COMMERCIAL LAW

SUPREME COURT REVIEW

BANKING

In *Berman v. United States National Bank*,[1] the Nebraska Supreme Court addressed for the first time the problem of whether a particular bank was to be classified as a "collecting bank"[2] or "payor bank."[3] The classification was critical to the defendant United States National Bank (Bank) since its liability for allegedly failing to give sufficient notice of dishonor of five drafts depended on whether it had acted as a payor or a collecting bank in the handling of the drafts.[4]

The controversy arose out of the financial difficulties of an international scrap metal dealer whose operations were based in Omaha. The dealer had three accounts with the Bank. One was a "payable through" account which was a bookkeeping account for the bank's use. The purpose of this account was to keep a separate and accurate record of dealer's drafts which were received under a "payable through agreement."[5] The sec-

---

1. 197 Neb. 268, 249 N.W.2d 187 (1976).

2. U.C.C. § 4-105(b) defines a "payor bank" as one "by which an item is payable as drawn or accepted." Comment 2 to this section states that "payor bank includes a drawee bank and also a bank at which an item is payable if the item constitutes an order on the bank to pay, for it is 'payable by' the bank." This contrasts with a "collecting bank" which must make presentment to or get acceptance from the drawee. *See* note 3 *infra*. For a description of the varying functions of "payor" and "collecting" banks *see* J. CLARKE, H. BAILEY & R. YOUNG, BANK DEPOSITS AND COLLECTIONS (4th ed. 1972).

3. U.C.C. § 4-105(d) describes a "collecting bank" as "any bank handling an item for collection except a payor bank." Comment 3 states: "Items are sometimes drawn or accepted 'payable through' a particular bank . . . [T]he 'payable through' bank . . . will be a collecting bank." *See also* U.C.C. § 3-120 which provides that "[a]n instrument which states it is 'payable through' a bank or the like designates that bank as a collecting bank."

4. U.C.C. § 4-202(1) imposes upon a collecting bank a duty to exercise ordinary care in presenting an item, and in settling for an item when the bank receives final settlement. U.C.C. § 4-103(5) sets the measure of damages for breach of this duty to be "the amount of the item reduced by an amount which could not have been realized by the use of ordinary care."

In contrast, a "payor bank" may be liable for the face amount of the item in the event of wrongful dishonor. U.C.C. § 4-102, Comment 4 to this section emphasizes that the measure of damages for collecting banks and payor banks is different.

5. 197 Neb. at 278, 249 N.W.2d at 192. The "payable through" agreement

ond account was a general account, which had been in a continuous state of overdraft since April 1, 1974.[6] The third account was a collateral account from which the dealer would transfer funds to his general account. Such transfer required the authorization of the Chase Manhattan Bank of New York (Chase) which had been extending credit to the dealer.[7]

On April 18 and 19, 1974, the disputed drafts were received by the Bank and on April 19 these drafts were debited to the dealer's general account. At the end of that day, this account had an overdraft of approximately $2,700,000. At the same time, the balance in the collateral account was some $410,000. Chase authorized transfer of the collateral account funds to the general account and the Bank requested dealer to deposit approximately $2,000,000 in the general account on April 22, the next banking day.[8] On April 22, the dealer deposited the requested amount in his collateral account and anticipated that Chase would authorize transfer to the general account. However, on the same day, Chase refused the transfer because it had been discovered that the dealer was in a "short position on the London Metal Exchange" and "hopelessly in trouble."[9] The Bank picked up the drafts from the dealer, marked them "insufficient funds," and returned them to the Federal Reserve Bank. The depository bank refused the items because notice and return were not timely.[10] Berman, the payee of the drafts, then brought suit against the Bank.

Central to the Bank's contention that it was a "collecting bank" was the designation on all five drafts, "Through the United States National Bank of Omaha." The Bank argued that this notation made the items "payable through" drafts, that an item which says it is "payable through" a bank makes that bank a "collecting bank," and that as a collecting bank it was liable only for the exercise of ordinary care in carrying out its obliga-

---

provided that the bank was to make provisional settlement on the day of receipt of the drafts and return or make final settlement on the following day.

6. *Id.* at 277-78, 249 N.W.2d at 192.
7. *Id.* at 276-77, 249 N.W.2d at 191-92.
8. *Id.* at 278, 249 N.W.2d at 192-93.
9. *Id.* at 279, 249 N.W.2d at 193.
10. *Id.* at 279-80, 249 N.W.2d at 193. U.C.C. §§ 4-301(1) and 4-302(a) provide that a "payor" bank must either return a demand item or send notice of dishonor by its "midnight deadline" if it is not to become accountable for the amount of the item. U.C.C. § 4-202 requires a collecting bank to send notice of dishonor before its "midnight deadline" following such receipt. U.C.C. § 4-104(1)(c) states that "midnight deadline" "with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later." For respective liabilities of "payor" and "collecting" banks, *see* note 4 *supra*.

tions. Furthermore, the Bank contended, if it had been negligent in its actions, it was liable only for the face amount of the items reduced by an amount which could not have been realized by ordinary care.[11] Berman, on the other hand, urged that the Bank was a "payor bank" and thus liable for the face amount of the items since the Bank failed to give notice of dishonor before the midnight deadline.[12]

In deciding that the Bank was a "payor bank," the court examined the drafts, analyzed the "payable through" agreement, and reviewed the practice of the Bank and the dealer in handling the drafts.

The court first found each of the instruments to be ambiguous on its face. The instruments did not indicate who the drawee was, nor was it apparent that presentment to the dealer was required, which would have indicated that the Bank was acting as a "collecting bank." In addition, the drafts did not bear the words "payable through" but simply "through."[13] Furthermore, the court found the drafts to contain several characteristics of checks, which instruments are drawn on banks and do not require presentment to the drawee.[14] Because of the instruments' ambiguities, the court found it appropriate to admit parol evidence and look to the function which the Bank was actually performing.[15]

The court found that the terms of the "payable through" agreement indicated that the Bank was functioning as a "payor bank." This agreement provided for provisional settlement on the day of receipt and final settlement on the following day, deadlines required by a payor bank.[16] In addition, the Bank would immediately debit the general account, even if this created an overdraft, and did not make presentment to the

11. 197 Neb. at 280-81, 249 N.W.2d at 193. *See* note 4 *supra*.

12. *Id.* at 281, 249 N.W.2d at 194.

13. *Id.* at 285-86, 249 N.W.2d at 196. The court observed that some jurisdictions have held that the notation "payable through" on the face of a draft immediately designates the bank a "collecting bank." *Id. See, e.g.*, Manufacturers Nat'l Bank v. Sutherland, 16 Mich. App. 286, 167 N.W.2d 894 (1969); Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co. 514 S.W.2d 860 (Mo. App. 1974). However, the court felt that "simply the word 'through' in small print followed by the name of the bank" created an ambiguity. 197 Neb. at 285-86, 249 N.W.2d at 196.

14. *See* U.C.C. § 3-104(1)(b). The court observed that the drafts contained the notation "CK" (checks) and the phrase "pay to the order of," which are typical of checks. In addition, the items stated "void if not cashed within 90 days," which the court felt typified checks since a draft is ordinarily for immediate presentment. 197 Neb. at 285, 249 N.W.2d at 196.

15. 197 Neb. at 286, 249 N.W.2d at 196.

16. *Id. See* U.C.C. § 4-302.

dealer for acceptance or payment.[17]

Finally, the court observed that although the dealer picked up the items after the day of receipt and had the opportunity to stop payment, the instruments in fact needed no acceptance by the dealer and were deemed payable unless the dealer affirmatively refused the item.[18] This the court found analogous to the procedure for stopping payment on a check.[19]

Although the ultimate resolution of the issues in *Berman* seems to have been supported by the relevant evidence, questions remain regarding the problems of the "payable through" draft.[20] The case law and literature on this topic have been relatively scarce and it has been observed that the Uniform Commercial Code itself does not clearly set out the technical differences between the processing of checks and drafts.[21] Thus, the significance of *Berman* may lie more in the fact that it brought attention to these problems than in its resolution and discussion of the issues.[22]

CONTRACTS

Noteworthy cases in the field of contracts concerned the applicability of promissory estoppel to avoid the Statute of Frauds[23] and the perennial problem of the parol evidence rule.[24]

In *Traudt v. Nebraska Public Power District*,[25] the Nebraska Supreme Court took the opportunity to analyze the parol

17. *Id.* at 287, 249 N.W.2d at 197.

18. *Id.* The court had earlier noted that the dealer had never refused an item.

19. *Id.* at 287-88, 249 N.W.2d at 197.

20. For example, the court failed to discuss the effect of Regulation J of the Federal Reserve regulations, 12 C.F.R. § 210 (1969), on the handling of instruments for payment of money. U.C.C. § 4-103 provides for variation of the Code provisions on collection by agreement. U.C.C. § 4-103(2) states that Federal Reserve regulations have the effect of agreements. *See* Katskee, *The Perils and Pitfalls of the "Payable Through" Draft*, 94 BANK. L. J. 333 (1977), which analyzes Regulation J and concludes that had the *Berman* court considered Regulation J, it would have reached the same result. For another discussion of Regulation J, *see* J. CLARKE, H. BAILEY, & R. YOUNG, BANK DEPOSITS AND COLLECTIONS 165-209 (1972).

21. Interview with Melvin R. Katskee, General Attorney, Omaha National Corp., in Omaha, Neb., July 12, 1977.

22. *Id.* Katskee commented that the Code provisions are geared toward the problems of handling and processing of checks and do not clearly address the processing of drafts. *See also* Katskee, *The Perils and Pitfalls of the "Payable Through" Draft*, 94 BANK. L.J. 333 (1977), which examines and suggests solutions to the practical problems concerning "payable through" drafts.

23. Farmland Servs. Coop, Inc. v. Klein, 196 Neb. 538, 249 N.W.2d 86 (1976). *See* Note, 11 CREIGHTON L. REV. (1977).

24. Traudt v. Nebraska Pub. Power Dist., 197 Neb. 765, 251 N.W.2d 148 (1977).

25. *Id.*

evidence rule, that legal concept "whose mysteries are familiar to many but fathomed by few."[26] Although the court essentially reaffirmed its long established, and conservative, position on the use of parol evidence,[27] its opinion is interesting in that it specifically addresses the pivotal problem of integration.[28]

The Traudts were landowners who granted an easement to the power district.[29] The conveyance stated a consideration of one dollar and further payment of one thousand dollars for four poles to be set. It also contained a provision showing how the payment was computed.[30] The Traudts alleged that at the time of the negotiations for the easement, the power district orally promised that if other landowners received more money, the Traudts would receive more money. The power district later acquired from another party a similar easement by eminent domain proceedings and the Traudts brought their action for additional funds.[31]

In approaching the problem of whether the alleged oral agreement could be admitted into evidence, the court acknowledged the "crucial question": "[I]n what manner is it to be determined whether the transaction was integrated into the conveyance which is the grant of easement?"[32] The court posited three tests which it said have been established in Nebraska: (1) the "completeness" of the writing,[33] with the corollary that the writing is the "sole criteria" [sic] of its own completeness;[34] (2) whether the evidence outside the writing "varies or contradicts"

26. J. MURRAY, CONTRACTS § 105, at 222 (1974).

27. For a review of early cases stating the rule and its exceptions, *see* Theno v. National Assurance Co., 133 Neb. 618, 276 N.W. 375 (1937); Wilson, *Parol Evidence Rule in Nebraska*, 4 NEB. L. BULL. 115 (1927).

28. As commentators have pointed out, the question of whether there is an integrated writing and whether such integration is total or partial is the "critical question to be determined in the application of the parol evidence rule." MURRAY, *supra* note 26, § 106, at 229. *See also* Calamari & Perillo, *A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L. J. 333, 337 (1967), in which the authors say the concept of total integration is the "battleground" of disagreement as to application of the rule.

29. 197 Neb. at 767, 251 N.W.2d at 149-50.

30. *Id.* at 771-72, 251 N.W.2d at 152.

31. *Id.* at 767, 251 N.W.2d at 150.

32. *Id.* at 769, 251 N.W.2d at 151.

33. *Id.* at 770, 251 N.W.2d at 151. S. Spiegal & Son v. Alpirn, 107 Neb. 233, 244, 185 N.W. 415, 419 (1920) stated the proper inquiry to be "whether or not the writing appears on inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties. . . ."

34. 197 Neb. at 770, 251 N.W.2d at 151. In Dawson County State Bank v. Durland, 114 Neb. 605, 611-12, 209 N.W. 243, 245 (1926), Nebraska adopted the test that the "completeness of a written contract is the writing itself, and parol evidence to show that it is incomplete is incompetent."

the terms of the writing;[35] and (3) the test stated by Dean Wigmore[36] that integration depends upon the intent of the parties.[37]

Although the restrictive "four corners" or "appearance" standard of the first two tests might appear incompatible with Wigmore's "search for intent" test, the court found that the three tests are not "necessarily mutually exclusive."[38] The tests in fact tend to complement each other since the effect of the Wigmore test is to confine the search for intent to the terms of the writing.[39] Thus, in a passage which the court seemed to find particularly supportive of its position, Wigmore states:

> In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element.[40]

Applying this standard, the court held that since the subject of consideration was dealt with in the conveyance and was a part of the transaction, it must be governed by the terms of the writing. Thus, the court found the conveyance to be a total integration of the agreement and parol evidence regarding the oral agreement to be incompetent.[41]

In *Traudt*, the Nebraska court lent force to the remark of one commentator that "the essence of the parol evidence rule is discovered by focusing upon how the judge performs this function [of determination of integration]."[42] The *Traudt* court confined its determination to the terms and face of the written agreement. In doing so, it eschewed the more liberal approach

35. 197 Neb. at 770, 251 N.W.2d at 151. *See, e.g.*, S. Spiegal & Son v. Alpirn, 107 Neb. 233, 245, 185 N.W. 415, 419 (1920); Cornhusker Dev. & Inv. Group, Inc. v. Knecht, 180 Neb. 873, 879, 146 N.W.2d 567, 572 (1966).

36. 9 WIGMORE ON EVIDENCE § 2430 (3d ed. 1940).

37. 197 Neb. at 770, 251 N.W.2d at 151. In Arman v. Structiform Eng'r Co., 147 Neb. 658, 666-67, 24 N.W.2d 723, 728 (1946), the court quoted extensively from Wigmore and adopted his view of how the intention of the parties is to be determined.

38. 197 Neb. at 771, 251 N.W.2d at 152.

39. *See* MURRAY, *supra* note 26, § 106, at 232. Murray criticizes Wigmore and Williston for retreating "from traditional determinations of intent in favor of formalistic tests." *Id. See also* Calamari and Perillo, *supra* note 28, at 341: "[S]horn of rote language of fiction indicating a search for intention, they are advocating and apply a rule of form."

40. 197 Neb. at 773-74, 251 N.W.2d at 153 (quoting 9 WIGMORE ON EVIDENCE § 2430(3), at 98 (3d ed. 1940) (emphasis added)).

41. 197 Neb. at 774, 251 N.W.2d at 153.

42. MURRAY, *supra* note 26, § 106, at 229.

whereby credible evidence may be considered in determining whether the parties intended the writing to be an integrated writing.[43] In effect, the court reaffirmed its belief in what an earlier Nebraska court referred to as the "sanctity of the written contract."[44]

CORPORATIONS

Although no developments of primary importance occurred in the area of corporations, several cases deserve mention for the problems which they presented to the court. One involved judicial dissolution of a deadlocked corporation,[45] while two others illustrated circumstances which the court found to warrant "piercing the corporate veil."[46]

In *Kollbaum v. K & K Chevrolet, Inc.*,[47] the court confronted for the first time[48] the issue of judicial dissolution of a deadlocked corporation under section 21-2096(1)(a) of the Nebraska Business Corporation Act.[49]

K & K Chevrolet, the corporation in question, was formed

43. *See* 3 J. CORBIN, CONTRACTS § 582 (1960); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 236, Comment c (1973), which suggests that if there is credible evidence that the writing is not meant to be integrated, it should be considered. For comparison of the Corbin and Williston-Wigmore positions, *see* MURRAY, *supra* note 26, § 106, at 231-32; Calamari & Perillo, *supra* note 28, at 337-45.

44. S. Spiegal & Son v. Alpirn, 107 Neb. 233, 245, 185 N.W. 415, 419 (1920).

45. Kollbaum v. K & K Chevrolet, Inc., 196 Neb. 555, 244 N.W.2d 173 (1976).

46. Hayes v. Sanitary & Improvement Dist. No. 194, 196 Neb. 653, 244 N.W.2d 505 (1976); Fowler v. Elm Creek State Bank, 198 Neb. 631, 254 N.W.2d 415 (1977).

47. 196 Neb. 555, 244 N.W.2d 173 (1976).

48. In Hockenberger v. Curry, 191 Neb. 404, 215 N.W.2d 627 (1974), the Nebraska Supreme Court dealt with dissolution under NEB. REV. STAT. § 21-2096(1)(b) (Reissue 1974) which provides for dissolution when "the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent. . . ." The court sustained a trial court's refusal to dissolve a corporation on the grounds of wrongful oppression of minority stockholders because the minority shareholders failed to sustain the burden of proving oppressive conduct. The court found no misappropriation of funds or wrongful payments of salaries or bonuses; the business appeared to be well-operated and growing; and it appeared the minority stockholders had not cooperated in the best interests of the corporation.

49. NEB. REV. STAT. § 21-2096 (Reissue 1974) provides in pertinent part:

> The district courts shall have full power to liquidate the assets and business of a corporation:
>
> (1) In an action by a shareholder when it is established:
>
> (a) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof. . . .

The above Nebraska provision is identical to the MODEL BUSINESS CORPORATION ACT § 97. For a discussion of the purpose of the provision, *see* MODEL BUS. CORP. ACT. ANN. 2d § 97, ¶2 (1971).

by Kollbaum and Kamrath, with Engel providing the consideration for purchase of the business and real estate. Engel was given fifty-five percent of the stock in the corporation, while Kamrath owned twenty-five percent and Kollbaum the remaining twenty percent of the stock.[50] Kamrath, who had been the franchise dealer, later died. At Engel's suggestion, Wente purchased Kamrath's twenty-five percent share of K & K's stock. However, Kollbaum and Engel could not agree on who the new franchise dealer should be. Because of this disagreement, none was appointed and Chevrolet terminated the franchise. Kollbaum then opened his own repair shop on K & K premises and Wente obtained and operated a new franchise, also on the premises of K & K.[51] Kollbaum later brought the action for dissolution on the theory that legal title to the real estate which K & K had been using was in him.[52] After disposing of the issue of who had title to the real estate, the court examined the district court's action in dissolving the corporation.

The court defined "deadlocked," as used in section 21-1096, as meaning "a corporation which, because of decision or indecision of the shareholders, cannot perform its corporate powers."[53] Applying this construction to the facts of the case, the court agreed with the trial court that dissolution was justified.[54] The pertinent facts justifying dissolution were that (1) the shareholders could not agree on an arrangement to save the franchise; (2) Kollbaum was operating a business on the premises but separate and distinct from the corporation; and (3) the Board of Directors was split, with Engel and Wente voting one way and Kollbaum the other.[55] In sum, the court felt that these facts demonstrated that "the corporation can no longer function in a viable fashion" and found that the district court had "followed precisely the very purpose of the dissolution statute."[56]

The supreme court felt compelled to disregard the corpo-

50. 196 Neb. at 557, 244 N.W.2d at 174.
51. *Id.* at 557-58, 244 N.W.2d at 174.
52. *Id.* at 558-60, 244 N.W.2d at 175-76. The initial issue resolved by the court was whether a resulting trust had arisen in favor of the corporation. Prior to incorporation of the dealership, Kollbaum and Kamrath had entered into a contract to purchase the business and real estate of Verzani Chevrolet of Ponca, Nebraska. Engel had provided the consideration for completing the contract and had required incorporation of the business and majority ownership. Title never existed in the corporation itself. The trial court however found that it was the intention of the parties to treat the land as that of K & K. The supreme court sustained this finding.
53. *Id.* at 562, 244 N.W.2d at 177.
54. *Id.*
55. *Id.*
56. *Id.* at 562-63, 244 N.W.2d at 177.

rate entity in *Hayes v. Sanitary & Improvement District No. 194*,[57] in which parent-subsidiary corporations were involved. The parent company, Dain, Kalman & Quail, Inc. of Minnesota (Dain-Minnesota), assumed a contract with Sanitary and Improvement District No. 194 (S.I.D.) whereby Dain was to act as fiscal agents for the S.I.D. A subsidiary, Dain Kalman & Quail Municipal-Nebraska (Dain-Nebraska), was formed to act as the fiscal agents.[58] Dain-Nebraska handled the issuance of certain bonds for the S.I.D. and received a $55,000 fee for its services. Dain-Minnesota purchased the bonds and made a profit of $163,000 on the sale of the bonds and supplemental coupons.[59] At issue was whether Dain-Nebraska, to whom the fee was paid, "occupied the position of bona fide agent or was, instead, a purchaser."[60]

The court held that the evidence was sufficient to sustain the trial court's determination that Dain-Nebraska was a corporate shell through which Dain-Minnesota conducted its business.[61] The relevant facts supporting this holding were that Dain-Nebraska's main source of credit was through the parent company; that Dain-Nebraska employees were paid out of a Dain-Minnesota payroll account; that there was "almost a total interlocking of officers and directors" between the two corporations; and that there was no evidence that Dain-Nebraska had made any attempt to sell the bond issue to other parties.[62] In essence, the court held that "where the difference between corporations is reduced to mere matter of bookkeeping, such corporations cease to have separate legal entities and will, in the interest of justice, be treated as one."[63]

---

57. 196 Neb. 653, 244 N.W.2d 505 (1976).

58. *Id.* at 656, 244 N.W.2d at 508.

59. *Id.* at 657-58, 244 N.W.2d at 509.

60. *Id.* at 664, 244 N.W.2d at 512. Resolution of this issue was important because NEB. REV. STAT. § 31-755 (Reissue 1974) provides that general obligation bonds may not be sold for less than their par value. If Dain-Nebraska were in fact a "bona fide agent," payment of the $55,000 fee would not have been regarded as a sale of bonds below par. If Dain-Nebraska were deemed a purchaser of the bonds, any allowance of commissions and fees to it would be regarded as a violation of the statutory prohibition against a sale at less than par. 196 Neb. at 665, 244 N.W.2d at 512.

61. *Id.* at 664, 244 N.W.2d at 511-12.

62. *Id.* at 662-63, 244 N.W.2d at 511.

63. *Id.* at 663, 244 N.W.2d at 511 (quoting Massachusetts Bonding & Ins. Co. v. Master Laboratories, Inc., 143 Neb. 617, 628, 10 N.W.2d 501, 506 (1943)). *See* H. HENN, LAW OF CORPORATIONS § 148, at 258-59 (2d ed. 1970) where the author observes:

> In the case of subsidiary or other affiliated corporations, the separate corporate entities or personalities will be recognized, absent illegitimate purpose, unless:

The court also felt it necessary to disregard the "corporate fiction" in *Fowler v. Elm Creek State Bank*,[64] where it found the activities of the stockholders in selling debentures to be "flagrantly fraudulent."[65]

The plaintiffs in *Fowler* brought actions against the bank, Midstate Insurance and Management, Inc. (Midstate), a holding company formed by the defendants for the purpose of purchasing the bank, and the five directors and stockholders of the bank, and Midstate. The plaintiffs alleged fraud, negligent mismanagement, and dissipation of corporate assets.[66]

The record before the court showed a plethora of irregularities in the corporate operations. The five defendants were shareholders and officers of both Midstate and the bank. Midstate had no board of directors and all of its business was conducted by the shareholders acting as a board of directors.[67] Following Midstate's purchase of the bank, the bank consistently showed a substandard financial condition and was continually criticized by the Department of Banking.[68] In July, 1970, the defendants, acting as shareholders of Midstate, voted to issue up to $200,000 in five year debentures for the purpose of altering the financial condition of the bank.[69] In a series of seven transactions, two of the defendants sold approximately $80,000 worth of debentures to the plaintiffs, representing that the debentures were a sound investment and that the bank was in sound finan-

---

(a) The business transactions, property, employees, bank and other accounts and records of the corporations are intermingled; . . .
(e) The policies of the corporation are not directed to its own interests primarily but rather to those of the other corporation.

64. 198 Neb. 631, 254 N.W.2d 415 (1977).

65. *Id.* at 639, 254 N.W.2d at 419.

66. *Id.* at 633, 254 N.W.2d at 417. Plaintiffs had also brought actions based upon violation of the Nebraska Blue Sky Law, Securities Act of Nebraska, NEB. REV. STAT. §§ 8-1101 to -1124 (Reissue 1974). However, these were dismissed because the statute of limitations had run on them.

67. 198 Neb. at 634, 254 N.W.2d at 417. Although the court did not raise the point, this activity on the part of the shareholders would appear to have violated NEB. REV. STAT. § 21-2035 (Reissue 1974) which provides that "[t]he business and affairs of a corporation shall be managed by a board of directors." This provision has been construed as meaning that a corporation "must have a board of directors" and that shareholders cannot assume managerial functions. MODEL BUS. CORP. ACT. ANN.2d § 35, ¶2 Comment (1971). Nebraska has not adopted the Model Act's provision for close corporations.

68. 198 Neb. at 634-35, 254 N.W.2d at 417-18. Among the adverse findings of the Department of Banking were that the adjusted ratio of capital to assets was substantially below average and finally fell below the department's guideline figure; that the percentage of delinquent loans was substantially higher than that of banks of comparable size; and that at one time the bank was deficient in its legal reserve requirement on five business days in violation of law. *Id.*

69. *Id.* at 635, 254 N.W.2d at 418.

cial condition.[70] In April, 1975, the Department of Banking and the Federal Deposit Insurance Corporation closed the bank. When the plaintiffs failed to receive any further interest or principal payments, they brought their actions against the defendants.[71]

On appeal from the trial court's finding for the plaintiffs, the defendants urged three arguments: (1) that there was insufficient evidence that fraudulent or knowing misrepresentations were made; (2) that representations made by two of the defendants were not authorized by the remaining defendants; and (3) that the evidence did not warrant piercing the corporate veil and imposing liability on the individual defendants.[72]

In disposing of these contentions, the court held that each of the defendants "knew or should have known, that facts would have to be concealed or misrepresented in order to sell the debentures"[73] and that the defendants could not avail themselves of the argument that someone else had committed the wrongful acts.[74] Finally, the court held that "where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefore in their individual capacities."[75]

REPLEVIN

In *White Motor Credit Corp. v. Sapp Brothers Truck Plaza, Inc.*,[76] the supreme court dealt with the nature of wrongful detention and the proper measure of damages for property which had been unlawfully detained. The plaintiff, White Motor Credit Corporation (Credit), was the assignee of a security agreement granting an interest in a freightliner tractor which

70. *Id.* at 635-37, 254 N.W.2d at 418.
71. *Id.* at 637, 254 N.W.2d at 418.
72. *Id.*, 254 N.W.2d at 419.
73. *Id.* at 638, 254 N.W.2d at 419.
74. *Id.* The court found Ashby v. Peters, 128 Neb. 338, 258 N.W. 639 (1935) to be controlling for the proposition that "[a]n individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known." 198 Neb. at 638, 254 N.W.2d at 419.
75. *Id.* at 639, 254 N.W.2d at 419. *See* Ashby v. Peters, 128 Neb. 338, 258 N.W. 639 (1935); Davis v. Walker, 170 Neb. 891, 104 N.W.2d 479 (1960). *See also* H. HENN, LAW OF CORPORATIONS § 146, at 252 (2d ed. 1970):

> The test [for disregarding the corporate entity] is simply whether or not recognition of corporateness would produce unjust or undesirable consequences inconsistent with the purpose of the concept. . . . Perversion of the concept to improper uses and dishonest ends (e.g. to perpetrate fraud, to evade the law, to escape obligations) . . . will not be countenanced.

76. 197 Neb. 421, 249 N.W.2d 489 (1977).

had been purchased by Missouri Minerals, Inc. (Missouri) for $17,900. This agreement had been properly filed and was noted on the certificate of title as the first lien against the truck.[77]

In August of 1973, Sapp Brothers Truck Plaza (Sapp) detained the truck, placed a chain on it, and refused to release it until a bill of nearly $9,000 was paid. Sapp then brought an action to collect money due it.[78] On December 15, 1973, Missouri defaulted on its payment due Credit. On December 28, 1973, pursuant to the Sapp action, the sheriff attached the truck but left it in the custody and control of Sapp. The appraised value of the truck at the time of the attachment was $22,000.[79]

In July of 1974, the truck sustained damage while on Sapp's lot and was subsequently pilfered. Although Credit made demand on Sapp for return of the truck in September, 1974, Sapp remained in possession of the truck until January, 1975, at which time the sheriff had it towed to another lot. On April 29, 1975, the trial court gave Credit temporary possession of the truck. The truck was appraised in May, 1975 at approximately $3,000 and sold the next month for $4,100.[80]

The trial court held that Credit was entitled to possession of the truck but dismissed the action for wrongful detention.[81] The supreme court agreed with the trial court on the matter of right to possession[82] but held that the trial court had erred in dismissing the action for wrongful detention. The supreme court assumed that the trial court had dismissed this action on the basis that Sapp had seized the truck before Credit's right to possession had arisen.[83] The court pointed out that it was immaterial whether the original taking was wrongful and that "the issue is . . . whether plaintiff is entitled to possession as against defendant."[84] Since Credit's interest was superior to that of Sapp's, Credit was entitled to possession and Sapp's continued possession was wrongful.[85]

77. *Id.* at 422-23, 249 N.W.2d at 491. NEB. REV. STAT. § 60-110 (Reissue 1974) provides that a security agreement noted on the certificate of title "shall be valid as against the creditors of the debtors, whether armed with process or not. . . ."

78. 197 Neb. at 423, 249 N.W.2d at 491-92.

79. *Id.*

80. *Id.* at 424-25, 249 N.W.2d at 492.

81. *Id.* at 422, 249 N.W.2d at 493.

82. *Id.* at 425, 249 N.W.2d at 492. The court stated that NEB. REV. STAT. § 60-110 (Reissue 1974) gave Credit an interest in the truck superior to that of Sapp's. *Id.* at 426, 249 N.W.2d at 493. *See* note 77 *supra.*

83. 197 Neb. at 426, 249 N.W.2d at 493. Sapp had seized the truck in August of 1973 whereas Missouri did not default until December 15, 1973.

84. *Id.* The court further observed that NEB. REV. STAT. § 25-1093.01 (Reissue 1975) does not require wrongful seizure.

85. *See* note 82 *supra.*

On the issue of damages, the court held that although the normal measure in replevin actions is either interest or loss of use of the property, the applicable statute[86] was broad enough to permit recovery for depreciation and deterioration.[87] The court accepted as the proper measure the difference between the value of the property at the time and place of the unlawful detention and its value at the time it was delivered to the prevailing party.[88] On the facts of the case, this would have been the difference between the value of the truck at the time of Sapp's attachment—$22,000—and the value of the truck at the time it was delivered to Credit—$4,100.[89] However, since Credit claimed "only a special interest in the property," the court held that its recovery was limited to its security interest in the truck not to exceed $17,900.[90]

UNIFORM COMMERCIAL CODE

Article Two—Damages

National Farmers Organization, Inc. v. McCook Feed & Supply Co.[91] (*N.F.O.*) was a case of first impression in which the Nebraska Supreme Court allowed recovery of lost profits via the consequential damages provision of section 2-715 of the Uniform Commercial Code.[92] In *N.F.O.*, the buyer sought recovery for lost profits which allegedly resulted from the seller's

86. NEB. REV. STAT. § 25-10,105 (Reissue 1975) provides in pertinent part: "In all cases where the property has been delivered to the plaintiff, . . . the jury . . . shall assess adequate damages to the plaintiff for the illegal detention of property."

87. 197 Neb. at 427, 249 N.W.2d at 493. *See also* Schrandt v. Young, 62 Neb. 254, 86 N.W. 1085 (1901), allowing that where the property is returned, damages for deterioration may be recoverable.

88. 197 Neb. at 428, 249 N.W.2d at 494. The court apparently preferred this over another measure to which it cited—the difference between the value of the property at the time of the wrongful detention and its value at the time of the trial.

89. *Id.* The court said the sale price should be considered as the value of the truck at the time of delivery to Credit.

90. *Id.* In Creighton v. Haythorn, 49 Neb. 526, 529, 68 N.W. 934, 934-35 (1896), the court observed that the statute allowing damages in replevin actions had been consistently construed "as limiting the recovery of a defendant who claims a special ownership only by virtue of a lien upon the property replevied, to the amount due upon such lien, within the value of the property. . . ." *See also* Hickman-Williams Agency v. Haney, 152 Neb. 219, 227, 40 N.W.2d 813, 818-19 (1950); Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 555, 41 N.W.2d 855, 858 (1950).

91. 196 Neb. 424, 243 N.W.2d 335 (1976).

92. U.C.C. § 2-715(2)(a) provides:

> Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . .

refusal to deliver some 45,000 bushels of corn. The buyer had intended to make a profit on the transaction by reselling the corn in the higher Kansas market.[93]

In allowing the injured buyer to recover loss of profits as consequential damages, the court observed that the Code provides three general approaches in assessing a buyer's damages where the seller has failed to deliver. The court first noted section 2-712 which provides that the buyer may "cover" by making purchase of substitute goods.[94] The buyer in *N.F.O.* had proved that he had unsuccessfully attempted to cover. The court found that unsuccessful cover did not preclude the buyer's other remedies under Article 2.[95]

The court then looked at section 2-713, which provides the contract-market differential as a measure of damages.[96] The buyer in *N.F.O.*, however, made no offer of proof as to the market price of the undelivered goods and chose to recover his damages under section 2-715.[97] Finding that the seller was aware that the buyer intended to resell the goods in another available market, the court allowed recovery under this third approach.[98]

Although *N.F.O.* clarified that lost profits are recoverable as consequential damages in resale cases,[99] it left unclear the

93. 196 Neb. at 427, 243 N.W.2d at 337.

94. *Id.* Section 2-712(1) states that the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from seller.

95. 196 Neb. at 428, 243 N.W.2d at 337. Section 2-712(3) states that "failure of the buyer to effect cover within this section does not bar him from any other remedy." Comment 3 points out that cover is not "mandatory" but that § 2-713(3) "must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover."

96. 196 Neb. at 428, 243 N.W.2d at 337. Section 2-713 provides in pertinent part: "The measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price. . . ."

97. 196 Neb. at 428, 243 N.W.2d at 338. *See* note 92 *supra*.

98. *Id.* By holding that the seller's knowledge of the buyer's intent to resell was sufficient to allow the buyer consequential damages, the court specifically rejected the so-called "tacit agreement" test. This test, articulated by Justice Holmes in Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 545 (1903), requires the seller to consciously assume the risk of consequent loss in case of his breach. The Nebraska court eschewed this test in favor of that which finds it sufficient if the seller knew of the buyer's situation. 196 Neb. at 430-31, 243 N.W.2d at 337. *See* U.C.C. § 2-715, Comment 2, which states that the "tacit agreement" test is rejected. *See also* Comment 6 to the same section: "In the case of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of subsection (2)(a)."

99. *See, e.g.*, Gulf Chemical & Metallurgical Corp. v. Sylvan Chemical Corp., 122 N.J. Super. 499, 300 A.2d 878, *aff'd* 126 N.J. Super. 261, 314 A.2d 73

relationship between sections 2-713 and 2-715.[100] In *N.F.O.*, the court allowed lost profits where the buyer made no attempt to show contract market differential. This would indicate that, in Nebraska, section 2-715 is a distinct alternative to section 2-713. What remains doubtful is whether an injured buyer could seek consequential damages under section 2-715 after having proven the contract market differential under section 2-713.[101]

In *Farmer's Union Co-op Co. of Mead v. Flamme Brothers*,[102] the Supreme Court dealt with the issue of adequate cover. In *Flamme*, the seller (Flamme) and the buyer (Co-op) entered into three contracts calling for the seller to deliver a total of 140,000 bushels of corn over a three month period.[103] The seller failed to deliver a substantial portion of the corn and the buyer purchased corn from its regular customers until the three contracts were fulfilled.[104] The buyer then brought an action against the seller for breach of the contracts.

On the issue of buyer's cover, the supreme court held that the buyer had acted reasonably in continuing to buy corn from its members and that it was not necessary for it to go into the market.[105] The court observed that if the buyer had purchased the entire volume of corn at one time, damages may have been lower, but that "the offended party is not bound by hindsight" and that the buyer had acted "without unreasonable delay" in effecting cover.[106]

(App. Div. 1973); Harbor Hill Lithographing Corp. v. Dittler Bros., Inc., 76 Misc.2d 145, 348 N.Y.S.2d 920 (1973). Both cases, discussed by the court in *N.F.O.*, allowed lost profits under § 2-715 where "cover" was impractical and proof of the contract market differential was lacking. *See also* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 10-4, at 322 (1972).

100. That a buyer must attempt cover before seeking consequential damages is clear. U.C.C. § 2-715(2)(a) requires that before the buyer may recover consequential damages he must attempt to prevent such damages by cover. Thus, although the court in *N.F.O.* did not specifically require cover, it did point out that the buyer had unsuccessfully attempted cover and was not thereby barred from his other remedies.

101. *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 10-4, at 322 n. 69 (1972), cautioning that "a court must be careful not to overcompensate him [a buyer]" in granting a buyer lost profits. For another discussion of *N.F.O. see* C. Gotch, *Loss of Profits—Past and Future*, in THE NEBRASKA LAW ON THE MEASURE OF DAMAGES X-11 (Nebraska Continuing Legal Education, Inc. 1976).

102. 196 Neb. 697, 245 N.W.2d 464 (1976).

103. *Id.* at 700, 245 N.W.2d at 465.

104. *Id.* at 705, 245 N.W.2d at 468.

105. *Id.* at 706-07, 245 N.W.2d at 468.

106. *Id.* The court found Comment 2 to U.C.C. § 2-712 "particularly applicable" to the facts in *Flamme*:

> The definition of "cover" under subsection (1) envisages a series of contracts or sales, as well as a single contract or sale. . . . The test of

Article Nine—Disposition of Collateral

In *First National Bank of Bellevue v. Rose*,[107] the supreme court further clarified the "three day rule" which it had earlier established[108] and which requires a creditor to allow three days for a debtor to receive notice of disposition of collateral.[109]

The defendant Rose had signed a promissory note in favor of the plaintiff bank which was secured by some of Rose's business equipment. Rose subsequently defaulted on the note.[110] The bank repossessed the collateral and notified Rose on a Wednesday that it intended to dispose of the equipment at a private sale on the following Monday.[111] The court found this notice inadequate. It observed that the notice which the bank had sent did not allow Rose sufficient time "to arrange financing or take other steps to protect his interest in the collateral, particularly if banks were closed on Saturday."[112] It held that the three day rule which it had previously established[113] was a "minimum requirement" and not necessarily sufficient in all cases.[114] Finding the bank's notice to be unreasonable, the court held the bank's deficiency judgment to be barred.[115]

In *Contois Motor Co. v. Saltz*,[116] the court distinguished public and private sales.[117] The plaintiff Contois Motors (Motors) sold an automobile to the defendant Saltz, who ex-

---

proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

107. 197 Neb. 392, 249 N.W.2d 723 (1977).

108. *See* DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N.W.2d 745 (1976), *discussed in* Comment, 11 CREIGHTON L. REV. (1977).

109. In Delay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., *supra* note 108, the court had imposed the three day requirement as an element of reasonable notice required by U.C.C. § 9-504(3) which provides in pertinent part that "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor. . . ."

110. 197 Neb. at 394, 249 N.W.2d at 724.

111. *Id.* at 397, 249 N.W.2d at 725.

112. *Id.*, 249 N.W.2d at 726.

113. *See* notes 108, 109 *supra*.

114. 197 Neb. at 397, 249 N.W.2d at 726.

115. *Id.*

116. 198 Neb. 455, 253 N.W.2d 290 (1977).

117. Although U.C.C. § 9-504(3) says that disposition of collateral "may be by public or private sale," neither type of sale is explained by the Code. The distinction is important since the form of notice given to the debtor differs for each and the type of sale may affect the rights of the purchaser. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26-11, 15 992 (1972).

ecuted a security agreement in favor of Motors to secure payment of the purchase price. Saltz subsequently defaulted; Motors repossessed the automobile and resold it for an amount less than the balance due. Motors then brought an action to recover the deficiency.[118]

The notice which Motors had sent to Saltz stated that if Saltz did not pay the amount due within a specified time, the car would be sold at a private sale. Motors later placed the car on its lot for sale in the ordinary course of its business as an automobile dealer. Saltz contended that since the car was "available for public sale to anyone," the sale made was a public one. Saltz then argued that the sale was not reasonable within the meaning of section 9-504(3)[119] since Motors had used a private sale form for a public sale.[120]

The court held that the notice was clearly of a private sale.[121] It said that public sales are characterized by competitive bidding between prospective customers and are made at an auction or under sealed bids where there is competitive bidding.[122] Because Motors' sale of the car was not made under these circumstances, it was a private sale and its notice was reasonable as required by section 9-504(3).

LEGISLATION

BANKING

In an apparent response to *Nebraskans For Independent Banking v. Omaha National Bank*,[1] (*Independent Banking*),

118. 198 Neb. at 456, 253 N.W.2d at 291-92.

119. U.C.C. § 9-504(3) provides that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." *See also* note 109 *supra*.

120. 198 Neb. at 463, 253 N.W.2d at 295. *Saltz* relied on DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N.W.2d 745 (1976), where the court held that a creditor who uses a private sale form for public sales violates § 9-504(3) and bars a deficiency judgment.

121. 198 Neb. at 463, 253 N.W.2d at 295.

122. *Id.* at 463-64, 253 N.W.2d at 295.

1. 530 F.2d 755 (8th Cir. 1976), *cert. granted*, 96 S.Ct. 2616 (1976). On petition for writ of certiorari to the United States Supreme Court, the petition was granted, the judgment of the court of appeals was vacated, and the case was remanded to the court of appeals for reconsideration in light of L.B. 763, 1976 Neb. Laws 531, in which the 84th Legislature, 2nd Session had amended NEB. REV. STAT. § 8-157 (Reissue 1974) to redefine "attached auxiliary teller office."

the Unicameral amended section 8-157 of the Nebraska statutes to provide what shall constitute an "attached auxiliary teller office."[2] L.B. 77,[3] enacted by the Eighty-Fifth Legislature, provides that a teller office which is "physically connected by a pneumatic tube or tubes, walkway, tunnel, or any other mechanical or structural connection or attachment for the public use of the bank" qualifies as an attached auxiliary teller office, if, in addition, it is within two hundred feet of the main bank.[4] The definition of such a facility is important since section 8-157 also provides that a bank may not establish more than two detached auxiliary teller offices, or "branch banks."[5]

In *Independent Banking*, a bank's alleged attached auxiliary teller office was held to be a "branch bank."[6] The facility in question was a "custom-built, free-standing building unattached to the main bank" with a pneumatic tube connection between the two buildings.[7] It accepted deposits, cashed checks, and made non-commercial loans. However, it did not offer safe deposit boxes, trust services, or commercial loans.

The Eighth Circuit, sitting en banc,[8] found the pivotal issue to be whether the disputed facility was "apart from the char-

---

The Eighth Circuit Court of Appeals then remanded the cause to the district court for further proceedings in light of the Supreme Court's opinion. 539 F.2d 673 (1976). On remand, the district court held that L.B. 763 was improperly adopted by the Nebraska Legislature insofar as the amendment redefining "auxiliary tellers" was not germane to the original bill dealing with financial institutions and was not before the Legislature for five legislative days as required by Article III, § 14 of the Nebraska Constitution. 423 F.Supp. 519, 523 (1976).

2. NEB. REV. STAT. § 8-157(2) (Reissue 1974) simply provided that "any bank may maintain an attached auxiliary teller office" without defining "auxiliary teller office".

3. L.B. 77, 85th Legis., 1st Sess. (1977) (amending NEB. REV. STAT. § 8-157 (Reissue 1974)). For background of this bill, *see* note 1 *supra*.

4. L.B. 77 § 1(2), 85th Legis., 1st Sess. (1977). The facility also may not be within 300 feet of another bank or another bank's auxiliary or detached teller offices.

5. *See also* § 7 of the McFadden Act, 12 U.S.C. § 36 (1970), which sets forth the conditions under which national banks may establish branches. One such condition is that a "branch" may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. § 36(c) (1970). *See* First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966) for extensive discussion of the history and purpose of the McFadden Act. The court noted that the purpose of the Act was to "place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Id.* at 261.

6. 530 F.2d at 757.

7. *Id.* at 758.

8. Earlier, a divided panel of the Eighth Circuit had affirmed the district court's finding that the disputed facility was not a branch bank. A petition for rehearing en banc was granted, which action vacated the panel opinion. 530 F.2d at 757.

tered premises," since it was clear that the auxiliary office was otherwise a "branch bank" within the United States Supreme Court's definition of that term.[9] Relying heavily on a Nebraska Department of Banking regulation which stated that connection by a system of pneumatic tubes did not "convert a detached facility into an attached facility,"[10] the court held that the facility was "one located 'apart from the chartered premises' as a matter of law."[11]

Whether section 8-157 as amended will be dispositive in further determination of the branch banking question in Nebraska is unclear. Three of the justices in *Independent Banking* vigorously took issue with the majority's having relied on state law. All three felt that the definition of "branch bank" is solely a question of federal law.[12]

CORPORATIONS

The most significant activity of the legislature in the area of corporations was the passage of a corporate takeover act.[13] L.B.

9. In First Nat'l Bank v. Dickinson, 396 U.S. 122, 133 (1969), the Supreme Court, construing 12 U.S.C. § 36(f) (1970) (The McFadden Act), stated that "the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises. . . ." (emphasis in original).

10. Neb. Dep't of Banking Reg. § 8-157-01 (1970) states:

> An attached auxiliary teller office contemplates a physical connection, a constructed attachment whereby there exists a single, integrated banking operation at the main banking house, expanded to accomodate customers coming to the main banking house. *Connecting a main banking facility by means of a system of pneumatic tubes and/or closed circuit television does not convert the detached facility into an attached facility* (emphasis added).

11. 530 F.2d at 763.

12. *Id.* at 764 (Lay, J., concurring); *id.* at 764-67 (Webster, J. & Henley J., dissenting). The United States Supreme Court vacated the decision and remanded the case to the Eighth Circuit for reconsideration in light of the amended statute. *See* note 1 *supra*.

13. L.B. 303, 85th Legis., 1st Sess. (1977) (current version at NEB. REV. STAT. §§ 21-2401 to -2417 (Supp. 1977)). Passage of state corporate takeover statutes has been a fairly recent development. As pointed out in Note, *The Indiana Business Takeover Act*, 51 IND. L.J. 1051, 1051 (1976), the "prosperity of the Sixties developed a new form of corporate investment" whereby corporations began to invest their excess capital by investing in other corporations. When the management of the target company proved reluctant to go along with the acquisition, the buyers, by means of the "tender offer," directed their efforts to the shareholders. It is this latter activity which state corporate takeover acts attempt to regulate. Cash tender offers are also regulated on the federal level by the Williams Act, 15 U.S.C. § 78(n), (e), (f) (1970). This raises problems of federal preemption. State takeover acts have been challenged on the grounds of federal preemption, the commerce clause, and due process. *See, e.g.*, Great Western United Corp. v. Kidwell, 46 U.S.L.W. 2144 (Sept. 20, 1977) (Idaho takeover statute held unconstitutional on grounds of preemption and violation of commerce clause). For discussion of the constitutional issues involved, *see generally* Moy-

303[14] (the Nebraska Act) provides requirements for certain acquisition attempts, provides duties for persons making such attempts, and specifies unlawful acts in corporate acquisitions.

The Nebraska Act regulates takeovers of any corporation (1) organized under the laws of Nebraska; or (2) having its principal place of business in Nebraska; or (3) having its principal executive office in Nebraska; or (4) having substantial assets in Nebraska.[15] Thus, the Act would affect out-of-state shareholders and national corporations.[16]

A takeover bid[17] is defined as the acquisition of or an offer

---

lan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687 (1975); Comment, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 SO. CAL. L. REV. 1133 (1974). For a discussion of the Williams Act, *see generally* Moylan, *Exploring the Tender Offer Provisions of the Federal Securities Law*, 43 GEO. WASH. L. REV. 551 (1975). For discussions of particular state acts, *see* Note, *The Indiana Business Takeover Statute*, 51 IND. L. J. 1051 (1976); Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722 (1970); Gibson & Freeman, *Business Associations, The Thirteenth Annual Survey of Virginia Law*, 54 VA. L. REV. 1224 (1968). For a general discussion of takeovers, *see Corporate Takeovers—The Unfriendly Tender Offer and the Minority Stockholder Freezeout*, 32 BUS. LAW. 1299 (1977).

14. L.B. 303, 85th Legis., 1st Sess. (1977) (codified in NEB. REV. STAT. §§ 21-2401 to -2417 (Supp. 1977)).

15. *Id.* § 21-2401(1).

The Nebraska Act does not apply when it is inconsistent with federal legislation in the following instances:

(1) when the offeror or target company is a public utility company. *Id.* § 21-2416(1);
(2) the offeror or target company is a bank or bank holding company subject to the Bank Holding Company Act of 1956, 12 U.S.C. 1841. NEB. REV. STAT. § 21-2416(2) (Supp. 1977) ;
(3) the offeror or target company is a savings and loan holding company. *Id.* § 21-2416(3);
(4) the offeror and the target company are banks and the offer is part of a merger transaction subject to approval by appropriate federal supervisory authorities. *Id.* § 21-2416.

16. This aspect of state takeover acts has been subject to the argument that they violate the commerce clause of the Constitution. Thus, a Texas district court recently held the Idaho takeover statute to be unconstitutional both because the Williams Act preempts takeover acts and because such acts are violative of the commerce clause. The court held that the Idaho statute violated the commerce clause because it did not effectuate a legitimate state purpose and its effect on interstate commerce was substantial. Great Western United Corp. v. Kidwell, 46 U.S.L.W. 2144, 2145 (Sept. 20, 1977). *See generally* Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974).

17. A takeover bid does not include:

(1) an offer effected by a dealer for his own account in the ordinary course of his business.NEB. REV. STAT. § 21-2401(1)(a) (Supp. 1977);
(2) an offer to acquire an equity security for the sole account of the offeror made to not more than ten persons within any consecutive twelve month period. *Id.* § 21-2401(1)(b);
(3) an offer approved or requested by the board of directors of the target

to acquire any equity security[18] of a target company[19] pursuant to a tender offer[20] or request for tender, if after tender, the offeror[21] will be the record or beneficial owner of more than ten percent[22] of the outstanding shares of any class of equity securities.

Under the Nebraska Act, a person making a takeover bid must (1) announce publicly the terms of the proposed bid and (2) file with the Department of Banking a statement containing certain required information.[23] In addition, the person making the bid cannot own five percent or more of the outstanding equity securities of the target company if (1) the securities were purchased within one year of the proposed bid and (2) the person did not make "fair, full, and effective disclosure" of his intention to make the bid to the person from whom he purchased the securities.[24]

The tender offer becomes effective thirty days after a disclosure statement[25] is filed with the Department of Banking

---

company if the board has furnished all terms of the offer to the shareholders. *Id.* § 21-2401(1)(c);

(4) an offer for the shares of a company with fewer than one hundred record owners. *Id.* § 21-2401(1)(d);

(5) an offer by the target to purchase its own shares. *Id.* § 21-2401(1)(e).

18. Equity security is defined as

> any shares or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of security holders, is treated as an equity security pursuant to regulations of the Department of Banking and Finance . . . .

Id. § 21-2401(5).

19. A "target company" is a corporation whose securities are to be the subject of a take-over bid. *Id.* § 21-2401(4).

20. "Tender offer" is left undefined. For a discussion of the definition of tender offer, *see* Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 388-89 (1969).

21. An "offeror" is a person who "makes, or in any way participates or aids in making, a take-over bid, and includes persons acting jointly or in concert, or who intend to exercise jointly or in concert, any voting rights attached to the securities for which such take-over bid is made." NEB. REV. STAT. § 21-2401(2) (Supp. 1977).

22. *Compare* The Williams Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1971) which requires disclosure if five percent of the outstanding shares will be owned after acquisition pursuant to the tender offer.

23. NEB. REV. STAT. § 21-2402 (Supp. 1977).

24. *Id.*

25. The Nebraska Act requires the filing of "all prospectuses, brochures, advertisements, circulars, letters or other matters by means of which the offeror proposes to disclose to offerees all information material to a decision to accept or reject the offer." *Id.* § 21-2404(1). It further requires the disclosure of:

(1) the background and identity of the offeror. *Id.* § 21-2404(2);

(2) the source and amount of funds used in the tender offer, including in particular a description of the borrowing transaction if any funds are obtained on credit. *Id.* § 21-2404(3);

unless the Department delays the effective day by order or calls a hearing with respect to the offer.[26] Any hearing must be called and held before the offer becomes effective, that is, within thirty days after filing.[27] Any determination of the Department following the hearing must be made within sixty days of the filing.[28] If the Department finds that the takeover bid fails to provide for full and fair disclosure[29] to offerees of all material information concerning the offer, it must deny the effectiveness of the bid.[30] If the finding is to the contrary, it must declare the offer effective.[31]

Prior to the effective date of the take-over bid, the offeror must (1) immediately return to any stockholder of the target company any stock certificates which that shareholder might tender or deliver to the offeror[32] and (2) make a public announcement or statement clearly indicating that it will make no tender offer until the takeover bid is effective.[33]

The Nebraska Act imposes certain conditions on the terms of the offer itself. First, the offer must be made to all shareholders of the target company who reside in Nebraska and must be made on the same basis to Nebraska shareholders as to all other shareholders.[34] Second, if the offer is for less than all the outstanding shares and a greater number of shares is tendered, the offeror must take up and pay for all securities deposited by the offerees.[35] Third, if the offeror, during the period of the

---

(3) any plans or proposals the offeror may have to sell, liquidate, or merge the assets of the target company upon gaining control. *Id.* § 21-2404(4);
(4) the number of shares the offeror currently owns or has a right to acquire. *Id.* § 21-2404(5);
(5) any information as to contracts, arrangements, or understandings the offeror has with any person concerning the shares of the target company. *Id.* § 21-2404(6);
(6) complete information on the organization and operations of the offeror. *Id.* § 21-2404(7);
(7) any other documents, exhibits, data, and information which the Department's regulations may require. *Id.* § 21-2404(8).

These disclosure requirements track those of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1970).

26. NEB. REV. STAT. § 21-2405 (Supp. 1977). The Department may call a hearing for the protection of the offerees or at the request of the target company.

27. *Id.* §§ 21-2405, -2406.

28. *Id.* § 21-2406. The Department may extend these time periods for the convenience of the parties or for the protection of the offerees in the state.

29. *See* note 25 *supra*.

30. NEB. REV. STAT. § 21-2406 (Supp. 1977).

31. *Id.*

32. *Id.* § 21-2408(1).

33. *Id.* § 21-2408(2).

34. *Id.* § 21-2409.

35. *Id. Compare* The Williams Act, § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1971)

offer, varies its terms by increasing the consideration, he must pay the increased consideration to all shareholders who tendered before the increase.[36] Fourth, the tender offer must remain open for at least thirty days.[37] Fifth, the offeror must obligate itself to take up and pay for all shares tendered by an offeree for a period of thirty days after the closing date of the tender offer and pay the highest consideration paid for the shares acquired pursuant to the takeover bid.[38] Finally, in the event that the target company merges or consolidates with the offeror within one year of the offeror's filing, the offerer must pay to any shareholder of the target company the highest per share price which the offeror paid in acquiring its holdings of the target company's common stock.[39]

Finally, the Nebraska Act contains a general antifraud provision.[40] Criminal[41] and civil[42] liability is imposed for violations of the provisions of the Act. The Department has investigatory and administrative powers[43] as well as the authority to promulgate regulations.[44]

---

which requires the offeror to take up securities deposited within ten days after copies of the offer or request are published or sent or given to the offerees.

36. NEB. REV. STAT. § 21-2409 (Supp. 1977). *Compare* The Williams Act, § 14(d)(7) 15 U.S.C. § 78n(d)(7) (1971) requiring the same provision.

37. NEB. REV. STAT. § 21-2409 (Supp. 1977).

38. *Id.* § 21-2410.

39. *Id.* § 21-2411.

40. *Id.* § 21-2412. Fraudulent, deceptive, or manipulative acts include:

(1) publication or use in connection with the offer of any untrue statement or misleading omission of material fact (but not including the mailing by a target company to its stockholders of solicitation materials published by the offeror). *Id.* § 21-2414(1);

(2) sale by any shareholder holding more than ten percent of the common stock of a target company at a price higher than the offer price. *Id.* § 21-2414(2);

(3) acquisitions of shares of the target company by or through a broker-dealer on behalf of an offeror or target company alongside the offer unless (a) the broker-dealer files such information as the Department may require, or (b) the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or a target company or that the acquisition was in connection with a takeover offer. *Id.* § 21-2414(3);

(4) any other acts or practices as the Department may prescribe by reasonable rules and regulations. *Id.* § 21-2414(4).

41. The Nebraska Act provides that the penalties and remedies set forth in the Nebraska Securities Act, NEB. REV. STAT. §§ 8-1101 to -1124 (Reissue 1974), are applicable under the corporate takeover act. NEB. REV. STAT. § 8-1117 provides that persons violating provisions of the Securities Act are subject to a fine of up to five thousand dollars, or subject to imprisonment up to three years, or both.

42. *Id.* § 8-1118 provides that a seller in violation of the Securities Act is liable to the buyer for damages. The measure of damages is the amount recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest of six percent per annum from the date of disposition.

43. *See id.* §§ 8-1115, -1116.

44. *See id.* §§ 21-2404(8), -2414(4) (Supp. 1977).

In other actions regarding corporations, the Unicameral, in L.B. 264,[45] amended section 21-2014[46] of the Nebraska statutes by expanding the classes of nonvoting stock. L.B. 264 deleted the restriction that only preferred shareholders may be denied voting rights. Section 21-2014 now provides that the articles of incorporation may limit or deny voting rights for shares of any class of stock as long as the limitation or denial is not inconsistent with other provisions of the Nebraska Business Corporation Act.[47]

LIENS

L.B. 218[48] creates a fertilizer lien in favor of a person[49] who, pursuant to a contract or agreement, (1) furnishes any fertilizer, soil conditioner, or agricultural chemical; or (2) furnishes machinery and equipment for the application of such products; or (3) performs work or labor in the application of such products.[50] In the absence of agreement as to charges, the person performing any of the above services is entitled to the reasonable charges and costs of satisfying such a lien.[51] The lien is upon crops produced within one year on the land where the above mentioned services were performed.[52]

The lien is perfected and attaches by filing a notice of lien with the county clerk of the county where the land upon which the crops are growing or to be planted is located.[53] To be valid against subsequent lienholders, the notice must be filed within thirty days of the last day upon which the product, machinery, or equipment was furnished or work performed.[54] Finally, the lien is foreclosed in manner and form provided in Article Nine of the Uniform Commercial Code.[55]

45. L.B. 264, 85th Legis., 1st Sess. (1977) (amending NEB. REV. STAT. § 21-2014 (Reissue 1974)).

46. *Id.* § 21-2014.

47. L.B. 264, 85th Legis., 1st Sess. (1977).

48. L.B. 218, 85th Legis., 1st Sess. (1977) (codified in NEB. REV. STAT. §§ 52-1101 to -1103 (Supp. 1977)).

49. A "person" includes a firm or corporation. *Id.* § 52-1101.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* § 52-1102. The notice of lien must contain:

(1) the name and address of the person for whom the products or machinery was furnished or work performed;
(2) the name and address of the person claiming the lien;
(3) the last date upon which the products or equipment were furnished or work performed; and
(4) the legal description of the land upon which the crops are growing or to be planted.

54. *Id.* § 52-1103.

55. *Id.*

SECURITY INTERESTS

Apparently at the suggestion of the Article Nine Review Committee,[56] the Unicameral amended section 60-110 of the Nebraska Certificate of Title Act,[57] making applicable the filing provisions of Article Nine[58] where motor vehicles are held as inventory.[59]

More specifically, L.B.47[60] provides that the filing provisions of Article Nine apply where the motor vehicle which is inventory is "held for sale by a person or corporation licensed . . . [under] Chapter 60, article 14[61] and is in the business of selling motor vehicles. . . ."[62] In such a situation notation of the lien on the instrument of title is not necessary.[63]

Finally, the amendment provides that "a buyer at retail from a licensed dealer of any vehicle . . . in the ordinary course of business shall take such vehicle free of a security interest."[64] Thus, the amendment incorporates the provision of U.C.C. section 9-307(1) which states that "a buyer in the ordinary course of business . . . takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of it."[65]

L.B. 157[66] amends U.C.C. section 9-306(1) to expressly in-

---

56. REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, FINAL REPORT ON PROPOSALS FOR CHANGES § 9-302 (1971).

57. NEB. REV. STAT. §§ 60-101 to -117 (Reissue 1974).

58. NEB. REV. STAT. (UCC) § 9-302 (Reissue 1971) requires that a financing statement be filed to perfect all security interests (with certain enumerated exceptions). It then provides:

> [T]he filing provisions of this article do not apply to a security interest in property subject to a statute . . . of this state which provides for central filing of, or which requires either retained possession of manufacturer's certificate of origin or indication on a certificate of title of, such security interests in such property.

Id. § 9-302(3).

59. Goods are "inventory" if

> [t]hey are held by a person who holds them for sale or lease or to be furnished under contracts for service or if he has so furnished them, or if they are raw materials, works in process or materials used or consumed in a business.

Id. § 9-109(4).

60. L.B. 47, 85th Legis., 1st Sess. (1977) (amending NEB. REV. STAT. § 60-110 (Reissue 1974)).

61. *Id.* § 60-1403.01 provides that a motor vehicle dealer must be licensed by the Nebraska Motor Vehicle Industry Licensing Board. Such license authorizes the dealer to engage in the business permitted by the license.

62. L.B. 47, 85th Legis., 1st Sess. (1977).

63. *Id.*

64. *Id.*

65. NEB. REV. STAT. (UCC) § 9-307(1) (Reissue 1971).

66. L.B. 157, 85th Legis., 1st Sess. (1977) (amending NEB. REV. STAT. (UCC) § 9-306(1) (Reissue 1971)).

clude insurance proceeds representing destroyed collateral within the meaning of "proceeds."[67] Thus, section 9-306, as amended, will avoid at least one interpretative problem of "proceeds" which has been encountered by other jurisdictions.[68]

---

67. *Id.* § 9-306(1) now provides: " 'Proceeds' includes whatever is received, including insurance proceeds representing destroyed collateral, when collateral is sold, exchanged, collected or otherwise disposed of."

68. *Compare* Quigley v. Caron, 247 A.2d 94 (Me. 1968) (insurance payments which compensate loss of collateral do not qualify as proceeds since obligation to pay derived from a personal surety contract rather than insured property itself) *with* PPG Industries Inc. v. Hartford Fire Ins. Co., 531 F.2d 58 (1976) (while not adopted by New York, amendment to U.C.C. § 9-306(1) in 1972 Revision of Article 9 persuasive indicator of effect which U.C.C. § 9-306 was originally intended to have).