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Practice and Procedure -- Effect of Judgment Pending Appeal as Res Adjudicata

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well as the municipal officials to a multiplicity of suits by dissatisfied taxpayers.¹⁴

On the other hand it may be pointed out that taxpayers' suits, with certain statutory exceptions, are maintained not for the immediate benefit of the individual taxpayer but in behalf of the municipality,¹⁵ and to deny that taxpayers are proper parties plaintiff is to leave them without remedy while the public funds are wantonly or corruptly dissipated by those in temporary charge of municipal affairs.¹⁶ The purpose of such suits is not to interfere with the exercise of discretionary powers by municipal officers, but the very basis of the taxpayer's action is the refusal of the proper authorities to act when there is some injurious misuse of corporate power.¹⁷

The majority view, which is supported by the analogy of stockholder's suits where corporate directors refuse to sue,¹⁸ seems to be based on sounder policy, because of the necessity of prompt action to prevent public injury and because the taxpayer's suit is the most direct and often the only means of setting in motion the machinery of the court.¹⁹

R. MAYNE ALBRIGHT.

Practice and Procedure—Effect of Judgment Pending Appeal as Res Adjudicata

Through his next friend, *A*, an incompetent Indian, brought suit in the Federal District Court against his former guardian, *B*, requesting an accounting. *B* offered in evidence as a bar to *A*'s action a judgment of the Oklahoma District Court from which an appeal was pending to the State Supreme Court. The Circuit Court of Appeals sustained the District Court's refusal to admit the judgment as evidence by conforming to the Oklahoma rule that while an appeal is pending a judgment has no force as *res adjudicata*.¹

The opposite result has been reached in many decisions which grant to a judgment pending an appeal the effect of a bar.² Of course, if

¹⁴ *Sears v. James*, 47 Or. 50, 82 Pac. 14 (1905) (Overruled in *McKenna v. McHaley*, 62 Or. 1, 123 Pac. 1069 (1912)). See note 9, *supra*).

¹⁵ *Neacy v. Drew*, 176 Wis. 348, 187 N. W. 218 (1922).

¹⁶ *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103 (1903); *Willard v. Comstock*, 58 Wis. 565, 17 N. W. 401 (1883).

¹⁷ *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103 (1903); *Murphey v. Greensboro*, 190 N. C. 268, 129 S. E. 614 (1925).

¹⁸ *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827 (1882). 4 DILLON, MUN. CORP. 2766.

¹⁹ 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) §1095; Note, (1929) 58 A. L. R. 588.

¹ *Coppedge v. Clinton*, 72 (2d) 531 (C. C. A. 10th, 1934). (Reversed in order that the District Court might determine a question of jurisdiction).

² *Eastern Building & Loan Ass'n v. Welling*, 103 Fed. 352 (C. C. D. S. C., 1900) (South Carolina judgment); *Tampa Waterworks Co. v. City of Tampa*, 124 Fed.

a judgment for the defendant has been ruled a bar, there is always the possibility of its subsequent reversal and the necessity for further litigation.³ On the other hand, the doctrine of the instant case⁴ is subject to more serious objections.⁵ If a judgment for a defendant is not a bar, then the plaintiff may sue at least once more, pending appeal, and if his effort is fruitful may force the defendant to appeal to prevent execu-

932 (C. C. S. D. Fla., 1903) (Florida judgment; *Contra Costa Water Co. v. City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal., 1904) (California judgment); *Edwards v. Bodkin*, 267 Fed. 1004 (S. D. Cal., 1919) (California judgment); *Howard v. Howard*, 67 Cal. App. 56, 226 Pac. 984 (1924); *Byrne, Vance & Co. v. Prather*, 14 La. Ann. 653 (1859); *B. & M. Mining Co. v. Montana Ore Purchasing Co.*, 26 Mont. 146, 66 Pac. 752 (1901) (Although the court refused to accept the judgment pending appeal as a bar, it did use it as evidence to influence a decision not to issue an injunction); *Haynes v. Ordway*, 52 N. H. 284 (1870); *McCusker v. Commonwealth Casualty Co.*, 106 N. J. 116, 148 Atl. 897 (1930); *City of Tulsa v. Wells*, 79 Okla. 39, 191 Pac. 186 (1920); *Smith v. Lathrop*, 44 Pa. 326 (1863) (New York judgment); *Southern Ry. Co. v. Brigman*, 95 Tenn. 624, 32 S. W. 762 (1895); *Fidelity Union Casualty Co. v. Hanson*, 44 S. W. (2d) 985 (Tex., 1932); *State Bank of Sevier v. American Cement & Plaster Co.*, 80 Utah 250, 10 Pac. (2d) 1065 (1932).

In North Carolina if there is another action involving substantially the same cause pending in a court of competent jurisdiction, the defendant may set the fact out in his pleadings and secure a dismissal of the second suit. *Jones Construction Co. v. Hamlet Ice Co.*, 190 N. C. 580, 130 S. E. 165 (1925); *MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE* (1929) §479. This doctrine would probably not be applicable where a judgment is pending appeal to the Supreme Court, first, because it has only been applied where the first action is pending in the trial court [*Emry v. Chappel*, 148 N. C. 327, 62 S. E. 411 (1908); *Cook v. Cook*, 159 N. C. 46, 74 S. E. 639 (1912)], and second, because the first action must be pending in a court of the same state in which the second action is brought [*Sloan v. McDowell*, 75 N. C. 29 (1876)].

The North Carolina courts have never been forced to say whether a judgment pending appeal would or would not bar a subsequent action, but it is probable, on the basis of certain statutes which declare the judgment of a court of record to be final until reversed by the Supreme Court, that they would declare such a judgment to be *res adjudicata*. N. C. CODE ANN. (Michie, 1931) §§601, 657.

³ "The evil resulting from this rule is, that though the judgment is erroneous, and for that reason is reversed, yet before the reversal it may be used as evidence, and thereby lead to another judgment, from which it may be impossible to obtain relief notwithstanding such reversal." 2 FREEMAN, JUDGMENTS (5th ed. 1925) §722.

⁴ "The chief objection to this line of decisions is, that it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking an appeal." 2 FREEMAN, JUDGMENTS (5th ed. 1925) §722.

⁵ *Straus v. American Publishers' Ass'n.*, 201 Fed. 306 (C. C. A. 2nd, 1912) (New York judgment); *By Products Recovery Co. v. Mabee*, 288 Fed. 401 (N. D. Ohio 1923) (Ohio judgment); *Railway Steel Spring Co. v. Chicago & E. I. Ry. Co.*, 12 F. (2d) 430 (C. C. A. 7th, 1926) (Indiana judgment); *Corinth Bank & Trust Co. v. Lawler*, 218 Ala. 83, 117 So. 620 (1928); *Allen, Ball & Co. v. The Mayor of Savannah*, 9 Ga. 286 (1851); *People v. Rickert*, 159 Ill. 496, 42 N. E. 884 (1896); *Hoyle v. Stellwagen*, 30 Ind. App. 674, 66 N. E. 910 (1903); *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092 (1893); *Faber v. Hovey*, 117 Mass. 108 (1875) (New York judgment); *Wilcox Trux. Inc. v. Rosenberger*, 169 Minn. 39, 209 N. W. 308 (1926) (judgment of a Federal District Court); *Ton Toy v. John Gong*, 87 Ore. 454, 170 Pac. 936 (1918); *Paine v. Schenectady Insurance Co.*, 11 R. I. 411 (1876) (New York judgment); *Kaufman v. Klain*, 69 Wash. 113, 124 Pac. 391 (1912); *Smith v. Schreiner*, 86 Wis. 19, 56 N. W. 160 (1893) (appeal from Circuit Court of Appeals pending in the United States Supreme Court); See *Walz v. Agricultural Insurance Co.*, 282 Fed. 646 (E. D. Mich. 1922); *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123 (1888).

tion of the second judgment. Thus, even though the first judgment for the defendant is affirmed, there still remains the anomaly of a second judgment for the plaintiff, which, so far as the record is concerned, might also call for affirmance.

There seems to be no adequate means of classifying this division of authority except to say that the courts probably adopted one rule in preference to the other as a choice which they considered to be the lesser of the two evils. However, other factors seem to have influenced some of the decisions. Several states have a statute to the effect that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal."⁶ It is a logical conclusion that under such a statute a judgment pending appeal would be ineffective as a bar or a defense,⁷ but some courts refuse to apply the statute to this situation on the ground that it was only intended to provide the proper basis for the application of the doctrine of *lis pendens*.⁸ Another statute, common to practically every jurisdiction but employed in this type of case in only a few, is that which requires the appellant to post a supersedeas bond for the protection of the appellee during the period of the appeal.⁹ Some courts hold that the posting of such a bond vacates the judgment and makes it unavailable as a bar to another action,¹⁰ while others hold that the bond only stays the execution of the judgment and does not alter its effect as "res adjudicata."¹¹ In other instances the mode of appellate review becomes important in the formulation of the rule. If the trial on appeal is to be *de novo* the judgment from which the appeal is pending will have no force as a defense, but if the appellate court may only affirm, reverse, or modify the judgment on appeal, it will be good as a bar to another action.¹²

⁶ Such a statute is found in only a few states. For example, CAL. CODE CIV. PROC. (Deering, 1931) §1049; UTAH COMP. LAWS (1917) §7220.

⁷ *Contra Costa Water Co. v. City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal. 1904) (construing the California statute); *Jennings v. Ward*, 114 Cal. App. 536, 300 Pac. 129 (1931); *Vance v. Heath*, 42 Utah 148, 129 Pac. 365 (1912).

⁸ *Ransom v. City of Pierre*, 101 Fed. 665 (C. C. A. 8th, 1900) (construing the South Dakota statute); *Day v. Holland*, 15 Ore. 464, 15 Pac. 855 (1887); see *Ebner v. Steffanson*, 42 N. D. 229, 172 N. W. 857 (1919) (involving a construction of the South Dakota statute).

⁹ This statute is found in practically every state, although its provisions differ in various states. For example, MO. REV. STAT. (1929) §1022; N. C. CODE ANN. (Michie, 1931) §630; OHIO GEN. CODE (Page, 1931) §12234.

¹⁰ *Watson v. Richardson*, 110 Iowa 698, 80 N. W. 416 (1899); *Small v. Reeves*, 25 Ky. L. 729, 76 S. W. 395 (1903); *Bobb v. Taylor*, 193 S. W. 800 (Mo. Sup. Ct., 1917); *Fassler v. Streit*, 92 Neb. 786, 129 N. W. 628 (1913).

¹¹ *Ransom v. City of Pierre*, 101 Fed. 665 (C. C. A. 8th, 1900); *Boynton v. Chicago Mill & Lumber Co.*, 84 Ark. 203, 105 S. W. 77 (1907); *Jennings v. Ward*, 114 Cal. App. 536, 300 Pac. 129 (1931); *Reese v. Damato*, 44 Fla. 692, 33 So. 462 (1902); *State v. Spratt*, 150 Minn. 5, 184 N. W. 31 (1921).

¹² The decisions supporting this doctrine should be placed in two classifications. First, the rule is applied where the judgment was rendered by a court of inferior jurisdiction and the appeal is pending in the trial court of general jurisdiction.

These factors are of only superficial value in the rationalization of the rule; they do not eliminate any of the inherent objections. A more satisfactory and stable result might be reached if the courts would recognize the pendency of the appeal from the judgment offered as a defense as a valid basis for a continuance.¹³ It should be mentioned, however, that in view of the crowded condition of the appellate calendar in Oklahoma¹⁴ the continuance suggested might have to be of extraordinary duration.

N. A. TOWNSEND, JR.

Practice and Procedure—Judgment of Nonsuit as Bar to Subsequent Action.

The Supreme Court affirmed a judgment of nonsuit on the ground that plaintiff by her own testimony had shown that she was guilty of contributory negligence.¹ Within one year thereafter she brought another suit on the same cause of action. A motion to dismiss for the reason that the first suit was *res adjudicata* was granted. On appeal this judgment was reversed. It was error to dismiss the second suit unless it appeared from an examination of the pleadings and hearing

Sutton v. Dunn, 176 N. C. 202, 96 S. E. 947 (1918) (appeal from a magistrate's court to the Superior Court); Moss v. Taylor, 73 Utah 277, 273 Pac. 515 (1928) (appeal from a Municipal Court to the District Court). *Contra*: Spokane Ry. Co. v. Spokane County, 75 Wash. 72, 134 Pac. 688 (1913) (appeal from a ruling of the Public Service Commission to the District Court). Second, the rule is applicable where the judgment was rendered by the trial court of general jurisdiction and the appeal is to the general appellate court. Ransom v. City of Pierre, 101 Fed. 665 (C. C. A. 8th, 1900); E. I. Du Pont Co. v. Richmond Guano Co., 297 Fed. 580 (C. C. A. 4th, 1924) (judgment rendered by a Federal District Court sitting in North Carolina); Boynton v. Chicago Mill & Lumber Co., 84 Ark. 203, 105 S. W. 77 (1907); Bank of North America v. Wheeler, 28 Conn. 433 (1859); Reese v. Damato, 44 Fla. 692, 33 So. 462 (1902); Cain v. Williams, 16 Nev. 426 (1882); see Sharon v. Hill, 26 Fed. 337 (C. C. D. Cal. 1885); see also the dissent of Lord, C. J., Day v. Holland, 15 Ore. 464, 15 Pac. 855 (1887). *Contra*: Watson v. Richardson, 110 Iowa 698, 80 N. W. 416 (1899) (where a supersedeas bond is posted the judgment will be *res adjudicata* regardless of the fact that the appeal will result in a hearing *de novo*).

¹³ Robinson v. El Centro Grain Co., 133 Cal. App. 567, 24 P. (2d) 554 (1933); McCusker v. Commonwealth Casualty Co., 106 N. J. L. 116, 148 Atl. 897 (1930); Paine v. Schenectady Insurance Co., 11 R. I. 411 (1876) ("We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be good ground for delaying the judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time").

¹⁴ (1934) 20 A. B. A. J. 148.

¹ Batson v. City Laundry Co., 205 N. C. 93, 170 S. E. 136 (1933). On a previous appeal in the same case it was held that the trial court was without authority to set aside a verdict for insufficiency of the evidence as a matter of law and then grant a motion for nonsuit made at the close of all the evidence and renewed after the verdict had been set aside. Batson v. City Laundry Co., 202 N. C. 560, 163 S. E. 600 (1932).