's duty is performed when he gives the prescribed notice, and he is not required to assign the case for trial or to see that it is tried.[23]

The rule prescribes that the notice state (a) the docket number, (b) the names of the parties, (c) counsel appearing, (d) date of filing the petition, and (e) that such case will be set for trial and subject to dismissal if not tried prior to January 1 of the succeeding year.[24]

The operation of the rule cannot be delayed in favor of a plaintiff by bringing in an additional defendant at a later date,[25] or by bringing in a defendant by cross-petition.[26] The court has held that a Rule 215.1 notice is ultra vires as to cases less than one year old. It does not deprive the court of any discretion in the action as it relates to such "later" defendants,[27] does not make mandatory the assignment and trial of the case as to them,[28] and does not create in later-added defendants any independent right to dismissal.[29]

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18. It is proper for the clerk to give notice to all counsel including those representing defendants recently included and against whom the action is not yet a year old. Although such notice is useful so they may also know of the situation, it gives them no independent right to dismissal. Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966).

19. Notice is given in the manner prescribed by Rule 82, which requires that "copies shall be mailed or delivered forthwith by the clerk to the attorney of record . . . if appearance is by attorney; otherwise to the parties."

20. A "try or dismiss" notice not mailed or delivered *prior* to August 15 fails to conform to the Rule 215.1 requirement and is not binding on the plaintiff. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Seela v. Haye, 256 Iowa 606, 128 N.W.2d 279 (1964).

The language that Rule 215.1 notice must be mailed or delivered *prior* to August 15 appeared in the *Schmidt* and *Seela* decisions, but there the plaintiff had received no notice. Should the notice be in substantial compliance (i.e., only a day late), the necessity of waiting another year for "due" notice may make the court more strict with a case of willful procrastination or gross neglect.

21. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Seela v. Haye, 256 Iowa 606, 128 N.W.2d 279 (1964). Although the *Schmidt* decision came after the amendment to Rule 215.1 allowing for more liberal reinstatement, plaintiff did not petition to vacate the judgment until more than six months had elapsed.

22. Rule 215.1 allows reinstatement "without limitation as to whose conduct must provide the cause." Rath v. Sholty, 199 N.W.2d 333, 337 (Iowa 1972).

23. Fischer v. Hauber, 257 Iowa 793, 134 N.W.2d 918 (1965); Gammel v. Perry, 256 Iowa 1129, 130 N.W.2d 550 (1964); Seela v. Haye, 256 Iowa 606, 128 N.W.2d 279 (1964); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963).

24. Iowa R. Civ. P. 215.1.

25. Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966).

26. Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962).

27. Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966).

28. *Id.*

29. *Id.* The court explains this interpretation by stating that a case may be divisible, so the rights of the two defendants need not necessarily be tried together.

Parties who receive the notice are charged with protecting their rights.[30] Once the notice is given, the alternatives are (a) assignment and trial, (b) dismissal without prejudice, or (c) continuation upon showing of satisfactory reasons for want of prosecution or grounds for continuance.[31]

II. Assigned, Tried or Dismissed

The Iowa supreme court has interpreted Rule 215.1 to mandate that cases shall be "assigned *and* tried or dismissed."[32] Assignment of the case for trial in the term following the mandatory dismissal date is expressly deemed inadequate to avoid dismissal[33] unless accompanied by an order continuing the action duly obtained[34] prior to the mandatory dismissal date.[35] A recent exception to the requirement that assignment *and* trial be before the dismissal date came in *Kutrules v. Suchomel*.[36] There the case (for a reason not apparent from the record) was assigned for trial on the first day of the term following the mandatory dismissal date without a motion for continuance. In reversing the dismissal and reinstating the case the court distinguished the former interpretation of the rule on the basis that it had never said a case "should be dismissed for lack of prosecution while on active trial assignment, assigned for trial on a date certain and before the arrival of the trial date."[37] Although the assignment was not in conformity with the only method allowed to continue the case and avoid mandatory dismissal, the court said "[s]uch a ruling [of dismissal] would be arbitrary and beyond the realm of sound discretion."[38] In *Baty v. City of West Des Moines*,[39] the court in dicta reaffirmed the *Kutrules* rationale.[40] The former hard line on assignment *and* trial before the mandatory

30. Fischer v. Hauber, 257 Iowa 793, 134 N.W.2d 918 (1965); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963).

31. Iowa R. Civ. P. 215.1. *See* Gammel v. Perry, 256 Iowa 1129, 130 N.W.2d 550 (1964); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963).

32. Iowa R. Civ. P. 215.1. *See* Talbot v. Talbot, 255 Iowa 337, 341, 122 N.W.2d 456, 459 (1963); Windus v. Great Plains Gas, 254 Iowa 114, 123, 116 N.W.2d 410, 415 (1962).

33. Gammel v. Perry, 256 Iowa 1129, 130 N.W.2d 550 (1964).

34. The rule is now interpreted to allow a timely application for continuance to avoid a mandatory dismissal, rather than requiring the resulting order of continuance to be of record prior to the mandatory dismissal date. *See* note 55 *infra*.

35. Gammel v. Perry, 256 Iowa 1129, 130 N.W.2d 550 (1964). *See also* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966) (although indicating it is necessarily a more or less arbitrary rule); McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964); Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963).

36. 258 Iowa 1206, 141 N.W.2d 593 (1966).

37. *Id.* at 1213, 141 N.W.2d at 598. The court emphasized that Rule 215.1 is designed to prevent dilatory tactics and to require reasonable diligence. The record indicated that plaintiff was affirmatively asking for trial and not a continuance. The court concluded that the action was not tried because it was not reached in its regular order, and found that the dismissal would be beyond the intent of the rule.

38. *Id.* This is an exception to the view that dismissal is mandatory notwithstanding that plaintiff is not at fault for the delay, and that reasonable care dictates the filing on application for continuance. *See* note 48 *infra*.

39. 259 Iowa 1017, 147 N.W.2d 204 (1966).

40. *Id.* at 1025, 147 N.W.2d at 210. The court states that: "It may be true, when it appears that due to a crowded docket an assigned case is not reached, the court, in compliance with the demand and insistence of the plaintiff, can retain jurisdiction and

dismissal date has thus shifted to an interpretation allowing a case to be moved from term to term ex parte and without the necessity of a formal continuance where plaintiff's diligence and desire for immediate assignment are clear.[41]

The "trial" requirement has been satisfied by a trial ending in a "hung jury" which brings further disposition of the action within the scope of Rule 200 and not 215.1.[42] A continuance then need not be to a specific term or date,[43] and dismissal is not mandatory even though the plaintiff may have taken action to delay retrial.[44]

III. CONTINUANCE

After notice by the clerk under Rule 215.1 the trial court has no discretion to grant a continuance of the matter unless it be (1) by a stipulation between the parties or a hearing after due notice *and* (2) secured by an order of court continuing the case to a future term of date certain, (3) obtained prior to the mandatory dismissal date, and (4) not ex parte.[45] When the dismissal date has passed without compliance with the terms of the rule, the court is without jurisdiction to do anything but dismiss the case.[46] Plaintiff must affirmatively ask

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entertain the cause by immediately placing it on the trial assignment in the succeeding term."

The court in *Baty* explicitly adds that such assignment is "defensive in nature" and "requires an affirmative showing by plaintiff" to avoid mandatory dismissal. Whether that "affirmative showing" follows the procedure for continuance (application, notice, hearing and order), or requires that plaintiff indicate readiness for trial as in *Kutrules* or merely have good cause for reinstatement is not clear. The *Kutrules* filing of certificate of readiness with requests later for immediate assignment should be adequate in a similar factual situation.

41. There appears to be little reason for this exception since the 1965 amendment to Rule 215.1 allowing for liberal reinstatement for "oversight, mistake or other reasonable cause." The necessity of such a reinstatement hearing would further guard against procrastination and dilatory tactics, while protecting an otherwise diligent plaintiff.

42. IOWA R. CIV. P. 200 recognizes an examination before a judge and jury as a "trial." In *Laffoon v. McCombs*, 261 Iowa 341, 344, 154 N.W.2d 68, 70 (1967), the court recognized that a new trial date could have been set by the trial court on his own motion or at the request of a party, but "until something was done by someone, the case was subject to Rule 200 and not Rule 215.1."

Rule 200 requires that the case be "retried immediately or at a future time, as the court directs," and not that the action be continued to a specific date or term. It appears that Rule 215.1 can again apply only when the cause is assigned for trial on a date or term certain, and not merely "continued over the term" as was the action in *Laffoon*.

43. Laffoon v. McCombs, 261 Iowa 341, 154 N.W.2d 68 (1967).

44. An amended and substituted petition was filed subsequent to the first trial in *Laffoon*, and the issues had not been joined by the end of the "try or dismiss" term. Where the reassignment is significantly delayed, however, and the reason for the delay is not "just because a jury has failed to agree," it appears that a defendant must request assignment to guard his rights under Rule 215.1. This is contrary to the rule that a defendant need do nothing to perfect his rights under Rule 215.1. *See* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

45. IOWA R. CIV. P. 215.1. *See* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

46. Johnson v. Linquist, 184 N.W.2d 681 (Iowa 1971); Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966). The exception is where the jury is discharged in a trial before the mandatory dismissal date. The court retains jurisdiction for retrial pursuant to Rule 200, and Rule 215.1 applies when the action is assigned for trial at a date or term certain. *See* note 42 *supra*.

for continuance, since a dismissal is mandatory if no continuance is requested even where grounds for a continuance exist.[47] Even if the case is not at issue, whether the fault be that of the plaintiff or defendant or both, reasonable care dictates the filing of an application for continuance.[48]

Although decisions in the early 1960's stated in dicta that the order granting a continuance must be on file *prior* to the mandatory dismissal date,[49] the court in *Anderson v. National By-Products, Inc.*,[50] found that the trial court could "decline to dismiss" an action where the motion to continue was on file before the mandatory dismissal date. The court reasoned that it may be physically impossible for a busy trial judge to hear and finally dispose of all pending matters before the close of the term. "He has inherent power to defer the hearing" at least until the second day of the immediately succeeding term.[51] The fact that the plaintiff in *Anderson* waited to move for continuance until the last three days (after a delay of several months in filing a recast petition) goes much further than the later *Kutrules*[52] "diligently seeking a trial" rationale for bending the rule, and would have some difficulty in satisfying the "busy lawyer relying on a promised reminder" justification for reinstatement of *Rath v. Sholty*.[53] The *Anderson* recognition of a trial court's "inherent power to defer"—an apparent contradiction to the mandatory dismissal requirement of Rule 215.1[54]—could stand as a powerful precedent for ex parte avoidance of mandatory dismissal if literally interpreted, although later cases have not so extended the rule.[55]

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47. The court in dicta has suggested that (a) the presence of undecided motions or applications, (b) the fact that the case is not at issue, or (c) the case is not ready for trial for any reason may be grounds for continuance. *See* McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964).

48. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964).

The court has excused the requirement of an application for continuance (a) where a busy plaintiff attorney had relied on the assurances of the trial judge that he would "let him know" about assignment, *Rath v. Sholty*, 199 N.W.2d 333 (Iowa 1972); (b) where the action was timely set for trial, but at a date later than the mandatory dismissal date, *Kutrules v. Suchomel*, 258 Iowa 1206, 141 N.W.2d 593 (1966); (c) where the action was not timely tried because it was not reached in its regular order, Kutrules v. *Suchomel, supra*; and (d) where the trial resulted in a "hung jury," necessitating a retrial after the mandatory dismissal date, *Laffoon v. McCombs*, 261 Iowa 341, 154 N.W.2d 68 (1967).

49. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); Gammel v. Perry, 256 Iowa 1129, 130 N.W.2d 550 (1964); Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963).

50. 257 Iowa 921, 135 N.W.2d 602 (1965).

51. The court concluded that they were "not disposed to hold under the circumstances . . . that the power of the court to continue the case and to decline to dismiss it under Rule 215.1 must be exercised at the dismissal term." Anderson v. National By-Products, Inc., 257 Iowa 921, 923, 135 N.W.2d 602, 603 (1965).

This grant of discretion appears to be a contradiction to the mandatory terms of the rule, but may be merely a recognition that the filing of an application for continuance is compliance with the terms of the rule.

52. 258 Iowa 1206, 141 N.W.2d 593 (1966); *see* notes 40 and 41 *supra*.

53. 199 N.W.2d 333 (Iowa 1972).

54. *See* note 46 *supra*.

55. The *Anderson* rationale has been later recognized only in the context of allowing a timely application for continuance to satisfy the terms of the rule. *See* McTaggart & Sons v. White, 257 Iowa 1168, 136 N.W.2d 296 (1965). The court recently affirmed

The trial court has no discretion to continue the matter on its own motion[56] or ex parte.[57] An ex parte oral agreement by the court was first held to be ineffective to continue or reinstate an action subject to Rule 215.1,[58] but *Rath v. Sholty* recognized such an assurance (that the case would be assigned) as a ground for reinstatement.[59] Likewise mere assignment of the case for trial did not at first act as a continuance to avoid immediate mandatory dismissal,[60] but *Kutrules v. Suchomel*[61] clearly excepted cases ready for trial while the plaintiff was affirmatively seeking trial.

A continuance pursuant to Rule 215.1 merely extends the mandatory dismissal date to the date stated in the order, and does not serve to abrogate the rule for the entire remainder of the year and compel a new notice after the next July 15.[62]

The Iowa supreme court has not yet had an opportunity to interpret what constitutes "satisfactory reasons for want of prosecution and grounds for continuance"[63] where an application for continuance under Rule 215.1 has been denied. They have only in dicta indicated grounds that could meet the test.[64]

IV. Dismissal

The operation of Rule 215.1 has been held to be mandatory and automatic.[65] When the dismissal date has passed without compliance with the terms of the rule,[66] the court is without jurisdiction to do anything but dismiss the

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the interpretation in *Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551, 554 (Iowa 1972), stating, "We now hold where a motion for continuance is filed and submitted on notice before the Rule 215.1 deadline . . . jurisdiction is retained by the trial court while it has such motion under advisement. Of course, if under such circumstances the motion is overruled, the result to plaintiff's cause may be fatal."

56. Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963).

57. For a discussion of what constitutes an ex parte or litigated motion, *see* Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966).

58. The reasoning of the court was that counsel had no basis for a claim of reliance upon any agreement short of the formal order of court required by the rule, and that to vacate a judgment on such a showing would be to nullify the rule. *See* Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963); Windus v. Great Plains Gas, 255 Iowa 587, 122 N.W.2d 901 (1963) (prior to the amendment of Rule 215.1).

59. 199 N.W.2d 333, 336-37 (Iowa 1972); *see* note 82 *infra.*

60. *See* note 32 *supra.*

61. 258 Iowa 1206, 141 N.W.2d 593 (1966). The court concluded: "Rule 215.1 was never intended nor does it require dismissal of cases that are at issue, ready for trial and while plaintiff is affirmatively asking for trial." Kutrules v. Suchomel, *supra* at 1214, 141 N.W.2d at 598.

62. McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964); *contra,* Johnson v. Linquist, 184 N.W.2d 681, 683 (Iowa 1971) (Becker, J., concurring specially).

63. Iowa R. Civ. P. 215.1.

64. *See* note 47 *supra.* The absence of such a reported appeal may indicate that the rule is working to get cases to trial before the mandatory dismissal date, although it more likely suggests the presence of a liberal standard at the trial court level, and a reluctance to reject a stipulation for continuance no matter what the justification.

65. *See* Johnson v. Linquist, 184 N.W.2d 681 (Iowa 1971); Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966). In *Baty* the court found that the 1965 revision of Rule 215.1 by merely adding an amendment provision was an approval of the court's prior interpretation that without proper continuance the dismissal of a cause was "mandatory and automatic."

66. *See* note 68 *infra.*

case without prejudice.[67] Dismissal is effective when the concerned party fails to do the things necessary to obtain a continuance or preserve the court's jurisdiction[68] and not when the formal order of dismissal is entered.[69] Unless and until it is set aside, the dismissal and entry of judgment for costs is a final judgment as to the pending action.[70] The rule places no duty upon the defendant to move the court for an order of dismissal[71] or to warn a plaintiff of the "imminence of disaster."[72]

Where the jurisdiction of the court is lost due to a Rule 215.1 dismissal and the dismissal has not been made of record, the procedure that a defendant should follow is not clear. Because the dismissal is mandatory and automatic, effective even without a formal order of court or removal of the case from the docket by the clerk,[73] an informal reminder to the clerk or court without a motion may be sufficient to have the action removed from the docket.[74] A motion to dismiss of record would achieve the same result.[75] A special appearance for the sole purpose of challenging the jurisdiction of the court is one alternative previously used with some success to combat continuation of the lawsuit by a plaintiff.[76] However, it is doubtful that a party not utilizing the special appearance could be deemed to have acquiesced in the renewed jurisdiction of the court to hear the case on the merits.[77]

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67. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964). For a discussion of the dismissal of civil actions for want of prosecution as res judicata, *see* Annot., 54 A.L.R.2d 473 (1957).

68. A plaintiff may preserve the court's jurisdiction (a) by assignment and trial of the case before the mandatory dismissal date (*see* notes 32 and 40 *supra*); (b) by obtaining an order continuing the action after stipulation of notice and hearing but not ex parte (*see* note 45 *supra*); (c) possibly by the assignment or requested assignment of the case with diligent pursuit of assignment (*see* note 48 *supra*); or (d) by filing an application for continuance (*see* notes 51 and 55 *supra*).

69. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

70. Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962).

71. *See* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966). The court in *Kutrules*, where the action was assigned for trial to a date later than the mandatory dismissal date, mentioned that there was nothing in the record indicating that there was any timely objection to such assignment. This has been the only indication that a defendant may have to take action to perfect his rights under Rule 215.1 (where the case was not otherwise subject to Rule 200).

72. Central Constr. Co. v. Klingensmith, 256 Iowa 364, 370, 127 N.W.2d 654, 657 (1964).

73. Johnson v. Linquist, 184 N.W.2d 681 (Iowa 1971); Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

74. This is consistent with the rule that a defendant need not move for dismissal or take any affirmative action to perfect his rights under Rule 215.1, since it would result in placing the burden on the party not at fault. *See* Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

75. The motion to dismiss of record was successfully used in a recent district court action after the appearance of new counsel for the long-displaced plaintiff. The clerk had not deleted the case from the docket and the court had entered no formal order of dismissal. *See* Bechtel v. Johnson, Law No. 13169 (3d D. Iowa, Dec. 15, 1972).

76. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962).

77. A dismissal under the rule is mandatory and automatic (*see* note 65 *supra*) irrespective of which party was responsible (*see* note 48 *supra*), and the judgment is treated as a final adjudication until it is set aside (*see* note 69 *supra*). Subsequent to dismissal the court has jurisdiction to alter a judgment only pursuant to Rule 215.1 or

V. REINSTATEMENT

Where the jurisdiction of the court is lost due to a Rule 215.1 dismissal, the procedure is then governed by Rule 215.1 or Rules 252 and 253.[78] Provided that application for reinstatement is filed within six months from the date of dismissal,[79] Rule 215.1 grants the trial court discretion to reinstate an action that has been so dismissed.[80] It is error for the trial court to fail to exercise that discretion when there is a timely application to reinstate.[81] The trial court must reinstate the action when there is a timely showing of "oversight,[82] mistake or other reasonable cause."[83] There is no limitation as to whose conduct must provide the cause.[84]

The Iowa supreme court has interpreted the reinstatement provision of Rule 215.1 to grant the trial court discretion comparable to that allowed under Rule 236 and Rule 252.[85] The court has been liberal, within the scope of permissible review, in affirming determinations of default-voiding mistake, inadvertence and excusable neglect in Rule 236 appeals,[86] continuing to recognize the policy favoring trial on the merits.[87] The court has thus been more reluctant to interfere with an order setting aside a dismissal than an order denying a motion to set a dismissal aside.[88]

Rules 252 and 253. Should a defendant not specially appear, it would not come within the grounds specified for vacating the judgment and reinstating the action. Any other grounds for reinstatement would be clearly contrary to the mandatory nature of the rule, and the philosophy that it is based purely on a plaintiff's lack of diligence.

78. The inherent and statutory power of the trial court under IOWA CODE § 602.15 to control the record and expunge or amend an entry does not apply where the jurisdiction of the court has been lost by the entry of this final judgment. Lamp v. Guth, 183 N.W.2d 674 (Iowa 1971); Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962).

79. The six months runs from the mandatory dismissal date and not the date a formal order of dismissal is entered or the cause removed from the docket. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

80. IOWA R. CIV. P. 215.1.

81. Johnson v. Linquist, 184 N.W.2d 681 (Iowa 1971).

82. "Oversight" has been defined as "an omission or error due to inadvertence," which is similar to excusable neglect. It is not gross neglect or willful procrastination. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972).

83. *Id.* at 335. The court has thus far recognized as grounds for reinstatement under the Rule 215.1 amendment (a) reliance on the assurances of the trial judge in *Rath*, (b) possibly reliance on an agreement with former counsel, referred to in *Baty*, and (c) the element of plaintiff's diligence in seeking a trial assignment, deemed significant in *Rath*.

84. The court also does not limit the grounds for reinstatement to purely technical or ministerial oversights. Rath v. Sholty, 199 N.W.2d 333, 337 (Iowa 1972).

85. Rule 236 is the provision for reinstatement of default judgments. Rules 252 and 253 establish the grounds and procedure necessary to modify or vacate a final judgment. *See* Rath v. Sholty, 199 N.W.2d 333, 335 (Iowa 1972).

86. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972); *see also* Hannan v. Bowles Watch Band Co., 180 N.W.2d 221 (Iowa 1970).

87. Although the Iowa supreme court explains that the policy favoring trials on the merits was always considered in Rule 236 default-voiding appeals, *Rath v. Sholty*, 199 N.W.2d 333 (Iowa 1972), it has qualified that policy by favoring "expeditious trials on the merits, under settled rules of procedure." Windus v. Great Plains Gas, 255 Iowa 587, 600, 122 N.W.2d 901, 909 (1963). To thus ignore the plain mandates of the rule would be to abrogate the rule and to reward inattention. Edgar v. Armored Carrier Corp., 256 Iowa 700, 128 N.W.2d 922 (1964).

88. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972); Windus v. Great Plains Gas,

A plaintiff may, within a year of the dismissal, also seek to have the judgment vacated pursuant to the more specific grounds of Rules 252 and 253.[89] A plaintiff's burden appears more formidable under this option, due to the limited grounds available to vacate a judgment and the limited tolerance with a careless plaintiff.[90]

VI. Conclusion

The Iowa court first adopted the "hard line" approach to Rule 215.1, admonishing that a strict adherence to its terms is the only way to avoid a "gradual whittling away" of its effectiveness.[91] The court recognized that the rule is a harsh but valuable one[92] and necessarily arbitrary.[93] The terms of the rule were treated as mandatory and automatic[94] in nearly all respects,[95] with no discretion in the trial court to deal with the extraordinary case. Perhaps it was inevitable that the rule would eventually be tempered by a recognition of some of the realities of modern litigation by the Iowa supreme court.[96] The court has been reluctant to find an exception to the clear mandates of the rule,[97] but

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255 Iowa 587, 122 N.W.2d 901 (1963). Although a determination that the evidence adduced at the hearing for reinstatement involves a factual finding, whether the facts constitute "inadvertence, mistake or other reasonable cause" is a legal question on review and the trial court's interpretation is not conclusive.

89. The Rule 215.1 dismissal is deemed a final judgment. Windus v. Great Plains Gas, 254 Iowa 114, 116 N.W.2d 410 (1962). Thus, this remedy is available from the mandatory dismissal date. Rule 253 establishes the procedure for such relief, while Rule 252 provides the grounds for modifying or vacating a final judgment.

90. "Unavoidable casualty," for example, is treated as an event or accident which human prudence and foresight cannot prevent, happening against the will and without negligence. Claeys v. Moldenschardt, 260 Iowa 36, 148 N.W.2d 479 (1967).

The court has indicated that the quantum of evidence required to support a Rule 252 application ("unavoidable casualty or misfortune") is greater than that necessary to set aside a default under the "mistake, inadvertence, surprise or excusable neglect" grounds of Rule 236 (similar to the grounds required by Rule 215.1). Cook v. Cook, 259 Iowa 825, 146 N.W.2d 273 (1966); Davis v. Glade, 257 Iowa 540, 133 N.W.2d 683 (1965).

91. Schmidt v. Abbott, 261 Iowa 886, 156 N.W.2d 649 (1968); Fischer v. Hauber, 257 Iowa 793, 134 N.W.2d 918 (1965); Talbot v. Talbot, 255 Iowa 337, 122 N.W.2d 456 (1963).

92. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966); McKinney v. Hirstine, 257 Iowa 395, 131 N.W.2d 823 (1964).

93. Baty v. City of West Des Moines, 259 Iowa 1017, 147 N.W.2d 204 (1966).

94. *See* note 65 *supra.*

95. The trial court has discretion with applications for continuance (*see* note 45 *supra*) and reinstatement (*see* notes 79 and 80 *supra*) under Rule 215.1.

96. Although the court does not recommend the method, it recognized the need for a busy lawyer to rely on a promised reminder. Rath v. Sholty, 199 N.W.2d 333 (Iowa 1972). It has also recognized that a case not reached for trial in its regular order is not within the intended scope of Rule 215.1. Kutrules v. Suchomel, 258 Iowa 1206, 141 N.W.2d 593 (1966). A busy trial judge cannot always hear motions for continuance before the mandatory dismissal date, but this also is not within the scope of the Rule. Anderson v. National By-Products, Inc., 257 Iowa 921, 135 N.W.2d 602 (1965).

There are apparently no reported Iowa cases where the trial court denied plaintiff a continuance thus causing a mandatory dismissal. This may be indicative of the success of Rule 215.1 in expediting litigation. It does, however, suggest a willingness at the trial court level to not strictly enforce the express policy of the rule and to recognize the need for a more flexible approach whether the reason be promotion of settlements, allowing busy attorneys time to prepare a complex suit, or recognition that all pending cases cannot be squeezed into an overcrowded term.

97. *See* note 90 *supra.*

has definitely cooled on the "strict adherence" approach.[98] This tendency and the liberal reinstatement provisions of the 1965 amendment to Rule 215.1 have clearly worked to loosen many teeth in the old "trap."

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98. *See* note 96 *supra*. Since the amendment allowing reinstatement has eased the plight of the displaced plaintiff under Rule 215.1, there should be less incentive for the trial court to avoid mandatory dismissal, but to hold the delinquent plaintiff to a showing of good cause on reinstatement.