

BARNETT BROS. *v.* WESTERN ASSURANCE COMPANY.

Opinion delivered February 18, 1918.

RES ADJUDICATA—FORMER JUDGMENT—FORMER APPEAL—AFFIRMANCE.—

A cause was appealed to this court and affirmed because of a failure of appellant to comply with a rule of this court as to filing an abstract of the record. *Held*, the judgment of affirmance operated as a complete bar to any other action on the same cause.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

*Oscar Barnett*, for appellants.

1. The former adjudication is not a bar to this suit. It was not tried on its merits, and the affirmance was nothing but an affirmance of a judgment of *involuntary nonsuit* and is not *res judicata*. 173 S. W. 412; 158 *Id.* 69; 173 *Id.* 412; 2 Black on Judgm. (2 ed.), 693, 702; 108 S. W. 594; 22 *Id.* 710; 128 *Id.* 10; 148 S. W. 160; 173 *Id.* 412, etc. Kirby's Digest, § 4381; 88 S. W. 572; 75 Ark. 406.

2. Argues the merits of the cause.

*Mehaffy, Reid & Mehaffy*, for appellee.

1. This case has already been finally adjudicated on its merits. The matter is *res judicata*. 191 S. W. 226; 2 Black on Judg. (2 ed.) 703; 15 R. C. L. 983; 20 S. E. 310; 30 Fed. 421; 140 N. Y. S. 993; 135 Pac. 717; 130 *Id.* 551. See also 89 Fed. 636; 43 S. W. 191; 94 *Id.* 887; 45 Atl. 243; 74 N. E. 1120.

McCULLOCH, C. J. This is an action instituted by appellants against appellee on a fire insurance policy, and was tried below solely on appellee's plea of a former adjudication of the same cause of action. It appears from the record that appellants formerly instituted an action on the same cause of action in the same court, and that a judgment was rendered in favor of appellee, and the judgment was, on appeal to this court, affirmed. 126 Ark. 562.

It is contended by appellant that the former adjudication does not constitute a bar to the second action because this court did not consider the case on its merits, but affirmed the judgment on account of noncompliance with the rules of this court in failing to submit a sufficient abstract of the record. Regardless of the particular reasons given for the action of this court, the judgment was one of affirmance of the judgment of the trial court, and it operated as a complete bar to any other action on the same cause.

Counsel insists that the judgment in the other action was equivalent to a nonsuit, which does not bar another action. It is clear that counsel labors under a mistake as to the effect of the former judgment, which operates as a bar and precludes any further investigation as to the merits of the original cause of action.

Affirmed.

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