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 1971

STATE OF MINNESOTA.
REVISOR OF STATUTES
SAINT PAUL

JOSEPH J. BRIGHT
REVISOR

Report concerning certain opinions of the Supreme Court.

January 5, 1971

The Honorable Rudolph G. Perpich
President of the Senate

and

The Honorable Aubrey W. Dirlam
Speaker of the House of Representatives

State Capitol
Saint 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, 1968, and ending September 30, 1970 and including three opinions of October 30, 1970, November 20, 1970, and December 11, 1970.

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, 1968, and ending September 30, 1970, and including three opinions of October 10, 1970, November 20, 1970, and December 11, 1970, 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.

JOHNSON v. CITY OF THIEF RIVER FALLS
282 Minn. 281, 164 N. W. 2d 71
January 17, 1969

Action was brought against the City of Thief River Falls for injuries sustained because of a defective condition in a pedestrian crosswalk on a street in the city, which street forms a part of a state trunk highway. The court held that as the city had no agreement with the commissioner of highways for the maintenance of the trunk highway that the city was not responsible and that the plaintiff was not entitled to recovery against the city for her damages.

The court, after quoting from the district court's memorandum as follows:

> "Had [this] street not been made a part of the trunk highway system, recovery under the facts and circumstances in this action would not be denied. It seems quite harsh and unfair to deny recovery for the sole reason that the street was taken over as a part of such system."

stated in a footnote:

> "4 We agree with the trial court that this result is harsh. The state grants no right of action against itself with respect to its construction and maintenance of the state highway system, but does impose liability upon its political subdivisions for their own streets and sidewalks. See, Schigley v. City of Waseca, 106 Minn. 94, 97, 118 N. W. 259, 260. The solution, however, is legislative and not judicial. Given the clear findings of the jury, including its assessment of the damages sustained, we think it not unlikely that the legislature would approve a claim made to it by these plaintiffs."

STATE v. JOHN A. PETERFESO
283 Minn. 499, 169 N.W. 2d 18
June 13, 1969

Defendant was convicted of selling without a permit radio equipment capable of being used in a motor vehicle on a police emergency frequency. The issue before the court was the constitutionality of Minnesota Statutes, Section 626.63, Subdivision 2, which makes unlawful the sale of such equipment without a permit.

The court found that the statute violates the Minnesota Constitution, Article I, Section 7, and the United States Constitution Amendment XIV, because its terms encompass not only criminal conduct but innocent activities as well.

The court said:

> "The difficulty with this particular statute is that it not only applies to converters specially designed for use with car radios, but also affects the sale of ordinary radio and television equipment which can be quickly and inexpensively modified to pick up police emergency frequencies. Hence, we have concluded that although this statute would be valid if it prohibited the installation or use in an automobile of equipment capable of receiving police emergency radio transmission, it does not meet the test of due process if it prohibits an innocent sale of equipment capable of an unlawful use. Accordingly, we hold the statute unconstitutional. The judgment of conviction is reversed."

STATE v. DAILEY ET AL.
284 Minn. 212, 169 N.W. 2d 746
July 25, 1969

Defendants in two cases, consolidated upon appeal, were convicted of prostitution in violation of a municipal ordinance. One issue is whether the municipal ordinance is ineffective on the ground that it has been preempted by state statute regulating the same subject. The court held that the municipal ordinance under which defendants were convicted is not preempted by the state statute. The state statute is Minnesota Statutes, Section 609.32, Subdivision 1 (1), which is part of the criminal code of 1963. The court pointed out that there are differences between the ordinance and the statute. The significant difference being that a violation of the ordinance is a misdemeanor; whereas, violation of the statute is a gross misdemeanor.

The court went on to say:

> "We take judicial notice that our legislature has in this recent decade moved on several fronts to assist, but not to replace, local government in meeting the extraordinary needs of the metropolitan area, such as the elimination of conditions which diminish the quality of urban life. We are averse, in these circumstances, to hold that the legislature contemplates its own regulation to exclude municipal regulation, without most clear manifestation of such intent. It is imperative, if we are to give faithful effect to legislative intent, that the legislature should manifest its preemptive intent in the clearest terms. We can be spared the sometimes elusive search for such intent if it is declared by express terms in the statute. And where that is not done in the enactments of future legislatures,

we shall be increasingly constrained to hold that statutes and ordinances on the same subject are intended to be coexistent."

STATE v. WEST
285 Minn. 188, 173 N.W. 2d 468
November 21, 1969

In this case defendant was convicted of burglary and theft. One of the issues in the case was whether or not a defendant in a criminal case, testifying in his own behalf, can be asked on cross examination about the fact and nature of prior criminal convictions without the state's having first obtained a ruling of the trial judge permitting the questions. The supreme court pointed out the relevant statute is Minnesota Statutes, Section 595.07, which provides.

> "Every person convicted of crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry; and the party cross-examining shall not be concluded by his answer thereto."

The court, after discussing the facts and law in the case, stated:

> "The members of this court have noted and given some attention to the recent trend of leaving to the trial court the question of whether the particular conviction raised against defendant as a witness in his own behalf substantially affects his credibility. It is our suggestion, however, that revising section 595.07 to conform to the emerging state of the law should be left to the legislature. It is not for the courts to make, amend, or change the statutory law, but only to apply it. If its language embodies a definite meaning which involves no absurdity or contradiction, the statute is its own best expositor. City of St. Louis Park v. King, 246 Minn. 422, 75 N.W. (2d) 487."

Justice Otis in a dissent in this case stated:

"I concur in the result, only because of peculiar circumstances which require an affirmance in this case. However, I vigorously dissent from that part of the opinion which purports to deny the court in future cases the right to reassess the validity of Minn. St. 595.07 when the proper occasion arises.

"To perpetuate the myth that the disclosure of defendant's prior convictions has no effect on a jury beyond reflecting unfavorably on his credibility is, in my opinion, an abdication of judicial responsibility.

"It is our duty to guarantee defendant a fair trial. The legislature cannot constitutionally enact rules of evidence which deprive defendant of that right. Nor are we obliged to stand mute in deference to legislative comity when a majority of the court agrees that a statutory rule is manifestly prejudicial to the rights of an accused.

"I cannot condone in perpetuity a law which so obviously and effectively denies defendant an opportunity to profess his innocence. In my opinion, the statute is simply a vestige of an era when the accused was prohibited from testifying on his own behalf for any purpose.

"I would reserve the right to review the matter in any future case where the application of the statute would frustrate the ends of justice."

JONES PRESS, INC. v. MOTOR TRAVEL SERVICES, INC.
286 Minn. 205, 176 N. W. 2d 87
February 20, 1970

This case involved the constitutionality of the garnishment law, Minnesota Statutes 1967, Sections 571.41, 571.42, and 571.60. The case arose before the amendment of the statutes by Laws 1969, Chapter 1142.

The statutes authorize the garnishment and impounding of accounts receivable without prior notice or an opportunity to be heard and the court held that this denied the defendant due process of law, and, on the authority of a United States Supreme Court decision, held the laws unconstitutional.

The court said:

> "Whether we are governed by the language in Sniadach that 'the sole question' is one of procedural due process, or whether, by analogy to the plight of the wage earner, this defendant is entitled to relief from the loss of his sustenance, we are of the opinion and hold that as here applied Minn. St. 1967, sections 571.41, 571.42, and 571.60, are unconstitutional. We address ourselves to this question with some reluctance because the garnishment statutes which here apply have now been amended by L. 1969, c. 1142. By the terms of the present statute, garnishments are permitted only under substantially the same circumstances as those which authorize attachments under Minn. St. 570.02."

JOHNSON v. CALLISTO, ET AL. AND
N. T. WALDOR, COMMISSIONER OF HIGHWAYS OF MINNESOTA
176 N. W. 2d 754
April 24, 1970

This action was brought by an individual against the commissioner of highways, predicated upon an alleged breach of duty in failing to provide "no passing" line markings on a trunk highway pursuant to Minnesota Statutes, Section 169.06, Subdivision 2, and further upon an allegation that the state has waived immunity for liability growing out of such alleged breach by reason of section 161.03, subdivision 2. The court held that the dismissal of the action by the lower court, on the ground that the complaint failed to state a valid claim, was proper and further held that the acts provided for by section 169.06 are discretionary with the commissioner and that there could be no recovery on the bond of the commissioner.

The court went on to say:

> "Plaintiffs argue that this court should reject the doctrine of sovereign immunity in actions against the Highway Department. In disposing of this point, it is only necessary to observe that the vast majority of the courts in this country have considered this question and have held that state highway departments, commissions, authorities, or similar bodies are mere agencies of the state entitled to the sovereign immunity from suit and that therefore an action for negligence will not lie against such an agency except where there has been a waiver of immunity. Annotation, 62 A. L. R. (2d) 1222.
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> "Although the doctrine of sovereign immunity has been widely criticized, this court would not be warranted on the record before us to seriously consider the suggested change. The social exigencies which prompted this court in Spanel v. Mounds View

School Dist. No. 621, 264 Minn. 279, 118 N. W. (2d) 795, to abolish sovereign immunity with respect to certain subdivisions of the state government do not exist here. The briefs and record supporting plaintiffs' doubtful claim do not suggest a good reason for this court to abolish or qualify the doctrine as it applies to the state. We agree with the trial court that if there is to be a change, it should come about by legislation which would be based upon findings warranting it and which would provide for procedures and limits of liability, as was done in the enactment of Minn. St. c. 466 subsequent to the Spanel case. Nor have we been provided with any suggestions or representations which would warrant us to assume that the present manner of hearing and determining claims by the State Claims Commission pursuant to Minn. St. 3.66 to 3.84 is not satisfactorily serving the best interests of the public."

STATE v. GAMELGARD
177 N. W. 2d 404
May 1, 1970

The defendant was adjudged guilty on two indictments for theft. He worked in conjunction with one Thomas Dwyer by making fraudulent claims with an insurance company. Dwyer pled guilty and received a 10-year indeterminate sentence and was placed on probation. The defendant in the instant case, tried before a different judge, was sentenced to five years on each of the two indictments to run consecutively, totaling ten years.

The court pointed out:

> "Thus, we have a situation where, according to defendant's claim, Dwyer, the principal perpetrator of the crimes, was immediately placed on probation by a judge of the same district court in which defendant was tried, whereas defendant was sentenced to 10 years' imprisonment by another judge in the same court for his involvement in the crimes with Dwyer."

The court further said:

> "In that connection it must be conceded that in a situation, as here, where Dwyer and defendant participated jointly in theft by fraud, the disparity between the 10-year sentence and probation given Dwyer and the consecutive sentences of 5 years on each of two convictions given defendant appears so great as to invite corrective action. However, it is not within our power to reevaluate or reduce sentences. Under our present law, disparity of sentences can occur even though all persons concerned in the sentencing process act conscientiously and with the best of motives. * * * Although each judge in his respective jurisdiction has the right to impose a sentence which in his discretion appears fair and reasonable, it seems to us that some procedure should be evolved

so that sentences imposed in criminal cases could be reviewed on a state-wide basis and that the agency or institution given power for such review should be charged with the duty of developing and applying state-wide standards which will serve to make the imposition of sentences in criminal cases reasonably uniform. As the law now stands, this court under our past decisions does not have, and cannot assume, this responsibility. We are not prepared at this time to hold that the appellate jurisdiction afforded to this court in all cases by our constitution embraces appellate review of sentences. We do, however, recommend the problem illustrated by this case to the legislature for its consideration in light of widely expressed views that sentences in serious criminal cases should be subject to review by appeal."

KNAPP v. O'BRIEN
179 N. W. 2d 88
July 24, 1970

This action arose to determine the constitutionality of Laws 1969, Chapter 1125, passed by the legislature during the 1969 session. The act changed the compensation of members of the tax court from a per diem to a calendar year. The house of representatives gave final approval of the bill on May 22, 1969, and the senate on May 26, 1969, the day on which each house individually adjourned sine die.

The question before the court is what is a legislative day within the meaning of the Minnesota Constitution, Article 4, Section 1, which limits the regular session of the legislature to 120 calendar days, exclusive of Sundays, from the date when the legislature convenes. The appellants contended that "legislative day" means any day on which the legislature actually meets while the respondent contended a legislative day is any day on which the legislature may meet which includes each calendar day from the date of convening, excluding only Sundays.

In a rather lengthy opinion as to the meaning of "legislative day" the court held that inasmuch as the legislature must adjourn on the 120th calendar day, exclusive of Sundays, after convening, any bill passed

on the day of adjournment is void under Article 4, Section 22, of the Constitution which provides that "no bill shall be passed by either house of the legislature upon the day prescribed for the adjournment of the two houses."

Olson v. Hartwig et al.
180 N. W. 2d 870
October 30, 1970

This case involved an action to recover for the wrongful death of the plaintiff trustee's decedent and the case was tried under the new comparative negligence statute. The jury found that plaintiff's decedent's negligence had contributed 40 percent to the cause of the collision and defendant's negligence had contributed 60 percent to the cause. It found damages in the amount of $65,000. The trial court deducted 40 percent of $65,000, leaving the sum of $39,000. It then reduced that amount to $35,000, the maximum recovery permitted under the death by wrongful act statute. The question before the court is whether plaintiff's decedent's negligence of 40 percent should be applied to the damages found by the jury ($65,000) or to the maximum recovery permitted under section 573.02 ($35,000).

The court stated:

> "The pertinent portion of our death by wrongful act statute, section 573.02, reads:
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> '* * * The recovery in such action [for wrongful death] is such an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death, shall not exceed $35,000, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death.' (Italics supplied.)

"Our comparative negligence statute, Minn. St. 604.01, which was enacted by the 1969 legislature (L. 1969, c.624, section 1), so far as material, reads:

"'Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.' (Italics supplied.)

"It is significant that section 573.02 speaks in terms of 'recovery' while section 604.01 speaks in terms of 'damages.' Obviously the two words are not synonymous. We recently had occasion to consider the difference in meaning between 'recovery' and 'damages.' In Range v. Van Buskirk Const. Co. 281 Minn. 312, 316, 161 N. W. (2d) 645, 648, also an action for death by wrongful act, we stated:

"'* * * In 1951 the legislature amended Minn. St. 1949, section 573.02, subd. 1, substituting the word "recovery" for the word "damages." L. 1951, c.697, section 1. A clear distinction exists between "damages" and "recovery," and the legislature is presumed to have used these distinctive words deliberately.'

"The pertinent portion of our comparative negligence statute was taken literally from the Wisconsin comparative negligence statute. Wisconsin's death by wrongful act statute, Wis. Stat. 1967, section 895.04, speaks in terms of damages whereas Minn. St. 573.02 speaks in terms of maximum recovery; but we see no significant difference in this fact in so far as construction of our comparative negligence act is concerned."

The court then pointed out that after a decision of the Wisconsin Supreme Court involving the death by wrongful act statute and the comparative negligence statute, that the Wisconsin Legislature amended its wrongful death statute which, in effect reversed the effect of that decision as to determining damages under the comparative negligence

statute of that state. The court said:

> "Thus, while ordinarily we would adopt the decision in Mueller with the statute, we are confronted here with the repudiation of the majority view by amendment of the Wisconsin statute shortly after the case was decided. When our legislature adopted our comparative negligence statute, it had available both the Mueller decision and the Wisconsin legislative act repudiating it. The question thus arises, in seeking the intent of our legislature: Did it intend to follow the Mueller decision or the amended statute? We are persuaded that if our legislature had intended to follow the amendment of Wisconsin's death by wrongful act statute, it would have adopted the statute as amended, either by appropriate provision in our comparative negligence statute or by amending our death by wrongful act statute. Not having done so, in the light of Range v. Van Buskirk Const. Co. supra, which clearly differentiates between damages and recovery, we must assume that the legislature intended the Wisconsin statute as construed in Mueller to be the proper interpretation."

STATE v. HALVORSON

November 20, 1970

This action arose out of the so-called implied-consent law, Minnesota Statutes, Section 169.123. Under this law, the refusal of a driver to permit the alcoholic test makes mandatory the revocation of the driver's license for a period of six months. The refusal of the driver to submit to a chemical test is subject to sanction only if, as stated in section 169.123, subdivision 2,

> "*** The test shall be administered at the direction of a peace officer, when (1) the officer has reasonable and probable grounds to believe that a person was driving or operating a motor vehicle while said person was under the influence of an alcoholic beverage, and (2) the said person has been lawfully placed under arrest for alleged commission of the said described offense in violation of Minnesota Statutes, Section 169.121 [operating a motor vehicle while under the influence of an alcoholic beverage or narcotic drug], or an ordinance in conformity therewith. ***"

The question before the court was whether the "peace officer" who would have directed administration of the test to the defendant, had she not declined it, fell within the meaning of subdivision 1 of this section. Section 169.123, subdivision 1, defines "peace officer" to mean:

> "*** a state highway patrol officer or full time police officer of any municipality or county having satisfactorily completed a prescribed course of instruction in a school for instruction of persons in law enforcement conducted by the university of Minnesota or a similar course considered equivalent by the commissioner of [highways]."

The commissioner of highways (now the commissioner of public safety) promulgated rules in accordance with this law as to the course of instruction required by a peace officer.

In the trial the question arose as to whether the particular officer had the qualifications of a peace officer under the statute. The court said in the concluding paragraphs of the opinion:

> "Although we might surmise that more detailed interrogation of Officer Oltman would have established that he had had the requisite course of instruction, we cannot hold as a matter of law that his special qualifications were proved. A license revocation proceeding is civil in nature, notwithstanding the vague language in section 169.123, subd. 6, that the judicial hearing 'shall proceed as in a criminal matter.' State v. Normandin, 284 Minn. 24, 26, 169 N. W. (2d) 222, 224. The defendant, therefore, is not clothed with those substantive constitutional rights associated with criminal matters. The defendant is not entitled to a presumption of innocence, and the state is not required to establish compliance with statutory conditions by proof beyond a reasonable doubt. The legislature nevertheless has manifested an intent that the peace officer's qualifications must be proved by a fair preponderance of the evidence.
>
> "Whether or not the legislature would better achieve its basic statutory purpose by a clearer indication as to whether both the arresting officer and the testing officer must be 'peace officers' and, more importantly, whether the legislature, or in this case the commissioner of public safety, should more clearly define the special qualifications, if any, of such officers is not for us to decide. We, like the trial court, must take the statute and the regulation as we find them."

HOENE v. JAMIESON

December 11, 1970

This was an action for a declaratory judgment for a determination that Minnesota Statutes, Section 297A.25, Subdivision 4, permitting a sales tax on road-building materials purchased by contractors is unconstitutional.

The tax reform and relief act of 1967 imposing a three percent sales tax on sales at retail had a provision now coded section 297A.25, which deals with exemptions. Subdivision 1 (h) of that section specifically exempts from the tax the gross receipts from the sale of all materials used or consumed in industrial production of personal property intended to be sold ultimately at retail, including the production of road-building material. Minnesota Statutes, Section 297A.25, provides in part:

> "Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:
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> * * * * * * * * * * * * * * * * * *
>
> "(j) The gross receipts from all sales of tangible personal property to, and all storage, use or consumption of such property by, the United States and its agencies and instrumentalities or the state of Minnesota and its agencies, instrumentalities and political subdivisions."

Section 297A.25, subdivision 4, which was the provision challenged in these proceedings, was drafted by a conference committee of the House and Senate at the 1967 Extra Session. It excludes certain sales from the exemptions otherwise

conferred by the sections cited, in the following language:

> "Nothing herein shall exempt the gross receipts from sales of road-building materials intended for use in state trunk highway or interstate highway construction, whether purchased by the state or its contractors."

The basic issue before the court was whether the imposition of a sales tax on materials purchased by contractors for use in state trunk highway or interstate highway construction unconstitutionally invades the state trunk highway fund created by Minnesota Constitution, Article 16, Section 6, expenditures from which are limited to trunk highway purposes.

The court stated:

> "As we have indicated, subd. 4 appears to have been an afterthought designed to take advantage of the Federal Government's major participation in the construction of trunk and interstate highways. Section 297A.25, subd. 1 (j), expressly exempts from the sales tax purchases of personal property by the United States Government and by the State of Minnesota. That provision is clearly consistent with the immunity which state and Federal governments ordinarily enjoy. We perceive no legislative intent to apply the exemption or nonexemption equally to contractors and to the state in other kinds of highway construction. As we have suggested, but for subd. 4, it would appear that purchases by the state would be exempt and purchases by the contractors would be subject to the tax. We therefore hold the application of the statute with respect to contractors and the state is severable as a matter of law."

The court held that the sales tax imposed by the "Tax Reform and Relief Act of 1967," on the purchase of materials by contractors for use in the construction of state trunk highways is not an unconstitutional invasion of the state trunk highway fund protected by Minnesota

Constitution, Article 16, Section 6.

The court however held that Minnesota Statutes, Section 297A.25, Subdivision 4, is unconstitutional as to the purchase of material by the state itself for use in the construction of state trunk highways.

The court said:

> "As we have indicated, all of the parties assume that the tax is invalid as to purchases by the state. In this assumption, we concur. Clearly, the imposition of a 3-percent sales tax on direct purchases diverts that amount from the trunk highway fund to the property tax relief fund. The precise amount of the tax is mathematically ascertainable in every instance. We have no difficulty, therefore, in holding the tax unconstitutional as to purchases made directly by the state."