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## APPEALS AND REVERSALS— A VAST WASTELAND

*Robert Kratovil\**  
*Raymond J. Werner\*\**

### I. Introduction

Mark Twain once said that everyone talks about the weather but no one does anything about it. To those who are concerned with the problem, it seems that reviewing courts talk endlessly about appeals, but say little concerning the consequences of reversal. In truth, this area has become a vast wasteland of conflicting and often ill-considered decisions which, when considered together with applicable legislation and court rules, cry out for clarification and improvement. Let us take a simple illustration.

**EXAMPLE:** *P* files a quiet title suit against *D*, alleging against *D*'s perfect record title a title obtained by adverse possession. After trial, the court holds for *P* and enters the desired decree. In apt time, *D* appeals and considers filing a "supersedeas bond." At that moment he is confronted with the doctrine in his state that "supersedeas does not apply to a self-executing decree." A quiet title decree is self-executing. No further action of any kind is required once the decree has been entered. Thus, *D* must now ask himself whether there is any effective way of preventing this property from passing into the hands of a purchaser while the appeal is pending, leaving *D* with a possibly valueless claim for damages against *P* if the reviewing court reverses. The brutal fact is that in most jurisdictions the answer to this question is shrouded in doubt.

The purpose of this article is to offer some description of the existing state of the law and its shortcomings, to offer some suggestions as to the courses open to an attorney confronted with the problem, to suggest the damaging possibilities where such courses are not pursued, and to deal in some detail with the problem of self-executing decrees.

Since the word "supersedeas" will crop up repeatedly, it is perhaps best to briefly describe this mysterious doctrine at the outset, leaving the remainder of the article to put some flesh on the skeleton. When an appeal becomes a supersedeas, usually by the posting of a supersedeas bond approved by the court, judicial action to enforce the judgment or decree is blocked.

**EXAMPLE:** *P* obtains a money judgment against *D*. In apt time, *D* files a supersedeas bond and the court approves it. *P* cannot cause

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execution to issue on the judgment. The judgment, however, continues in force. A supersedeas does not destroy the legal effect of the judgment or decree superseded.

## II. Historical Background

At early common law a writ of error without security, directed against a common law judgment, operated as a supersedeas.<sup>1</sup> This practice fell into disfavor as writs of error came to be more frequently used for purposes of delay than for genuine purposes of review. Statutes were eventually enacted to require the filing of a security if the writ was to operate as a supersedeas.<sup>2</sup> Such was the general state of the law as it existed in England prior to the revolution and which prevailed in this country either by force of English statutes or similar colonial enactments.<sup>3</sup> Of the early practice in the law courts of this country it is said, "At common law the party against whom a judgment was rendered in a civil action was entitled to a writ of error as a matter of right which, when issued, operated to stay execution."<sup>4</sup>

In early chancery practice, as distinguished from the practice in the common-law courts, a question arose regarding the power of the House of Lords to review decrees in chancery. Ultimately it was decided that the House of Lords did indeed have that power.<sup>5</sup> To implement the jurisdiction which the House of Lords had thus won, the rule developed that an appeal to the House of Lords automatically operated as a supersedeas or stay of proceedings in the lower court.<sup>6</sup> This rule was disregarded in actual practice, and notwithstanding the appeal, the chancery court often proceeded with the enforcement and implementation of its decree.<sup>7</sup> Legal recognition was accorded to this practice when the House of Lords ordered that an appeal to it would not "stay" proceedings in the chancery court.<sup>8</sup> The Lords provided, however, that they or the lower court had the power to order a stay in a proper case.<sup>9</sup>

In England and in this country there developed the requirement that a bond or other security be posted if a chancery appeal was to operate as a supersedeas.<sup>10</sup> Today in England an appeal does not operate as a stay unless the trial or reviewing court so orders.<sup>11</sup> In America, the practice for obtaining a super-

1 See *Kountze v. Omaha Hotel Co.*, 107 U.S. 378 (1882). See generally 1 TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT* 530 (4th Amer. ed. 1856).

2 See *Kountze v. Omaha Hotel Co.*, 107 U.S. 378 (1882).

3 *Id.*

4 20 *ENCYCLOPEDIA OF PLEADING & PRACTICE, Supersedeas and Stay of Proceedings* 1212 (1901). Citations to older authorities are often included herein because newer authorities tend to ignore the whole question.

5 See *Ringgold's Case*, 1 Blands Ch. Rep. 5, 12 (Md. 1824); *Hart v. Mayor*, 3 Paige 380 (N.Y. 1832).

6 See *Huguenin v. Baseley*, 15 Ves. Jr. 184 (H.L. 1807) and *Hart v. Mayor*, 3 Paige 380 (N.Y. 1832).

7 See *Huguenin v. Baseley*, 15 Ves. Jr. 184 (H.L. 1807).

8 *Id.*

9 *Id.*

10 *Kountze v. Omaha Hotel Co.*, 107 U.S. 378 (1882).

11 16 HALSBURY, *THE LAWS OF ENGLAND Execution* Pt. 1 § 10 (3rd ed. 1956).

sedeas is governed by various rules of court or practice acts which, in combining law and chancery into one procedure, have caused a blending of the two procedures, remnants of both law and chancery remaining in the rules as they exist today. Some of those rules provide generally that an appeal stays the enforcement of a judgment only if a bond in a reasonable amount is presented and approved.<sup>12</sup> Others set forth that a judgment will be suspended during appeal "upon the giving of an adequate appeal bond with approved sureties."<sup>13</sup>

These acts or rules of court generally fall short of the mark. For example, the Texas Rules of Civil Procedure provide that a "good and sufficient bond" will "suspend the execution of the judgment."<sup>14</sup> This is a typical rule of practice in that it does not make provision for self-executing decrees but only applies to judgments which may be executed upon.<sup>15</sup> The rule goes on to provide that where the judgment decrees custody of a child, the court may order the judgment suspended during appeal.<sup>16</sup> This implies that the court has the power to stay the force and effect of the judgment. The implication is reinforced by another section of the act which provides:

Where the judgment is for other than money or property or foreclosure, the bond shall be in such amount to be fixed by the court below as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal.<sup>17</sup>

From this section the inference may be drawn that the Texas rules allow for the suspension of the force and effect of any judgment, self-executing or not. That inference is dashed to the rocks by a further provision which defines the effect of the filing of the supersedeas bond as staying "the execution of the judgment,"<sup>18</sup> a provision which seems to limit the applicability of the rules to judgments which have to be executed upon. Hence the result is unclear. It is the office of the remainder of this article to examine the general law in this area and to offer some suggestions for reform.

### III. Supersedeas Described

In an action which culminates in a money judgment or in some other judgment or decree which can be executed upon, the supersedeas may be employed to prevent execution.<sup>19</sup> Supersedeas has been consistently defined as "a suspension

12 ILL. REV. STAT., ch. 110A § 305(a)(1) (1971). See also 12 OKLA. STAT. ANN. § 968 (1973 Cum. Supp.).

13 IND. R. OF TR. PRO., Rule TR. 62(D)(1). See also MINN. R. OF CIV. APP. PRO., rule 108.01(1) and TEX. R. OF CIV. PRO., rule 364(a). For an alternative security device, see the procedure outlined in CALIFORNIA CIVIL APPELLATE PRACTICE § 8.5 (1966), which discusses the utilization of a promissory note made payable to a lending institution which loans funds to the appellant by making payment directly to the appellee upon the certification of the finality of the review process adverse to the appellant.

14 TEX. R. OF CIV. PRO., rule 364(a).

15 53 TEX. JUR. 2d *Supersedeas and Stay of Proceedings* § 5 (1964).

16 TEX. R. OF CIV. PRO., rule 364(f).

17 TEX. R. OF CIV. PRO., rule 364(e).

18 TEX. R. OF CIV. PRO., rule 368.

19 See generally *Kremer v. Schutz*, 82 Kan. 175, 107 P. 780, 781 (1910) where the court said:

The supersedeas bond and resulting stay only operates on the enforcement of a judgment by execution. . . . "We are unable to find any language used by the Legislature

of the power of the court below to issue an execution on the judgment or decree appealed from. . . ."<sup>20</sup> If, however, a writ of execution has been issued by the lower court, the supersedeas operates as a prohibition emanating from the court of appeal against the execution of the writ.<sup>21</sup> The Illinois Supreme Court has described the object and purpose of a supersedeas as being the suspension "of the efficacy of a judgment or decree. . . . [It] operates against the enforcement of the judgment and not against the judgment itself. . . . [It] restrains the appellee from taking affirmative action to enforce his judgment. . . ."<sup>22</sup> A supersedeas is not an injunction, however, nor does it set aside or annul the order appealed from.<sup>23</sup>

This concept also exists in the federal courts. The United States Supreme Court in the famous *Slaughter-House Cases* said, "[T]he only effect of the supersedeas is to prevent all further proceedings in the subordinate court except such as are necessary to preserve the right of the parties."<sup>24</sup>

#### IV. Application of Supersedeas to Self-Executing Decrees

Given the effect of a supersedeas upon a judgment or decree which requires execution for its fruition, what effect does it have on a decree which is self-executing? This question has been considered in a number of jurisdictions. Generally, the courts have determined that although supersedeas may be an appropriate vehicle for the suspension of the execution of a judgment, it is not suitable for use by a litigant who has had a self-executing decree rendered against him. As stated by one court,<sup>25</sup> "a self-executing judgment is not affected by a *supersedeas*."<sup>26</sup> Various other cases have, after discussing the nature of the decree rendered therein, simply stated that a supersedeas has no impact upon a self-executing decree.<sup>27</sup>

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which seems to us to imply that a stay of execution has any other force or effect on the judgment than simply to prevent its enforcement by execution."

Willard v. Ostrander, 51 Kan. 481, 32 Pac. 1092 (1893).

20 27 AM. & ENG. ENCY. OF LAW 416-417 (2nd ed. 1904). See also *Monks v. Hemphill*, 119 Colo. 378, 203 P.2d 503 (1949); *Willis v. Willis*, 165 Ind. 332, 75 N.E. 655 (1905) and *Sakraida v. Sakraida*, 192 Ore. 217, 217 P.2d 242 (1950).

21 27 AM. & ENG. ENCY. OF LAW, *supra* note 20, at 417.

22 *Gumberts v. East Oak Street Hotel Co.*, 404 Ill. 386, 88 N.E.2d 883, 885 (1949). See also *Solorza v. Park Water Co.*, 80 Cal. App.2d 37, 183 P.2d 275 (2d Dist. 1947); *Archer v. Bd. of Educ.*, 251 Iowa 1077, 104 N.W.2d 621 (1960); *Miss. Power & Light Co. v. Coldwater*, 234 Miss. 615, 99 So.2d 443 (1958).

23 *Western United Dairy Co. v. Miller*, 40 Ill. App.2d 403, 189 N.E.2d 786 (1963). See also Note, *California Stay Law—Supersedeas and Statutory*, 40 CALIF. L. REV. 249, 251 (1952).

24 77 U.S. 273, 297-98 (1869). See also *Hovey v. McDonald*, 109 U.S. 150 (1883).

25 *Gumberts v. East Oak Street Hotel Co.*, 404 Ill. 386, 88 N.E.2d 883 (1949).

26 *Accord*, *Western United Dairy Co. v. Miller*, 40 Ill. App. 2d 403, 189 N.E.2d 786 (1963).

27 *Merrimack River Sav. Bank v. Clay Center*, 219 U.S. 527, 534 (1911); *Solorza v. Park Water Co.*, 80 Cal. App. 2d 37, 183 P.2d 275 (2d Dist. 1947); *State ex rel. Kaplan v. Lamb*, 239 Ind. 25, 154 N.E.2d 500 (1958); *Willis v. Willis*, 165 Ind. 332, 75 N.E. 655 (1905); *Archer v. Bd. of Educ.*, 251 Iowa 1077, 104 N.W.2d 621 (1960); *Quinn v. Bechly*, 243 Iowa 1185, 54 N.W.2d 492 (1952); *Hewitt v. Hawkeye Cas. Co.*, 212 Iowa 316, 232 N.W. 835 (1930); *First Nat'l Bank v. Dutcher*, 128 Iowa 413, 104 N.W. 497 (1905); *Haaland v. Verendrye Electric Coop.*, 66 N.W.2d 902 (N.D. 1954); *Sakraida v. Sakraida*, 192 Ore. 217, 217 P.2d 242 (1950); *Nichols v. Ingram*, 75 Ore. 439, 146 P. 988 (1915); *Barnard v. Bd. of Educ.*, 19 Wash. 8, 52 p. 317 (1898).

What does this mean to the practicing attorney in terms of the cases which confront him? Generally, a decree is self-executing if it determines a party's status<sup>28</sup> and "does not require implementation by court process."<sup>29</sup> As stated by one court, the decree "accomplishes by its mere entry the result sought."<sup>30</sup> The list of types of decrees which have been held to be self-executing is long indeed. The following sampling indicates the far-reaching aspects of this problem. A denial of appointment as executor is a self-executing decree<sup>31</sup> as is an order revoking letters of guardianship and restoring custody of a minor to one of his parents.<sup>32</sup> So are the following: an order of dismissal of a complaint;<sup>33</sup> the quashing of a writ of garnishment;<sup>34</sup> a decree in a quiet title action;<sup>35</sup> a judgment removing one trustee and appointing a successor;<sup>36</sup> an order dissolving a corporation;<sup>37</sup> an order quashing execution;<sup>38</sup> the revocation of a liquor license;<sup>39</sup> the disbarment of an attorney;<sup>40</sup> a decree in a quo warranto proceeding that a city was not properly incorporated;<sup>41</sup> a decree of ouster from public office;<sup>42</sup> a take nothing decree;<sup>43</sup> a prohibitory injunction;<sup>44</sup> and the dismissal of an appeal.<sup>45</sup>

#### V. Inherent Power of Courts to Preserve the Status Quo Pending Appeal

The law does not leave a sophisticated unsuccessful litigant hopelessly and helplessly at the mercy of the party who prevailed at the trial level. The appellant does not have to stand by and allow the self-executing decree to be used against him, thereby making a subsequent successful appeal a hollow or costly victory; but he must pursue an unusual and somewhat drastic course in many states to obtain the protection that a mere "supersedeas" cannot give him. To fill the void left by the rule that supersedeas does not apply to a self-executing decree, many courts have exercised what they have called their "inherent power" to preserve the status quo pending appeal.<sup>46</sup> This is a power which the court possesses in addition to and different from the supersedeas power conferred upon it by statute<sup>47</sup> and the power cannot be impaired by the legislature.<sup>48</sup> The power

28 Note, *Appeal and Error*, 38 ORE. L. REV. 335, 337 (1959).

29 CALIFORNIA CIVIL APPELLATE PRACTICE, *supra* note 13, § 8.59 at 280.

30 *Feinberg v. Doe*, 14 Cal.2d 24, 92 P.2d 640, 642 (1939).

31 *In re Workman's Estate*, 156 Ore. 333, 65 P.2d 1395, 1401 (1937).

32 *Ex parte Case*, 54 Cal. App.2d 36, 128 P.2d 544 (2d Dist. 1947).

33 *Gumberts v. East Oak Street Hotel Co.*, 404 Ill. 386, 88 N.E.2d 883 (1949).

34 *State ex rel. W. G. Platts, Inc. v. Superior Court*, 55 Wash. 2d 714, 349 P.2d 1087, 1088 (1960).

35 *See Aetna Cas. & Sur. Co. v. Bd. of Supervisors*, 160 Va. 11, 168 S.E. 617 (1933).

36 *Stewart v. Hurt*, 9 Cal.2d 39, 68 P.2d 726 (1937).

37 *In re Imperial Water Co. No. 3*, 199 Cal. 556, 250 P.394 (1926).

38 *Hulse v. Davis*, 200 Cal. 316, 253 P. 136, 137 (1927).

39 *In re Grant*, 44 Utah 386, 140 P.226, 230 (1914).

40 *State ex rel. Martin v. Poindexter*, 43 Wash. 147, 86 P. 176 (1906).

41 *People ex rel. Boarts v. Westmoreland*, 135 Cal.App. 517, 27 P.2d 394 (4th Dist. 1933).

42 *People ex rel. Dibelka v. Reinberg*, 263 Ill. 536, 105 N.E. 715 (1914).

43 *Miss. Power & Light Co. v. Coldwater*, 234 Miss. 615, 99 So. 2d 443 (1958).

44 *Food & Grocery Bureau v. Garfield*, 18 Cal.2d 174, 114 P.2d 579 (1941). However, a mandatory injunction is not self-executing. *See* CALIFORNIA CIVIL APPELLATE PRACTICE, *supra* note 13, § 8.58.

45 *Archer v. Bd. of Educ.*, 251 Iowa 1077, 104 N.W.2d 621 (1960).

46 *See generally Merrimack River Sav. Bank v. Clay Center*, 219 U.S. 527, 534 (1911).

47 *Banach v. Milwaukee*, 31 Wisc. 2d 320, 143 N.W.2d 13, 19 (1966).

48 *Smith v. Reid*, 60 S.D. 128, 244 N.W. 81, 83-84 (1932).

exists in the trial court<sup>49</sup> as well as the reviewing court.<sup>50</sup> The federal courts possess this authority as well as the state courts.<sup>51</sup> It is to be used by the courts as the purposes of justice require<sup>52</sup> and should always be exercised "when any irreparable injury may result from the effect of the decree as rendered."<sup>53</sup> The exercise of this power preserves the fruits of litigation to the appellant so the right of appeal is not rendered valueless nor the judgment of the reviewing court made ineffective.<sup>54</sup>

The application of this inherent power theory has taken many forms, a fact which may well be reflective of the power of the court to "fashion a remedy to the particular facts."<sup>55</sup> One such application is the court's entering of an order to parties commanding them to preserve the status quo. An early example of this approach is found in *Hart v. Mayor*<sup>56</sup> where the court, after determining that it had no statutory authority to prohibit the defendants' out-of-court activities subsequent to the denial of an injunction, ordered the defendants to refrain from certain conduct pending the outcome of the appeal. The court grounded its action on the "advancement of justice."<sup>57</sup> Similarly, courts have entered injunctions to preserve the status quo pending appeal.<sup>58</sup> This practice has been characterized as "equity's means of staying the operation of judgments."<sup>59</sup>

This inherent power doctrine, on its face adequate for the purpose, is in fact a trap for the unwary. Each state has statutes and court rules relating to appeals, and in each state provisions for supersedeas exist. To the average practitioner these statutes and court rules seem to give adequate protection to his client during the pendency of the appeal. Counsel is often unaware of the traps fashioned by the inadequacies of supersedeas, and he is also often unaware of the inherent power concept. Thus it seems far more logical to make explicit provision by rule

49 See generally *Blaustein v. Standard Oil Co.*, 43 Del. 238, 45 A.2d 527 (1945); *Palmer v. Harris*, 230 Okla. 500, 101 P. 852 (1909); *Aetna Cas. & Sur. Co. v. Bd. of Supervisors*, 160 Va. 11, 168 S.E. 617 (1933); *Banach v. Milwaukee*, 31 Wisc. 2d 320, 143 N.W.2d 13 (1966). *Contra*, CALIFORNIA CIVIL APPELLATE PRACTICE, *supra* note 13, at § 8.3.

50 See *Deepwell Homeowner's Protection Ass'n v. City Council*, 239 Cal. App. 2d 63, 48 Cal. Rptr. 321 (4th Dist. 1965); *Haaland v. Verendrye Elec. Coop.*, 66 N.W.2d 902 (N.D. 1954); *Smith v. Reid*, 60 S.D. 128, 244 N.W. 81 (1932); *Lund v. Idaho & W.N.R.R.*, 48 Wash. 453, 93 P. 1071 (1908). See also Note, *Appeal and Error*, 38 ORE. L. REV. 335, 345 (1959). The power of the reviewing court in Arizona to make an appropriate order to preserve the status quo is codified at 16 ARIZ. REV. STAT. ANN., Rules of Civil Procedure, Rule 62(h) (1973). See also, CAL. CODE CIV. PRO. § 923 (West Supp. 1974). Both are modeled after Federal Rules, *Infra*, note 51.

51 See generally *Merrimack River Sav. Bank v. Clay Center*, 219 U.S. 527 (1911); FED. RULES CIV. PRO. rule 62(g) also Fed. App. Rule 8, see 9 Moore, Federal Practice 1405 (1972). The power exists in the district and appellate courts by virtue of 28 U.S.C. § 1651 (1970), the "all writs statute." See Strubbe, *A Lawyer's Guide to the Federal Rules of Appellate Procedure—A Practical Handbook*, 3 JOHN MARSH. J. PR. & PRO. 260, 276 (1970).

52 *Merrimack River Sav. Bank v. Clay Center*, 219 U.S. 527, 534-35 (1911).

53 *Id.*

54 *West Coast Home Improvement Co. v. Contractors' State License Bd.*, 68 Cal. App. 2d 1, 155 P.2d 863 (2d Dist. 1945) and *Lund v. Idaho & W.N.R.R.*, 48 Wash. 453, 93 P. 1071 (1908).

55 *Banach v. Milwaukee*, 31 Wisc. 2d 320, 143 N.W.2d 13, 18 (1966).

56 3 Paige 380 (N.Y. 1832).

57 *Id.* at 385.

58 See *Louisville & N.R. Co. v. United States*, 227 F. 273 (M.D. Tenn. 1915); *In re Workman's Estate*, 156 Ore. 333, 65 P.2d 1395, 1401 (1937); *Banach v. Milwaukee*, 31 Wisc. 2d 320, 143 N.W.2d 13 (1966). For a discussion of the power of a reviewing court to enter an injunction to protect the subject matter of an appeal or to preserve the status quo see Annot., 133 A.L.R. 1105 (1941).

59 Note, *Appeal and Error*, 38 ORE. L. REV. 335, 345 (1959).

or statute for the suspension of a decree's force and effect when an appeal is taken and adequate security is posted. This was the approach taken by the Illinois Supreme Court when it revised its rule 305 to give the judge in the trial or reviewing court the power to "stay . . . the enforcement, force and effect of any other final or interlocutory judgment or judicial or administrative order."<sup>60</sup> The inherent power concept has application to self-executing decrees.<sup>61</sup> It has been drawn upon by many courts to preserve and maintain the status quo where there was no statutory authority for the accomplishment of the desired result.<sup>62</sup> The statutory or court rules counterpart of the inherent powers concept can also operate in this wholesome and efficient way, the only difference being that it does so openly. It is visibly available to the average practitioner.

### VI. *Lis Pendens* Theory of Appeals

In contrast to the rule that supersedeas has no application to a self-executing decree is the rule in some jurisdictions that the mere filing of an appeal in litigation involving land continues the *lis pendens* in the court below through the entire appellate process.

**EXAMPLE:** *A* brings an action to quiet title against *B* and files an appropriate *lis pendens* notice. The court decrees that *A* is the sole fee owner of the property and *B* appeals but takes no steps to hold the decree in abeyance or suspend its force and effect. While the appeal is pending, *A* conveys the property to *C*. Many courts would hold that *C*'s interest is subject to the outcome of the appeal, on the theory that the action remains pending while the appeal process proceeds, so that a purchaser takes *lis pendens* just as if he had purchased while the suit was pending in the trial court.

That result is unjust. It is the product of mechanical jurisprudence which wholly ignores reality. The appellant, without giving any security, is able to effectively remove the property from the market for the entire amount of time consumed by the appeals process, a process which because of successive appeals, remandments, retrials, and additional appeals may be inordinately long. The appellee, who has already had a judgment entered in his favor, a judgment which is entitled to the protection of a presumption of its correctness, is stymied in his use and development of the land. Additionally, if the appellant is not required

60 ILL. REV. STAT. ch. 110A, § 305(b)(1)(1971). See also *Blaustein v. Standard Oil Co.*, 43 Del. 238, 45 A.2d 527, 536 (1945); *Aetna Cas. & Sur. Co. v. Bd. of Supervisors*, 160 Va. 11, 168 S.E. 617, 629 (1933). A detailed discussion of this point is set out *infra*; see text at notes 98 *et seq.*

61 *In re Workman's Estate*, 156 Ore. 333, 65 P.2d 1395 (1937).

62 See *Food & Grocery Bureau v. Garfield*, 18 Cal.2d 174, 114 P.2d 579, 581 (1941); *Haaland v. Verendrye Electric Coop.*, 66 N.W.2d 902 (N.D. 1954) (decided upon the basis of the court's statutory authority to issue original and remedial writs); *Palmer v. Harris*, 230 Okla. 500, 101 P. 852, 855 (1909); *Barnard v. Bd. of Educ.*, 19 Wash. 8, 52 P. 317, 319 (1898); *Banach v. Milwaukee*, 31 Wisc. 2d 320, 143 N.W.2d 13 (1966). *Contra*, *Solorza v. Park Water Co.*, 80 Cal.App.2d 37, 183 P.2d 275 (2d Dist. 1947); *Miss. Power & Light Co. v. Coldwater*, 234 Miss. 615, 99 So. 2d 443, 445-46 (1958).

to post adequate security, the appellee bears the risks during the pendency of the appeal. How does this square with the fact that the party who appeals from the entry of an adverse money judgment must, if he is to avoid execution on that judgment, obtain a supersedeas,<sup>63</sup> an alternative which invariably requires the posting of security? The answer is simple. The notion that a successful litigant should be protected in the fruits of his victory unless his adversary is willing to post security is completely ignored. A mere appeal continues the *lis pendens* in force just as if the trial had not been completed. This concept assigns a humiliating and illogical role to the trial judge. The disappointed litigant files a piece of paper entitled "notice of appeal" and it is as if nothing had happened in the trial court. The case has simply been transferred to the reviewing court and remains pending there.

In the typical litigation which ends with the entry of a judgment or decree in the trial court, *lis pendens* in a sense terminates in its effect with the entry of that decree or an execution thereon.<sup>64</sup> Of course, it is ancient learning that one who purchases in the face of such litigation is bound by the judgment or decree therein.<sup>65</sup> Although the recording and registration systems are set up to give a purchaser notice, constructive or actual, of the pendency of an action if the notice thereof is properly filed,<sup>66</sup> it has been said that the *lis pendens* theory is based not upon notice to the purchaser, "but rather on the principle that, pending the litigation, a party thereto cannot transfer his rights in the land to others, so as to prejudice another party to the litigation, since otherwise the decision might be utterly ineffectual."<sup>67</sup>

The theory that the purchaser from an appellee takes subject to the ultimate result on review stems from what may be called the "*lis pendens* theory of appeal." Pushing to an illogical result the notions that (1) one who takes *lis pendens* takes subject to the final judgment that is rendered and (2) an appeal is a continuation of the proceedings below, the *lis pendens* theory proceeds upon the premises that an appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of.<sup>68</sup> As stated by one court, an appeal "is not the institution of a new suit, but the removal and continuation of an old one."<sup>69</sup> In many jurisdictions adhering to this theory, the taking of the appeal continues the effect of the *lis pendens* notice until the process of review is completed.<sup>70</sup> In arriving at this result one court has placed its emphasis upon the pendency of an action in a court of record and held that those who acquired rights in the subject matter of the suit are bound by the ultimate result therein.<sup>71</sup>

63 *United States v. Jenkins*, 153 F.Supp. 636, 638 (S.D. Ga. 1957). See also 2 A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS, § 1071 (5th ed. 1925).

64 3 MERRILL ON NOTICE § 1168 at 91 (1952).

65 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 405 & 406 at 393-394 (2nd ed. 1839).

66 See 3 MERRILL, *supra* note 64, § 1176 at 97.

67 5 H. TIFFANY, THE LAW OF REAL PROPERTY § 1294 at 82 (3rd ed. 1939).

68 *Gulf Refining Co. v. United States*, 269 U. S. 125, (1925); *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131 (1924); *Nicastro v. United States*, 206 F.2d 89 (10th Cir. 1953); see *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972).

69 *Patterson v. Old Dominion Trust Co.*, 149 Va. 597, 140 S.E. 810, 813 (1927).

70 *Maedel v. Wies*, 309 Mich. 424, 15 N.W.2d 692 (1944).

71 *McClung v. Hohl*, 10 Kan. App. 93, 61 P. 507 (1900).

Other courts have explained that the title of the successful appellant should not be defeated by a conveyance from a party to the proceeding to any person having actual, constructive, or implied notice of the pending appeal,<sup>72</sup> or that the purchaser *pendente lite* on appeal stands in the shoes of his grantor.<sup>73</sup> It has also been said that one of the underlying reasons for the existence of this rule is to keep the property within the power and control of the reviewing court, thereby enabling the court to give force and effect to its judgment.<sup>74</sup> Another court has rested its decision upon the premise that the result is consistent with the purpose of *lis pendens*, *i.e.*, to put bona fide purchasers or mortgagees upon notice that the title to certain real or personal property is being litigated.<sup>75</sup> From the plaintiff's point of view, *lis pendens* affords protection until he is able to pursue all the remedies to which he is entitled, including appellate review.<sup>76</sup> Words are piled upon words, explanations upon explanations, but nothing is offered in explanation of the injustice to the successful litigant who is immobilized without security for an indefinite period of time by a piece of paper entitled "notice of appeal."

At this juncture it must be pointed out that, absent a supersedeas, an appeal from and subsequent reversal of a decree ordering a *judicial sale* have no effect upon the title of a stranger who purchases at the sale.<sup>77</sup> There are two reasons for this rule. One is that a decree ordering a judicial sale orders something to take place such as the issuance of execution on a money judgment. Hence supersedeas, which blocks enforcement of a judgment or decree, can work effectively in this situation; absent a supersedeas, the purchaser at the judicial sale, if a third party, should be protected. The other reason assigned is that the public should be encouraged to bid at judicial sales. Unfortunately, the effectiveness of the rule, even in this narrow area, is dissipated by two factors: (1) all judicial sales must be confirmed<sup>78</sup> and an appeal from the order confirming the sale is an appeal from a self-executing decree, which is accompanied with all of the problems besetting such decrees; and (2) if a party to the suit is the bidder at the sale, and an appeal is taken from the decree of sale, but no supersedeas bond is filed, he is generally not protected,<sup>79</sup> and any purchaser who buys from him while the appeal is pending takes *lis pendens*. Where the reversal is of the order confirming the sale, the title of the purchaser has been held to be affected.<sup>80</sup> Thus even a third party purchaser at a judicial sale can be brutally harmed by the *lis pendens* theory of appeals. If an appeal is taken from the order confirming the sale, the purchaser, who has deposited at least a down payment toward the

72 See generally, Carr v. Gates, 96 Mo. 271, 9 S.W. 659 (1888).

73 Mackenzie v. A. Engelhard & Sons Co., 266 U.S. 131, 142 (1924). See also Kremer v. Schutz, 82 Kan. 175, 107 P. 780 (1910); Martin v. Abbott, 72 Neb. 89, 100 N.W. 142 (1904).

74 Olson v. Leibpke, 110 Iowa 594, 81 N.W. 801 (1900). See generally 54 C.J.S. *Lis Pendens*, § 1 (1948).

75 Ashworth v. Hankins, 241 Ark. 629, 408 S.W.2d 871, 873 (1966).

76 Stuart v. Coleman, 78 Okla. 81, 188 P. 1063 (1920).

77 Annot., 155 A.L.R. 1252 (1945). See also 5 H. TIFFANY, *supra* note 67, § 1309.

78 Levy v. Broadway-Carmen Building Corp., 366 Ill. 279, 8 N.E.2d 671 (1937).

79 Rose v. Cox, 297 Ky. 458, 179 S.W.2d 871 (1944). See generally 50 C.J.S. *Judicial Sales* § 42 (1947).

80 Hubinger v. Central Trust Co., 94 F. 788 (8th Cir. 1899); Marling v. Robrecht, 13 W. Va. 440, 471-472 (1878); Sinnett v. Craller's Admr. 4 W. Va. 600, 603 (1870). *Contra*, *In re Pure Penn Petroleum Co.*, 188 F.2d 851 (2d Cir. 1951).

sale price, is left with an unmarketable title. No one will buy or lend on a title when an appeal is pending.

The far more sane approach is to give the sale validity in both instances. This conclusion is dictated by the rationale of the general rule stated above. At least one court has said that were it otherwise, judicial sales would come to an end.<sup>81</sup> A possibly more accurate explanation for the rule is found in *Mills v. Laing*, where the court said:

[P]ublic policy requires that all persons should have confidence in the title derived from such sale; otherwise, few would take the risk of purchasing, and the property would almost invariably be sold at a grossly inadequate price.<sup>82</sup>

Surely the rationale for protecting the bona fide purchaser from a reversal of the decree ordering the judicial sale applies to protect the same purchaser when the decree confirming the sale is set aside on appeal.

#### VII. *Lis Pendens* Theory of Appeals—Interim Between Judgment in the Trial Court and the Taking of an Appeal

Although the authorities are in conflict, it is held by the majority of courts following the *lis pendens* theory of appeals that one who purchases after the rendition of the final decree but prior to the expiration of the time for the taking of an appeal is bound by the result of an appeal which is later but seasonably perfected.<sup>83</sup> Thus where the party prevailing at the trial level has no inkling of his adversary's intentions with respect to appeal, he is immobilized because appeal time has not gone by, and the appeal, if and when filed, will continue the *lis pendens* into the reviewing court.

At least one state has responded to this problem by enacting a statute or rule of practice to cover this interim period. The court rules in Illinois provide that if the stay is not perfected within 30 days from the entry of the judgment, the time for the filing of notice of appeal,<sup>84</sup> the reversal or modification of that judgment will not affect the right, title, or interest of a non-party purchaser who acquires his interest after the judgment becomes final but before it is stayed.<sup>85</sup>

#### VIII. *Lis Pendens* Theory of Appeals—Appeal from Highest State Court to the United States Supreme Court

Another but similar problem is created by an appeal from the highest state court to the United States Supreme Court either by way of certiorari or direct appeal. It has been held that proceedings in the Supreme Court are a continuation of the original litigation.<sup>86</sup> Thus, the *lis pendens* would continue in effect

81 The John Twohy, Jr., 189 F. 965 (E.D. Va. 1911).

82 38 Cal. App. 776, 177 P.493, 494, (1st Dist. 1918).

83 3 MERRILL, *supra* n.64, § 1170. See also Annot., 10 A.L.R., 415, 418-419 (1921).

84 ILL. REV. STAT. ch. 110A, § 303(a) (1971).

85 ILL. REV. STAT. ch. 110A, § 305(i) (1971).

86 Nations v. Johnson, 65 U.S. 195, 204-205 (1860).

throughout the entire action including that period during which the case is pending in the Supreme Court.<sup>87</sup> This extension of the theory only serves to demonstrate the folly of allowing the appellant to keep the *lis pendens* in effect without having to post security to keep the appellee whole. Surely it is absurd and unjust for a piece of valuable property to be tied up by a litigant who brings his case through the three levels of the state court system without posting security, then to the Supreme Court, and possibly back again through the state courts upon remandment.

### IX. *Lis Pendens* Theory of Appeals—Effect of the Failure of the Appellant to Stay the Effect of the Decree of the Lower Court

The *lis pendens* theory subjects the purchaser to the result on the appeal whether or not the appellant took the requisite steps to preserve the status quo pending appeal.<sup>88</sup> Such result is based upon the premise that a supersedeas bond and resulting stay only operate upon the enforcement of a judgment by execution,<sup>89</sup> the *lis pendens* theory enjoying an existence independent of and unaffected by the statutory requirements of appeal bonds. That reasoning surely overlooks the obvious purpose of statutes requiring the filing of such bonds. What purpose can these statutes serve if an appellant can get total protection by filing only a notice of appeal? One court has reasoned that because the appeal was from the dismissal of a complaint for specific performance there was "no yardstick by which the penal sum of a supersedeas bond could be computed."<sup>90</sup> This result does not follow. Even where damages are difficult to compute, the successful plaintiff seeking damages is everywhere entitled to compel the trial court to arrive at a figure.<sup>91</sup> What is more difficult about the process of fixing an appeal bond?

### X. The Indiana Approach

In a limited number of jurisdictions, an appeal is the beginning of a new suit as opposed to the continuation of the old.<sup>92</sup> In these jurisdictions it would appear that if no subsequent or second *lis pendens* notice was filed for the taking of the appeal, one who purchased while the appeal was pending would obtain his

87 *Stuart v. Coleman*, 78 Okla. 81, 188 P. 1063 (1920). See also *Dyer v. Lowell*, 33 Me. 260, 262 (1851), where the court held that review on a writ of certiorari was a continuation of the original litigation. That case involved a common-law writ of certiorari which is something separate and distinct from the statutory certiorari under which the United States Supreme Court presently operates. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 281 (1936).

88 See generally 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 634b (5th ed. 1941). See also *Ashworth v. Hankins*, 241 Ark. 629, 408 S.W.2d 871 (1966); *Kremer v. Schutz*, 82 Kan. 175, 107 P. 780 (1910); *McClung v. Hohl*, 10 Kan. App. 93, 61 P. 507 (1900); *Patterson v. Old Dominion Trust Co.*, 149 Va. 597, 140 S.E. 810 (1927). In *Stuart v. Coleman*, 78 Okla. 81, 188 P. 1063 (1920), the court said, "the application of the *lis pendens* statute did not depend on the filing of a supersedeas or other bond." 188 P. 1063, 1065. But see *In re Pure Penn Petroleum Co.*, 188 F.2d 851 (2d Cir. 1951).

89 *Kremer v. Schutz*, 82 Kan. 175, 107 P. 780 (1910).

90 *Ashworth v. Hankins*, 241 Ark. 629, 408 S.W.2d 871, 874 (1966).

91 C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 27 (1935).

92 *Wingfield v. Neal*, 60 W. Va. 106, 54 S.E. 47 (1906).

interest free and clear of the result on appeal. This is the result which would obtain under the procedure recently adopted by the Indiana Supreme Court.<sup>93</sup> This rule provides that a reversal is "ineffective against a purchaser of an interest in land" if the purchaser "gives notice and perfects of record or takes possession . . . in good faith and without notice of the [reversal] . . . while the [appellant] is not in possession . . . and before he has filed notice in the [appropriate] *lis pendens* record. . . ." Thus, Indiana has a bifurcated system of *lis pendens* which places a burden upon the appellant who seeks to maintain the status quo pending appeal.<sup>94</sup> This burden, however, is not very great, and is discharged merely by the filing of a second *lis pendens* notice in appropriate statutory form.<sup>95</sup> The system has obvious defects; the major one is that the appellant, merely by being in possession of the premises, is able to prevent the successful litigant from conveying indefeasible title to a purchaser.<sup>96</sup> This protection is afforded to the appellant without requiring him to post security.

### XI. The Illinois Experience

Prior to July 1, 1971, Illinois had rules of practice which provided that if various requirements were met, an appeal would operate as a supersedeas.<sup>97</sup> The rule went on to provide that if the requirements for the appeal to operate as a supersedeas were not met,

the reversal or modification of the judgment [would] not affect the right, title or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final but before the appeal operates as a supersedeas.<sup>98</sup>

Although the rule went on to provide for a "stay . . . [of] the force and effect of any final or interlocutory judgment or judicial or administrative order granting relief other than money,"<sup>99</sup> the rule, in numerous instances,<sup>100</sup> used the term "supersedeas," and that "created some doubt as to whether it was applicable to cases in which the judgment was self-executing, since in such cases supersedeas would be inappropriate."<sup>101</sup> It was felt that the concept of *supersedeas* was so unsatisfactory that even the name should be banished and the concept of *stay* substituted. For this reason part of the rule was redrafted to provide that "on notice and motion and an opportunity to be heard, the trial court, or the review-

93 IND. RULES OF CIV. PRO., Tr. R. 63.1(A).

94 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE, 342 (1971).

95 IND. RULES OF CIV. PRO., Tr. R. 63.1(A).

96 *Id.*

97 ILL. REV. STAT. ch. 110A, § 305(a) (1965) provided that the appeal would operate as a supersedeas "if the notice of appeal is filed within 30 days after the judgment appealed from becomes final and if within that 30 day period . . . a bond in a reasonable amount to secure the appellee is approved . . . and filed." Further provision was made for an appeal to operate on a supersedeas upon order of the reviewing court or a judge thereof. *See* ILL. REV. STAT. ch. 110A, § 305(b) (1965).

98 ILL. REV. STAT. ch. 110A, § 305(h) (1965).

99 ILL. REV. STAT. ch. 110A, § 305(j) (1965).

100 *See, e.g.*, ILL. REV. STAT. ch. 110A, § 305(a), (b)(1), (b)(3), (c), (g) and (h) (1965).

101 *See* Committee Comments at S.H.A. ch. 110A, § 305(i) (1973 Supp.).

ing court or a judge thereof may stay pending appeal . . . the enforcement, force and effect of any . . . final or interlocutory judgment or judicial or administrative order."<sup>102</sup> This provision empowers the court to "stay the force and effect of a self-executing judgment."<sup>103</sup> To obtain this protection the appellant must post a bond.<sup>104</sup> If the appellant does not protect himself by way of the above procedure, the rights of the transferee will not be affected by a subsequent modification or reversal of the decree.<sup>105</sup> The purpose of the court in adopting the earlier rule discussed above was to limit the application of *lis pendens*.<sup>106</sup> The recent amendments complete the task.

This form of practice does not work unnecessary hardship upon the successful appellant if he fails to secure the status quo. He is able to obtain an accounting from the party who erroneously prevailed at the trial level<sup>107</sup> and this result may be achieved without depriving the purchaser of his title.<sup>108</sup> Thus, full restitution of the value of the property would be made to the successful appellant.<sup>109</sup> After years of bitter experience with the vagaries of supersedeas, Illinois has taken the only sensible step. It has given the notion of supersedeas a decent interment.

## XII. Conclusions

Judging from the number of cases decided on this point, a good many lawyers and their clients have learned too late and to their dismay of the inapplicability in their jurisdictions of the supersedeas to self-executing judgments and decrees. This alone would suggest the need for additional labor in this vineyard. Since many judgments are self-executing in their nature, it is a mystery why practice acts and rules that deal at length with the appellate process should leave this important segment of the law to the little-known common-law rules about inherent powers of appellate and trial courts to preserve the status quo. The Illinois experience suggests that this is a matter that needs attention and that a change in terminology would be healthy in helping us to rid ourselves of the difficulties connected with supersedeas. As to the *lis pendens* theory of appeals, it seems clear that this doctrine is deserving of a legislative death sentence. The salutary effects of *lis pendens* while the action is pending before the trial court disappear once that court has spoken. After that, the successful litigant is entitled to a security if his hands are to be tied pending appeal; and his adversary is entitled, by posting adequate security, to hold the matter in status quo until the reviewing court decides. All this belongs in statutes or rules of practice, not in obscure common-law decisions resting on notions of inherent power.

102 ILL. REV. STAT. ch. 110A, § 305(b)(1) (1971).

103 See Committee Comments, *supra* n.97.

104 ILL. REV. STAT. ch. 110A § 305(b)(3) (1971).

105 ILL. REV. STAT. ch. 110A, § 305(i) (1971).

106 See Committee Comments, *supra* n.97.

107 *Ure v. Ure*, 223 Ill. 454, 79 N.E. 153 (1906).

108 *Id.*

109 *Barnard v. Michael*, 392 Ill. 130, 63 N.E.2d 858 (1945).