NEBRASKA SUPREME COURT REVIEW

The Nebraska Law Review is pleased to continue in this issue a section devoted exclusively to recent decisions of the Nebraska Supreme Court. This section will contain a critical discussion of recent decisions which the Nebraska Law Review believes are either cases of first impression in our court or rulings which substantially alter previous case law in Nebraska. The purpose of the Nebraska section is (1) to provide attorneys in Nebraska and elsewhere with a comprehensive study of the holdings of selected cases and an analysis of how these decisions relate to previous Nebraska decisions, and (2) to provide a forum in which members of the Nebraska Law Review can critically analyze the rationale of the cases in light of decisions in other jurisdictions.

The decisions composing the section were taken from decisions handed down during the last half of the 1968-69 term. This will update 48 Nebraska Law Review 985 (1969), which analyzed the first half of the term.

The subject areas and decisions discussed in this Nebraska Supreme Court Review are as follows:

I. Adoption—Inheritance

II. Contracts

III. Criminal Law
   A. Miranda-Related Decisions
   B. Right To Conduct Own Defense and Pretrial Identification
   C. Evidence
   D. Procedure
   E. Criminal Flight

IV. Evidence
V. Insurance—Automobile

VI. Natural Resources

VII. Parol Evidence

VIII. Real Property

IX. Torts—Negligence

X. Workmens Compensation
A. Injury From Employment Exertion or Strain
B. The Increased-Risk Test and “Contact-with-the-Premises” Exception in “Injury by the Elements” Cases
C. Expert Medical Testimony

The Nebraska section does not include those cases which are or may become the subject of individual case notes. Thus this section does not represent a discussion of all of the important Nebraska decisions. The Review would welcome any suggestions from Nebraska attorneys or others interested in Nebraska law regarding both the method by which cases may be selected for future issues and the general form and content of this section.

John A. Rasmussen, Jr.
Nebraska Editor

I. ADOPTION-INHERITANCE

Wulf v. Ibsen\(^1\) was a case of first impression in Nebraska, in which the Nebraska Supreme Court concluded that an adopted child could inherit from his natural parents.

\(^1\) 184 Neb. 314, 167 N.W.2d 181 (1969).
Fred Wulf died intestate survived by four children. He had been married twice and had two children by each marriage. The plaintiff, Mrs. Anna Marie Ibsen, was born during his first marriage and, during her mother's last illness, was placed under the care of Fred Wulf's sister, Mrs. Reeh. Later the plaintiff was adopted by Mrs. Reeh and her husband, but continued to keep in close contact with her father during his lifetime. The plaintiff shared in her adoptive father's estate when he died testate, and inherited the remainder of her adoptive parent's estate when her adoptive mother died intestate under Nebraska law. This action involved plaintiff's claim for her share of her natural father's intestate estate as a natural child.

In reaching its decision that Mrs. Ibsen could inherit from her natural father, the court reasoned that adoption was a creature of statute and, as such, the "rights accruing or sacrificed by reason of adoption are to be determined by reference to the statutes of the state having jurisdiction." After examining the Nebraska statutes governing adoption, the court concluded that although a natural parent could not inherit from his own child once adopted by other parents, "the failure to restrict the right of the child to inherit from its natural parents cannot be deemed an oversight but rather an act evidencing the legislative intent to preserve this right in the child." This legislative intent was even more clearly expressed by the statute providing that where a child was placed under the care of the Department of Public Welfare or a licensed child placement agency, his right to inherit would not be impaired.

Other jurisdictions presented with the question in Wulf and with statutes similar to those of Nebraska have also preserved the right of the adopted child to inherit from his natural parents. The Utah Supreme Court approached the question of whether an adopted child could inherit from his natural parents as one of statutory construction. The Utah court construed the statutes as being enacted for the benefit of the adopted child and held that simply by virtue of being born to his natural parents, a child's status was established under Utah's succession statutes and the adopted child became entitled to inherit from its natural parents.

8 E.g., In re Ballantine's Estate, 81 N.W.2d 259 (N.D. 1957).
9 In re Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946).
10 Id.
The Supreme Court of Washington also approached the problem in terms of statutory construction in In re Roderick's Estate. The Washington court reasoned that:

Our adoption statute grants to the adopted child the right to inherit from its adoptive parent, but does not divest that child of the right of inheritance from its natural parents. The statute is in derogation of the common law. It cannot be assumed, presumed or inferred that the appellant cannot inherit from her father, in the absence of a legislative declaration to that effect.

In jurisdictions which, pursuant to their statutes, grant an adopted child the right to inherit from his adoptive parent, the question of whether an adopted child is entitled to inherit from his natural parent necessarily raises the question whether a state allows a dual inheritance. The Nebraska Supreme Court, in In re Estate of Enyart held that: "[O]ur statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent." It is apparent from the court's decision in In re Estate of Enyart that, in Nebraska, an adopted child can inherit from his adoptive parents. The Wulf decision allows an adopted child to inherit from his natural parents, and consequently, implies that a dual inheritance is acceptable in Nebraska, even though the court never discussed dual inheritance.

Courts in at least two other jurisdictions have, however, found dual inheritance to be an unattractive policy. The Missouri Supreme Court was confronted with a situation similar to the one before the court in Wulf. In discussing the application of a statute whose language was considerably stronger than Nebraska statutes regarding adoption, the court commented on dual inheri-

---

11 158 Wash. 377, 291 P. 325 (1930). The court held that under the statute of descent an adopted daughter was entitled to share in the estate of her natural father.
12 Id. at 381, 291 P. at 326.
13 116 Neb. 450, 218 N.W. 89 (1928).
15 In their brief the appellants dealt with the issue of dual inheritance and, in fact, devoted a large part of their argument to that question. Brief for Appellants at 10-17, Wulf v. Ibsen, 184 Neb. 314, 167 N.W.2d 181 (1969).
16 Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645 (1953); Young v. Bridges, 86 N.H. 135, 165 A. 272 (1933).
17 Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645 (1953).
18 "When a child is adopted in accordance with the provisions of this chapter, all legal relationships and all rights and duties between such child and his natural parents . . . shall cease and determine. . . ." Mo. Rev. Stat. § 453.090 (1949) (emphasis added).
Adoptions are granted primarily for the best interests of the child adopted. Generally the change by adoption is one of gain. The new status is a better one than the former. To grant dual inheritance, the child adopted would be given the inheritance of a natural child and allowed an additional one. The law intended to give the child adopted the same rights and advantages of a natural child as far as possible. It was never intended to give the child of adoption more.\(^2\)

The Missouri court felt that this dissent expressed the law in Missouri as evidenced by *Mississippi Valley Trust Co. v. Walsh.*\(^2\) In *Walsh* the court stated:

> It is no part of the public policy of the state that adoption should operate as an instrumentality for dual inheritance, with resulting animosity and litigation among those whom a testator provided in his will should share with equality and per stirpes. And the denial of dual inheritance under these circumstances is not opposed to the public policy of promoting the welfare of adopted children.\(^2\)

The failure of the Nebraska Supreme Court to discuss the issue of dual inheritance in *Wulf* implied an approval of the doctrine. It is submitted that the position of the Supreme Court of Nebraska is in agreement with *In re Roderick's Estate,*\(^2\)\(^3\) cited favorably in the *Wulf* opinion.\(^2\)\(^4\) In *Roderick's Estate,* the Supreme Court of Washington held that in the absence of a statute preventing dual inheritance, an adopted child could inherit from both adoptive and natural parents.\(^2\)\(^5\)

The *Wulf* decision permits an adopted child to inherit from his natural parents which, in conjunction with an adopted child's statutory right to inherit from his adoptive parents, confers upon the adopted child the right to a dual inheritance.

II. CONTRACTS

In *Heine v. Fleischer*\(^2\)\(^6\) plaintiff sought to recover damages for an alleged failure of the defendants to deliver possession of property in accordance with the parties' oral agreement. Defendants had

---

\(^{19}\) 109 Utah 172, 166 P.2d 257 (1946).

\(^{20}\) Id. at 179, 166 P.2d at 260.

\(^{21}\) 360 Mo. 610, 229 S.W.2d 675 (1950).

\(^{22}\) Id. at 619-20, 229 S.W.2d at 681.

\(^{23}\) 158 Wash. 377, 291 P. 325 (1930).

\(^{24}\) 184 Neb. at 318, 167 N.W.2d at 183.

\(^{25}\) 158 Wash. at 383-84, 291 P.2d at 327.

granted plaintiff an option to purchase land owned by them. The option was exercised and a deed was delivered. Plaintiff alleged the parties had stipulated in the oral agreement that March 30, 1962, was to be the date for delivery of possession. The written memorandum contained no reference to the date of delivery. Defendant's demurrer to plaintiff's petition was sustained by the trial court on the grounds that any oral agreement between the parties as to delivery date of the property was void under the Statute of Frauds. The Nebraska Supreme Court affirmed the lower court's decision. In so doing the court held that under the circumstances the time for performance had to be included in the memorandum.

Time for performance is not ordinarily an essential term of the contract because the law implies that it shall take place within a reasonable time. But if the time for performance is specified, it must be included in the memorandum to be enforceable.

The supreme court applied the reasoning of an earlier case, Ord v. Benson, involving sales of goods, to the situation in Heine. In Ord the court upheld the memorandum as being sufficient because the date of delivery was not agreed upon in the oral contract.

The memorandum must contain a statement of the essential terms of the oral contract. If the time of delivery of the goods and the time of their payment is an integral part of the oral contract, they must be set out in the written memorandum. But if, as here, they are not agreed upon in the oral contract, the law implies that the delivery was to be made in a reasonable time and that payment would be made upon delivery.

The Nebraska Statute of Frauds provides that the memorandum must be in writing.

Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made.

The Nebraska Supreme Court has interpreted this to mean that the memorandum must contain the "essential terms" of the oral contract. If the "essential terms" are not included then the memorandum is insufficient under the Statute of Frauds.

28 163 Neb. at 367, 79 N.W.2d at 713.
29 163 Neb. 367, 79 N.W.2d 713 (1956).
30 Id. at 370, 79 N.W.2d at 715.
The memorandum is not subject to the parol evidence rule. It may be shown by parol evidence . . . that the memorandum was incomplete and that the oral agreement contained terms not set forth in the memorandum. . . . [In such a case,] it would have to be held that the memorandum was insufficient under the statute of frauds and that the agreement between the parties was unenforceable for that reason. . . .

The difficulty lies in defining what are the "essential terms." "There is . . . considerable diversity of opinion in the jurisdictions as to what constitutes 'essential terms,' and this is clearly reflected in the cases. Perhaps nowhere is this as well illustrated . . . as in contracts for the sale of land." The phrase is very flexible and can usually be best answered by looking at the particular case.

For purposes of applying the statute of frauds, as for other purposes, what terms are so "essential" that they cannot be supplied by parol evidence is a question of degree to be answered in the light of circumstances of the particular case. A rule stated in such words as these does not go far in helping a court to decide a case but it should serve to warn the court that the application of the statute is not a mere matter of textual interpretation . . .

Although the question has not arisen in many jurisdictions, the majority of courts which have been confronted with the issue have held that the time of delivery is an "essential term" of the oral contract.

---

34 The Nebraska Supreme Court has determined in several cases what some of the "essential terms" to be included in the memorandum are: (1) Ord v. Benson, 163 Neb. 367, 79 N.W.2d 713 (1958) (time of delivery of goods and time of payment if agreed upon in the oral contract); (2) Barkhurst v. Nevins, 106 Neb. 33, 182 N.W. 563 (1921) (signature of vendor); (3) Frahm v. Metcalf, 75 Neb. 241, 106 N.W. 227 (1905) (names or descriptions of parties to the agreement); (4) Mc-Williams v. Lawless, 15 Neb. 131, 17 N.W. 349 (1883) (description of land sold).
36 2 A. Corbin, Corbin on Contracts § 499 (1950).
37 Santoro v. Mack, 108 Conn. 683, 145 A. 273 (1929); Block v. Sherman, 109 Ind. App. 330, 34 N.E.2d 951 (1941); Carpenter v. Murphy, 40 S.D. 280, 167 N.W. 175 (1918); Beckman v. Brickley, 144 Wash. 558, 258 P. 488 (1927). See also Restatement of Contracts § 207(c) (1932). 2 A. Corbin, Corbin on Contracts § 499 (1950) (emphasis added): "If a memorandum for the sale of land describes the land, the price, and the parties, it satisfies the statute [of frauds] if the parties made an oral agreement containing only those terms, intending to be bound thereby, saying nothing whatever as to . . . the time and place of payment and delivery. . . ."
If the parol agreement fixed no time for delivery, the memorandum evidencing the contract is sufficient under the statute, since it contains all the terms which have been agreed on. In such a case the law supplies the missing term and requires delivery within a reasonable time. If, on the other hand, the time was fixed by the parties the memorandum is insufficient.\(^{38}\)

In holding that the date of delivery, if stipulated in the oral contract, was an "essential term," the Heine court overruled a portion of the earlier case of Ruzicka v. Hotovy.\(^ {39}\) In Ruzicka the supreme court had held that the time for consummation of the contract could be established by parol evidence and therefore did not have to be included in the memorandum.

[The memorandum] is . . . lacking in no particulars, unless it be in respect that it does not specify when the remainder of the consideration is to be paid, nor when the transfer is to be made, nor whether the deferred payments are to be secured. These matters may be proved by parol evidence under our statute.\(^ {40}\)

It is submitted that by overruling Ruzicka the supreme court has actually applied the intent of the parties to the transaction. By setting the specific time for performance the parties have established that they consider it to be an essential term of the oral contract. Under the Statute of Frauds, it should be included in the written memorandum and not subject to repudiation by one of the parties. The parties have shown that the time for performance is no longer open to negotiation, and they intend to be bound by that date. It must, therefore, be included in the memorandum.

III. CRIMINAL LAW

A. Miranda-Related Decisions

Two cases recently decided by the Nebraska Supreme Court, State v. Dubany\(^ {41}\) and State v. Caha,\(^ {42}\) relate to the Nebraska interpretation of the "in custody" and "substantial denial of freedom" statements found in Miranda v. Arizona.\(^ {43}\) The combined result of the Nebraska cases arguably bends the spirit of Miranda and may undermine its effectiveness in this state.

State v. Dubany\(^ {44}\) is concerned with the Nebraska court's interpretation of the "on-the-scene investigation" test as opposed to in-

\(^ {39}\) 72 Neb. 589, 101 N.W. 328 (1904).
\(^ {40}\) Id. at 593, 101 N.W. at 329.
\(^ {42}\) 184 Neb. 70, 165 N.W.2d 362 (1969).
\(^ {44}\) 184 Neb. 337, 167 N.W.2d 556 (1969).
custody interrogation mentioned in *Miranda v. Arizona*, and the admissibility of any evidence derived therefrom. The Nebraska Supreme Court held that questioning a defendant before arrest was permissible without giving the *Miranda warning* and any statements made at that time could be used as evidence against him.

The opportunity to question the defendant in *Dubany* arose when Officer Zurcher approached the defendant's vehicle which was stuck in a ditch beside the road. The officer requested the defendant, who was seated in the driver's seat of his own vehicle, to hand over his driver's license. After checking it, the officer asked the defendant if he had been drinking. Defendant answered, "Yes." Defendant was taken to the patrol car and driven to Valentine for a blood test. The result: .27 percent alcohol by weight in the blood.

The evidence here, without defendant's admission that he had been drinking, is sufficient to support the conviction. The possible importance of this decision, however, rests in the failure of the officer to give the *Miranda* warnings, before asking any questions relating to the probable violation. The decision can be considered consistent with a narrow construction of the *Miranda* decision. There was no coercion evidenced by the given testimony. *Dubany* was not under arrest, and was alone, inside his own vehicle at the time of the question. But there are several questions raised by the *Dubany* decision which may be cause for concern.

*Dubany* could be read to have established the precedent in this state that an investigating officer could delay arrest until after questioning. Thus, as in this particular case, an officer who has good reason to believe that a crime has been committed and knows who the defendant will be, could have the sanction of the Nebraska Supreme Court in evading the constitutional mandate of *Miranda* by conducting a complete interrogation, under the guise of an "on-the-scene investigation," before announcing that the defendant is now under arrest and now protected by the Constitution. It is submitted that under *Miranda* the defendant is entitled to the warnings protection before questioning when the officer reasonably feels he has committed the alleged crime under investigation and any statements made by the defendant before the *Miranda* warnings should not be allowed into evidence.

46 The *Miranda* warnings are: (a) the suspect has a right to remain silent; (b) any statement can and will be used against him; (c) he has the right to an attorney (appointed or retained). *Miranda v. Arizona*, 384 U.S. 436 (1966).
In this same light, the Nebraska Supreme Court stated in *Dubany* that: "In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it."48 The text in *Miranda* from which the court derived this conclusion reads as follows:

> When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.49

Clearly, the intention of the United States Supreme Court was to limit the investigation to those who would not reasonably be considered defendants. *Miranda* allows interrogation of potential defendants only after they have been made aware of their constitutional rights and have knowingly and voluntarily waived those rights, regardless of whether the officer has gone through the formality of arrest.

Finally, *Dubany* may have established that questioning a defendant in his own vehicle is questioning before custody which involves a situation where the defendant has not been substantially denied his freedom of action.50 This may present difficult questions which should not be settled by an unbending general rule. A better method would be to consider each case on its particular facts and the determinative test should be whether the individual would be allowed to leave the officer without recourse. Thus any actual or apparent control of the accused by the officer could be ascertained in order to properly determine whether the defendant was entitled to the warnings. If there is an arrest, naturally the warnings must be given. More importantly, however, the warnings must be given when the person is substantially denied his freedom of action. If the officer does control the person's movements then that individual should be placed under arrest and given notice of his constitutional rights.

*State v. Caha*51 also dealt with the problem of those particular situations where the *Miranda* warnings52 are required to be given in Nebraska. Specifically, it dealt with whether questioning in a police

---

50 *Id.*
52 See note 46 *supra.*
cruiser, resulting in an admission of guilt, should be considered part of the process of interrogation aimed at eliciting incriminating statements from the defendant.\textsuperscript{53}

The interview in question arose from the alleged crime of rape which occurred on the day before the defendant was interrogated. The prosecutrix was unable to identify her attacker, but she did give the investigators sufficient factual evidence regarding her attacker, and a description of his vehicle, to lead the police to Caha. The officer “talked with the defendant about his car, his family, and matters of general interest. He then gave the \textit{Miranda} warnings which he recited on the witness stand, in which he made no mention of the defendant’s right to remain silent.”\textsuperscript{54} Caha then told the officer that he had picked up the prosecutrix and engaged in sexual relations with her.

The Nebraska Supreme Court concluded that “the evidence was acquired during the investigative process and does not relate to the evils that Escobedo and Miranda were intended to correct.”\textsuperscript{55} In reaching this result, the court gave no consideration to the question of whether the omission of the warning of defendant’s right to remain silent would constitute reversible error.\textsuperscript{56}

Therefore, the only point to be considered is whether the Nebraska Supreme Court was correct in deciding that the questioning was “purely investigative.” The court based its decision on the conclusions that “the evidence was acquired during the investigative process . . . [and] the defendant, so far as the evidence shows, was not in custody nor otherwise deprived of his freedom until after his admissions were made to the officer.”\textsuperscript{57} It is submitted that the court has perhaps failed to properly consider the foundations of \textit{Escobedo} and \textit{Miranda} in arriving at this conclusion.

\textit{Escobedo} holds:

\textquote[Escobedo v. Illinois, 378 U.S. 478, 492 (1964).]{When the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.\textsuperscript{58}}

By its holding in \textit{Caha} the Nebraska Supreme Court has ruled that the process is not accusatory when facts link the defend-

\textsuperscript{53} 184 Neb. 70, 165 N.W.2d 362 (1969).
\textsuperscript{54} 184 Neb. 70, 72, 165 N.W.2d 362, 363 (1969).
\textsuperscript{55} \textit{Id.} at 74, 165 N.W.2d at 364.
\textsuperscript{56} \textit{Id.} at 72, 165 N.W.2d at 363.
\textsuperscript{57} \textit{Id.} at 74-75, 165 N.W.2d at 364.
ant to the alleged crime, the defendant is given the majority of the *Miranda* warnings, and the officer demands: “Tell me about the girl you had in your car last night.” It would appear in light of these facts that the fine line separating the investigatory from the accusatory stage had been crossed.

*Miranda* holds: “At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”

The court’s conclusion that Caha was “not in custody” at the time of his interrogation seems to be in direct conflict with testimony adduced at the trial. The relevant portion of Officer Gallagher’s testimony is as follows:

Q: When did you have him under arrest?
A: Well, when I first met him.

The Court: You mean under arrest or in custody?
Q: In custody?
A: When I first met him in the work part of the Taylor Florist there I said I wanted to talk to him, I was a police officer and I showed him my badge and I told him ‘come outside, I want to talk to you’ and he came out and that’s when I first started to talk to him.

Q: You say that’s when you had him in custody at that time?
A: Yes.

When coupled with the knowledge of the defendant’s “confine-ment” in the police cruiser during the “interrogation,” the court’s statement that the defendant was “not in custody nor otherwise deprived of his freedom” seems clearly erroneous.

Further evidence of the court’s misapplication of *Miranda* and *Escobedo* is the officer’s decision to read the *Miranda* warnings and the confinement in the police cruiser. There are cases and other authorities which conclude that interrogation while defendant is in a police cruiser is further evidence of custodial interrogation as opposed to a general investigation. These authorities, and the fact that Officer Gallagher’s questions could most reasonably be considered accusatory rather than investigatory, indicate a most narrow reading of *Miranda* by the Nebraska court.

---

59 In Caha the officer omitted the right of the suspect to remain silent.
62 Brief for Appellant at 12.
The court seems to have ignored the basic principles behind the *Miranda* decision, and the constitutional protections established therein. The odious techniques used by some law enforcement personnel, specifically condemned by the United States Supreme Court in *Miranda v. Arizona*, have, at least for the moment, not been clearly laid to rest in Nebraska.

B. RIGHT TO CONDUCT OWN DEFENSE AND PRETRIAL IDENTIFICATION

*State v. Beasley*[^64] dealt with the right of a defendant to conduct his own defense and the question of whether pretrial identification of the defendant from photographs is prejudicial error.

The identification and trial resulted from a robbery at King Loan Company on October 11, 1967. The cashier, alone in the office, had just completed counting the cash on hand. The defendant, after waiting several minutes for the manager, held a gun on the cashier and took the cash. On leaving the office the defendant passed the manager and assistant manager who were returning to the office.

Following the defendant's arrest, the cashier was taken to the police station where she identified the defendant's photograph from among several before her. At the trial defendant was positively identified by the cashier, the assistant manager and the manager. The defendant was represented by counsel at the preliminary hearing but at trial he "refused assistance of counsel and insisted that he be allowed to represent himself."[^65]

The Nebraska Supreme Court based its decision on the question of whether a defendant may conduct his own defense on a South Dakota case, *State v. Thomlinson*,[^66] also involving robbery. In *Thomlinson* the South Dakota Supreme Court held that a defendant electing to defend himself in person "with full knowledge and understanding of the danger and possible pitfalls of representing himself . . . should be allowed to do so."[^67] The Nebraska Supreme Court framed the same meaning in these words: "[I]n the absence of unusual circumstances a defendant in a criminal case who is sui juris and mentally competent has the right to conduct his defense in person without assistance of counsel."[^68] This right is further embodied in both the constitution and statutes of Nebraska.[^69]

The question of the mental competency is not handled thoroughly by the decision in *Beasley*, especially with regard to the

[^64]: 183 Neb. 681, 163 N.W.2d 783 (1969).
[^65]: Id. at 683, 163 N.W.2d at 785.
[^66]: 78 S.D. 235, 100 N.W.2d 121 (1960).
[^67]: Id. at 238, 100 N.W.2d at 123.
formulation of any viable test of mental competency for future application. In Beasley the only evidence pertaining to mental incompetence was the admission by the defendant at sentencing that he had voluntarily gone to the Ohio State Hospital as a "TV man" but had received no treatment. The Nebraska Supreme Court apparently saw nothing in the trial record to indicate that Beasley was not mentally competent, nor did they attempt either to define the term or elucidate factors which would indicate mental incompetence. Consequently, we are left without a test and without guidelines in the determination of mental competence.

The most expressive case on the issue of mental competence to conduct your own trial is Dietz v. State. In Dietz, the Wisconsin Supreme Court looked at (1) the overwhelming case against the defendant; (2) the defendant's decision not to use a lawyer; (3) the defendant's knowledge of trial procedure; (4) the defendant's apparent understanding and effective use of the rules of evidence; and (5) the "fluency and force" of his address to the jury, in finding that there was nothing substantial to support a claim of mental incompetence. It is submitted that the Nebraska Supreme Court should have explicated some or all of these points. We are left, however, to speculate as to what was actually considered in finding that "[t]here is no other evidence of mental incompetence."

The other issue considered by the Nebraska Supreme Court was the question of photographic identification of the defendant. The Nebraska Supreme Court settled the matter in an abrupt manner by adopting the test used by the United States Supreme Court in Simmons v. United States. The holding in Simmons indicated that each case would have to be considered on its own facts and then examined for "a very substantial likelihood of irreparable misidentification."

In Beasley there seems to be no question that the cashier had more than ample opportunity to observe the defendant and her identification from photographs "did not result in any prejudice to the defendant."

C. Evidence

In State v. Allen defendant was convicted in county court of robbery. The case on appeal dealt solely with the admissibility of evidence when the chain of evidence tracing the possession of objects could at some time have been broken.

70 149 Wis. 462, 136 N.W. 166 (1912).
73 Id. at 384.
75 183 Neb. 831, 164 N.W.2d 662 (1969).
Defendant Allen was approached following a robbery of a cigarette lighter, part of a roll of mints, and $4.43 in cash. The arresting officers observed the defendant throwing a lighter into the weeds and on searching the defendant, recovered the remaining stolen items. All recovered items were identified by the victim, who again identified these objects at trial. Between the seizure of the stolen items and their introduction at trial, the lighter and mints were stored in a property envelope in the evidence vault at the Omaha Police Department.

The Nebraska Supreme Court, affirming the decision of the lower court, stated the admissibility test as follows:

[A]n exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading.\(^7\)

Appellant's primary contention on appeal was that the identity of objects admitted into evidence must be traced through every hand that held them and failure to do so renders the objects inadmissible. This contention is a fairly accurate assessment of the law when applied to chemical testing\(^7\) and the correlation between the object and the test result. It would be essential for the credibility of a chemical test that the test result could be conclusively linked to the actual object being introduced into evidence. But that is not the problem in this case. Allen deals only with identification of material, visible or identifiable objects and the test applied to admissibility of scientific evidence is not necessary for such evidence.

The recent Nebraska case of State v. Gau,\(^7\) held that property which is the object of a robbery is always admissible into evidence when properly identified. In Allen the court wisely refines this test by requiring both proper identification and no misleading or substantial change in the object. The question of whether the substantial change renders the object misleading and thus inadmissible is left to the discretion of the trial judge.\(^7\)

In adopting this test the Nebraska Supreme Court has followed the weight of authority on this question.\(^8\) The wisdom of the majority is based on its practicality. In any given situation the proof

---

76 Id. at 833, 164 N.W.2d at 664.
77 E.g., Joyner v. Utterback, 196 Iowa 1040, 195 N.W. 594 (1923).
78 182 Neb. 114, 153 N.W.2d 298 (1967).
80 Brewer v. United States, 353 F.2d 260 (8th Cir. 1965); West v. United States, 359 F.2d 50 (8th Cir. 1966), cert. denied, 385 U.S. 867 (1966); United States v. S. B. Penick & Co., 136 F.2d 413 (2d Cir. 1943).
of the complete chain of evidence could take days. It would create an unreasonable burden on the party introducing the evidence and would serve no valuable purpose. Without clear abuse of discretion by the police and/or prosecuting attorneys, evidence should be admitted when the tests established by Allen are fulfilled.

*State v. Hunter*\(^{81}\) pertains to the admissibility into evidence of burglary tools found on or near a building from which the defendant was seen fleeing. This is a case of first impression in Nebraska which extends the general theme of former Nebraska precedent\(^{82}\) and follows a line of recent Illinois decisions.\(^{83}\)

The burglary tools in question were found by a police officer after being called to the scene by the night watchman at Weslake Bar who heard someone trying to chop into the roof of the bar. Upon arriving at the scene, the officers observed one person fleeing from the premises and another descending from the roof of the building. After the officer gave warning, he shot one of the defendants in the leg. Following the arrest an officer who was inspecting the area found a crowbar near the corner of the building and an axe near the hole in the roof.

The Nebraska cases in accord with *Hunter* are *Liakas v. State*\(^{84}\) and *State v. Stroh*.\(^{85}\) When the defendant was arrested in *Liakas*, the tools which could have been used to provide him access to the store in which he was discovered, were lying loose in defendant's trunk. In admitting the tools into evidence, the Nebraska Supreme Court held: "[E]vidence showing that he owned, possessed, or had access to any articles with which the crime was or might have been committed is competent."\(^{86}\)

*People v. Fontana*\(^{87}\) is cited in *Stroh* with apparent approval, but the Nebraska Supreme Court emphasized that *Fontana* contained "no proof that the articles found had ever been in the possession of any of the defendants, [therefore] evidence relating to them is inadmissible."\(^{88}\) In *Stroh* the tools were found in the possession of the accomplice and were deemed admissible for the

---

\(^{81}\) 183 Neb. 689, 163 N.W.2d 879 (1969).
\(^{83}\) People v. Fontana, 356 Ill. 461, 190 N.E. 910 (1934); People v. Stanton, 16 Ill. 2d 459, 158 N.E.2d 47 (1959); People v. Santucci, 24 Ill. 2d 93, 180 N.E.2d 491 (1962); People v. Craddock, 30 Ill. 2d 348, 196 N.E.2d 672 (1964).
\(^{84}\) 161 Neb. 130, 72 N.W.2d 677 (1955).
\(^{85}\) 181 Neb. 24, 146 N.W.2d 756 (1966).
\(^{86}\) 161 Neb. 130, 143, 72 N.W.2d 677, 684 (1955).
\(^{87}\) 356 Ill. 461, 190 N.E. 910 (1934).
\(^{88}\) Id. at 467, 190 N.E. at 913.
purpose of showing intent. The possible inconsistency with *Fontana* is overcome by the Nebraska Supreme Court in *Stroh* by demonstrating that the evidence established a *link* between the defendant and the tools.

The Illinois Supreme Court has now distinguished *Fontana* and has established the following rule: "[B]urglary tools found in a building in which the accused was caught, or from which he fled, are competently received in evidence." The Nebraska Supreme Court in *Hunter* now adopts the Illinois rule and defines "in the building" or "in the premises" to include an area close to the burglarized building. Herein lies the essence of the court's decision in relation to former precedent. Previous Nebraska cases have involved factual situations which limited the rule to tools found actually in the possession of the defendant or his accomplice. The rule in Nebraska is now extended to include tools found around, as well as in, the burglarized building. This modification, though logically extending the old doctrine, presents some problems for the jury in attempting to link the tools to the defendant. The admission of the tools into evidence does not establish the defendant's guilt but this evidence "that defendant had the means to commit the offense in the manner that it was committed ... is a circumstance which the jury may consider." Evidence submitted to the jury in the past has been limited to tools found in the actual possession of the defendant; the jury is now allowed to consider as evidence, tools that were located around the building area from which the defendant was seen fleeing. This expansion gives the prosecutor more latitude in what he may present for jury consideration. It may, however, necessitate a later definition by the court of the nexus required to be shown between the defendant and the tools.

D. Procedure

*State v. Brockman* dealt with an alleged failure to give the required allocution by a District Judge. The Nebraska Supreme Court held that former precedent in Nebraska indicating that every error in allocution is prejudicial would be henceforth disapproved.

This proceeding stems from the criminal prosecution of H. N. Brockman for possession of marijuana. The defendant waived pre-
liminary hearing and entered a plea of guilty. The minimum sentence was imposed following the court's questions: "Do you have anything to say Mr. Brockman, prior to sentence? Is there any statement you wish to make at this time?" On appeal defendant alleged that these questions were not sufficient to conform to the requirement of Nebraska's statute. The Nebraska Supreme Court held that the error was harmless.

The State raised the question of whether, under the Nebraska statute regarding the "verdict of the jury," there is a requirement that any allocution be given. The Supreme Court of Nebraska does not deal with the question and could, by their silence, be in conformity with holdings from other jurisdictions that a plea of guilty does not waive allocution.

Former precedent in Nebraska, *McCormick v. State* and *Evers v. State*, indicated that every error in allocution was prejudicial. In *McCormick*, the defendant had been convicted of felonious homicide and "was not informed by the court of the verdict of the jury, and asked if he had anything to say why the sentence of the court should not be passed upon him, as is provided by . . . the Criminal Code." In reversing the conviction the Nebraska Supreme Court held that: "These provisions have been construed, as the language thereby implies, as mandatory." The court also held that "the statute remains to be followed according to its provisions, the mandatory character of which is not to be questioned."

The statute now in effect in Nebraska is based upon the common law notion that in capital cases the defendant should have the opportunity before judgment is passed to say why the sentence of death should not be pronounced upon him. This basis has been largely eroded and its major justification today is therapeutic effect.

---

96 *Id.* at 435, 168 N.W.2d at 367.
97 "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgement should not be passed against him." Neb. Rev. Stat. § 29-2201 (Reissue 1964).
100 66 Neb. 337, 92 N.W. 606 (1902).
101 84 Neb. 708, 121 N.W. 1005 (1909).
102 66 Neb. 337, 346, 92 N.W. 606, 609 (1902).
103 *Id.* at 346, 92 N.W. at 609.
104 *Id.* at 347, 92 N.W. at 609.
In abandoning the mandatory nature of the statute the Nebraska Supreme Court created a test of reasonableness in deciding whether any error in allocution is harmful. With respect to the questionable need or value of the allocution this direction is commendable, but there could be a more serious problem created by the decision rendered in Brockman, that is, the gradual dissolution of any allocution by the Nebraska Supreme Court's later definition of "harmful." The request has been made for the legislature to alter or abolish the present statute and such a move by the legislature could remove the problem Brockman creates. In any case, the old requirement of allocution will gradually be dissolved except in those unnamed situations where failure to give an allocution is determined to be harmful.

E. CRIMINAL FLIGHT

State v. Lincoln\textsuperscript{106} is a case of first impression in Nebraska dealing with the definition of flight and distinguishing it from mere departure.

Defendant in Lincoln was first observed five minutes before the burglary, parked without lights, two and one-half blocks from the burglarized store. A few seconds after the burglary, defendant was again observed without lights. On this occasion he was one block from the store and traveling thirty miles per hour. Defendant was finally observed five blocks from the store with his lights on and was stopped almost immediately after the arresting officer turned on his spotlight. The defendant's primary contention was that there was no evidence as to speed of chase and no evidence of flight. The Nebraska Supreme Court in holding that here there was evidence of flight, set forth the following test:

"[F]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt."\textsuperscript{107}

The test requires, first, departure or leaving which presumably is anything taking the accused away from the scene. The real key to the stated test lies in the present and unexplained circumstances which "reasonably" justify the "inference that it was done with a consciousness of guilt pursuant to an effort to avoid apprehension of prosecution based on that guilt."\textsuperscript{108}

\textsuperscript{106} 183 Neb. 770, 164 N.W.2d 470 (1969).
\textsuperscript{107} Id. at 772, 164 N.W.2d at 472.
\textsuperscript{108} Id.
Nebraska adopts this test from the recent New Jersey case of *State v. Sullivan*.\(^{109}\) In addition to requiring more than mere departure, the New Jersey court held that “there may be facts, entirely legitimate, connected with a departure which would not support such an inference [of guilt] at all.”\(^ {110}\)

With the test now established there remains the problem of defining, through further decision, what factual settings “reasonably” fall under the test. Stating the test as they have, the Nebraska Supreme Court has established only broad guidelines for trial judges to follow. Before reversing lower court decisions in the future, the Nebraska Supreme Court must be shown an abuse of discretion on the part of the trial judge unless there is some over-reaching of the basic guidelines established in *Lincoln*. The question remains whether this test actually does anything to or for Nebraska law. The court now establishes the test, based on common law,\(^ {111}\) which incorporates essentially the definition of flight—departure coupled with guilt. The decision in *Lincoln* serves only to establish in Nebraska law a precedent for determining what should constitute flight and leaves the test similar to the former test of reasonableness.

### IV. EVIDENCE

In *Anderson v. State Department of Roads*\(^ {112}\) the Nebraska Supreme Court held that in eminent domain proceedings hearsay evidence as to sales of comparable land may be given by an expert on matters of land value. The court stated that such evidence is admissible even though the expert has no personal knowledge of the comparable sales. In so doing, the court joined a growing list of jurisdictions admitting such testimony in condemnation proceedings.\(^ {113}\)

*Anderson* involved an eminent domain proceeding brought by the Nebraska State Department of Roads for the acquisition of part of Anderson’s land to be used in constructing a portion of the Interstate Highway through Keith County. The State tried to introduce testimony of an expert witness to show comparable sales of land in the area. The trial court sustained an objection to the expert’s testimony on the grounds that he had no personal knowledge of

---


\(^{110}\) Id. at 238, 203 A.2d at 192.

\(^{111}\) 2 J. WIGMORE, EVIDENCE § 276 (3d ed. 1940); 1 F. WHARTON, WHARTON’S CRIMINAL EVIDENCE § 205 (12th ed. 1955).

\(^{112}\) 184 Neb. 467, 168 N.W.2d 522 (1969).

\(^{113}\) See Annot., 12 A.L.R.3d 1064 (1967).
the sales and therefore it was hearsay. Evidence of such comparable sales was barred completely.114

The courts which have decided the question of admitting hearsay evidence in eminent domain proceedings have generally reasoned one of three ways. First, certain federal courts and some state supreme courts have allowed the use of such evidence, taking the view that it can be admitted where it is restricted to showing the basis of the expert's opinion.115 The expert is allowed to give information as to comparable sales of property which he used as a basis for his opinion. These comparable sales would otherwise be subject to objection as hearsay since the expert did not personally participate in the sales. The line of reasoning is to be distinguished from other decisions holding that an expert's hearsay testimony may be considered as substantive value evidence.116

114 In connection with admitting such hearsay evidence, see the Uniform Composite Reports as Evidence Act, NEB. REV. STAT. § 25-12,115 (Reissue 1964): "A written report or finding of facts prepared by an expert not being a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the cooperation of several persons acting for a common purpose, shall, insofar as the same may be relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party." For an application of section 25-12,115 see Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965).


Secondly, several federal courts have held that the admission of such hearsay testimony should be left to the discretion of the trial court. These cases recognize that certain exceptional situations will arise where the trial court would consider it helpful to permit a witness to give the basis of his opinion, even if resting upon hearsay.\(^{117}\)

Lastly, a limited number of state supreme courts have taken the position that such hearsay testimony should never be admitted. These courts would not allow the evidence even though it is offered for the restricted purpose of showing the basis of an expert's opinion of value as opposed to offering it as substantive evidence.\(^{118}\)

In a condemnation proceeding the principal means of demonstrating the value of the condemned property is by expert opinion evidence.\(^{119}\) In order to adequately give an opinion the expert must obtain all possible information which will assist him in arriving at that opinion. As a result, the expert bases a large part of his testimony on what he has learned through his inquiries and investigations. The information uncovered by the expert and upon which he bases his opinion is hearsay evidence because the records and documents read by the expert are not produced, nor are the persons who participated in the similar sales called as witnesses.

In Nebraska the hearsay rule is usually defined as forbidding:

\[\ldots\] the use of an assertion, made out of court, as testimony to establish the truth of the fact asserted, unless the circumstances

\(^{117}\) United States v. 18.46 Acres of Land, 312 F.2d 287 (2d Cir. 1963); District of Columbia Redevelopment Land Agency v. 61 Parcels of Land in Squares, 98 App. D.C. 367, 235 F.2d 884 (1956); International Paper Co. v. United States, 227 F.2d 201 (5th Cir. 1955); United States v. Katz, 213 F.2d 799 (1st Cir. 1954), cert. denied, 348 U.S. 857 (1954); United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1952).


\(^{119}\) A witness who wishes to qualify as an expert must expressly show his qualifications to the court. McNaught v. New York Life Ins. Co., 143 Neb. 213, 12 N.W.2d 108 (1943). See 2 J. WIGMORE, EVIDENCE § 560 (3d ed. 1940). The State's witness in Anderson qualified as an expert in that he had been a professional appraiser for 21 years and had taught rural appraising for the American Society of Rural Appraisers and Farm Managers.
under which the statement was made are such as to justify the waiver of the requirement that it be given under oath and subject to cross-examination.120

Hearsay evidence is most generally objected to because it is not trustworthy nor is it subject to the test of cross-examination.

Theory of the Hearsay Rule. The fundamental test, shown by experience to be invaluable, is the test of Cross-examination. The rule, to be sure, calls for two elements, Cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable. . . .

1. The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination. . . . [T]he Hearsay rule, as accepted in our law, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination. . . .121

These two general criticisms of hearsay evidence, lack of trustworthiness and the opportunity to cross-examine, are less valid when applied to an expert's opinion in condemnation proceedings. In order to qualify as an expert in the proceedings the witness must meet certain standards. As noted earlier,122 it must be shown to the satisfaction of the court that the witness has had experience in appraising or dealing in real estate as a business. These standards in most instances should be sufficient to dispel the argument of trustworthiness.

Ordinarily evidence . . . given by an expert as the basis of his opinion as to value comes with a sufficient guarantee of trustworthiness to justify the relaxation of the hearsay and best evidence rules.123

In addition, the expert should be allowed to tell the jury the basis for his opinion.

Testimony as to value would be worth little or nothing, if witnesses were not allowed to explain to the jury their qualifications as experts and the reasoning by which they have arrived at the expert opinion to which they testify; and the rule is that they may thus give the grounds of their opinions.124

120 Hamilton v. Huebner, 146 Neb. 320, 329, 19 N.W.2d 552, 557 (1945). Both oral and written assertions are covered under the rule. There are many exceptions to the hearsay rule which under certain circumstances allow the hearsay statements to be submitted to the triers of fact.

121 5 J. Wigmore, Evidence § 1362 (3d ed. 1940).

122 See note 119 supra.

123 United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952).

In considering the criticism that there is no cross-examination of such hearsay evidence, it should be remembered that the expert and the basis for his opinion are subject to cross-examination.

If the expert has made careful inquiry into the facts, he should be allowed to give them as the basis of the opinion he has expressed. If he had not made careful inquiry, this will be developed on cross examination and will weaken or destroy the value of the opinion.\(^{125}\)

One additional fear which the courts have expressed in allowing such hearsay evidence to be admitted is that this would lead the court into many irrelevant collateral issues which would only obscure the main issue and thus prolong the trial. It is submitted that any danger of collateral issues arising can best be met by allowing the trial court discretion in this regard.

Cases can readily be imagined where the court in its discretion should exclude evidence of this sort because of the remoteness in time of the sales or because the property sold was not similar to that being valued, but should ordinarily not be excluded under the hearsay or best evidence rules.\(^{126}\)

The opinions of an expert realty appraiser are necessarily based on factors which cannot be proved as substantive facts.

It is quite often true that the most thorough, comprehensive and accurate professional appraisals are based almost entirely on "hearsay" in the legal sense of the word. Persons who appraise or deal in real estate professionally make it their business to keep abreast of current transactions. . . . It is of importance to the court and jury to know how it was made and on what information it was based. If some or all of that information was acquired by hearsay, but through the customary channels of the trade, or by methods recognized as standard in the making of appraisals, we see no useful purpose in a rule of absolute exclusion.\(^{127}\)

\(^{125}\) United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952).

\(^{126}\) Id.


Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969), Rule 7-03: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Advisory Committee's Note on Rule 7-03: "Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. . . . The second source, presentation at the trial, also reflects existing practice. . . . The third source contemplated by
If each person who actually participated in the comparable sales was required to personally testify as to the facts of his sale, condemnation cases would be severely burdened. Under such circumstances it would be almost impossible for the parties to prove the valuation of the land within a reasonable time and at a reasonable cost.

The witness within reasonable bounds should have been allowed to give the jury the facts upon which his opinion as to value was based; and it would unduly hamper the production of such testimony and needlessly prolong the trial to require that the sales be proved with the particularity that would be necessary in suits to enforce the contracts relating thereto.\(^\text{128}\)

The Anderson court cites several decisions from other jurisdictions which presumably show the conditions under which the hearsay evidence will be admitted in Nebraska. The quoted portions used by the Nebraska court state the basic qualifications:

> If the expert has made careful inquiry into the facts, he should be allowed to give them as the basis of the opinion he has expressed. . . .\(^\text{129}\) If some or all of that information [given by the expert] was acquired by hearsay, but through the customary channels of the trade, or by methods recognized as standard in the making of appraisals, we see no useful purpose in a rule of absolute exclusion. Therefore, confining the effect of this opinion to witnesses whose qualifications include experience in appraising or dealing in real estate as a business, we hold that testimony as to prices paid in comparable sales is not inadmissible merely because it is secondary or hearsay evidence.\(^\text{130}\)

Even though the basic conditions are given by the court, it failed to state how such hearsay testimony may be used. For example, may it be used as substantive evidence or is it to be confined to showing the basis of the expert's opinion? Although the court may have felt that settling this question was not necessary for a proper determination of the present suit, other courts have emphasized the fact that such testimony was only to be used to establish the basis of the expert's opinion. In addition, the cases cited by the court do not help clarify its position on this point. The court cites three cases from three jurisdictions which actually stand for three different positions on the problem. The first case cited and relied

---

\(^{128}\) United States v. 5139.5 Acres of Land, 200 F.2d 659, 662 (4th Cir. 1952).

\(^{129}\) 184 Neb. at 470, 168 N.W.2d at 525, quoting, International Paper Co. v. United States, 227 F.2d 201, 209 (5th Cir. 1955).

\(^{130}\) 184 Neb. at 470, 168 N.W.2d at 525, quoting, State Highway Comm'n v. Parker, 225 Ore. 143, 164, 357 P.2d 548, 557 (1960).
upon by the court, *International Paper Co. v. United States*\(^{131}\) admitted the hearsay evidence to establish a basis for the expert’s opinion. It was emphasized there, however, that the admission of such evidence really lies within the discretion of the trial court. In *Anderson* the Nebraska court did not even discuss the role of the trial judge in admitting such evidence.\(^{132}\) The Nebraska Supreme Court then cited a Texas case, *State v. Oakley*,\(^{133}\) which held that such hearsay evidence was admissible only for the limited purpose of showing the basis upon which the expert witness arrived at his opinion. Under the *Oakley* rationale the trial court’s discretion is quite limited. The third case cited by the Nebraska Supreme Court in *Anderson* is *State Highway Commission v. Parker*,\(^{134}\) in which the court allowed the most liberal extension of the exception in that the hearsay testimony is admitted as substantive value evidence.

The Nebraska Supreme Court, in reversing the lower court’s decision, relies on all three of these cases, each standing for a different solution of the problem. On remand the trial court would not be able to determine from the *Anderson* decision just how far the court intended the exception to apply. Did the Nebraska Supreme Court mean to give the trial judge a wide discretion in determining when to admit such testimony? Can the evidence be used for general purposes or is it to be confined to showing the basis for the expert’s opinion? It is submitted that these were questions which the court should have decided in *Anderson*. In neglecting to clarify its position the court has failed to provide adequate guidelines for trial courts admitting such hearsay evidence in future litigation.

V. INSURANCE—AUTOMOBILE

The Nebraska Supreme Court, in *Arndt v. Davis*,\(^{135}\) committed itself to the “liberal” or “initial permission” doctrine in interpreting an ordinary omnibus clause from an automobile insurance policy. The court held that if permission to use the automobile is initially given by the insured to another party, the party using the automobile becomes an insured under the terms of an ordinary omnibus clause contained in the insured’s policy and remains such until the permission is terminated.

The action involved a garnishment proceeding. On September 5, 1962, Sharon Arndt, plaintiff’s decedent, died as a result of an auto-

\(^{131}\) 227 F.2d 201 (5th Cir. 1955).

\(^{132}\) For a recent discussion of the trial court’s discretion in condemnation proceedings and the use of comparable sales, see *Liebers v. State Dep’t of Roads*, 183 Neb. 250, 159 N.W.2d 557 (1968).

\(^{133}\) 163 Tex. 463, 356 S.W.2d 909 (1962).

\(^{134}\) 225 Ore. 143, 357 P.2d 548 (1960).

\(^{135}\) 183 Neb. 726, 163 N.W.2d 886 (1969).
mobile accident. The accident occurred while she was riding as a passenger in an automobile, owned by Daniel F. Kemp and leased to Armour and Company, which was being operated by Clyde Davis, an employee of Armour. At the time of the accident, Davis was intoxicated, and it was five hours after his normal working hours.

The automobile that Davis was operating was supposed to be retained at Armour headquarters during all non-business hours, except when Davis was traveling out of town overnight. As a salesman, Davis had the alternative of selecting between two contracts of insurance pertaining to the use of the automobile. He could maintain full-time possession of the automobile and use it for personal as well as business purposes or he could elect to use it only for business purposes, in which case the automobile was to be retained at Armour's headquarters after normal business hours. Davis selected the latter alternative. Armour and Company insured its fleet of automobiles with the defendant Aetna Casualty and Surety Company. The insurance policy contained a standard "omnibus clause" which provided:

The unqualified word 'Insured' includes ... (2) under Coverages A and B, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named Insured or with his permission ...

The primary question, which the court decided in the affirmative, was whether the defendant insurance company was liable to the plaintiff for the payment of a $13,199 judgment against Davis.

At the outset, the court stated that the Nebraska Motor Vehicle Safety Responsibility Act, which holds an insured liable when the insured expressly or impliedly permits another to use his automobile, was not controlling in cases of this nature because: "The statute is not always applicable and in any event, in view of the generally accepted definition of the word 'permission' to include implied permission, the omnibus clause and the statute are synonymous."  

---

136 Id. at 728, 163 N.W.2d at 886.
137 The plaintiff, father of the decedent, instituted a wrongful death action against Davis and Armour. In this action the court dismissed the plaintiff's cause of action against defendant, Armour, on the ground that Davis was not acting within the scope of his employment at the time of the accident. Id.
In dealing with the interpretation of omnibus clauses, the court discussed three different rules. The first is commonly referred to as the strict or conversion rule. This rule in effect holds that any deviation from the use for which permission was granted, however slight, will defeat liability on the insurer’s part under the omnibus clause. The rule seems to be followed by the great majority of jurisdictions.\(^{142}\) The Supreme Court of Nebraska, in the case of *Witthauer v. Employers Mutual Casualty Co.*,\(^ {143}\) adhered to the strict or conversion rule. However, later cases modified this strict rule until finally the *Arndt* decision completely abrogated the strict rule in favor of the liberal rule. In *Witthauer* the defendant insured’s employee had been hired as a truck driver with the specific instructions that the truck was to be used only on company business. The employee had used the truck to go eat lunch at a cafe, contrary to his general orders, and while returning to work, he struck the plaintiff with the truck, allegedly insured by the defendant. The court held that the “actual use” of the truck at the time of the accident was without the permission of the “Named Insured” and, therefore, the employee was not covered by the omnibus clause.\(^ {144}\) *State Farm Mutual Automobile Insurance Co. v. Kersey*\(^ {145}\) also adhered to the strict rule holding that a daughter was not covered by the omnibus clause in her father’s insurance policy since she lacked express or implied permission to operate the vehicle.

The second rule is the moderate or minor deviation theory. Under this approach any deviation from the permission granted, which constitutes more than a slight deviation, will be sufficient to exclude the employee from coverage under the omnibus clause. The difficulty with applying this rule is in determining whether the deviation was slight or of a material nature.

The more recent cases decided by the Supreme Court of Nebraska lend support to the third rule, commonly referred to as the liberal or initial permission rule. Under this rule, once permission is given to use the vehicle it will be extended to include any and all uses of the vehicle. Three recent cases decided by the Nebraska Supreme Court have followed this rule.

*Protective Fire & Casualty Co. v. Cornelius*\(^ {146}\) involved an action whereby Protective Fire & Casualty Company, plaintiff, was seek-

---

\(^{142}\) See 7 Am. Jur. 2d Automobile Insurance § 123 (1963); Annot., 5 A.L.R.2d 600, 651 (1949).

\(^{143}\) 149 Neb. 728, 32 N.W.2d 413 (1948).

\(^{144}\) Id. at 733, 32 N.W.2d at 416.

\(^{145}\) 171 Neb. 212, 106 N.W.2d 31 (1960).

\(^{146}\) 176 Neb. 75, 125 N.W.2d 179 (1963).
ing determination of the extent of liability on two automobile insurance policies. The owner of a used car lot allowed one of his employees, who was interested in purchasing a car, to take a car home over the weekend to try it out. The employee allowed his girlfriend, Glenda Cornelius, to drive the car, and while she was operating the vehicle it was involved in a collision with another automobile. In holding the employer's insurance carrier liable to the extent of the policy limits for any judgments obtained against the employer, the employee, or Glenda, the court reasoned in reference to the omnibus statute:147

The statute is remedial in nature and has for its purpose the protection of the public against damages resulting from accidents arising because of the negligent use of automobiles by irresponsible and uninsured permittees. The statute should be construed to accomplish the purpose and policy of the legislation. We must therefore reject the contention that the language of the omnibus statute means that the permission to use the car in a specified manner or for a specified purpose only bears upon the liability where permission to use the car is in fact given. Under this rule . . . a deviation from the permitted use is immaterial, the only essential being that permission be given for use in the first instance.148

In citing the Cornelius case the court in Arndt stated that: "[L]iability was based primarily upon the provisions of the Nebraska Motor Vehicle Safety Responsibility Act. It would appear that the same result would have been obtained had consideration been confined to the omnibus clause."149

In Metcalf v. Hartford Accident Indemnity Co.,150 a president of a corporation permitted his son to use a company owned car. At times, the president had used the car for personal and family purposes. He instructed his son not to allow anyone else to operate the automobile. An accident occurred while the son's friend was driving the car. Thus the question presented was whether a permittee had the ability to grant permission to a second permittee. The court stated that a person who assists a user of an automobile by taking over the operation of the vehicle becomes an additional insured within the meaning of the omnibus clause. The Metcalf case, therefore, must also be considered to comply with the liberal rule.

150 176 Neb. 468, 126 N.W.2d 471 (1964).
In *Farm Bureau Insurance Co. v. Allied Mutual Insurance Co.*,\(^{151}\) the Supreme Court of Nebraska stated that: "Protective Fire & Casualty Co. v. Cornelius...\(^{152}\) commits us to a broad rather than a narrow construction of the word 'permission' as it is used in the omnibus clause."\(^{153}\) This recent expression by the Nebraska Supreme Court clearly evidences an adherence to the liberal rule.

The Nebraska Supreme Court in *Arndt* observed that the law in Nebraska, as evidenced by the interpretations given to omnibus clauses in the previous cases, is in an undefined status. The cases are not in accord with each other and are based on different interpretations of omnibus clauses. However, the court concluded that in view of the recent cases, Nebraska was committed to the liberal doctrine.

Although the position taken by the court was contrary to the general rule, there are some very strong policy considerations supporting the court's position. Under the facts presented in *Arndt*, the court reasoned that to adhere to the strict or conversion rule, "would verge on the impractical and the ridiculous."\(^{154}\) Adherence to the strict rule could require Davis to stop using his car after normal business hours if he were out of town. It is conceivable that Davis would have to get a taxi to his motel since he would have to park the car adjacent to the place where he made his last business call of the day. He would be required to do the same for any traveling he did after business hours while out of town, whether it be going to a restaurant, a church or a social function.\(^{155}\) The court's opinion stating that such a situation would be highly restrictive and impractical does not seem at all unreasonable. In their policy argument for the liberal rule the court stated:

> Proponents of this rule justify it on the ground that it is good public policy to protect persons injured in automobile accidents against uninsured motorists. They further justify the rule on the theory that the purpose of the omnibus clause is to broaden the coverage of the policy to cover all persons operating the insured automobile with the knowledge and consent of the insured owner and insist that once the owner has placed the automobile in the possession of the driver and consented to his operating the automobile, any deviation from the purposes for which the automobile was entrusted to the operator is immaterial.\(^{156}\)

---

\(^{151}\) 180 Neb. 555, 143 N.W.2d 923 (1966).

\(^{152}\) 176 Neb. 75, 125 N.W.2d 179 (1963).


\(^{155}\) Id. at 732-33, 163 N.W.2d at 889-90.

\(^{156}\) Id. at 729, 163 N.W.2d at 888.
Other jurisdictions have adopted the liberal rule and approach the issue in a similar manner. In the case of Konrad v. Hartford Accident & Indemnity Co., the Supreme Court of Illinois stated:

"When the named insured has initially once given permission to another person to use his motor vehicle but that person deviates from the permission granted, Illinois follows the so-called initial permission rule to the effect that the user need only have received permission to take the vehicle in the first instance, and any use while it remains in his possession is with 'permission,' under the omnibus clause, though that use may be for a purpose not contemplated by the named insured when he parted with possession of the vehicle. . . ."

The Arndt decision indicates that the Nebraska Supreme Court has made the liberal rule of interpretation of omnibus clauses the settled and clearly defined law of Nebraska. A practical consequence of the decision may be that automobile liability insurance companies in Nebraska will no longer offer different types of automobile liability insurance policies. According to Arndt, once permission is given liability will be extended to all situations. Therefore, insurance companies may only offer a policy covering the employee under all circumstances. Assuming a higher premium on this type of policy than on the type that only covers the employee during normal business hours, there will be an increase in insurance costs for the employer. This increased cost would most likely be deferred in this case through higher prices on Armour's products or lower wages for Armour's employees.

VI. NATURAL RESOURCES

In Baumgartner v. Gulf Oil Corporation, a case of first impression in this state, the Supreme Court of Nebraska held that where primary recoverable oil has been exhausted, the operator of a secondary recovery project, authorized by the Nebraska Oil and Gas Conservation Commission, does not incur liability to owners who refuse to join the project when the injected substance used for the secondary recovery of oil sweeps oil from the leased land of non-complying owners.

This case involved an action for trespass and conversion. On June 13, 1960, the State of Nebraska issued to the plaintiff an oil and gas lease for a term of ten years. The plaintiff held the lease for five years and then allowed it to lapse. Gulf Oil Corporation, defendant, is the operator of the Kenmac "J" Sand Unit (hereinafter

158 11 Ill. App. 2d 503, 137 N.E.2d 855 (1956).
159 Id. at 514, 137 N.E.2d at 861.
referred to as Kenmac) which was created when the Nebraska Oil and Gas Conservation Commission (hereinafter referred to as Commission) approved the Kenmac Field Agreement. This agreement provided for the secondary recovery of oil by waterflooding and was approved by all of the working interest owners in the field, with the exception of the plaintiff. It was further agreed to by the owners of over eighty percent of the royalty interest.

Kenmac was formed for the purposes of increasing the ultimate recovery of oil and the prevention of waste. Without Kenmac, there would have been no recovery of secondary oil.

Primary oil is that oil which is produced under natural energy force. Secondary oil is that oil which is produced by either supplementing or introducing extraneous pressure into the producing formation by the injection of water or other means, and can be recovered only by a unit operation. To obtain secondary oil it is necessary to unitize a field to protect the relative rights of the parties since an operation for the secondary recovery of oil by water-flooding necessarily causes the oil and water to migrate across lease lines.

Testimony accepted at trial established that plaintiff could not have profitably developed his lease; that plaintiff refused to join Kenmac unless his assessment of the costs and profits, which was fair and equitable, was waived; and that the development of plaintiff's lease by waterflooding by Kenmac would have resulted in a $27,455 profit to plaintiff.

The court pointed out that the law of Nebraska pertaining to the question of unitization had been amended since the formation of Kenmac. However, the court stated that the case had to be decided under the law as it existed prior to the amendment.

In reaching its decision the court focused its attention on the nature of oil and gas and an examination of the objectives of the Nebraska Oil and Gas Conservation Act, giving consideration to the public policy arguments contained therein.

The court reasoned that it was in the best interests of the state and its citizens if the natural resources of oil and gas within its borders could be utilized to their fullest extent. The declared

161 NEB. REV. STAT. § 57-910.03 (Reissue 1968). This statute provides for compulsory unitization upon the approval of 75% of the production owners and those required to pay 75% of the development costs.

162 NEB. REV. STAT. § 57-901 to -921 (Reissue 1968).

163 "It is hereby declared to be in the public interest . . . to authorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; . . . and to encourage and to authorize . . . secondary recovery operations. . . ." NEB. REV. STAT. § 57-901 (Reissue 1968).
public policy in this state, as indicated by the legislature, is to encourage and authorize secondary recovery operations. Compliance with this policy will insure that the greatest possible economic benefit is obtained from the vital irreplaceable natural resources of oil and gas within the state for the common good of the general public.164

The law of capture provides that a person may acquire title to oil or gas which he produces from wells on his own land even though the oil or gas may have migrated from adjoining lands. Pursuant to this rule, a person can appropriate the oil or gas flowing from his neighbors' lands without their consent and without incurring any liability.165 Confronted with the question of whether the law of capture could be applied where an extraneous substance was injected into oil reservoirs to induce the migration of oil, the court in Baumgartner affirmed the rule but limited its application by saying:

We have reached the conclusion that where the primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis, and if any interested party refuses to join he should not be permitted to capitalize on that refusal. To hold otherwise would discourage unitization and encourage rather than avoid waste. Consequently, we hold where a secondary recovery project has been authorized by the commission the operator is not liable for willful trespass to owners who refused to join the project when the injected recovery substance moves across lease lines.166

The court's decision is obviously restricted to a rather narrow set of circumstances. In view of the fact that a statute has been enacted which deals with the issues presented by Baumgartner, the court was justified in so limiting its holding.

However, there is authority which indicates that this was a trespass.167 In Jenal v. Green Island Drain Co.,168 the Supreme Court of Nebraska stated:

The legislature possesses no authority, however, to take the property of one citizen and transfer it to another, even when full compensation is made. The law guarantees to every one the free use and enjoyment of his property, and he can be required to surrender it only when it is required for public use, and upon full compensation being made.169

164 Id.
167 See Mining Co. v. Tarbet, 98 U.S. 463 (1878); 43 C.F.R. § 9293.0 to .7; 36 Am. Jur. Mines and Minerals § 7 (1941).
168 12 Neb. 163, 10 N.W. 547 (1881).
169 Id. at 166-67, 10 N.W. at 548 (citations omitted).
Two cases which have ruled on the question presented in Baumgartner held that the underground migration of oil and water across lease lines which necessarily results from the recovery of secondary oil does not constitute a trespass. In Railroad Commission v. Manziel\(^{170}\) the Supreme Court of Texas, in a case of first impression, held that the common law doctrine of trespass does not apply to the migration onto an offsetting lease of water from an injection well which is authorized by the Texas Railroad Commission under the oil and gas conservation laws of that state. In Manziel the court stated:

The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as arise out of the secondary recovery of natural resources. If the intrusions of salt water are to be regarded as trespassory in character, then under common notions of surface invasions, the justifying public policy considerations behind secondary recovery operations could not be reached in considering the validity and reasonableness of such operations. Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.\(^{171}\)

In California Co. v. Britt,\(^{172}\) the Mississippi Supreme Court held that the injection of gas in a unit well which swept oil from plaintiff's lease onto the unit where it was produced by a unit recovery well did not constitute a common law trespass. In answering the plaintiff's claim for the value of the oil drained from his lease on the ground of willful and malicious trespass, the court held that no trespass had occurred stating:

Since there was no invasion of appellees' mineral interest by drilling a well on it, and all of California's activities have been in accord with the requirements of the conservation act and orders of the board, this is one of those cases, somewhat unusual today, where the law of capture applies...\(^{173}\)

The Britt case seems to be directly in accord with the holding of the Nebraska Supreme Court in Baumgartner.

In the future the statutory amendment\(^{174}\) will control issues of this nature. In any event, the court has indicated through Baumgartner that the controlling questions with regard to statutory

\(^{171}\) Id. at 568 (citations omitted).
\(^{172}\) California Co. v. Britt, 247 Miss. 718, 154 So. 2d 144 (1963).
\(^{173}\) Id. at 727, 154 So. 2d at 147.
construction will center around the welfare of the public and the peculiar nature of oil and gas reservoirs in relation to the weight of the individual rights concerned.

One criticism of the Baumgartner decision is the ambiguous nature of the remand. The court stated that: "[T]he judgment herein is reversed and the cause remanded to the district court for retrial under the rule of damages enunciated above." The problem centers around the question of what damages the court will sanction in compliance with their decision.

As the facts point out, plaintiff never had the opportunity to capture the primary oil in his lease before the secondary operation swept it away. The court recognized the fact that plaintiff was entitled to this primary oil even though efforts to extract it on his part would have resulted in an economic loss. The dissenting opinion advocated dismissal of the suit for this reason. The question that arises is which standard to use in computing damages; can plaintiff recover for only primary oil less expenses or can he recover for secondary oil also? The standard of damages for recovery of only primary oil is advanced when the court states: "[T]he most that plaintiff should have a right to recover is what he can prove by a preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project...." The standard of damages for the recovery of both primary and secondary oil is suggested when the court states: "If the testimony of his manager of operations is accepted, then the profit he could have realized from his own operations for both primary and secondary recovery would have been $12,224." In the first instance the court implies a recovery for only primary oil since through his own efforts he could not have recovered any secondary oil, secondary oil only being recoverable through the joint efforts of the unit members. However, in the second instance the court states that plaintiff can recover something for secondary oil. This apparent contradiction makes the rule of damages to be applied very ambiguous. It is submitted that the proper rule of damages to be applied is the profit or loss plaintiff would have realized through his own primary operations, since that seems to follow the basic reasoning of the decision.

The Nebraska Supreme Court in Brummund v. Vogel was presented with a question as to the extent to which the owner of land

---

175 184 Neb. at 400, 168 N.W.2d at 519.
176 Id. at 399-400, 168 N.W.2d at 519.
177 Id. at 400, 168 N.W.2d at 519.
bounding upon a watercourse is entitled to interrupt the natural flow of a stream in a manner consistent with the rights of lower users of the stream.

_Vogel_ was an action in equity whereby the plaintiff was seeking to enjoin the defendant from constructing an earthen dam. The facts disclose that plaintiff was the owner of farm property which abutted on a creek. He used the stream to water his livestock but had no appropriate right and neither pleaded nor proved that he or his predecessors in title owned the land before April 4, 1895, which in the language of the court "is the cut-off date for the acquisition of riparian rights..." However, the defendants had acquired appropriator status on August 24, 1967, upon filing with the Department of Water Resources. The certificate which the defendants received from the Department of Water Resources stated that they could not interfere with the prior rights of any persons who, by compliance with the laws of Nebraska, had acquired a right to use the waters of the stream. Pursuant to this permit, the defendants were preparing to build an earthen dam on a spring-fed creek located on their land. The plans for the dam indicated that a one and one-half inch pipe was to run into the interior where it would join with a twenty-four inch pipe to carry water through the dam to supply water for livestock watering on plaintiff's land below.

The lower court denied the requested injunction and dismissed the plaintiff's complaint. In the Nebraska Supreme Court the matter was tried de novo with the court ultimately affirming the judgment denying the injunction, but expressly limiting the rule of res judicata so that it should not affect plaintiff's right to the flow through the one and one-half inch pipe. In its opinion, the court stated:

We hold that the right of plaintiff to use water from this stream for domestic purposes is superior to the defendants' right to construct a dam to have a reservoir for either agricultural or recreational purposes, and the fact that defendants may also use it for domestic purposes will not justify any unreasonable diminution of water resulting in harm to plaintiff.

---

179 Watercourse is defined as: "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." _Neb. Rev. Stat._ § 31-202 (Reissue 1968).

180 See _Neb. Laws c. 69, §§ 42, 43, 65_ (1895).


After deciding that plaintiff failed to meet the required burden of proof concerning the effect of the proposed dam on the flow of the water downstream, the court concluded:

Plaintiff complains that the defendants have the right to control the shut-off valve on the 1½-inch pipe which was placed in the proposed dam 6½ feet above the bed of the stream. The evidence of the defendants is to the effect that this 1½-inch pipe was specially designed for the benefit of the plaintiff. Plaintiff is entitled to protection from any interference by the defendants as to the uninterrupted flow of water through this pipe which is provided for in the plans of the proposed dam, as well as any silting or other obstruction in the functional operations for the conducting of water through the various outlets of the dam.

We hold that plaintiff's complaint in regard to the fact that the 1½-inch pipe has a shut-off valve under the control of the defendants and the right to have an uninterrupted flow of water through this pipe was not an issue litigated between the parties so as to give rise to the defense of res judicata in any subsequent litigation.\(^{184}\)

At the outset the Vogel opinion appears to impose two separate burdens of proof on plaintiff in future litigation. First, he must prove the effect of defendants' dam on the downstream flow. Second, he must prove that his land was severed from the public domain prior to April 4, 1895, as evidenced from the court's language recognizing this as the cutoff date to invoke "the law of priority of application giving the better right as between those using the water for the same or different purposes, and preferring domestic uses over other uses in cases of insufficient water."\(^{185}\) However, subsequent language in the opinion expresses that the plaintiff had a right to use the stream for domestic purposes which was superior to defendants' right to construct a dam and use the water for either agricultural or recreational purposes. The opinion further states that if defendant used the stream for domestic purposes he would not be justified in causing any unreasonable diminution of water resulting in harm to plaintiff.\(^{186}\) The court is stating that defendants' preference is not as high as that of plaintiff: plaintiff was a domestic (cattle) user, whereas, defendants were only recreational and agricultural (soil conservation) users.

The court appears to hold that a domestic user, regardless of whether he is an officially certified appropriator, a proven riparian, takes precedence over a non-domestic user of appropriator status. Under the well established principles of Crawford Co. v. Hath-

\(^{184}\) Id. at 422, 168 N.W.2d at 28-29.
\(^{185}\) Id. at 420, 168 N.W.2d at 27.
\(^{186}\) Id. at 421, 168 N.W.2d at 28.
away, the plaintiff in the instant action would hold a clear priority over an appropriator if plaintiff had shown that his riparian status preceded the Irrigation Act of 1895. Since plaintiff has not pleaded or proved riparian status, and since plaintiff has not achieved appropriator status, the court in Vogel appears to have stated a new rule of law.

This new rule of law suggests that a sleeping domestic user can impede the progress of a certified appropriator simply by proving domestic preference.

VII. PAROL EVIDENCE

In Property Sales, Inc. v. Irvington Ice Cream and Frozen Arts, Inc. the Supreme Court of Nebraska returned the law of this state "to a position consonant with [the] law of contract." The court held that a broker's contract for the sale of land which had expired under its own terms could not, subsequent to the expiration, be extended by parol.

On March 4, 1966, Property Sales, Inc., plaintiff, entered into a valid written brokerage contract with the defendant, Irvington Ice Cream and Frozen Arts, Inc., for the sale of the defendant's real estate and his ice cream business. The terms of the contract specifically stated that the contract would expire on September 1, 1966. Six months after the brokerage contract expired, the parties entered into an oral extension agreement. Property Sales, Inc. arranged a meeting between the defendant and a prospective buyer and, as a consequence of this meeting, the defendant sold its property to the buyer. Property Sales, Inc. did not participate in the negotiations and the defendant closed the sale personally on July 1, 1967. The defendant refused to pay Property Sales, Inc. a commission on the sale.

The foremost question with which the court was concerned was whether Hetzel v. Lyon should be overruled. The Hetzel case held that a broker's contract, executed pursuant to the Statute of Frauds, for the sale of land, which by its terms limited the time of its existence, could be extended by parol after the contract had been terminated. The court noted that the decision in Hetzel was based unequivocally on the case of Rank v. Garvey and reasoned that:

187 67 Neb. 325, 93 N.W. 781 (1903).
190 Id. at 22, 165 N.W.2d at 81.
191 87 Neb. 261, 126 N.W. 997 (1910).
193 66 Neb. 767, 92 N.W. 1025 (1902).
Even a cursory reading of Rank v. Garvey reveals that the broker's contract had not expired and was in full force and effect at the time the contract was modified, by an oral agreement as to the listing price, a term not required to be in writing under the Statute of Frauds. These facts strike a clear distinction between the Rank and Hetzel cases. It, therefore, appears to be beyond argument that the Hetzel case stands entirely upon a misconception of the rule in the Rank case which we consider to be sound law.  

Proceeding to a discussion of the case on the merits, the court agreed that a contract which had expired by its own terms was legally defunct. It reasoned: "[I]n order to extend a contract, there must be a contract in existence to extend by parol, lest the parol agreement fall for failure to comply with the Statute of Frauds." The court is taking the position that once a contract required to be in writing under the Statute of Frauds has expired, it cannot be extended by parol because it is then without continuing legal existence.

The Supreme Court of Washington in Pavey v. Collins was presented with a situation closely analogous to that in Property Sales, Inc. The parties in Pavey executed two exclusive brokerage agreements in writing for the sale of real estate, which expired by their own terms on December 31, 1946. Washington has a Statute of Frauds substantially like that of Nebraska. On January 12, 1947, the owner of the property wrote the broker confirming the expiration of the written contract but advising the broker that if he got a buyer he would still be paid a commission on the sale. The broker subsequently found a buyer but the negotiation and the sale were made between the buyer and the owner. The owner refused to pay the broker a commission on the sale and the broker filed suit, contending that the original contract had been extended, both orally and in writing. The Washington Supreme Court, in reversing the trial court's decision allowing the extension as valid, held that:

[A] contract which by its terms has expired is legally defunct, and, since the vitality which it once had has ceased, there is nothing upon which an extension may legally operate. . . . [W]hen the contract has terminated or been extinguished, it is no longer subject to extension, for extension implies an existing agreement. To bring the terms of an extinguished contract into renewed existence requires a new contract embodying such terms.

---

197 31 Wash. 2d 864, 199 P.2d 571 (1948).
The Supreme Court of Nebraska cited the Pavey case as perhaps the most persuasive authority in support of their position.\textsuperscript{200} However, an obvious mistake appears in the opinion of the Nebraska Supreme Court where they state: "[F]or several reasons, we disagree with the theory of extension of the Supreme Court of Washington."\textsuperscript{201} The court meant to refer to the decision of the Washington trial court and not to the decision of the Supreme Court of Washington, since it was the trial court that argued in favor of the theory of extension. The reasons given by the Nebraska Supreme Court for disagreeing with the Supreme Court of Washington on the theory of extension, are the same reasons advanced by the Washington Supreme Court for disagreeing with the Washington trial court on the theory of extension. Once this ambiguity in the opinion of \textit{Property Sales, Inc.} is clarified, it becomes clear that the Supreme Court of Nebraska is in complete accord with the Supreme Court of Washington.

As a logical consequence of its decision, the Nebraska Supreme Court overruled the decision in \textit{Hetzel v. Lyon},\textsuperscript{202} and returned the law of Nebraska to a position consonant with the law of contract.\textsuperscript{203} In doing so, the court also reaffirmed the rule in \textit{Rank v. Garvey}.\textsuperscript{204} As the law now stands in Nebraska, a broker's contract for the sale of land which has expired under its own terms cannot, subsequent to the expiration, be extended by parol. It should be noted, however, that \textit{Property Sales, Inc.} does not stand for the proposition that the essential or important terms of a contract, required to be in writing under the Statute of Frauds, can be orally modified if the contract is still in effect.\textsuperscript{205}

\textbf{VIII. REAL PROPERTY}

\textit{Horst v. Housing Authority}\textsuperscript{206} was a case of first impression in Nebraska in which the Nebraska Supreme Court held that covenants restricting the use of land constitute an interest in the land and, are compensable when eminent domain extinguishes the covenants.

The Housing Authority of the County of Scottsbluff instituted condemnation proceedings for the purpose of acquiring twenty-four

\textsuperscript{200} Property Sales, Inc. v. Irvington Ice Cream & Frozen Arts, Inc., 184 Neb. 17, 20, 165 N.W.2d 78, 80 (1969).
\textsuperscript{201} Id. at 21, 165 N.W.2d at 80.
\textsuperscript{202} 87 Neb. 261, 126 N.W. 997 (1910).
\textsuperscript{203} 2 A. CORBIN, \textsc{CORBIN ON CONTRACTS} 103 (1950).
\textsuperscript{204} 66 Neb. 767, 92 N.W. 1025 (1902).
\textsuperscript{205} Cf. Nason v. Morrissey, 218 Miss. 601, 67 So. 2d 506 (1953).
\textsuperscript{206} 184 Neb. 215, 186 N.W.2d 119 (1969).
lots in a residential subdivision. Appellants did not own any of the twenty-four lots being condemned, but they did own other lots within the subdivision. Each lot in this subdivision was restricted to single family residential use by a deed covenant.

Appellants, claiming to be condemnees because of an alleged real property interest in the covenants of each parcel actually condemned, maintained that the extinguishment of the restrictive covenants in the condemnation of the twenty-four lots entitled owners of lots other than those condemned to compensation. The Supreme Court of Nebraska agreed, and in so holding sided with a clear majority of other jurisdictions.207

A restrictive covenant confers a property right on those benefiting from the restriction and, as such, should require compensation when property subject to the restriction is taken through the power of eminent domain for a use violating the restriction.208 The court used this reasoning to refute the contention of the Housing Authority that: "[T]he rights of the appellants arising from such restrictive covenants are negative rights not known at common law, and, therefore, not property rights in the lots being acquired."209

The Nebraska Constitution specifically provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."210 Horst reiterated that this constitutional language was an effective guard against allowing the government to inflict damage to property without liability simply because it is the government. Since interests in these restrictive covenants were property in the constitutional sense, according to the court they had to be compensated for if the owners were damaged by their extinquishment.

By this reasoning the Nebraska Supreme Court may have gone beyond the majority rule it purported to adopt. Other jurisdictions following the majority rule seem to limit its application to situations, as in Horst, where restrictive covenants pertaining to residential use are involved.211 No such limitation, however, is neces-

---

208 RESTATEMENT OF PROPERTY § 566 (1944), provides that: "Upon a condemnation of land subject to the obligation of a promise respecting its use in such manner as to extinguish the interest in the land created by the promise, compensation must be made to those entitled to the benefit of the promise."
211 But see, State Highway Comm. v. McNeill, 238 Ark. 244, 381 S.W.2d 425 (1964).
sarily apparent on the face of Horst. The opinion implies a more general application because of the reference to article one, section twenty-one of the Constitution of Nebraska.

Jurisdictions adhering to the minority viewpoint are not in complete agreement as to the basis upon which compensation should be denied. Some courts take the position advanced by the appellees in Horst, stating that no property right is involved. Other courts, however, have denied compensation on several grounds of public policy. One seemingly incongruous result of the majority view allows landowners to create a compensable right against the condemning authority merely by signing a piece of paper, but at the same time denies a right to compensation to landowners in the area not covered by the restrictive covenant. A practical consideration is involved in situations where the restrictions extend over large areas and involve large numbers of landowners. The administrative difficulties that could be encountered in attempting to handle such a large number of claims could effectively restrain the governmental use of the eminent domain power. One way to avoid many of these problems, although perhaps not the best way, would be to adopt the rationale that the right of eminent domain is founded upon the basis of public necessity, and any covenant which attempts to hinder the exercise of this right is to that extent void as against public policy.

The trend of the latest decisions has been to deny the right to compensation for the destruction of such use restrictions. However, the Supreme Court of Nevada has recently ruled in accord with the Supreme Court of Nebraska and the majority view. Applying the same line of reasoning as the Nebraska Supreme Court in Horst, the Nevada court held that when a restrictive covenant is extinguished in eminent domain proceedings, landowners directly affected by the restrictive covenant and intended to be benefited by it were entitled to compensation.

Horst committed Nebraska to the majority rule, but whether the Nebraska Supreme Court will limit its holding only to restrictions for residential purposes or expand it to restrictions for busi-

---

216 Id. at 752.
ness or industrial purposes remains to be seen. It should be noted, however, that the decision appears to be broad enough to encompass all restrictions.

The status of an unacknowledged improvement mortgage on a homestead was clearly defined by the Supreme Court of Nebraska in *Miles Homes, Inc. v. Muhs.*217 The court held that lack of statutory acknowledgement of an improvement mortgage on a homestead does not preclude enforcement of the mortgage.

Walter Muhs and his wife, defendants, purchased a one acre tract of land from his parents. After paying a consideration of $1, the defendants bought a small trailer house, put it on the acre in question, and lived in the trailer house for about six months. Leaks in the trailer forced the defendants to move into Walter's parents' farmhouse, where they resided for the next two and three-fourths years. Shortly after they moved into the parents' farmhouse, they started construction of a basement for their dwelling house on the land. Approximately a year after construction of the basement had begun, the defendants issued their installment note for $9,288 payable to the plaintiff, stating: "This note is secured by a mortgage of even date executed by the undersigned... and represents payment... for materials... used in the improvement... of the property described in said mortgage."218 The mortgage was never validly acknowledged but was altered by the addition of a false certificate of acknowledgement. The materials were delivered to the defendant and were used in the construction of the house. In view of these facts the court termed the mortgage as an acknowledged improvement mortgage.

In its opinion the court cited *City Savings Bank v. Thompson,*219 which dealt with a similar problem. In *Thompson* the wife contracted with the plaintiff to buy some land. She bought the land with the intention of moving the family house onto the land purchased. The agreement included as purchase money the plaintiff's loan of $1,000 for improvements to the land. The husband refused to sign the contract of purchase. By a vote of four to three the court decided that the improvement loan was not part of the purchase money. In reaching its decision the court reasoned that:

[S]ince her husband did not execute or acknowledge the contract of purchase, ... a vendor's lien for the money advanced for the improvements, as distinguished from purchase money, did not attach to the homestead. This conclusion is not demanded by the

218 Id. at 618, 169 N.W.2d at 691.
219 91 Neb. 628, 136 N.W. 992 (1912).
principles of justice governing courts of equity independently of statute, but there does not seem to be any way to avoid it without doing violence to the homestead laws.\textsuperscript{220}

The homestead laws, to which the Thompson opinion refers, provide that:

A homestead not exceeding in value two thousand dollars, consisting of the dwelling house . . . its appurtenances, and the land on which the same is situated, . . . shall be exempt from . . . forced sale, except as provided in sections 40-101 to 40-217. . . . [\textsuperscript{221}] The homestead is subject to . . . forced sale in satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant. . . . [\textsuperscript{222}] The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife . . . .\textsuperscript{223}

An examination of these statutes clearly indicates that there was no way to avoid the Thompson decision "without doing violence to the homestead laws."\textsuperscript{224}

The Supreme Court of Nebraska in Muhs adopted a position which is in conflict with the Thompson case. The court's position in Muhs is that there is a strong policy against allowing a homestead to be acquired or improved without payment to, or a superior lien on the part of, the creditor. Muhs states that the statutory provisions granting vendors', mechanics' and laborers' liens priority over the homestead interest is the basis for this policy. The court stated that this policy "limits the requirement for both spouses' acknowledgment, a requirement probably conceived to prevent coercion of the wife."\textsuperscript{225} The court in Muhs cited a 1925 article which stated:

Apparently, the object of the legislature in adding these two extra requirements [execution and acknowledgement] for validity in case of homestead instruments was to furnish a safeguard against the coercion of a wife by her husband by requiring acts to be done before witnesses and public officials. It may well be doubted whether this safeguard is worth what it has cost in the insecurity of land titles. . . . As a practical matter, it may be doubted whether there is any serious danger of coercion existing today. Whatever

\begin{itemize}
\item \textsuperscript{220} Id. at 633, 136 N.W. at 994.
\item \textsuperscript{221} \textsc{Nebraska Rev. Stat.} § 40-101 (Reissue 1968).
\item \textsuperscript{222} \textsc{Nebraska Rev. Stat.} § 40-103 (Reissue 1968) (emphasis added).
\item \textsuperscript{223} \textsc{Nebraska Rev. Stat.} § 40-104 (Reissue 1968) (emphasis added).
\item \textsuperscript{224} City Savings Bank v. Thompson, 91 Neb. 628, 633, 136 N.W. 992, 994 (1912).
\item \textsuperscript{225} Miles Homes, Inc. v. Muhs, 184 Neb. 617, 619, 169 N.W.2d 691, 692 (1969).
\end{itemize}
may have been true of her grandmother, the modern woman is not easily coerced by a mere husband. . . . If a wife is in fact coerced, the door to equitable relief is always open to her.226

Another article also presents a sound argument for the court's decision when it states:

Closely allied to the status of purchase money obligations is that of funds furnished to pay for improvements on the homestead property . . . . The Kansas courts have held that one to whom money is furnished for improvements on the homestead may avail himself of the exemption, whereas one to whom the materials have been supplied for that purpose may not. The distinction seems unsound, at least where by statute the homestead consists of land and all the improvements thereon. One who furnishes money for improvements has in a sense provided a part of the purchase price of the homestead, and the exemption . . . should not be the means of obtaining a free home, neither should it be available for obtaining a more habitable one without payment.227

Thus, the court reasoned that the legislature, by its act of establishing certain liens as superior to the homestead exemption, manifested an intent to preclude a homesteader from acquiring or improving a homestead without payment. This intent on the part of the legislature necessarily limits the requirement for joinder of the spouses' acknowledgements, a requirement which, the court implies, is no longer practical. The Thompson case was disapproved to the extent that it conflicted with Muhs.

There is a divergence of opinion in other jurisdictions, but it is generally held that a mortgage for the purpose of obtaining materials to make improvements on a homestead is not within the rule requiring the acknowledgement of both husband and wife.228 The Kentucky Supreme Court in Thacker v. Booth229 held that even though the wife of the mortgagor had not joined in the mortgage, the homestead exemption was not a valid defense against a mortgage which secured a note for the payment of materials furnished for improvement of the homestead. In Keys v. Tarrant County Building & Loan Association,230 the Court of Civil Appeals of Texas held: "The erection of a house on said lot in pursuance of said arrangements did not impress it with the homestead character as against the lien given to secure said loan."231

227 Haskins, Homestead Exemptions, 63 Harv. L. Rev. 1289, 1305 (1950) (emphasis added, citations omitted).
229 9 Ky. L. Rptr. 745, 6 S.W. 460 (1888).
231 Id. at 595.
A relevant consideration is whether the Supreme Court of Nebraska exceeded its power in *Muhs*. The judicial function is to interpret the laws while the legislative function is to enact and amend the laws. In Nebraska, statutory law states that: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife . . . ."\(^{232}\) Mr. Chief Justice White's dissenting opinion in *Muhs* states that the statute meant what it said.\(^{233}\) If the reasons for the enactment of the statute no longer exist, it could be contended that it is up to the legislature, and not the courts, to amend or repeal the statute.

It is significant that the Nebraska Supreme Court has interpreted an unacknowledged improvement mortgage as being enforceable as against the homestead exemption. The court seems to have equated the unacknowledged improvement mortgage for materials with a mechanics' lien and, therefore, has brought it within the scope of the statute which expressly states a mechanics' lien to be superior to a homestead exemption.\(^{234}\) In so doing, the court has recognized the current economic realities and equities involved in homesteads and their improvements.

**IX. TORTS—NEGligence**

In *Newkirk v. Kovanda*\(^{235}\) plaintiff was a passenger in an automobile that struck the rear end of another car stopped at a stop light. Plaintiff claimed she was not injured as a result of this collision and she remained in the automobile. Subsequently, the defendant came upon the scene in his car. Although the street was icy, defendant claimed he was able to stop his automobile before coming into contact with the car in which the plaintiff was sitting. Both parties and the majority of the court agreed that he was able to stop his car in time.\(^{236}\) Deciding to back up and go around, defendant put his car in reverse but when he released his brakes his car slid forward into the automobile in which plaintiff was sitting.\(^{237}\) Plaintiff claimed she suffered neck injuries as a result of this second impact and brought suit to recover damages.


\(^{236}\) The dissent said it was a question of fact for the jury. Id. at 134, 165 N.W.2d at 580.

\(^{237}\) The supreme court quoted the defendant as saying that he decided to "get out of there." *Id.* at 129, 165 N.W.2d at 578. Defendant was the owner of a 1966 "stick shift" Mustang. Brief for Appellee at 12.
At the trial the plaintiff requested a jury instruction that the defendant was negligent as a matter of law. She also requested an instruction that if the jury should find that her injuries were the result of separate independent acts of negligence (the first collision combined with the second one involving the defendant), the defendant was liable for the entire extent of the injuries sustained. The trial court denied both requests. Under the instructions given by the court the jury returned a verdict for the defendant. On appeal the Nebraska Supreme Court reversed and held that refusal to grant the first requested instruction was prejudicial error. The court upheld the lower court's refusal to give the second instruction.

In holding that the defendant was negligent as a matter of law, the supreme court in *Newkirk* combined two separate automobile negligence doctrines. The court first relied on several earlier Nebraska cases making it negligence as a matter of law to run into a stopped vehicle under certain conditions. These cases dealt with situations where the defendant-driver of one car ran into plaintiff's parked or stopped automobile. In each of the cases the defendant was not able to stop in time to avoid the collision. The supreme court had held that this was negligence as a matter of law because a driver is legally obligated to keep a proper lookout.\(^\text{238}\) The second doctrine applied in *Newkirk* deals with the Nebraska cases defining ice and snow as conditions rather than intervening causes. These cases say that if the presence of frost, ice, snow, mist, fog or smoke is known, or should be reasonably anticipated, they are conditions rather than intervening or proximate causes. Such conditions do not relieve a driver of responsibility for the result of his negligence unless such a result would have occurred even if the motorist had not been negligent.\(^\text{239}\) In *Newkirk* the supreme court combined these two doctrines and held the defendant negligent as a matter of law.

---

\(^\text{238}\) The proper lookout rule relied upon by the supreme court is actually one aspect of the range of vision rule as adopted in Nebraska. See Doleman v. Burandt, 160 Neb. 745, 71 N.W.2d 521 (1955) (heavy snow; defendant's auto collided with plaintiff's auto standing in the highway; defendant held negligent as a matter of law); Ritchie v. Davidson, 183 Neb. 94, 158 N.W.2d 275 (1968) (defendant failed to apply emergency brake before colliding with plaintiff's auto stopped at a stop sign; defendant held negligent as a matter of law); Stanley v. Ebmeier, 166 Neb. 716, 90 N.W.2d 290 (1958) (defendant failed to slow down in time to avoid hitting plaintiff who had slowed to make a turn; defendant held negligent as a matter of law). See also Schmeling, *The Range of Vision Rule in Nebraska*, 49 Neb. L. Rev. 7 (1969).

\(^\text{239}\) Fairman v. Cook, 142 Neb. 893, 8 N.W.2d 315 (1943); Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N.W.2d 446 (1943); Harding v. Hoffman, 158 Neb. 86, 62 N.W.2d 333 (1954); Shields v. County of Buffalo, 161 Neb. 34, 71 N.W.2d 701 (1955); Guerin v. Forburger, 161
Unlike the cases cited by the court, the question of proper look-out was not involved in the Newkirk facts. The defendant was able to stop his car without colliding with the automobile in which plaintiff was sitting. It was only after he had attempted to back up that his car slid forward and hit the automobile. As pointed out by the dissenting opinion, the real issue in the case was whether a car skidding on ice is in itself negligence as a matter of law or evidence of negligence. The trial court submitted that issue to the jury.

By combining the proper lookout rule and the cases dealing with ice and snow as conditions, the court has apparently created a strict liability situation:

The undisputed evidence is that it was broad daylight, that the automobile in which the plaintiff was sitting was in plain sight, and that, in fact, the defendant had already stopped behind it. The facts here are undisputed. We know of no rule that would permit a holding that because the defendant's degree of inadvertence was small, that it would be, therefore, nonnegligent. The only inference that can be drawn from the evidence is that the defendant so managed and operated his automobile as to drive into the rear end of a vehicle ahead of him in plain sight and plainly visible to him.241

It now appears that evidence of a collision, without evidence of negligent acts, will be sufficient to produce liability in similar future litigation. Such a rule is not called for by any of the previous Nebraska decisions.

The plaintiff in Newkirk also requested that the trial court give the following instruction:

If separate, independent acts of negligence combine to produce an injury, each party involved therein is responsible for the entire result even though the act of one alone might not have caused the injury. If you find that the injuries to plaintiff were proximately caused by negligence of defendants as herein set forth, or were proximately caused both by the first collision and the negligence of defendants as herein set forth and that the injury is single

---

240 Neb. 824, 74 N.W.2d 870 (1956); Bramhall v. Adcock, 162 Neb. 198, 75 N.W.2d 696 (1956); Barney v. Adcock, 162 Neb. 179, 75 N.W.2d 683 (1956); Stevens v. Shaw, 179 Neb. 34, 136 N.W.2d 169 (1965); Kuffel v. Kuncl, 181 Neb. 770, 150 N.W.2d 908 (1967).

241 Id. at 130, 165 N.W.2d at 580. The appellant seems to be arguing for such a strict liability application when she says in her brief: "[I]cy and slippery conditions known to the driver (as they were here) are merely conditions imposing on the driver the duty to use care commensurate with the circumstances. . . . If this is true, then surely there can be no excuse or justification for the conduct of the defendant in running into the rear of the stopped car ahead." Brief for Appellant at 17.
and indivisible and cannot logically be apportioned between the two collisions, then defendants are liable for the whole extent of the injuries sustained.\textsuperscript{242}

The trial court refused to give this instruction. In her pleadings, the plaintiff did not claim that she received an indivisible injury as a result of the two accidents, nor was it alleged that she was injured as a result of the combined or concurrent negligence of the defendants and the driver of the car in which she was riding. The supreme court upheld the lower court's refusal to give the requested instruction, saying that it was a well established rule in Nebraska that only issues pleaded and supported by the evidence are to be submitted to the jury.\textsuperscript{243} Thé court did not stop there, however. After pointing out that the plaintiff was not entitled to the instruction because of her pleadings, the court went on to discuss some questionable theories of indivisible injury:

In her pleadings [plaintiff] does not claim that she received an indivisible injury as the result of the two accidents nor was it alleged that she was injured as a result of the combined or concurrent negligence of defendant and the driver of the car in which she was riding. . . . There is no contention in this case by the plain-

\textsuperscript{242} Record at 15, Newkirk v. Kovanda, 184 Neb. 127, 165 N.W.2d 576 (1969). The instruction finally given by the trial court stated: "Before plaintiff can recover against the defendants on her petition in this action, the burden is upon the plaintiff to prove by a preponderance of the evidence, each and all of the following propositions:
1. That defendants were negligent in one or more of the particulars claimed against them by the plaintiff;
2. That such negligence, if any, of the defendants was a proximate cause of the collision;
3. That as a direct and proximate result of said negligence and resultant collision the plaintiff sustained damages; and
4. The nature, extent and amount of the damages thus sustained by the plaintiff.

If the plaintiff has failed to establish any one or more of these propositions by a preponderance of the evidence, your verdict will be for the defendants. On the other hand, if the plaintiff has established by a preponderance of the evidence all of these propositions, your verdict must be for the plaintiff for the amount of her damages as to each her first and second causes of action." Record at 26.

\textsuperscript{243} See Frederick v. Kinzer, 17 Neb. 366, 22 N.W. 770 (1885); Hall v. Strode, 19 Neb. 658, 28 N.W. 312 (1886); Thom v. Dodge County, 64 Neb. 845, 90 N.W. 763 (1902); Harvey v. Harvey, 75 Neb. 557, 106 N.W. 660 (1906); Thornton v. Davis, 113 Neb. 529, 204 N.W. 69 (1925); Holst v. Warner, 116 Neb. 208, 216 N.W. 659 (1927); Becks v. Schuster, 154 Neb. 360, 48 N.W.2d 67 (1951); Barney v. Adcock, 162 Neb. 179, 75 N.W.2d 663 (1956); Owen v. Moore, 166 Neb. 228, 88 N.W.2d 759 (1958); Hopwood v. Voss, 174 Neb. 304, 117 N.W.2d 778 (1962); Reorganized Church of Jesus Christ of Latter Day Saints v. Universal Surety Co., 177 Neb. 60, 128 N.W.2d 361 (1964).
tiff that the driver of the car in which she was riding at the time of the first accident was negligent, or that any negligence on the first driver's part continued on and concurred with the alleged negligence of the defendant.244

If the plaintiff pleaded and proved an indivisible injury from the two accidents must she still prove that the first driver was negligent, i.e., she would be unable to collect the entire injury from the defendant if the first driver was not negligent? Such a rule would put an almost impossible burden on the plaintiff and also be contrary to several well-known cases.245 There have been several cases in Nebraska dealing with two negligent causes or a negligent cause combined with an act of God producing a single injury. In such a situation the court has held that even if the defendant's negligence is not the sole cause of the injury he is liable for the entire result.246 The Newkirk opinion now raises the possibility that even if the issues are properly submitted by the plaintiff, the defendant will be liable for the entire injury only if both causes are negligent.

X. WORKMEN'S COMPENSATION

A. INJURY FROM EMPLOYMENT EXERTION OR STRAIN

Two Nebraska Supreme Court cases this term more clearly define the effect of 1963 legislative amendments to the Workmen's

244 184 Neb. at 133, 165 N.W.2d at 580.

"If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about." RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

"The statement in Subsection (2) applies not only when the second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown." RESTATEMENT (SECOND) OR TORTS § 432, comment d at 431 (1965).

Compensation Act substituting unforeseen "injury" for unforeseen "event" in the definition of "accident" and adding statutory language with respect to the issue of proving causation. The amended act eliminated the previous rules requiring unusual employment exertion or a "slip, trip or fall" and codified the judicial rules relating to the burden of factual proof. As amended, the statute provides:

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.

The first case reported by the court under the amendment was Harmon v. City of Omaha. In that case plaintiff was a city swimming instructor who sustained a herniated intervertebral disk while picking up clothing baskets at the bath house where she worked. In holding for the plaintiff the court emphasized the legislative intent in liberalizing the act:

The substitution of the word injury for event has eliminated the necessity of proof of an event external to the body as a cause of injury. The effect of the amendment is to liberalize the act and bring it into conformity with the compensation laws of many other states.

\[\text{Neb. Rev. Stat. § 48-151(2) (Reissue 1968).}\]

\[\text{For an in-depth analysis of the 1963 amendments to section 48-151 see Gradwohl, Workmen's Compensation: An Analysis of Nebraska's Revised "Accident" Requirement, 43 Neb. L. Rev. 27 (1963).}\]


\[\text{Neb. Rev. Stat. § 48-151(2) (Reissue 1968) (brackets indicate deletions, emphasis indicates additions).}\]

\[\text{Id. at 354, 160 N.W.2d at 191. This legislative intent to restore the original interpretation of the "accident" definition is also shown by the amendment's Judiciary Committee. Statement of the Judicial Committee on L.B. 497, 73d Neb. Leg. Sess. (May 22, 1963): "For the last two decades the Supreme Court has given a narrow interpretation of the type of injury which occurs from exertion on the part of the employee while doing work demanded by his employment. At one}\]
In *Brokaw v. Robinson*, plaintiff claimed compensation for a cerebral vascular accident or stroke. He drove a truck for the defendant hauling cattle and feed. In order to load some bulls at a local farm he had to pull a heavy portable chute by hand. He claimed he suffered the stroke as a result of this labor. The court upheld the lower court's decision awarding damages to plaintiff.

In amending section 48-151(2) the legislature intended to alter the old substantive requirement of unusual exertion. In *Brokaw* the court seems to have followed the legislative intent in this regard:

> The change in the workmen's compensation statute clearly removes the necessity of finding a single traumatic event as the cause of the injury. The "by accident" requirement of the Workmen's Compensation Act is now satisfied, either if the cause was of an accidental character, or if the effect was unexpected or unforeseen, and happened suddenly and violently. . . . The statutory change has removed Nebraska from the minority of states which require a showing that the employment exertion which produced the result was in some way unusual in order to establish its accidental character.

The factual burden of proof that the injury arose out of the employment expressly rests on the claimant under the 1963 amendment. The wording used in the amendment codified prior case law on this point. In *Brokaw* the court held that under the circumstances the claimant had sufficiently met the burden of proof:

> In a workmen's compensation case such as this, the plaintiff now has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. Obviously, the presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment. In this case there was no evidence that the plaintiff had any preexisting disease or condition which was material to a cerebral vascular injury or accident. . . . The evidence here preponderantly established that the cerebral vascular injury was unexpected or unforeseen, hap-

---

254 See note 252 *supra*.
255 183 Neb. at 763-64, 164 N.W.2d at 464.
256 See note 249 *supra*. 
pened suddenly and violently, and produced at the time objective symptoms of an injury. We think the evidence also established that the plaintiff's injury, in reasonable probability, arose out of and in the course of his employment.257

In Brokaw the court made an effort to look at the legislative intent behind the 1963 amendments to the Workmen's Compensation Act and then applied that intent to the situation presented. It is submitted that such a logical, workable approach to solving workmen's compensation cases is not only advantageous to the parties concerned but should be followed by the court in future litigation.

In Beck v. State,258 plaintiff was the widow of the State Director of Veterans' Affairs. As State Director, Beck served on a board of inquiry exercising jurisdiction over the Nebraska Soldiers' and Sailors' Home at Grand Island. The deceased had become emotionally upset when L.B. 128 was introduced at the 77th Session of the Nebraska Legislature (1967). The bill authorized the Governor to transfer part of the Grand Island home's land to Hall County for educational purposes. Plaintiff sought to prove that this emotional strain came about as a result of the deceased's employment and that the strain combined with chronic coronary artery disease to bring about his death. The Workmen's Compensation Court initially awarded death benefits to the widow, but on rehearing dismissed her claim. The district court reversed the order of dismissal. The Nebraska Supreme Court held that the injury was not compensable and reversed the district court's decision.

In holding against the widow the supreme court said that the strain on Beck was no greater than that of nonemployment life.

In a workmen's compensation case death caused by (1) heart disease that was a personal risk and (2) emotional strain that was an employment risk is not compensable in these circumstances. The strain was no greater than that of nonemployment life. See Brokaw v. Robinson, 183 Neb. 760, 164 N.W.2d 461.259

The court did not attempt to determine the case under the Workmen's Compensation Act nor did the court even mention the statute. Instead, as a basis for its opinion the court quoted a rule presented by Professor Larson in a law review article:

[W]hen the employee contributes some personal element of risk—e.g., . . . a personal disease which figures causally in his injury—the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the

257 183 Neb. at 764-65, 164 N.W.2d at 464-65.
259 184 Neb. at 479-80, 168 N.W.2d at 533.
causal contribution of the personal risk. . . . If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with this employee's usual exertion in his employment, but but [sic] rather with the exertions present in the normal non-employment life of this or any other person.260

The court cited Brokaw v. Robinson261 as establishing precedent for the decision in Beck, yet no effort was made to look at the legislative intent as was the case in Brokaw. In Brokaw the court recognized the burden of proof and made a conscientious effort to determine the legislative intent behind the statute. No such attempt was made in Beck. Instead, the Beck court chose to disregard the statute entirely. Brokaw is certainly not precedent for such a procedure.

Even if the Nebraska Supreme Court in Beck is saying that the widow did not meet the burden of proof as to whether her husband's death was a result of the employment, the decision is of doubtful validity because the employer, the State of Nebraska, introduced no medical evidence as to causation.262 Thus the situation is different from other workmen's compensation cases where both parties have presented evidence. In Cook v. Christensen Sand & Gravel Co.,263 for example, the court properly denied recovery, holding that the plaintiff had failed to meet the burden of proof placed upon him by the amended statute. The court pointed out that the medical testimony showed the claimant's perforated ulcer "could just as reasonably have been attributed to the ingestion of the peanut butter sandwich as to the emotional stress [of claimant's employment]."264 If the Beck decision means that the claimant can never recover for a heart attack which can be factually traced to the employment, then its is directly contrary to the clear statutory language awarding compensation to an injured employee who can sustain the burden of factual proof.

262 Beck became emotionally upset on approximately February 21, 1967, as a result of the legislative bill. He died on March 4, 1967.
How Brokaw relates to the burden of factual proof put on the claimant may be seen in another opinion by Justice McCown, the author of the Brokaw opinion, Todd v. Mer-Del Enterprises, Inc., 184 Neb. 258, 166 N.W.2d 598 (1969).
263 183 Neb. 602, 163 N.W.2d 105 (1968).
264 Id. at 608, 163 N.W.2d at 109.
In amending the Workmen's Compensation Act the legislature intended to alter the old substantive requirement of unusual exertion. However, the court in Beck has now apparently substituted a different requirement of unusual exertion. The old substantive test (which the legislature attempted to change by the 1963 amendment) was unusual versus ordinary employment. Even though the employee's injury was caused by his employment he could not collect damages unless the employment-cause involved unusual exertion or strain, i.e., greater than that ordinarily incident to the employment. The new test under Beck now seems to be unusual versus private life. The employment-related activity must be unusual as compared to a person's private life. By establishing this new test of "unusual" exertion, the court has adopted a substantive rule of law without any attempt to determine what the Workmen's Compensation Act provides or what the legislative intent was in enacting the 1963 amendments. Beck has now established an unusual exertion requirement which the claimant must meet in heart attack cases. It should be noted that while the court has written this extraordinary exertion requirement into the Workmen's Compensation Act, it has continued to apply a more liberal rule in firemen's pension cases, holding that heart damage or myocardial infarction is received in the line of duty if the fireman contracts the injury while in the discharge of his duty.

It is submitted that the decision in Beck does not square with the statutory language and legislative intent of the Workmen's Compensation Act. To establish such an exertion requirement by quoting an outside treatise, without any attempt to work with the workmen's compensation statute establishes an unsound precedent for future litigation.

265 See Pruitt v. McMaken Transp. Co., 175 Neb. 477, 482, 122 N.W.2d 236, 240 (1963): "This appears to be a case where the exertion incident to [claimant's] occupation resulted in the back difficulty. We are committed to the rule in this jurisdiction that mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident." See also Green v. Benson Transfer Co., 173 Neb. 226, 228, 113 N.W.2d 61, 62 (1962): "Under the evidence adduced, plaintiff's injury resulted from work incident to his employment. It falls within the rule announced in Jones v. Yankee Hill Brick Manufacturing Co., 161 Neb. 404, 73 N.W.2d 394 [1955], which is to the effect that mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the workmen's compensation law."

266 Hooper v. City of Lincoln, 183 Neb. 591, 163 N.W.2d 117 (1968). See also Campbell v. City of North Platte, 178 Neb. 244, 132 N.W.2d 876 (1965).
B. THE INCREASED-RISK TEST AND "CONTACT-WITH-THE-PREMISES" EXCEPTION IN "INJURY BY THE ELEMENTS" CASES

The general rule in most jurisdictions is that injuries sustained as a result of windstorms or tornadoes are not compensable under Workmen's Compensation provisions unless the employee at the time of injury was subject to a greater risk from the elements by reason of his employment than were the people of his community generally. This is commonly called the "increased-risk" test. Nebraska has directly applied this test in two cases: *Gale v. Krug Park Amusement Co.* and *Crow v. Americana Crop Hail Pool, Inc.* In *Krug* the deceased employee had been employed to paint the buildings at Krug's park. He and another painter had completed painting one of the buildings and while in the course of placing their paint cans in that building a wind storm struck. The storm destroyed the building and the employee was killed. The court denied compensation to the employee's widow, stating that he had been exposed to a hazard common to all mankind.

In *Crow*, the deceased was employed as a hail insurance adjuster. While driving his automobile in the course of his employment, it was struck by a tornado and he was killed. Citing the *Krug* case, the Nebraska Supreme Court said there was nothing in the facts to show that the decedent was exposed to any different hazard than that which applied to all mankind in the area where his death occurred. As a result the court held that the injuries did not arise out of the employment.

In many jurisdictions there has been an exception applied to this general rule called the "contact-with-the-premises" exception.

---


268 114 Neb. 432, 208 N.W. 739 (1926).


270 114 Neb. at 437, 208 N.W. at 741.
One exception used to soften the increased-risk rule is the holding that if the harm, though initiated by an act of God, takes effect through contact of claimant with any part of the premises, causal connection with the employment is shown. \[271\] Although the original force, such as hurricane, lightning, or earthquake, did not arise out of the employment under the increased-risk test, the injury may be compensable to the extent that it results from physical contact, produced by that force, with some part of the working environment. In less abstract terms, while claimant cannot recover for the effects of the direct impact of the tornado on him, he can recover if the tornado blows down a wall which in turn falls on him.\[272\]

In *Ingram v. Bradley\[273\]* the Nebraska court recognized the exception for the first time, quoting with apparent approval the exception as stated above.

In *Ingram*, William and Merritt Ingram worked at defendant Bradley's outdoor theatre, selling tickets from a small wooden six by eight foot frame building. Usually William stood outside the booth handing tickets and money back and forth between his wife at the ticket window and the patrons in the car. Two of the glass windows in the building were cracked and the window on the west was broken into four pieces. Plaintiffs had told the defendant of this condition, but nothing had been done.

The plaintiffs were severely injured when a very strong windstorm hit the drive-in theatre and the nearby town of Neligh. The ticket booth was blown over, as was the wooden theatre screen. No one else in the theatre area, the city of Neligh or the surrounding vicinity was injured during the storm.

In holding for plaintiffs the Nebraska Supreme Court said that the facts allowed the plaintiffs to recover under the "increased-risk" test as well as under the "contact-with-the-premises" exception to the general rule:

Even under the increased risk test of the Krug case, the plaintiffs here were exposed to a greater hazard than the general public, because the general public was not in a 6 x 8 foot frame ticket booth, with cracked windows, and skids for foundations during a severe windstorm.\[274\]


\[274\] Id. at 697, 163 N.W.2d at 878.
Rather than solely decide the case under the increased-risk test, however, the court applied the contact-with-the-premises exception as well, actually combining the two doctrines in reaching its decision:

A definite exception to the doctrine which permits recovery only when a hazard is imposed upon the employee, by reason of the employment greater than that of the general public, has been developed. That exception has been adopted by a large number of courts. "Although the original force, such as hurricane, lightning, or earthquake, did not arise out of the employment under the increased-risk test, the injury may be compensable to the extent that it results from physical contact, produced by that force, with some part of the working environment . . ." It is . . . clear that the plaintiffs' injuries were caused by direct contact with the glass and boards of the structure in which they were required to be and not simply by the direct impact of the windstorm on their bodies.\footnote{275}

Under the new rule laid out by the Nebraska court, if the workman is injured by physical contact with some part of the place where he works, then apart from the question of his own misconduct, the accident is associated with his employment and nothing further needs to be considered. If the roof or walls fall on him there is no need to make further inquiry as to why the accident happened.\footnote{276}

Although the court did not expressly overrule the earlier Krug and Crow cases dealing with the increased-risk test, their validity now seems to be in question. If the contact-with-the-premises exception had been recognized at the time of those two cases would their outcome still have been the same? The Ingram court attempted to distinguish the two cases by saying that there were "obvious" factual distinctions between the two earlier cases and the Ingram facts, yet the court failed to mention any of the "obvious" distinctions. Actually, the facts in Krug were very similar to the instant case. Although the building which fell upon the deceased in Krug was not as deteriorated as the one in Ingram, he was killed as a direct result of his "contact with the premises." The same may be said of the Crow situation where the deceased was killed when the tornado demolished the car in which he was riding, the car being

\footnote{275 Id. at 696-97, 163 N.W. 2d at 878, quoting, Larson, note 271 supra.}

\footnote{276 One question resulting from the court's recognition of the contact-with-the-premises exception is whether or not it will be limited to cases concerning acts of God as was the situation in the instant case. For examples of the diverse areas in which the exception has been applied see 1 A. Larson, The Law of Workmen's Compensation § 8.30 (1968).}
his employment "premises." Because of *Ingram v. Bradley*, the *Krug* and *Crow* restriction on workmen's compensation may have very limited application in future litigation.

C. EXPERT MEDICAL TESTIMONY

In *Yost v. City of Lincoln*, plaintiff attempted to recover workmen's compensation for the loss of an eye. Yost worked for the city of Lincoln, Nebraska, as a maintenance repairman. He was cutting wood with an electric saw when a "burst" of sawdust struck him in the face, some of which entered his right eye making it "sting." Infection developed in the eye and approximately two months later the eye had to be removed. The Workmen's Compensation Court (both the one and three judge court) dismissed plaintiff's case and the district court affirmed. The Nebraska Supreme Court reversed the lower court's decision, holding that the evidence supported the finding that the infection in the claimant's eye was not due to natural causes or natural progression of a preexisting condition, but rather had developed out of Yost's employment.

In holding that the claimant had met his burden of proof as required by the Workmen's Compensation Act, the supreme court noted that there was no expert medical testimony given to link the claimant's injury to the employment. In spite of this, the court allowed the claimant to recover, stating that in certain instances medical testimony is not needed to prove causation.

The *Yost* court framed its "test" in relation to the lower court's finding on the need for expert testimony:

> [D]irect expert testimony is not indispensable if the issue can be determined from the evidence presented and the common knowledge and usual experience of the trier of fact. . . . There is nothing unusual about infection following the introduction of a foreign body into an eye. . . . The fact that the infection developed immediately following the accident and continued until the loss of the eye supports an inference that the infection is traceable to the injury.278

---


278 Id. at 265, 166 N.W.2d at 597-98 (emphasis added). The Court relied on a previous Nebraska case, *Clark v. Village of Hemingford*, 147 Neb. 1044, 26 N.W.2d 15 (1947), as the basis for its opinion. However, the *Clark* case is distinguishable from the *Yost* decision in two major respects. In *Clark*, the cause of the claimant's injuries and their permanency was not questioned. Also the *Clark* decision emphasized that the trial court had found in favor of the claimant and therefore the supreme court was reluctant to overturn that judgment. The *Yost* court, however, reversed the lower court's determination of the facts and held for the claimant. This raises the question of how much weight
The general proposition given by the court that there can be valid workmen's compensation awards without definite medical diagnosis is upheld by many courts.\textsuperscript{279} Expert opinion is usually held to be unnecessary where the claimant's disability is the "natural and probable" result of the injuries\textsuperscript{280} or where "special and peculiar circumstances" are involved:

\begin{quote}
[1]n the great majority of cases such [expert medical] testimony is necessary because of the seeming absence of connection between a particular accident and a claimed resulting injury. But in other cases involving special and peculiar circumstances, medical evidence, although highly desirable, is not always essential for an injured employee to make out a prima facie case, especially if the testimony is adequate, undisputed and unimpeached. Thus where . . . injury appears in a bodily member reasonably soon
\end{quote}

should be given the compensation court's decision when expert testimony is held to be unnecessary. The test set out by the court would give the lower court's factual determination a strong presumption of validity, yet the court did not indicate to what extent this determination would be binding. Another question resulting from the court's opinion is how much expert testimony is needed for claimant's proof of causation in the face of adverse expert opinion. Some jurisdictions have held that if the circumstances are persuasive enough, a conclusion supported by no medical testimony may stand in spite of medical testimony to the contrary. See, e.g., Thomas v. United States Casualty Company, 218 Ga. 493, 128 S.E.2d 749 (1963); Forest Constructors, Inc. v. Tadlock, 248 Miss. 460, 160 So. 2d 214 (1964); Texas Employers' Ins. Ass'n v. Smith, 374 S.W.2d 287 (Tex. Civ. App. 1963).


\textsuperscript{280} 12 W. SCHNEIDER, WORKMEN'S COMPENSATION LAW § 2532(c) (1960).
after an accident, at the very place where the force was applied and with symptoms observable to the ordinary person, there arises, in the absence of believed testimony to the contrary, a natural inference that the injury, whatever may be the medical name, was the result of the employment.\textsuperscript{281}

The Yost court does not talk of the lack of expert testimony in terms of "natural and probable" results or "special and peculiar circumstances." However, the court seems to be applying the same type of standard when talking of the "common knowledge and usual experience of the trier of fact."

The reason for such a relaxation of the need for expert testimony is usually said to be that lay testimony should be allowed to establish such simple matters as the existence and location of pain,\textsuperscript{282} the sequence of events leading to the accident\textsuperscript{283} and claimant's inability to perform his work.\textsuperscript{284} Nebraska has now clearly joined the growing list of jurisdictions allowing recovery in certain workmen's compensation situations without the use of expert testimony.

\textit{James S. Angus '71}
\textit{Dennis W. Collins '71}
\textit{G. Eric Lonnquist '71}

\textsuperscript{282} Wynn v. Vaughan, 33 So. 2d 711 (La. App. 1948).