

Nebraska Law Review

Volume 44 | Issue 4

Article 6

1965

Employment-Precipitated Heart Attacks: A Few Legal Issues in Establishing Compensability

John M. Gradwohl

University of Nebraska College of Law

Hans J. Holtorf Jr.

Holtorf, Hansen & Kortum

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

John M. Gradwohl and Hans J. Holtorf Jr., *Employment-Precipitated Heart Attacks: A Few Legal Issues in Establishing Compensability*, 44 Neb. L. Rev. 809 (1965)

Available at: <https://digitalcommons.unl.edu/nlr/vol44/iss4/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

EMPLOYMENT-PRECIPITATED HEART ATTACKS: A FEW LEGAL ISSUES IN ESTABLISHING COMPENSABILITY

John M. Gradwohl*
Hans J. Holtorf, Jr.**

I.

Suppose that employee, *E*, is found by fellow employee, *F*, at 12:15 p.m., slumped over his desk in physical circumstances from which it is equally plausible that *E* had been eating his lunch or working with ledgers.¹ *E* was in obvious pain and told *F* that the pain had started a few minutes earlier, just after carrying the ledgers up two flights of stairs from the basement. *E* was rushed to a hospital where he passed away at 3:30 p.m. from what an autopsy indicated to be coronary thrombosis. *E* told the attending physician that the pain had struck just after carrying the ledgers up the stairs.

Further investigation revealed that carrying this sort of ledger from the basement was a part of *E*'s normal duties. There is no direct evidence as to when or how the ledgers got from the basement to *E*'s desk. *F* can testify that *E* customarily ate a lunch which he brought from home at his desk at 12:00 noon, although he was not required to do so. At about 11:00 a.m. on the day of his death, *E* told *S*, the plant supervisor for *E*'s employer, a national concern, that he felt tired and intended to take a nap during the noon hour and meet with *S* at 1:00 p.m. A few minutes before noon, *E* told his secretary that he had already eaten lunch and planned to get the ledgers from the basement and work on them during the noon hour to prepare for the meeting with *S*. Portions

* B.S., 1951, LL.B., 1953, University of Nebraska; LL.M., 1957, Harvard Law School; Member, Nebraska Bar; Professor of Law, University of Nebraska. Some of the research for this article was done by Gregory C. Brady, a senior in the University of Nebraska College of Law, under a grant from the University of Nebraska Research Council.

** A.B., 1937, LL.B., 1939, University of Nebraska; Member, Nebraska Bar; Partner, Holtorf, Hansen & Kortum, Gering, Nebraska; contributor of the original Nebraska research to McNEECE, HEART DISEASE AND THE LAW (1961).

¹ Former students of Dean David Dow's practice course will recognize the evidentiary issues raised by this hypothetical case as a collection of some of the imponderables posed by him annually in that course.

of this information can also be found in a company-required accident report prepared by *F* the afternoon of the accident and in the doctor's and hospital's records.

II. COMPENSABILITY

A. IN GENERAL

These facts are intended to present a situation in which entitlement to workmen's compensation benefits depends upon establishing that the exertion from carrying the ledgers precipitated the heart attack. The statute provides that "compensation shall be paid in every case of injury or death caused by accident or occupational disease arising out of and in the course of employment. . . ."² As amended in 1963, the related definitions in section 48-151 of the Nebraska Revised Statutes provide:

(2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen [event] *injury* happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. *The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.*

(4) The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in said employment. The terms shall include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work, *nor to mean an injury, disability or death that is the result of a natural progression of any preexisting condition.*³

An employee voluntarily performing his employment duties on the employer's premises during a noon hour is covered during that time.⁴ But it must also be established by a preponderance

² NEB. REV. STAT. § 48-109 (Reissue 1960).

³ NEB. REV. STAT. §§ 48-151(2) and (4) (Supp. 1963) (Emphasis added.), showing the new [in italics] and deleted [in brackets] language from the 1963 amendments.

⁴ *Tragas v. Cudahy Packing Co.*, 110 Neb. 329, 193 N.W. 742 (1923) (employee voluntarily sharpening chisel during noon hour "on his own time").

of the evidence that the employment, as distinguished from other potential causes, precipitated the injury or death. Under Nebraska law, an employee is entitled to compensation where a work-injury combines with a pre-existing disease or other physical infirmity to produce disability or death. This is true even though the disability or death would not have occurred from the employment except for the presence of the pre-existing infirmity.⁵

The ultimate element in claimant's case must be a qualified medical opinion that facts admitted in evidence showing employment exertion were the "aggravating" or "precipitating" cause⁶ of E's death or of a condition which resulted in E's death. For recovery to be allowed on the hypothetical facts set out above, it would be critical that some evidence be introduced of employment exertion of a sufficient degree to support a reliable medical

⁵ For a discussion of these rules, their development, and their relationship to compensation for injuries by exertion or strain, see Gradwohl, *Nebraska Workmen's Compensation For Aggravation of Pre-Existing Infirmities By Exertion or Strain*, 41 NEB. L. REV. 101 (1961).

⁶ "Aggravation of disease" refers to "active suffering from a pre-existing condition which was enhanced by an injury;" "precipitation" to "a pre-existing condition which never manifested itself by overt symptoms." Gair, *The Aggravation, or Precipitation, or Aggravation and Precipitation, of Pre-Existing Condition by Trauma, Aggravation of Pre-Existing Conditions: Medical Aspects of Heart Injury Cases* 33 (P.L.I. 1957): "In the case of precipitation, the 'condition' was below water level, so to speak, and might never have emerged above it; but in the case of the aggravation, of course, it was already observable." Compensation is awarded in Nebraska for either "aggravation" or "precipitation." See, e.g., *Haskett v. National Biscuit Co.*, 177 Neb. 915, 920, 131 N.W.2d 597, 600-01 (1964): "Both Dr. Farrell and Dr. Jones testified that the accident was the precipitating cause of the psychiatric condition which resulted in the plaintiff's present disability. There is evidence that the plaintiff was predisposed to develop such condition, and that the same injury to another person might not have resulted in a similar disability. But that was no defense. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation." *Turner v. Beatrice Foods Co.*, 165 Neb. 338, 341, 85 N.W.2d 721, 724 (1957): "We have held that when an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor." *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922) (syllabus by the court): "It is sufficient to show that the injury and pre-existing disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arose out of the employment."

opinion on causation.⁷ In the absence of establishing both the employment exertion and a medical opinion as to its causal relation to the death the claimant would lose the hypothetical case.⁸ In fact, no Nebraska Supreme Court decision to date has awarded workmen's compensation benefits in a heart attack *death* case.⁹

⁷ There are two phases of this requirement: (1) The opinion of an expert medical witness must be based upon facts admitted in evidence; and (2) because a compensation award cannot rest upon surmise, conjecture or possibility, the expert's opinion must be "with reasonable certainty" or "with reasonable medical certainty." See, e.g., *Marasco v. Fitzpatrick*, 173 Neb. 272, 113 N.W.2d 112 (1962); *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945) (rejecting doctor's opinion that "it could" or "it could be"); *Whittington v. Nebraska Natural Gas Co.*, 177 Neb. 264, 286, 128 N.W.2d 795, 808 (1964) (civil negligence suit): "He was then asked, 'Can you say with reasonable medical certainty that it would be possible that she would have the effects which we described and which you have observed from the effects of natural gas?' Objections were made to this for the reasons that they should not deal in possibilities but with reasonable medical certainty and that it was incompetent, irrelevant, and immaterial. Over repeated objections, Dr. Merrick was allowed to answer. 'I think it would be reasonable to say that among the causes for these symptoms the possibility of exposure to gas would have to be considered.' It seems apparent that the objections should have been sustained and the answer excluded." For an interesting "Presentation of Expert Medical Evidence in Court—Mock Trial of a Case of Trauma and the Heart," see BEAR, LAW, MEDICINE, SCIENCE—AND JUSTICE, 75-143 (1964).

⁸ For Nebraska decisions before the 1963 amendments denying compensation for heart injuries allegedly caused by employment, see *Cochran v. Bellevue Bridge Comm'n*, 174 Neb. 761, 119 N.W.2d 292 (1963); *Nelson v. Frenchman-Cambridge Irr. Dist.*, 168 Neb. 37, 95 N.W.2d 201 (1959); *Eschenbrenner v. Employers Mut. Cas. Co.*, 165 Neb. 32, 84 N.W.2d 169 (1957); *McCauley v. Harris*, 164 Neb. 217, 82 N.W.2d 30 (1957); *Ruderman v. Forman Bros.*, 157 Neb. 605, 60 N.W.2d 658 (1953); *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945); *Pixa v. Grainger Bros. Co.*, 143 Neb. 922, 12 N.W.2d 74 (1943); *Duncan v. Weidman*, 143 Neb. 864, 11 N.W.2d 537 (1943); *Mook v. City of Lincoln*, 143 Neb. 254, 9 N.W.2d 184 (1943); *Brown v. City of Omaha*, 141 Neb. 587, 4 N.W.2d 564 (1942); *Rose v. City of Fairmont*, 140 Neb. 550, 300 N.W. 574 (1941); *Feeney v. City of Omaha*, 140 Neb. 497, 300 N.W. 571 (1941); *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N.W. 802 (1938); *Brady v. Beatrice Creamery Co.*, 127 Neb. 786, 257 N.W. 66 (1934); *Gilkeson v. Northern Gas Eng'r Co.*, 127 Neb. 124, 254 N.W. 714 (1934); *Uribe v. Woods Bros. Constr. Co.*, 124 Neb. 243, 246 N.W. 233 (1933). See also *Marasco v. Fitzpatrick*, 173 Neb. 272, 113 N.W.2d 112 (1962); *Mullen v. City of Hastings*, 125 Neb. 172, 249 N.W. 560 (1934).

⁹ The Nebraska decisions in which surviving employees have recovered compensation for heart injuries are: *Knaggs v. City of Lexington*, 171 Neb. 135, 105 N.W.2d 727 (1960); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Yakal v. Henkle & Joyce Hardware Co.*, 145

B. USUAL VERSUS UNUSUAL EXERTION IN HEART CASES

The 1963 amendments to the workmen's compensation law were intended to remove the judicial interpretation of the "accident" definition requiring some sort of a cause external to the workman's body—a slip, trip, or fall, or some form of exertion which was unusual to his ordinary work duties. Under the amendment, employees are entitled to compensation for disability or death caused by exertion or strain in performing any of the duties of their employment, usual or unusual.¹⁰ Nevertheless, it has not been completely clear whether a claimant would be required in some situations to show unusual exertion as an element of "arising out of and in the course of employment" or "in fact caused by the employment."¹¹ No reason appears for differentiating heart cases from any other injuries by exertion or strain, except perhaps, that medical knowledge of the causes of heart malfunctions and the testimony based thereon, may be somewhat less certain at the present time.¹²

Neb. 365, 16 N.W.2d 531 (1944); *Schirmer v. Cedar County Farmers Tel. Co.*, 139 Neb. 182, 296 N.W. 875 (1941). In other cases, compensation has been awarded for heart injury as a part of some other disability. See, e.g., *Marler v. Grainger Bros.*, 123 Neb. 517, 243 N.W. 622 (1932) (increased heart rate and dizziness as a part of post traumatic neurosis).

¹⁰ For a general discussion of the scope and effect of the 1963 amendments, see Gradwohl, *Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement*, 43 NEB. L. REV. 27 (1963).

¹¹ *Id.* at 31-2 (citing Florida decisions under the statute from which the original 1963 legislative draft [later amended in this respect] was copied). In view of the decision in *Campbell v. City of North Platte*, 178 Neb. 244, 132 N.W.2d 876 (1965) (discussed *infra*), however, the likelihood that the Nebraska court will take this approach seems slight.

¹² The Minnesota court appears to have determined this issue realistically in a series of cases stemming principally from *Golob v. Buckingham Hotel*, 244 Minn. 301, 304, 69 N.W.2d 636, 639 (1955): "There is much of interest from a medical viewpoint in the record and briefs. It would be of no value to set forth the opposing views of the medical experts. It is sufficient to say that it is apparent that in this field of medicine, as well as others, even those specializing in the field do not agree on the question of whether trauma or exertion can cause the formation of a blood clot and the resulting thrombosis. It is possible that part of the difficulty in understanding the divergence of views of doctors comes about by virtue of the difference in approach to the question of causation by members of the medical and legal professions. However that may be, until the time comes when medical knowledge has progressed to such a point that experts in the field of medicine can agree, causal relation in determining compensable injury or disease will have to remain in the province of the trier of

1. *Legislative development*

The context of the 1963 legislative amendments indicates clearly that there should be no unusual exertion test under any section of the workmen's compensation law, applicable to all or any exertion cases. Addition of the language relating to proving employment cause as a part of the "accident" definition has statutorily fused the "by accident" and "arising out of and in the course of employment" requirements. Artistically, the "in fact caused by the employment" sentences might better appear either as a separate section pertaining to burden of proof or as a part of the definition of "arising out of and in the course of employment." The Judiciary Committee, which had previously split three-to-three (with one senator not voting) on the bill as introduced, voted the bill to the floor of the Legislature only after addition of the language relating to employment-cause.¹³ The predominant intent of the Committee to eliminate the unusual exertion test is clear.¹⁴

fact." See *Rosvold v. Independent Consol. School Dist.*, 251 Minn. 297, 300-01, 87 N.W.2d 646, 649 (1958): "So we have here a situation which arises often in compensation cases. An employee dies from some disease, such as cancer, stroke, coronary thrombosis, as here, or some other disease, having had experiences in the course of his work which it is claimed were the cause of his death. Competent medical experts are called in to give their opinions as to whether there is causal connection between these work experiences and his death. Those called by petitioner will testify that there is such causal connection, while those called by the employer will say that there is no such connection. It does not follow that their opinions are colored or influenced by reason of the fact that they are called by the one side or the other. In many fields of medicine there is still much room for disagreement among experts, but the number of such fields is becoming less and less. As medical science progresses, it is expected that more and more conflicts will be resolved. But while these disagreements or conflicts are still going on, finders of fact and courts generally must make decisions. . . . The determination of the question of causation on conflicting expert testimony is no different than the determination of any other question of fact where witnesses disagree." Cf. *Campbell v. City of North Platte*, 178 Neb. 244, 247, 132 N.W.2d 876, 878 (1965) (opinion of Judge Smith): "No complaint is made that a direct causal relationship in medicine will not permit an inference which meets this standard. To refine further is to mistake one science for another. When the question is medical, medicine must give us the answer."

¹³ *Hearings Before the Committee on the Judiciary on L.B. 497*, 73d Neb. Leg. Sess. (April 17, 1963, April 22, 1963, and May 8, 1963).

¹⁴ *Statement of Judiciary Committee on L.B. 497*, 73d Neb. Leg. Sess. (May 22, 1963): "For the last two decades the Supreme Court has given a narrow interpretation of the type of injury which occurs from exertion on the part of the employee while doing work demanded by his employment. At one time the Nebraska court favored the more

It is a safe assumption that the statutory addition of the last two sentences in section 48-151(2) and the last clause in section 48-151 (4) was intended to assure that those rules for proving employment-connection, then clearly stated in many judicial opinions, would remain unchanged. That several technically separate requirements were thrown together in the process indicates a clear substantive as well as physical fusion of the requirements, at least with respect to employment exertion or strain. This result seems wholly proper since both requirements serve the same underlying purpose of requiring a claimant to locate with some degree of precision the time and place within the employment from which the injury was derived.

2. *Judicial Analogy*

It is submitted that the recent firemen's pension decision in *Campbell v. City of North Platte*¹⁵ provides a convincing precedent that unusual exertion is not, and should not be, required to establish employment-connection in workmen's compensation heart cases. In most respects, *Campbell* cannot be taken as a forecast of the outcome of future workmen's compensation cases. Even as a firemen's pension precedent, the decision should be carefully limited to its facts.

On the issue of legal causation, however, the *Campbell* case stands squarely for the proposition that it is not necessary to show unusual employment exertion to prove a work-caused heart injury. The majority termed the issue "a fact question whether the disease was contracted in the line of duty." But certainly the majority opinion, and probably the dissenting opinion as well, operated on the clear assumption that the performance of ordinary work duties, without a showing of extraordinary exertion or stress beyond the normal duties, could be the cause in fact of a heart attack.

The workmen's compensation "accident" definition has the added requirements of "suddenness" and "objective symptoms" not found in the firemen's pension law. These requirements

liberal rule which is law in a great majority of the other states; but in the last two decades our Supreme Court has construed, generally, that inner bodily injuries caused by exertion are not compensable unless the employee obtains such in connection with a slip, trip or fall. This narrow court interpretation does not do justice in many cases and is not in harmony with the majority of opinions in other states under workmen's compensation law."

¹⁵ 178 Neb. 244, 132 N.W.2d 876 (1965).

will be extremely significant in trials of compensation cases where the injury or death is alleged to have resulted from exertion or strain. Although the burden of proving these two elements will result in significant hurdles for a claimant to master, once over them, the underlying legal requirement of exertion or strain in the two systems are identical.

The applicable fireman's pension statute provided benefits for the widow or minor children "in case of the death, while in the line of duty . . . or in case death is caused by or is the result of injuries received while in the line of duty."¹⁶ Mr. Campbell died on March 11, 1963, of coronary artery disease at 56 years of age. He had been a paid fireman since 1948, serving as assistant chief from 1951 through 1962. He had passed physical examinations in 1948, 1951, and 1955.

The *Campbell* opinion reports that "in the fall of 1959 and later he complained of severe chest pain and pressure in his throat occurring mostly upon his return to the fire station from a call. In December, 1961, a physician diagnosed coronary arteriosclerosis."¹⁷ The precise nature of these findings are not reported. Apparently, his condition was not severe since there is no indication that his fire fighting duties were curtailed at this time or that his secondary part-time job for land surveyors was limited.¹⁸

The final sequence of events occurred as follows:

Campbell worked for a land surveyor on July 5 and 6, 1962. The following day—his third consecutive day off duty and the fifteenth day since his last call—symptoms of a coronary occlusion hospitalized him. When he returned to duty in October, he was assigned tasks limited to the fire station. On March 11, 1963, he worked at the station from 2 to 4 p.m., and died at home at 9:30 p.m.¹⁹

¹⁶ NEB. REV. STAT. § 35-202 (Reissue 1960). Judge Smith's majority opinion in *Campbell* quoted only the phrase "death is caused by or is the result of injuries received while in the line of duty." Judge Spencer's dissenting opinion charged that the majority opinion changed the first portion of the statute to read "In case of death while in the employ."

¹⁷ 178 Neb. 244, 246, 132 N.W.2d 876, 878 (1965).

¹⁸ It should be noted that full-time paid firemen in Nebraska have traditionally worked on alternate twenty-four hour schedules, with additional work days off periodically. Most paid firemen have found it economically necessary to secure secondary employment on these off-days. Mr. Campbell had worked from one or two to eight hours per day at this part-time job for several years.

¹⁹ 178 Neb. 244, 246, 132 N.W.2d 876, 878.

The only expert witnesses were two general practitioners and an internist called by the plaintiff widow. The internist "found on hypothesis a direct causal relation between duty and disease." The jury verdict was undoubtedly produced by this expert medical testimony. The defendant city called no additional medical experts.

In a compensation case, the plaintiff's evidence would additionally have needed to establish that the heart condition producing death was caused "suddenly and violently"²⁰ by the employment and that there were "at the time objective symptoms of an injury." These elements of compensation proof would undoubtedly have been lacking in Mr. Campbell's situation.

It should not be inferred that in a workmen's compensation case, the claimant will be put to any greater burden of proof or persuasion than "a preponderance of the evidence" as in jury cases under the firemen's pension law. But the suddenness and objective symptoms requirements mean that, in those respects, the compensation statutes have drawn a tighter legal requirement for employment-causation than have the firemen's pension statutes.

The supreme court majority decision in *Campbell* did no more than find the evidence sufficient to support the jury verdict under traditional concepts of appellate review. The evidence contained a medical opinion that there was a direct causal relation between Mr. Campbell's fire fighting duties and his fatal heart attack. Applying the rule that an expert's opinion, if not impeached, is sufficient to sustain a jury verdict, the internist's opinion of the

²⁰ It would seem that any heart attack "happening suddenly" would automatically be "violently" as used in this phrase. At the time of the 1963 amendments, there had been no substantial judicial development of the term "violently" other than as a part of the entire phrase intended to require a degree of suddenness which would fix the time and place of the alleged disability or death within the employment. The 1963 amendments were intended to eliminate the means by which disability or death was brought about as a requirement for compensability. For that reason, the phrase "happening suddenly and violently" should continue to be applied as an entity relating to speed, without imposing an additional requirement of physical or external violence or violent means. *But cf.* *Shamp v. Landy Clark Co.*, 134 Neb. 73, 80, 277 N.W. 802, 806 (1938) (unwitnessed death of coal hauler found dead crumpled over the heap of coal in his truck): "The death of Ole Shamp was unsuspected and unforeseen and happened suddenly, but there is a lack of evidence from which it may properly be inferred that there was any violence, within the meaning of the law, connected with the death."

effect of "emotional stress, emotional-physical strain, and toxic effects" properly carried the case to the jury.²¹

The four judge supreme court majority opinion did not pass fully on the medical issues in the *Campbell* case, but merely affirmed a jury verdict resulting from the testimony of the internist. Three judges dissented on the basis that there was not enough evidence that the stress of fire fighting produced the heart condition causing death to submit the case to the jury since the internist had conceded that other activities, such as those engaged in by surveyors, physicians, attorneys, or businessmen, might be equally strenuous in this regard.

Had the *Campbell* case been one of de novo review upon the record of a workmen's compensation award,²² the four majority members of the court might well have evaluated the medical evidence contained in the record in favor of the defendant. For the same reasons, at the district court or compensation court trial of the same compensation case without a jury, the trial judges might have found against employment-cause on this medical evidence. This limitation in the *Campbell* decision, if any, in this respect, is an inherent aspect of resolving complex medical factual issues by jury trial in an adversary system.

By similar reasoning, it seems quite probable that the dissenting judges in *Campbell* will not impose an unusual exertion requirement in a workmen's compensation heart case. Judge Spencer's dissenting opinion is focused on the proposition that Mr. Campbell's fire fighting duties were not shown to have caused Mr. Campbell's death. The opinion contends that the statute has been construed by the majority to read "while in the employ" rather than "while in the line of duty." The reasons assigned are that the evidence did not establish an immediate disablement because of the extended time interval and the occurrence while sitting in a living room at home; that the evidence did not differentiate fire fighting from the moonlighting as a potential cause of the fatal heart attack; and that the evidence did not differentiate fire fight-

²¹ Apart from the tactical risk before the jury, the fact that defendant offered no independent medical evidence would not affect this result. In both of the cases cited for this proposition in the Supreme Court majority opinion, the defendant had introduced medical evidence. See *Long v. Railway Mail Ass'n*, 145 Neb. 623, 17 N.W.2d 675 (1945); *McNaught v. New York Life Ins. Co.*, 145 Neb. 694, 18 N.W.2d 56 (1945). See also *Hassmann v. City of Bloomfield*, 146 Neb. 608, 20 N.W.2d 592 (1945).

²² NEB. REV. STAT. § 48-185(3) (Reissue 1960).

ing from ordinary life stresses as a potential cause of the fatal heart attack.

Note that Judge Spencer's reasons are not concerned with whether or not the death arose from the ordinary stresses of fire fighting. It is not contended that to establish fire fighting as a potential cause of death unusual exertion within fire fighting must be shown. The factual concern involved differentiating the ordinary stresses of fire fighting from non-fire fighting stresses.

Further, a potential workmen's compensation claimant would need to meet the "happening suddenly" and "producing at the time objective symptoms of an injury" requirements. The sort of evidence involved in these issues might well have filled the void the dissenting judges found in *Campbell*.

In this regard, the dissenting opinion distinguished *Elliott v. City of Omaha*,²³ relied upon by the majority, on the basis that in *Elliott* there is stronger evidence that the employee contracted pneumonia at work and then died from that disease. Mr. Campbell's 1962 heart attack occurred on his third consecutive day off, fifteen days after his last fire call. It is significant, at least inferentially, to the majority in *Campbell* that the 1959 symptoms occurred at work and that the internist's opinion linked the stresses of fire fighting, whenever they may have occurred, to the resulting cause of death.

In *Elliott*, the jury had found that a fireman contracted pneumonia in the line of duty from which he died ten days later. Judge Day's supreme court opinion held that the phrase "injuries received while in the line of duty" includes a disease contracted in the line of duty. The opinion states (and this is the item reported in the annotation under section 35-202 of the Nebraska Revised Statutes):

Cases arising under compensation acts are not very helpful to the present discussion, because in most, if not all, of them compensation is allowed only for injuries by accident, arising out of and in the course of the employment. It will be readily conceded that the phrase, 'injuries received while in the line of duty,' has a much broader meaning than the language generally used in compensation acts.²⁴

Judge Day meant this language to support the conclusion that a disease constituted an "injury" under the fireman's pension act although it would not have been an "accident" within the

²³ 109 Neb. 478, 191 N.W. 653 (1922).

²⁴ *Id.* at 480-1, 191 N.W. at 653-54.

compensation law. The first occupational disease coverage was not added to the workmen's compensation law until 1937. For that reason, Judge Day's opinion properly concluded that although it would not be covered by the workmen's compensation statutes, the fireman's pension law "includes any hurtful effect which a fireman may receive in the line of duty."

But at the time of the *Elliott* opinion, the Nebraska court had already decided in favor of the compensability of injuries from exertion under the workmen's compensation statute. In *Manning v. Pomerene*,²⁵ compensation was allowed for the death of an employee from the bursting of blood vessels in the employee's brain or stomach as he pushed two "I" beams in the ordinary performance of his duties. The workmen's compensation unusual exertion requirement was brought into existence by the court more than ten years after *Elliott*; nothing prior to *Elliott* remotely suggests any such workmen's compensation requirement. Thus, the reasoning in *Elliott* would wholly support the proposed analogy on employment-cause from the *Campbell* case to injuries by exertion or strain under the workmen's compensation law.

III. RULES OF EVIDENCE

A. IN GENERAL

The rules of evidence which will be applied to a trial of the hypothetical facts set out above are the normal rules of evidence applicable to district court equity trials.²⁶ Unlike some other states, Nebraska follows no special evidentiary rules in workmen's compensation cases.²⁷ Although the Workmen's Compensa-

²⁵ 101 Neb. 127, 162 N.W. 492 (1917). See *Derr v. Kirkpatrick*, 106 Neb. 403, 184 N.W. 91 (1921).

²⁶ See NEB. REV. STAT. § 48-181 (Reissue 1960).

²⁷ See, e.g., *Hamilton v. Huebner*, 146 Neb. 320, 332, 19 N.W.2d 552, 559 (1945): "We are unwilling to accept the doctrine, stated in the Minnesota and Pennsylvania cases, that evidence which would be incompetent as hearsay in other cases should be considered competent in cases for compensation under the Workmen's Compensation Act. So to hold would tend to change the liability of the employer from liability for injuries or death arising out of and in the course of the employment to the liability of an insurer of the well being of his employee. The compensation act does not put that burden upon the employer." *Muff v. Brainard*, 150 Neb. 650, 652-53, 35 N.W.2d 597, 600 (1949): "Hearsay evidence is not admissible in a workmen's compensation case any more than in any other type of case. The foregoing rule is no different because the death of the employee alleged to have suffered a compensable accident has made it difficult of proof." For a survey of the special evidentiary rules applied in other states, see 2 LARSON, WORKMEN'S COMPENSATION LAW § 79 (1961).

sation Court has some power to relax the usual common law or statutory rules of evidence,²⁸ it has done so only with respect to the manner of presenting medical evidence on original hearings before a single judge of the court.²⁹

B. SPONTANEOUS DECLARATIONS AND RES GESTAE

There is an abundance of Nebraska decisions and judicial statements concerning spontaneous declarations and *res gestae*. However variously stated,³⁰ the requirements are substantially those classified as spontaneous exclamations by Wigmore:

(a) *Nature of the occasion.* There must be some *occurrence, startling enough* to produce this nervous excitement and render the utterance spontaneous and unreflecting. . . .

(b) *Time of the utterance.* The utterance must have been *before there has been time to contrive and misrepresent, i.e.,* while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. . . .

(c) *Subject of the utterance.* The utterance must *relate to the circumstances of the occurrence preceding it.* . . .³¹

Several Nebraska workmen's compensation cases are quite similar to the hypothetical facts. From these cases, it seems that

²⁸ NEB. REV. STAT. § 48-168 (Reissue 1960). The supreme court's requirement that the general rules of evidence apply to compensation cases has been established in appeals from trials *de novo* in a district court and has not dealt specifically with the Workmen's Compensation Court's power under § 48-168.

²⁹ NEB. WORKMEN'S COMP. CT. R. XV.

³⁰ See, e.g., *Gain v. Drennen*, 160 Neb. 263, 267-68, 69 N.W.2d 916, 919 (1955): "There is no hard and fast rule for demarcation between that which is and that which is not *res gestae* but this court has said that a declaration, to be competent evidence as part of the *res gestae*, must be made at such time and under such circumstances as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made." *Tongue v. Perrigo*, 130 Neb. 564, 571, 265 N.W. 737, 740 (1942): "The doctrine of *res gestae* is somewhat obscure, but expressed in our language, and not in the abbreviated Latin phrase, its application to the admissibility of statements depends upon their being spontaneous and impulsive; the material inquiry being whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection and premeditation." See *Callahan v. Prewitt*, 141 Neb. 243, 3 N.W.2d 435 (1942); *Roh v. Opocensky*, 126 Neb. 518, 253 N.W. 680 (1934).

³¹ 6 WIGMORE, EVIDENCE § 1750 (3d ed. 1940). This definition has been paraphrased in Nebraska decisions. See *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958); *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W. 2d 552 (1945).

some of *E*'s statements are within the scope of this rule, but that introduction of the testimony would depend upon further development of the circumstances in which the statements were made, especially *E*'s probable condition throughout the time interval between event and declaration.

The leading workmen's compensation case appears to be *Hamilton v. Huebner*.³² A forty-five year old filling station operator sustained a heart attack after attempting to start an engine with a rope. Thirty to sixty minutes after the initial pulling, decedent told a fellow employee he had not been able to start the engine and that he had a severe pain in his chest. A few minutes later, he said the same thing to a tire company representative. He did not tell of any fall, ask for assistance, or appear to be extremely ill. Sometime within the next hour, he walked to his home less than a block away and for the first time in response to his wife's question as to cause, added that the starter rope had broken and he had fallen. At that time he was excited and in pain and showed signs of physical distress. Fifteen or twenty minutes later, he told his doctor that he had fallen and suffered an acute pain very shortly thereafter. Because the usual exertion rules would have barred compensation for injuries from the performance of normal duties, claimant's case depended upon establishing that the decedent had fallen.

The court noted in *Hamilton* that "[d]ue to the variable circumstances arising in each case, any attempt to base a decision on fact precedent is largely futile."³³ Nevertheless, the rejection in *Hamilton* of the testimony as to the decedent's post injury statements appears to represent a sound application of the spontaneous declaration rules under the classic statements: There was no showing that the statements to the fellow employee or tire salesman were made as a result of any nervous excitement. The statements to the wife and doctor, while made under what might be stress and pain, were made only after time to reflect, uttered in circumstances of reflection, and probably did not relate to the circumstance preceding them in point of time. It is possible that since the legislative elimination of the usual exertion rules in 1963, a claimant in a similar case could sustain a burden of proof of employment-connection upon a fuller development of other facts relating to his attempts to start the engine. But his after-the-event statements which were previously excluded would also be excluded today.

³² 146 Neb. 320, 19 N.W.2d 552 (1945).

³³ *Id.* at 329, 19 N.W.2d at 557.

Other Nebraska workmen's compensation cases have applied Wigmore's statement paraphrased in *Hamilton* that "the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated."³⁴ In *Ridenour v. Lewis*,³⁵ the court admitted oral statements made ten to thirty minutes after an attack by robbers. *Perry v. Johnson Fruit Co.*³⁶ admitted decedent's statements made upon reviving in a hospital some fifteen minutes after the accident. But in *Milton v. City of Gordon*,³⁷ the casual statement of an employee twenty-five or thirty minutes after the alleged employment-caused injury was not admissible. The effect of these factual determinations is likely to be minimal. Each case will depend upon an application of the general rules to the specific facts without substantial factual analogy.

Apart from the spontaneous declaration rule, employee statements after the injury as to its cause are inadmissible hearsay narratives of past events. This covers written reports by the employee to the employer as well as his oral statements.³⁸

The exceptions to the spontaneous declarations rule are not significant in the hypothetical situation. A doctor is permitted to testify as to the past history given him by the patient, including the cause of the harm. The testimony is admissible, however, only on the issue of diagnosis and treatment, and is not evidence on causation.³⁹ To be admissible on the cause issue, the medical opinion must rest on facts otherwise admitted in evidence. Subsequent statements to the decedent's wife have been admitted in rebuttal to defendant's position that no claim of employment-connection was made at the time of the alleged injury, although the testimony would not have been received on the case in chief.⁴⁰ Similarly, direct evidence may open up the subject for cross-

³⁴ 6 WIGMORE, *op. cit. supra* note 31, § 1750.

³⁵ 121 Neb. 823, 238 N.W. 745 (1931).

³⁶ 123 Neb. 558, 243 N.W. 655 (1932).

³⁷ 129 Neb. 888, 263 N.W. 483 (1935).

³⁸ See *Muff v. Brainard*, 150 Neb. 650, 35 N.W.2d 597 (1949). The briefs of the parties make clear that the decedent prepared a written, signed accident report.

³⁹ *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956). See *Gotfrey v. Sakurada*, 169 Neb. 879, 101 N.W.2d 470 (1960).

⁴⁰ *McCoy v. Gooch Milling & Elevator Co.*, 156 Neb. 95, 102-03, 54 N.W.2d 373, 378 (1952).

examination.⁴¹

C. THE "STATE OF MIND" EXCEPTION

The Nebraska decisions have not dealt definitively with the so-called "state of mind" exception to the hearsay rule. Some courts have ruled that statements evidencing a present state of mind or intention of the declarant are not hearsay when testified to by another and can be offered on the issue of the declarant's subsequent conduct where relevant.⁴²

Nebraska appears to have applied these rules in a number of criminal cases. For example, the defendant in a murder case was permitted to introduce evidence of his deceased wife's stated intention within three weeks of her death to commit suicide in support of his defense that death occurred by suicide.⁴³ Applying the "state of mind" exception to the hypothetical facts, *E*'s secretary would be permitted to testify as to *E*'s statements that he intended to carry the books and *S* could testify (if not precluded by the dead man's statute) as to *E*'s statements that he intended to eat lunch at 12:00. The weight to be given this evidence would depend to a large degree, however, upon the surrounding circumstances. In any event, the secretary would not be permitted to testify concerning *E*'s statements of having eaten lunch previously, as this would relate to a past fact and not to the existing state of *E*'s mind.

⁴¹ See NEB. REV. STAT. § 25-1215 (Reissue 1964); *Sweeney v. Midwest Life Ins. Co.*, 129 Neb. 521, 262 N.W. 47 (1935).

⁴² 6 WIGMORE, *op. cit. supra* note 31, § 1725; McCORMICK, EVIDENCE § 270 (1954).

⁴³ *Sutter v. State*, 102 Neb. 321, 167 N.W. 64 (1918). Also, a defendant might introduce evidence of "uncommunicated threats" by the deceased to illustrate or explain some act of the deceased, although the evidence is not admissible unless other evidence has first been introduced in support of self-defense. See *Binfield v. State*, 15 Neb. 484, 19 N.W. 607 (1884). The state has been permitted to introduce evidence, where relevant, in a criminal prosecution concerning an intention of a deceased person. See, e.g., *Fields v. State*, 107 Neb. 91, 185 N.W. 400 (1921). In dictum, the court has stated the general rule, citing, among other authorities, the leading decision in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892); *Gering v. School Dist.*, 76 Neb. 219, 227-28, 107 N.W. 250, 254 (1906). For the effect of analogous evidence admitted in two will contest cases, compare *Muse v. Stewart*, 173 Neb. 521, 113 N.W.2d 644 (1962), with *Hober v. McArdle*, 173 Neb. 510, 113 N.W.2d 625 (1962).

D. "HABIT"

Unwitnessed employee death cases provide a potential source for determining whether the habits or customs of an individual can, where relevant, be introduced as evidence that he did or did not do certain acts on the questioned occasion. The process of industrialization often encourages employers to adopt standard operating procedures and employees to become creatures of habit while at work. Consistent business practices have received favorable evidentiary treatment in past cases.⁴⁴

Where witnesses to the act in question are present, evidence of habit is apparently inadmissible in Nebraska.⁴⁵ But the court has quoted an American Law Reports annotation which states:

Although the cases are not in accord, and decisions from the same state do not always apply a uniform general rule, the numerical weight of authority is to the effect that, if a person is killed in an accident of which there are no eyewitnesses, evidence of his habits is admissible as tending to throw light upon his probable conduct at the time of the injury.⁴⁶

Taking this statement of the majority rule at its full value, the testimony by *E*'s fellow employees that *E* regularly ate his lunch at his desk at 12:00 noon would be admissible.

E. THE "DEAD MAN'S STATUTE"⁴⁷

Whoever initiates a workmen's compensation death claim will be considered the representative of the deceased employee under the dead man's statute,⁴⁸ except possibly to the extent the issue

⁴⁴ 1 WIGMORE, *op. cit. supra* note 31, §§ 92-93; McCORMICK, *op. cit. supra* note 42, § 162.

⁴⁵ *Holberg v. McDonald*, 137 Neb. 405, 289 N.W. 542 (1940).

⁴⁶ Annot., 15 A.L.R. 125, 138 (1921), quoted in *Peake v. Omaha Cold Storage Co.*, 158 Neb. 676, 692, 64 N.W.2d 470, 480 (1954).

⁴⁷ NEB. REV. STAT. § 25-1201 (Reissue 1956).

⁴⁸ See *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 205, 220 N.W. 255, 258 (1928): "The objection to the testimony . . . seems to be well taken. This testimony had to do with transactions and conversations with a deceased person, and the plaintiff [widow] is the representative under the provisions of the workmen's compensation act permitting the claim for compensation to be made by the widow, next of kin, or administrator of the estate." See also *Coster v. Thompson Hotel Co.*, 102 Neb. 585, 586, 168 N.W. 191, 192 (1918): "These sections, construed together, seem to authorize recovery to be had by the dependent or dependents themselves, their legal guardian or trustees, the executors or administrator of the deceased, and, if no representative be qualified, the payment may be made 'to such persons as would be appointed administrator of the estate of such decedent.' The statute

involves the plaintiff's personal standing to sue.⁴⁹ It is likely that in the hypothetical case, *S*, as the plant supervisor of the corporate employer, is a "person having a direct legal interest" under the dead man's statute and thereby incompetent to testify as to any transactions or conversations with the employee.⁵⁰ The testimony of corporate stockholders⁵¹ and members of unincorporated associations⁵² is incompetent under the statute. Similar reasoning would apply to the directors and high level managerial personnel of corporations and associations. At some point, however, it can be argued that a "mere agent" of a party is not incompetent to testify.⁵³ *S* is probably incompetent to testify concerning his conversation with the deceased employee unless the compensation claimant in some manner waives the statutory bar. But *E*'s fellow employees would not appear to be incompetent to testify under this rule.

is confusing upon its face and inconsistent, but it should be liberally construed, and, if it is borne in mind that its object is to furnish compensation to those dependent on the deceased for support, it does not seem very important in whose name the action is brought, so long as the relief is sure to reach the proper party." The statutory language involved in this decision is still on the books. Compare NEB. REV. STAT. §§ 48-124 and 48-143 (Reissue 1960) with NEB. REV. STAT. §§ 3665 and 3685 (1913). For similar reasons, whoever initiates a workmen's compensation death claim would be considered "the personal representative of a deceased person" for purposes of waiving the physician-patient privilege. See NEB. REV. STAT. § 25-1207 (Supp. 1963).

- ⁴⁹ Cf. *Bourelle v. Soo-Crete, Inc.*, 165 Neb. 731, 87 N.W.2d 371 (1958) (issue whether widow was deceased's common law wife; ruling that employer was not representative of deceased).
- ⁵⁰ See Cashen, *Practice and Procedure Before Nebraska Workmen's Compensation Court*, 41 NEB. L. REV. 151, 162 (1961); Pospishil, *The "Dead Man's Statute" in Nebraska*, 31 NEB. L. REV. 1, 5 (1951).
- ⁵¹ See, e.g., *Tecumseh Nat'l Bank v. McGee*, 61 Neb. 709, 724, 85 N.W. 949, 954 (1901): "An examination of the record discloses that the purported conversation was between the officers and stockholders of the bank, on the one side, and the deceased on the other, in which different ones took part, and as to the officers of the bank, all should be regarded as participants. Being stockholders and officers in the bank, they had a legal interest in the action, and they were rendered incompetent to testify regarding such conversation."
- ⁵² *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 220 N.W. 255 (1928).
- ⁵³ Cf. *Preferred Pictures Corp. v. Thompson*, 170 Neb. 694, 698, 104 N.W.2d 57, 60 (1960) (permitting witness to testify as to conversations with deceased agent of party): "Appellant was not incompetent to testify to a conversation had by him and Weilepp, the deceased agent, because appellee was not the representative of the deceased agent. A party

F. UNIFORM BUSINESS RECORDS AS EVIDENCE ACT⁵⁴

It is highly questionable whether *F*'s accident report, although pursuant to an established reporting practice of the employer, is a business record under the Nebraska interpretation of the Uniform Act. Relying upon the leading decision in *Palmer v. Hoffman*,⁵⁵ the Nebraska court has refused to apply the statute to records of descriptions of the acts of employees in carrying out their work.⁵⁶ On the other hand, it can be argued that maintaining accident records is an inherent requirement of the workmen's compensation system and therefore a part of the regular course of the business of covered employers. Through experience ratings in the insurance rates, the system intentionally encourages the improvement

to an action is not an incompetent witness by whom to prove a transaction or conversation with an agent of the other party since deceased. Stated differently: 'Adverse party' as used in the statute does not include agents or officers of 'adverse party.'" *Light v. Ash*, 174 Neb. 627, 628, 119 N.W.2d 90, 91 (1963), noted in 43 NEB. L. REV. 641 (1964): "The only criterion for determining the competency of a witness under this statute is whether or not the witness will benefit from the result of the case in which he seeks to testify. . . . Under these cases, the interest of the witness in the result of the litigation, and not his relationship or status with interested parties, determined the question of the competency of the witness to testify."

⁵⁴ NEB. REV. STAT. §§ 25-12,108 to -12,111 (Reissue 1956).

⁵⁵ 318 U.S. 109, 114 (1943) (statement of engineer of train, deceased before trial, to assistant superintendent of railroad and representative of Utilities Commission two days after crossing accident was not made "in the regular course of business" when offered as evidence in a tort suit, since: "In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading."). See also *Dilley v. Chesapeake & Ohio Ry.*, 327 F.2d 249 (6th Cir. 1964), cert. denied, 85 Sup. Ct. 47 (1964) (required report of foreman containing opinion as to cause of employee's death inadmissible in Federal Employer's Liability Act action); *United States v. New York Foreign Trade Zone Operators Inc.*, 304 F.2d 792 (2d Cir. 1962) (statement of employee to supervisor contained in supervisor's required report held admissible business record in suit by assignee of employee's personal injury claim, but opinion indicated that the report would be inadmissible in the employee's suit for workmen's compensation).

⁵⁶ *Higgins v. Loup River Pub. Power Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955) (memorandum in company files, prepared as a matter of personal habit by department head but without company's request or requirement, stating that department head had met with other party on a certain date, held inadmissible as a business record when offered to prove company's good faith effort to negotiate with other party).

of employee safety measures by employers and insurance companies. An employer is required to submit a report to the compensation court of all injuries occurring in the course of employment.⁵⁷ This argument is only that an intra-company employee accident report is capable of being a business record under the Uniform Business Records As Evidence Act.⁵⁸ It does not require any special hearsay rule for compensation cases; only that the accident reports can constitute business records. This also does not require that the official report required to be submitted by the employer to the compensation court be considered either as a business record or an admission against interest.⁵⁹ Assuming that the statement of *E* to *F* is a spontaneous declaration by *E* and part of the *res gestae* which *F* has promptly recorded,⁶⁰ the intra-company report could become a business record within the Uniform Business Records As Evidence Act. Also, in an actual case, notwithstanding the effect of previous limiting decisions, there might be admissible evidence under the act in the records of the doctor⁶¹ or hospital.⁶²

⁵⁷ NEB. WORKMEN'S COMP. CT. R. VII: "In every case of injury occurring in the course of employment whether resulting from accident or from occupational disease, the employer shall file a report thereof with the Compensation Court. Said report shall be filed immediately upon the employer having knowledge of such injury." This rule was promulgated pursuant to NEB. REV. STAT. §§ 48-144, 48-163, 48-165 (Reissue 1960). It conspicuously omits the statutory phrase "arising out of" the employment.

⁵⁸ For a forceful application of this type of reasoning to similar facts, see *Fagan v. City of Newark*, 78 N.J. Super. 294, 188 A.2d 427 (1963).

⁵⁹ *Muff v. Brainard*, 150 Neb. 650, 35 N.W.2d 597 (1949). See *Seymour v. Journal-Star Printing Co.*, 174 Neb. 150, 158-59, 116 N.W.2d 297, 302-03 (1962), overruling *Orchard & Wilhelm Co. v. Petersen*, 127 Neb. 476, 256 N.W. 37 (1934). The form for the "First Report of Alleged Accident or Occupational Disease" still states "All Alleged Accidents Or Occupational Disease Cases Must Be Reported" and that "Filing of This Report is Not an Admission of Liability Only a Report of the Alleged Accident or Occupational Disease." NEB. WORKMEN'S COMP. CT. R. VII. Neither would the death certificate be admissible as to the cause of death. See *O'Neil v. Union Nat'l Life Ins. Co.*, 162 Neb. 284, 75 N.W.2d 739 (1956); *Omaha & C.B. St. Ry.*, 109 Neb. 526, 191 N.W. 691 (1922).

⁶⁰ This assumption avoids the difficult question of "double" or "included" hearsay under the Uniform Act with which the Nebraska cases have not yet specifically dealt.

⁶¹ Cf. *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956).

⁶² Cf. *Anderson v. Evans*, 164 Neb. 599, 83 N.W.2d 59 (1957).