REPORT

of

REVISOR OF STATUTES

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CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

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Submitted to the Legislature of the State of Minnesota

JANUARY 1965

STATE OF MINNESOTA
REVISOR OF STATUTES
SAINT PAUL

JOSEPH J. BRIGHT
REVISOR

Report

January 5, 1965

The Honorable A. M. Keith
President of the Senate

and

The Honorable Lloyd L. Duxbury Jr.
Speaker of the House of Representatives
State Capitol
St. Paul, Minnesota 55101

The Revisor of Statutes respectfully transmits herewith his Report to the Legislature of the State of Minnesota as required by Minnesota Statutes, Section 482.09(9), concerning any statutory changes recommended or discussed or statutory deficiencies noted in any of the opinions of the Supreme Court of Minnesota for the period beginning September 30, 1962, and ending September 30, 1964, and including two opinions of December 4, 1964 and December 24, 1964.

Respectfully submitted,

Joseph J. Bright

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Revisor of Statutes

REPORT OF THE REVISOR OF STATUTES TO THE LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, Section 482.09(9), which provides that the Revisor of Statutes shall:

> "Report to each regular biennial session of the legislature concerning any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the Supreme Court of Minnesota filed during the two-year period immediately preceding September 30 of the year preceding the year in which the session is held, together with such comment as may be necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning September 30, 1962, and ending September 30, 1964, and including two opinions of December 4, 1964, and December 24, 1964, together with a statement of the cases and the comment of the court, are set forth on the following pages, in the order of their decision.

SPANEL v. MOUNDS VIEW
SCHOOL DISTRICT NO. 621, ET AL
264 Minn. 279, 118 N.W. 2d 795
December 14, 1962

Plaintiff sued on behalf of his five year old son to recover damages from a school district and a teacher and principal employed by it for injuries resulting from the alleged negligence of defendants in permitting a defective slide to remain in the kindergarten classroom of an elementary school.

The lower court dismissed the action and the issue before the supreme court was whether the doctrine of governmental tort immunity should be overruled by judicial decision. The court held:

> "We hold that the order for dismissal is affirmed, with the caveat, however, that subject to the limitations we now discuss, the defense of sovereign immunity will no longer be available to school districts, municipal corporations, and other subdivisions of government on whom immunity has been conferred by judicial decision with respect to torts which are committed after the adjournment of the next regular session of the Minnesota Legislature."

The court discussed many of the cases as to governmental tort immunity -- the origin of the doctrine and its treatment in Minnesota as well as in other states. It pointed out the many recent cases in other states that have by judicial decision revoked the doctrine.

The court stated:

"The Minnesota Legislature has not wholly ignored the problem. School districts have been authorized to provide liability insurance and to waive immunity with respect to claims so insured. Such laws are important steps toward mitigating the harshness of the immunity doctrine. However, we do not share the view that a court-made rule, however unjust or outmoded, becomes with age invulnerable to judicial attack and cannot be discarded except by legislative action.

"While the court has the right and the duty to modify rules of the common law after they have become archaic, we readily concede that the flexibility of the legislative process--which is denied the judiciary--makes the latter avenue of approach more desirable.

"We recognize that by denying recovery in the case at bar the remainder of the decision becomes dictum. However, the court is unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims against school districts, municipal corporations, and other subdivisions of government on whom immunity has been conferred by judicial decision arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims. However, we do not suggest that discretionary as distinguished from ministerial activities, or judicial, quasi-judicial, legislative, or quasi-legislative functions may not continue to have the benefit of the rule. Nor is it our purpose to abolish sovereign immunity as to the state itself.

"Counsel has assured us that members of the bar, in and out of the legislature, intend to draft and secure the introduction of bills at the forthcoming session which will give affected entities of government an opportunity to meet their new obligations. A number of procedural and substantive proposals for the orderly processing of claims have been suggested. Among them are: (1) A requirement for giving prompt notice of the claim after the occurrence of the tort (2) a reduction in the usual period of limitations, (3) a monetary limit on the amount of liability, (4) the establishment of a special claims court or

commission, or provision for trial by the court without a jury, and (5) the continuation of the defense or immunity as to some or all units of government for a limited or indefinite period of time."

STATE v. DIETZ
264 Minn. 551, 119 N.W. 2d 833
February 15, 1963

The defendant was charged with grand larceny in the second degree and entered a demurrer to the information. One of the questions before the court was the constitutionality of Minnesota Statutes, Section 622.06. The court pointed out that a 1955 amendment to this section created an observed result. The section after the amendment read as follows:

> 622.06 "Every person who, under circumstances not amounting to grand larceny in the first degree, in any manner specified in this chapter, steals or unlawfully obtains or appropriates:
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> "(1) Property of the value of more than $100 but not exceeding $500 in any manner;
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> "(2) Property of any value by taking it from the person of another;
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> "(3) Property of any value by taking it in the daytime from any dwelling house, office, bank, shop, warehouse, vessel, motor vehicle, railway car, or building;
>
> "(4) Property of less value than $25 by taking it in the nighttime from any dwelling house, office, bank, shop, warehouse, vessel, motor vehicle, railway car, or building; or
>
> "(5) A record of a court or officer or a writing, instrument, or record kept, filed, or deposited according to law with or in keeping of any public officer.
>
> "Is guilty of grand larceny in the second degree and may be punished by imprisonment in the state prison for not more than five years, by imprisonment in the county jail for not more than one year, or by a fine of not more than $500." (underlining supplied)

Then the court said:

> "By increasing the value of the property in paragraph (1) in the 1955 amendment from $25 to $100, without making a corresponding change in paragraph (4), a rather anomalous result followed. Thus, under the law as so amended and under the present law, a person who steals property worth from $100 to $500 in any manner; steals property of any value from an automobile in the daytime; or property of value less than $25 from an automobile in the nighttime is guilty of grand larceny in the second degree, but if he steals property worth between $25 and $100 from an automobile in the nighttime he is guilty of only petit larceny. It is quite obvious that this result must have been due to legislative inadvertence, as we could hardly ascribe to the legislature the intention to create such an absurd result."

The question raised as to this statute by the court is now mute inasmuch as the statute was repealed by the Criminal Code Laws 1963, Chapter 753.

ETZLER v. MONDALE
266 Minn. 353, 123 N.W. 2d 603
August 30, 1963

This case involves an application to vacate a portion of the plat of certain real estate, the portion being designated on the plat as "park" and to have the title to the portion of the plat so vacated adjudged to be in applicant's name. A part of the questions in the case was that of due process upon owners or occupants of land within the platted area. The court pointed out the inadequacy of Minnesota Statutes, Section 505.14, in this respect. This section provides in part:

> "Upon the application of the owner of land included in any plat, and upon proof that all taxes assessed against such land have been paid, and the notice hereinafter provided for given, the district court may vacate or alter all, or any part, of such plat, and adjudge the title to all streets, alleys, and public grounds to be in the persons entitled thereto;* * *. The petitioner shall cause two weeks published and posted notice of such application to be given, the last publication to be at least ten days before the term at which it shall be heard; and the petitioner shall also serve personally, or cause to be served personally, notice of such application, at least ten days before the term at which the application shall be heard, upon the mayor of the city, the president of the village, or the chairman of the town board of the town where such land is situated."

The court had this to say about this section:

> "However, it would seem that, while applicant was authorized to proceed under Sec. 505.14, no effort or attempt was made to accord due process to the purchasers of lots within the platted area. We have held that one purchasing a lot within a plat may rely upon the dedication of streets and alleys shown therein, and posses the right to use the same. Bryant v. Gustafson, 230 Minn. 1, 40 N.W. (2d) 427; see, also, Gilbert v. Emerson, 60

Minn. 62, 61 N.W. 820. Certainly the same right would extend to the use of areas dedicated for park purposes. While Sec. 505.14 makes provision for determination and payment of damages to owners or occupants of land affected by vacation proceedings, it does not appear to us that any adequate procedure for according due process to such persons is provided for therein. It is true that under this section provision is made for publication and posting of notice of proceedings to vacate platted areas, but under circumstances such as are presented in this case, in our opinion this method of obtaining service would fall far short of due process under the Fourteenth Amendment of the Federal constitution as construed by the United States Supreme Court. (cases cited)

"In future proceedings under Sec. 505.14, it should be kept in mind that adequate service must be made upon owners or occupants of land within the platted area, and that service by the publication and posting of notice of the procedure, as provided in Sec. 505.14, will be deemed inadequate. In the present proceedings, the district court's determination accordingly would not constitute a bar to the claim of any such owner or occupant not appearing herein for damages resulting from the vacation of the park area within the plat of Spring Green South."

STATE EX REL. DUCK HUNTERS ASSOCIATION OF
MINNESOTA v. WAYNE H. OLSON
266 Minn. 571, 123 N.W. 2d 679
September 27, 1963

This case came before the court on a writ of prohibition seeking to restrain the commissioner of conservation from enforcing an order limiting the number of migratory birds that may be taken and possessed during the season of 1963 below that authorized by Federal regulation. The Federal regulation permitted the taking of four ducks per day and the possession of eight during the hunting season. The commissioner of conservation made an order providing for the taking of no more than three ducks per day and possession of no more than six. The question was whether the commissioner had authority to limit the taking and possession of ducks at less than that authorized by the Federal authority. The court held that the commissioner did have the authority and stated as follows as to the statutes involved:

> "The legislature of the State of Minnesota has conferred upon the commissioner of conservation quite broad powers for the protection of wild animals. Minn. St. 97.48, subd. 1, as far as pertinent here, reads:
>
> "'The commissioner may extend protection to any species of wild animal in addition to that accorded by chapters 97 to 102, by further limiting or closing open seasons, areas of the state, or by reducing limits with respect to any or all areas of the state, whenever he finds such action necessary to guard against undue depletion or extinction, or to promote the propagation and reproduction of such animals,* * *.'

"Section 97.48, subd. 8, reads:

"'The commissioner shall do all things deemed by him desirable in the preservation, protection and propagation in their natural state, and artificially, of all desirable species of wild animals.'

"Section 100.27, subd. 6, dealing with migratory birds, reads:

"'All migratory game birds, excepting mourning doves, may be taken and possessed whenever and so long as the taking or possession is not prohibited by federal laws or regulations, subject, however, to all requirements of chapters 97 to 102, provided that it shall be unlawful to take any migratory game birds at any time in violation of any federal law or regulation. Mourning doves shall not be taken and possessed in the state.'

"Petitioner contends that under the latter provision the legislature, while it could have done so, has not conferred authority upon the commissioner of conservation to reduce the number of migratory birds which may be taken or possessed below that authorized by Federal regulation. It contends that Sec. 100.27, subd. 6, being a specific provision relating to migratory birds, takes precedence over the general provisions dealing with other wild animals and birds. The commissioner, on the other hand, contends that Sec. 100.27, subd. 6, expressly recognizes the overall authority conferred upon the commissioner by c. 97 to reduce the number of birds, including migratory birds, which may be taken or possessed when in his opinion it is deemed necessary to do so in order to prevent the depletion or extinction of such birds.

"If the clause in Sec. 100.27, subd. 6, 'subject, however, to all requirements of chapters 97 to 102,' had read 'subject, however, to all provisions of chapters 97 to 102,' we assume that the commissioner's position would be unassailable. The word 'requirements' is more restrictive and does render the statute open to two possible constructions, namely, that advanced by petitioner and that advanced by the commissioner. We conclude, however, that in all probability the legislature intended that the commissioner should have the authority to reduce the number of migratory birds that may be taken or possessed, as well as other game birds and animals, when it becomes necessary to do so to avoid the depletion or extinction of such species. If that were not true, it would hardly have been necessary to refer to c. 97 in the section

dealing with migratory birds at all. In any event, if we are to err in our determination of legislative intent, we prefer to err on the side of conservation rather than on the side of depletion of existing migratory birds, leaving it to the legislature to clarify the meaning of the language it has used."

In re ESTATE of JOSEPH J. JERUZAL, et al
v.
GERTRUDE M. JERUZAL,
130 N.W. 2d 473
August 21, 1964

This case involved so-called "Totten trust". A Totten trust is a deposit by person of his own money in his own name as trustee for another; it does not establish an irrevocable trust during lifetime of depositor but is tentative trust revocable at will, until depositor dies or completes gift in his lifetime by some unequivocal act or declaration such as delivery of passbook or notice to beneficiary; but in case depositor dies before beneficiary without revocation or some decisive act of declaration of disaffirmance presumption arises that absolute trust was created as to balance on hand at time of death of depositor.

In this case Jeruzal, a widower, married the plaintiff but later they were separated and Jeruzal died. Before his death decedent transferred a considerable amount of his estate and placed it in building and loan associations in trust for various relatives. The widow claimed that these Totten trusts should be included in his estate.

The supreme court pointed out that in previous decisions it had followed the rule of the courts of New York to the effect that in a trust of this nature if the depositor dies before the beneficiary without having done some act to revoke or disaffirm, a presumption arises that an absolute

trust was created as to the balance remaining after the depositor's death.

The court observed that authorities have used three approaches to the question, the New York rule heretofore mentioned and the Maryland rule where the courts have adopted an equitable approach on a case by case basis and the approach as expressed by Restatement,Trusts (2d) Sec. 58. The court stated as to the latter as follows:

> "The third approach as expressed by Restatement, Trusts (2d) Sec. 58, comment e, takes into consideration the intent of the donor in carrying out the gift but also gives protection to the wife's interest under inheritance law. It comprehends that the beneficiaries of the trusts receive what the decedent intended them to have except in so far as such funds are necessary to satisfy the statutory share of the surviving spouse after the general assets of the estate are used up. The Restatement comment provides:
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> "'Restrictions on testamentary disposition. Although the surviving spouse in claiming his or her statutory distributive share of the estate of the decedent is not entitled to include in the estate property transferred during his lifetime by the decedent in trust for himself for life with remainder to others, even though the decedent reserves a power of revocation (see Sec. 57, Comment c), the surviving spouse of a person who makes a savings deposit upon a tentative trust can include the deposit in computing the share to which such surviving spouse is entitled.
>
> "'Although the amount which the surviving spouse is entitled to receive is measured by the sum of the decedent's owned assets and the amount of such deposits, the owned assets are to be first applied to the satisfaction of the claim of the surviving spouse. The situation is somewhat similar to that in which creditors seek to reach the estate of a decedent who has by will exercised a general power of appointment. See Restatement of Property, Sec. 329.'"

The court observed that this third approach has been adopted by the Pennsylvania courts and that the same result is now reached in Pennsylvania by statute. The court then went on to say as follows:

> "We are not satisfied that either the New York or Maryland rule should be adopted. While the Maryland rule is more equitable, it provides no clear standard of application. Under both the New York and Maryland rules, the trust is either good against the spouse or void altogether. We would prefer the Restatement rule, by which the beneficiaries receive what the decedent intended them to have except so far as the trust funds are necessary to satisfy the statutory interests of the spouse after the general assets of the estate have been exhausted. <u>However, in view of the widespread use of Totten trusts in the area of testamentary disposition, we do not feel free to adopt the Restatement rule without first giving the legislature an opportunity to provide for it by statute as was done in Pennsylvania.</u>" (underlining supplied)

The court further said:

> "However, this court will feel free to follow the Restatement rule hereafter if the legislature declines to act on this matter."

LUSTIK v. RANKILA
Filed December 4, 1964

This case involved the difficulty encountered in cases of negligence arising out of the statutory presumption of decedent's due care under Minnesota Statutes, Section 602.04. This section reads as follows:

> "In any action to recover damages for negligently causing the death of a person, it shall be presumed that any person whose death resulted from the occurrence giving rise to the action was, at the time of the commission of the alleged negligent act or acts, in the exercise of due care for his own safety. The jury shall be instructed of the existence of such presumption, and shall determine whether the presumption is rebutted by the evidence in the action."

In this case an action was brought to recover damages for personal injuries sustained by appellant, Mary Jane Lustik, as a result of a head-on collision between vehicles driven by her and by decedent, Ruth Rankila. Previously an action was brought against Mrs. Lustik under Minnesota Statutes 573.02 for the death of Mrs. Rankila. A motion to consolidate the two proceedings was denied on the authority of Lambach v. Northwestern Refining Co. Inc. 261 Minn. 115, 111 N.W. (2d) 345, which held that because of the statutory presumption of decedent's due care, Sec. 602.04, it was improper to do so. The court ordered that the trustee's suit be given priority since it was first sued. The jury rendered a verdict awarding the trustee damages against Mrs. Lustik. In the above case Mrs. Rankila's special

administrator moved for summary judgment, claiming that the issue of Mrs. Lustik's contributory negligence was res judicata and that the verdict estopped her from asserting this claim. The trial court granted the motion and Mrs. Lustik appealed.

In essence it was the position of appellant that the doctrine of estoppel by verdict is not applicable because (1) the estoppel is not mutual; (2) the issues are not the same; (3) the parties are not identical and do not have privity; (4) the inability to counterclaim gives an arbitrary and unfair advantage to the first person suing; and (5) under Minn. Const. art. 1, Sec. 8, there is no right without a remedy.

The court pointed out:

> "We have carefully considered all of appellant's contentions and acknowledge that the statutory presumption of decedent's due care may lead to an unseemly race to the courthouse, as Mr. Chief Justice Knutson predicted in the Lambach case. However, as long as Minn. St. 602.04 remains on the books, litigants will continue to find themselves burdened with duplicated litigation and with the necessity for maneuvering for the tactical advantage of being the first to trial."

and added as a footnote the following statement:

> "As a practical device to minimize the impact of submitting two different standards of negligence, and to avoid having damages presented by one side and not the other, it may be advisable hereafter to adopt a rule that under circumstances of this kind the surviving claimant's contributory negligence and decedent's own negligence shall first be tried in the survivor's action on the question of decedent's liability only. Such a procedure would achieve something approaching an equal footing

for the survivor, free from conflicting presumptions, but would not necessarily prevent successive lawsuits."

The appellant conceded that in the prior action for death by wrongful act the jury necessarily found she was negligent and that her negligence was a proximate cause of the accident. She sought to avoid the effect of this determination that in a subsequent action (this case) without decedent's presumption of due care as provided by Sec. 602.04 that Mrs. Rankila's negligence might be found to have insulated prior negligence on the part of the appellant. The court pointed out that the conclusion is inescapable that whether or not Mrs. Rankila (the deceased) is now found to be negligent there has already been a judicial determination in the prior case that Mrs. Lustik was herself guilty of negligence which was a proximate cause of this collision and that the court's judgment in the instant case would be precisely the same as it was in the first action and that therefore appellant was barred from recovering and the supreme court affirmed the lower court.

Justice Murphy concurred specially and made these remarks:

"I agree with the result. I cannot agree with the views expressed in the majority opinion in so far as they might be interpreted to propose the repeal of Minn. St. 602.04. The legislature has the power in civil cases to establish a rule of law relating to presumptive evidence that is essentially a regulation of the burden of proof. (cases cited) There is a valid reason for the presumption. It may be

assumed that in adopting Sec. 602.04 the legislature had in mind that in the absence of the testimony of eyewitnesses to an accident or other evidence sufficient to dispell or rebut a presumption of due care, it is reasonable to assume that the decedent, acting on the instinct of self-preservation, was in the exercise of ordinary care."

Justice Thomas Gallagher in dissenting opinion, after discussing further the facts and procedure in the case, had this to say:

"The disadvantage to plaintiff by this procedure is obvious and is emphasized by the fact that she had no choice as to her position in the prior litigation. She did not choose the forum for it and could only appear defensively therein. She had there no opportunity to litigate her affirmative claims without the statutory presumption embodied in Sec. 602.04 against her. She was without authority to interpose a counterclaim or to present her claims for injuries in a consolidated trial of the two cases. She lacked completely the opportunity of establishing decedent's liability under evidentiary rules not 'stacked' against her. The instructions given in the prior action as to the presumption of decedent's due care pursuant to Sec. 602.04 would have been erroneous except for the statute which now gives evidentiary stature to the presumption. TePoel v. Larson, 236 Minn. 482, 53 N.W. (2d) 468."

Justice Sheran in his dissent concluded with these remarks:

"The unfairness of the situation which follows from the application of the statute in favor of the plaintiff only in an action for death by wrongful act seems evident. But until a change is made by legislative or judicial action, I believe that an adjudication of liability in an action for death by wrongful act should not bar subsequent assertion by the defendant of a claim for damages resulting from the occurrence."

DULTON REALTY INC., ET AL v. STATE OF MINNESOTA
Filed December 24, 1964

In the above entitled case there was involved the validity of certain taxes on real property situate in the city of Duluth. It was the practice of the city assessor of Duluth in fixing the full and true value of real property therein to take a percentage of the market value of the real property instead of the full amount thereof. The percentage was not applied to all property but varied depending upon location and classification. The city assessor had, without statutory authority, classified real property as residential or commercial. The trial court held the tax invalid as excessive, unfair, discriminatory and illegal. The trial court further held that the city of Duluth is the taxing district and not the county and that the lowest percentage of the market value in the city of Duluth should be applied in determining the amount of the tax for the purpose of making the refunds ordered. The supreme court sustained the order of the trial court holding the tax excessive, unfair, discriminatory, illegal and invalid. However, the supreme court held that the city of Duluth, as the assessment district, constituted the taxing district or unit of the state.

The supreme court in its decision wrote the following:

"Minnesota legislature no doubt will take cognizance of present problems with respect to equalization of

taxes and the need for statutory revisions which may serve as guide for assessors and officials having responsibilities in field of taxation.

"The legislature is soon to assemble and no doubt will take action with respect to the many problems presently relating to equalization of taxation with a view toward eliminating the confusion and inequality now present. One suggestion is that it specify a definite number of years during which all assessors be required to use a fixed percentage of full and true value in determining the assessed value of property. Possibly the average percentage presently prevailing throughout the state, if it can be ascertained, would suffice for this. It might further provide that at the end of the prescribed period all assessors thereafter be required to take the true and full value of property as the sole basis for its assessment as required by the constitution. It would also seem essential that tax rates be adjusted so that this latter requirement would not increase taxes to the point of confiscation in areas where valuations have been low. Whatever formula is arrived at, it should be such that if its use is required uniformly throughout the state, equality in taxation will result.

"It has been suggested that real property might be classified by assessors as to type, i.e., farm, lakeshore, residential, commercial, etc.; and that when so classified by them, even though different percentages were applied to the market values of properties in different classifications, this would not invalidate taxes on properties within a classification to which the identical percentage had been applied. We are of the opinion that before such classifications could be undertaken by assessors some statutory enactment, delegating authority therefor to them, with standards for guidance, would be essential. At present Sec. 273.13, manifests a legislative intent to reserve any authority in this field to the legislature."