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# Standardized Instructions to Juries: 1953 Cumulative Supplement, Adopted by the Association of District Judges of Nebraska

# STANDARDIZED INSTRUCTIONS TO JURIES
# 1953 CUMULATIVE SUPPLEMENT*

Adopted by the

Association of District Judges of Nebraska

### No. 1

### ARREST—DEFINITION

An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge.

### No. 2

### ARREST—CONDUCT OF OFFICER

In order for you to determine whether the conduct of the officer in making the arrest was wrongful you are advised that the officer need not have acted according to the standard of a cool, calm and collected man, or have measured the amount of force necessary to make the arrest with deliberation or absolute precision. Neither would the fact that his conduct was that of a man who was excitable, unnatural and indiscreet, if you should so find, be sufficient to justify you in finding that his conduct was wrongful. The standard to be used in measuring his conduct is that he must conduct himself as an ordinarily prudent man would have done under the circumstances as shown by the evidence.

### No. 3

### ARREST—CONDUCT OF OFFICER

The law does not require an officer in making an arrest for a misdemeanor, if resistance to arrest is offered, to determine with absolute precision what force is necessary to accomplish his purpose, and the officer is permitted reasonable discretion. The officer, however, is not

* In 1949 the Standardized Jury Instructions which had been adopted by the Association of District Judges of Nebraska up to that year were printed in pamphlet form. Since then, the Association has adopted additional instructions, all of which are included in this Cumulative Supplement.

Criticism of all the adopted instructions is invited, and it is urged that all members of the legal profession in Nebraska cooperate in this field of endeavor to the end that the collection of adopted instructions to juries may be further enlarged and improved.

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permitted to use any more force than that which would appear to an ordinarily prudent person, under all the existing circumstances, to be reasonably necessary to make an arrest.

**No. 4**
**ARREST WITHOUT A WARRANT**

Under the Laws of Nebraska, any member of the Nebraska Safety Patrol has the powers of a peace officer for the purpose of enforcing the laws regulating the operations of motor vehicles, or the use of the highways, and after establishing his identity as such officer, has authority to demand the presentation of a motor vehicle operator's license from anyone operating a motor vehicle on the public highways of the state. The failure to present a motor vehicle operator's license upon such demand constitutes a misdemeanor, and subjects the person guilty of such failure to arrest without a warrant by such officer. Therefore the defendant, John Doe, as a member of the Nebraska Safety Patrol had the right and authority to demand that the plaintiff present his motor vehicle operator's license, and upon failure of the plaintiff to do so, in conformity with such order, the defendant Doe had the right to arrest the plaintiff without a warrant.

**No. 5**
**ARREST—USE OF FORCE**

In making an arrest, the officer may use whatever force is reasonably necessary to effect the arrest. If the person sought to be arrested resists, the officer may use such force as may be reasonably necessary under the circumstances to overcome the resistance and make an effective arrest. However, an officer may not use violence disproportionate to the extent of the resistance offered, and if he uses unnecessary and excessive force, or acts wantonly or maliciously, he is liable therefor in damages. In this case if you find from a preponderance of the evidence, that the plaintiff did not offer resistance to his arrest, the defendant Doe was without authority to use force against the plaintiff. On the other hand, if you find from a preponderance of the evidence that resistance was offered by the plaintiff, then the defendant Doe had the authority to overcome such resistance by the use of force but only such force as was reasonably necessary to overcome such resistance and arrest the plaintiff. However, the burden is not on the defendant to prove by a preponderance of the evidence that the force used was not excessive.

**No. 6**
**ASSAULT AND BATTERY—DEFINITIONS**

An "Assault" is a wrongful offer or attempt, with force and violence to do bodily hurt to another, with apparent means to carry out such offer or attempt.

An "Assault" is a wrongful offer or attempt with unlawful force or threats made in a menacing manner to inflict bodily injury upon another with the present apparent ability to give effect to the attempt.

The word "Battery" as used in these instructions is any unlawful physical violence or contact inflicted on a human being without his consent.

**No. 7**

**ASSAULT AND BATTERY—GREAT BODILY INJURY—DEFINITIONS**

You are instructed that the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. The term "great bodily injury," as used in this case, implies an injury of a graver and more serious character than an ordinary battery.

**No. 8**

**BLOOD TEST EVIDENCE, DRUNKEN DRIVER CASES**

Neb. Rev. Stat. § 39-727.01 (Cum. Supp. 1951).

The Statutes of Nebraska provide in any criminal action relating to operating a motor vehicle while under the influence of alcoholic liquor, that if there is proof of the presence of alcohol in the defendant's blood, as shown by chemical analysis, such evidence shall give rise to rebuttable presumptions, as follows:

1. If there was 0.05% or less by weight of alcohol in his blood, it shall be presumed that he was not under the influence of alcoholic liquor at the time the specimen of his blood was obtained;
2. If there was in excess of 0.05% but less than 0.15% by weight of alcohol in his blood, such fact shall not give rise to any presumption that he was or was not under the influence of alcoholic liquor but may be considered by the jury together with other evidence relating to his guilt or innocence;
3. If there was 0.15% or more by weight of alcohol in his blood, it shall be presumed that he was under the influence of alcoholic liquor at the time the specimen of his blood was obtained.

(The law requires that tests, to be considered valid, shall be shown to have been performed according to a method approved by the Department of Health of the State of Nebraska and by a person possessing a valid permit issued by said department for such purpose.)

(Omit unless there is a dispute in the evidence as to whether or not the method used followed the statutes.)

Accordingly, you should consider the blood test evidence in this case. Before it can give rise to a presumption that the defendant was under the influence of alcoholic liquor, the burden of proof is upon the State to prove each and all of the following four (three) propositions beyond a reasonable doubt by said blood test evidence:

1. That the blood test evidence related to a specimen of blood obtained from the defendant;
2. That said specimen of blood has not been tampered with between the time it was obtained from the defendant and the time it was chemically analyzed;
3. That the test was performed according to a method approved by said Department of Health, and by a person possessing a valid permit issued by said Department for such purpose;
   (Omit unless there is a dispute in the evidence as to whether or not the method used followed the statutes.)
4. That there was 0.15% or more by weight of alcohol in the blood of the defendant at the time such specimen was obtained, as shown by chemical analysis.

If you are not satisfied that by said blood test evidence the State has proved each and all of said four (three) propositions beyond a reasonable doubt, then said evidence cannot give rise to a presumption that the defendant was under the influence of alcoholic liquor.

If you find that the blood test evidence is sufficient to give rise to a presumption that the defendant was or was not under the influence of alcoholic liquor, the effect thereof is to allow you to infer such fact without direct proof by other evidence. A presumption, if raised by the evidence, is not conclusive proof of such fact, and may be rebutted or disproved. Such presumption has the force of evidence sufficient to support a verdict unless contradictory evidence is presented which in your opinion overcomes the presumption. If you find said evidence is sufficient to give rise to such presumption, it is your duty to weigh such presumption together with all other evidence relating to the guilt or innocence of the defendant, giving the presumption such weight as you find it is entitled to receive under all of the facts and circumstances.

A presumption of this character does not have the effect of shifting the burden of proof, which is always upon the State to prove the guilt of the defendant beyond a reasonable doubt.

The defendant is not required to offer proof beyond a resonable doubt in order to give rise to a presumption that the defendant was not under the influence of alcoholic liquor. (The giving of this paragraph is optional.)

(A similar instruction may be used for body fluids other than blood.)

**No. 9**

**CONFESSION—WHEN IT MAY BE CONSIDERED AS EVIDENCE**

Exhibit "O" has been offered by the State as a confession of the defendant. If you are satisfied from the evidence that Exhibit "O" is a statement made voluntarily by John Doe and (was) not obtained

by compulsion or fear nor by any promise or inducements offered to him, you may consider it the same as any other evidence, otherwise you shall reject it and not consider it for any purpose whatsoever.

Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944);
Schlegel v. State, 143 Neb. 497, 10 N.W.2d 264 (1943).

**No. 10**

**DAMAGES—SEEPAGE OF WATER FROM CANALS OR RESERVOIRS**

If you find for the plaintiff, it will become your duty to determine the amount that the plaintiff shall recover. If you do not find for the plaintiff, you are not concerned with any determination of any amount of damages. The amount of the plaintiff's recovery, if any, will be the difference between the reasonable market value of the lands hereinbefore described, without any seepage from the defendant's canals or reservoirs upon it, and the reasonable market value of said lands with such seepage upon it as you find from the evidence resulted from leekage from said canals or reservoirs, all as of the time you find such seepage first became visibly apparent upon said lands, plus the amount that you find the reasonable market value of any annual crop such as corn, that you find had already been planted at the time of the appearance of such seepage, was diminished in amount by and on account of leekage from said canals or reservoirs, all at the time and place of the occurrence of such seepage. You cannot allow for any item of damage except as you find it shown by a preponderance of the evidence. You cannot allow any amount for injury to any perennial crop such as alfalfa or prairie grass, for the reason that such perennial crops are parts and parcels of the lands. You cannot allow any amount for any annual crops for any year other than the first year. You cannot allow for any damage that arose from seepage that was caused from rainfall or surface water accumulating in ponds or swails upon the surface of the plaintiff's lands. The defendant can only be held liable for damage that would not have occurred except on account of leakage from its said canals or reservoirs. If you find that water from the defendant's canals or reservoirs has combined with waters from other sources for which defendant would not be responsible, and find that such combined waters have caused damage to the plaintiff's land, then before the plaintiff can recover it is encumbent upon him either to show that such damages would have occurred from such waters from the defendant's canals or reservoirs alone without any water from other sources, or to allocate and separate the amount of damage done by waters from such canals or reservoirs from the amount of damage done by waters from such other sources.

If you find that the plaintiff is entitled to recover, you will make no allowance by way of interest as that is a matter which will be considered and disposed of by the court.

Smith v. Platte Valley Public Power and Irrigation District, 151 Neb. 49, 36 N.W. 2d 478 (1949).

### No. 11

### TABLES OF EXPECTANCY

You are instructed that in an action for damages for personal injuries, if such injuries are found to be permanent, the tables of expectancy of life are competent as bearing upon and tending to prove the expectancy of life, but are not conclusive. They are to be received and considered by the jury as any other evidence and subject to the same rules as to their weight and sufficiency as other testimony. They should be considered together with all other facts and circumstances in evidence bearing on the expected life of the plaintiff (or plaintiff's decedent).

### No. 12

### FAMILY PURPOSE CAR

In this case the evidence shows that the automobile being driven by John Doe at the time of the accident in question was owned by the defendant William Doe.

You are instructed that in order for the plaintiff to be entitled to recover against the defendant William Doe for the alleged negligence of John Doe, if any, the plaintiff must prove by a preponderance of the evidence that the automobile of the defendant being driven by John Doe at the time of the accident in question was a family purpose car, that is to say, that it was an automobile owned and maintained by the defendant William Doe for his own use and for the use, pleasure or benefit of members of his family; that the members of his family were permitted to use said car for their individual benefit, pleasure or convenience; that John Doe was a member of the family of the defendant William Doe and one for whose use and benefit said car was maintained; and that John Doe was so using said car at the time of the accident.

If you find from a preponderance of the evidence that said automobile was a family purpose car, you should then consider negligent acts of John Doe, if any, as negligence on the part of the defendant himself.

### No. 13

### GUEST PASSENGER, STANDARD OF DUTY

You are instructed that the standard of duty of an invited guest riding in an automobile is the same as that of the driver, but the conduct to fulfill that duty is ordinarily different because their circumstances are different. It is the duty of the guest to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances. A guest is not required to watch the road or to advise the driver in relation to the management of his auto-

mobile under ordinary conditions and may assume that the driver is reasonably safe and careful except when the guest has knowledge which indicates to the contrary.

But when a situation arises which is out of the usual and ordinary, or if the guest perceives danger, the guest is under the duty to exercise ordinary care to warn of dangers which would or should be apparent to him, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail or go unheeded, or that the driver observed or should have observed the danger as well as the guest. Also it is the duty of an invited guest with knowledge of approaching danger, in the exercise of ordinary care, to protest to the driver if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail, (or if reasonably necessary, to ask permission to leave the vehicle.)

You are further instructed that the failure of a guest to fulfill the duty as herein set forth would constitute negligence.

Hendrix v. Vana, 153 Neb. 531, 45 N.W. 2d 429 (1951); Marks v. Dorkin, 105 Conn. 521, 163 Atl. 83 (1927); Restatement, Torts § 495 (1934).

**No. 14**

**JURY TO CONSIDER ALL INSTRUCTIONS**

You are cautioned that the court has not attempted to embody all the law applicable to this case in any one instruction. Therefore, in considering any one instruction given you herein, you should consider it in the light of and in harmony with all the other instructions given you in this case.

**No. 15**

**JURY, CONDUCT OF IN SEPARATE HOTEL ROOMS IN CRIMINAL CASES**

If you have not agreed upon a verdict by 10 o'clock p.m., you will be taken by the bailiffs to the hotel where arrangements will be made for you to spend the night.

You will be assigned to rooms by the bailiffs and will go to your rooms promptly. After going to your rooms you will remain in them except by permission of a bailiff until called by the bailiffs.

You will at no time while outside the jury room converse with or suffer yourselves to be addressed by any other person on the subject of the trial nor to listen to any conversation on the subject. You will also refrain from discussing the case among yourselves until you return to the jury room, neither will you use the telephone for any purpose.

Be obedient to the instructions of the bailiffs and observe both the letter and the spirit of this instruction.

(To be given only in case of necessity.)

No. 16

MOTOR VEHICLE DRIVER UNDER AGE *

The statutes of the State of Nebraska further provide that it shall be unlawful for any person under 16 years of age to operate a motor vehicle, with certain exceptions with which we are not here concerned, and but for these exceptions the statute further provides that no license shall, under any circumstances, be issued to any person who has not attainted the age of full 16 years; and the statute further provides that it shall be unlawful for one to authorize, cause or knowingly permit his child under the age of 16 years to drive a motor vehicle upon any highway when such minor is not authorized under a statute to do so, or to authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized to drive as provided by statute.

The foregoing statutes are passed in the interest of public safety and the violation thereof is evidence to be considered together with all other facts and circumstances in evidence in determining whether or not such person was negligent, but some causal relation between the violation of such statute and the accident must exist before it could enter into the plaintiff's recovery in this case, and therefore, unless you find that the age of the defendant driver did cause or contribute to cause the accident, you will not consider it in reaching a conclusion as to liability.

Pratt v. Western Bridge & Construction Co., 116 Neb. 553, 218 N.W. 416 (1928); Note, 73 A.L.R. 156 (1931);
Blashfield, Instructions to Juries §§ 591, 593 (1916).

* Judge Thomsen's note: Before giving any of the foregoing instruction, see Wysock v. Borchers Bros., 104 Cal. App. 2d 571, 232 P. 2d 531 (1951), and the annotation to this case in Note, 29 A.L.R. 2d 963 (1953).

No. 17

MOTOR VEHICLE HOMICIDE—PROOF OF UNLAWFUL OPERATION

The charge in the information that the defendant was "engaged in the unlawful operation of a motor vehicle" requires proof of gross or great and excessive negligence, or negligence of a very high degree. It requires proof beyond a reasonable doubt that a motor vehicle was operated in such a manner as to create an obvious danger of injury to the person or property of others, and wherein the conduct of the driver is such as to indicate either a willingness to inflict injury or damage, or a conscious indifference to the probable and injurious consequences thereof. It is necessary to prove more than mere inadvertence or want of ordinary care. Proof of the violation of a statute regulating speed or prescribing precautions to be observed by drivers of motor vehicles, if such you find, is not conclusive, but is a

circumstance bearing upon the question, and, if established, should be considered together with all of the other facts and circumstances.

"Negligence" is defined as the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances, or, doing what reasonable and prudent persons would ordinarily not have done under the circumstances. It is the failure to exercise "ordinary care" which is that amount or degree of care which ordinary prudence and a proper regard for one's own safety and the safety of others requires under the circumstances. (This paragraph is optional.)

Unless you find that such unlawful operation of a motor vehicle by the defendant has been established by the evidence beyond a reasonable doubt, your verdict will be not guilty.

**No. 18**

**MOTOR VEHICLE HOMICIDE—PROXIMATE CAUSE**

The charge in the information that the defendant did "cause the death" requires proof beyond a reasonable doubt not only of unlawful operation of a motor vehicle by the defendant, but also that such unlawful operation was the proximate cause of the death. In other words, such death must be shown to have been the natural and probable consequence of such unlawful operation of a motor vehicle, and not of any independent cause.

By "proximate cause" is meant the primary cause or fault where no other cause disconnected therefrom intervenes to produce the result.

Unless you find that it has been established by the evidence beyond a reasonable doubt that such death was proximately caused by unlawful operation of a motor vehicle by the defendant, your verdict will be not guilty.

**No. 19**

**MOTOR VEHICLE HOMICIDE—NON-CRIMINAL CAUSE OF DEATH IS PRESUMED**

The mere fact that an accident occurred and that a death resulted, if such you find, does not alone and of itself establish proof of unlawful operation of a motor vehicle. In the absence of proof beyond a reasonable doubt to the contrary, the law presumes that death results from accidental or natural causes of a non-criminal character.

**No. 20**

**NEGLIGENCE OF PERSON NOT PARTY TO THE ACTION**

You are instructed that regarding contributory negligence the statutes of Nebraska provide: "The fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contribu-

tory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff." Before you can apply this statute you must have determined what negligence, if any, was the proximate cause of said accident and the person or persons guilty of said negligence.

Under this statute, if you find both the plaintiff and the defendant were negligent, and that such negligence concurred to form the proximate cause of said accident or a part of such proximate cause, the plaintiff cannot recover in this case, if you find from the evidence that his negligence when compared with that of the defendant was more than slight; neither can he recover if you find from the evidence that the negligence of the defendant when compared with that of the plaintiff was less than gross.

You will note that the comparison required up to this point is a comparison between the negligence of the plaintiff, if any, on the one hand, and the negligence of the defendant, if any, on the other hand.

If you find that the plaintiff was guilty of slight negligence, and that the negligence of the defendant in comparison therewith was gross, the plaintiff is entitled to recover, but in that event it is your duty to mitigate or deduct from the whole amount of damages, if any, sustained by the plaintiff as required by the statute. To do this, you should determine if AB (third person not a party) was negligent and, if so, whether his negligence concurred with the negligence of the defendant and the plaintiff to form the proximate cause of the accident.

If you find that AB was negligent and that his negligence was a part of the proximate cause of said accident and plaintiff's damage, then you should consider the negligence of AB and compare the negligence of the plaintiff with the combined negligence of all the negligent persons and deduct from the whole amount of damages, if any, sustained by the plaintiff such proportion thereof as the contributory negligence chargeable to the plaintiff bears to the entire negligence as shown by the evidence and return a verdict for the balance only.

### No. 21

### NEGLIGENCE—LEFT TURN BETWEEN INTERSECTIONS

It is not unlawful to turn to the left into a private driveway in between intersections, nor is it negligence as a matter of law to do so, but to turn to the left between intersections is such an unusual occurrence that other drivers would not readily anticipate such a movement and, therefore, requires upon the part of the one so turning the exercise of that degree of care which the possible danger from such a movement might create or encounter, and consequently, requires an

extra effort and precaution on the one so turning to see that the movement can be made with reasonable safety.

With the foregoing rule in mind, it became the duty of the plaintiff not only to indicate by the required sign that he intended to turn to the left across the path of other vehicles, but to exericse ordinary care in observing whether such movement could be made with reasonable safety, and if you find from all the facts and circumstances in evidence that it would have appeared to an ordinary prudent man in the situation in which the plaintiff found himself before he made the turn and while he was proceeding, that he could do so with reasonable safety, you are then not warranted in finding he was negligent in doing so. On the other hand, if you find that in the exercise of the degree of care described in the forepart of this instruction, the plaintiff should not have proceeded to cross the lanes of eastbound traffic, the plaintiff would be negligent in doing so. In determining whether or not he could do so with reasonable safety, you should consider whether a preponderance of the evidence establishes that the light for east and west traffic at the time defendant's car approached such light, was red, and the speed at which it would appear to one using ordinary care the defendant was approaching such intersection, and whether under the conditions the plaintiff could reasonably anticipate that defendant would continue eastward, and all other facts and circumstances in evidence.

Angstadt v. Coleman, 156 Neb. 850, 58 N.W. 2d 507 (1953).

**No. 22**

**REASONABLE DOUBT**

A reasonable doubt, within the meaning of the law, is such a doubt as would cause a prudent and considerate person, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matters charged. It does not mean the possibility that the accused may be innocent, nor does it mean an imaginary doubt or one based upon groundless conjecture, but it does mean an actual and substantial doubt, having some reason for its basis. It may arise from the evidence or from lack of evidence in the case. If upon full consideration of all the evidence for the state and for the defendant your minds are in that condition that you cannot say that you feel a confidence, amounting to a moral certainty, from all the evidence in the case that the defendant is guilty, then you have a reasonable doubt. If, however, after a careful and impartial consideration of all the evidence the jury have an abiding conviction of the guilt of the accused and are fully satisfied of the truth of the charge, then the jury are satisfied beyond a reasonable doubt.

### No. 23

### RES IPSA LOQUITUR

If you find from a preponderance of the evidence that the thing which caused the accident in this case was under the exclusive management and control of the defendant, and that the accident was such that in the ordinary course of events it would not have happened if defendant had used ordinary care in such control and management, then the jury may infer that defendant was negligent without any proof of specific acts of negligence.

The jury, however, is not required to so infer negligence but should give all the evidence full and fair consideration. It is for the jury to say whether under all the facts and circumstances in evidence the defendant was or was not negligent.

NOTE: The doctrine of res ipsa loquitur, although it provides a substitute for direct proof of negligence where plaintiff is unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. . . . However, plaintiff is not deprived of the benefit of the doctrine from the mere introduction of evidence which does not clearly establish the facts or leaves the matter doubtful, for, if the case is a proper one for the application of the doctrine and the pleading is such that it may be invoked, an unsuccessful attempt on the part of plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur.

45 C.J. § 774 (1928).

### No. 24

### SELF-DEFENSE

The defendant contends that he was first assaulted by one John Doe, and that what he did thereafter was in self-defense, and for the purpose of repelling the attack made on him.

In this connection you are instructed that if you find that the defendant was threatened or attacked by John Doe, in such a manner that it caused the defendant to believe that he was in danger of receiving bodily injury, he was justified in using such force to repel the attack as at that time appeared to him to be reasonably necessary, although he may have been mistaken as to the extent of the actual danger, if a reasonable person would also have been mistaken. He is justified in acting, in such a case, upon the facts as they appeared to him, and is not necessarily to be judged by the facts as they actually were.

However, when the person threatened uses more force to defend himself than is reasonably necessary, or, in other words, uses excessive force, or resorts to acts of violence upon his antagonist not called for in necessary self-defense, he then, in law, becomes the assailant, and

when such unnecessary force is used, the party using such force becomes guilty of unlawful assault and battery and is criminally responsible therefor.

No. 25

SELF-DEFENSE—COMPANION INSTRUCTIONS

25A

The law of self-defense is founded in necessity. The danger apprehended must be urgent and pressing, or apparently so, at the time of the alleged conduct of the defendant which he seeks to justify as being in self-defense. The right of self-defense is given only in an emergency to enable persons who may be attacked or assaulted or to whom it may reasonably appear that they are in immediate danger of personal injury or violence, to defend their persons.

If you believe from the evidence that the said John Doe began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have a right to use that amount of force which, under the circumstances, appeared to him to be reasonable and necessary in making his defense.

25B

Actual and positive danger is not indispensible to self-defense. The law considers that when a person is threatened with danger, he is entitled to judge from appearances and to determine therefrom as to the actual state of things as they appear to him; and in such case, if the accused person acts with an honest belief under the circumstances, he will not be held responsible criminally for a mistake as to the actual danger, although it afterwards appears that the accused was in no actual danger, or that he used more force than was actually necessary to protect himself from serious bodily harm.

The rule in such case is this: What would a reasonable person of ordinary caution, judgment and observation, in the position of the defendant, seeing what he saw and knowing what he knew, do under the situation and surroundings? If such person so placed would be justified in believing himself in imminent danger of personal injury or violence, then the defendant was justified in believing himself in such peril, and in acting on such appearances.

25C

Words of provocation alone will not justify an assault; neither will a slight assault justify a person in using more force or violence than is reasonable and apparently necessary to protect his person from injury.

Further, the law of self-defense does not permit acts done in retaliation or revenge. Therefore, if you believe that the defendant, sought, brought on, or voluntarily entered into an altercation with the said John Doe, for the purpose of wreaking vengeance upon him,

or to accomplish some unlawful purpose; or, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant stabbed and cut the said John Doe, at a time when he had, because of the acts of said John Doe, no reasonable apprehension of immediate or impending danger to himself, or did it to accomplish some unlawful purpose, or did it in a spirit of retaliation or revenge, for the purpose of punishing the said John Doe for some grievance, real or imgainary, supposed to have been committed by the said Doe against the accused, then the defendant cannot avail himself of the law of self-defense, as such conduct on the part of the defandant, should you so find, would be unjustified and unlawful.

See Lambert v. State, 80 Neb. 562, 114 N.W. 775 (1908).

25D

In determining whether the alleged conduct of the defendant was committed in necessary defense of his person, and in determining whether the amount of force and violence used was apparently reasonably necessary for said purpose, you should consider all the acts and conduct of the defendant and the complaining witness at the time in question; the means, nature and extent of any force or violence used by either the said Doe, towards the accused, or the accused towards the said Doe; the character and place of any wounds; what was said by the parties at that time; and all the facts and circumstances surrounding the occurrence as shown by the evidence, bearing upon the question whether the conduct of the accused was reasonably and apparently necessary, in good faith, to defend his person, or whether defendant was acting maliciously or in a spirit of retaliation or revenge. It is not incumbent upon the accused to satisfy the jury, by the weight of evidence, that the acts with which he is charged were justified or excusable, but if the evidence thereon is sufficient to raise a reasonable doubt in the minds of the jury as to the guilt of the defendant, you should give the defendant the benefit of such doubt and acquit him.

## No. 26

## SELF-DEFENSE

"Assault" or "attack," as used in these instructions pertaining to the defense of self-defense, does not necessarily mean that an actual blow must have been struck but means any act causing a well-founded belief of immediate peril.

While a person has the right, when assaulted by another in such a manner to excite in him a reasonable belief that he was in danger of losing his life or receiving great bodily injury, to resist the attack or assault by using such force as was apparently necessary to defend himself, yet if, after he has secured himself from danger, he proceeds to make an attack or assault upon his assailant in a spirit of revenge,

or for some other unlawful purpose, he cannot claim exemption from punishment on the ground of self-defense.

Under the law, words alone, no matter how abusive, vexatious or provocative, will not justify an assault.

If you believe from the evidence beyond a reasonable doubt that the defendant was the aggressor and made the first assault upon John Doe and before John Doe had made any assault upon him, then and in that case the defendant would not be entitled to avail himself of the right of self-defense. If, however, you believe from the evidence that the said John Doe made the first assault upon the defendant, then the defendant would have such right.

Regarding the offense with which the defendant is charged, it is necessary for the State to prove beyond a reasonable doubt that the defendant, William Roe, was not acting in self-defense and the burden is not on the defendant to prove he was acting in self-defense, and if the evidence in this case does not establish beyond a reasonable doubt that the defendant was not acting in self-defense, then you should find the defendant not guilty.

# INDEX

# *John F. Murray*

*(Handwriting Expert)*

# EXAMINER

*and*

# PHOTOGRAPHER

*of*

# QUESTIONED DOCUMENTS

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