Briefs - State Bank of Ravenna Case

26879

General Number 26879.

IN THE

Supreme Court of Nebraska

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APPELLANTS,

V.

THE STATE BANK OF RAVENNA, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY.
Hon. B. O. Hostetler, Judge.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

W. L. Minor,
B. J. Cunningham,
Attorneys for Appellants.

STATEMENT OF THE CASE.

This case was commenced in the District Court of Buffalo County, Nebraska, and before the trial of the case had been completed a stipulation was entered into by the appellants, who will hereafter be referred to as

the defendants, and the appellee which will hereafter be referred to as the plaintiff. The stipulation, which was somewhat incomplete, was reduced to writing and is contained in the bill of exceptions. The decree of the court was based upon the stipulation and the decree, while being dated September 28, 1927, was filed October 25, 1927. The dceree was prepared by plaintiff's attorney and was not signed by the district judge.

The decree was based upon the stipulation entered into and was rendered in favor of the plaintiff and against the defendants decreeing the foreclosure of the mortgages sued upon granting to the defendants, the right to redeem the property foreclosed, and providing that a certain note, in favor of C. N. Davenport, which was in dispute, in the sum of $5900.00 should be cancelled, and that a certain claim which the defendant, Stella B. Jungles, held against the plaintiff should be cancelled and waived, that a deficiency judgment against the defendants on said foreclosure, should be waived and with the provision that the defendants should remain in possession of the premises as leasees until redeemed, or until March 1, 1929. The case was tried to the district judge and decree entered accordingly.

The Pleadings.

On June 22, 1928, a supplemental petition was filed by the plaintiff requesting that the decree be corrected with reference to the amount found due from $3433.50 to $6777.00 on one of the mortgages as to a certain tract of land included in the mortgage. The supplemental petition further requested that a receiver be appointed to take possession of the premises and that said receiver be ordered and directed to convey the premises on March 1, 1929. The answer of the defendants to the supple-

mental petition was filed setting forth that the decree was not in accordance with the stipulation, and contained a general denial.

On October 11, 1928, trial was had on the supplemental petition and judgment was entered by the court in favor of the plaintiff in accordance with the prayer of the supplemental petition.

The original petition, answer and reply are not shown in the transcript but the incomplete stipulation is shown in the bill of exceptions and the amended decree and orders appointing a receiver, etc., are shown in the transcript.

Errors Relied on for Reversal.

1. The court erred in granting the prayer of the supplemental petition and entering an amended decree for the reason that the supplemental petition is based on a motion and notice to correct the decree, as to the amount found due under paragraph 5 of the original decree, and the supplemental petition is not based upon, nor in accordance, with the original stipulation.

34 C. J. 240.

Barnes v. *Hale,* 44 Neb. 355, 62 N. W. 1063.

Meade Plumbing Co. v. *Irwin,* 77 Neb. 385, 109 N. W. 391.

2. The court erred in appointing a receiver and ordering said receiver to take possession of the crops and premises for the reason that no statutory notice was given defendants, and that the court was without authority to appoint a receiver in a proceeding upon an application to correct a decree, rendered at a former term of court.

Secs. 8755, 8758, 8762, Comp. Stat. 1922.

McCormick v. *Stires,* 68 Neb. 432, 94 N. W. 629.

Girard Trust Co. v. *Null,* 97 Neb. 324, 149 N. W. 809.

34 C. J. 249.

3. The court erred by inserting in the decree "that Stella B. Jungles has waived any claim * * * against the plaintiff *or any of its officers or employees* by reason of the application of $6800.00 * * *" (p. 5 of Trans.), in lieu of the provision, in the stipulation, which was as follows: "Stella B. Jungles hereby waives any claim that she may have *against the plaintiff* by reason of the application of $6800.00, etc.," for the reason that it deprives Stella B. Jungles of a claim which she has against the officers and employees of said bank and which has not been adjudicated.

The Evidence.

The evidence in connection with the case is brief and the same will be discussed in connection with the argument.

THE ARGUMENT.

The transcript of this case shows that the trial was had on the 28th day of September, 1927; that the decree was not approved by the attorneys for the defendants, but that some correspondence was had with reference to changes; that the attorneys for the plaintiff filed said decree on the 25th of October, 1927, without having submitted the same to the district judge for his signature. No further proceedings were had in the case until the 28th of June, 1928, which was after the September, 1927 term of court had adjourned, and also after the January, 1928, term of district court had adjourned.

The supplemental petition was filed on June 28, 1928, and the principal object of the same appeared to be the correction of an alleged mistake with reference to the amount found due in paragraph 5 of the decree. In addition, however, the plaintiff requested the appointment of a receiver and requested that an order be entered authorizing the receiver to collect the rents, etc., and to convey the land on March 1, 1929. This request of the order resulting therefrom is clearly in violation of the stipulation agreed upon by the parties in the case (see Exhibit "One," p. 5, B. of Ex.). The said stipulation provides that the defendants should remain in possession of said premises until March 1, 1929, on a rental basis of one-third of the crop delivered to market, one-half of the hay and alfalfa crop, and $1.00 per acre for the pasture land. The stipulation clearly covered the conditions under which said premises would be occupied by the defendants; also the decree dated September 28, 1927, also covered the stipulations as to the lease and the said decree also provided "that said defendants shall forthwith execute and deliver a good and sufficient deed conveying said premises to the plaintiff or its assigns and that in default thereof by the said defendants *this decree shall operate as a conveyance of said premises absolutely to the said State Bank of Ravenna or its assigns.*" Under the original decree and stipulation no provision was made for the appointment of a receiver and there was no necessity of the appointment of a receiver. The receiver, after being appointed, submitted to the defendants a lease which defendants refused to sign by reason of conditions being inserted in said lease which were not a part of the original stipulation or decree. The said lease contained the provision that said farm should be cultivated *under*

the supervision of the party of the first part or its authorized agents (see p. 23 of the Trans.).

The above provision was no part of the original decree or stipulation. The said lease was tendered in July, 1928, after the crops had been planted and the defendants should not have been required to submit to the supervision of the receiver as to the manner in which said land should be farmed. The lease also contains the conditions (see p. 24, B. of Ex.) which would have forfeited all rights of the defendants, had any of the conditions of the lease been unfulfilled and the receiver was thereby given the power to cancel the lease in the event that he should decide that the lease was not being complied with according to the terms thereof, or under the terms that might be imposed under his supervision. The said receiver has even gone so far as to serve notice for the defendants to vacate said premises under date of August 31, 1928 (see p. 24 of Trans.), the notice being the usual three days notice given the tenant. The defendants submit that they should not have been subject to ouster proceedings from the above described premises until March 1, 1929, unless there was some good cause shown or some provision in the stipulation or decree rendered by the court. It was not required by the court that they enter into a written lease or that they submit to the supervision of the plaintiff or of a receiver and no receiver was appointed at the time the decree was entered.

On October 6, 1928, an order was entered directing the sheriff to place the receiver in possession of said premises and that a writ of assistance was issued by the clerk of the court. There is no evidence in the case but what the defendants were farming the prem-

ises in a good workmanlike manner. No rent was to be paid until October 1, 1928, and no division of the crop was to be made until the same was harvested. The defendants, it is true, had not executed a deed to the premises but the decree contanied a provision that in event of their failure to do so that the decree would stand as a conveyance and by reason thereof the decree was in no way violated by reason of the defendants having failed to execute a deed. This brings us to the question as to whether or not there is any reason for the defendants having failed to execute the deed and in connection therewith the attention of the court is called to a variation in the terms of the decree rendered from the terms of the stipulation agreed upon by the parties. The last paragraph of the stipulation contains the following provision:

> "It is further stipulated that in consideration of the foregoing stipulation the defendant Stella J. Jungles hereby waives any claim that she may have *against the plaintiff by reason* of the application of $6800.00 of money claimed by her to the payment of the debts of her husband David F. Jungles in about the mnoth of February, 1922" (see p. 7, B. of Ex.).

The last paragraph of the decree contains the following provisions:

> "2. That in satisfaction of this decree the defendants * * * and that Stella B. Jungles has waived any claim that she may have against the plaintiff *or any of its officers or employees* by reason of the application of $6800.00, money claimed by her, to the payment of debts of her husband, David F. Jungles, in about the month of February, 1922; that in consideration of the foregoing, plain-

tiff waives deficiency judgment against the defendants" (see p. 4 of Trans.).

The court will note that in the stipulation the defendant, Stella B. Jungles, waived any claim which she had against the plaintiff by reason of the application of $6800.00 of money claimed by her, to the payment of the debts of her husband, etc. When the decree was written by plaintiff's attorney, the provision was made to cover any claims which the defendant, Stella B. Jungles, had against the plaintiff, a corporation, and in addition thereto any of its officers or employees. This would prevent Stella B. Jungles from enforcing any claims which she might have had against the officers or employes of said bank and such waiver or release was never contemplated by the plaintiff or the defendants at the time the stipulation was entered into. The evidence which was taken at the original trial of the issues in this case is not before the court and the reason of plaintiff's desire for the release as to the officers or employes cannot be here stated. However, the officers of the plaintiff bank are not parties to this suit nor were they parties to the original suit; and, therefore, any claims which Stella B. Jungles may have against the officers of the State Bank of Ravenna or against the employes of said bank should not be litigated or determined in this case, and the stipulation contained no waiver whatsoever as *against said officers or employes* of said plaintiff bank. The claim which Stella B. Jungles has against said officers or employes would necessarily be against them personally and if she waived her claim as against the bank no recovery could be had against said bank in any future action for her claims against the officers and employes were never waived. But an attempt is made to extend the scope of the waiver as

against said bank so that it would include the officers and employes thereof. For this reason the deeds were not executed by the defendants. The defendants point out that there is a variation in the terms and provisions of said decree when compared with the stipulation shown at page 7 of the transcript. The decree which was drawn by Mr. McDonald and shown on pages 31 to 37, bill of exceptions, was not approved by the attorneys for the defendants and was not signed by the judge but was filed with the clerk as shown by page 31, bill of exceptions, October 25, 1927. Defendants, in the meantime, were not apprised of any amendments necessary in the decree and relying upon said decree being in accordance with the stipulation entered into, had no knowledge that said decree would provide that Stella B. Jungles, defendant, waived her claim against the officers and employes of the bank. No objection was made to the decree until June 22, 1928, which was the third term of the district court after the trial of the case. Defendants, therefor, submit that the court erred in rendering a decree wherein Stella B. Jungles is prevented from any recovery from the officers or employes of the plaintiff bank, as any claim which she may have against the officers or employes of said bank could not be litigated without having made said employes or officers of said bank parties to this suit.

Defendants further contend that the court erred in appointing a receiver, as the stipulation in the decree included all of the conditions under which the premises described should be operated until March 1, 1929.

Defendants further contend that the court erred in ordering the receiver to take charge of any part of the crops growing upon said premises and in ordering said

receiver to convey said property as all of said orders were in violation of the stipulation and decree rendered in the case.

Defendants, therefore, respectfully state the dceree of the district court should be reversed for the reasons above assigned.

Respectfully submitted,

W. L. MINOR,
B. J. CUNNINGHAM,
Attorneys for Appellants.

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BRIEF OF APPELLEE.

N. P. McDONALD,
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Bruno O. Hostetler, Judge.

BRIEF OF APPELLEE.

N. P. McDonald,
Attorney for Appellee.

STATEMENT.

This is an action on a supplemental petition in an action pending in the District Court of Buffalo County, Nebraska, wherein the State Bank of Ravenna was

plaintiff and David F. Jungles and Stella B. Jungles were defendants. The object and prayer of the supplemental petition was to correct the decree that had been entered in said cause prior thereto, to have a receiver appointed to take possession and control of the property involved in the case and to have a master commissioner appointed to carry into effect the decre of the court theretofore entered by conveying to the plaintiff the property involved in the case. Trial was had and decree entered, in accordance with the prayer of the supplemental petition. Defendants Jungles, appeal to this court from the decree of the supplemental petition.

Issues.

This original action was for the foreclosure of mortgages on several tracts of land. During the trial considerable evidence was taken, and finally a stipulation was made by the parties in open court and decree rendered on September 28, 1927, and shown at page 1 of the transcript. Afterwards and on June 22, 1928, a supplemental petition was filed in said cause by the plaintiff, the object and prayer of which was:

1. To correct the amount found due in the decree as in one cause of action in the petition;

2. To have a receiver appointed immediately to take possession and control of the property involved in the case, and

3. To have a master commissioner appointed to carry out the decree theretofore entered in said cause by conveying the property involved to the plaintiff (pp. 5 to 12, Trans.).

A hearing for the appointment of a receiver was had on July 9, 1928, and a receiver was appointed by the court and he was ordered to take immediate possession of the real estate involved, manage, control and lease the same (Tr. pp. 17 to 19).

Answer was filed by the defendants to the supplemental petition on September 24, 1928. In the answer it is alleged:

1. That a stipulation was agreed on by the plaintiff and defendants at the trial of the cause on September 28, 1928, but that it was agreed that the stipulation should be submitted to the defendants by the plaintiff and that it should be signed and executed by both of the parties, which was not done.

2. That at the trial it was agreed a decree should be prepared in accordance with the stipulation; that the decree, which was prepared by the attorney for the plaintiff, was not in accordance with the stipulation; was not consented to by defendants or their attorney; that the same was filed in court without having been submitted to the judge and without the consent of the defendants or their attorney; that the decree does not conform to the stipulation; that the decree is void because it was not signed by the court; that the decree is at variance with the conditions of the stipulation.

The prayer of the answer is that the supplemental petition be dismissed; that the decree be stricken from the files; that the costs be taxed to the plaintiff, and the defendants have equitable relief (Trans. pp. 26 and 27).

The reply is a general denial of the allegation of the answer (Trans. pp. 26 to 28).

Trial was had and decree entered on October 11, 1928, in which the court found that the matter of correcting the decree, as set forth in paragraph 1 of the supplemental petition, had theretofore been corrected on motion; that the allegations of plaintiff's supplemental petition were true; excepting that no finding was made as to the insolvency of David F. Jungles; that Frank Skochdopole had theretofore been appointed receiver of the property involved in the action; that the defendants had failed and refused to convey the property involved in the action to the plaintiff, in accordance with the stipulation of the parties made in open court and the decree theretofore entered in said action; that Frank Skochdopole, who was the receiver, be appointed master commissioner and authorized and directed to convey the real estate involved in the action to the plaintiff on March 1, 1929, because the defendants had failed and refused to convey said real estate to the plaintiff, in accordance with the stipulation in the trial of the original case and the decree entered therein. From this decree the defendants have appealed to this court (Tr. pp. 32 to 34).

Answer To Errors Alleged.

1. The supplemental petition was not based upon any motion as to the amount due the plaintiff under paragraph 5 of the original decree, but is in accordance with the original stipulation and decree and is based thereon.

2. There was no error in appointing a receiver to take charge of the premises involved in the case be-

cause statutory notice was given, as required by law, and the court had full power and authority to appoint a receiver in this case.

3. The third error assigned by the appellant goes to the original decree. No appeal has been taken from the original decree, which was entered September 28, 1927, and no motion has been made or action taken in any manner to modify or correct in any particular said decree (pp. 1 to 5 of the Tr.).

Evidence.

The evidence is brief and the material parts thereof will be referred to in the argument herein.

PROPOSITIONS OF LAW.

I.

When a decree is entered conforming to the agreement and consent made in open court of all the parties to the action, the court having jurisdiction to enter such decree, then no party to the decree, nor one claiming under such party, can be heard to question it, except for fraud or mistake, even though the pleadings would not support the decree had the action been contested.

Clark v. *Charles*, 55 Neb. 202.

Wallace v. *Goldberg*, 72 Mont. 234, 231 Pac. 56.

Schoren v. *Schoren*, 110 Ore. 272, 222 Pac. 1096.

Schmidt v. *Oregon Gold Mining Co.*, 28 Ore. 9, 40 Pac. 406.

Bancroft Code Practice, Vol. 3, Sec. 1786 to 1790.

II.

It is the duty of the clerk of the district court to prepare journal entries of judgments and decrees and record them. When judicial acts or other proceedings of any court have been regularly brought up and recorded by the clerk thereof, and upon examination found correct, the presiding judge of said court shall subscribe the same.

Compiled Statutes 1922, Sec. 8956.

The decree would be valid though not signed by the judge.

Gallentine v. *Cummings*, 2 (Unof.) Neb. 690.
Scott v. *Rohman*, 43 Neb. 618.

III.

Real property may be conveyed by master commissioners when by an order or judgment in an action or a proceeding a party is ordered to convey such property to another and he shall neglect or refuse to comply with such order or judgment.

Comp. Statutes 1922, Section 8960.

IV.

A receiver may be appointed by the district court after judgment or decree to carry the same into execution, or to dispose of the property according to the decree or judgment.

Comp. Statutes 1922, Section 8754.

ARGUMENT.

This was an action to foreclose several mortgages executed by appellants to the appellee. Trial was had on September 28, 1927, on the petition of the

plaintiff, the answer of the defendants, the reply thereto, the evidence and the stipulation of the parties, as alleged in the supplemental petition herein, on which this appeal is taken, in paragraph 2 thereof (Tr. pp. 6 and 7), which the court finds is true in the decree thereon (Tr. p. 32, par. 2). After taking evidence a stipulation was made and entered into by the parties in open court, which stipulation is in the bill of exceptions, page 5. A journal entry was prepared by the attorney for the plaintiff and filed in the office of the clerk of the district court and entered in the complete record in said cause, which decree was approved by the judge of said court, as shown by said complete record (B. of Ex. pp. 6 to 15). The approval of the decree as entered on the record is made by the judge of said court on page 15, bill of exceptions.

In this decree the court finds the amount due on the several mortgages set forth in plaintiff's petition and adjudged the same to be valid liens on the respective mortgaged premises and ordered several tracts of real estate to be sold to satisfy the amount found due. In said decree (B. of Ex. p. 12, par. 9) the court further finds:

> "That it is stipulated by the parties in open court that all of said premises as above described, shall be conveyed by the defendants, David F. Jungles and Stella B. Jungles, his wife, to the plaintiff, or its assigns, immediately by good and sufficient deed of conveyance, and that the title to said premises shall vest absolutely in the said grantee."

There is further provision in the decree that the defendants, appellants herein, should have the right

to purchase any of said tracts by paying to the plaintiff the amount found due on its mortgage lien thereon, and they should have the right to lease said real estate described in said mortgages from the plaintiff, the appellee herein, for a term ending March 1, 1929.

It is alleged in the supplemental petition filed in the court below on June 22, 1928, that the defendants therein had failed and refused to convey said real estate to the plaintiff, as provided in said decree; that they had failed and refused to lease said premises from the plaintiff and had failed and refused to surrender possession thereof to the plaintiff, and had failed and refused to perform the terms and conditions provided for them to be performed in said decree. The purpose of said supplemental petition was to have a receiver appointed to collect the rents and profits, manage said estate until the conveyance of said real estate should be made to the plaintiff, and to appoint a master commissioner to carry into effect the decree of the court by a conveyance of said real estate to the plaintiff by said master commissioner, which could not be done until March 1, 1929, at which time the defendants' right to purchase said real estate or any part thereof expired by the terms of the original decree.

It is contended by the appellants that the proceedings under the supplemental petition are erroneous because those proceedings were based upon the original decree, which they contend is void for two reasons:

1st. The decree is not in conformity with the stipulation of the parties in open court.

We shall not take the time or space in this brief to show that the decree is in conformity with the evidence

and the stipulation in that case. The stipulation is found on page 5, bill of exceptions, and the court may determine from the reading of the stipulation as to whether or not it supports the decree.

The decree is not such a decree as would have been entered under the pleadings, but the parties always have the right to make agreements during the progress of the trial of a case for the disposition thereof. This court has held:

> "When a decree is entered conforming to the agreement and consent made in open court of all the parties to the action, the court having jurisdiction to enter such decree, then no party to the decree, nor one claiming under such party, can be heard to question it, except for fraud or mistake, even though the pleadings would not support the decree had the action been contested."
>
> *Clark* v. *Charles*, 55 Neb. 202.
>
> *Wallace* v. *Goldberg*, 72 Mont. 234, 231 Pac. 56.
>
> *Schmidt* v. *Oregon Gold Mining Co.*, 28 Ore. 9, 40 Pac. 406.
>
> Bancroft Code Practice, Vol. 3, Sec. 1786 to 1790.
>
> *Schoren* v. *Schoren*, 110 Ore. 272, 222 Pac. 1096.

This stipulation was greatly to the advantage of the defendants in that it provided that the defendants might purchase back any of this land by paying the amount of the mortgage lien thereon with the low rate of interest of 6 per cent during a time much longer than this period of stay of execution under the statute, and a practical cancellation of a note made by the defendant

David F. Jungles to C. N. Davenport, by the agreement of R. M. Thomson, cashier of the plaintiff bank, to hold said defendants harmless from any liability on said promissory note, and the waiving of all deficiency judgments against the defendants, since the land is adjudged to be of less value than the amount of the mortgage thereon, as alleged in the supplemental petition (Tr. p. 11) and determined by the order appointing the receiver (Tr. p. 17) and the decree on said supplemental petition (Tr. p. 32). This stipulation was taken in shorthand by the court reporter, transcribed by him during the trial, and a copy given to the plaintiff and the defendants, and it was expressly assented to and participated in by the defendants at the time it was made and with their full knowledge and consent (B. of Ex., pp. 3 and 4). There can be no reason why the defendants should not carry out the decree in good faith.

2. It is next contended by the appellants that the original decree is void because it was not approved by the attorney for the defendants and signed by the court. It is true the journal entry was prepared by the attorney for the plaintiff. A copy of that journal entry was submitted to the attorney for the defendants. See testimony of N. P. McDonald (pp. 39 to 45), especially copy of a letter inclosing stipulation to Mr. Cunningham (Exhibit 4, p. 41), an original letter from Mr. Cunningham to Mr. McDonald (Exhibit 5, p. 43), in which he acknowledges receipt of the copy of the decree as drafted, and says that "Mr. and Mrs. Jungles were in today and there were a few changes they desired to have made which I do not think are very important, but upon which they insist," and specifies only one thing and that was to have returned the Davenport

note, which Mr. Thomson, as cashier of the bank, agreed to protect them on. There is no substantial objection to the decree as prepared and as filed with the clerk of the district court and by him entered in the complete record, which complete record was approved and signed by the judge of that court (B. of Ex., p. 15).

There is no requirement of the statute or of the law that a decree or journal entry prepared by an attorney of record shall either be approved by the attorney on the other side or the instrument itself signed by the judge of the court. All the statute does require is that when the judicial acts or other proceedings of any court have been regularly brought up and recorded by the clerk thereof, and upon examination found correct, the presiding judge of such court shall subscribe the same.

Comp. Stat. 1922, Sec. 8956.

If the decree was in any manner incorrect or not in accordance with the facts, the findings of the court or the law, the defendants had ample opportunity to have the same corrected or modified. No attempt has been made in any manner to have said decree changed, corrected or modified in any particular, and the same must stand as the settled decree in this case.

Master Commissioner.

No complaint is made in appellants' assignment of errors or in the proceedings under the supplemental petition in this case of the appointment of a master commissioner to convey the real estate to the plaintiff on account of the neglect and refusal of the appellants to convey the real estate to the plaintiff, as provided in the original decree. In any event, this was a proper proceeding. Our statute specially provides therefor.

Section 8960 of the Compiled Statutes for 1922 is as follows:

> "Real property may be conveyed by master commissioners as hereinafter provided: First, when by an order or judgment in an action or a proceeding a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment."

In any event, the district court has the power to make such order as may be necessary to carry into effect its judgments and decrees.

Receiver.

The second assignment of error by the appellants is that the court erred in appointing a receiver to take possession of the property, and contend that under the original decree the Jungles were entitled to the possession of the real estate. The attorney for the appellants has evidently overlooked the provisions of the stipulation and the decree. In the stipulation it is agreed (B. of Ex., p. 6), and in the decree it is found and adjudged (p. 14, Tr. pp. 3 and 5), "That the plaintiff shall have possession of said premises on March 1, 1928." It is true that the decree provided that the Jungles might lease the real estate from the plaintiff after they had conveyed the real estate to the plaintiff. They failed and refused to convey the real estate, and failed and refused to enter into a lease of the real estate from the plaintiff or surrender possession to it.

Mr. Thomson, cashier of the bank (p. 16), testifies that the Jungles have failed to convey the land to the plaintiff and that the bank employed W. T. Eckerson for that purpose (B. of Ex., p. 16).

Mr. Eckerson testifies in this case that in June, 1928, he had a conversation with David F. Jungles and his wife about conveying the land involved in the case to the State Bank of Ravenna; that he went to them with a deed (B. of Ex. p. 21, Exhibit 2), and a lease and told the Jungles that he had a deed and some leases for them to sign, some papers that were involved in the case, and talked to them about it and they said "No, they wouldn't sign anything." They would not sign the deed and would not sign the lease. They said they would not sign anything (B. of Ex., pp. 18 and 19).

Frank Skochdopole testified in this case that he was the receiver appointed by the court in this case; that he went to Mr. and Mrs. Jungles about making a lease on the land and he offered to lease it to them and they refused and would not sign the lease which he had with him at the time, and said they would not sign anything. On cross-examination he said that they would not sign anything for him as receiver or any other man; they would not sign anything and they would not do anything (B. of Ex., pp. 23 to 25).

There is nothing in the record that the appellants objected to the lease offered to them or that it was not in accordance with the terms of the original decree. They simply refused to do anything, either to convey the property or to lease the same from the plaintiff. They refused to perform the decree of the court in conveying the property or leasing the same, but insisted on remaining in possession. In order that the decree of the court might be carried into effect, it was necessary to have a receiver appointed. Section 8754 of the Compiled Statutes for 1922 provides as follows:

> "A receiver may be appointed by the supreme court or the district court or by the judge of either in the following cases: Third. After judgment or decree to carry the same into execution or to dispose of the property according to the decree or judgment or to preserve it during the pendency of an appeal."

That is just exactly what was done in this case. In the order appointing the receiver, the interests of the Jungles were carefully protected in this matter by providing, "Said receiver shall have power and authority to lease said real estate to David F. Jungles and Stella B. Jungles, or either of them, for a term ending March 1, 1929, for a rental basis of one-third of the grain and corn crop and one-half of the hay and alfalfa crop raised on said premises, to be delivered by the lessor at the nearest market without expense to the lessee, under the usual terms of leases made in that vicinity for similar real estate, and $1.00 per acre for the pasture land on any of said premises, to be paid in cash on the 1st day of October, 1928" (Tr. p. 19). This order was entered on June 30, 1928. The appellants persisted in ignoring the order of the court to convey said real estate to the plaintiff, or lease the same from the plaintiff, or surrender possession thereof to the plaintiff or the receiver, even until the trial under the supplemental petition, on September 6, 1928.

There was nothing for the court to do but to appoint a receiver to take possession of the property, and a master commissioner to convey it to the plaintiff, or submit to its orders and decrees being entirely ignored by the appellants.

Objection is made that the appointment of the receiver was without sufficient notice. The supplemental tran-

script shows that motion for the appointment of the receiver and notice of hearing thereon was served on the defendants David F. Jungles and Stella B. Jungles on June 23, 1928, giving notice of hearing on the motion on June 30, 1928. The order appointing the receiver (Tr. p. 17) recites that on June 30, 1928, the application for the appointment of the receiver was continued by consent of parties to July 7, 1928, and on said date by agreement of the parties, said cause was continued to Monday, July 9, 1928, at 10 o'clock A. M., and on that date the receiver was appointed. There is absolutely nothing in the contention of the defendants that the receiver was appointed without legal notice. No objection was ever made, either at the time the receiver was appointed, or in the answer of the defendants to the supplemental petition, or at the trial, that the receiver was appointed without due notice.

From the foregoing it must be apparent that the appointment of the receiver was not only a proper proceeding, but was absolutely necessary in order to protect the rights of the plaintiff and enforce the decree of the court.

Miscellaneous.

In the argument in appellants' brief complaint is made of various matters contained in the original decree, and which are not at all involved in any manner in this proceeding under the supplemental petition. One of the things mentioned is that concerning $6800 applied to the payment of obligations of her husband, David F. Jungles, to the bank. She was contending that it was so applied without her consent, but that fact was not in issue in the case. In order that the controversies between the plaintiff and the defendants might be fully

adjusted and settled, the stipulation in open court was made and it was there agreed that R. M. Thomson, cashier of plaintiff bank, would save and keep the defendants harmless from any and all liability on two certain promissory notes made by the defendant David F. Jungles to C. N. Davenport, amounting in the aggregate to about $5900, and interest thereon; that there should be no deficiency judgment and all deficiency judgments are waived; and "it is further stipulated that in consideration of the foregoing stipulation, the defendant Stella B. Jungles hereby waives any claim that she may have against the plaintiff by reason of the application of $6800 of money claimed by her to payment of the debts of her husband, David F. Jungles, in about the month of February, 1922" (B. of Ex., p. 7). On this stipulation findings were made and judgment entered by the court, in accordance therewith (B. of Ex., pp. 13 and 15). The complaints are all made about things that are adjudicated in the original decree, from which no appeal was taken and no effort made to correct or modify. As a matter of fact, the original decree is not subject to attack for any irregularity. We call special attention to the fact that these criticisms made by the appellants have no reference to the findings or decree under the supplemental petition, from which alone appeal has been taken in this case. The third assignment of error, as made by appellants, therefore must fall.

CONCLUSION.

From the foregoing we must conclude that the court had jurisdiction of the subject matter under the supplemental petition; that the appointment of master commissioner to convey the real estate involved to the

plaintiff was within the powers and duties of the court; that the appointment of the receiver was a proper proceeding and necessary to protect the interests of the plaintiff, and to carry into effect the decree of the court; that the other matters complained of in appellants' brief are not in issue in this case. We therefore ask that the decree of the court below be affirmed.

Respectfully submitted,

N. P. McDONALD,
Attorney for Appellee.

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29083

In The

Supreme Court of Nebraska

STATE OF NEBRASKA, EX REL, C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF,

V.

THE STATE BANK OF RAVENNA, DEFENDANT,

DAVID F. JUNGLES, INTERVENOR AND APPELLANT,

E. H. LUIKART, RECEIVER OF THE STATE BANK OF RAVENNA, RAVENNA, NEBRASKA, DEFENDANT AND APPELLEE.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY.
Hon. Bruno O. Hostetler, Judge.

BRIEF OF APPELLANT.

LLOYD KELLY,
Attorney for Appellant.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

General Number 29083.

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APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY.
Hon. Bruno O. Hostetler, Judge.

BRIEF OF APPELLANT.

LLOYD KELLY,
Attorney for Appellant.

STATEMENT OF THE CASE.

Nature of the Case.

Appellant brought this suit as an intervenor, against the State Bank of Ravenna and against E. H. Luikart, as receiver of said bank, in order to object to the classification of his claim against the bank as invalid.

From a judgment dismissing the case, the intervenor appeals the case to this court.

The Issues.

The appellant, in his petition of intervention, objected to the classification of his claim as invalid, alleging that between the dates of February 27th, 1919, and May 31st, 1923, he executed certain listed promissory notes in favor of the bank, which he delivered to the bank and which the bank received and agreed to give the appellant credit for the notes and deposit the proceeds to the appellant's credit. The appellant further alleged that the State Bank of Ravenna, and its officers and agents, wrongfully and fraudulently accepted the notes, but failed and refused to give credit; that the bank appropriated the proceeds of the notes for the use of the bank; that such was done wrongfully and fraudulently without authority; that the officers and agents represented to appellant that he had been given credit on the notes; that two notes for five thousand dollars each were obtained fraudulently, taken into the bank, the proceeds deposited to the credit of officers and other customers of the bank, and that the bank refused to credit the appellant, and that the appellant was compelled to pay the notes with interest. Appellant further alleges that three notes for five thousand dollars each were similarly appropriated by the bank and its officers, wrongfully and fraudulently; and that other notes were treated similarly; and that appellant was forced to pay such note. The appellant then alleged the acts of the bank to be illegal, unlawful, and without his knowledge, consent or authority; further alleged demand on the bank, its officers and its receiver, and refusal of payment; and prayed for relief,

that the sum of $65,500.92 with interest from the date of the petition be decreed a preferred claim against the bank. Attached to the petition is an exhibit listing all notes referred to in the petition (Trans. pp. 2-5).

The State Bank of Ravenna, through its receiver, E. H. Luikart, answered the petition of intervention by a general denial, praying dismissal of the case and asking affirmance of the classification of appellant's claim as invalid (Trans. p. 6).

Later, on the 22nd day of September, 1933, the appellant moved the court for a continuance of 30 days for the reason that appellant's counsel had withdrawn from the case and that insufficient time remained in which to prepare for trial. This motion was supported by affidavits given by Mr. Kelly, present attorney for appellant, by Dr. E. E. Farnsworth, physician for Mr. Hannon, by Mr. Hannon himself; all affidavits being to the effect that the serious illness with tuberculosis of Mr. Hannon made it an impossibility for him to bring the case to trial on the date named. Also attached to it a copy of a letter from Mr. Hannon to Mr. Radke of the state receivership division, written eleven days before trial, asking for more time for some other attorney to prepare for trial, since he would be unable to do so himself (Trans. pp. 8-15).

Findings and Judgment.

On the 22nd day of September, 1933, this matter came to trial, and after presentation of the application for a continuance, with a counter-showing by the receiver, the court found that the application for a

continuance was made merely for dilatory purposes and not in good faith. Accordingly, the case was called for trial, the intervenor failed to appear, and the court dismissed the petition of intervention at appellant's costs (Trans. p. 16).

A motion for a change of venue was denied also as having been filed out of time (Trans. 7, 16 [these two pages misplaced in the transcript each in the place of the other]).

On the 10th day of October, 1933, appellant made an application to set aside the dismissal on grounds that appellant had no opportunity to present affidavits on his behalf on the facts set forth by the counter-showing filed by the receiver of the bank (Trans. pp. 11-15, 17), that the intervenor had no attorney to represent him in such a showing, and that the court was not fully advised of the facts by the affidavit of Barlow Nye. In support of this motion, appellant submitted affidavits of Edward F. Hannon, together with three exhibits which were letters written to intervenor and Mr. Radke concerning the necessity for a continuance due to Hannon's illness, etc., of B. J. Cunningham, and of intervenor David F. Jungles (Trans. pp. 18-32). To this application to set aside the dismissal of the petition of intervention of appellant, a counter-showing was made by the receiver of the State Bank of Ravenna, through its attorney, in the form of affidavits by Fred A. Nye and F. M. McGrew, together with correspondence between the parties given as exhibits (Trans. pp. 33-39).

Accordingly, the appellant appeals to this court.

Errors Relied Upon for Reversal.

1. The court erred in dismissing appellant's petition of intervention.

2. The court erred in not granting the application of the appellant to set aside the dismissal of the petition of intervention.

PROPOSITIONS OF LAW AND AUTHORITIES RELIED UPON FOR REVERSAL.

I.

Granting or refusing a continuance rests in the discretion of the court; and reversible error can be predicated upon an abuse of the sound legal discretion of the trial court.

20-1148, Compiled Statutes, 1929, Nebraska.

Richelieu v. *U. P. R. Co.,* 97 Neb. 360, 149 N. W. 772.

Johnson v. *Dinsmore,* 11 Neb. 391, 9 N. W. 558.

Stratton v. *Dale,* 45 Neb. 472, 63 N. W. 875.

Burris v. *Court,* 48 Neb. 179, 66 N. W. 1131.

City of Lincoln v. *Lincoln Street R. Co.,* 75 Neb. 523, 106 N. W. 320.

Kramer v. *Weingand,* 88 Neb. 392, 129 N. W. 543.

Armour & Co. v. *Kollmeyer,* 161 Fed. 78, 88 C. C. A. 248, 16 L. R. A. (N. S.) 1110.

Cox v. *Hart,* 145 U. S. 376, 12 S. Ct. 962, 36 L. Ed. 741.

Spencer v. *Lapsley,* 15 L. Ed. 902.

Copper River Mining Co. v. *McClellan,* 138 Fed. 333, 70 C. C. A. 623 (Cert. denied, 200 U. S. 616).

Dexter v. *Kellas*, 113 Fed. 48, 51 C. C. A. 35.
Texas, etc. R. Co. v. *Humble*, 97 Fed. 837, 38 C. C. A. 502.
Baker v. *Langan*, 165 Iowa 346, 145 N. W. 513.
Roney v. *Healy*, 170 Mich. 46, 135 N. W. 959.
Bernth v. *Smith*, 112 Minn. 72, 127 N. W. 427.
McDonald v. *McAllister*, 32 Neb. 514, 49 N. W. 377.
Paine v. *Aldrich*, 133 N. Y. 544, 30 N. E. 725.
Pollack v. *Jordan*, 22 N. D. 132, 132 N. W. 1000, Ann. Cas. 1914A 1264.
Crouch v. *Dakota, etc. R. Co.*, 18 S. D. 540, 101 N. W. 722.
McMahon v. *Snyder*, 117 Wis. 463, 94 N. W. 351.
6 R. C. L. 544-5.
13 C. J. 125.
4 C. J. 808-9.

II.

The withdrawal of the principal counsel from a case on account of illness, leaving no counsel sufficiently familiar with the case to carry it to trial, and leaving insufficient time for new counsel to acquaint themselves with the case before time of trial, is good ground for a continuance; and a refusal to grant a continuance in such a case is reversible error.

Rhode Island v. *Massachusetts*, 11 Pet. 226, 9 L. Ed. 697.
Rumford Chemical Works v. *Hecker*, 20 F. Cas. No. 12131.
Shultz v. *Moore*, 22 F. Cas. No. 12825.

Turner v. *Loomis,* 146 Ia. 655, 125 N. W. 662.
Frey v. *Shadbolt Mfg. Co.,* 145 N. Y. S. 48.
Kramer v. *Heins,* 34 N. D. 507, 158 N. W. 1061.
Rice v. *Melendy,* 36 Ia. 166.
American Soda Fountain Co. v. *Dean Drug Co.,* (Ia.) 111 N. W. 134.
13 C. J. 134, 145, 148.
6 R. C. L. 550.

ARGUMENT.

The court erred in refusing the continuance and in dismissing the petition of intervention.

This case was set for trial on the 22nd day of September, 1933, at an equity term of court before the Hon. Bruno O. Hostetler in the district court of Buffalo County. Prior to this time, Mr. Edward F. Hannon, of Grand Island, was the attorney retained by the appellant. On the 16th of September, he notified the appellant that the disease from which he was suffering had caused his physical condition to become sufficiently worse, that it was imperative for him to stop his practice and move to another climate, and that he was accordingly withdrawing from the case (Trans. p. 9). This attorney had gone over the audits, interviewed the witnesses, carried on the negotiations for settlement which were made—in general, had done all of the material work in preparing for trial. It is a matter which would appear to call for nothing but the most ordinary form of common sense that the appellant could not retain other counsel who could familiarize themselves sufficiently with the rather complex features of this case to enable them to go to trial on the matter. Six days only separated the letter of withdrawal

by Mr. Hannon, and the time of the trial. At least one of these days would be lost through passage of the mails. If either the trial court or opposing counsel could have placed themselves in the position which must have been assumed by new counsel had the case gone to trial—i. e., preparing for an intricate banking case which even the auditors and accountants who worked on the books were not able to completely grasp—they would have seen that the refusal of the continuance would work a real injustice and constitute an abuse of discretion.

When the case was called on the 22nd day of September, 1933, counsel, which appellant had retained for the purpose of handling this motion, appeared and asked for a continuance, the motion was supported by an affidavit by Mr. Kelly, attorney, with offices in the same building with Mr. Hannon, who stated that the physical condition of Mr. Hannon made a change of climates a necessity and the discontinuance of his business imperative; by an affidavit by Dr. E. E. Farnsworth of the Grand Island Clinic stating that Mr. Hannon's physical condition required a discontinuance of his practice and his removal to another climate; by two letters from Mr. Hannon, one to the appellant dated September the 16th, informing him that he must withdraw from the case, and one dated September the 11th, informing Mr. Radke of the receivership division of the Department of Trade and Commerce, and Mr. Nye of Kearney, one of counsel for appellee, that he would be unable to try the case on the 22nd (Trans. pp. 8-10). The court received the motion for a continuance, heard a counter-showing by the appellee in the form of an affidavit by Barlow Nye, one of counsel for appellee, and then decreed that the application for

a continuance should not be allowed as *made merely for dilatory purposes and not in good faith.* The court then called the case for trial. Counsel for appellant, who presented the application for a continuance, was retained solely for this purpose and was unable to try the case. Accordingly, the appellant was unable to appear and prosecute his claim. *The court then decreed that the petition of intervention of appellant be dismissed at his costs* (Trans. p. 16 [misplaced between 10 and 11]). At a later date in the same term of court, the appellant moved the court to set aside the decree of dismissal, giving reasons, and supported by affidavits by Mr. Hannon, by Mr. Cunningham, attorney, of Grand Island, by Mr. Jungles, the appellant in this cause, and by numerous pieces of correspondence which passed between Mr. Hannon and counsel for appellee (Trans. pp. 17-32).

It is apparent from the above statements that the *questions* involved in this appeal will be *few and well-defined.* A lengthy argument would be as useless as it would be ill-advised. Having only the transcript of the case as the record, which includes pleadings, motions, stipulations, affidavits and correspondence of the parties and counsel, and the court's decree, *this court could get as clear an understanding of the case as would be necessary by reading little other than this record itself. The few points of conflict are thrown into relief by affidavits of parties.*

Section 20-1148 of the Compiled Statutes of Nebraska for 1929, governs the granting or refusal of continuances. The appellant complied with the requirements of that section in making a written motion for the

continuance, by setting forth the grounds on which the motion was based, which in this case was the forced withdrawal of his counsel with insufficient time for preparation of new counsel before time set for trial, by offering affidavits in support of the motion made by persons competent to testify as witnesses and by persons acquainted with the facts upon which the motion was based. After stating these requirements, which were complied with, the statute reads:

> "* * * The court may, upon the hearing, *in its discretion,* grant or refuse such application; *and no reversal* of such cause or proceeding by the supreme court *shall be had* on account of the action of the court in granting or refusing such application, *except when there has been an abuse of a sound legal discretion therein by the court.*"

The part of the statute quoted is in accord with the overwhelming weight of authority, and support for it could be found in every jurisdiction. It leaves no doubt on the question that in Nebraska "an abuse of a sound legal discretion" must be shown to warrant the reversal of a case.

In the Nebraska case of *Richelieu* v. *Union Pac. R. Co.*, 97 Neb. 360, 149 N. W. 772, the district court refused to allow the defendant a continuance, which prevented the presentation of a defense. The grounds for the continuance differ between the cited case and the instant case, but we find the following language used by this court in reversing the case on grounds of an abuse of discretion by the district court, the quotation itself being taken from the case of *Johnson* v. *Dinsmore*, 11 Neb. 391, 9 N. W. 558:

> "It is said that an application for a continuance is addressed to the sound discretion of the court, and that its action thereon *cannot be reviewed*. But this is stating the rule too broadly. The object of the law is to administer justice, and where it clearly appears from all the facts and circumstances in the case that there has been an abuse of discretion, operating to the prejudice of the party in the final determination of the case, the court, in a proper case, will grant a new trial. If it were not so, a party might be entirely defeated in this cause of action or defense for the lack of material testimony, which a continuance would enable him to procure."

It is the contention of the appellant that the district court in the instant case did not exercise a sound discretion in its consideration of appellant's motion for a continuance, and that the denial of the same constituted an abuse of discretion sufficient to warrant the reversal of the case. There is no question but that the seriousness of Mr. Hannon's illness justified the course of action which he took. Mr. Hannon was in such a critical stage of tuberculosis that a failure to remove to a higher and dryer climate would endanger his life. Here, then, we have notice being given to the appellant on the 16th day of September, six days prior to the time the case was supposed to be called, of two factors—illness of counsel and withdrawal from the case of counsel. Either or both have been considered as sufficiently good cause for granting a continuance (13 Corpus Juris, 133-4, 145, with numerous citations). That counsel employed is too ill to try the case is almost always considered good grounds for a continuance (*Rhode Island* v. *Massachusetts*, 9 L. Ed. 697; *Turner* v. *Loomis*, 146 Ia. 655, 155

N. W. 662). The condition is added sometimes, though infrequently, that the applicant for a continuance must show that he has a meritorious action. The holding of *Cornell* v. *Tuck*, 104 Neb. 759, 178 N. W. 612, is along that line. That the appellant did have a meritorious action would appear to be true from the mere fact that the correspondence between counsel discloses that at one time appellant offered to compromise for $30,000.00 (Trans. p. 29); that Mr. Radke, general counsel for the receivership division of the Department of Trade and Commerce, offered to settle by allowing the appellant a general claim for $10,000.00 (Trans. p. 31); and that this offer was rejected by appellant (Trans. p. 32).

That this particular counsel (Mr. Hannon) was necessary to the proper presentation of the case is shown by his own affidavit that from December, 1931, until the 16th day of September, 1933, he was counsel for appellant, and handled all negotions and acts in connection with the case (Trans. p. 18). On this score, counsel for appellee attempted in their counter-showing on the motion for a continuance to becloud the issue and give the impression that a host of attorneys had successively taken and dropped the case, or refused to consider taking it. This is obviously unfair, and even if it had been true, should not have been allowed to prejudice the rights of the appellant in his attempt to seek justice. An example of the fallaciousness of this argument is shown by the fact that Barlow Nye, in his affidavit, states that Butler & James of Cambridge, Nebraska, were among the "many counsel" employed by appellant (Trans. p. 11). Mr. James, of that firm, in a letter to Nye and Nye, both among counsel for appellee, states that they were re-

tained "to make an examination of the books of the State Bank of Ravenna, and this was as far as our participation in the case was arranged for." Why counsel for appellee saw fit to make those statements, with their necessary inference, we do not see. Further, Mr. Jungles, intervenor and appellant, by affidavit states that "he did not employ Robert P. Starr as attorney in the above case, nor W. L. Minor in this case" (Trans. p. 26).

That there was not sufficient time or opportunity to employ other counsel to conduct the case by the 22nd day of September, and to allow such counsel time to prepare for trial, should be a matter of common knowledge to the judiciary and to the profession, when one considers that this case involved an investigation and an audit of a defunct bank whose records were in notoriously bad shape. Mr. Hannon withdrew on Saturday, September the 16th. At best, if appellant could have obtained counsel instantly upon receiving that letter, but four days would have remained. Mr. Hannon, by sworn affidavit, stated on this matter:

> "* * *; that in order to prepare for the trial of said case it was necessary to go over the records in said bank and that it would require several weeks time to do so and that the said David F. Jungles could not possibly prepare his evidence and make the examinations necessary for the trial of said case by the 22nd day of September; * * * that by using due diligence the said David F. Jungles could not obtain the evidence which would be necessary to present in support of his claim by the 22nd of September, that affiant believes that a continuance should have been granted; that said

> continuance was not requested for the purpose of delay but that the same was caused by affiant's physical condition which necessitated his withdrawing from said case and giving up his law practice in Grand Island; * * *."

It would not be error to deny a motion for a continuance because of the absence or illness of an attorney, if the party making the motion is represented at the trial by other competent counsel *familiar with his case.* So holds *First National Bank of Omaha* v. *Dye,* 73 Neb. 300, 102 N. W. 614. In the instant case, appellant did *not* have other counsel *familiar with the case.* Error was committed by the trial court in refusing the continuance. The prejudice resulting to appellant is obvious.

Mr. Barlow Nye, in his affidavit presented against the motion for a continuance further stated that the appellant had had Walker and Faulk, accountants, prepare a complete audit of the books, and that such audit showed that appellant had no cause of action, and that hence, appellant's attorneys had stated that they did not expect to use this audit (Trans. p. 13). This is true, but as given by Mr. Nye it is an unwarranted statement as being only a partial disclosure of fact. Mr. Cunningham, by affidavit, states that "at one time an audit was made by Walker and Faulk, but that said audit was not a complete audit and said audit covered the items listed in case number 11609 in the District Court of Buffalo County, Nebraska; that at the time of the dismissal of said case, the auditors informed the affiant and David F. Jungles that a shortage had been discovered in the funds of the said David F. Jungles to the extent of two $5000.00 notes and between $3500.00 and $5000.00 shortage

could be shown by further investigation, constituting a total shortage of from $13,500.00 to $15,000.00." With an audit failing to show this much, it is understandable that it would not be used without additional work being done; and with no time in which to do it, a continuance was but the more imperative (Trans. p. 23). By affidavit, Mr. Drake, employed by appellant to examine the books of the bank, states that the audit made formerly by Walker & Faulk "contained matters and records which in many respects were not contained upon the records of the bank, and affiant found that many notes were traced upon the records of the bank in a far different manner than shown upon that audit, and affiant believes that the audit mentioned was made from records of personal records in the possession of the said David F. Jungles, from oral representations and statements of other persons and from other sources than the actual bank records in many respects, and *affiant came to the conclusion and informed David F. Jungles that if proof were made from the records of the bank only that his claim would be supported upon his petition of intervention more substantially in many respects than by any sort of attempt to follow the use of that audit made by Walker and Faulk*" (Trans. p. 42). From this, one can understand why appellant and his attorney were not going to use this audit. The truth of the matter places Nye's statement in a much different light than it stood while offered against the motion for a continuance. Furthermore, Emma M. Bengtson made a partial examination of the bank's records, and according to her affidavit found irregularities in the transactions of David F. Jungles which would require a complete audit to clear up (Trans. p. 43).

The court stated in the journal entry on September 22nd that the application for a continuance was made merely for dilatory purposes and not in good faith, and accordingly called the case for trial. This was the first time that this case had been set for trial, and accordingly the court necessarily must have been (1) prejudiced against the case, the appellant or his attorney, or (2) have been influenced by some of the statements in Mr. Nye's affidavit against the motion for a continuance, many of the statements in which have been shown to be either erroneous or misleading. We have no reason to believe that the court was prejudiced in any manner. We rather wish to believe that the court was led into an erroneous ruling by the second method above set out. The continuance was made for *"dilatory purposes and not in good faith."* What can the court mean by this statement? Would it deny that Mr. Hannon was seriously and dangerously ill, and that he could not continue with the case or try the cause? Surely, there is no bad faith involved by the forced withdrawal of one dangerously diseased with tuberculosis. In the same way, Mr. Hannon did not arrange this physical disability in order to delay the cause. There can only be one possible reason for the court thinking that the grounds given were substantiated, and that would be that it thought there was sufficient time during the six days between the time Mr. Hannon wrote his withdrawal and the time when the cause was to be tried. The unsatisfactory audits which had been had, the fact that Mr. Hannon alone had handled the material transactions of the case for over a year and a half, should suffice to show this contention invalid. Further discussion on this point has been given ante.

On the question of the continuance being desired for dilatory purposes, see a letter written by Mr. Hannon to Mr. Radke on September 11th. Mr. Hannon stated in part: "If it cannot be settled, *the Jungles are anxious that it be tried at an early date* for there is no object in delaying it further, however, they would probably want more time than the 22nd of this month to get a new attorney" (Trans. p. 21). There is no indication here of an attempted or desired delay.

Nor can the appellee claim that they were surprised by the motion for a continuance. Parts of Mr. Hannon's affidavits and correspondence have already been quoted. On this same matter, let us examine a portion of Mr. Cunningham's affidavit in support of the application to set aside the dismissal:

> "Affiant further states that he informed the said Barlow Nye and F. C. Radke that the said David F. Jungles would not be ready for trial on the 22nd and informed them that they should notify witnesses so as to avoid the expense, and requested that a continuance of two weeks be granted in order that the said David F. Jungles might be prepared for trial;"

and further that

> "that the said F. C. Radke instructed the said David F. Jungles to make an application for continuance and make a showing that Edward F. Hannon was ill and could not try said case and that he, F. C. Radke felt sure that the District Judge at Kearney would be fair in deciding the matter of a continuance under said circumstances, and the said David F. Jungles was directed at said time by F. C. Radke to go to Kearney and make application for continuance" (Trans. pp. 24-5).

According to the same affidavit, Mr. Radke communicated with Barlow Nye, but that Mr. Nye refused to agree to a continuance *because his father, who was handling the case at Kearney would withdraw from the case if a continuance was granted* (Trans. p. 24). This shows that conditions, as they stood with appellant and his attorney-to-be were known to counsel for appellee.

Nor can any lack of diligence be claimed. Mr. Jungles could not have anticipated Mr. Hannon's forced withdrawal from the cause. Indeed, he could not even have learned of it until the 18th, which would leave him only four days in which to retain new counsel, and for them to acquaint themselves with the case.

And the fact that the case has been pending for several terms is of itself no ground for refusing to grant a continuance.

6 R. C. L. 548.
74 Am. Dec. 142.
Hooper v. *Memphis, etc. Steamboat Co.*, 19 Ga. 85.
Marrero v. *Nunez*, 3 La. Ann. 54.

The general rule on the whole question of continuances is generally stated to be that the grant or refusal of a continuance is a discretionary power. However, it is equally true, that this discretion is to be exercised in a sound and legal manner, and not arbitrarily or capriciously (6 R. C. L. 546; 4 C. J. 809; 74 Am. Dec. 141-2). It is submitted that the action of the court in refusing the continuance and in dismissing the cause was based upon insufficient knowledge of the facts, or upon prejudice which would show his decree at least to be arbitrary and without just cause.

Counsel for appellee stated in affidavit that appellant had made an effort to settle the litigation "for a comparatively small sum of money" (Trans. p. 13). This is, again, obviously an attempt to convey the impression that the appellant's cause was without merit. As a counter-offer, counsel for appellee wanted to settle the case by allowing appellant a general claim of $10,000.00. Counsel for appellee may regard this a "small sum" of money. The lowest that appellant offered to settle for was $30,000.00. This would appear to be but another example of the way in which the court was misled by the counter-showing against the motion for a continuance made by appellee.

It is submitted that the appellant, without fault, without a lack of due diligence, in good faith, without attempting or desiring a delay, has been deprived of a right to establish his claim and to obtain justice. His motion for a continuance was presented in proper form, supported by sworn affidavits of Mr. Hannon's physician and others. Mr. Hannon's condition as stated in the motion and the affidavits was pitifully bona fide. At no point in the case do we see either a "dilatory purpose" or a lack of "good faith," either on the part of Mr. Jungles, the appellant, or on the part of his attorney. It is sincerely maintained that this case presents a situation which demands a reversal because of the court's abuse of a sound legal discretion.

In accordance with above views, we pray that this court cause the case to be reversed and remanded to stand trial at the next term of court in Buffalo County.

Respectfully submitted,

LLOYD KELLY,
Attorney for Appellant.

29083

In The
Supreme Court of Nebraska

STATE OF NEBRASKA, EX REL. C. A. SORENSEN, ATTORNEY GENERAL,

Plaintiff,

VS.

THE STATE BANK OF RAVENNA,

Defendant;

DAVID F. JUNGLES,

Intervener and Appellant;

E. H. LUIKART, RECEIVER OF THE STATE BANK OF RAVENNA, RAVENNA, NEBRASKA,

Defendant and Appellee.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY
HON. BRUNO O. HOSTETLER, *Judge*

BRIEF OF APPELLEE

JAMES L. BROWN,
FRED A. NYE,
FRANZ C. RADKE,
BARLOW NYE,
Attorneys for Appellee.

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General Number 29083

In The
Supreme Court of Nebraska

STATE OF NEBRASKA, EX REL. C. A. SORENSEN,
ATTORNEY GENERAL,
Plaintiff,

VS.

THE STATE BANK OF RAVENNA,
Defendant;

DAVID F. JUNGLES,
Intervener and Appellant;

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OF RAVENNA, RAVENNA, NEBRASKA,
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STATEMENT OF THE CASE

1. NATURE

Twelve years ago intervener and the bank had business transactions. Out of them grew the Jungles litigation. In the litigation there have been four lawsuits in the Buffalo County District Court in which a total of seven petitions have been filed by Mr. Jungles. He is the intervener herein. The present intervention is the second of the lawsuits to reach this court.

This appeal does not relate primarily to the subject matter of the litigation. It is an appeal by intervener from a decree dismissing his petition in intervention. Judge Hostetler dismissed the case when intervener refused to prosecute his claim. Intervener refused to prosecute when his motion to postpone the trial was overruled.

His stated ground for a continuance was that his attorney had withdrawn from the case and he had not had sufficient time to obtain another to present the evidence and interview the witnesses.

When the three earlier cases were filed the bank was a going concern. After it failed in 1931 the subject matter of the old litigation was filed as a claim as for a trust fund which the receiver rejected; this intervention followed to establish a preferred claim for $65,500.92 which was resisted by the receiver, who is the appellee herein.

The issues in the intervention were made up early in 1932 and on September 2, 1933, the case was specially

set for trial on September 22. Intervener claims his attorney withdrew four days before trial. The trial court found intervener had had adequate notice and that the motion to postpone "was for dilatory purposes and not in good faith."

Intervener now appeals from the judgment entered when he refused to prosecute his claim. Intervener appeals upon the theory that denial of his motion to continue constituted an abuse of sound legal discretion.

2. THE ISSUES ON THE INTERVENTION

a. The Petition in Intervention

Intervener objected to the classification of his claim as invalid and alleged as follows: That during the years 1919, 20, 21, and 22 he executed certain promissory notes in favor of the bank, described in an attached exhibit; the notes were received by the bank which agreed to give him credit therefor and to deposit the proceeds thereof to his credit. That the bank, its officers and agents, fraudulently accepted same, refused to give credit for the proceeds thereof; fraudulently and without authority appropriated the proceeds for the use of the bank; represented that intervener had been given credit for the notes; wrongfully represented to intervener that three of said notes represented his indebtedness on a garage transfer of May 3, 1920; that the bank obtained above described notes through the garage and other real estate transactions; that two of said notes fraudulently obtained were without consideration and the proceeds thereof were deposited to the credit of officers and customers of the bank which refused to credit any part to intervener; that intervener paid the notes.

That as to three certain notes the bank wrongfully appropriated to its own use the proceeds of two of said notes and refused to credit intervener for said notes and that intervener paid all of said notes; the bank wrongfully deposited the proceeds of two notes to its use and benefit and refused to credit intervener with said notes and that he paid all said notes and by reason of acts of the bank he was defrauded. That all acts of the bank were unlawful; that the bank's fraudulent acts were not discovered by intervener until May, 1931; that he makes claim for said notes and interest paid and interest; intervener prayed that he be decreed to have a preferred claim in the sum of $65,500.92 and equitable relief.

b. Answer to Petition in Intervention

The receiver denied generally the petition.

3. THE ISSUES ON THIS APPEAL

At the call of the docket of the District Court of Buffalo County held at the commencement of the September, 1933, term on September 2, 1933, the case was specially set for trial for September 22, at 9 A. M. (14). On the 22nd the cause came on for trial at 9:40 A. M. upon the petition of intervention and the answer; intervener, through his attorney, Mr. Oscar A. Drake, presented an application filed the same day (8) for a 30 day continuance alleging "that counsel retained by the plaintiff has withdrawn from the case and that the plaintiff has not had sufficient time to obtain an attorney to present the evidence and interview the witnesses necessary for the trial." There was a showing supporting the

motion. At 10:20 A. M. the receiver filed a counter-showing against the motion for continuance (11).

At 10:40 A. M. intervener by his attorney, Mr. Herbert E. Hill, presented a motion (7-16) alleging that he had reason to believe that Judge Hostetler was prejudiced "to the rights and interests" of intervener; the motion asked a postponement of the proceedings and appointment of another judge.

HOW THE ISSUES WERE DECIDED

Judge Hostetler overruled both motions. When the intervener failed to appear and prosecute his claim the court dismissed the petition in intervention. The procedure will be made clearer by the court's journal entry which follows:

The Findings and Judgment

"Be it remembered that on the 22nd day of September, 1933, this matter came on for trial before the court at 9:40 a. m., upon the petition of intervention of David F. Jungles, and the answer thereto of the receiver of said bank; the intervener being represented by Oscar Drake, his attorney, and the receiver of the State Bank of Ravenna, being represented by Barlow Nye and Fred A. Nye, his attorneys. The intervener presented an application for a continuance. The receiver presented a counter showing. Upon due consideration of the application for continuance and the counter showing, the court finds: That notice of the time of trial of this action was given in writing to the intervener and his attorneys more than one week prior to this date, so that the intervener and his attorneys were fully informed of the time of trial at this time. Accord-

ingly, the court finds that the application for a continuance is made merely for dilatory purposes and not in good faith. The court called the case for trial. The intervener fails to appear and prosecute his claim, which is the basis of this petition of intervention.

"IT IS THEREFORE CONSIDERED, ADJUDGED AND DECREED BY THE COURT that the petition of intervention of said David F. Jungles be and the same is hereby dismissed at his costs. At 10:40 a. m., the intervener presents a motion for a change of venue, by his attorney, Herbert E. Hill. Upon due consideration of the same, the court finds that it has been filed out of time and after the case had already been finally disposed of by the court. Accordingly the same is overruled, to which ruling of the court the intervener excepts. His supersedeas bond is fixed at $1,000.00."

Application to Set Aside Dismissal

Later, on October 10, 1933, intervener, through his attorney, Mr. Lloyd W. Kelly, filed an application to set aside the dismissal for the following reasons (17):

"1. That the said David F. Jungles did not have an opportunity to present affidavits on his behalf upon the facts set forth in the counter-showing filed by the receiver of the State Bank of Ravenna.

"2. That said intervener did not have any attorney to represent intervener or to present evidence in opposition to the affidavit of Barlow Nye, filed herein.

"3. That the court was not fully advised of the facts with relation to said case and that the affi-

divit of Barlow Nye did not set forth the facts with reference to the notice which was given to the said Barlow Nye that a continuance of said case would be requested by the intervener."

The application was supported by a showing.

ASSERTED ASSIGNMENTS OF ERROR

Intervener assigns two alleged errors, namely:

1. The court erred in dismissing appellant's petition of intervention.

2. The court erred in not granting the application of the appellant to set aside the dismissal of the petition of intervention.

It is assumed that intervener does not intend to press alleged error No. 2 inasmuch as the transcript does not disclose that the application to set aside the dismissal of the petition of intervention has been ruled upon.

Further, as to the motion to dismiss, intervener's brief does not assert with particularity that the court denied intervener's attorneys, Mr. Drake and Mr. Hill, an opportunity to present a showing in his behalf in opposition to the receiver's counter-showing to the motion to dismiss.

STATEMENT OF THE EVIDENCE IN THE SHOWINGS

Intervener's brief does not attempt to set out all the important facts and circumstances in the proceedings. Because he has selected isolated quotations from the record and fails to accurately reflect the situation pre-

sented to the trial court, appellee must now detail the evidence in the record.

There was no showing in support of the motion to appoint another judge, but the showings for and against the motion for continuance and to set aside the order of dismissal follow:

As to the Motion to Postpone

Attorney Lloyd W. Kelly deposed (8) that the physical condition of Attorney Hannon required a removal from this climate and a severance of his connection with pending matters. Attached to his affidavit are:

(a) A physician's letter stating that Mr. Hannon's condition requires an abandonment of his professional duties (9).

(b) Letter dated September 16, 1933, written by Mr. Hannon to intervener, advising that the attorney could no longer represent him (9). It also advises intervener that the attorney was discontinuing his practice "this week"; also that Mr. Hannon could have notified intervener earlier of his intention to discontinue his practice but had not done so because he hoped to effect a settlement (9).

(c) Mr. Hannon's letter dated September 11 addressed to an attorney for the Receivership division. In it Mr. Hannon states that he will be unable to try the Jungles case at 9 A. M. September 22; that the Jungles desire an early trial but would want more time than the 22nd to get a new attorney (10).

Counter Showing on Motion to Postpone

Mr. Barlow Nye, one of the attorneys for the receiver, deposed upon knowledge and belief as follows:

That intervener bases his cause of action upon transactions with the bank prior to the year 1923. That all of the causes of action of the intervener as against the bank were fully adjudicated in a foreclosure action commenced by the bank against the intervener in 1927 in the District Court of Buffalo County wherein notes of $31,000.00 were involved; intervener then claimed he was defrauded in a real estate transaction involving $14,000 representing other notes. This case was tried in September, 1927, and subsequently Jungles appealed to the Supreme Court of Nebraska. The Supreme Court confirmed the judgment of the District Court as to the adjudication of Jungles' rights against the bank growing out of the transaction. In that case all of intervener's causes of action against the bank were fully adjudicated.

In 1928, Mr. Jungles commenced a law suit against the bank in the District Court of Buffalo County upon all the causes of action shown in the petition of intervention, together with many others; at least five amended petitions were filed in that suit before Mr. Jungles dismissed it. He was represented by Mr. Cunningham. Subsequently, in March, 1930, he commenced another suit which in June, 1931, was dismissed; that among counsel who have been employed by Mr. Jungles are Butler & James, Cambridge, Nebraska, W. L. Minor, Kearney, Robert P. Starr of Ravenna, Benjamin F. Cunningham of Grand Island.

The bank failed in September, 1931. Mr. Jungles filed a claim as for a trust fund for $99,377.44. The receiver classified the claim as invalid; the District Court of Buffalo County confirmed that classification; later, the petition of intervention was filed, and the case has been at issue since early in 1932.

At none of the three regular terms of court thereafter did intervener, through the attorney who filed the petition nor those subsequently employed, attempt to set the matter for trial; intervener had had a complete audit of the bank books pertaining to the transaction prepared by Walker & Fulk, certified public accountants; which audit showed that Jungles had no cause of action against the bank. Attorneys recently employed by intervener have said they do not expect to use this audit.

Subsequent to the filing of the petition in intervention at the instance of intervener's counsel (Mr. Hannon and Mr. Drake), the receiver gave intervener and an accountant access to the books and records of the bank for the purpose of preparing for trial; intervener's accountant was engaged many days in the examination. This audit intervener does not desire to use.

In May, 1932, Attorney Drake stated he was withdrawing from the case and was so informing intervener, and further that the health of Mr. Hannon would probably not permit him to try the case and that he would

undoubtedly withdraw. Affiant believed these facts were made known to intervener.

After the case was set for trial at the commencement of the September term, local counsel for the receiver notified intervener of the time and place of hearing and also notified Mr. Hannon, Mr. Drake, Butler & James, and all the attorneys who had ever appeared of record in the cause.

On the 20th day of September, 1933, intervener and his attorney, Mr. Cunningham, called at the office in Lincoln, of the receiver. Mr. Cunningham stated that he would never try the case but did try to make some arrangements for a settlement. The affiant says that he believes by reason of conversations with various counsel for intervener that Mr. Cunningham is the real counsel for intervener, is still employed by him and expects compensation in the event of a recovery; that the receiver was ready for trial. He had brought four witnesses from distances to attend. Considerable time had been spent preparing for trial. The receiver had brought to the courtroom all the books and records of the bank, arranged and indexed to facilitate introduction of evidence.

The receiver had in his hands $25,000.00 which he was withholding from the depositors pending adjudication of the rights of intervener. The depositors of the bank desired a distribution of this fund; many of them were in dire need of same.

Affiant also stated that if a continuance is granted it is his belief that no new counsel will be employed; and that the intervener has no desire to litigate the

matters set forth in his petition of intervention. The receiver asked for an order dismissing the intervention for want of prosecution.

Showing In Support of Application to Set Aside Dismissal

The transcript fails to show that the trial court has ruled on the motion to set aside dismissal and it may be assumed that intervener is not appealing from any order with reference to it. However, affidavits filed in support of the application are brought before this court by intervener and the receiver desires that the court have the benefit of any facts therein shown. The showing (18) filed by Mr. Kelly as attorney for intervener includes the affidavits of intervener, Mr. Hannon and Mr. Cunningham.

Affidavit of Attorney Hannon

Mr. Hannon states in his affidavit dated September 20 (18), that he filed suit on the claim for Mr. Jungles (either he or the record errs as the suit on the claim seems to have been filed by Mr. Cunningham, 4); that he acted as intervener's attorney from December, 1931, to September 16, 1933; that he had various conferences attempting to effect a compromise; that he was informed a number of times by Attorney Radke of the Receivership Division that an audit would be made of the bank with reference to the claim; that he and intervener "relied upon said statement of the officers in the banking department and was willing to have an impartial audit made of the claim and account"; he urged several times that a settlement or an audit be had by officers of the

banking department "in accordance with the promises of the officers thereof"; that on September 11, he notified Attorney Radke of the department it would be necessary for him to withdraw, give up his practice on account of his health; that he has been afflicted for five years with tuberculosis; that he is physically unable to prepare for or try a lawsuit and was in that condition when he advised Mr. Radke; immediately thereafter he was advised by local attorneys for the receiver that the case had been set for September 22; that he immediately informed Mr. Radke he was unable to try the case and that more time would be necessary for the preparation for trial, and sent a copy to the local attorney; tha sufficient time was not given to obtain counsel or to prepare for trial; that in order to prepare it was necessary to go over the records in the bank, requiring several weeks time and that intervener could not prepare his evidence and make necessary examinations by September 22; that he advised intervener to arrange for other counsel or to try to arrange for a continuance; that he was absent from Grand Island from September 18 to 23 and unable to confer with intervener regarding the case or counsel to represent him; that the case was set down for hearing without agreement on his part and was set for trial during the term and without notice excepting a letter he received from local counsel; that by due diligence intervener could not obtain the necessary evidence by September 22; that the continuance was not requested for delay but that same was caused by his physical condition which necessitated his withdrawal and giving up his practice; that affiant has planned to leave for another climate but he is delayed by his condition.

Attached to his affidavit are several letters. One is dated September 6, 1933. It is addressed to intervener and informed intervener that Mr. Hannon would quit the law business within 10 days (that is, by September 16) (20).

Another letter written by Mr. Hannon, dated September 11, 1933, to Mr. Radke, advised that the case was set for trial on the 22nd and "it would be impossible for me to try it at that time. As I stated when talking to you last week, if some adjustment could not be made soon, I would withdraw for I will not be able to give it the time that would be required to prepare for trial before leaving. I intend to clean up my business as soon as possible this week and had not intended to do anything afterwards. * * * I shall appreciate hearing from you in ample time that some arrangement can be made before the 22nd" (21).

Another letter dated September 16th, written by Mr. Hannon to intervener (22) was in part as follows: "This is to advise that it will be impossible for me to represent you further in the above styled matter. It has become necessary for me to change climates—I am discontinuing my practice here this week. It has just been the last two or three weeks that I have definitely decided to make the change this fall. However, I could have notified you earlier, but I had hoped that some adjustment could be made the first part of this month."

Affidavit of Mr. Cunningham

Affiant deposed on October 7, 1933 (23), that he assisted in filing the intervener's claim but that Mr.

Hannon was employed by intervener and that affiant had not acted as attorney in the case since early in 1932; that he knew of the negotiations for settlement; that no complete audit was made; that an audit was once made by Walker and Fulk but it was not a complete audit; and covered items listed in case No. 11609; he was informed by the auditors at the time when said case was dismissed that "a shortage had been discovered in the funds of the said David F. Jungles to the extent of two $5,000.00 notes and between $3,500.00 and $5,000.00 shortage could be shown by further investigation, constituting a total shortage of from $13,500.00 to $15,000.00."

Affiant says he had no connection with the case from early 1932 until September 20, 1933; that intervener requested him to go to Lincoln and "make a request of F. C. Radke of the Banking Department for a continuance"; that affiant was unable to communicate with Mr. Hannon who was out of the city and would not return until September 21 or 22; that affiant and intervener went to Lincoln to interview the department's attorneys and told them of Mr. Hannon's physical condition and that he could not try the case and that intervener should have opportunity to obtain further counsel and witnesses and the evidence necessary for trial; that Mr. Radke communicated with Mr. Barlow Nye who refused to agree to a continuance and who said Mr. Fred Nye, the local counsel, would withdraw if one was granted; that affiant was engaged in the trial of a case which was set for September 22 and could not assist intervener nor appear with him at Kearney to seek a continuance; that Mr. Radke informed affiant that he had agreed with

intervener and Mr. Hannon to have an audit made, but that in attempting to do so the examiner found the books in bad shape, some of the records missing, and that he thought it would be impossible to get a complete audit without great expense.

Affiant says that he informed Messrs. Nye and Radke that intervener was not ready for trial and they should notify witnesses and avoid expense and he "requested that a continuance of two weeks be granted in order that David F. Jungles might be prepared for trial"; that Mr. Radke directed Mr. Jungles to make an application for a continuance.

Affiant also states that Mr. Hannon did not return to Grand Island until September 23, and further states that Mr. Hannon's health made it impossible for the latter to try or assist in the trial of the case; that the request for continuance was in good faith.

Explanatory note: The date of the conversation with Mr. Radke referred to in Mr. Cunningham's affidavit does not clearly appear therefrom, but it must have been on September 20. See line 23, p. 28.

Intervener's Affidavit

The intervener deposed on October 7, 1933, "that he was not present in court at the time of the dismissal of said case and had no attorney representing him at that time; that he had engaged Oscar Drake to present a motion for continuance——" (26); that after the case was dismissed he ascertained that a counter-showing had been filed; he says that he never engaged Butler & James

to assist "in the trial of the above case," but at one time employed Mr. James to assist in taking depositions "in a different and separate case"; that he did not employ R. P. Starr as attorney "in the above case" nor W. L. Minor "in said case"; that "subsequent to the filing of the above entitled case" F. C. Radke, attorney for the Banking Department "agreed" to have an audit made which intervener could use upon trial; that he relied upon this and "repeatedly requested" that an audit be made; that he was led to believe it would be made before the case was set; he denied he offered to settle for a small amount, as Mr. Nye deposed, but offered to settle on the basis of *a general claim* of $30,000.00; this was refused; that subsequently, attorney for the receiver said he believed the matter could be settled for a *general claim* of $10,000.00 which intervener rejected (attention is called to the fact that these sums referred to were to be allowed, not as *trust funds*, not as *claims for deposit*, but as *general claims* only; the court will take judicial notice of the fact that a general claim has little, if any, value); that "he intended to proceed to the trial of said case, but was not advised that the banking department would not make an audit of said account in sufficient time to obtain an audit thereof or to obtain investigation of said bank records and the evidence necessary for the trial of said case."

Intervener says that no complete audit was ever made of his account with the bank and that he was informed on September 20th that it was "practically impossible" to make an audit because of the condition of the books; that his case appealed to the Supreme Court of this

state did not involve the questions involved in the instant case.

Affiant says that he did not until September 12, 1933, receive notice that the case would be set for trial; that he "immediately attempted to see Mr. Hannon, his attorney, during the week of September 18, but that he was out of the city"; that he requested Mr. Cunningham to go to Lincoln and ask the banking department to agree to a continuance until "he could obtain his evidence or could employ counsel to represent him in the case."

He corroborates other statements made by Mr. Cunningham and further says that a member of the depositors' committee of the bank informed him that the committee would recommend the payment to him of $1,000.00 in settlement of his claim.

Attached to intervener's affidavit is a letter written by Mr. Hannon in April, 1932, making an offer to compromise (29); and the reply thereto (30); and a letter written in July, 1932, by Mr. Radke, suggesting that a compromise might be made on the basis of a general claim for $10,000.00 (31); and a letter (32) in which Mr. Hannon said that Mr. and Mrs. Jungles refused to settle and suggesting that a joint audit be made to lessen the expense.

COUNTER-SHOWING AGAINST APPLICATION TO SET ASIDE DISMISSAL

The showing consists of the affidavit of Mr. Fred A. Nye, local attorney for the receiver, with copies of let-

ters attached (33-38) and the affidavit of F. M. McGrew, assistant receiver of the bank (39).

Affidavit of Mr. Fred A. Nye

On September 9, 1933, Mr. Nye, local attorney for the receiver, mailed letters to Mr. Cunningham, Mr. Hannon, to Butler & James, advising them that the case was set for September 22 at 9 A. M. On September 11th he wrote the same information to Mr. and Mrs. Jungles.

He received a reply from Butler & James, dated September 11, 1933, in which was said that that firm was not then representing Mrs. Jungles; that the firm had been retained by Mr. Cunningham to make an examination of the books of the bank, but further participation by them in the case was not arranged for. That firm suggested that the receiver's attorney communicate with Mr. Cunningham.

Mr. Hannon replied to Mr. Nye under date of September 18, 1933, saying that inasmuch as no adjustment could be made it was necessary for him to withdraw by reason of discontinuing his practice for the present. He also wrote that he was "no longer interested in the litigation."

Affidavit of Assistant Receiver, McGrew

Later Mr. McGrew's affidavit was filed, in which he deposes (39) that in the summer of 1933 Mr. Drake spent a part of two days examining the records of the bank. He further says that in 1932 Mrs. Jungles and Edw. Spevacek, a former bookkeeper of the Citizens

State Bank of Ravenna, spent four or five days in The State Bank of Ravenna examining the books with reference to the David Jungles account in that bank.

Affiant further says that Mrs. Ella M. Bengtsor (Emma M. Bengtson?), a certified accountant of Hastings and Harvard, and Mrs. Jungles were in The State Bank of Ravenna three or four days in the late part of the summer of 1932 examining its books with reference to the David Jungles account. This accountant was sent to the bank by Attorney Wellensiek of Grand Island.

Additional Affidavits for Intervener

Still later, were filed affidavits of Mr. Drake, Mrs. Bengtson and intervener in substance as follows:

Affidavit of Mr. Drake

On December 20, 1933, was filed the affidavit (42) of Mr. Oscar A. Drake who deposed that during his employment as attorney for intervener he examined on several occasions the records of the bank for the purpose of checking the records with an audit formerly made; that he found the audit contained "matters and records which in many respects were not contained upon the records of the bank, and affiant found that many notes are traced upon the records of the bank in a far different manner than shown upon that audit, and affiant believes that the audit mentioned was made from records of personal records in the possession of the said David F. Jungles, from oral representations and statements of other persons and from other sources than the actual

bank records in many respects, and affiant came to the conclusion and informed David F. Jungles that if proof were made from the records of the bank only that his claim would be supported upon his petition of intervention more substantially in many respects than by any sort of attempt to follow the use of that audit made by Walker and Fulk."

Explanatory note: Mr. Drake's examinations were made in the summer of 1933 (39).

Affidavit of Emma M. Bengtson

Emma M. Bengtson deposed (43) that she had made a "partial examination" of the bank records "as to note, and deposit, and check transactions of David F. Jungles"; and that the examination revealed "irregularities which would require a complete audit to clear up."

Explanatory note: The affidavit is silent as to the date of her examination, but it was in the summer of 1932 (39).

Affidavit of Intervener

Mr. Jungles deposed (44) that the Edwin Spevacek described in the McGrew affidavit had examined the records of the bank at intervener's request; that Spevacek made a partial examination and that same was never completed; that Spevacek informed affiant he found irregularities and discrepancies and that it would be necessary to make a complete audit to determine the actual condition of his account; that the examiner had been a bank clerk for six or seven years; that after

filing of the petition he made no further examination; that the irregularities and discrepancies were found by partial examination made previous to the filing of the petition of intervention.

Explanatory note: Mr. Jungles' affidavit is not specific as to the date of this examination, but it was made in 1932 (39).

NARRATIVE OF EVIDENCE IN THE SHOWINGS

For greater clarity related facts and inferences presented by the record are now brought together under headings suggested by the context. Necessity for this treatment arises because there was no cross-examination to clarify, particularize, and contrast general statements of fact in affidavits.

DID INTERVENER HAVE SUFFICIENT TIME TO PROCURE COUNSEL AND PREPARE?

Intervener's showing for postponement exhibits Mr. Hannon's letter (9) to him dated September 16 and formally advising of withdrawal from the case set for trial September 22, in which letter the attorney observed he could have notified intervener sooner. This letter is the basis of intervener's hypothesis that after Mr. Hannon withdrew he had but four days in which to obtain new counsel (intervener's brief, p. 13, line 20), and which was insufficient time for a new attorney to prepare for trial and that therefore refusal of a continuance would "work a real injustice and constitute an abuse of discretion" (see 1st par. argument, intervener's brief, p. 7).

On page 13, the brief says: "Mr. Hannon withdrew on Saturday, September the 16th."

However, Mr. Hannon wrote a letter to intervener on September 6th which informed intervener he would quit practice not later than September 16 (20). Intervener must have had actual knowledge on September 12 by reason of Mr. Fred Nye's letter (36) that the case would be tried on the 22nd, and he himself admits knowledge when he says (28) "that he did not receive any notice that said case would be set for trial until the 12th." Therefore on the 12th intervener knew that his case would be tried on the 22nd and that Mr. Hannon could not try it. So intervener had ten days' actual notice of Mr. Hannon's withdrawal—not four days' notice.

Though ten days intervened before trial, intervener admits in the showing to set aside dismissal that he attempted to consult no attorney until the week of Monday, September 18th, when he tried to consult Mr. Hannon, but failed because, intervener says (28), Mr. Hannon was out of town. However, Mr. Hannon was in his office a part of September 18th writing a letter (38) advising the receiver's attorney that he was no longer interested in the case.

Finally, on the 20th day of September, intervener consulted Mr. Cunningham (23-24), but only to help him obtain a continuance. This consultation on the 20th was the first he had with any lawyer after acquiring actual knowledge on the 12th that the case was set for trial and he needed an attorney.

AS TO THE TIME NECESSARY FOR PREPARATION

The trial court found (16) that intervener and his attorneys had written notice of more than one week of the date of trial, which to the court seemed sufficient; the intervener asked (8) for 30 days' time; intervener had 10 days' time after actual notice of trial and after notice of Mr. Hannon's withdrawal. Mr. Cunningham himself indicated two weeks as sufficient time to prepare for the trial for he requested department attorneys "that a continuance of two weeks be granted in order that the said David F. Jungles might be prepared for trial" (24).

Hence the dispute narrows to this: Was ten days sufficient time?

WAS INTERVENER DILIGENT IN OBTAINING EVIDENCE?

Although the motion for continuance does not specify what witnesses it was necessary for an attorney to interview or what evidence was to be presented, the brief makes it clear that an audit of the bank books was the only evidence which the court could have denied intervener an opportunity to obtain. Mr. Hannon describes the necessary preparation for trial in these words: "* * * in order to prepare for the trial of said case, it was necessary to go over the records in said bank * * *" (19)

There is no express mention of an audit or an examination in intervener's motion for a continuance or the showing in its support. In the showing supporting the

motion to set aside the dismissal, intervener first mentions audit.

Mr. Hannon says he was informed a number of times (when, not set out) by an attorney for the department that it would make an impartial audit, on which he relied (18). Mr. Cunningham says (24) that the department attorney informed him the bank books were in bad shape, some missing. Intervener's brief speaks of the records as "in notoriously bad shape."

However, intervener knew this from the following examinations he and Mrs. Jungles had previously caused to be made of the bank's books. These examinations were:

1. The law firm of Butler & James was retained to make an examination in one case (37).

2. Walker and Fulk, certified public accountants, made an audit for intervener. Mr. Cunningham, however, deemed it to be incomplete (13-23).

3. Another certified public accountant, Mrs. Emma M. Bengtson, made an examination in 1932 by direction of Attorney Wellensiek. After three or four days (39) she decided that there were "irregularities" requiring a complete audit "to clear up" (43).

4. Attorney Oscar A. Drake examined the books for part of two days in 1933 (39), after which he told intervener "if proof were made from the records of the bank only that his claim would be supported—more substantially in many respects than by any sort of attempt

to follow the use of that audit made by Walker and Fulk" (42).

5. Edwin Spevacek, who had been for six years a bookkeeper in a competitor bank, made a four-day examination of the books in 1932 (39). Intervener says this examiner did not complete his "partial examination" (44).

It seems that these five audits or examinations were made prior to the fall of 1933 at the direction of Mr. Jungles, Mrs. Jungles, or their attorneys.

DID RECEIVER PROMISE TO FURNISH INTERVENER AN AUDIT?

In his affidavit Mr. Hannon says intervener "relied upon said statement of the officers in the banking department" * * * "that an audit would be made" (18), but omits to say exactly when the statement was made. And Mr. Cunningham says counsel for the department informed him of an agreement with Mr. Jungles and Mr. Hannon to have an audit made (24). He does not state if counsel also informed him of the date of the agreement. Intervener deposes (26) that Mr. Radke "agreed that he would have an audit made by representatives of the banking department of affiant's account with said state bank * * * available * * * for the intervener upon trial of said case." Likewise, intervener omits to mention the date of the agreement.

Prior to July 26, 1932, no such agreement had been made according to Mr. Hannon's letter (32) of that date to Mr. Radke in which he suggested a joint audit

to save expense and invited an answer to his letter. Intervener fails to produce an answer in the record.

Soon after Mr. Hannon's letter of July, 1932, suggesting a joint audit, Mrs. Jungles proceeded "in the late part of the summer of 1932" to obtain an audit and Mrs. Bengtson made her audit (39). During the year following Mr. Hannon's letter of July, 1932, suggesting a joint audit, intervener did not rely on any such agreement for in the summer of 1933, Attorney Drake made his examination (39). Then, intervener did not rely on any agreement made before the Drake examination in the summer of 1933. If there was such an agreement it was made after Mr. Drake's examination in the summer of 1933 and before the trial in September. None of Mr. Hannon's many letters during that period mention such an agreement.

But Mr. Hannon deposes that he was informed an audit would be made "a number of times" (18). Intervener says that he and his attorney "repeatedly" requested the audit be made (26).

DID THE WITHDRAWAL LEAVE INTERVENER WITHOUT AN ATTORNEY FAMILIAR WITH THE CASE?

A number of attorneys have touched the Jungles litigation over the years. Among these attorneys are Messrs.:

Edward F. Hannon (8)	Herbert E. Hill (16)
B. J. Cunningham (4)	W. L. Minor (11)
Lloyd W. Kelly (17)	Robert P. Starr (11)
Oscar A. Drake (16)	H. G. Wellensiek (39)

Butler & James (37)

It is fair to mention that intervener deposes (26) that he "at one time employed Attorney James to assist in taking depositions in a different and separate case from the above; that he did not employ Robert P. Starr as attorney in the above case. Nor W. L. Minor in said case." However, Mr. James wrote (37) in September, 1933: "*In re Jungles* v. *State Bank of Ravenna* * * * we were retained by Mr. Cunningham to make an examination of the books of the State Bank of Ravenna * * *."

The only evidence which intervener apparently needed or could obtain was in the bank records. There is a record in the transcript that several of the above named lawyers were familiar with these records and the case. Mr. Drake, in court at the trial representing intervener (16), himself had inspected the records and knew of evidence available therein (42).

Mr. Cunningham had filed the petition in intervention (4), and 5 or 6 petitions in earlier litigation involving the subject matter (11). He retained Butler & James to make an examination of the books in one case.

Attorney Wellensiek had sent Mrs. Bengtson, the certified public accountant, to the bank when she made her four-day examination (39).

The record therefore shows several attorneys "familiar with the case" as to the only needed evidence specifically mentioned in intervener's showings or brief. This record does not disclose the exact extent of familiarity with the litigation of other lawyers who appear to have been

connected with it. But is it reasonable to infer that each of the attorneys mentioned would have a comprehensive knowledge of any litigation with which he was or had been connected.

INTERVENER WAS WELL REPRESENTED AT TRIAL

Intervener deposes "he * * * had no attorney representing him * * * at the time of the dismissal of said case" (26). In his application (17) he says he had no attorney to represent him in opposition to the affidavit in receiver's counter-showing against the motion to postpone trial. Still, the record discloses intervener had four attorneys working on his case during the trial and the day before.

On September 21st, the day before trial, the motion to postpone was prepared, Attorney Kelly making a supporting affidavit before Attorney Cunningham as notary (8). The next morning at trial Attorney Drake was in court representing intervener and presenting the motion to postpone (16). Within that hour Attorney Herbert E. Hill was also in court presenting the motion to oust Judge Hostetler.

DELAYING DISTRIBUTION TO BANK DEPOSITORS

The depositors of the bank needed their distributive share of the bank's assets. The need was said to be great. The receiver had $25,000.00 to distribute. Until the adjudication of this claim for more than the amount in his hands, the receiver is withholding distribution of the $25,000.00 (15).

One of the members of the depositors' committee attempted apparently to assist the courts in removing the cause of delay. This depositor went to Mr. Jungles, the latter says, and said the committee would recommend a payment of $1,000.00 to settle his $65,000.00 claim (28).

OUTLINE OF THE JUNGLES-BANK LITIGATION

Intervener seems to dispute the fact that the instant case arises out of the subject matter of the old litigation. Whether it does or does not bears importantly upon many questions herein—such questions as whether intervener was left without an attorney "familiar with the case"; as to the probability of existence of evidence which intervener still seeks; as to whether intervener really needed an opportunity to prepare his case; as to his motives and the bona fides of his request for postponement of which the trial judge spoke. To present this point clearly, we must draw together disassociated statements in the record in the following form:

The affidavit of Barlow Nye, attorney for receiver, discloses briefly a history of the Jungles litigation. This affidavit indicates that: all the transactions upon which intervener's cause of action is based arose out of transactions with the bank during the years 1920, 1921, and 1922 (11—line 22). In 1927, the bank sought to foreclose a mortgage securing notes of $31,000.00 (12—line 5). Defending, Mr. Jungles alleged he was defrauded in a real estate deal involving $14,000.00 in other notes (14—line 8). The district court's judgment was appealed by Mr. Jungles to the Supreme Court of Nebraska, which confirmed all matters pertaining to the

adjudication of his rights as against the bank on account of said transaction (12—line 14). That each and all of the causes of action of said intervener as against the bank were therein adjudicated (12—line 17). All the causes of action set up in the petition of intervention were set up in a case (No. 11195) commenced in July, 1928, by Mr. Jungles against the bank (11—line 5). Mr. Cunningham, in an effort to get the cause at issue, filed five petitions and in March, 1930, dismissed said cause of action (11—line 9). On the same day intervener attempted to refile a new petition in a new cause of action (Case No. 11609) (11—line 11). In June, 1931, said cause of action was again dismissed.

Intervener in the application to set aside dismissal (17) says he had no attorney to present evidence in opposition to Mr. Nye's affidavit which contained the above historical data. In his affidavit (27) supporting his application to set aside, he says of Mr. Nye's affidavit this: "* * * the case referred to in the affidavit of Barlow Nye, which was appealed to the Supreme Court, did not involve the questions involved in the above entitled case, and that said case was an entirely separate one and did not in any manner affect the issues involved in the above entitled case" (27).

With Mr. Jungles' last mentioned affidavit in support of his motion to set aside are the affidavits of Mr. Cunningham (23) and Mr. Hannon (18). Mr. Hannon's affidavit is silent as to the above historical data in Mr. Nye's affidavit. Mr. Cunningham's is likewise silent except a reference to an audit which he said covered items listed in case 11609 and what auditors informed

him and intervener at the time of dismissal of said case (23). Mr. Nye's affidavit was part of the showing against postponement.

PROPOSITIONS OF LAW

I.

Unless it clearly appears that there has been an abuse of sound discretion, the trial court's ruling upon a motion for a continuance will not be disturbed.

Billings v. *McCoy Brothers,* 5 Neb. 187.

Mahaffy v. *Hansen Live Stock & Feeding Co.,* 105 Neb. 9, 178 N. W. 829.

Kansas City R. Co. v. *Conlee,* 43 Neb. 121, 61 N. W. 111.

20-1148, Comp. St. 1929.

II.

It is not an abuse of discretion to refuse a postponement to one who has not shown diligence in procuring counsel.

Pool v. *Riegal,* 46 Okl. 5, 147 Pac. 1193.

Van Cott v. *Wall,* 53 Utah 282, 178 Pac. 42.

Maloney v. *Traverse,* 87 Ia. 306, 54 N. W. 155.

Waldron v. *Lapidus,* 121 Neb. 54, 236 N. W. 139.

Miles v. *Ballantine,* 4 Neb. (Unof.) 171, 93 N. W. 708.

2 Bancroft, Pr. 1518.

6 R. C. L. 551.

ARGUMENT

I.

Unless it clearly appears that there has been an abuse of sound discretion, the trial court's ruling upon a motion for a continuance will not be disturbed.

This court has repeatedly announced the foregoing. The rule is stated in the following form in syllabus 3, *Kansas City R. Co.* v. *Conlee, supra:*

> "The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion, and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense."

The Conlee case did not involve absent counsel, but absent evidence. The motion for continuance was overruled because the movent failed to show diligence in obtaining the evidence by not availing itself of ample opportunity to take depositions. If deprived of an opportunity to make its case it was deprived by its own fault. In the opinion, it is said:

> "An application for a continuance of a cause is addressed to the sound legal discretion of the trial court, and its ruling thereon will not be disturbed unless it clearly appears that such discretion has been abused, and that by the refusal of the continuance a party has been without his fault deprived of an opportunity of making his case or defense. *Manufacturing Co.* v. *McAlister,* 22 Neb. 359, 35 N. W. 185."

In the instant case we think the court exercised sound legal discretion. Intervener's conduct clearly discloses an utter lack of ordinary diligence in obtaining his evi-

dence or in procuring counsel to try his case. Just as it is no abuse of discretion to deny a postponement to a litigant who has not been diligent in obtaining evidence, it is no abuse of discretion to deny a continuance to one not diligent in procuring counsel.

II.

It is not an abuse of discretion to refuse a postponement to one who has not shown diligence in procuring counsel.

There is something arresting in a litigant's plea that he has been denied a day in court. So the courts are lenient with one denied the benefit of advocacy by sudden illness and withdrawal of counsel on the eve of trial. The courts are less lenient with him who fails to show diligence in obtaining counsel. Obvious and unexplained failure to obtain counsel when ample opportunity is afforded raises a duty upon the court to scrutinize efforts to postpone. Otherwise, there is "the law's delay." Consequently, the exercise of this duty in a proper case is no abuse of discretion.

The writer in 6 R. C. L. 551 observes that:

> "As respects the withdrawal of counsel from a cause as a ground for continuance, it is generally recognized that such withdrawal, though unexpected, and occurring on the eve of the time set for trial does not necessarily entitle a party to a continuance, since otherwise, if a cause had to be continued every time an attorney withdrew there would be no end to the matter."

Intervener's sole complaint is that he was denied an opportunity to timely replace his counsel who had with-

drawn from the case; that denial of a continuance under the circumstances constitutes abuse of sound legal discretion. Complaint is based upon this premise:

> "Mr. Hannon withdraw on Saturday, September the 16th. At best, if appellant could have obtained counsel instantly upon receiving that letter (the so-called letter of withdrawal dated September 16th), but 4 days would have remained (p. 13, intervener's brief)."

Again, intervener says in his brief at p. 18:

> "Nor can any lack of diligence be claimed. Mr. Jungles could not have anticipated Mr. Hannon's forced withdrawal from the cause. Indeed, he could not even have learned of it until the 18th, which would leave him only 4 days in which to retain new counsel, and for them to acquaint themselves with the case."

These persuasive statements are based upon a demonstrably erroneous assumption that Mr. Hannon withdrew on the 16th and intervener "could not even have learned of it until the 18th."

The demonstration lies in intervener's own record.

Mr. Hannon's letter dated September 6, which intervener does not deny receiving in ordinary course, informed intervener that he would withdraw entirely from the law practice by the 16th (20). Intervener had notice on the 12th that the case would be tried on the 22nd (see p. 23, this brief). Hence on the 12th, intervener knew that Mr. Hannon would not act as his counsel on the 22nd. Therefore, intervener had ten days instead of four days in which to procure new counsel.

In *Pool* v. *Riegal, supra,* it is said in the syllabus:

> "It is not an abuse of discretion to overrule a motion for continuance on account of absence of counsel where the motion is unverified, *does not show that the absent counsel is the sole counsel in the case,* the facts and circumstances with reference to his absence, *or that any effort has been made to procure other counsel.*"

Intervener's showing supporting the motion for continuance does not clearly disclose that Mr. Hannon was his sole counsel, or, that he had made a single effort to procure other counsel to try the case after Mr. Hannon withdrew. The transcript affirmatively shows that Mr. Cunningham's appearance was entered when he filed the petition in intervention. The transcript does not show it was ever formally withdrawn, though he says (23), he had no connection with the case from early 1932 to September 20, 1933. The transcript shows that after the 12th, intervener did not procure substitute counsel. He apparently consulted other attorneys including Mr. Drake and Mr. Hill, but only for the limited purpose of obtaining postponement and for the purpose of ousting Judge Hostetler, not for the purpose of obtaining counsel to try the case.

In *Van Cott* v. *Wall, supra,* the court observed that the continuance therein was not sought on account of the absence of a witness or witnesses, nor because the defendant had evidence which he could not then present, but because he desired to employ other counsel. The opinion says:

> "We remark that the record discloses that the defendant for some time had been fully advised just

> when the case was set for trial, and had ample time to employ other counsel * * *. The record is devoid of any showing of diligence on the part of defendant in that regard."

In the Iowa case of *Maloney* v. *Traverse, supra,* the denial of a postponement was approved because of lack of diligence in putting off employment of counsel until the day of trial. We quote from that opinion:

> "The application to continue or postpone the case is quite extended, and need not be produced here. It is, in effect, a showing by the attorney for Peter Maloney that he was employed only a few minutes before the trial, and could not, with the utmost diligence and tact, prepare for the trial of the case then called. It asked for a postponement to some other day in the term. There seem to have been other counsel for Maloney, who were for some reason no longer appearing. There is no showing whatever of the diligence of Maloney in securing counsel, or why his former counsel did not further appear. The district court said, in ruling upon the motion, that, while the attorney making the application was acting in good faith, the defendants had not evidently 'been diligent, or they could have had counsel, and ought not to put off the employment of counsel until today.' The court specially found that the clients had been negligent, and refused the application. The ruling was right. It was the duty of the client, as well as the attorney, to be diligent."

After Mr. Hannon withdrew, intervener put off any attempt to interview another attorney until the second day before trial. It is inferable that when he saw Mr. Cunningham on the 20th, that the latter either refused to try the case or Mr. Jungles did not desire him to try

it; likewise Mr. Drake on the 22nd. Inferable, because both were acquainted with the search for evidence in the bank records and because in May, 1932, Attorney Drake said that he was withdrawing from the case (13), and, because Mr. Cunningham explains incidentally (24), that he was engaged in the trial of a case set for September 22nd. In the fact that intervener applied for a thirty day continuance lies the inferance that the continuance was not asked for the purpose of enabling Mr. Cunningham to try the case, as it is reasonable to assume that Mr. Cunningham's case set for the 22nd would not last so long.

In the case of *Waldron* v. *Lapidus, supra,* Mr. Justice Good thus succinctly comments upon the conduct of litigants who consult their own convenience and purposes in disregard of the rights of others and the orderly administration of justice:

> "The time of trial of causes in court cannot be made to depend on the whim, caprice, or convenience of litigants. Unless good cause can be shown, litigants should be ready to proceed with the trial of their causes when regularly reached. A motion for continuance is addressed to the sound discretion of the trial court, and, unless an abuse thereof is shown, its ruling will not be disturbed. *Dilley* v. *State,* 97 Neb. 853; *Ridings* v. *State,* 108 Neb. 804; *Smith* v. *State,* 109 Neb. 579; *Middaugh* v. *Chicago & N. W. R. Co.,* 114 Neb. 438."

Miles v. *Ballantine, supra,* is useful in this problem. The facts here and in the Miles case are strikingly similar as to personnels, circumstances, and events.

Therefore, we are justified in quoting at length from the opinion in that case:

> "At the October term of the court for the year 1900, and on the 1st day thereof, the cause was assigned for trial. On the following day the plaintiffs in error made an application for a continuance, based on certain affidavits. It was alleged in the affidavit of William H. Miles that one Tanner was his counsel in the case, and was in sole charge of it until August 18, 1900, at which time, owing to differences arising between them, he discharged the said Tanner from further employment in the case, and, on account of illness, he had not been able to procure other counsel until the first day of the term, at which time he employed one S. A. Searle to act in that capacity for him; that he was informed by said Searle that it was impossible for him (the said Searle), for want of time, to properly examine the questions involved in the case, and prepare for trial at that term. He further alleged that it was necessary for him to have certain persons, whom he named, as witnesses, and who, he alleged, if present, would testify that he had been in open, notorious, adverse, and exclusive possession of the premises for more than 10 years next before the commencement of the action; that they were absent from the county; that one of said witnesses was in the state of Illinois, and as to the other two, their whereabouts was unknown; that the same facts could not be shown by the testimony of any other witnesses. This affidavit was supplemented by the affidavit of S. A. Searle, who alleged that, for want of time, it was impossible for him to properly prepare the case for trial at that term of court. On motion of the plaintiffs, this application, and the affidavits accompanying it, were stricken from the files, and the motion for a continuance denied. It appears further from the record that one Graham was also one of plain-

tiffs' attorneys, and it does not appear that he had been discharged, or was in any way incapacitated from serving as counsel in the case; and an examination of the affidavits discloses that no diligence whatever was exercised by the plaintiffs to procure other counsel, although they had discharged Tanner, as they allege, about two months before the case was set for trial. No diligence was shown on their part in attempting to obtain the testimony of absent witnesses. No reason was shown why their depositions had not been taken, and, as to the two witnesses whose whereabouts were unknown, there was no showing that their testimony could be procured at a future time. Again, it appears that, by the rules of practice in force in the trial court, one who desires a continuance of his case must file his application on or before the first day of the term. It does not appear that the rule is an unreasonable one. The question of refusing or allowing a continuance is left largely to the discretion of the trial judge. In this case a careful examination of the application and affidavits convinces us that there was no abuse of discretion in striking the application from the files, and refusing the continuance of this case. Therefore the action of the trial judge in that behalf is affirmed. *Stratton* v. *Dole,* 45 Neb 472, 63 N. W. 875; *Storz* v. *Finklestein,* 48 Neb. 31, 66 N. W. 1020; *Burris* v. *Court,* 48 Neb 181, 66 N. W. 1131."

The Parallels of Miles and Jungles

Remarkable are the parallels in the Miles case and the Jungles case. Even obscure circumstances in one find faithful counterparts in the other. However, Miles must have been somewhat more diligent than Jungles for the one employed substitute counsel the day his

cause was assigned for trial; the other never employed substitute trial counsel.

After the cases were set for trial the similarities abound. Both needed time to procure counsel. Both needed time for new attorneys to prepare. Miles did not say when he could obtain needed evidence; nor does Jungles.

Miles, it appeared from the record, had another attorney who did not appear to have been discharged or was in any way incapacitated from serving as counsel in the case; intervener, likewise. Miles' showing disclosed no diligence in attempting to procure other counsel after his attorney was discharged; nor did Jungles attempt to procure other trial counsel after Mr. Hannon withdrew. Miles in his showing did not exhibit diligence to obtain absent evidence; nor did intervener. Miles did not show it could be procured in the future; nor did Jungles.

There was no abuse of discretion, it was said, in refusing Miles' application for continuance. So there was no abuse of discretion in this case. The action of the trial judge in the Miles case was affirmed.

He who sleeps in decision, sleeps in peace. So the sleep of restless depositors, perhaps even that of intervener himself, we think, may be more peaceful, if the startling parallels persist unto the end.

INTERVENER'S CITED AUTHORITIES DO NOT FIT THE FACTS IN THIS CASE

We have no quarrel with intervener's abstract proposition that the withdrawal of principal counsel on account of illness, leaving insufficient time for new counsel to acquaint themselves with the case, is a ground for continuance.

Of course, Mr. Hannon's condition required him to seek a kindlier climate where it is hoped he may be speedily restored to health and return to his practice. But the facts do not justify the application of intervener's above stated legal proposition. It does not clearly appear from the showing for the continuance that Mr. Hannon was principal counsel, or that he was relied on to try the case. He says that to prepare one must go over the records of the bank. Of course, the presumption is that as a good lawyer he had prepared. Intervener does not detail the preparation made by Mr. Hannon but the record affirmatively shows preparation by other attorneys like Mr. Drake whose examination of the bank records was so complete he could interpret the certified accountant's audit. There is no showing that the new counsel could ever more thoroughly acquaint themselves with the case.

Five examinations of the bank books made in 1933 and prior years were unsatisfactory to intervener. The trouble seemed to be that none of the auditors could obtain just the evidence which intervener wanted or needed. Their audits always failed, he implies. There is no showing that new counsel could ever find the evidence. It was not available before trial for new or old counsel

to acquaint themselves with. The evidence which has eluded so many lawyers, auditors, and bank bookkeepers is still to be found. It is not clear what is meant by intervener's words: "insufficient time for new counsel to acquaint themselves with the case," in connection with counsel's withdrawal. More nearly accurate would have been a statement that intervener needed more time to search for evidence.

Intervener injects a thought that the receiver's attorneys agreed to furnish him an audit, a complete one apparently in the sense that it would disclose the elusive evidence. But the charge that their was such agreement and that he relied upon it melts away under intervener's conduct which shows his auditors searching the records before and during the summer preceding the trial in September. Claims of "repeated" requests for the audit and claims of reliance upon the promise while intervener was himself obtaining audits seem incongruous. Why should intervener expect the receiver or anyone to furnish a complete audit from books "notoriously in bad shape?"

Our view is that Mr. Hannon did not withdraw leaving insufficient time for others to prepare. He withdrew ten days before trial. Mr. Cunningham indicates the time needed to prepare as fourteen days.

Analysis of Cases Cited by Appellant Under Foregoing Proposition

Several cases are cited by intervener (p. 6 his brief), supporting the proposition that withdrawal on account of illness leaving insufficient time for new counsel to

prepare is ground for a continuance. However, the facts of these cases do not, it seems to us, remotely parallel those in the present case. They relate to situations where the only counsel familiar with the case became ill suddenly, on the eve of trial, or under such circumstances that a litigant was unable by diligence to procure other counsel. In the cited cases the element of withdrawal is not generally present. Following is an analysis of these cases cited by intervener:

In the case of *Rhode Island* v. *Massachusetts* (1836), counsel for Rhode Island was prevented from attending by "unexpected and severe illness." Massachusetts, in possession of the territory in dispute, was not injured by delay. Counsel did not withdraw.

In *Rumford Chemical Works* v. *Hecker* (1834), the New Jersey court said: "The court listens more readily to such a suggestion, as a reason for postponement, when it comes at the first term after issue joined. It would not be a safe ground to rely upon ordinarily, when the proceedings have been long pending and the sickness of long standing." Withdrawal element not present.

In *Schultz* v. *Moore* (1838). Leading counsel was sick and unable to attend court. The report does not indicate whether the illness was on the eve of trial or long standing. The element of withdrawal was not present.

In *Turner* v. *Loomis,* (Ia.), the court said in the syllabus: "On the sudden illness of his counsel, de-

fendant is entitled to a continuance * * *," and that "The unexpected illness of counsel prevented his attending court * * *." The element of withdrawal was not present.

In *Frey* v. *Shadbolt Mfg. Co.*, the opinion of nine lines states that the counsel was ill "when the case was called." No element of withdrawal.

In *Kramer* v. *Heins*, (N. D.), the point involved seemed to be less that of illness of counsel than the effect of a continuance upon jurisdiction. The syllabus: "Sect. 8615 * * * is not so construed * * * as to imply that such district court will lose jurisdiction—merely because the case has been continued over the term on account of the illness of counsel." No element of withdrawal.

Rice v. *Melendy* (1872), was a case involving illness and one in which "it was impossible for any other attorney to prepare for the trial of the case at that term, owing to its * * * complexity and other peculiar facts * * *." No element of withdrawal.

In *American Soda Fountain Co.* v. *Dean Drug Co.* (1907), it was conclusively shown that one of defendant's attorneys was engaged in a murder trial, another was attending his mother's funeral, and a third was unfamiliar with the case. No element of withdrawal.

The above analysis includes all the cases specifically cited under intervener's proposition II.

As to the Application to Set Aside the Dismissal

Though intervener relies upon an assigned alleged error of the court "in not granting the application of appellant to set aside the dismissal of the petition of intervention," the record does not disclose that the trial court so ruled. Nor, does intervener's brief treat this assignment seriously. His argument is generally silent thereon excepting on p. 9 thereof where in nine lines the fact of filing is mentioned. The showings in its support have been useful, however, in disclosing instructive facts bearing upon intervener's complaint.

An examination of the showing supporting the motion to set aside the judgment, we think, fully justifies the statement that it shows none of the requirements of diligence missing in the application for continuance.

Nor do we believe intervener seriously contends that Judge Hostetler was prejudiced either against "the case, the appellant, or his attorney," as he conjectures on p. 16 of his brief; nor that any statement in the receiver's showing misled the trial judge. No act or word suggesting bias in the trial judge is pointed to, other than the act of overruling the motion; his long experience in the Jungles litigation over the years suggests that none could mislead his mind as to any controlling fact involved.

IN CONCLUSION

When intervener presented his motion for continuance he failed to show clearly that withdrawing counsel was sole counsel; failed to show diligence in employing other counsel; failed to show who were the witnesses to be interviewed or what their testimony would be, or if either existed. The reasoning of *Miles* v. *Ballantine* applies in this case.

We now know intervener had ample time to employ new counsel and prepare. Ten days were at his disposal. His own representative has indicated he could prepare in fourteen days. It does not appear that intervener has yet procured the evidence or an attorney to present it.

If intervener had a case to present by reason of evidence in the bank records or elsewhere, he was deprived of an opportunity to present it only by his own negligence in failing to use ten days time to procure counsel and produce evidence. He was not deprived of the opportunity through manifest abuse of sound legal discretion.

The bank record evidence of which intervener has said so much may exist. But it eludes so many years of search as to suggest that after all its existence may lie in a phantom of hope. Meanwhile the depositors' money is withheld from them. Judge Hostetler could have reached no logical conclusion other than that the motion for continuance was for dilatory purposes.

The litigation should end. The depositors should be paid. Further delay will not benefit intervener; it will further injure them. The order and decree of the district court, we think, should be affirmed.

Respectfully submitted,

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In The

Supreme Court of Nebraska

STATE OF NEBRASKA EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF,

V.

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DAVID F. JUNGLES, INTERVENER AND APPELLANT,

E. H. LUIKART, RECEIVER OF THE STATE BANK OF RAVENNA, RAVENNA, NEBRASKA, DEFENDANT AND APPELLEE.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY.
Hon. Bruno O. Hostetler, Judge.

REPLY BRIEF OF APPELLANT.

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General Number 29083.

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REPLY BRIEF OF APPELLANT.

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Attorneys for Appellant.

We are satisfied that appellant's brief fairly covered the issues in the above case, but desire to reply to some of the statements contained in appellee's brief, which, we believe, are somewhat misleading.

The first point which we wish to consider is the continual insistence on the part of the appellee that the intervener and appellant was represented by attorneys sufficiently familiar with the case to carry on the trial in the absence of Mr. Hannon. The appellee has repeatedly, in his brief, named the various attorneys whom he states were interested in the case, and on page 27 of appellee's brief attempts to show the court that nine attorneys had been connected with the case. The transcript clearly indicates that Mr. Hannon was the only attorney who handled the case after the filing of the petition of intervention; that he was employed in the case from December, 1931, until September, 1933; that the petition of intervention was filed by Mr. Cunningham, but he had no further connection with the case whatsoever. Mr. Kelly and Mr. Hill appeared for Jungles regarding the continuance of the case on September 22, 1933. Mr. Minor and Mr. Starr had been attorneys for Mr. Jungles in an entirely different suit several years previous and the matter involved was a foreclosure of the real estate mortgage. Mr. Wellensiek had recommended an auditor who made an attempt to audit the bank books but found them in such condition that it was impossible to do so. Mr. James made a partial audit of the bank books at one time, which was long before the present case was filed. For the appellee to claim that all of the above attorneys were familiar with the case, or could have tried the case, is unfair, and not entitled to consideration by this court. Mr. Hannon had been handling the case for Mr. Jungles and, as set forth by his affidavit, had made repeated attempts through correspondence and personal calls on the attorneys for the banking department, for a settlement. The condition of his

health became so serious from tuberculosis that he was compelled to remove to a different climate, but he notified the appellant on the 16th of September, and informed the attorneys for appellee that he was withdrawing from the case on account of his health, but up until a few days before that time, he had relied upon representations made to him by counsel for the appellee that a settlement could probably be effected.

Another statement in appellee's brief is to the effect that the case was set for trial on September 2nd. The only support this statement has is a general statement in the affidavit of Mr. Nye, who does not state he was present when the case was set, and no one else appears to have had any knowledge that the case was set at that time. The letter of Mr. Hannon, shown at page 20 of the transcript, shows that Mr. Hannon had called to see Mr. Radke regarding the case on September 6th and discussed a settlement of the case. Nothing was said with reference to the case being set for trial, but on September 9th, notices were sent out by Mr. Nye at Kearney that the case had been set for trial. The judge's docket contains no such entry and none is shown in the transcript, and it appears from the transcript and the evidence that the case was never actually set down for trial by the district judge. No other application for continuance had ever been made by Mr. Jungles and we submit that there is no evidence to justify the conclusion that the request for continuance was made in bad faith and solely for the purpose of delay. Appellant agrees with the appellee that payment to the depositors in said bank should not be delayed, and that the case should have been disposed of sooner, but if the appellee's attorneys would

have prepared an audit of the account of Mr. Jungles in the bank, the matter could have been disposed of long ago and without the necessity of an appeal to this court, which has already delayed the matter for more than six months. Mr. Jungles had no control over the books of the bank. It was necessary for him to obtain evidence from the books of the bank, which were in the custody of the banking department for nearly a year, and the statement of Mr. Radke to the effect that part of the bank records were missing so that it was difficult to make an audit, is evidence of the difficulty under which Mr. Jungles was laboring in endeavoring to obtain an accounting with the bank. The fact that Mr. Radke had agreed to allow a general claim in the sum of $10,000.00, if accepted by Mr. Jungles, and that a member of the depositor's committee agreed to recommend a settlement on the basis of $1,000.00, proves that the claim is not groundless as contended by the attorneys for the appellee. The attorneys for the banking department should have been willing to audit the books of the bank in connection with the Jungles claim, because the claim of Mr. Jungles is just as valid and legitimate as any other claim against the bank. If his claim is unfounded, an audit of the account at the bank would settle the controversy. The attorneys for the banking department had agreed to have such an audit made, then refused to do so, and the attempt to force the case to trial before Mr. Jungles had an opportunity to have such an audit made, seems unfair and unjust.

We hesitate to continue further with this argument, but feel urged to do so in view of other statements made by appellee in his brief. For instance, on page

29 of appellee's brief, we find the paragraph heading "Intervener Was Well Represented at Trial," and the second paragraph therein stating:

> "On September 21st, the day before the trial, the motion to postpone was prepared, Attorney Kelly making a supporting affidavit before Attorney Cunningham as notary (8). The next morning at trial Attorney Drake was in court representing intervener and presenting the motion to postpone (16). Within that hour Attorney Herbert E. Hill was also in court presenting the motion to oust Judge Hostetler."

Appellee contends that the only information necessary for any one of these attorneys to proceed to the trial of the case was contained in the bank records. The foregoing review of the connection these attorneys had with the case is sufficient to show that no one of them could have proceeded to trial—at least if giving appellant a chance to be represented by adequately prepared counsel was any object. Mr. Kelly, being Mr. Hannon's partner, asked for the continuance and had, theretofore, had no connection with the case. Mr. Cunningham had had no connection with the case for two years, unless notarizing the affidavit would be regarded as sufficient to inform him of the developments of the case. Messrs. Drake and Hill appeared on the day of trial solely to present motions for continuance and change of venue.

At no time during the entire course of the Jungles litigation has there been more than one attorney having entire charge of the case. At the time the case was set for trial, Mr. Hannon was that attorney. That he withdrew on the eve of the trial should not cause Mr.

Jungles to be branded with "lack of due diligence" simply because other attorneys had been once involved. We have not been heretofore familiar with the argument that because more than one attorney has been involved in one manner or another with a case that the case loses standing and that a dismissal is justified on that ground. Nor are we pleased or persuaded that such an argument should be given consideration before this court.

2.

On September 20th, Mr. Hannon being out of town, Mr. Jungles requested Mr. Cunningham to go to Lincoln with him to see the state banking department counsel. Mr. Cunningham did so, and upon talking with Mr. Radke, counsel for appellee in this case, informed him of the situation and asked that a two weeks' continuance be granted. Mr. Barlow Nye was consulted by Mr. Radke, and Mr. Nye refused to agree to a continuance, his sole reason for so refusing being that if such a continuance were granted that his father, local counsel aiding the appellee at Kearney, would withdraw from the case. Mr. Radke, however, admitted that he had agreed with the Jungles and Mr. Hannon that a complete audit of the bank's books should be made, and suggested that the two weeks' continuance be asked for and that he thought the judge would be fair in deciding the matter of a continuance. This was two days prior to trial. The Jungles admitted that without Mr. Hannon they would be unable to go to trial on the 22nd of September. They further informed Mr. Radke that because they could not go to trial, the department's witnesses and counsel should be accordingly notified. Yet, even knowing that appellant would

and could make no attempt to go to trial on the issues, the appellee complains in his brief that:

> "He had brought four witnesses from distances to attend. Considerable time had been spent preparing for trial. The receiver had brought to the courtroom all the books and records of the bank, arranged and indexed to facilitate introduction of evidence" (brief, p. 11).

The only reason given by the department, prior to the affidavit made by Mr. Nye in opposition to the motion for a continuance, for refusing to agree to such a continuance was the fact that Mr. Nye's father would withdraw. Counsel for appellee had ample notice that such a continuance would be asked for, and that there would be no trial on the merits on September 22nd. Accordingly, there should be no argument of expense and bother incurred on account of attempting to go to trial on the 22nd.

3.

Appellee raises the question of whether the receiver promised to furnish the intervener an audit. Mr. Hannon's affidavit states in part that he "relied upon said statement of the officers of the banking department * * * that an audit would be made" (Trans. p. 18). According to Mr. Cunningham's affidavit, when he accompanied the intervener to Lincoln to see the department's counsel, Mr. Radke also admitted that there had been an agreement to make such an audit, "but that in attempting to do so, the examiner found the books in bad shape, some of the records missing, and that he thought it would be impossible to get a complete audit without great expense" (Trans. p. 24).

It was probably because the bank's books were in such bad shape that the audits and examinations made on behalf of the appellant, and which are played up so continually throughout appellee's brief, were inadequate to prepare the appellant for trial.

Appellee's argument for claiming that no such promise was made to furnish the intervener an audit seems to be based principally upon the fact that the intervener fails to mention the exact dates upon which each of these conversations and agreements were had with the counsel for the banking division.

The receiver, and counsel for the department, did not deny, by affidavit or otherwise, that they did make such an agreement with intervener that such an audit should be made.

4.

Appellee further questions whether intervener had enough time to prepare for trial after learning that Mr. Hannon was going to withdraw. Mr. Hannon's letter actually withdrawing was written on the 16th, and with Sunday intervening, the Jungles probably received it on the 18th, four days prior to date of trial (Trans. p. 9). Counsel for appellee, however, claim that the intervener had ten days actual notice due to Hannon's letter of September 6th stating that he would withdraw from practice by the 16th, and Mr. Fred Nye's letter stating that the case was set for the 22nd, received on September 12th (Trans. p. 36). However, an examination of Mr. Hannon's letter of the 6th will disclose that the entire letter is concerned with the proposition of settlement. At that time, both

parties were evidently planning on a compromise being reached. Quoting from Mr. Hannon's letter (Trans. p. 20), we find that he states that:

> "I was in Lincoln yesterday and talked to Mr. Radke in reference to settlement of your claim. * * * He had just returned from his vacation that morning and was quite busy, but promised me that he would try and get something done on it this week if possible. Mr. Luikart and Mr. Stall were both out of town up in Wyoming somewhere and *as soon as they get back he would try and get together with them on a proposition of settlement*" (italics ours).

Up until the 16th, the Jungles firmly believed that the case would be settled. They had good reasons for so believing.

5.

Under Part II of appellee's argument in his brief we find the claim that the intervener failed to use due diligence in obtaining other counsel; and further that, "Obvious and unexplained failure to obtain counsel when ample opportunity is afforded raises a duty upon the court to scrutinize efforts to postpone" (brief, p. 34). The quotation alone will serve to point out the differences in viewpoint between appellant and appellee. It is our claim that the failure to get other counsel to try the case was not "unexplained." The explanation is simply that the few days left to intervener after Mr. Hannon's withdrawal were not time enough for one to prepare for a case involving bank transactions, particularly when the books were in the jumbled condition they were in. Furthermore, appellee's position necessitates the unwarranted assumption that the in-

tervener had "ample opportunity" to obtain other counsel. This question is one which we are willing to leave entirely to the discretion of this court. We wonder if the banking department would have considered four days ample opportunity and time to retain counsel and prepare for the trial of this case.

As regards the cases cited by appellee, we find ourselves in complete accord with their holdings. It simmers down only to the question of whether the facts of this case fit the holdings quoted. For instance, we think the quotation taken from Mr. Justice Good's opinion in the case of *Waldron* v. *Lapidus* to be a just and commendable statement of the law. Appellee did not point out just what conduct on the part of intervener he considered to be whimsical, capricious or considerate only of his own convenience, and accordingly it stands only as an abstract statement. We feel that nothing short of a strained construction would allow such a classification of intervener's conduct. As regards the *Miles* case, claimed to have such remarkable parallels to the Jungles case, and upon which appellee relies so completely, we again disagree with appellee's application of its law to the facts of this case. In discussing those parallels, the appellee states that the intervener never employed substitute counsel (brief, p. 41), directly contradicting his own argument that intervener was well represented at the trial, naming four attorneys (brief, p. 29). Furthermore, Mr. Jungles not only could not obtain needed evidence, but up until time for trial had relied upon representations of the receiver and the banking department that a complete audit would be made. Appellee deems it desirable that the "startling parallels persist unto the end" and that the

dismissal be affirmed; we would deem such a result startling as effecting a grave injustice.

The trial court dismissed this action, the following being a part of the journal entry:

> "Accordingly, the court finds that the application for a continuance is made merely for dilatory purposes and not in good faith" (Trans. p. 16).

Barlow Nye's affidavit contesting the motion for a continuance reads:

> "Affiant further says that it is his belief that if a continuance is granted to said intervener that no new counsel will be employed and that said cause will never be tried and that the said David J. Jungles has no desire to litigate the matters set forth in his petition of intervention."

Both of the above quotations show that Mr. Nye and the court considered intervener's move to have been made in bad faith. The intervener, however, had never before asked for a continuance. This was not one of many such moves, but the only one of its kind. The conclusion is hard to escape that the court was either violently prejudiced to the intervener and his case, or was swayed by the statements made in Mr. Nye's affidavit. No justification can be given for either the attitude of the court or of the statements by Mr. Nye. Mr. Jungles had given them no provocation for feeling that his actions were *mala fides*. On the contrary, we find Mr. Hannon writing to Mr. Radke on September 11, 1933 (Trans, p. 10), and stating in part:

> "If it cannot be settled, the Jungles are anxious that it be tried at an early date for there is no object in delaying it further; however, they would

> probably want more time than the 22nd of this month to get a new attorney."

The Jungles were perfectly willing that the case should stand trial. We regard Mr. Nye's statement that he believed that Mr. Jungles "had no desire to litigate the matters set forth in his petition" as totally unfounded. If Mr. Jungles was at fault, it was probably in placing too great reliance upon the representations of the appellee and the banking division that an audit would be made, or a settlement reached, rather than in exercising a lack of due diligence, or bad faith.

We respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

LLOYD KELLY,
B. J. CUNNINGHAM,
Attorneys for Appellant.

29083

In The

Supreme Court of Nebraska

STATE OF NEBRASKA, EX REL, C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF,

V.

THE STATE BANK OF RAVENNA, DEFENDANT,

DAVID F. JUNGLES, INTERVENOR AND APPELLANT,

E. H. LUIKART, RECEIVER OF THE STATE BANK OF RAVENNA, RAVENNA, NEBRASKA, DEFENDANT AND APPELLEE.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY.
Hon. Bruno O. Hostetler, Judge.

MOTION FOR REHEARING OF APPELLANT AND BRIEF IN SUPPORT THEREOF.

LLOYD KELLY,
B. J. CUNNINGHAM,
Attorneys for Appellant,

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

General Number 29083.

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LLOYD KELLY,
B. J. CUNNINGHAM,
Attorneys for Appellant,

MOTION FOR REHEARING.

The appellant moves the court to vacate and set aside its findings and decree herein, and grant a rehearing for the following reasons:

1. The court erred in affirming the judgment of the district court in dismissing said case.

2. The court erred by not approving the stipulation signed by the attorneys for the appellant and appellee.

3. The court erred in holding that the bill of exceptions was necessary after the appellant and appellee had stipulated that the transcript should be substituted for the bill of exceptions so far as it included the evidence considered by the district court in ruling upon the motion for continuance.

4. The court erred in dismissing the case.

Respectfully submitted,

LLOYD KELLY,
B. J. CUNNINGHAM,
Attorneys for Appellant.

BRIEF IN SUPPORT OF MOTION.

I.

The court erred in affirming the judgment of the district court in dismissal of the case.

Coleman v. *Spearman, Snodgrass & Co.*, 68 Neb. 28, 93 N. W. 983.

McFarland v. *West Side Improvement Assn.*, 47 Neb. 661, 66 N. W. 637.

II.

The court erred by not approving the stipulation signed by the attorneys for the appellant and appellee.

Hobson v. *Huxtable*, 79 Neb. 340, 116 N. W. 278.

Williams v. *Miles*, 62 Neb. 566, 87 N. W. 315.

III.

The court erred in holding that a bill of exceptions was necessary after the appellant and appellee had stipulated that the transcript should be substituted for the bill of exceptions in so far as it included the evidence considered by the court in ruling upon the motion for continuance.

In re Page, 89 Neb. 299, 131 N. W. 280.

Rich v. *State National Bank*, 7 Neb. 201.

Behrends v. *Beyschlay*, 50 Neb. 304, 69 N. W. 835.

ARGUMENT.

This appeal was taken from the ruling of the District Court of Buffalo County, denying a motion for continuance, which motion was supported by an affidavit and doctor's certificate, and a counter-show-

ing supported by an affidavit made by one of the attorneys for the appellee.

The clerk of the district court has copied the motion, affidavits, and doctor's certificate filed by the appellant, and also the affidavit which constituted the counter-showing of the appellee.

The journal entry certified to by the clerk of the district court contains the following statement made by the court:

> "Upon due consideration of the *application for continuance and of the counter-showing,* the court finds," etc.

There could be no question in view of the above record, but that the court considered the affidavit and certificate in support of the motion and the affidavit made in support of the counter showing. The court's own language in the journal entry explicitly shows this fact. The appellant herein is only asking this court to review the affidavits and certificate *which the trial court admits it has reviewed and considered.* Attorneys for appellee in their brief, admit that the affidavits were filed and considered by the court and argue to this court that the showing for continuance was insufficient; appellant contends that the affidavits submitted were sufficient and that a continuance should have been granted.

Appellant therefore respectfully requests this court to pass upon the same motion which the district court overruled; to consider the motion on the same affidavits and certificate which the trial court considered, and the

affidavits and certificate are copied in full and set forth in the transcript certified by the clerk.

In support of the opinion filed by this court in the above case, this court cited the case of *Travellers Insurance Company* v. *Sawicka,* 239 N. W. 726. The evidence in that case was not presented to this court either by bill of exceptions or by transcript and the court in its opinion in the Sawicka case, used the following language:

> "There is no bill of exceptions. We are not advised as to what evidence was presented for the appointment of a receiver or upon the motion to vacate."

In the Sawicka case no record of the evidence was presented to this court, while in the present case, a complete copy of the motion and affidavit in support thereof and the affidavit supporting the counter-showing is set out in full.

In the case of *Doan* v. *Adcock,* also cited by this court, there was no bill of exceptions and the transcript contained only the pleadings, the rulings of the court and the verdict of the jury, while in the present case the transcript contains all affidavits and certificates, etc. The court also cites the case of the *First Trust Company* v. *Glendale Realty Company,* 125 Neb. 283, 250 N. W. 68. That case was a foreclosure of a mortgage; the property was sold on April 19, 1932, sale confirmed April 30, 1932. Motion for deficiency judgment, answer and objections filed May 12, but on May 17, an affidavit and additional transcript was permitted to be filed by the court and this court in its opinion, says:

> "At no place in the bill of exceptions filed in this case does it appear that this affidavit, or the evidence contained therein was offered or received as proof on the hearing of this case in the district court."

Certainly the record in that case cannot be compared to the record in the present case in view of the fact that the journal entries filed by the court specifically state that the application and counter-showing were duly considered by the court.

This court also refers to the case of *Patterson* v. *Kerr,* 254 N. W. 704. In that case affidavits of jurors were filed in support of a claim that the verdict of the jury was a "quotient verdict." The affidavits of ten jurors were filed by the defendant and affidavits of the remaining jurors filed by the plaintiff. It appears that the affidavits filed by the plaintiff were omitted from the bill of exceptions and the court therefore refused to pass on the question of the quotient verdict for the reason that a material part of the evidence had been omitted from the bill of exceptions. The present case differs from all the cases cited by the court in that in each of said cases, some part of the evidence or affidavits were omitted from the transcript or bill of exceptions. There is no claim in this case that any part of the evidence on which the trial court based his decision, is missing, but on the other hand, it is conclusively shown that all of the affidavits were copied in full and included in the transcript *so that this court may pass on identically the same motion and affidavits as passed upon by the district court.*

All of the above cases are clearly distinguishable from the case at bar. In the present case, the evidence upon which the court based its ruling has been presented in the transcript; no objection was raised by the attorneys for the appellee; the questions of law based on those affidavits have been extensively briefed by the attorneys for the appellees and after the court had called the attention of the attorneys that a bill of exceptions would be required, attorneys for the appellees stated that they desired that the appeal be decided upon the evidence contained in the transcript which ought to be sufficient proof that the affidavits upon which the district court based its ruling, had been preserved in the transcript and presented to this court. We do not understand why this court should desire to raise and stand upon a technicality which was not raised or urged by any of the attorneys in the case. Submitting, however, to the court's views that such a technicality should be permitted to stand and if this court is still of the opinion that a bill of exceptions should have been filed, we feel certain that this technicality was removed by the stipulation in writing signed by the attorneys for the appellant and appellee and filed with the court at the time of the oral argument to this court on the questions involved in this case. The said stipulation was reduced to writing, signed by the attorneys for the appellee and provided that the transcript containing the affidavits and certificates filed in this case should be substituted for the bill of exceptions and the case be considered by this court upon the affidavits and evidence certified to in the transcript.

If there remained any doubt in the mind of the court as to whether the affidavits and certificate included in

the transcript were the identical ones considered by the lower court, that doubt should be removed by the above stipulation, and if there was any further question as to whether the record as shown by the transcript included all of the evidence considered by the court and ruling upon the motion, it surely was met and fully satisfied by the stipulation.

This court has held that if a defective transcript is signed, its defect may be waived by the attorneys for the parties, in the supreme court.

Coleman v. *Speerman*, 93 Neb. 939.

This court has also held that a defective bill of exceptions may be waived by the parties in this court.

Yates v. *Kearney*, 37 N. W. 590.

McFarland v. *West Side Improvement Assn.*, 66 N. W. 637.

If the parties to a suit can waive defects in a transcript or bill of exceptions by failure to object to the defects or by affirmative acts or acquiescence, certainly they ought to be able to cure a defect by a written stipulation filed in this court, especially when such facts agreed to in the stipulation are supported by a certificate of the clerk of the district court as being correct and further supported by journal entry signed by the district judge to the effect that he based his ruling upon the motion to which were attached the affidavits and counter-showing, all of which is set out in the transcript and stipulated by the attorneys for the appellant and appellee as being correct.

Certainly no injustice can result to anyone interested in the case by the court's approval of the stipulation

filed herein. This court should be willing to consider this case upon the record before it, when all of the parties concerned are willing that the case may be decided by this court upon the record as stipulated.

We respectfully urge that a rehearing be granted; that the stipulation herein filed be approved by the court, that the case be decided upon the record now in this court, and that the judgment be entered herein in favor of the appellant, which judgment we feel is supported by the record and the affidavits filed with the motion of the appellants in the district court.

Respectfully submitted,

LLOYD W. KELLY,
B. J. CUNNINGHAM,
Attorneys for Appellant.