It has been suggested that the acquiring corporation should insert a disclaimer in the prospectus[41] and negotiate for indemnification and contribution provisions in the acquisition agreement[42] in an effort to relieve itself of section 11 liabilities for materials supplied to it by the acquired corporation. The effectiveness of such provisions are, as yet, unknown. However, such provisions may provide a margin of relief for the issuer and, in light of potentially harsh results of Rule 145, should be included.[43]

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41 *See* Schneider & Manko, *supra* note 38, at 825.
42 *See generally* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting Conspiracies, In Pari Delicti, Indemnification and Contribution*, 120 U. PA. L. REV. 597, 647-59 (1972) [hereinafter cited as Ruder]; Schneider & Manko, *supra* note 38, at 826.
43 *See* Ruder, *supra* note 42; Schneider & Manko, *supra* note 38, at 825-26.

WORKMEN'S COMPENSATION—AN INMATE WORKING IN PRISON INDUSTRIES IS NOT AN EMPLOYEE FOR PURPOSES OF THE WORKMEN'S COMPENSATION ACT.—*Frederick v. Men's Reformatory* (Iowa 1973).

Theodore Frederick was an inmate at the Men's Reformatory at Anamosa. On May 20, 1969, while Frederick was operating a punch press in the license plate factory at the prison, four of his fingers were crushed and later amputated. Without disputing the facts, the State denied the inmate's claim for workmen's compensation on the basis that he was not an employee of the State at the time of the injury.[1] He applied for arbitration[2] and the deputy industrial commissioner found that he was an employee and awarded benefits.[3] The State then applied for a review decision[4] and the industrial commissioner affirmed the award.[5] Upon appeal to the district court,[6] however, the court held that the commissioner had exceeded his powers and reversed his decision.[7] The Supreme Court of Iowa *held*, affirmed, an inmate working in prison industries is not an employee for purposes of the Workmen's Compensation Act. *Frederick v. Men's Reformatory*, 203 N.W.2d 797 (Iowa 1973).

The sole issue presented to the court was whether a prisoner could qualify as an employee of the State to recover workmen's compensation benefits. The issue is one of first impression in Iowa. The general rule regarding inmates injured while engaged in prison industries is to deny compensation, even when some type of monetary reward is paid for their services.[8] The reason most often given is that a prisoner cannot and does not make a contract of hire for his services and thus cannot be employed.[9] Most of the states which have dealt with this issue have used a similar rationale.[10] Other states deny-

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1 After an injury has occurred, the employee serves notice of his intent to claim compensation on his employer. IOWA CODE §§ 85.24-.25 (1971).

2 If the parties fail to reach an agreement as to compensation, either party may file a petition for arbitration with the industrial commissioner. IOWA CODE § 86.14 (1971).

3 Frederick v. Men's Reformatory, Arb. Dec. (1971) (Ferris, Arbitrator).

4 If either party is aggrieved by the decision of the deputy commissioner at the arbitration hearing, it may file a petition for review with the commissioner and at the review hearing, the commissioner hears all the evidence taken before the arbitration hearing and any additional evidence that is presented. IOWA CODE § 86.24 (1971).

5 Frederick v. Men's Reformatory, Rev. Dec. (1971) (Landess, Comm'r).

6 A party may appeal from the review decision to the district court of the county in which the injury occurred. IOWA CODE § 86.26 (1971).

7 Frederick v. Men's Reformatory, No. 16999 (D. Iowa, Oct. 29, 1971).

8 *See* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 47.31, at 759 (1st ed. 1967) [hereinafter cited as LARSON]; E. BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAW 4-25 (1972).

9 *See* 1A LARSON, *supra* note 8, § 47.31, at 761.

10 *See, e.g.*, Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966) (no voluntary agreement or intent to contract); Schraner v. State, 189 N.E.2d 119 (Ind. 1963) (contract for hire must be voluntary; prison labor is involuntary); Jones v. Houston Fire & Cas. Ins. Co., 134 So. 2d 377 (La. 1961) (no capacity to contract for hire); Green's Case, 28 Mass. 506, 182 N.E. 857 (1932) (not an employee under a contract of hire); Scott v.

ing compensation have done so on the basis of lack of wages or other remuneration.[11] And two states have used both the criteria of contract and wage by noting that neither was present and therefore, benefits must be denied.[12] But the general rule of denial of benefits is based on the fact that generally workmen's compensation acts require the existence of a contract of hire before one can qualify as an employee.[13]

The Iowa Workmen's Compensation Act appears to adopt a broad definition of "employee."[14] The use of the disjunctive "or" between the phrases "a person who has entered into the employment of" and "works under contract of service" seems to imply that a man need not have a contract of service if he can establish some other method of employment. However, the Iowa courts have held, beginning in 1918,[15] that a contract of service is necessary to bring an employee under the protection of the Workmen's Compensation Act.

In addition to the five elements which must be present to constitute an employer-employee relationship cognizable by Iowa law,[16] the court has developed a sixth test to determine whether the necessary contract was formed: did both parties intend to create the relationship?[17] The court in *Frederick* read into this requirement of intent that the intent be entirely voluntary.[18] Consequently, the court decided that prisoners did not have the capacity to intend to create the relationship of employment.[19] It must have determined that prisoners, because of their status, cannot make voluntary decisions regarding their employment.

City of Hobbs, 69 N.M. 330, 366 P.2d 854 (1961) (prisoner lacks capacity to contract for hire); *In re* Kroth, 408 P.2d 335 (Okla. 1965) (prisoner performs labor by operation of law and not by contract).

11 *See, e.g.*, Lawson v. Traveler's Ins. Co., 37 Ga. 85, 139 S.E. 96 (1927) (prisoner working without pay denied benefits); Shain v. Idaho State Penitentiary, 77 Idaho 292, 291 P.2d 870 (1955) (prisoner injured while making license plates not employee because no wages paid); Miller v. City of Boise, 70 Idaho 137, 212 P.2d 654 (1949) (wages must be paid before employment can exist).

12 *See* Moats v. State, 215 Md. 49, 136 A.2d 757 (1957) (employment cannot exist without both a contract and wages); Brown v. Jamesburg State Home, 60 N.J. Super. 123, 158 A.2d 445 (1960) (juvenile in home for boys did not have contract and no compensation was paid); Goff v. Union County, 26 N.J. Misc. 135, 57 A.2d 480 (1948) (employment requires both a contract for hire and compensation).

13 1A LARSON, *supra* note 8, § 47.31, at 759.

14 IOWA CODE § 85.61(2) (1971) defined employee as "a person who has entered into the employment of, *or* works under contract of service, express or implied, or apprenticeship, for any employer . . . ." (emphasis added).

15 *See* Pace v. Appanoose County, 184 Iowa 498, 168 N.W. 916 (1918); Knudsen v. Jackson, 191 Iowa 947, 183 N.W. 391 (1921). *See also* Note, 7 IOWA L. BULL. 100 (1922) for a discussion of the development of this rule after *Pace, supra*.

16 The accepted criteria by which to determine whether an employer-employee relationship exists are set out in *Hjerleid v. State*, 229 Iowa 818, 826-27, 295 N.W. 139, 143 (1940) as being "(1) [t]he right of selection or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed." *See also* Henderson v. Jennie Edmundson Hosp., 178 N.W.2d 429 (Iowa 1970); Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1966); Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 127 N.W.2d 636 (1964).

17 *See, e.g.*, Henderson v. Jennie Edmundson Hosp., 178 N.W.2d 429, 431 (Iowa 1970).

18 203 N.W.2d at 798.

19 *Id.*

Voluntary employment must result from a matter of choice and not compulsion. The *Iowa Code,* in defining the nature of the imprisonment at both the penitentiary and the men's reformatory, mandates that all commitments are to be at hard labor.[20] The employment that results from such commitment is thus compulsory, or involuntary, and by the reasoning of the court, not at all voluntary.[21] The cases relied on by the claimant[22] were distinguished because they all dealt with employment relationships that were voluntarily entered into.[23] The court concluded by noting that prisoners *should* be given compensation because such injury may be a cruel and uncontemplated form of punishment, but that it was for the legislature, and not the courts, to grant it.[24]

The crucial factor in the *Frederick* decision, then, was that Frederick, because he was a prisoner and subject to mandatory hard labor, lacked the necessary capacity to contract and therefore no contract of service existed. The decision to affirm the trial court actually reversed the rulings of both the deputy commissioner in the arbitration hearing and the industrial commissioner in the review decision.[25] The industrial commissioner had awarded compensation to the claimant on several grounds: that the claimant received remuneration for his services rendered; that the statutes providing for prison industries make use of the words "employ"[26] and "employment"[27]; that the legislature had expressly excluded prisoners on a work-release program from coverage, thereby implying that those working inside the prison walls were not excluded; and that the prisoner actually did have the capacity to give his consent to a contract for services, enjoying sufficient bargaining rights in that contract. As the findings of fact of the commissioner are binding on the court[28] as well as the inferences drawn therefrom,[29] a brief examination of these grounds is in order.

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[20] Iowa Code § 246.31 (1971).

[21] 203 N.W.2d at 798.

[22] Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960), *award set aside on other grounds,* 92 Ariz. 263, 375 P.2d 866 (1962) (prisoner who was loaned to private corporation and worked voluntarily was awarded compensation); State Comp. Ins. Fund v. Workmen's Comp. App. Bd., 8 Cal. App. 3d 978, 87 Cal. Rptr. 770 (1970) (no statute requiring city jail inmates to perform labor); Pruitt v. Workmen's Comp. App. Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (1968) (county prisoner loaned to city for noncompulsory work at sewage plant); California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 251 P. 808 (1926) (statute allowed Highway Comm'n to *employ* inmates; prisoners could refuse work).

[23] 203 N.W.2d at 799.

[24] *Id.* For a more lengthy discussion of the legislative responsibility for compensating injured prisoners, see the special concurrence in *Shain v. Idaho State Penitentiary,* 77 Idaho 292, 296, 291 P.2d 870, 872 (1955).

[25] *See* text immediately following note 1, *supra.*

[26] Iowa Code § 246.18 (1971) states: "Prisoners in the penitentiary or men's reformatory shall be *employed* . . . in such industries as may be established and maintained in connection therewith by the state director . . . ." (emphasis added).

[27] Iowa Code § 246.27 (1971) states: "The fund created and described in section 246.26 shall be used only for establishing and maintaining industries for the *employment* of the inmates at the respective institutions . . . ." (emphasis added).

[28] Iowa Code § 86.29 (1971).

[29] Hassebroch v. Weaver Constr. Co., 246 Iowa 622, 67 N.W.2d 549 (1955).

The use of the words "employ" and "employment" in penal codes, although found by the California courts to carry some weight in establishing an employer-employee relationship,[30] does not seem to be a determining factor in other jurisdictions. Of the ten states surveyed that have denied compensation to injured prisoners,[31] five make use of the words "employ," "employment," or "employees" in their prison labor statutes[32] and six use either "compensation" or "wage."[33] The definition of "employ" as used in the penal codes is evidently not the same as that used in the workmen's compensation statutes.

Remuneration was present in only one case where compensation was denied[34] and the lack of wages was used as a ground for denial of benefits in several jurisdictions[35] but the court held that the eight cents per hour paid to Frederick was not provided as wages but as an inducement to cooperate.[36] While the amount of the remuneration should not be used to determine whether or not it is wages,[37] the purpose of the remuneration can be.[38] And here the court ruled that Frederick was paid not for services rendered but for an incentive to follow the rules of the prison.[39] Remuneration is only one of the factors to be considered, however, and the commissioner also considered the prisoners' capacity to contract before arriving at his decision to award compensation.

The commissioner found that not only do prisoners in Iowa have the capacity to contract for services but also that in this instance, a contract did exist.[40] He based this conclusion on several facts that appeared in the record. Frederick had a choice of working at several different "occupations." It is the reformatory's policy for the inmate to discuss his job selection with a

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30 *See, e.g.*, State Comp. Ins. Fund v. Workmen's Comp. App. Bd., 8 Cal. App. 3d 978, 87 Cal. Rptr. 770 (1970); California Highway Comm'n v. Industrial Accident Comm'n, 200 Cal. 44, 251 P. 808 (1926).

31 Only ten states have denied compensation to injured prisoners: *Arizona*: Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966); *Georgia*: Lawson v. Traveler's Ins. Co., 37 Ga. App. 85, 139 S.E. 96 (1927); *Idaho*: Shain v. Idaho State Penitentiary, 77 Idaho 137, 212 P.2d 654 (1949); *Indiana*: Schraner v. State, 189 N.E.2d 119 (Ind. 1963); *Louisiana*: Jones v. Houston Fire & Cas. Ins. Co., 134 So. 2d 377 (La. 1961); *Maryland*: Moats v. State, 215 Md. 49, 136 A.2d 757 (1957); *Massachusetts*: Green's Case, 280 Mass. 506, 182 N.E. 857 (1932); *New Jersey*: Brown v. Jamesburg State Home, 60 N.J. Super. 123, 158 A.2d 445 (1960); Goff v. Union County, 26 N.J. Misc. 135, 57 A.2d 480 (1948); *New Mexico*: Scott v. City of Hobbs, 69 N.M. 330, 366 P.2d 854 (1961); *Oklahoma*: *In re* Kroth, 408 P.2d 335 (Okla. 1965).

32 GA. CODE ANN. § 77-904 (1972); IDAHO CODE ANN. § 20-409 (Supp. 1972); MASS. LAWS ANN. ch. 127, § 48 (1969); N.J. STAT. ANN. § 30:4-92 (1964); OKLA. STAT. ANN. tit. 57, § 510 (1969).

33 GA. CODE ANN. § 77-904 (1972); IDAHO CODE ANN. § 20-409 (Supp. 1972); LA. REV. STAT. ANN. § 15.871 (1964); MASS. LAWS ANN. ch. 127, § 48A (1969); N.J. STAT. ANN. § 30:4-92 (1964); OKLA. STAT. ANN. tit. 57 § 510 (1969).

34 *See* Jones v. Houston Fire & Cas. Ins. Co., 134 So. 2d 377 (La. 1961).

35 *See* cases cited note 11, *supra.*

36 203 N.W.2d at 798.

37 Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

38 *Id. See also* Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 127 N.W.2d 636 (1964).

39 Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

40 Frederick v. Men's Reformatory, Rev. Dec. (1971) (Landess, Comm'r).

counselor who then recommends the choice to a classification committee. If the inmate does not wish to remain in his position, he may apply for a transfer. Frederick started in the kitchen but wished to be placed in the license plate factory; he applied and was subsequently moved. The inmates at Anamosa are paid an hourly wage which varies with the complexity of the task and the skills necessary to complete it. Once assigned to an area, an inmate is placed at a task commensurate with his skills and paid a corresponding wage. At the discretion of the area foreman, the prisoner may then progress to more complex tasks and receive a higher wage for each move he makes. Frederick was working as a "catcher" at eight cents per hour when injured but could have progressed to the position of machine operator at fifteen cents per hour had he not been incapacitated. The inmates also receive an incentive pay, *in addition to* their wages for producing more than a certain number of plates per day.

The inmates at Anamosa are represented by an inmate council which acts as a grievance committee for the prisoners and also as a negotiating team with the administration, bargaining for such things as higher wages and better working conditions. From the time Frederick was injured to the time he returned from the hospital, the council had successfully negotiated a raise with the administration of from fifteen cents an hour as the highest possible pay in the license plate factory to twenty-one cents an hour. Based on these facts, the commissioner found that Frederick had a sufficient capacity to enter into a contract for services and sufficient bargaining rights in that contract.[41]

The commissioner partly based his ruling on yet another argument, one with which the trial court and the supreme court did not deal. The state legislature enacted special legislation affecting work-release programs in the penitentiary and the men's reformatory.[42] One section specifically provides that the compensation for prisoners injured while working in such programs shall be from the insurance carrier of the outside employer and not from the state.[43] No such mention is made of prisoners working within the prison walls in prison industries. They are not so excluded from state coverage and the commissioner interpreted this to mean that the legislature intended for prisoners working in prison industries to be covered by the insurance of the state. By relating the factual situation surrounding Frederick's employment and by discussing the legislative intent, the commissioner demonstrated that his findings were supported by the evidence.

The commissioner's findings cannot be reversed absent fraud, insufficient supportive evidence, or overreaching by the commissioner.[44] As there was

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41 *Id.*

42 Work Release Law, *Acts*, 62 G.A. ch. 220 (1967).

43 IOWA CODE § 247A.8 (1971).

44 IOWA CODE § 86.40 (1971). For a discussion of how binding the commissioner's findings are on the court, *see* Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 803 (1941). *See also* F. HALL, IOWA WORKMEN'S COMPENSATION LAW § 178 (1st ed. 1936) [hereinafter cited as HALL].

no fraud alleged and the decision is supported by the evidence, the court could only reverse on the grounds that the commissioner acted in excess of his powers. Despite some confusion in the early Iowa decisions regarding the grounds on which the court may reverse and the tests for their determination,[45] the more recent cases have uniformly held that the findings of the commissioner are conclusive where the facts are in dispute or where reasonable minds may differ as to the inferences that could be drawn from the proven facts.[46] It is within the power of the commissioner, then, to draw inferences from the facts and, if other inferences could have been drawn, the district court may not review them.

It would seem that when the tests for determining employee status have been established by the courts, the application of those tests to a set of facts is an act of drawing inferences from them. The Iowa cases have so held.[47] In *Sister Mary Benedict v. St. Mary's Corporation*,[48] the facts were similar. The commissioner inferred that employment did exist, and the court held that it could not disturb his findings.[49] The claimant was a member of a Roman Catholic order teaching at a parochial school at the direction of her Mother Superior. She was required to live in a convent, was not paid directly for her services, and could withdraw from her teaching assignment only by requesting a transfer or a dispensation from her Mother Superior. The essential difference between the *Frederick* case and the *Sister Mary Benedict* case is that Theodore Frederick was a prisoner assigned to labor by operation of law and Sister Mary Benedict was not. Clearly, if Frederick were not a prisoner, he could have qualified for compensation.

The court overruled the commissioner because of Frederick's prisoner status: that prisoners do not have the capacity to contract for services. If the question had been whether a contract existed, the court would have been bound by the commissioner's findings. But the question of capacity, whether an individual in a given situation has the ability to enter into a contract, is a question of law[50] and completely reviewable by the court.[51] Thus, the court had the power to reverse the commissioner's findings as to the capacity of an inmate to contract for services. But, *should* it have? Given that a contract for services must exist and that a party must have the necessary capacity before he can enter into it, should the court have ruled that inmates at Anamosa lack that capacity?

The legislature, by providing that prisoners who are involved in the work-

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45 CENTER FOR LABOR AND MANAGEMENT, THE IOWA LAW OF WORKMEN'S COMPENSATION, Mon. Ser. No. 8, at 117 (1967).

46 *Id.* at 118. *See, e.g.*, Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 127 N.W.2d 636 (1964).

47 *See, e.g.*, Henderson v. Jennie Edmundson Hosp., 178 N.W.2d 429 (Iowa 1970).

48 255 Iowa 847, 124 N.W.2d 548 (1963).

49 *Id.* at 852, 124 N.W.2d at 551.

50 RESTATEMENT (SECOND) OF CONTRACTS § 18 (1964).

51 HALL, *supra* note 45, § 178. *See also* 1A LARSON, *supra* note 8, § 47.10 at 754.

release programs are covered by workmen's compensation insurance,[52] implies that prisoners *can* meet the requirements of the Act. If they could not contract for services, they could not be "employed" for the purposes of the Act[53] and would not be able to receive the benefits of workmen's compensation regardless of who is responsible to pay. But the legislature declared that they can receive compensation, albeit from the outside employer's insurance instead of the state's.[54] A prisoner eligible for the work-release program is no less a prisoner; his status is not changed.[55] An inmate eligible to participate in the program may apply for it or he may choose not to do so.[56] His capacity to contract should not be changed because he chooses to remain within the prison walls and work in a prison industry. The legislature, by allowing prisoners on work-release programs to recover benefits under the Workmen's Compensation Act recognized by implication either that an individual need not have the capacity to contract to be covered or, if the capacity is required, that prisoners do in fact have that capacity.

The proposition that the legislature did not intend the state to accept responsibility for the compensation of prisoners injured while in prison must be dispelled. In 1872, before the passage of the Workmen's Compensation Act in Iowa,[57] a convict in the state penitentiary was injured while performing mandatory excavation work for a private contractor inside the prison walls. Instead of maintaining an action against the state, he petitioned the state legislature for relief. Subsequently, the Fourteenth General Assembly granted him compensation at the rate of $12.50 per month.[58] The court decision that followed noted that the state could have shielded itself behind the maxim of sovereign immunity but chose not to do so.[59] The state accepted its responsibility to compensate injured prisoners; it does not follow that forty years later, when the Workmen's Compensation Act was passed in Iowa,[60] it should reject that responsibility.

The statutes and the case law in Iowa do *not* compel a decision that prisoners lack the capacity to contract for services and therefore must be denied benefits under the Workmen's Compensation Act. On the contrary, it has been demonstrated that inmates working in prison industries could be

52 Iowa Code § 247A.8 (1971). *See* textual material immediately preceding note 44, *supra.*

53 Employment is defined in Iowa Code § 85.61(2) (1971) and the necessity of a contract for service has been illustrated in the cases cited note 16, *supra.*

54 Iowa Code § 247A.8 (1971) states: "the inmate's recovery shall be from the insurance carrier of the employer of the project. . . ."

55 Iowa Code § 247A.9 (1971) provides that "[n]othing in this chapter shall be construed to affect eligibility for parole under chapter 247 or diminution of confinement of any inmate released under a work release plan."

56 Iowa Code § 247A.3 (1971) sets out the process for application: "An inmate eligible to participate in the work release program *may* make application to the superintendent . . . for permission to participate . . . ." (emphasis added).

57 Workmen's Compensation Act, Acts, 35 G.A. ch. 147 (1913).

58 An Act for the Relief of Joseph Metz, Acts, 14 G.A. ch. 244 (1872).

59 Metz v. Soule, 40 Iowa 236, 240 (1875).

60 Workmen's Compensation Act, Acts, 35 G.A. ch. 147 (1913).

found to be employees and thus qualify for compensation. It is well established that any close questions of law or fact should be resolved in favor of the claimant,[61] in this case in favor of awarding benefits to Theodore Frederick. The court chose, however, to follow the general rule as set out in other jurisdictions and to deny compensation. This decision unfortunately not only leaves Frederick without compensation but also the state legislature with an additional and unnecessary task.

GEORGE PERRY

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[61] *See, e.g.*, Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964); Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 346, 107 N.W.2d 102, 105 (1961).