TORTS

RECOVERY OF LITIGATION EXPENSES FOR "DOUBLE EXPOSURE" TO SUIT

The successful party in a lawsuit is seldom awarded litigation expenses[1] in excess of fixed statutory costs,[2] nor can he generally maintain a subsequent action for their recovery.[3] The policy behind this denial is to encourage litigants to enforce their rights or test their obligations in the courts by relieving them of the fear of successive suits, each to recover the expenses of its predecessor.[4] Should this policy preclude recovery against a litigant who has intentionally attempted to violate the integrity of the court through which he seeks justice? This question is presented by the recent case of *Singer Sew-*

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1. At common law litigation expenses were never recoverable. Peter's Church v. Beach, 26 Conn. 355 (1857); State *ex rel* Macri v. City of Bremerton, 8 Wash.2d 93, 111 P.2d 612 (1941) (including a discussion of the development of the general rule in this country). See, in general, McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 MINN. L. REV. 619 (1931).

An exception to this rule allows litigation expenses incurred in a prior suit with third parties where the litigation was necessitated by the wrongful conduct or breach of duty by the defendant. Reichard Inc. v. Ezl. Dunwoody Co., 45 F. Supp. 153 (E.D. Pa. 1942) (sub-vendor required to defend his warranty where the original warrantor refuses to assume the defense); McOsker v. Federal Ins. Co., 115 Kan. 626, 224 Pac. 53 (1924) (defense against good faith purchaser of note fraudulently obtained by defendant); Curtley v. Security Sav. Soc., 46 Wash. 50, 89 Pac. 180 (1907) (defense against contractor's suit where plaintiff had purchased lot from defendant relying on his false claim of title).

Recovery of counsel fees for a present suit may be awarded in several situations: Harrison v. Perea, 168 U. S. 311 (1897) (protecting or preserving a common fund or estate); *Ex parte* Austin, 245 Ala. 22, 15 S.2d 710 (1943) (wife awarded reasonable fees in divorce proceedings); Webb. v. Beal, 20 N. M. 218, 148 Pac. 487 (1915) (reasonable litigation expenses recovered from injunction bond after injunction has been dissolved); Palm Springs-La Quinta Development Co. v. Kieberk Corp., 46 Cal. App.2d 234, 115 P.2d 548 (1941) (stipulation of liability for attorney fees in promissory and other contracts between the parties; Missouri K. & T. Ry. v. Cade, 233 U. S. 642 (1914) (attorney fees awarded to successful litigants by statute).

2. Statutory costs are usually only a nominal sum, completely inadequate to compensate the successful party for expenses incurred in litigation. *See* Dahlstrom Metallic Door Co. v. Evatt Const. Co., 256 Mass. 404, 417, 152 N.E. 714, 720 (1926); Note, 15 U. OF CIN. L. REV. 313, 314 (1941); McCormick, *supra* note 1, at 621.

3. Stickney v. Goward, 161 Minn. 457, 201 N.W. 630 (1925); Miss. Susan, Inc. v. Enterprise & Century Co., 270 App. Div. 747, 62 N.Y.S.2d 250 (1946).; Marvin v. Prentice, 94 N.Y. 295 (1884); Comment, 49 YALE L. J. 699 (1940); Note, 21 VA. L. REV. 920 (1935).

A contrary rule prevails in England. See MCCORMICK, DAMAGES § 71 (1935); Note, 32 ILL. L. REV. 11 (1937). For a comparison of the English and American rules, see Goodhart, 38 YALE L. J. 849 (1929). The American position has been severely criticized by the legal writers. MCCORMICK, DAMAGES 256 (1935); SEDGEWICK, DAMAGES § 230 (9th ed. 1912); Note, U. OF CIN. L. REV. 313 (1941).

4. Ritter v. Ritter, 381 Ill. 549, 46 N.E.2d 41 (1943); Fondiller v. Fondiller, 184 Misc. 1021, 55 N.Y.S.2d 613 (1945); Note, 38 ILL. B. J. 189 (1949). Awarding of litigation expenses as damages is properly a legislative function. Manko v. City of Buffalo, 271 Misc. 286, 65 N.Y.S.2d 128 (1946). For a summary of the traditional arguments see MCCORMICK, DAMAGES 235 *et seq.* (1935); Note, 4 WASH. & LEE L. REV. 177 (1947).

ing Machine Co. v. American Safety Table Co., 88 F. Supp. 261 (E.D. Pa. 1949).[5]

In 1934 American sued Singer for patent infringement. The district court found American's patent invalid and not infringed.[6] After filing an appeal but before argument, American employed Morgan S. Kaufman, an attorney, for the sole purpose of having him exert an improper influence over Judge Warren Davis of the United States Court of Appeals for the Third Circuit, where the appeal was pending.[7] The Court of Appeals reversed the trial court's judgment and found that the patent was valid, that it was infringed, that an injuction issue, and that an accounting be had.[8]

In 1944, after certain prior unethical dealings between Judge Davis and Kaufman had become public, Singer petitioned the Court of Appeals to vacate its previous judgment.[9] In allowing the petition, the court found that Kaufman had been hired specifically to improperly influence Judge Davis[10] and based its decision on the sole ground that American was guilty of unclean hands in attempting to corrupt the judicial process.[11] In addition, the trial court was ordered to vacate the original judgment and to dismiss the suit.[12]

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5. For the background and history of this case see Note, 35 CORNELL L. Q. 178 (1949).

6. Unreported.

7. Kaufman was paid $3,000 and promised substantially more, solely because of his personal influence and intimacy with Judge Davis, although he was not competent to brief or argue a patent case. See Note, 35 CORNELL L. Q. 178, 180 (1949). In the early 1940's, the public was apprised of this intimate relationship. American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 535, 539 (3d Cir. 1948). Davis and Kaufman were indicted but were released because of a disagreement of the jury. Judge Davis resigned from the bench. Kaufman resigned from the Federal and Pennsylvania Bars after appropriate hearings. American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 514, 541 (3d Cir. 1948).

8. American Safety Table Co. v. Singer Sewing Machine Co., 95 F2.d 543 (3d Cir. 1938); *cert. denied,* Singer Sewing Machine Co. v. American Safety Table Co., 305 U.S. 622 (1938).

9. Action on the petition was delayed pending the outcome of an appeal to the U. S. Supreme Court in another case involving the actual bribery of Judge Davis by Kaufman. Root Refining Co. v. Universal Products Co., 169 F.2d 514 (3d Cir. 1948). In January, 1946, the Supreme Court appointed a special court to sit as the Court of Appeals for the Third Circuit to hear and determine the issues of corruption of the judicial process in both cases. American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 514, 540 (3d Cir. 1948).

10. See American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 514, 540 (3d Cir. 1948): "He [Kaufman] had only one asset to offer his employer, and that was his personal intimacy and influence with Judge Davis. We cannot escape the conclusion that it was for this purpose only that he was employed by American in this case."

11. Prior to this time, the leading authority on review of judgments obtained by corruption of the court were the decisions involving the bribery of a judge on the Second Circuit Court of Appeals. In those cases the court did not dismiss the offending litigant's complaint, or deny him further access to the court, but merely reheard the issues on their merits, on the ground that one of the judges on the original court had been disqualified. See Electric Auto-Light Co. v. P. & D. Mfg. Co., 109 F.2d 940 (2d Cir. 1940); Art Metal Works v. Abraham & Strauss, 107 F.2d 940 (2d Cir. 1939).

12. 169 F.2d 514, 541 (3d Cir. 1948).

Singer then began the present suit to recover litigation expenses resulting from the infringement action and the subsequent proceedings.[13] American moved to dismiss on the ground that the complaint failed to state a cause of action because there was no allegation, nor had there been a finding, that Kaufman actually succeeded in influencing Judge Davis.[14] This motion was denied, the court holding that a cause of action "sounding in tort" could be established by proper evidence, and that an allegation of actual influence was not a prerequisite to recovery:

> . . . [F]rom the moment that American . . . ceased 'to depend upon the justice of [its] case' and sought 'discriminatory and favored treatment' the judgment, no matter how obtained and no matter whether correct or incorrect so far as concerned the merits of the case, became an instrument of wrongdoing in its hands . . . [rendering it liable] for loss resulting to others from its use of it.[15]

A tort presupposes damages;[16] in this area, damages could only arise from litigation expenses in excess of the amount society imposes on its members for the privilege of protecting their rights through the judicial process. Normally each member is expected to bear the cost of prosecuting all suits defended reasonably and of defending all meritorious actions prosecuted in a reasonable manner.[17] Where one has defended a suit and can be assured that he will not have to answer the same complaint again, he has not been damaged, even though the suit was pursued inequitably; for the result is in effect the same as a suit pressed in a reasonable fashion and determined in favor of the

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13. The plaintiffs relied heavily on two recent cases, Hartford Empire Cases, 163 F.2d 474 (3d Cir. 1947) and Universal v. Root, 169 F.2d 534 (3d Cir. 1948). Both, however, are readily distinguishable due to the gravity of the wrongs committed. In the former case, the plaintiffs obtained a decree to the effect that their patent was infringed. Subsequently it was learned that during the prosecution of the suit, one of the plaintiffs' attorneys wrote a laudatory article dealing with the patent, and arranged to have it published in a trade journal. A labor leader was paid for attaching his name to the article. This article had not only been referred to in the plaintiffs' brief, but was also cited extensively as authority in the court's opinion. Thus the *Hartford* case differs from the instant case in that there was no finding that Kaufman actually influenced the court. In Universal v. Root the same attorney and judge were involved as in the present case. However, the alleged fraud was actual bribery, and a specially designated court found that Judge Davis' decision was obtained as a result of the bribe. Here again there is a vast difference between actual bribery and the willingness to be represented by an attorney known to have a questionable influence with the court.

14. ". . . there will be no need to consider whether or not in this case Kaufman actually succeeded in exerting an influence on Judge Davis." American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 514, 541 (3d Cir. 1948).

15. Singer Sewing Machine Co. v. American Safety Table Co., 88 F. Supp. 261, 262 (E.D. Pa. 1949).

16. See Radin, *Speculative Inquiry into the Nature of Torts*, 21 TEXAS L. REV. 697, 701 (1943).

17. ". . . honest litigants are to be encouraged to seek justice and not to be deterred by fear of an action in return. . . . [T]he good citizen must endure any resulting expense or damage as an inevitable burden to be borne under his government. . . ." PROSSER, TORTS 886 (1941).

defendent.[18] But where one has once defended a just claim, and may be subjected, because of the misconduct of his opponent, to the cost of defending the same cause again, there may be damages as defined above.

The necessity of defending a suit more than once may be brought about by a variety of causes. A judgment may be vacated or a cause of action dismissed when a court is satisfied it would be against good conscience and justice to let the judgment stand or the proposed action proceed.[19] The doctrine of unclean hands is often utilized to accomplish this result;[20] equitable relief may be invoked against conduct which has accidently, mistakenly, negligently, or intentionally prejudiced the other party.[21]

An examination of existing tort categories fails to reveal a remedy for a litigant harmed by double exposure to litigation costs. Three actions—abuse of process, malicious prosecution, and wrongful civil proceedings—are aimed at protecting an abused litigant,[22] but have been so restricted as to be useless here. The abuse of process action offers a remedy only for the *misuse* of court orders *properly* obtained.[23] Wrongful civil proceedings [24] and malicious prosecution[25] protect only those who have been forced into court without probable cause.[26]

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18. This, of course, presupposes that reasonable grounds for the suit exist. See notes 23-25 *infra*.

19. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Griffith v. Bank of N. Y., 147 F.2d 899 (2d Cir. 1945), 54 YALE L. J. 687; Keller v. Young, 186 S.W. 405 (Tex. Civ. App. 1916), 16 COL. L. REV. 692.

20. Shawkee Mfg. Co. v. Hartford-Empire Co., 322 U.S. 271 (1944); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942), 40 MICH L. REV. 1266; Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933).

21. McGuinness v. Superior Ct., 196 Cal. 222, 237 Pac. 42 (1925) (failure to notify interested parties of the pendency of a suit); Bacon v. Bacon, 150 Cal. 477, 89 Pac. 317 (1907) (will negligently misread in court, unnoticed by party, embodied in court's order). See CAL. CODE CIV. PROC. ANN. § 473 (1949) which empowers the court to set aside a judgment obtained through mistake, inadvertance, surprise, or excusable neglect. See also Russell v. Superior Journal Co., 47 F. Supp. 282 (S.D. Wis. 1942); Note, 31 CALIF. L. REV. 600 (1943).

22. PROSSER, TORTS ch. 18 (1941). See, in general, WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921).

23. Benny v. King, 201, Ill. 47, 66 N.E. 377 (1903); Bourisk v. Derry Lumber Co., 130 Me. 376, 156 Atl. 382 (1931); Hauser v. Bartow, 273 N.Y. 370, 7 N.E.2d 268 (1937); Pittsburgh J. E. & E. R. Co. v. Wakefield Hardware Co., 143 N.C. 54, 55 S.E. 422 (1906); PROSSER, TORTS 895 (1941).

24. Riegel v. Hygrade Seed Co., 47 F. Supp. 290 (W.D. N.Y 1942); Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917); Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106 (1884); Lexington Cab Co. v. Terrell, 282 Ky. 70, 137 S.W.2d 721 (1940); Kulka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897); Teesdale v. Liebschwager, 42 S.D. 323, 174 N.W. 620 (1919). See Lewson, *Malicious Prosecution of a Civil Suit*, 21 AM. L. REG. 353 (1882); RESTATEMENT, TORTS § 674 (1934); PROSSER, TORTS 885 (1941); Ahring v. White, 156 Kan. 60, 131 P.2d 699 (1943) (abuse of process and malicious prosecution of a civil suit distinguished).

25. Larocque v. Dorsey, 299 Fed. 556 (2d Cir. 1924); Long v. Rogers, 17 Ala. 540 (1850); Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Glenn v. Lawrence, 280 Ill. 581, 117 N.E. 757 (1917); Wilson v. Lapham, 196 Iowa 745, 195 NW. 235 (1923). See, in general, PROSSER, TORTS § 96 (1941).

26. Beatty v. Puritan Cosmetic Co., 236 Mo. App. 907, 158 S.W.2d 191 (1942); Hen-

But with tort law steadily expanding,[27] the fact that a just claim does not fall within a judicial pigeon-hole is inconclusive.[28] It should be sufficient to show a wrongful act resulting in a loss worthy of compensation.[29] In this narrow area allowance of litigation expenses would not only provide reparation for an injured party but would also deter future litigants from prosecuting actions with wilful misconduct. The question then becomes: does the policy forbidding general recovery of litigation expenses encompass this situation of double exposure to suit?

Recovery of litigation costs would seem to be prohibited where the judgment is set aside or dismissed for less than intentional misconduct. The threat of litigation expenses against one whose judgment might be vacated, or suit dismissed, because of improper pleading, misjoinder, or negligent conduct would place an unwarranted deterrent on persons contemplating the pursuit of a lawsuit in good faith. But where a litigant purposely presses a claim in a manner contrary to equitable principles of judicial conduct, knowing full well that if his actions are brought to light any judgment which he has obtained will be vacated or his action dismissed,[30] the policy against recovering litigation costs does not preclude holding him responsible for the expenses incurred by the other party—*unless he is to be barred from again seeking a determination of the same rights.*[31]

Thus a court in deciding a claim for litigation expenses based on "double exposure" would be confronted with two questions—whether the alleged wrongdoer is free to again bring his cause of action before the courts, and if

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derson-Klie Hat Co. v. Cape Trading Co., 214 Mo. App. 243, 260 S.W. 498 (1924); Nisewanger v. W. J. Lane Co., 75 N.D. 448, 28 N.W.2d 409 (1947); Sawyer v. Schick, 30 Okla. 353, 120 Pac. 581 (1911).

In the principal case, there was no finding that American would not have succeeded on the merits had it proceeded properly (see note 14 *supra*), leaving the question of probable cause open to speculation. The fact that Kaufman was not hired until after the appeal was filed is *some* evidence that there was a reasonable belief in the validity of the case. See Chafee, *Coming Into Equity With Clean Hands,* 47 MICH. L. REV. 877 (1949).

27. POLLOCK, TORTS 21 (13th ed. 1929); HARPER, TORTS ch. 1 (1933); Winfield, *The Foundation of Liability in Tort,* 27 COL. L. REV. 1 (1927); WINFIELD, TORTS 15 (3d ed. 1946); Albertsworth, *Recognition of New Interest in the Law of Torts,* 10 CALIF. L. REV. 461 (1922).

28. "New and nameless torts are being recognized constantly, and the progress of the law is being marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none had been recognized before." PROSSER, TORTS 5 (1941).

"Since it is undoubtedly true that . . . 'new and nameless torts' are being constantly created, our old categories, nominate or innominate, will not serve us, when these new situations confront us." Radin, *A Speculative Inquiry into the Nature of Torts,* 27 TEX. L. REV. 697, 700 (1943). See also Smith, *Torts Without Particular Names,* 69 U. OF PA. L. REV. 91 (1921).

29. See Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Kujok v. Goldman, 150 N.Y. 176, 44 N.E. 773 (1896).

30. See note 21 *supra.*

31. See note 17 *supra.*

he is, whether the wrongful conduct which prevented a determination on the merits in the prior suit was negligent or intentional. The first is a question of law.[32] A vacated judgment, in and of itself, can never be res judicata.[33] But the effect of a dismissal, except in the federal courts, is generally not so easy to ascertain.[34] Rule 41(b) of the Rules of Civil Procedure[35] provides that in the federal courts any involuntary dismissal operates as res judicata unless otherwise specified, or unless based on lack of jurisdiction or improper venue.[36] Many states have adopted a similar rule.[37]

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32. An existing final judgment on the merits rendered by a court of competent jurisdiction is res judicata, in all subsequent actions, of the rights of the parties thereto, and of their privies, on all material issues which were, or might have been determined. Bliss v. Security-First National Bank, 81 Cal. App.2d 50, 83 P.2d 312 (1947); Hughes v. Bank of America National Trust and Savings Association, 78 Cal. App.2d 631, 178 P.2d 533 (1947). It is sufficient that the status of the action was such that the parties might have had their suit disposed of on the merits if they had properly presented and managed their respective cases. Wright v. Lindsay, 24 Tenn. App. 77, 140 S.W.2d 793 (1940). See, in general, Cleary, *Res Judicata Reexamined,* 57 YALE L. J. 339 (1948); Von Moschzisker, *Res Judicata,* 38 YALE L. J. 299 (1929); Note, 23 So. CALIF. L. REV. 610 (1950).

33. Riordan v. Ferguson, 42 F. Supp. 47 (S.D. N.Y. 1941); Standard Life Ass'n v. Merrill, 147 Kan. 121, 75 P.2d 825 (1938).

"The general rule is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made. The matters in controversy are left open for future determination." 1 FREEMAN, JUDGMENTS § 302 (5th ed. 1925).

34. A general order of dismissal renders all issues raised res judicata. Hughes v. Henderson, 61 Ga. App. 743, 7 S.E.2d 317 (1940); Dones v. Phoenix Joint Stock Land Bank, 381 Ill. 106, 45 N.E.2d 20 (1942). But dismissal before final judgment or dismissal not involving the merits is not res judicata. Fidelity & Casualty Co. v. Heitman Trust Co., 317 Ill. App. 256, 46 N.E.2d 155 (1942). See Note, 15 TULANE L. REV, 312 (1941). It is difficult to lay down an all-inclusive and satisfying formula to determine whether or not a judgment should operate as res judicata. ". . . determination of the question must rest in the sound discretion of the courts as applied to the circumstances of each case, having proper regard to public policy of res judicata and to the rights of the parties to have every bona fide issue passed on." Von Moschzisker, *Res Judicata,* 38 YALE L. J. 299, 315 (1929).

35. FED. R. CIV. P. 41(b).

36. "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute 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 him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication on the merits." FED. R. CIV. P. 41(b).

As to the application of this rule see American National Bank & Trust Co. v. United States, 142 F.2d 571 (D.C. Cir. 1944); Kataoka v. May Dept. Stores Co., 30 F. Supp. 346 (S.D. Cal. 1939); Burns Mortgage Co. v. Stoudt, 2 F.R.D. 219 (E.D. Pa. 1942).

37. In general, the words "without prejudice" or "with prejudice," or words of similar import, are used in dismissal decrees; and where the judgment of dismissal contains the words "without prejudice" it purports on its face to be not on the merits, and does not operate as res judicata. DeMoville v. Merchants & F. Bank, 233 Ala. 204, 170 So. 756 (1936); Baughman v. Overman, 183 Ark. 561, 37 S.W.2d 81 (1931); Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390 (1942); Barlow v. Hoffman, 103 Colo. 286, 86 P.2d 239 (1938); Varanelli v. Luddy, 130 Conn. 286, 33 A.2d 333 (1938); Tilton v. Horton, 103 Fla. 497, 137 So. 801 (1931); Horowitz v. Horowitz, 175 Md. 166, 199 Atl. 816 (1938); Spilies v. Papps, 288 Mass. 23, 192 N.E. 155 (1934); McIntyre v. McIrtyre. 205 Mich.

In those states which do not follow the federal rule, the problem is one of determining whether the dismissal was *intended* to be an adjudication on the merits.[38] It is obvious that a court (unless it is the same court which ordered the dismissal) will avoid this difficult issue if possible; and this decision might well be held open until the second question has been answered. If it is found that the conduct which prevented a determination on the merits in the prior suit was not intentional, then the question of whether the dismissal was meant to be res judicata is immaterial. If it is decided that the conduct in question was intentional, the court might further avoid the res judicata problem by rendering a conditional decree to the effect that before the alleged wrongdoer can again enter the courts for a re-consideration of his cause of action, he must pay the litigation expenses of his opponent in the original suit.

In the case under discussion the dismissal was ordered by a federal court and thus governed by rule 41(b). Since the court failed to specify that the order was *not* to serve as a decision on the merits, and since no question of venue or jurisdiction was involved, it necessarily operates as res judicata.[39] Thus, Singer is not to be subjected to "double exposure," but has only defended a reasonable cause of action once through the courts. The policy against allowing litigation expenses militates against recovery—even though American's conduct which caused dismissal was intentional and of the most reprehensible nature.

496, 171 N.W. 393 (1919); Long v. Long, 141 Mo. 352, 44 S.W. 341 (1897); Shepardson v. Fagin, 116 Neb. 806, 219 N.W. 187 (1928); Globe Crayon Co. v. Manufacturers Chemical Co., 263 App. Div. 131, 31 N.Y. S.2d 691 (1941); Dose v. Beatie, 62 Ore. 308, 1 Pac. 383 (1912); Werry v. Sheldon, 148 Pa. Super. Ct. 13, 24 A.2d 631 (1942); Armstrong v. Anderson, 70 S.W.2d 801 (Tex. Civ. App. 1934); Adams v. Pugh, 116 Va. 797, 83 S.E. 370 (1914); Russell v. Leslie, 142 Wash. 60, 252 Pac. 151 (1927).

Conversely, a judgment of dismissal which expressly provides that it is "with prejudice" operates in general as res judicata. Roden v. Roden, 29 Ariz. 549, 243 Pac. 413 (1926); Union Indemnity Co. v. Benton Co. Lumber Co., 179 Ark. 852, 18 S.W.2d 327 (1929); Hargis v. Robinson, 70 Kan. 589, 79 Pac. 119 (1905); Noakes v. Noakes, 290 Mich. 231, 287 N.W. 445 (1939); Carroll v. Patrick, 23 Neb. 834, 37 N.W. 671 (1888); Conley v. Hill, 115 W. Va. 175, 174 S.E. 883 (1934).

However, a court cannot control the effect of a judgment by inserting the words "with prejudice" or "without prejudice" where the judgment on its face does not support their respective connotations. State v. Griffith, 54 Ariz. 436, 96 P.2d 752 (1939); Goddard v. Security Title Ins. & G. Co., 14 Cal.2d 47, 92 P.2d 804 (1939); Lins v. Eads, 145 Kan. 493, 66 P.2d 390 (1937).

38. Carmen v. Fox Film Corp., 204 App. Div. 776, 198 N.Y. S. 766 (1923). See GLENN AND REDDEN, CASES AND MATERIALS ON EQUITY 538 (1946).

39. The court's language supports this conclusion without the aid of FED. RULE 41(b):

"One who comes into a court of equity must come with clean hands, and the suitor who fails in this respect will be denied all relief, whatsoever may be the merits of his claim." American Safety Table Co. v. Singer Sewing Machine Co., 169 F.2d 514, 540 (3d Cir. 1948). And "[he is] fortunate if he loses no more than the rights he seeks to obtain." *Id.* at 541.