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Voluntary Dismissal by Order of Court - Federal Rules of Civil Procedure Rule 41(a)(2) and Judicial Discretion

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VOLUNTARY DISMISSAL BY ORDER OF COURT— FEDERAL RULES OF CIVIL PROCEDURE RULE 41(a)(2) AND JUDICIAL DISCRETION

I. Introduction

There are various circumstances under which a plaintiff may seek to terminate an action: 1) he may have found a more advantageous forum; 2) he may wish to escape unfavorable developments in a pending suit that can be avoided in subsequent litigation; or 3) he may wish to forego a tenuous claim not worth the expense involved in pursuing it. Of course, a defendant will oppose dismissal of a case in order to get a judgment if he has had significant expenditures of time and money in the pending litigation, or if he has gained some advantage in the current action that may subsequently be lost. Dismissal, therefore, can be a useful procedural device to the plaintiffs, and a tactic of which defendants should be aware when litigating in a federal forum.

Plaintiff's right to dismiss an action has a long history under the common law.[1] Prior to the merger of law and equity, he had an absolute right at law to dismiss his action any time prior to judgment or verdict.[2] At a time when form was exalted over substance, voluntary dismissal, or nonsuit, was necessary to preserve the rights of a plaintiff who had committed technical error in his action.[3] In equity, a plaintiff was not allowed a voluntary dismissal if the defendant would suffer some prejudice other than the mere prospect of a second suit.[4]

Prior to the adoption of the Federal Rules of Civil Procedure voluntary dismissal in the various state courts was an established right of plaintiffs.[5] At law, the federal courts conformed to this approach.[6] Federal Rule 41(a), however,

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1 *See* Head, *The History and Development of Nonsuit,* 27 W. VA. L. REV. 20 (1920). For the development of voluntary dismissal in the various states, *see* Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice,* 37 VA. L. REV. 969 (1951).

2 *Ex Parte* Skinner & Eddy Corp., 265 U.S. 86, 93 (1924).

3 *See* Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit,* 63 YALE L. J. 738 (1954).

4 265 U.S. at 93.

5 *See* Note, *The Right of a Plaintiff to Take a Voluntary Nonsuit or to Dismiss His Action Without Prejudice,* 37 VA. L. REV. 969 (1951).

6 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196.

> That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however,* That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof. 17 Stat. 197.

In equity the common law right could be restricted by local court rule. Such a rule was approved by the Supreme Court in *Bronx Brass Foundry, Inc. v. Irving Trust Co.,* 297 U.S. 230 (1936). There the Court upheld Rule II of the Equity Rules of the Southern District of New York which states:

> If justice require, the Court, after issue joined, may refuse to permit the plaintiff to discontinue even though defendant cannot have affirmative relief under the pleadings and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action. *De Filippis v. Chrysler Sales Corp.,* 116 F.2d 375 (2d Cir. 1940).

separated voluntary dismissals into two categories. In order to prevent abusive use of voluntary dismissal as of right, Rule 41(a)(1)[7] was adopted to limit it to an early stage of the proceedings. The rule permitted voluntary dismissals only before service of answer or motion for summary judgment.[8] Rule 41(a)(2)[9] preserves the procedure of voluntary dismissal by plaintiff after an answer or motion for summary judgment. The dismissal, however, lies entirely within the court's discretion and no longer exists as a matter of right.[10] By design, the new rule would restrict any dismissal which unfairly affects the other side.[11] This would include situations in which an impending unfavorable judgment exists[12] or where the court has indicated its intention to find for the defendant on a pending motion.[13] Whether the purposes for which the rule was adopted will be achieved depends on the manner in which courts apply it in individual cases.

The factors to be considered on a motion for dismissal are a function of the legal standard the court believes applicable. If, as some courts have held, the rule

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7 FED. R. CIV. P. 41(a)(1):

> *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), 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.

The interaction of dismissal under Rule 23(e) and Rule 41(a) is discussed in Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part I*, 22 SW. L. J. 767 (1968).

8 Harvey Aluminum Co. v. American Cyanamid Co., 203 F.2d 105 (2d Cir.), *cert. denied*, 347 U.S. 913 (1954); Ockert v. Union Barge Line Corp., 190 F.2d 303 (3d Cir. has been the subject of much confusion. *See e.g.*, Nix v. Lodge No. 2, Int'l Ass'n of Machinists, 452 F.2d 794 (5th Cir. 1971); Note, *Exercise of Discretion in Permitting Dismissals Without Prejudice Under Federal Rule 41(a)*, 54 COLUM. L. REV. 616 (1954); Note, *Federal Civil Procedure: Voluntary Dismissal Under Rule 41(a)(1)*, 1962 DUKE L.J. 285.

9 FED. R. CIV. P. 41(a)(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 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 is without prejudice.

A motion must be made for voluntary dismissal under Rule 41(a)(2), Diamond v. United States, 267 F.2d 23, 25 (5th Cir.), *cert. denied*, 361 U.S. 834 (1959), and an order granting such dismissal is not appealable by plaintiff as he consented to it. Scholl v. Felmont Oil Corp., 327 F.2d 697, 700 (6th Cir. 1964). The motion may limit the terms and conditions which plaintiff will accept, but if they are not satisfactory to the court dismissal will be denied. Federal Savings & Loan Ins. Corp. v. First Nat'l Bank, 4 F.R.D. 313, 315 (W.D. Mo. 1945). *See also* Roth v. Great Atl. & Pac. Tea Co., 2 F.R.D. 182 (S.D. Ohio 1942).

10 *See e.g.*, Grivas v. Parmelee Transp. Co., 207 F.2d 334, 336 (7th Cir. 1953), *cert. denied*, 347 U.S. 913 (1954); Ockert v. Union Barge Line Corp., 190 F.2d 303 (3d Cir. 1951); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 316 (8th Cir. 1943). Where, however, plaintiff seeks only to gain a jury trial in a subsequent action, the court has no discretion to dismiss in order to remedy an untimely demand for jury trial. Noonan v. Cunard Steamship Co., 375 F.2d 69 (2d Cir. 1967).

11 Alamance Indus., Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir.), *cert. denied*, 368 U.S. 831 (1961).

12 Moore v. C. R. Anthony Co., 198 F.2d 607 (10th Cir. 1952).

13 *E.g.*, Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942 (4th Cir. 1954); International Shoe Co. v. Cool, 154 F.2d 778 (8th Cir.), *cert. denied*, 329 U.S. 726 (1946).

envisioned is no more than a codification and statement of practice existing at the time the federal rules were adopted,[14] the legal standard applied in such courts will differ from those courts that feel the rule should be interpreted independently of the former practice.[15] As a result, the factors deemed relevant and the emphasis given any particular factor will vary with the legal standard applied.

This note will discuss the various legal standards utilized on a motion for voluntary dismissal and indicate which standard appears to best "secure the just, speedy, and inexpensive determination of every action"[16] under the Federal Rules. Discussion and analysis of the individual factors to be considered by a court under that standard will follow.

II. Legal Standards Used by Federal Courts When Evaluating a Motion to Dismiss

There are basically two approaches which federal courts have taken when ruling on a plaintiff's motion for voluntary dismissal. The normal approach parallels the common law procedure utilized prior to adoption of the Federal Rules. Under it, courts will ask whether the defendant suffered some plain legal prejudice other than the prospect of a second suit on the same cause of action.[17] The second approach asks what the fairest and most equitable course of action will be under all the circumstances. The latter approach is decidedly more nebulous and lacking in well-defined standards.[18]

A. *Plain Legal Prejudice*

The phrase "plain legal prejudice" has its roots in the common law,[19] and is the language traditionally used by the federal courts to delineate the nature or amount of injury to a defendant that would justify a court's refusal to grant plaintiff a voluntary dismissal.[20] Before the merger of law and equity, it appears

14 *See, e.g.*, Durham v. Florida E. C. Ry., 385 F.2d 366, 368 (5th Cir. 1967); Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943).

15 *Cf.* Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942 (4th Cir. 1954); Klintworth v. Atlantic C. Line R.R., 39 F.R.D. 330 (D.S.C. 1966); Therrien v. New England Tel. & Tel. Co., 102 F. Supp. 350 (D.N.H. 1951).

16 FED. R. CIV. P. 1.

17 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2364, at 165 (1971).

18 *See* Burgess v. Atlantic C. Line R.R., 39 F.R.D. 588 (D.S.C. 1966); Klintworth v. Atlantic C. Line R.R., 39 F.R.D. 330 (D.S.C. 1966); Lunn v. United Aircraft Corp., 26 F.R.D. 12 (D. Del. 1960); Therrien v. New England Tel. & Tel. Co., 102 F. Supp. 350 (D.N.H. 1951).

19 See note 1 *supra*.

20 *See* Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947). Unfortunately, the phrase has no precise meaning and has taken various forms such as "prejudicial to substantive rights," Shaffer v. Evans, 263 F.2d 134, 135 (10th Cir. 1958), *cert. denied*, 359 U.S. 990 (1959); "plain prejudice," Westinghouse Elec. Corp. v. United Elec. Workers, 194 F.2d 770, 771 (3d Cir.), *cert. denied*, 343 U.S. 966 (1952); "seriously prejudicial," Lunn v. United Aircraft Corp., 26 F.R.D. 12, 17 (D. Del. 1960); "actual prejudice," Therrien v. New England Tel. & Tel. Co., 102 F. Supp. 350, 351 (D.N.H. 1951); "suffer an injustice," United States v. E.I. Du Pont de Nemours & Co., 13 F.R.D. 490, 496 (N.D. Ill. 1953); "unduly prejudicial," Harvey Aluminum Co. v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953); "clear showing of prejudice," Meltzer v. National Airlines, Inc., 31 F.R.D. 47, 49 (E.D. Pa. 1962); and, "clear legal prejudice," Gammino Constr. Co. v. Great American Ins. Co., 52 F.R.D. 323, 325 (D.R.I. 1971).

that the adjective "legal" referred to a species of prejudice cognizable in a common law court and that only such prejudice to defendant could justify denial of voluntary dismissal. However, presently it appears that the word is used solely to denote a legally cognizable prejudice[21] more substantial than that of a second suit.[22] In other words, "legal" has lost any meaning as a word of art and now serves to indicate the degree of prejudice a particular factor will have on a defendant.

The United States Court of Appeals for the Eighth Circuit in *Home Owners' Loan Corp. v. Huffman*[23] was among the first courts to consider a motion under Rule 41(a)(2). There, a trial which resulted in a judgment for defendant was reversed on appeal and remanded to the district court, whereupon plaintiff had an order of dismissal entered *ex parte*. Defendant appealed from the denial of its motion to set aside the dismissal. In reversing the district court denial of defendant's motion, the Court of Appeals adopted the traditional "plain legal prejudice" formulation and said that Rule 41 was only declaratory of the former practice which required the court to determine whether the defendant lost any substantial right by the dismissal.[24] The court only looked at the effect a dismissal would have on the defendant and noted that plaintiff's motives for seeking dismissal were not a subject of consideration under Rule 41(a).[25]

A change in emphasis was indicated in *International Shoe Co. v. Cool*[26] where the Court of Appeals for the Eighth Circuit not only recited the traditional principle but also made reference to the fact that the record did not disclose any specific grounds as a basis for plaintiff's motion to dismiss.[27]

Plaintiff's reasons for desiring dismissal have become increasingly more important as a factor to which courts will look when examining a motion to dismiss.[28] Indicative of this trend is *Therrien v. New England Telephone & Tele-*

21 It goes without saying that when a defendant resists a plaintiff's motion to dismiss, he anticipates some kind of prejudice. It does not appear to this Court, however, that National Airlines, Inc, will suffer legally cognizable prejudice to a degree sufficient to bar plaintiff's dismissal.
Meltzer v. National Airlines, Inc., 31 F.R.D. 47, 49 (E.D. Pa. 1962).

22 It is well settled that the possibility of a second suit is not a factor requiring a court to deny voluntary dismissal. United States v. E.I. Du Pont De Nemours & Co., 13 F.R.D. 490 (N.D. Ill. 1953). The problem that courts have to face is deciding what constitutes prejudice sufficient to warrant their denying the motion. Under the traditional formulation of the rule, the defendant has the burden of showing the court that he will suffer such prejudice as a result of dismissal. *See* Meltzer v. National Airlines, Inc., 31 F.R.D. 47, 49 (E.D. Pa. 1962).

23 134 F.2d 314 (8th Cir. 1943).

24 *Id.* at 317.

25 The *Home Owners'* court based this conclusion on dicta contained in *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924). The rationale in *Skinner & Eddy* was grounded on the fact that in 1924 the plaintiff had an absolute right to dismissal and there was no reason to consider his motives. The defendant in *Skinner & Eddy* was attempting to show the unworthy nature of plaintiff's motives for dismissal, which he hoped would mandate denial of the motion to dismiss. Such was not the case in *Home Owners'*, and later cases have disagreed with this conclusion. *See* Lunn v. United Aircraft Corp., 26 F.R.D. 12 (D. Del. 1960). Plaintiff's motives are now a proper subject of consideration for the court. *See, e.g.,* Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942 (4th Cir. 1954); Lunn v. United Aircraft Corp., *supra.*

26 154 F.2d 778 (8th Cir.), *cert. denied,* 329 U.S. 726 (1946).

27 *Id.* at 780.

28 *See, e.g.,* Grivas v. Parmelee Transp. Co., 207 F.2d 334 (7th Cir. 1953), *cert. denied,* 347 U.S. 913 (1954). This case overruled *Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir.), *cert. denied,* 340 U.S. 813 (1950), which had held that under Rule 41(a)(2)

graph Co.[29] wherein the plaintiff sought to dismiss so that he could refile in a state court, join a resident defendant, and thereby prevent removal on diversity grounds. The New Hampshire District Court found that the defendant would only be subjected to a second suit and that no other prejudice existed. They, therefore, granted the plaintiff's motion for dismissal, stating that denial of the motion would impose a severe burden on the plaintiff.[30]

Further examination of federal cases discloses a continuing trend to inquire into the reasons behind a plaintiff's motion for dismissal without prejudice.[31] This modification of the common law principle has prompted one court to state:

> It is increasingly plain from the cases that the supposed absolute right to dismiss, upon the exercise of which just conditions can be imposed, has become a conditional right exercisable only for good cause shown and upon just conditions when it appears that the case is to be continued elsewhere.[32]

B. *Equities of the Parties*

Under the traditional common law approach to a plaintiff's motion for dismissal, the motives of the plaintiff were not a proper consideration for the court.[33] Though this approach has not been totally abandoned by the federal courts,[34] the emerging trend has been to weigh the interests of both the plaintiff and defendant so that a result which is fair and equitable to all participants in the litigation can be secured.[35]

Examples of the equitable approach can be found in several cases. In *Lunn v. United Aircraft Corp.*[36] plaintiff moved for a voluntary dismissal after answer so that all its claims could be litigated in one forum, New York. The district court stated that it would exercise its discretion so that substantial justice was done to the parties.[37] The courts in *Klintworth v. Atlantic Coast Line R.R.*[38] and in *Burgess v. Atlantic Coast Line R.R.*[39] said that the judge "should weigh the equities and make that decision which seems fairest under all the circumstances."[40] Similarly, the New Hampshire district court deciding *Therrien v. New England Telephone & Telegraph Co.* said that a decision should be made

a plaintiff had a right to dismissal and that a court's only discretion lay in the terms and conditions it could impose upon dismissal of plaintiff's action.

29 102 F. Supp. 350 (D.N.H. 1951).

30 *Id.* at 351.

31 *See, e.g.,* Pace v. Southern Express Co., 409 F.2d 331 (7th Cir. 1969); Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958), *cert. denied,* 359 U.S. 990 (1959); Stevenson v. United States, 197 F. Supp. 355 (M.D. Tenn. 1961); Fair v. Trans World Airlines, Inc., 22 F.R.D. 60 (E.D. Ill. 1957).

32 Mistretta v. S.S. Ocean Evelyn, 250 F. Supp. 868, 870 (E.D.N.Y. 1966) (admiralty, Federal Rules of Civil Procedure technically not applicable).

33 *Ex parte* Skinner & Eddy Corp., 265 U.S. 86, 93 (1924). See note 25 *supra.*

34 *See* Westinghouse Elec. Corp. v. United Elec. Workers, 99 F. Supp. 597 (W.D. Pa. 1951), *aff'd* 194 F.2d 770 (3rd Cir.), *cert. denied,* 343 U.S. 966 (1952).

35 Gammino Constr. Co. v. Great American Ins. Co., 52 F.R.D. 323 (D.R.I. 1971); Burgess v. Atlantic C. Line R.R., 39 F.R.D. 588 (D.S.C. 1966); Lunn v. United Aircraft Corp., 26 F.R.D. 12 (D. Del. 1960); and cases cited note 15 *supra.*

36 26 F.R.D. 12 (D. Del. 1960).

37 *Id.* at 13.

38 39 F.R.D. 330 (D.S.C. 1966).

39 39 F.R.D. 588 (D.S.C. 1966).

40 *Id.* at 592 *and* 39 F.R.D. at 332.

"in accordance with what would be fairest and cause the least hardship to the parties."[41]

In addition to the interests of the parties, discretion should be exercised with a view towards achieving the just, speedy, and inexpensive determination of every action.[42] To this end the court's duty under Rule 41(a)(2) has been aptly described:

> Here the court has an express judicial function to perform. All of the concepts and processes of judicial determination are brought into play.
> . . . This along with countless elements, traditionally called upon to underpin our concepts of reasonableness and fairness, goes into the process of sound discretion of the trial court, as 41(a)(2) says "as the court deems proper."[43]

With the language above, the Court of Appeals for the Fifth Circuit announced that the two-dismissal rule of Rule 41(a)(1)[44] did not apply to discretionary dismissals under Rule 41(a)(2). The court did not want its discretion to be unduly fettered when performing a judicial function. In like manner, it seems that the traditional common law approach to a plaintiff's motion for dismissal has given an advantage to plaintiff that no longer remains necessary under today's rules of procedure. The approach most likely to attain the goals embodied in Rule 1 is one equitable in nature where the court is given full power to freely exercise its discretion in the best interests of justice.

III. Factors Considered by the Court on a Motion for Voluntary Dismissal

Several factors have been scrutinized by various courts considering a motion to dismiss. These include "[u]ndue vexatiousness, undue burden to a litigant in presenting his defense or claim in another jurisdiction, excessive and duplicitous expense of a second litigation, the extent to which any judgment in the new action would be conclusive as to issues and parties as contrasted to a final determination in the pending suit, the extent to which the current suit has progressed,"[45] intervention of other interests, as where counterclaims or third-party proceedings are involved,[46] and time spent by a court in familiarizing itself with the action.[47] Additional factors to be considered are existence of simultaneous litigation in several forums,[48] docket conditions, plaintiff's choice of forum, loss of a defense, and technical defect in proof. Each factor will be analyzed (though not separately) through an examination of the cases wherein it has appeared. These factors will be evaluated in relation to the disposition that would best serve the interests of justice.

41 102 F. Supp. 350, 351 (D.N.H. 1951).
42 See text accompanying note 16 *supra.*
43 American Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963).
44 See note 7 *supra.*
45 Harvey Aluminum Co. v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953).
46 Lunn v. United Aircraft Corp., 26 F.R.D. 12, 17 (D. Del. 1960).
47 Nixon Constr. Co. v. Frick Co., 45 F.R.D. 387, 389-90 (S.D.N.Y. 1968).
48 See part B *infra.*

A. *Right of Plaintiff to Choose His Forum*

Plaintiff makes his initial choice of forum when he decides where first to bring suit. Through inadvertence or mistake, this choice may not have been wisely made, a fact which usually comes to light only after the defendant has answered or made some motion to otherwise diminish plaintiff's hopes for recovery. In addition, defendant may defeat plaintiff's choice of forum by removing from a state court to a federal court or transferring from one federal court to another. At this point, a plaintiff will invariably discover a better forum for his suit and attempt to change forums or retain his initial forum choice by seeking to dismiss the pending action. A second action may or may not have already been begun in another forum.

Absent any equities defendant might have in wishing to remain in the forum where the motion for dismissal is pending, plaintiff's right to choose his forum has been of sufficient weight to justify dismissal.[49] *Stevenson v. United States,*[50] for example, was an action for the recovery of income taxes brought in the United States District Court for the Middle District of Tennessee. The Government had answered and made a motion for change of venue, which admittedly was improper, to the United States District Court for the Eastern District of Tennessee. Plaintiff then moved to dismiss in the Middle District so that he could bring suit against the District Director of Internal Revenue for the Middle District. The court, in exercising discretion to either transfer or dismiss the action without prejudice, said that it had to weigh the plaintiff's right to choose his own forum against the greater convenience to defendant of a trial in the Western District.[51] The court dismissed the action upon terms and conditions,[52] giving the greater weight to plaintiff's right to choose the forum.[53]

B. *Multiple Litigation*

In some cases a plaintiff may seek to recover for the same claim in more than

49 See Stevenson v. United States, 197 F. Supp. 355 (M.D. Tenn. 1961); Roberts Bros., Inc. v. Kurtz Bros., 236 F. Supp. 471 (D.N.J. 1964). *But cf.* Blue Mountain Constr. Co. v. Werner, 270 F.2d 305 (9th Cir. 1959), *cert. denied,* 361 U.S. 931 (1960).

50 197 F. Supp. 355 (M.D. Tenn. 1961).

51 *Id.* at 358.

52 (1) Plaintiffs make available to the defendant any pertinent books and records or contracts with third parties before any trial in an action commenced against the District Director in the Middle District.
(2) Plaintiffs produce employees at such trial and pay cost of their transportation.
(3) Plaintiffs pay one-half of transportation costs and expenses of other witnesses from Memphis area, located in the Eastern District.
(4) Plaintiffs pay all of the costs of the present action. 197 F. Supp. at 359.

53 It will be noted that here plaintiff was desirous of remaining in the forum it originally had chosen. In allowing a voluntary dismissal the court relied on the strong authority of *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947) which said:

> [U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. 330 U.S. at 508.

It would seem that the right of a plaintiff to make a second choice of forum would not be as great as the right to make the first choice. Therefore, only in a case where plaintiff sought to remain in or regain his initial forum would the authority of *Gulf Oil* apply with full force. Where plaintiff is desirous of changing forums in order to obtain some tactical advantage, without other prevailing reasons, defendant's equities would not have to be as overwhelming as indicated in *Gulf Oil.*

one forum. The reasons for this vary, but may include such things as unavailability of all defendants in one jurisdiction, different substantive law in different forums, and harassment of defendants. Unquestionably, multiple litigation of the same claims does not provide for the just, speedy and efficient administration of justice.

Multiple litigation situations, where plaintiffs seek voluntary dismissal in the federal forum, can be categorized according to whether the second suit is pending in another federal forum or a state forum. The two main cases wherein a plaintiff commenced suit in another federal forum are *Alamance Industries, Inc. v. Filene's*[54] and *Roberts Brothers, Inc. v. Kurtz Brothers.*[55]

Alamance was a patent infringement action brought in the United States District Court for Massachusetts against a retailer of the allegedly infringing items. An earlier declaratory judgment action had been brought by several manufacturers in the Middle District of North Carolina wherein Alamance counterclaimed for infringement. The suit in Massachusetts had been dormant for fourteen months, apparently because of an agreement to allow suit to proceed in North Carolina, when defendants asked for a trial date. On appeal from the trial court's dismissal of the complaint and denial of Alamance's motion for dismissal without prejudice, the United States Court of Appeals for the First Circuit held that the district court had not exercised any discretion and said in addition:

> North Carolina was the primary forum in which to try—not only because it was first, but because of the number of substantial parties before the court, and the time and effort which had been spent in preparation.[56]

In *Roberts Brothers,* actions were pending in Pennsylvania and New Jersey federal district courts. Plaintiff sought transfer with respect to some defendants and dismissal without prejudice as to others. The court stressed the fact that only one forum should proceed and that dismissal without prejudice upon terms and conditions would be the most appropriate way to accomplish this end.[57] Thus, where there are simultaneous suits by a plaintiff in different federal forums, the plaintiff should be allowed to dismiss one of the pending actions and proceed with the action in which the greater number of litigants are parties.[58]

There are many cases wherein a plaintiff in the federal forum has sought dismissal without prejudice in order to prosecute his action in a state court. Three of the more detailed treatments are contained in *Therrien v. New England Tele-*

54 291 F.2d 142 (1st Cir.), *cert. denied,* 368 U.S. 831 (1961).
55 236 F. Supp. 471 (D.N.J. 1964).
56 291 F.2d at 146.
57 Roberts Bros. Inc. v. Kurtz Bros., 236 F. Supp. 471, 473 (D.N.J. 1964). *See also* Angelucci v. Continental Radiant Glass Heating Corp., 51 F.R.D. 314 (E.D. Pa. 1971). Dismissal has been refused when an order of transfer to another federal district court has already been granted for the convenience of parties and witnesses and in the interests of justice. Wilson v. Ohio River Co., 236 F. Supp. 96, 99 (S.D.W. Va. 1964).
58 S.C. Johnson & Son, Inc. v. Boe, 187 F. Supp. 517 (E.D. Pa. 1960) (motion of indispensable party to intervene as defendant was denied and plaintiff's motion to dismiss was granted where intervenor was a party to another suit in a different state).

phone & Telegraph Co.,[59] *Lunn v. United Aircraft Corp.*,[60] and *Sahutsky v. National Dairy Products Corp.*[61]

In *Therrien* the plaintiff brought two separate suits for the same claim in New Hampshire courts, one against a resident defendant and the other against a nonresident defendant. The nonresident, New England Telephone & Telegraph Co., removed the case to the federal court where plaintiff moved to dismiss with the intention of joining New England Telephone in its other state court action. Commenting on the efficacy of dismissing in order to accomplish this end, the court said: "Absent actual prejudice accruing to the defendant, convenient disposition of plaintiff's claim in one trial is sufficient basis to warrant dismissal."[62]

In *Sahutsky* plaintiff had commenced an action in the state court against a truck driver and an action in the federal court against the driver's employer, National Dairy Products Corp. The plaintiff moved to dismiss after the employer had moved for summary judgment on the issue of agency. Conceding that this question could not be disposed of by motion in the state court, the federal district court allowed dismissal because the granting of defendant's motion would not terminate litigation in the state court. If the employer were joined there, all issues could be disposed of in one court.

The plaintiff in *Lunn* had commenced his suit in a New York court for personal injuries and wrongful death. It was dismissed for lack of personal jurisdiction over defendant United Aircraft Corp., which was not then doing business in New York. Suit was next brought in the federal district court in Delaware where the claim for personal injuries was dismissed as barred by the Delaware statute of limitations. Plaintiff ultimately reinstituted suit in New York after learning that United Aircraft had been licensed to do business there. He subsequently sought to dismiss in the Delaware federal district court. The court said that suit would have to continue in New York on the personal injuries claim regardless of the disposition of the suit in Delaware, and it granted dismissal on the basis that the New York forum would best serve the interests of justice and convenience of the parties. Where, therefore, plaintiff seeks a dismissal in order to consolidate actions in a state court, loss of a federal forum is not a countervailing equity.[63]

C. *Interests of Codefendants and Third Parties*

If a defendant has pleaded a counterclaim, the court cannot dismiss the complaint over his objection unless it can retain jurisdiction over the counter-

59 102 F. Supp. 350 (D.N.H. 1951).
60 26 F.R.D. 12 (D. Del. 1960).
61 184 F. Supp. 68 (E.D. Pa. 1960).
62 102 F. Supp. at 351.
63 *See* Mason v. Ohio River Co., 373 F.2d 69 (6th Cir. 1967) (admiralty); Grivas v. Parmelee Transp. Co., 207 F.2d 334 (7th Cir. 1953), *cert. denied*, 347 U.S. 913 (1954); Gammino Constr. Co. v. Great American Ins. Co., 52 F.R.D. 323 (D.R.I. 1971) (dismissal with prejudice). Where defendant seeks dismissal of removed cause in order to re-file in state court joining resident defendant, loss of federal forum by itself will not prevent dismissal. Grivas v. Parmelee Transp. Co., *supra*. If dismissal would eventually result in two separate suits, one in federal court and another in state court, dismissal should not be granted. *See* Chase v. Ware, 41 F.R.D. 521 (N.D. Okla. 1967).

claim for independent adjudication.[64] This portion of Rule 41(a)(2) stems from the former practice in equity, where a bill would not be dismissed after defendant had requested affirmative relief.[65] An analogous situation is presented where a defendant seeks affirmative relief by filing a cross-claim against a co-defendant or a third-party complaint. The existence of cross-claims[66] and third-party complaints[67] in an action are matters to be considered by a court on a motion for voluntary dismissal of the complaint. Where there is more than one defendant in an action, a plaintiff may seek dismissal as to all of them or only some.[68] In either situation, dismissal may be denied where the rights of the defendants *inter se* may be diminished as a result of a dismissal.[69] In such cases adequate precautions should be taken to protect any affected defendants.[70]

Fair v. Trans World Airlines, Inc.[71] involved an action for wrongful death brought against Trans World Airlines (TWA), United Air Lines (UAL), and the United States. Recognizing that TWA might be prejudiced[72] on plaintiff's motion to dismiss the United States, the court retained jurisdiction over TWA's cross-claim against the United States. This course of action compared favorably to the provisions of Rule 41(a)(2) with respect to counterclaims[73] and simplified an already complex action.

D. *Stage of Proceedings When Dismissal Sought*

The more developed a suit, the easier it is for a perceptive plaintiff's counsel

64 FED. R. CIV. P. 41(a)(2) note 9 *supra*. *See* Angelucci v. Continental Radiant Glass Heating Corp., 51 F.R.D. 314 (E.D. Pa. 1971); *cf. In re* Nathan, 98 F. Supp. 686 (S.D. Cal. 1951) (bankruptcy); Wall v. Connecticut Mut. Life Ins. Co., 2 F.R.D. 244 (S.D. Ga. 1941) (counterclaim could not be retained). Service of counterclaim after service of motion to dismiss is no bar to dismissal. United States v. Professional Air Traffic Controllers Organization, 449 F.2d 1299 (3d Cir. 1971). Rule 41(a)(2) does not prevent dismissal of a counterclaim simultaneously with complaint, when it can remain for independent adjudication. *See* McGraw-Edison Co. v. Performed Line Prods. Co., 362 F.2d 339 (9th Cir.), *cert. denied*, 385 U.S. 919 (1966).

65 *See Ex parte* Skinner & Eddy Corp., 265 U.S. 86, 93-94 (1924).

66 *See* Fair v. Trans World Airlines, Inc., 22 F.R.D. 60 (E.D. Ill. 1957).

> Trans World Airlines, Inc., has filed a cross-claim against the United States and may well be prejudiced by dismissal of the action if their cross-claim were also dismissed. 22 F.R.D. at 63.

See Gammino Constr. Co. v. Great American Ins. Co., 52 F.R.D. 323 (D.R.I. 1971); Broadway & Ninety-Sixth St. Realty Corp. v. Loew's, Inc., 23 F.R.D. 9 (S.D.N.Y. 1958).

67 Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942, 947 (4th Cir. 1954):

> [I]t is obvious that the filing of a third-party complaint in any case is a factor which should be taken into consideration when the plaintiff seeks a voluntary dismissal.

68 For the propriety of a motion under Rule 41(a)(2) dismissing with respect to less than all defendants, *see* Note, *Miller v. Stewart: Voluntary Dismissal by Less than All Plaintiffs Under the Federal Rules of Civil Procedure*, 73 DICK. L. REV. 150 (1968). *See* Altman v. Liberty Equities Corp., 54 F.R.D. 620 (S.D.N.Y. 1972); Fastener Corp. v. Spotnails, Inc., 291 F. Supp. 974 (N.D. Ill. 1968).

69 *See* Altman v. Liberty Equities Corp., 54 F.R.D. 620, 624 (S.D.N.Y. 1972). *But cf.* Southern Elec. Generating Co. v. Allen Bradley Co., 30 F.R.D. 135 (S.D.N.Y. 1962); Broadway & Ninety-Sixth St. Realty Corp. v. Loew's, Inc., 23 F.R.D. 9 (S.D.N.Y. 1958); Northern Ins. Co. v. Grove, 126 F. Supp. 457 (M.D. Pa. 1954) (intervening plaintiffs have no standing to object to dismissal by plaintiff).

70 *Cf.* Wood v. United Air Lines, Inc., 216 F. Supp. 340, 345 (E.D.N.Y. 1963). Loss of a right to contribution from a codefendant is a significant factor. *See* Altman v. Liberty Equities Corp., 54 F.R.D. 620 (S.D.N.Y. 1972); Young v. Wilky Carrier Corp., 150 F.2d 764 (3d Cir. 1945) (concurring opinion), *cert. denied*, 326 U.S. 786 (1946).

71 22 F.R.D. 60 (E.D. Ill. 1957).

72 See note 66 *supra*.

73 See text accompanying note 64 *supra*.

to determine his client's possibilities for recovery. If it becomes increasingly clear that plaintiff has little chance of recovery, it might be wise to obtain a voluntary dismissal. The difficulty with this course of action is the position in which the defendant is left. A dismissal at a late stage in the proceedings, such as at trial, may deprive him of the opportunity to obtain a favorable judgment after a tremendous amount of time, money and energy have been devoted toward this goal.[74] Under the common law in England,[75] the efforts of the defense would be adequately compensated with money since costs included attorney's fees. The expense of the pending litigation was, therefore, not a factor affecting dismissal. However, under the American system, attorney's fees have never been awarded as a matter of course and the expenses of litigation became a factor to be considered when dismissal became discretionary. In such cases the dismissed defendant might be monetarily worse off than when litigation was commenced. Since courts are empowered to impose "terms and conditions," attorney fees have often been awarded in such cases.[76] Some courts[77] have expressed the concern that it seems anomalous for a dismissed defendant to receive counsel's fees where a successful defendant does not. However, a successful defendant has the benefit of a judgment in his favor while a dismissed defendant winds up with little or nothing save a large bill from his attorney. Thus, the defendant's expenses are not an overwhelming factor for the plaintiff who is willing to pay.

Litigation expense should not be the sole concern of the trial court when deciding a plaintiff's motion for dismissal. The defendant may have obtained some beneficial procedural or substantive ruling which might be lost in a subsequent proceeding. Examples of this are the opportunities for extensive discovery, availability of witnesses, favorable evidentiary rulings, and right to contribution or indemnity from codefendants or third parties. Of course, the length of time that a proceeding has been before the court is not the greatest concern; the time consumed preparing matters for the court and time spent before the court are of paramount interest.[78]

Where the proceedings have advanced to the trial stage, a court should be reluctant to grant plaintiff's motion for dismissal unless he has a good reason for seeking such disposition.[79] In effect, plaintiff should be required to show why he has delayed so long in requesting a dismissal.

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74 However, dismissal may be appropriate if there has been a technical defect in plaintiff's proof. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947) (dicta). The plaintiff moving for voluntary dismissal in such circumstances must make a showing to the court that he has further evidence. *See* Yoshio Murakami v. Dulles, 221 F.2d 588 (9th Cir. 1955); Boaz v. Mutual Life Ins. Co., 146 F.2d 321 (8th Cir. 1945); Western Union Tel. Co v. Dismang, 106 F.2d 362 (10th Cir. 1939). Where there is additional evidence a new trial might be more appropriate. *See Cone supra.* If the circumstances warrant, a new trial would be more economical than a dismissal followed by a new action and it might, at the same time, protect defendant from the possibility of undue harassment.

75 See note 1 *supra.*

76 *See, e.g.,* Lunn v. United Aircraft Corp., 26 F.R.D. 12, 18 (D. Del. 1960).

77 *Id.*

78 *See* Alamance Indus., Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir.), *cert. denied,* 368 U.S. 831 (1961), *but see* Erie-Lackawanna R.R. v. United States, 279 F. Supp. 303, 306-07 (S.D.N.Y. 1967), where an enormous amount of time had been spent by the court over an extremely complex case that had already been to the Supreme Court.

79 *See* Ockert v. Union Barge Line Co., 190 F.2d 303 (3d Cir. 1951); Boaz v. Mutual Life Ins. Co., 146 F.2d 321 (8th Cir. 1945).

In *Colonial Oil Co. v. American Oil Co.*[80] plaintiff obtained a verdict, and the judgment was appealed to the United States Court of Appeals for the Fourth Circuit. A new trial was required and after remand from the Court of Appeals plaintiff moved for dismissal without prejudice. The court held that the defendant had acquired substantial rights in the law of the case set down by the United States Court of Appeals and therefore denied dismissal.[81] If trial has not yet begun, but all preparatory matters have been completed, then there may be no law of the case in defendant's favor. Under such circumstances the propriety of dismissal at that stage of the proceedings is not a settled question,[82] but if defendant would be no worse off after dismissal than before the litigation started, the dismissal can be allowed.[83]

It has been said that "no one has a vested right in any given mode of procedure."[84] However, some courts have viewed the loss of discovery provisions of the Federal Rules as sufficient to deny dismissal. One case confronted the matter and denied dismissal.[85] Others have conditioned dismissal on the production of documents or agreement of a party to be deposed in the subsequent action.[86] But the loss by the defendant of procedural advantages does not outweigh the plaintiff's right to choose a forum. Therefore, either dismissal on terms and conditions or retention of the action may be appropriate, depending on the circumstances of the individual case.

When defendant has made a motion to transfer the case, the plaintiff may attempt to dismiss in order to avoid transfer.[87] Since both motions are discretionary with the court they can be decided together.[88] However, if a defendant's motion to transfer has been granted for the convenience of parties and witnesses and in the interests of justice, then dismissal should only be granted on a strong showing by plaintiff.[89] On balance, when a court is confronted with a motion to transfer and a motion to dismiss, absent extraordinary circumstances, any prejudice to defendant is not sufficient to prevent dismissal.[90]

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80 3 F.R.D. 29 (E.D.S.C. 1943).

81 This also appears to be a substantial reason for denying dismissal during the initial trial, unless plaintiff is possessed of countervailing equities.

82 *Compare* Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958), *cert. denied,* 359 U.S. 990 (1959), *with* Durham v. Florida E.C. Ry., 385 F.2d 366 (5th Cir. 1967). Award of attorney's fees seems manifestly appropriate if dismissal is granted. *See* Hentley v. Atlantic C. Line R.R., 224 F.2d 929, n.4 (5th Cir. 1955); Pathe Laboratories, Inc. v. Technicolor Motion Picture Corp., 19 F.R.D. 211 (S.D.N.Y. 1955), *but see* Todd v. Thomas, 202 F. Supp. 45 (E.D.N.C. 1962).

83 *See* Todd v. Thomas, 202 F. Supp. 45, 47 (E.D.N.C. 1962).

84 *Ex parte* Collett, 337 U.S. 55, 71 (1949); See Grivas v. Parmelee Transp. Co., 207 F.2d 334, 338 (7th Cir. 1953), *cert. denied,* 347 U.S. 913 (1954); New York, C. & St. L.R.R. v. Vardaman, 181 F.2d 769, 771 (8th Cir. 1950).

85 Trammell v. Eastern Air Lines, 136 F. Supp. 75 (W.D.S.C. 1955).

86 *E.g.,* Mashek v. Silberstein, 20 F.R.D. 421 (S.D.N.Y. 1957). *See* Pacific Vegetable Oil Corp. v. S/S Shalom, 257 F. Supp. 944 (S.D.N.Y. 1966); Eaddy v. Little, 234 F. Supp. 377 (E.D.S.C. 1964); *cf.* S.S. Bethflor v. Thomas, 364 F.2d 634 (5th Cir. 1966) (admiralty); United States v. E.I. Du Pont de Nemours & Co., 13 F.R.D. 490, 496 (N.D. Ill. 1953).

87 Tele-View News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961).

88 Stevenson v. United States, 197 F. Supp. 355, 358 (M.D. Tenn. 1961).

89 *See* Wilson v. Ohio River Co., 236 F. Supp. 96, 99 (S.D. W. Va. 1964); Tele-View News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961).

90 New York, C. & St. L.R.R. v. Vardaman, 181 F.2d 769 (8th Cir. 1950); Meltzer v. National Airlines, Inc., 31 F.R.D. 47 (E.D. Pa. 1962). *Cf.* Littman v. Bache & Co., 252 F.2d 479 (2d Cir. 1958).

A defendant's motion going to the merits of the dispute differs from one merely seeking transfer since it may completely terminate litigation. Where a motion going to the merits is made after extensive pretrial discovery, wherein all issues have fairly been explored, voluntary dismissal upon the plaintiff's cross-motion may be as inequitable to the defendant as would be a dismissal during trial. Unless adequate terms and conditions could be imposed, therefore, dismissal under such circumstances would not be a proper exercise of discretion.[91]

E. *Subsequent Litigation*

In every case where plaintiff seeks a dismissal without prejudice the possibility of subsequent litigation exists. Since it is well settled that a second suit, by itself, is not sufficient to bar dismissal,[92] the defendant must show some additional impediment to a defense in the second suit in order to defeat dismissal. Of course, if a second suit would only serve to harass defendant, then dismissal alone would be a harsh burden on him and should be denied.[93]

The ordinary expense attendant to a second litigation is normally not a factor warranting great consideration.[94] The situation changes, however, when expense of the second litigation will be increased over and above what would usually be incurred in a suit of similar scope. In *Harvey Aluminum, Inc. v. American Cyanamid Co.*[95] plaintiff wished to dismiss in New York in order to bring a subsequent suit in British Guiana. The district court denied dismissal, saying:

> If a new action were commenced in British Guiana a substantial portion of the legal fees will have been wasted. The estimated cost of transportation of witnesses, living expenses, loss of salaries and other items required to defend a second suit in British Guiana is in excess of $55,000 and does not include necessary additional legal fees.[96]

The court concluded that this would be an onerous and burdensome expense far beyond that required in ordinary litigation.[97]

Loss of defense as a result of dismissal is sufficient to bar the dismissal.[98] This situation is particularly burdensome when the contemplated forum will apply a different body of substantive law.[99] In *Kennedy v. State Farm Mutual Auto-*

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91 *Cf.* Littman v. Bache & Co., 252 F.2d 479 (2d Cir. 1958); Harvey Aluminum Co. v. American Cyanamid Co., 203 F.2d 105 (2d Cir.), *cert. denied,* 345 U.S. 964 (1953); Boaz v. Mutual Life Ins. Co., 53 F. Supp. 97 (E.D. Mo. 1943), *aff'd,* 146 F.2d 321 (8th Cir. 1945).

92 See note 22 *supra.*

93 American Cyanamid Co v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963) held:

> While there is no precise digital answer, the mere repetition of such occurrence [dismissal] may, in and of itself, become so oppressively prejudicial as to require the sound conclusion that even once more is too much.

94 *Contra,* Blue Mountain Constr. Co. v. Werner, 270 F.2d 305 (9th Cir. 1959), *cert. denied,* 361 U.S. 931 (1966).

95 15 F.R.D. 14 (S.D.N.Y. 1953).

96 *Id.* at 20.

97 *Id.* at 18.

98 Southern Maryland Agricul. Ass'n v. United States, 16 F.R.D. 100 (D. Md. 1954).

99 *Compare* Kennedy v. State Farm Mut. Auto. Ins. Co., 46 F.R.D. 12 (E.D. Ark. 1969), *with* Stevenson v. Missouri Pac. R.R., 53 F.R.D. 184 (E.D. Ark. 1971).

mobile Insurance Co.[100] an action had been brought to recover on an automobile insurance policy. The plaintiff had already recovered on one policy, and the co-insurance provisions of the policy in suit precluded recovery. The action had not been pending for long when plaintiff sought dismissal in order to sue in Georgia because the Arkansas Supreme Court had recently upheld the anti-stacking provision of the State Farm policy. The Arkansas federal district court said that it would be "legal prejudice to subject the defendant to the risk that plaintiff may succeed in inducing the Georgia courts to refuse to apply Arkansas law to the policy in suit."[101]

Conclusion

The plaintiff's common law right to voluntary dismissal is no longer necessitated by hypertechnical rules of procedure which once prevailed in England. Rule 41(a)(2) recognizes this fact and entrusts the matter to the discretion of the court. In exercising its discretion the court must be governed by the mandate of Rule 1 to achieve a "just, speedy and inexpensive determination of every action." The inflexible "plain legal prejudice" standard is ill-suited to that objective. Only by means of the laborious balancing process discussed above can the court reach a decision which is truly just.

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100 46 F.R.D. 12 (E.D. Ark. 1969).

101 *Id.* at 15. Loss of the defense of the statute of limitations does not bar a dismissal. *See* Lunn v. United Aircraft Corp., 26 F.R.D. 12 (D. Del. 1960); Klar v. Firestone Tire & Rubber Co., 14 F.R.D. 176 (S.D.N.Y. 1953), *but cf.* Love v. Silas Mason Co., 66 F. Supp. 753 (W.D. La. 1946). Where plaintiff plans to refile in a state court in which the district court sits in order to have the question concerning the statute of limitations relitigated, dismissal should be denied. Baker v. Sisk, 1 F.R.D. 232 (E.D. Okla. 1938). However, when the contemplated forum is located in another state, dismissal might as well be granted, absent other factors, since a judgment based on the defense of the statute of limitations would not be res judicata in another state. Warner v. Buffalo Drydock Co., 67 F.2d 54 (2d Cir.), *cert. denied,* 291 U.S. 678 (1933); RESTATEMENT OF JUDGMENTS § 49, comment *a.*