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THE FINAL JUDGMENT RULE AND APPELLATE REVIEW OF DISCOVERY ORDERS IN NEBRASKA

In *Lund v. Holbrook*[1] the Nebraska Supreme Court held that no appeal could be taken until after final judgment from an order requiring a party to turn over documents to his opponent for inspection and copying. The basis for the decision was a statute limiting the appellate jurisdiction of the supreme court to the review of a "judgment rendered or final order."[2] "Final order" is defined by statute as one which " . . . in effect determines the action and prevents a judgment."[3] The same rule would undoubtedly by applied to any other discovery order in Nebraska.

This "final judgment" rule exists in some form in almost every state.[4] The application of the rule in *Lund v. Holbrook* is

1 157 Neb. 854, 63 N.W.2d 112 (1954).

2 Neb. Rev. Stat. § 25-1911 (Reissue 1948). The same provision is made as to the appellate jurisdiction of the district court on appeal from the "county court, justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court. . . ." Neb. Rev. Stat. § 25-1901 (Reissue 1948).

3 Neb. Rev. Stat. § 25-1902 (Reissue 1948).

4 New Hampshire appears to be the only state which does not have the final judgment rule. See discussion in Glover v. Baker, 76 N.H. 261, 81 Atl. 1081, 1082 (1911) where the court says, "The theory that questions of law could be finally determined only by a writ of error after final judgment has been so long abandoned as to be practically unknown to practitioners at this bar."

in line with the rulings of the majority of states as to discovery orders.[5] The purpose of the rule is to reduce the volume of appeals which would, in the absence of the rule, clog the calendars of appellate courts and cause interminable delay in litigation.[6]

Many states have modified the final judgment rule by statute to allow immediate appeal from specified orders which are not reviewable under the majority rule until after final judgment. The reason for these modifications may be either that the final judgment rule does not fulfill its puropses, or that the assumption underlying the rule (i.e., that the effect of any error on the part of the trial court can be remedied by a new trial) has proved to be untrue.

The decision in *Lund v. Holbrook*[7] illustrates another type of order, the discovery order, which may be worthy of consideration as justifying a departure from the final judgment rule. We propose to examine:

(a) the effect of the final judgment rule in cases involving discovery orders, to determine whether departure from the final judgment rule is justified,

(b) the means presently existing in Nebraska for avoiding the effect of the final judgment rule as to discovery orders, and

(c) the desirability of, and possibilities for statutory modification of the final judgment rule as to discovery orders in Nebraska.

I. THE EFFECT OF THE FINAL JUDGMENT RULE IN DISCOVERY CASES

A. Types of Discovery Procedures.

Nebraska procedure provides several means by which a party may elicit information from other persons before trial. These procedures may be used either by plaintiffs or defendants. Some may be used only against parties, and some may be used against any person having the desired information. Disclosure of " . . .

[5] See Annot., 37 A.L.R.2d 586 (1954).

[6] See Note, 58 Yale L.J. 1186 (1949) and cases cited therein. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932) concludes that the desire of appellate courts to prevent being swamped with appeals is the policy underlying the final judgment rule, but the authorities cited therein seem to support equally well the proposition that the purposes of the rule include the prevention of delay and expense to litigants.

[7] 157 Neb. 854, 62 N.W.2d 112 (1954).

[8] Neb. Rev. Stat. § 25-1267.02 (Supp. 1955).

any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." may be required.[8] It is no objection that the matter sought to be discovered would not be admissible at the trial if it appears ". . . reasonably calculated to lead to the discovery of admissible evidence."[9]

The one discovery procedure usable against either parties or non-parties is the taking of depositions.[10] Depositions may be taken either upon oral examination or upon written interrogatories.[11] Subpoenas may be issued to require the attendance of witnesses, and subpoenas may be issued to require the attendance of witnesses, and subpoenas duces tecum may be used to require witnesses to produce documents and other material evidence.[12] Notice to adverse parties is required for the taking of all depositions,[13] but leave of court is required only if the notice of taking the deposition is to be served by the plaintiff within twenty days after the commencement of the action.[14]

The remaining discovery procedures may be used only against parties. Notice and a showing of "good cause" are required before the court will enter orders requiring parties to produce documents for inspection and copying,[15] permit entry on land,[16] or submit to mental or physical examination.[17] Other procedures which may be used only against parties are requests for admission of facts and the genuineness of documents, and written interrogatories, for both of which answers must be served in writing. Notice is not required for this procedure, and leave of court is required only if the requests or interrogatories are made within ten days after commencement of action.[18]

Upon the failure of a party or witness to answer a question on a deposition, the court may enter an order requiring the de-

9 Ibid.
10 Id. § 25-1267.01.
11 Id. § 25-1267.01.
12 Id. § 25-1267.01 (". . . The attendance of witnesses may be compelled by the use of subpoena as proided by law."); Neb. Rev. Stat. § 25-1224 (Reissue 1948) ("The subpoena . . . may contain a clause directing a witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce as evidence.").
13 Neb. Rev. Stat. § 25-1267.20 (Supp. 1955).
14 Id. § 25-1267.01.
15 Id. § 25-1267.39.
16 Id. § 25-1267.39.
17 Id. § 25-1267.40.
18 Id. §§ 25-1267.37, 25-1267.41.

ponent to answer.[19] We will speak of this type of order, together with the other orders described above, as discovery orders, as distinguished from orders entered to compel compliance with them.[20] The orders compelling compliance we will speak of as discovery "sanctions."

B. Possibilities of Harm from the Operation of Discover Orders

It is suggested above that discovery orders may be worthy of consideration as presenting reasons for a modification of the final judgment rule. The reasons we speak of are based on the possibilities of serious harm to parties or witnesses arising out of the operation of discovery procedures. We proceed to discuss these reasons.

1. Delay and Expense Caused by the Final Judgment Rule.

The usual procedure for correcting errors committed by a trial court is a retrial of the case, after an appeal from final judgment and a decision by the appellate court that the error was prejudicial. The procedure may involve, for both parties, the considerable delay and expense required for a new trial, which might have been made unnecessary by an interlocutory appeal before final judgment. The delay and expense of an interlocutory appeal may, however, be just as great, and the final judgment rule proceeds upon the theory that it is better to impose upon the complaining party the burden of a new trial, than to give him the opportunity of causing even greater delay and expense to the other party by several interlocutory appeals. In this respect, the discovery order presents no more persuasive reason for allowing interlocutory appeal than does any other interlocutory order. There is always the possibility that the party complaining of the granting or denial of the discovery order will win on final judgment, so that an appeal will not be desired by him. Furthermore, the erroneous granting or denial of the order may not, even though the complaining party loses, have been prejudicial to his interests at the trial. These factors are impossible of determination until after the trial.

[19] Id. § 25-1267.43. Although copied from the Federal Rules of Civil Procedure, the Nebraska discovery statutes omit the provision of Federal Rule 37(a) that a party may be required to answer questions propounded on an interrogatory to a party. It is believed, however, that the inherent power of the court to give effect to procedures provided for is sufficient to enable the court to compel an answer. See Healey, Discovery and Preparation for Trial, 32 Neb. L. Rev. 292, 298 (1953).

[20] See Neb. Rev. Stat. § 25-1267.44 (Supp. 1955).

We conclude that the delay and expense is not a persuasive reason for allowing interlocutory appeals from them. But there are other factors, inherent in discovery, which are more persuasive.

2. Irreparable Injury.

Discovery procedures present a danger of injury which is not found in the usual interlocutory order. The right to conduct fishing expeditions, granted by the discovery rules, may give rise to difficult questions concerning privilege, good cause, notice, and intended scope of the discovery statutes. (For the purposes of this discussion let us call the one seeking discovery the "inquirer," and the one against whom the discovery order runs the "withholder.") The order may erroneously require the withholder to disclose matter which is privileged, such as a communication between attorney and client,[21] physician and patient,[22] priest and penitent,[23] or husband and wife,[24] or matter tending to incriminate the withholder.[25] Questions involving, for example, whether the attorney's "work product,"[26] trade secrets,[27] reports furnished to parties by expert witnesses,[28] the coverage furnished by the withholder's liability insurance policy,[29] or the withholder's income tax return[30] are proper subjects of discovery, may also arise.

When the withholder gives up information, it can never be erased from the inquirer's knowledge. If the erroneously required disclosure is an injury, it is an irreparable one. An appeal from final judgment does not repair the injury. It attempts to shut the gate after the cows are out, but unlike the cows, the information disclosed cannot be effectively brought back. This applies, of course, only to the order *granting* discovery.[31]

21 Neb. Rev. Stat. § 25-1206 (Reissue 1948).

22 Ibid.

23 Ibid.

24 Id. § 25-1204.

25 Id. § 25-1210.

26 See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947).

27 Neb. Rev. Stat. § 25-1267.22 (Supp. 1955) provides that the court may, upon motion of a party or person to be examined on a deposition, make an order that secret processes, developments, or research need not be disclosed.

28 See 4 Moore, Federal Practice para. 26.24 (2d ed. 1950).

29 See, e.g., Jeppesen v. Swanson, 68 N.W.2d 649 (Minn. 1955); Lund v. Holbrook, 157 Neb. 854, 62 N.W.2d 112 (1954).

30 See Peterson v. Peterson, 70 S.D. 385, 17 N.W.2d 920 (1945) (income tax report in files of Internal Revenue Bureau privileged).

31 See discussion in Brown v. St. Paul City Ry., 241 Minn. 15, 29-32, 62 N.W.2d 688, 698-699 (1954).

The same concept, i.e., that the effect of error in granting certain orders cannot be relieved on appeal from final judgment, seems to be the basis for some of the exceptions made to the final judgment by statute in many states.[32] Interlocutory appeal is quite commonly allowed by statute in cases involving, for example, injunctions,[33] partitions,[34] receivership,[35] and attachment.[36] It should be possible, by requiring the posting of bond, to protect the pecuniary interests of parties pending appeal in many such actions. But that sort of protection is hardly sufficient in cases involving discovery, where the withholder may, as a result of being required to disclose information, be subjected to criminal prosecution where the privilege against self-incrimination is in-

[32] See discussion in Note, 58 Yale L.J. 1186, 1187 (1949).

[33] Ariz. Code Ann. § 21-1702 (1939); Ark. Stat. Ann. § 27-2102 (1947); Cal. Code Civ. Proc. § 963 (1953); Colo. R. Civ. P. 111(a)(3); Del. Const. art. 4, § 11(4), (5); Fla. Stat. Ann. § 59.02 (Supp. 1955); Idaho Code Ann. § 13-201 (1947); Ill. Ann. Stat. c. 110, § 78 (Supp. 1956); Kan. Gen. Stat. § 60-3302 (1949); Md. Ann. Code Gen. Laws art. 5, § 31 (1951); Mass. Ann. Laws c. 214, § 19 (1955); Mo. Rev. Stat. § 512.020 (1949); Mont. Rev. Codes Ann. § 43-8003 (1947); Nev. Comp. Laws § 9385.60 (Supp. 1941); N.J. Sup. Ct. rule 2:2-3(a)(1); N.D. Rev. Code § 28-2702 (1943); Okla. Stat. tit. 12, § 952 (Supp. 1955); Pa. Stat. Ann. tit. 12, §§ 1101, 1102 (1953); S.C. Code § 15-123 (1952); S.D. Code § 33.0701(5) (1939); Tex. Stat., Rev. Civ. art. 4662, Tex. Stat., Civ. Proc. rule 583 (1948); Va. Code § 8-462 (1950); Wash. Rev. Code § 4.88.010 (1951); W. Va. Code Ann. § 5788(g) (1949); Wis. Stat. § 274.33 (1953).

[34] Ariz. Code Ann. § 21-1702 (1939); Cal. Code Civ. Proc. § 963 (1953); Del. Const. art. 4, § 11(4), (5); D.C. Code Ann. § 11-772 (1951); Fla. Stat. Ann. § 59.02 (Supp. 1955); Idaho Code Ann. § 13-201 (1947); Mass. Ann. Laws c. 214, § 19 (1955); Mo. Rev. Stat. § 512.02 (1949); Nev. Comp. Laws § 9385.60 (Supp. 1941); Pa. Stat. Ann. tit. 12, § 1093 (1953); Va. Code § 8-462 (1950); W. Va. Code Ann. § 5788(g).

[35] Ariz. Code Ann. § 21-1702 (1939); Ark. Stat. Ann. § 27-2102 (1947); Cal. Code Civ. Proc. § 963 (1953); Colo. R. Civ. P. 111(a)(4); Del. Const. art. 4, § 11(4), (5); Fla. Stat. Ann. § 59.02 (Supp. 1955); Ill. Ann. Stat. c. 110, § 78 (Supp. 1956); Kan. Gen. Stat. § 60-3302 (1949); Md. Ann. Code Gen. Laws art. 5, § 31 (1951); Mass. Ann. Laws c. 214, § 19 (1955); Mo. Rev. Stat. § 512.020 (1949); Mont. Rev. Codes Ann. § 43-8003 (1947); Nev. Comp. Laws § 9385.60 (Supp. 1941); N.J. Sup. Ct. Rule 2:2-3(a)(2); S.C. Code § 15-123 (1952); S.D. Code § 33.0701(5) (1939); Wash. Rev. Code § 4.88.010 (1951).

[36] Del. Const. art. 4, § 11(4), (5); Fla. Stat. Ann. § 59.02 (Supp. 1955); Idaho Code Ann § 13-201 (1947); Md. Ann. Code Gen. Laws art. 5, § 31 (1951); Mass, Ann. Laws c. 214, § 19 (1955); Minn. Stat. Ann. § 605.09 (West 1948); Mont. Rev. Codes Ann. § 43-8003 (1947); Nev. Comp. Laws § 9385.60 (Supp. 1941); N.D. Rev. Code § 28-2702 (1943); Okla Stat. tit. 12, § 952 (Supp. 1955); Pa. Stat. Ann. tit. 12, § 1108 (1953); S.D. Code § 33.0701(5) (1939); Va. Code § 8-462 (1950); Wash. Rev. Code § 4.88.010 (1951); W. Va. Code Ann. § 5788(h) (1949); Wis. Stat. § 274.33 (1953).

volved, the loss of business prospects where trade secrets are involved, the loss of the prospect of reasonable settlement in cases where the coverage limits of an insurance policy are involved, or the loss of an advantage at the trial where the matter sought to be reached is the attorney's work-product, or the opposing party's theory of the facts of the case. Whether disclosure of any of these matters should or should not be required is not the immediate problem. The problem is rather to find a means of resolving the issue of whether disclosure should be required, without causing irreparable injury to the withholder if the question happens to have been wrongly decided in the trial court.

II. METHODS OF AVOIDING THE FINAL JUDGMENT RULE

A. Discovery Sanctions

The sanctions provided by the discovery rules for their enforcement may provide a means of obtaining appellate review of orders which are not immediately appealable. These sanctions include: (1) a judgment of civil or criminal contempt, available against either parties or non-parties;[37] (2) an order, against a party, that the facts which the inquirer was attempting to establish by discovery be taken as established;[38] (3) orders limiting the introduction of evidence by the party against whom discovery is sought;[39] (4) orders striking pleadings or parts thereof;[40] (5) orders staying proceedings until the order is obeyed, (useful only against a plaintiff);[41] (6) orders dismissing the action where the plaintiff refuses to comply;[42] and (7) orders rendering a default judgment where the defendant refuses to comply.[43]

[37] Neb. Rev. Stat. § 1267.44(1) (Supp. 1955). Fed. R. Civ. P. 37(b) provides not only that refusal to answer a question on a deposition may be considered contempt, but that an order directing arrest may be used as a sanction for the disobedience of any discovery order except one for physical or mental examination The Nebraska statute omits the latter sanction. There seems little doubt, however, that contempt may be used as a sanction for the disobedience of any discovery order, apparently even one for a mental or physical examination, under Neb. Rev. Stat. § 25-2121 (3) (Reissue 1948), the general contempt statute.

[38] Neb. Rev. Stat. § 25-1267.44(2)(a); see Fed. R. Civ. P. 37(b)(2)(i).

[39] Neb. Rev. Stat. § 25-1267.44(2)(b); see Fed. R. Civ. P. 37(b)(2)(ii).

[40] Neb. Rev. Stat. § 25-1267.44(2)(c); see Fed. R. Civ. P. 37(b)(2)(iv).

[41] Ibid.

[42] Ibid.

[43] Ibid.

1. Finality of Orders Imposing Sanctions.

The opportunity for a party or witness to get review of a discovery order by appeal from any of these orders imposing sanctions depends upon whether the order imposing the sanction is final. An order dismissing the action, or rendering default judgment is clearly final, and therefore immediately appealable.[44] The others are not final, and therefore not immediately appealable,[45] with the exception of a judgment of contempt.

When civil or criminal contempt is the sanction used for enforcement of a discovery order, a petition in error may be used to review the order in Nebraska.[46] In the federal courts, if a judgment of contempt is construed as being entirely civil in character, and runs against a party of record, it is not appealable except in connection with a final judgment or order.[47] A non-party may, of course, appeal from either civil or criminal contempt judgments, since he cannot take an appeal from final judgment. In Nebraska, review is allowed by petition in error in both civil and criminal contempt cases whether the contempt judgment is

[44] See Davis v. Jennings, 78 Neb. 412, 111 N.W. 128 (1907) (dismissal of action without prejudice held to be final order and appealable). There appear to be no Nebraska cases on the question of whether a default judgment entered for failure to comply with a discovery order or other order of the court is final and appealable. But see Anson v. Kruse, 147 Neb. 989, 25 N.W.2d 896 (1947) holding that an order overruling a demurrer is not final, and that no appeal will be allowed from it unless defendant elects to stand on his demurrer and submit to the rendition of a judgment against him. This is substantially the same situation as that presented by a defendant's election to stand on his refusal to comply with a discovery order and submit to the rendition of a default judgment against him. See also 4 Moore, Federal Practice para. 26.37[2] (2d ed. 1950).

[45] See State ex rel. Sorenson v. State Bank of Omaha, 131 Neb. 223, 267 N.W. 532 (1936) (order sustaining motion to strike part of answer not final and not appealable) ; Welch v. Calhoun, 22 Neb. 166, 34 N.W. 349 (1887) (order sustaining motion to strike amended petition from the files not an appealable order). See also 4 Moore, Federal Practice para. 26.37[2] (2d ed. 1950).

[46] Appeal from a judgment of contempt may be taken only by petition in error, Frye v. Frye, 158 Neb. 694, 64 N.W.2d 648 (1954); Gross v. Garfield County, 145 Neb. 414, 16 N.W.2d 850 (1944); Whipple v. Nelson, 138 Neb. 514, 293 N.W. 382 (1940); Maryott v. State, 124 Neb. 274, 246 N.W. 343 (1933); Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N.W. 574 (1931); Hawthorne v. State, 45 Neb. 871, 64 N.W. 359 (1895). Habeas Corpus will lie to review only the question of whether the imprisonment order is void, and the question of whether the contempt judgment is merely in error is not raised, In re Niklaus, 144 Neb. 503, 13 N.W.2d 655 (1944); Cain v. Miller, 109 Neb. 441, 191 N.W. 704 (1922).

[47] Dickinson v. Rinke, 132 F.2d 884, 885 (2d Cir. 1943). See also In re Eskay, 122 F.2d 819, 824 (2d Cir. 1941).

against a party or a non-party.[48] A party in the action, of course, cannot appeal from a judgment of contempt against a witness, since he is not a party to the contempt action.[49]

It is obvious, then, that the trial court has the power to allow review of an interlocutory order by using against the one desiring review a discovery sanction which employs a final order.

2. Utility of Review by Appeal from Final Discovery Sanctions.

This method of review is not without disadvantages. An appeal from a default judgment or dismissal of the action may involve the risk that if the withholder loses on appeal, res judicata will apply to the merits. For plaintiffs, this difficulty may be avoided by a dismissal without prejudice to bringing another action.[50] But whether to dismiss with or without prejudice is discretionary with the trial judge[51] and the decision may depend on his feeling as to whether the plaintiff is justified in refusing to comply with the discovery order. Even this uncertain means of side-stepping the res judicata problem is not available in advance for a defendant against whom a default judgment is entered. If an appeal from the final judgment of default is decided before the end of the term at which it was rendered, which seems unlikely, and the defendant loses on appeal, he might apply to have the default judgment vacated, agree to comply with the discovery order, and be allowed to proceed with his defense on the merits.[52] There is no guarantee, of course, that he would be allowed to do this. If the appeal is not decided until after the trial court term has ended, there is apparently no way for the defendant to get his default judgment vacated.[53]

[48] Maryott v. State, 124 Neb. 274, 246 N.W. 343 (1933).

[49] Neb. Rev. Stat. § 29-2301 (Reissue 1948) ("When a person shall be convicted of an offense . . . the court may, on application of the person so *convicted*, suspend the execution of the sentence . . . for such period . . . as will give the *person so convicted* a reasonable time to apply for [a writ of error]. . . .").

[50] Neb. Rev. Stat. § 25-601 (Reissue 1948).

[51] Ferson v. Armour & Co., 109 Neb. 648, 192 N.W. 125 (1923); Howell v. Malmgren, 79 Neb. 16, 112 N.W. 313 (1907).

[52] See Barney v. Platte Valley P.P. & I. Dist., 147 Neb. 376, 23 N.W.2d 335 (1946) (district court has inherent power during term to vacate a default judgment).

[53] If the appeal resulted in a decision that the discovery order was correctly granted, the withholder would have none of the grounds set forth in Neb. Rev. Stat. § 25-2001 (Reissue 1948) for vacating a judgment after term.

Another disadvantage in this manner of achieving review is that it is only available when parties to the action are involved, since dismissals and default judgments can be used only when the withholder is a party. Contempt is probably available as a sanction against either parties or non-parties, and does provide a means of review free from concern about res judicata. It also has its disadvantages. Of course, if the procedure is being used merely as a means to get review of the order, and the judge is satisfied there is considerable question about his decision, the penalty for contempt may be only nominal. This has been done both in Nebraska and in the federal courts.[54] When this is not the situation, the withholder may have to go to jail. The village doctor cannot, however honorable his motives, occupy the county jail in order to preserve the privilege of his client, who may not even be involved in the pending action. Lawyers may find themselves in the same position, as might also clergymen, or any one else from whom privileged information is sought. As a social matter, it would seem that no one ought to be required to stand in contempt of court to get review of a discovery order, if an unsettled legal question exists, and if there is reason to believe that disclosure might irreparably injure the withholder, or perhaps his confider.[55] In that situation it is the conduct of the judge, and not the person against whom the order runs, which should be the subject of appellate concern.

Thus we have a means of review by appeal from final judgments arising out of discovery sanctions, but it is submitted that these means of review are inadequate. The default judgment and dismissal techniques are inadequate because they appy only to parties and involve res judicata, and contempt is inadequate because of its harshness. Furthermore, the type of sanction used should depend upon the importance to the inquirer's case of being able to get discovery, not upon whether the judge is uncertain as to the propriety of the discovery order. To make the type of sanction used depend on the latter factor would lead to the use of the most stringent of the sanctions, i.e., dismissal, default, or contempt, where the judge is least sure of the correctness of the discovery order.

[54] See State v. Rice, 157 Neb. 579, 60 N.W.2d 668 (1953), where the penalty for contempt was a fine of $1; and Hickman v. Taylor, 329 U.S. 495 (1947).

[55] See Brown v. St. Paul City Ry., 241 Minn. 15, 31-32, 62 N.W.2d 688, 698-699 (1954) ("It seems extremely harsh to require a litigant to subject himself to a contempt proceeding before a matter of this kind may be reviewed effectively.").

B. *Extraordinary Remedies*

Another means of getting review of a discovery order may be by the use of an extraordinary remedy. Those applicable to this question are prohibition, mandamus, and certiorari.

1. Prohibition.

An ancient common law writ, prohibition is issued by a superior court to an inferior court commanding that the latter cease from exceeding its jurisdiction.[56] While mandamus requires an official to perform some act or duty within his jurisdiction, prohibition requires a court to refrain from doing something outside its jurisdiction.[57] Being extraordinary in its nature, prohibition lies at the discretion of the court which issues it, and will lie only where ordinary proceedings at law, in equity, or by appeal will not redress the grievance.[58] It is a preventive, rather than a corrective remedy, and traditionally will not lie to review mere error.[59] The requisite for its use is usually considered to be a "jurisdictional over-reaching" on the part of the inferior court.[60] Because of this, prohibition is not ordinarily considered a proper procedure for the review of discovery orders.

In some states, however, prohibition has been used to review the granting of discovery orders, either by statutory construc-

[56] Massman Construction Co. v. Nebraska Work. Comp. Ct., 141 Neb. 270, 3 N.W.2d 639 (1942); State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937); 3 Blackstone, Commentaries *112; High, Extraordinary Legal Remedies 706-707 (3d ed. 1895).

[57] ". . . In a general sense they are counterparts of each other in their object and purpose, but only to the extent that one is prohibitory and the other mandatory; one acts on the person, the other acts on the tribunal. . . . Prohibition [however] is not an affirmative remedy like mandamus, but purely negative, for it commands not that something be done, but that something be left undone." 42 Am. Jur., Prohibition § 3 at 140 (1942); High op. cit. supra note 56 at 708.

[58] High, op. cit. supra note 56, at 717; State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

[59] 4 Moore, Federal Practice para. 26.37(4) (2d ed. 1948); High, op. cit. supra note 56 at 717.

[60] Ibid.

tion,[61] by court rule,[62] or by merely disregarding the "jurisdictional over-reaching" requirement.[63]

In Nebraska, even disregarding the jurisdictional requirement, prohibition would apparently not be available for the review of discovery orders granted by a district court. The Nebraska Supreme Court at one time indicated that the writ of prohibition was abolished in Nebraska.[64] Later it was decided that the writ was available, but was not within the original jurisdiction of the supreme court.[65] This would appear to make prohibition available only for the review of the actions of courts inferior to the district court. Since discovery procedures are presumably available in the inferior courts in Nebraska,[66] the writ of prohibition may be available to review the granting of discovery orders in those courts. However, prohibition has seldom

[61] Comment, 41 Calif. L. Rev. 124 (1953) discusses the use of the statutory writ of prohibition as a means of reviewing various interlocutory orders. The statutory requirement that before the writ of prohibition will lie, the inferior court must have acted "without or in excess of its jurisdiction" is construed to include "any acts which exceed the defined power of a court in any instance" so that prohibition will lie for "mere error." See, however, Superior Insurance Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833 (1951) which held that mandamus is the proper means for vacating a discovery order.

[62] See Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954) allows review of a discovery order under Ky. Ct. App. Rule 1.420, which seems to merge the common law writs of prohibition and mandamus.

[63] See, e.g., Jeppesen v. Swanson, 68 N.W.2d 649 (Minn. 1955) where prohibition was used to review a discovery order, without discussion of the propriety of the use of prohibition, apparently relying on a suggestion in Brown v. St. Paul City Ry., 241 Minn. 15, 29-32, 62 N.W.2d 688, 698-699 (1954) that prohibition might be available for this purpose. Both the *Jeppesen* and *Brown* opinions were by Justice Knutson.

4 Moore, Federal Practice para. 26.37(7) (2d ed. 1948) suggests a relaxation of the "jurisdictional" requirement in the area of pre-trial discovery orders, but the federal courts do not seem in sympathy with this view. See Bank Line v. United States, 163 F.2d 133 (2d Cir. 1947); Terminal Ry. Ass'n v. Moore, 145 F.2d 128 (8th Cir. 1944).

[64] State ex rel. King v. Hall, 47 Neb. 579, 66 N.W. 642 (1896) held that prohibition was not within the original jurisdiction of the Nebraska Supreme Court. This was apparently taken to mean that it was not within the jurisdiction of any Nebraska court. See State ex rel. Parmenter v. Troup, 98 Neb. 333, 334, 152 N.W. 748 (1915) ("The common law writ of prohibition is abolished in this state. . . .").

[65] State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1934).

[66] Neb. Rev. stat. §§ 24-502, 26-1201, 26-206, 27-1801 (Reissue 1948) make the provisions of the code of civil procedure (chapter 25 of the Nebraska Revised Statutes) applicable to proceedings before justices of the peace, county courts, and municipal courts. Apparently this would include the discovery procedures.

been used in any court in Nebraska, and it is impossible to predict whether or not the jurisdictional over-reaching requirement would be disregarded.

2. Certiorari

The writ of certiorari has been abolished in Nebraska,[67] but it should be noted that several jurisdictions, including Florida,[68] Iowa,[69] Montana,[70] Rode Island,[71] Utah,[72] Washington,[73] and Wisconsin[74] have used it for the review of discovery orders.

3. Mandamus

At least four states have used mandamus for the review of discovery orders. They are Alabama,[75] California,[76] Michigan,[77] and Oklahoma.[78] Mandamus *may* be available to a limited extent for that purpose in Nebraska. The reasons for the belief that mandamus may be available, and the possible limitations on its use, form the remainder of our discussion of the extraordinary remedies.

[67] Neb. Rev. Stat. § 25-1930 (Reissue 1948).

[68] Kilgore v. Bird, 149 Fla. 570, 6 So.2d 541 (1942), establishes that certiorari is the proper remedy to review discovery orders, rather than prohibition.

[69] Neufeld v. Jordan, 240 Iowa 1063, 38 N.W.2d 601 (1949); Chandler v. Taylor, 234 Iowa 287, 12 N.W.2d 590 (1944); Main v. Ring, 219 Iowa 1270, 260 N.W. 859 (1935); Fairbanks Morse & Co. v. District Court, 215 Iowa 703, 247 N.W. 203 (1933); Iowa Farm Credit Corp. v. Hutchison, 207 Iowa 453, 223 N.W. 271 (1929); Davis v. District Court, 195 Iowa 688, 192 N.W. 852 (1923).

[70] State ex rel. Pitcher v. District Court, 114 Mont. 128, 133 P.2d 350 (1943); State ex rel. Smith v. District Court, 112 Mont. 506, 118 P.2d 141 (1941); and see State ex rel. Boston & Montana, etc., Co. v. District Court, 27 Mont. 441, 71 Pac. 602 (1903).

[71] See Broadway Furniture Co. v. Superior Court, 123 Atl. 566 (R.I. 1924).

[72] Olson v. District Court, 93 Utah 145, 71 P.2d 529 (1937).

[73] State ex rel. Bronson v. Superior Court, 194 Wash. 339, 77 P.2d 997 (1938).

[74] State ex rel. Walling v. Sullivan, 245 Wis. 180, 13 N.W.2d 550 (1944).

[75] Ex Parte Benson, 243 Ala. 435, 10 So.2d 482 (1942); Ex Parte Pollard, 233 Ala. 335, 171 So. 628 (1936).

[76] Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833 (1951); McCarty v. Superior Court, 30 Cal.App. 1, 159 Pac. 736 (1935); Shell Oil Co. v. Superior Court, 109 Cal. App. 75, 292 Pac. 531 (1930). For general discussion, see Comment, 50 Colum. L. Rev. 102 (1950).

[77] Klett v. Hickey, 310 Mich. 329, 17 N.W.2d 201 (1945); Hallett v. Michigan Consol. Gas Co., 298 Mich. 582, 299 N.W. 723 (1941); International Harvester Co. v. Smith, 163 Mich. 55, 127 N.W. 695 (1910);

[78] State ex rel. Westerheide v. Shilling, 190 Okla. 305, 123 P.2d 674 (1942) (review of order denying discovery).

As indicated, mandamus is an extraordinary remedy. By statute in Nebraska, it will lie only to compel performance by an inferior court or public official of an act which the law "specifically enjoins" as a duty. It will not lie to control judicial discretion, nor will it lie where there is a "plain and adequate remedy in the ordinary course of law."[79]

In *State ex rel. Parmenter v. Troup*,[80] mandamus was used to review a discovery order. A district court had dismissed a personal injury action without prejudice upon the plaintiff's refusal to comply with an order requiring her to submit to a physical examination. The plaintiff sought mandamus to require the district court to reinstate her action. It was argued that mandamus did not lie because there was an adequate remedy in the ordinary course of law by appeal from the order dismissing the action. The court held that appeal was not an adequate remedy because it might result in such delay as to practically defeat the plaintiff's action, even if she won on appeal. This holding was apparently based on the plaintiff's argument that it would take two years, under ordinary appeal procedure, merely to obtain a trial of the action.[81]

If the *Troup* case is to be given any weight, there would be many situations where the remedy in the ordinary course of law would not be adequate. Where, as in the *Troup* case, mandamus is sought after the imposition of a sanction embodying a final order, mandamus would present little advantage over an appeal from the final order, whether it be dismissal, with or without prejudice, rendition of a default judgment, or a judgment of contempt, except insofar as it allows a more speedy review. Since both mandamus actions and ordinary appeals can both be advanced on the docket of the supreme court,[82] mandamus has no advantage in that respect. Mandamus might present an advantage in that it would be unnecessary to wait for the preparation of a transcript and bill of exceptions such as would be required on appeal.

Where the sanction used to enforce compliance with the discovery order is a non-final order, review by mandamus would save a re-trial of the action by getting the discovery question decided before the trial. But this does not seem to be regarded as suf-

[79] Neb. Rev. Stat. § 25-2156 (Reissue 1948).

[80] 98 Neb. 333, 152 N.W. 748 (1915).

[81] Brief for Relator, p. 15, State ex rel. Parmenter v. Troup, 98 Neb. 333, 152 N.W. 748 (1915).

[82] Neb. Sup. Ct. Rule 16.

ficient reasons for regarding the remedy by appeal as inadequate.[83] There is, of course, the possibility in this situation that the withholder will win the action on the merits in the trial court.

The statutory requirement that there be a duty specifically enjoined by law in order for mandamus to be proper is in part the obverse of the statutory limitation that mandamus will not lie to control judicial discretion. It is more than that, however. It also involves the judicially construed rule that mandamus will not lie to review mere error,[84] nor to require a court to undo that which it has already done.[85]

As they are stated in the Nebraska cases, however, these latter rules concerning "mere error" and undoing what has already been done are almost always coupled with a statement of the rule that mandamus will not lie where there is an adequate remedy in the ordinary course of law.[86] There seems to be no statutory connection between these rules, but a reading of the cases suggsts that the operative rule is that mandamus will not lie to correct mere error or to undo things already done *unless* the remedy in the ordinary course of law is inadequate. In the *Troup* case, for example, mandamus was said to be proper because the remedy by appeal was inadequate. Had the plaintiff succeeded on the merits, the issuance of mandamus would have compelled the trial court to undo what it had already done because of a mere error. The court also said that mandamus was proper because prohibition was "abolished," but it seems doubtful that the action of the

[83] See, e.g., State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N.W. 28 (1929), where the defendant in a criminal case demanded a jury trial in the county court. The county court denied it, and the district court issued a peremptory writ of mandamus, holding unconstitutional the statute under which jury trial was denied. The supreme court held that mandamus would not lie because there was an adequate remedy by appeal from final judgment.

[84] See State ex. rel. Garton v. Fulton, 118 Neb. 400, 410, 225 N.W. 28, 32 (1929) ("Mandamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. Mandamus will not issue to review the action of an inferior court when there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error."); State ex rel. Cohn v. Jessen, 66 Neb. 515, 519, 92 N.W. 584, 596 (1902).

[85] See State ex rel. Ensey v. Churchill, 37 Neb. 702, 704, 56 N.W. 484, 485 (1893); State ex rel. North American Cattle Co. v. McGee, 32 Neb. 149, 151, 49 N.W. 220, 222 (1891).

[86] Supra notes 84, 85.

trial court would today be considered a jurisdictional over-reaching, so prohibition would not lie anyhow.

So also, in *State ex rel. Goff v. Dodge County*,[87] mandamus was used to compel a county board to correct errors where it appeared that the board falsely made up the record to show that evidence was received when no evidence had actually been received, thus preventing, as pointed out by the reviewing court, review by appeal or error.

Thus where mandamus is sought to review the granting of a discovery order, it could be argued that mandamus is proper, regardless of whether it is for the review of mere error, or to compel undoing what has been done, it if appears that the remedy by appeal is not adequate. If, however, mandamus is sought before the imposition of a sanction, it would be impossible to determine what type of sanction the trial judge plans to use to compel compliance, so that it could not be determined whether the remedy by appeal was inadequate.

All this is not to say, however, that the Nebraska court would hold mandamus to be a proper remedy for the review of discovery orders even when a sanction had been entered. The concept that mandamus will lie to review "mere error" where there is not an adequate remedy at law has no basis in the Nebraska mandamus statute, and has never been positively stated in the cases. It is particularly doubtful that the court would hold mandamus proper for review of orders granting discovery in view of its apparent reluctance to decide such questions even when properly presented by petition in error from a contempt judgment.[88]

[87] 20 Neb. 595, 31 N.W. 117 (1887).

[88] See State v. Rice, 157 Neb. 579, 60 N.W.2d 668 (1953), a proceeding in error from a judgment of contempt arising out of a deposition with subpoena duces tecum and involving the questions of the attorney's work-product and the defendant's insurance coverage. The notice for the deposition was defective, but this point was not raised by the parties on appeal. The court, however, seized upon this point and threw out the deposition, without even mentioning Neb. Rev. Stat. § 25-1267.32 (Supp. 1955) which provides: "All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice." No objection, written or oral, was made until the taking of the deposition. The witness refused to testify, and objected that the taking of the deposition was ". . . not in accordance with the Statutes of the State of Nebraska." Not until the party taking the deposition moved that the matter be certified to the district court and that the witness be charged with contempt did the witness object to the notice. The court does not say whether this objection was in writing.

III. STATUTORY MODIFICATION OF THE FINAL JUDGMENT RULE TO PROVIDE FOR REVIEW OF ORDERS GRANTING DISCOVERY

From the preceding discussion it appears that there is in Nebraska no satisfactory procedure for the review of orders granting discovery. The use of discovery sanctions which are in themselves final orders provides a means of review which is available in the discretion of the trial court. But the use of these final orders is attended with substantial risk because res judicata applies to the merits in the case of default judgments or dismissals with prejudice. Further, the use of final sanction orders against non-parties is limited to contempt judgments. Prohibition is not available for use in actions brought in the district court, where discovery procedures are most frequently used, because it is not within the original jurisdiction of the supreme court. The availability of prohibition for review of orders granting discovery in actions in courts inferior to the district court is doubtful because of the jurisdictional over-reaching requirement. Mandamus is likewise of uncertain availability, although within the original jurisdiction of the supreme court, because of the rule that it will not lie to review mere error or to enforce a duty not specifically enjoined by law.

Legislation would seem to be needed to remove the uncertainty which exists as to what means of reviewing discovery orders is available. The requisites for a procedure for review of orders granting discovery seem fairly obvious. It should, of course, avoid the evils which the final judgment rule is designed to avoid. It must also keep to a minimum the opportunities for obstructing the use of discovery procedures.

An examination of the procedures adopted in some jurisdictions, by statute or court rule, and suggested for adoption in other jurisdictions, allowing appeal from interlocutory orders before final judgment, reveals a wide range of variations. The procedures may be classified as follows

A. Appeal as of right;[89]

B. Appeal on leave granted by

1. the trial court, in its discretion,
   a. on motion of a party,[90] or

[89] See notes 33, 34, 35, and 36 supra.

[90] N.H. Rev. Stat. Ann. §§ 490.9, 502.20, 547.30 (1955); Mass. Ann. Laws c. 214, § 30, c. 215, § 13, c. 231, § 111 (1955); Minn. Stat. Ann. § 605.09 (1947) (orders overruling demurrers); Miss. Code Ann. § 1148

b. at the joint request of all the parties,[93] or

2. an appellate court, in its discretion,
   a. on motion of a party,[92] or
   b. at the joint request of all parties, [91] or
   c. after leave granted by the trial court,[94] or
   d. after leave denied by the trial court.[95]

We shall discuss here the mechanics of the operation of these procedures, with a view toward suggesting a procedure which would operate satisfactorily for review of discovery orders in Nebraska.

A. Appeal as of Right.

One of the benefits of discovery procedure is that it expedites the disposal of litigation by exposing sham claims and defenses, and by reducing the issues at the trial to those over which there is a real conflict. Another benefit is to make easy and inexpensive the proof of facts which would otherwise be difficult and expensive to prove.[96] Probably one of the basic benefits also is the possibility that the withholder, realizing he can be forced to disclose information, will do so upon request without requiring the inquirer to use the discovery procedures. To give the withholder the right to an appeal, before final judgment, from every order granting discovery, would give the withholder a delaying weapon which might greatly reduce the effectiveness of the discovery procedures in producing these benefits, which is the very evil against which the final judgment rule is designed to guard. For this reason, appeal as of right is unsuitable as a procedure for review of orders granting discovery.

(1942) (specified decrees and orders in equity); R.I. Gen. Laws c. 545, § 5 (1938), R.I. Public Laws c. 545, § 6 (1940); Vt. Rev. Stat. § 2124 (1947); W. Va. Code Ann. § 5788 (1949) (questions arising on summons or pleadings).

91 Conn. Gen. Stat. § 7967 (1949).

92 Ill. Ann. Stat. c. 110, § 101.30 (Supp. 1956) (order granting a new trial); Iowa R. Civ. P. 332(a); La. Code Prac. Ann. art. 566, (1942); N.J. App. Div. rule 2:2-3(a)(4), (b); N.Y. Civ. Prac. act. § 589; S.D. Code § 33.0701(6) (1939); Utah R. Civ. P. 72(b).

93 W. Va. Code Ann. § 5788 (1949).

94 Del Sup. Ct. rule 20(2)(a), (b), (c), Del. Super. Ct. (Civ.) rule 75, Del. Ch. Ct. Rule 72(b).

95 Miss. Code Ann. § 1148 (1942).

96 See 4 Moore, Federal Practice para. 26.02 at 1014-1016 (2d ed. 1950) for an outline of the benefits of discovery procedure.

B. *Appeal by Leave of Court*

The method of interlocutory appeal which leaves allowance of the appeal to the discretion of some court, either trial, appellate, or both, would seem to be better than an appeal as of right, so far as concerns the review of orders granting discovery. Some jurisdictions which use this type of procedure impose limitations upon the exercise of the court's discretion in allowing the appeal. Since the justification for an appeal from orders granting discovery is that there appears a likelihood that irreparable injury will result from an erroneous determination of the law by the trial court, there should also be a requirement that there is a likelihood that the trial court has determined the law incorrectly, i.e., that the order raises a question of law which is unsettled in the jurisdiction.

The problem in the area of interlocutory appeals by leave of court which has provoked the most heated discussion is whether the trial court or an appellate court should make the decision as to whether an interlocutory appeal should be allowed in a particular case.[97]

It has been suggested, in favor of vesting discretion in the trial court to allow the appeal, that the trial judge is better qualified, through a more intimate knowledge of the facts of the case, to decide whether appeal should be allowed to avoid irreparable injury, and that this would avoid interrupting the progress of the case to decide whether appeal should be allowed.[98] Certainly this procedure would avoid the objection made to the appeal as of right that the appellate courts would be swamped with appeals, provided the trial judge has sufficient objectivity to decide which appeals should be allowed and which should not. A too timid judge might allow almost every appeal asked. This could be controlled, however, by also giving the appellate court discretion to deny the right to appeal after it has been granted by the trial court.

If, however, the trial judge were to be extremely hesitant about allowing appeals from his rulings, either because he is con-

[97] For discussions of this topic, principally in connection with Fed. R. Civ. P. 54(b), see Comment, 50 Colum. L. Rev. 1106, 1111 (1950); Note, 15 So. Calif. L. Rev. 504, 512 (1942); Note, 58 Yale L.J. 1186, 1190-1192 (1949); Note, 55 Yale L.J. 141, 149 (1946).

[98] See Note, 15 So. Calif. L. Rev. 504, 512 (1942).

vinced that the order is correct[99] or because he feels that interlocutory appeals are generally unwise, a procedure which provided review of his decision not to allow the appeal might unduly burden the appellate court.

Applications for leave to appeal might also be unduly burdensome under a procedure by which the decision of whether to allow the appeal lay initially with the appellate court. Although the court could control the number of appeals it heard, it could not easily control the number of applications for leave to appeal without laying down rather specific standards which would destroy the flexibility needed in determining whether, in any given case, irreparable injury is likely.

The wisdom of laying down specific standards is involved where the determination of whether the appeal should be allowed is at the trial court level. If discretion to allow appeals is in the trial judge, one judge may be much more liberal in allowing appeals than another.[100] The only way to avoid this difficulty is to set down specific standards for the allowance of appeals, or to provide for complete review of the trial court's determination.

These considerations led the Judicial Conference of the United States, in considering the advisability of a procedure for interlocutory appeals, to recommend a procedure allowing appeal in the discretion of the court of appeals after a finding by the district court, in issuing an order, that the order involved:

> ". . . a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."[101]

This proposal was directed toward the early disposition of questions which would be controlling in anti-trust and similar protracted litigation. The same body disapproved a proposal which would have given the courts of appeals discretion to allow the appeal with the comment that it would ". . . unduly encourage fragmentary and frivolous appeals with the evils and delays in-

[99] See Clark v. Taylor, 163 F.2d 940, 952 (2d Cir. 1947) (concurring opinion by Judge Frank, ". . . experience teaches that a trial judge, mistakenly convinced that his order is flawless and that an appeal would be useless, may well be unwilling to expedite its review. . . ."); Note, 15 So. Calif. L. Rev. 504, 506 (1942).

[100] Clark v. Taylor, 163 F.2d 940 (2d Cir. 1947), citing as an example the lack of uniformity among federal district judges in sentencing. See also Note, 15 So Calif. L. Rev. 504, 512 (1942).

[101] Jud. Conf. U.S. Ann. Rep. 27 (1953).

cident thereto. . . ."[102] It might be doubted that the number of appeals from orders granting discovery in Nebraska would be such as to "swamp" the Nebraska Supreme Court with appeals if discretion to allow interlocutory appeals were given that court, but it is impossible to predict whether a procedure for interlocutory appeals would be used merely for delay. Perhaps the best way to accomplish the purpose of preventing irreparable injury resulting from an incorrect determination of the law by the trial court in granting a discovery order, yet avoiding "fragmentary and frivolous" appeals, is a procedure somewhat like that suggested by the Judicial Conference, with however, the decision of the trial court limited to and conclusive on the question of whether irreparable injury is likely to result. The supreme court would be left the question of whether there was substantial ground for difference of opinion as to the law. This would both give uniformity in the allowance of appeals, and prevent overburdening of the supreme court, while taking advantage of the better knowledge of the facts by the trial court on the question of whether there was likely to be irreparable injury.

A finding by either the trial or appellate court that there were not sufficient grounds for an interlocutory appeal should have the effect of foreclosing review of the propriety of the order granting discovery on appeal from final judgment, since such review would be too late to prevent injury anyhow.

Where the parties are agreed that irreparable injury may result from enforcement of the discovery order, a stipulation should be allowed to take the place of the trial court's finding, as on any other issue of fact.

In order to make the appeal speedy and inexpensive, there should be only a short time allowed after the order is entered for the application for leave to appeal to be made. After a finding by the trial court that the appeal is necessary to prevent irreparable injury, the supreme court should have power to determine the manner and time within which the application for leave to appeal must be submitted to it. Such appeal could, if necessary, be advanced on the docket of the supreme court.

In the discussion of the proposed procedure for interlocutory appeals from orders granting discovery, we have assumed that the order is granted by the district court, and appeal would be to the supreme court. Where the order is granted by a court inferior to the district court, it is possible that prohibition, which

[102] Jud. Conf. U.S. Ann. Rep. 203 (1952).

is within the jurisdiction of the district court, may lie to review the order. If prohibition is available, it would seem to be adequate for the review of such orders, and until its availability has been determined, we make no suggestion as to whether a procedure for interlocutory appeal should be provided for inferior courts.

CONCLUSION

It is submitted that the means presently existing for review of orders granting discovery in the district court in Nebraska are inadequate, and that the procedure here would provide a satisfactory means of review without overburdening the supreme court or appreciably interfering with the use of discovery procedures in Nebraska.

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