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Waiver of Right to Appeal

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Comments

WAIVER OF RIGHT TO APPEAL

I. INTRODUCTION

Under what circumstances should the Nebraska court hold that an appellant has waived his right to appeal by accepting money damages awarded to him in the lower court? The object of this comment is to suggest a workable solution to this problem.

II. BASIC RULE

All jurisdictions have followed the general rule that acceptance of the benefits of a lower court's decision constitutes waiver of the right to appeal. The rule is usually stated to be based on the reasoning that there has been an implied waiver of the right to appeal, or conduct which amounts to estoppel. However, as these terms are usually defined, very few cases meet the requirements to constitute such waiver or estoppel. Waiver involves intentional or voluntary relinquishment of a known right,[1] or such conduct as warrants an inference of the relinquishment of such right.[2] To make out a case of *implied* waiver of a legal right there must be a clear, unequivocal and decisive act of the party showing such intent.[3] Estoppel differs from waiver as there is no need of intent to abandon or surrender the right; however, there does have to be injury to the other party[4] arising out of reliance and a change of position.[5] Even though the courts usually list the above reasons, there are other factors which seem to influence their decisions.

[1] Lehigh Val. R. Co. v. Ins. Co., 172 F. 364 (2d Cir. 1909); Vermillian v. Prudential Ins. Co. of America, 230 Mo. App. 993, 1004, 93 S.W.2d 45, 51 (1936).

[2] Rand v. Morse, 289 F. 339, 344 (8th Cir. 1923); Dexter Yarn Co. v. American Fabrics Co., 102 Conn. 529, 129 A. 527 (1925); Gibbs v. Bergh, 51 S.D. 432, 441, 214 N.W. 838, 841 (1927).

[3] Rosenthal v. New York Life Ins. Co., 99 F.2d 578, 579 (8th Cir. 1938).

[4] Benson v. Borden, 174 Md. 202, 219, 198 A. 419, 427, 428 (1938) and Johnston v. Columbian Nat. Life Ins. Co., 130 Me. 143, 146, 154 A. 79, 80 (1931).

[5] Wertz v. Shane, 216 Iowa 768, 249 N.W. 661 (1933); Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941); Garman v. Fitzgerald, 168 Miss. 532, 151 So. 726 (1934).

First, the courts feel that the appellant is being inconsistent by accepting the right given to him and then appealing therefrom.[6] A decision produces a judgment right and if this right is accepted the plaintiff should not argue that the right is incomplete. The theory of inconsistency seems to be based on history and runs throughout the law, being applied in most instances where the party is given a choice.[7]

Second, where there is a possibility of a reversal, modification, cross claim or cross appeal, the courts have been reluctant to permit an appeal after acceptance of the benefits of a decree because the court might not be able to replace the parties in their respective positions if the plaintiff was held not to be entitled to the relief awarded him. The defendant would thus have to take his chances of collecting from the plaintiff. If the right accepted is different from the right appealed from, jurisdictions usually distinguish between a situation where a counter claim could reduce the plaintiff's claim and those where the court requires the defendant to proceed to collect his own claim, treating the counter claim as a completely separate action.

III. CONSIDERATIONS OF PROBLEM BY OTHER JURISDICTIONS

A. Statutory Regulation

A few states have adopted statutes controlling the situation, however, they have not been very successful. Kentucky's statute[8] provided that when a party recovered judgment for only part of the demand sued for, the acceptance thereof would not prevent him from prosecuting an appeal for as much of the demand not recovered.[9]

[6] See, San Bernardino County v. Riverside County, 135 Cal. 618, 67 P. 1047 (1902) and In re Shaver's Estate, 131 Cal. 219, 63 Pac. 340 (1900).

[7] See, 31 C.J., *Inconsistent*, § 405 (1923) (for cases showing the general area of the law where the term is applied).

[8] KY. CIV. PRAC. CODE § 757 (Repealed in 1953).

[9] Under this provision it was held that a plaintiff might accept voluntary satisfaction of the judgment without losing his right to appeal. Combs v. Bates, 147 Ky. 849, 145 S.W. 759 (1912); Combs v. Bates, 150 Ky. 188, 150 S.W. 20 (1912); Nicholson v. Alvery, 150 Ky. 343, 150 S.W. 364 (1912); Hendrickson v. New Hughes Jellico Coal Co., 172 Ky. 568, 189 S.W. 704 (1916); Dury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933).

An Indiana statute[10] declares that the party obtaining a judgment could not appeal after receiving money on such judgment. Under this statute appellants, whether plaintiffs of defendants, are held barred from appeal,[11] however, in recent cases the court has construed the statute narrowly.[12]

Lousiana's Practice Code[13] states that the party against whom judgment has been rendered cannot appeal if such judgment has been confessed by him, or if he has acquiesced in the same, by executing it voluntarily. In spite of the provisions of the statute the court in the earlier cases held the statute applied

[10] IND. ANN. STAT. § 2-3201 (1933) Appeals may be taken from the circuit courts and superior courts to the Supreme Court, by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars ($50.00); Provided, however, that this exception shall not apply to prohibit an appeal in cases originating before a justice of the peace or mayor of a city involving the validity of an ordinance passed by an incorporated town or city. The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon.

[11] See Clark v. Wright, 67 Ind. 224 (1879), where plaintiff in a foreclosure proceedings credited by the amount for which he bid in the property, was held bared from appealing from a provision in the judgment declaring a prior lien in a defendant; Mutual Ben. Life Ins. Co. v. Simpson, 163 Ind. 10, 71 N.E. 131 (1904), where it was held that the statute operated even where the appellant accepted payment for the accomodation of the appellee, and with a belief that the acceptance should not affect his right of appeal. Wycoop v. Laughner, 106 Ind. App. 457, 19 N.E.2d 486 (1939), where it was held that the receipt of money after the appeal had the same effect under the statute as the receipt of it before the appeal.

[12] In State *ex rel* Jackson v. Middleton, 215 Ind. 219, 19 N.E.2d 470, 20 N.E.2d 509 (1939), one of the questions was whether the clerk was a party in interest within the meaning of the statute and his receiving payment of a judgment had the effect of placing it in the hands of the real plaintiff. The opinion states that the statute is merely declaratory of the common-law rule that a party cannot accept the benefit of an adjudication and at the same time allege it to be erroneous, "but like most general rules this has its exceptions and it is accordingly recognized that an acceptance of an amount to which the acceptee is entitled in any event does not estop him from appealing or bringing error to the judgment or decree ordering its payment." The court cited Indianapolis v. Stutz Motor Car Co., 94 Ind. App. 211, 180 N.E. 497 (1932).

[13] LA. CODE PRAC. ANN. art. 567 (Dart 1932) (This statute has not been changed since 1875).

to the plaintiff as well as to a defendant[14] and the statute was strictly enforced.[15] However, the court soon began to make exceptions,[16] and in more recent cases it has been held that a plaintiff may proceed to execute a judgment favorable to him without losing his right to appeal.[17]

B. Exceptions to Basic Rule by Court Decision

There are many exceptions carved from the basic rule, with cases varying all the way from allowing an appeal because of conditions of war and depression,[18] to dismissing an appeal because appellant accepted $115.00 which the trial court awarded him as administrator under the order for payment of attorney's

[14] In Stimson v. O'Neal, 32 La. Ann. 947 (1880) it was held that where a plaintiff sought to recover real estate from one who held possession of it under tax sales, and the defendant abandoned all claim to the property and left only an issue as to the plaintiff's right to the collected rents and to damages for occupation, the plaintiff could not prosecute an appeal from the judgment as to the latter issue because it appeared that he had, after the judgment, begun to collect rents from the tenants.

[15] In Flowers v. Hughes, 46 La. Ann. 436, 15 So. 14 (1894) it was held that a party to a partition proceeding who had been awarded a certain sum as his share could not draw out a portion of it and appeal.

[16] In Kaiser's Succession, 48 La. Ann. 973, 20 So. 184 (1896) the court held that where there are two subjects of a judgment that are distinct, acquiescense in one will not defeat the appeal as to the other. See also, Planters' Bank & T. Co. v. Savant, 172 La. 464, 134 So. 394 (1931); In Cory v. Askew, 169 La. 479, 125 So. 455 (1929) it was held that acceptance of the payments awarded for five weeks disability at $20.00 per week did not bar his appeal for $20.00 per week for 400 weeks. *Accord*; Chandler v. Oil Fields Gas Co., 2 La. App. 778 (1925) & Glover v. Washington-Youree Hotel Co., 12 La. App. 110, 125 So. 455 (1929).

[17] In Foster & Glassell Co. v. Harrison, 173 La. 550, 138 So. 99 (1931) the court stated that there was irreconcilable conflict between the cases of Campbell v. Orillion, 3 La. Ann. 115 (1848) and Flowers v. Hughes, 46 La. Ann. 436, 15 So. 14 (1894) and the later cases on the same question, and the court stated that since there was such conflict the earlier cases must be considered as overruled. The court then went on to adopt the rule that a plaintiff may proceed to execute a judgment so far as it is favorable to him without losing his right to appeal. This case was followed by Barcelo v. Barcelo, 174 La. 81, 139 So. 765 (1932). See also, Hinricks & Son v. Lewis, 180 La. 898, 158 So. 11 (1934) where it was held that even though the plaintiff's had assigned their judgment and it had been satisfied by the defendant the plaintiff could prosecute its appeal because it claimed a sum in excess of that awarded.

[18] Greenspot Desert Inns. v. Roy, 63 Cal. App.2d 54, 146 P.2d 39 (1944).

fees and suit money.[19] Following are some of the exceptions adopted by other jurisdictions.

1. *Right of Acceptance Conceded in Opponent's Petition*

Most states hold that if the right to the judgment has been conceded by the opposing party in his petition or complaint, acceptance of the lower courts decision is not a waiver of the right to appeal. If the plaintiff has put into issue only a liability above a stated figure, the implied admission of liability for such figure, thus made, will support the defendant in accepting this amount waiving his right to review as to the amount in issue. In *Embry* v. *Palmer*[20] the plaintiffs had brought a proceeding to enjoin the collection of a judgment against them for more than a certain sum, on the ground that as to the balance the judgment had been procured by defendant's fraud. The lower court entered a decree as prayed for on condition that the plaintiffs pay into court the amount admitted to be due. The plaintiffs did so and the defendant drew out the money. The court held that this did not bar the defendant from prosecuting a writ of error, by stating:

> It is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum at least, is due and payable from them to him.[21]

[19] Dickenson v. Kallusch, 91 Cal. App. 141, 266 P. 816 (1928).

[20] 107 U.S. 3, 8 (1883).

[21] Followed in Reynas v. Dumont, 130 U.S. 354 (1889) (which shows the plaintiff may accept an amount admitted in the pleadings of the defendant to be due as well as a defendant accepting an amount admitted by the plaintiff to be due). The court stated; "The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled." See also; Giordano v. Height, 188 N.Y.S. 837 (1921) where it was held that the plaintiffs acceptance of payment of the judgment for the undisputed items admitted by the defendant is not a waiver of his right of appeal

2. *Right Admitted During Proceedings*

If the right to a certain judgment is admitted during the course of the proceedings the courts usually hold that acceptance of such admitted liability does not constitute a waiver of the right of appeal. For example, in *Bethlehem Steel Co.* v. *Mayo*[22] the claimant for workmen's compensation appealed from an award of 50 per cent compensation for permanent partial disability to his leg. The defendant having presented the issue as to whether there was more than 50 per cent disability, it was held that the court did not err in refusing to dismiss the claimant's appeal because of acceptance of payments based on the 50 per cent because the right to the amount of the judgment accepted was conceded by the opposing party, thus falling within an exception to the general rule.[23]

The voluntary payment by a defendant of a judgment against him has apparently not been held sufficient admission of liability of the amount to be included within this exception. However, in *Bass v. Ring*[24] the court held that the payment of a judgment for part of the plaintiff's claim worked as a severance for that part.

as to the other items because this would remain due the plaintiff on any conceivable disposition of the appeal. See also; Brawand v. Home Installment Co., 75 Or. 478, 147 P. 391 (1915).

[22] 168 Me. 410, 177 Atl. 910 (1935).

[23] See also Betleyoun v. Industrial Commission, 31 Ohio App. 53, 166 N.E. 378 (1927) where during the trial on appeal the defendant confessed judgment for compensation at $15.00 per week for 2 weeks. After judgment the plaintiff accepted the amount, and the court held this was no bar to his prosecuting error. The court stated that the claim of the plaintiff was divided into two parts, the question of compensation for thirteen days following the injury, and the question as to whether there was any further liability. Therefore the plaintiff was entitled to receive $30.00 in any event. The court said: "The receipt therefor by the plaintiff of the money which was confessedly his could not of course, be construed as an admission that the judgment which he attacks is not erroneous, as the amount received was not in dispute, the judgment being attacked because the plaintifff claimed he was entitled to a sum of money in addition to that admitted to be due him." In Luglan v. Lenning, 214 Iowa 439, 239 N.W. 692 (1931) the defendant's had conceded that the east 40 of 80 acres attached by the plaintiff was subject to attachment, but had defended as to the west 40. The lower court held that the attachment was good on the east 40 but not on the west, and gave special execution accordingly. It was held that the sale under this execution and the bidding in of the property by the plaintiff did not prevent him from prosecuting his appeal.

[24] 210 Minn. 598, 299 N.W. 679 (1941).

3. *Acceptance Only of Minimum Due*

Another exception to the rule has been applied if the nature of the controversy is such that the party has received the smaller of two amounts that he would be entitled to. This would be true where the issue between the parties is as to which of two alternative theories governs their rights, and the sum accepted appears to be a minimum due the accepting party under either theory.

For example, if the issue is as to the appellant's right to priority payment out of a fund and the lower court gives priority to his opponent, he is entitled to accept the surplus and still maintain his appeal, because if the decision is reversed he will still be entitled to retain the amount of his then priority claim.[25] Or, for example, if a receiver's distribution where the sum was awarded a creditor but the receiver was directed to retain an additional sum claimed by this creditor, pending final determination of proceedings upon the claim of another of equal priority, it was held no waiver of the right to appeal for such additional sum by accepting the lesser award.[26] This exception is probably extended the furthest in *Cunningham v. Cunningham.*[27] In that case a wife had asked for more alimony and, even though the appellate court had power to modify any part of the decree, the court said that the alimony award was not so large as to render it probable that less might be allowed on a retrial making refund necessary, and held there was therefore no waiver of the right to appeal. The Nevada court's policy is that if it is not probable, though procedurally possible, that an amount awarded will be reduced, the appellant brings himself under the rule that an acceptance of what one is entitled to in any event will not bar his appeal for an additional sum.

[25] Funk v. Mercantile Trust Co., 89 Iowa 264, 56 N.W. 496 (1893). See also; Nickle v. Mann, 210 Iowa 906, 232 N.W. 722 (1931) where the debtor's property having been sold and the funds placed in the hands of a receiver, an issue of priority was raised between the lessor of the debtor and a chattel mortgagee. The amount of the mortgages was greater than the fund and the lower court directed payment of the rent as a prior claim. The mortgagee appealed and after the appeal the court ordered the receiver to pay the balance on the mortgages. It was held that acceptance of this sum, did not constitute waiver of the right to appeal. Followed in Eysink v. Jasper County, 229 Iowa 1240, 296 N.W. 376 (1941).

[26] Merriam v. Victory Min. Co., 37 Or. 321, 56 P. 75, 58 P. 37, 60 P. 997 (1900).

[27] 60 Nev. 191, 102 P.2d 94, 105 P.2d 398 (1940).

4. *Review Legally Confined to Additional Amount*

The right of appeal has usually been held to survive the acceptance of an amount that will not be put in jeopardy by the review sought. This applies where the controversy raised by the appeal or petition for review is legally confined to liability for the additional amount claimed.[28] Some courts hold this refers only to a right which will not be put in jeopardy by the appellant's own proceedings, it being immaterial that the right may be endangered by a cross appeal, or cross assignment of errors.[29] However, if the counterclaim is held not to be a separable matter, but a mere claim in reduction of damages, the court will probably hold that acceptance of the benefits bars the right to appeal.[30]

Where there is a certification of a question by the lower court concerning the right of a plaintiff to certain items of an account, acceptance of the amount of a judgment for the other items has been held not to waive the right of appeal.[31] The acceptance of the principal sum under a judgment has therefore been held not to bar the right of appeal upon a claim for interest,[32] costs,[33]

[28] For example see City of Grand Rapids v. Bogoger, 141 Wis. 530, 124 N.W. 679 (1910) & Appleton Waterworks Co. v. Railroad Commission, 54 Wis. 121, 142 N.W. 476 (1913); In both cases the condemnee was given the right of appeal for more damages than awarded by the assessing agency under condemnation proceedings. The courts' held that a right of appeal is not waived where the issue is limited by law to the question of whether the damages should be increased. In Shaffer v. Great American Indemn. Co., 147 F.2d 981, (5th Cir. 1945) it was held that where the plaintiff had been awarded a sum for total disability but denied a sum for partial disability under workman's compensation, he was not estopped from prosecuting an appeal as to the partial disability by having accepted payment of the award made. In Garvy v. Garvy, 324 Ill. App. 518, 58 N.E.2d 340 (1944) it was held that a wife's acceptance of payments allowed her for separate maintenance did not require a dismissal of her appeal for an order allowing her payments from the date of her original petition, rather than at the end of the trial courts decree.

[29] See Fiedler v. Howard, 99 Wis. 388, 75 N.W. 163 (1898).

[30] Mastin v. May, 130 Minn. 281, 153 N.W. 756 (1915).

[31] Byran v. Polk County, 76 Iowa 75, 40 N.W. 102 (1888).

[32] See Re Hubbell, 216 Cal. 574, 15 P.2d 503 (1932) where a legatee was allowed the amount of his legacy and yet allowed to appeal for error in denying him interest.

[33] See Glock v. Elges, 39 Nev. 415, 159 P. 629 (1916) where it was held that the acceptance by the plaintiff of the amount of the judgment in his favor did not waive his right of appeal from the part of the judgment denying costs.

or a penalty,[34] if the appeal is legally limited to the latter claim. Where an appeal is confined to a claim of error for reducing an amount to which the party was previously entitled, the party is not barred by acceptance of the reduced amount, if a further reduction cannot come into issue,[35] and it has been held that the additional amount sought by appeal after accepting the lessor amount does not have to be a separable item.[36]

In *Worthington v. Beeman*[37] it was held that where a plaintiff prayed for distinct causes of action on separate counts, prevailed on only one count and collected judgment on it, he could prosecute error as to the other count whether the judgment was in one entry or separate entries.[38]

[34] See Henderson v. Nixon, 66 Idaho 780, 168 P.2d 594 (1945) where it was held that the plaintiffs were entitled to accept the amount of a judgment for the excess rent paid over that permitted by wartime regulations, and yet appeal from the judgment in so far as it denied the penalty imposed upon the defendant for charging the excessive rent.

[35] See Indianapolis v. Stutz Motor Car Co., 94 Ind. App. 211, 180 N.E. 497 (1931) where the appellant's ground of appeal was that the lower court had no jurisdiction to make the reduction.

[36] See Clarke v. Angelus Memorial Asso., 14 Cal. App.2d 750, 58 P.2d 974 (1936) where the plaintiff had recovered judgment against a corporation upon a debt, and a judgment against a stockholder for a percentage of the debt. Plaintiff appealed on the ground that the statutes made the stockholder liable for a larger percentage, and the court held that acceptance of the amount found due from the stockholder was no bar to the appeal. See also; Schaeffer v. Ardery, 238 Ill. 557, 87 N.E. 343 (1909) and Hawkins v. Lake County, 302 Ill. 213, 134 N.E. 84 (1922) where the courts' hold that acceptance of taxes by a collector will not bar his appealing for a higner valuation. In Mudd v. Perry, 25 F.2d 85 (8th Cir. 1928) the court held plaintiff could maintain an appeal for one half interest in an estate notwithstanding he had accepted distribution of one-fourth interest since that interest was not being controverted. [writ of certiorari was denied in 278 U.S. 601 (1928)] There are contrary holdings however. See, *In re* Baby, 87 Cal. 22, 25 P. 405 (1890); Turner v. Markham, 152 Cal. 246, 92 P. 485 (1907) and Kellner v. Schmidt, 237 Ill. App. 428 (1925).

[37] 91 F. 232 (7th Cir. 1899).

[38] The same result was reached in Peck v. Richter, 217 F. 880 (8th Cir. 1914) where it was held the plaintiff could maintain his appeal as to the items not allowed where the action was for several items independently contested. See also, Upton Mfg. Co. v. Huiske, 69 Iowa 557, 29 N.W. 621 (1886) and Altoona Sav. Bank v. Pace, 195 Iowa 447, 192 N.W. 251 (1923) which reached the same result on notes that were severally counted upon.

The appeal itself was held to be divided in *Goepel v. Kurtz Action Co.*[39] where the complaint joined two causes of action, (1) a claim for goods sold and delivered and for loss of profits alleged to have arisen from a breach of the contract under which the sales were made and (2) a claim for a balance due for other goods sold. The trial court dismissed the complaint as to the loss of profits, but entered a judgment on the other claims. Even though the appeal was from the whole judgment, it was held that the plaintiff's collection of the amount of the judgment did not waive his appeal as to the claim for loss of profits, since the two were separable. The appellate court, it was stated, should dismiss the appeal from the part of the judgment which the plaintiff had enforced, but entertain it as to the rest. It was emphasized that if the plaintiff prevailed, the judgment would be reversed only as to that part.[40]

The Federal Rule[41] states that the court may direct the entry of a final judgment upon less than all the claims if there is no reason for delay and upon an express direction for the entry of judgment, but in other cases the adjudication of less than all the claims is subject to revision at any time before the entry of judgment.

The history of this enactment[42] shows that the rule was originally adopted in order to avoid possible injustice of a delay in judgment of a distinctly separate claim required to await adjudication of the entire case. However some district courts made piecemeal disposition of an action and entered what the parties thought was a judgment, but when appealed, the finality of the partial judgment was often put in question. Because of the confusion, the Advisory Committee concluded that a retention of the older Federal Rule was desirable, and that it was sufficient to grant the judge discretionary power to afford a remedy in the infrequent harsh case.

The principle of separable relief is often more difficult to enforce in equity suits because the decrees are more complicated and

[39] 216 N.Y. 343, 110 N.E. 769 (1915).

[40] See also; Huntington County State Bank v. Mason, 85 Ind. App. 320, 154 N.E. 20 (1926) where the court stated that ordinarily where several mortgages are sought to be foreclosed in one proceeding, a sale under the judgment of foreclosure as to one will not bar an appeal as to the others.

[41] FED. R. CIV. P. 54 (b).

[42] See Notes of Advisory Committee concerning FED. R. CIV. P. 54 (b) located in 28 U. S. C. A. p. 118 (1960).

their provisions are more closely interrelated. However, the rule is usually held to be the same, as in suits at law. For example, ordinarily in a divorce action a wife cannot accept alimony payments and yet appeal from the decree if the appeal would take up the main issue. But where the alimony awarded and accepted was expressly confined to alimony for the support of a child, the wife was not barred from appealing from the decree for denying alimony for her own support.[43]

5. *Acceptance of Prior Right Left Open by Adjudication*

Where the benefits accepted are merely an enforcement of a prior right, acceptance of such right which was not merged in the judgment but was only recognized or confirmed by it will not bar prosecution of appeal or error.[44]

6. *Acceptance by Person Without Authority*

A sixth exception carved from the rule is that acceptance by a person without authority does not bar the right to appeal. An attorney's acceptance of benefits is usually attributed to his client, however, if the attorney has been discharged from the case his clients should not be bound by such acceptance.[45]

Also if the parties repudiate the act of the attorney in drawing out a sum paid into court and repay the amount drawn, it has been held that the party has not waived his right of appeal.[46] The acceptance of benefits by a guardian, the party of record, for his ward without the courts authority has also been held to be an acceptance by an unauthorized person.[47]

7. *Acceptance in Trust or as Deposit*

Where it appears that the money paid under a judgment is to be held as a deposit or in trust to await the outcome of the appeal, the acceptance does not waive the right of appeal. For example in *Matter of Petition of N. Y. & H. R. R.*[48] city land was taken

[43] Coley v. Coley, 128 Ga. 654, 58 S.E. 205 (1907).

[44] Farguharson v. Fresno Oil Co., 248 S.W. 481 (Tex. Civ. App. 1922).

[45] Ruchman v. Alwood, 44 Ill. 183 (1867).

[46] Jewell v. Reddington, 57 Iowa 92, 10 N.W. 306 (1881).

[47] Hempstead v. Broad, 275 Ill. 358, 114 N.E. 120 (1916) & Ward v. Williams, 278 Ill. 227, 115 N.E. 883 (1917).

[48] 98 N.Y. 12 (1885).

by the railroad company. A statute provided the court should direct the manner in which the money should be deposited by the company and the court ordered the amount paid to the city chamberlain. It was held that the payment was intended to be held as a deposit only, and that the city had not lost its right of appeal.

8. *Expressed Lack of Intention to Waive*

In most areas of the law, waiver rests on intention and voluntary choice, so some courts have held that an affirmative showing by plaintiff in error that he did not intend to waive his appeal is another exception to the rule.[49]

9. *Reservation of Rights*

It has been held that if money paid into court is ordered paid to a party without prejudice to his right of appeal, his acceptance of it will not operate against that right.[50]

If the circumstances imply that the party who pays the judgment consents to a reservation of rights of appeal by the party who acecpts the decree, it has been held that there has not been a waiver of rights. In *Lightner v. Greene County*,[51] it was held not a waiver of the right to appeal, when a drainage assessment was accepted by the board of supervisors, where the receipt given by them expressly reserved that right. This reservation of the right of appeal can be preserved by implication as well as by expression.[52] Thus if the acceptance is taken under protest, it has been held not a waiver of right to appeal.[53]

[49] Jones v. Pettingil, 245 F. 269 (1st Cir. 1917) (writ of certiorari denied in 245 U.S. 663).

[50] Chicago R. Equipment Co. v. National Hollow Brake Beam Co., 173 Ill. App. 595 (1912). *Accord*; Frankel v. Frankel, 41 Ariz. 396, 18 P.2d 911 (1933) (Appellant made a showing to the trial court that she needed money to prosecute her appeal and obtained permission to accept the amount deposited with the clerk without waiving her right of appeal. Held: no waiver of such right.) See also: Smith v. Zuta, 247 Ill. App. 203 (1928) where it was held the right to appeal was not waived by the acceptance of attorney's fees ordered paid and taken without prejudice to the right of the plaintiff to appeal.

[51] 156 Iowa 398, 136 N.W. 761 (1912).

[52] In Seattle v. Liberman, 9 Wash. 276, 37 P. 433 (1894) it was held that a stipulation entered into under which the city was to distribute part of the money, showed by implication that some of the distributees intended to appeal, so such right was not waived.

[53] In Eakin v. Eakin, 83 W. Va. 512, 98 S.E. 608 (1919) it was held that acceptance of money and notes returned to appellants from the trial

10. *Acceptance Under Compulsion*

A few cases have held that need of money is acceptance under compulsion, and not a waiver of the right of appeal. For example, in *Greenspot Desert Inns v. Roy*[54] it was held that because of depression and war conditions, the rule as to accepting benefits would not be enforced as the case came within the exception that acceptance of the judgment was involuntary since there was risk of financial loss.

IV. PRESENT NEBRASKA LAW ON WAIVER OF RIGHT TO APPEAL

A. Nebraska Statutes

At the present time Nebraska has no statutes directly applying to waiver of appeal. The Nebraska Constitution[55] has been held by the court to allow the defendant the right to exercise an appeal after payment of a judgment, where it was not made voluntarily[56], but the section has apparently not been applied to acceptance by the plaintiff. A Nebraska statute[57] suggests that the lower court's judgment can be enforced in an action arising on contract for the payment of money only, if sufficient security is given and the court

courts annulment of a sale of partitioned land under protest did not bar the right to appeal. However for cases to the contrary see: Clairview Park Improv. Co. v. Detriot & L.St. C. R. Co., 164 Mich. 74, 129 N.W. 353 (1910); Hyland v. Hogue, 131 Kan. 512, 292 P. 750 (1930) and Clothier v. Wallace, 137 Kan. 928, 22 P.2d 462 (1933).

[54] 63 Cal. App.2d 54, 146 P.2d 39 (1944).

[55] NEB. CONST. art. 1, § 24 states: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied . . . ."

[56] See Burke v. Dendinger, 120 Neb. 594, 234 N.W. 405 (1931) where payment after a judgment was held not to waive the right of appeal, because the payment was made to avoid the sale of the defendants property and thus was not made voluntarily. *Contra* - School Dist. No. 65 v. McQuiston, 163 Neb. 246, 79 N.W.2d 413 (1956).

[57] NEB. REV. STAT. § 25-1934 (Reissue 1956) states: "In an action arising on contract for the payment of money only, notwithstanding the execution of an undertaking to stay proceedings, if the defendant in error or appellee give adequate security to make restitution in case the judgment is reversed or modified, he may upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment. Such security must be an undertaking executed to the plaintiff in error by at least two sufficient sureties, to the effect that if the judgment be reversed or modified, he will make full restitution to the plaintiff in error or appellee of the money by him received under the judgment."

gives leave. However, here again the law applies to a defendant, not to a plaintiff.[58]

B. NEBRASKA CASE LAW

Nebraska adopted the basic rule in 1881 in *Hamilton County v. Bailey*[59] where the court held that a claimant waived his right to appeal by accepting a warrant in payment of an account filed with the board of county commissioners.[60] In the case of *Harte v. Castetter*[61] the rule was somewhat broadened when the court held that a partial acceptance of the benefit of the lower court's decision would waive the right of appeal.[62]

[58] See Burke v. Dendinger, *supra* note 56. Bodewig v. Standard Cattle Co., 56 Neb. 217, 76 N.W. 580 (1898).

[59] 12 Neb. 56, 10 N.W. 539 (1881).

[60] The court in this case said: "Where an account is filed with the board of county commissioners, and allowed in part, and a warrant, drawn for the sum thus allowed, is accepted by the claimant, he therefore waives his right of appeal.... He cannot accept the amount awarded to him by an order of judgment, and thereby receive the benefit of the same and appeal from such order or judgment." This rule was quoted with approval in Western v. Falk, 66 Neb. 198, 92 N.W. 204 (1902). See also, Gray v. Smith, 17 Neb. 682, 24 N.W. 340 (1885).

[61] 38 Neb. 571, 57 N.W. 381 (1894).

[62] The court stated: "The doctrine that a party who accepts the benefits of a decree in his favor waives the right to prosecute an appeal, is not limited in its application to those alone who have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntarily accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed him. If appellant desired to prosecute his appeal he should not have accepted any portion of the fund paid into court, which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided. The acceptance of the money, under the circumstances disclosed by this record, precludes appellant from challenging the correctness or validity of the decree." This rule was quoted with approval in McKee v. Goodrich, 84 Neb. 479, 121 N.W. 577 (1909) in answer to the contention that the rule did not apply in the case because plaintiff only enforced so much of the judgment as was in his favor. The court held that the plaintiff may enforce the judgment so far as it benefits him, but if he recognized its validity to that extent, he cannot question any part of it. Here the validity of the decision was recognized only by accepting costs. The quote was also cited with approval in Larable v. Larable, 128 Neb. 560, 257 N.W. 520 (1935) and Tunison v. Millsap, 112 Neb. 722, 201 N.W. 151 (1924). See also, Snyder v. Hill, 153 Neb. 721, 45 N.W.2d 757 (1951).

The Nebraska court has not been confronted with all the exceptions listed, however, it has approved at least four of them. The first exception — Right of Acceptance Conceded by Opponents Petition — has been adopted by Nebraska in *Meade Plumbing, Heating & Lighting Co. v. Irwin*[63] where the court held that an acceptance of an amount admitted in the answer did not constitute waiver of the right of appeal.

The second exception — Right Admitted During Proceedings — was adopted in Nebraska in *First Trust Co. v. Hammond*[64] where it was held that if benefits are conceded, as where the defendant did not ask for affirmative relief, did not offer any testimony that she had any claim upon the property, and took no appeal, the plaintiff will not be held to have waived his right of appeal by accepting the benefit of the lower court's decree. The court cited the rules of the *Harte*[65] and *Larabee*[66] cases and then stated:

> But these rules do not take into account those situations wherein the benefits are conceded. The rule of this court in such situations is the following; 'The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment. . . . It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from.' Weston v. Falk, 66 Neb. 202, 93 N.W. 131, Meade Plumbing, Heating and Lighting Co. v. Irwin, 77 Neb. 385, 109 N.W. 391.[67]

The fourth exception — Review Legally Confined to Additional Amount — has been accepted by the Nebraska court. In 1909 the court held that a party who by execution collects so much of a judgment for costs as are in his favor waives his right to bring error from the part thereof against him.[68] However, this decision has been overruled. In *Hoesly v. Dept. of Roads & Irr.*[69] it was held that the owner of condemned land did not loose his right to

[63] 77 Neb. 385, 109 N.W. 391 (1906).

[64] 139 Neb. 546, 551, 298 N.W. 144, 147 (1941).

[65] *Supra* note 61.

[66] 128 Neb. 560, 259 N.W. 520 (1935).

[67] The above rule was cited with approval in Dove v. School Dist. No. 23, 166 Neb. 548, 90 N.W.2d 58 (1958).

[68] McKee v. Goodrich, 84 Neb. 479, 121 N.W. 577 (1909).

[69] 143 Neb. 387, 9 N.W.2d 523 (1943) a rehearing of Hassly v. Dept. of Roads & Irr., 142 Neb. 383, 6 N.W.2d 365 (1942).

prosecute error by having accepted an amount based upon a plan which failed to include a stock pass, because it appeared that the amount he accepted was absolutely due him. And in *Nuss v. Nuss*[70] the parties had accumulated an estate which stood in the name of the plaintiff. At the trial however, the court relieved the plaintiff of its control, ordering that court costs be paid out of the estate. There was no judgment or decree in favor of the defendant, but his court costs amounted to $4.00. The court held that this was not an acceptance within the meaning of the rule.

Nebraska has also followed the sixth exception — Acceptance by Person Without Authority. In *First Trust Co. v. Hammond*[71] the court held that a guardian had no authority to bind his ward's estate by accepting part of the personal property claimed and thus constitute waiver of the right of appeal, without the courts consent.

The Nebraska court has not considered the third, fifth, seventh, or eighth exceptions, but has suggested that it will not follow the ninth, and tenth. In *Thurston v. Travelers Ins. Co.*[72] the court indicated that it would not accept — Reservation of Rights — as an exception to the rule, stating that a waiver of appeal can be accomplished by appellant even if there is an agreement that the acceptance of payment should not affect his right of appeal.

It is suggested by way of dicta in *State ex rel. Heintz v. County of Adams*[73] that Nebraska would not follow *Greenspot Desert Inns v. Roy*[74] and this can probably be taken for the proposition that Nebraska would not follow the tenth exception — Acceptance Under Compulsion.

V. RECOMMENDATIONS AND CONCLUSIONS

It is submitted that Nebraska should adopt a statute similar to the following:

> When the appellant gives adequate security to make restitution in case the final judgment is reversed or modified, he may upon leave obtained from the court below, or a judge thereof in vacation, proceed to appeal from the

[70] 148 Neb. 417, 27 N.W.2d 624 (1947).

[71] *Supra* note 64.

[72] 128 Neb. 141, 258 N.W. 66 (1934).

[73] 162 Neb. 127, 75 N.W.2d 539 (1956).

[74] *Supra* note 54.

> judgment after accepting the benefits therefrom. Such Security to be executed to the court shall cover the amount of the judgment accepted plus court costs, so that if the judgment be reversed or modified, or a judgment is given on a cross claim or cross appeal, the court will be able to make full restitution to the appellee of the money adjudiciated to him under such reversal, modification or judgment.

If the above statute was enacted and the appellant required to follow it, there is no reason to hold that he cannot accept the lower court's judgment and still appeal. There would be no waiver or estoppel, there would be no inconsistency of action, and the defendant would be protected from injury. This would cause less coercion on the plaintiff to forgo appeal from an unjust result, as the plaintiff would be allowed the use of money he is in all probability entitled to, and he would not be required to risk the possibility that defendant will become insolvent during appeal.

Which of the situations discussed would be controlled by the statute? The first five exceptions would usually be outside the scope of the statute because the right appealed from is a different right from the one accepted. Thus there has been no waiver, estoppel, or inconsistency and if there is no possibility of a cross claim or cross appeal where on final judgment the defendant's claim should be balanced against the plaintiff's, there is no reason to require compliance with the statute. However, if the situation is such that there may be a cross appeal or cross claim the bond should be required and the statute followed.

The sixth and seventh exceptions should be adopted without requiring compliance with the statute if the benefit received is returned or available to the court so a defendant will not be injured on reversal, as here again there has been no waiver, estoppel, or inconsistency of action.

Under the eighth, ninth, and tenth, exceptions the courts should require compliance with the statute to protect the appellee from a possible reversal or modification. These exceptions are based upon the whims of the plaintiff, and even though in many circumstances the appellant has not waived his right to appeal, or estopped himself from so pleading, the underlying principle of inconsistency and the possibility of harm to the appellee are still present.

The right to appeal, however, should not be set aside except upon clear and decisive grounds, and if the court upon reversal can restore both parties to their respective rights, there is no

reason to hold that the right of appeal has been waived. As suggested in the statute, under a proper exercise of discretion, with the requirement of a bond conditioned on the result of the appeal, a plaintiff should be able to reserve his right of appeal.

Duane L. Mehrens, '61