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REPORT

OF

REVISOR OF STATUTES

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

SUBMITTED TO THE LEGISLATURE OF THE STATE OF MINNESOTA

JANUARY 1963

State of Minnesota

REVISOR OF STATUTES

State Capitol

St. Paul (1) Minnesota

January 8, 1963

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 1, Minnesota

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, 1960, and ending September 30, 1962, including one opinion of December 14, 1962.

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, 1960, and ending September 30, 1962, including one opinion of December 14, 1962, 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.

EASTWOOD v. DONOVAN
259 Minn. 43, 105 N.W. 2d 686
October 17, 1960

A proceeding to compel the secretary of state to remove from the general election ballot the name of a candidate who filed for Congress by petition, which petition was challenged on the ground that it lacked the required number of signatures. The case was decided on a question of law, it being unnecessary for the court to pass upon the merits. In commenting upon the judicial problems that exist if the court had been required to pass upon the merits, the decision states.(259 Minn. 44):

> "Existing statutes make it virtually impossible to have a case of this kind heard and determined on the merits. Section 202.11, subd. 2, provides that no person may sign a nominating petition until after the date of the primary election. Under § 202.13, subd. 1, such nominating petition must be filed on or before 39 days before the general election. In view of the large number of names required, such petition frequently is not filed until the last day on which that may be done. Such was the case here. The time required to check out all names on such petition makes it difficult, if not impossible, to bring the matter into court in time so that a trial of the claims of the parties may be adequately heard and determined. A decision in such case must be rendered in time so that ballots may be printed and mailed to absentee voters all over the world. If we are to avoid disenfranchisement of such absentee voters, it is apparent that the time allowed for trial and determination of fact issues is wholly insufficient. It would seem to us that this difficulty merits the careful consideration of the legislature. Either nominating petitions should be filed sufficiently long in advance of the election to permit an adequate

challenge of an insufficient petition or they should be abolished entirely. The only other alternative is for this court to refuse to entertain such petition on the ground that we are denied an opportunity of adequately considering it."

STATE v. DAHLGREN
259 Minn. 307, 107 N.W. 2d 299
January 20, 1961

This case involves among other things the question of the appointment and payment of counsel to aid an indigent convicted person in presenting an appeal to the supreme court.

The only statutory provision dealing with the subject is Minnesota Statutes, Section 611.07, Subdivision 2, which reads:

> "If counsel so appointed* shall appeal or procure a writ of error, and after the hearing of the appeal or writ of error the supreme court shall determine that defendant is unable, by reason of poverty, to pay counsel, and that review was sought in good faith and upon reasonable grounds, such counsel may be paid such sum for his services and expenses therein as the supreme court shall determine, to be certified to the county treasurer by the clerk of the supreme court. In any case such compensation and expense shall be paid by the county in which the defendant was accused."
>
> [*Refers to § 611.07, subdivision 1, dealing with appointment of counsel upon the trial.]

The court points out that the quoted law provides that upon appeal counsel who conducted the trial may be paid, but that it does not provide for payment of counsel who is appointed and acts only on the appeal. The court said (259 Minn. 313):

"While the courts may have inherent power to appoint counsel to represent an indigent person on appeal, we have no power to appropriate money to compensate such counsel. Only the legislature can do that. The only statutory provision for such compensation is that found in § 611.07, subd. 2."

In conclusion the court stated (page 318):

"* * * This statutory provision contemplates payment of the expenses of an attorney representing an indigent prisoner only in cases where the attorney has been appointed to assist defendant in the trial court according to the procedure provided in the preceding subdivision of the same section. State v. Coursolle, 255 Minn. 384, 390, 97 N.W. (2d) 472, 477. While this statute may be inadequate to permit the trial court or this court to compensate counsel appointed to represent a convicted indigent person upon an appeal, we think that it may be said that it is the duty of an attorney appointed to defend such person on the trial to continue such representation after conviction if he conscientiously believes that the defendant has not had a fair trial. The attorney having accepted appointment as defendant's counsel, the same relationship of attorney and client exists as in any case of private employment. Such attorney owes his client the same duty of fidelity as any other attorney. That is true whether the appointed attorney is a public defender or a private attorney. If he conscientiously believes that nothing can be accomplished by a review, he should so advise his client and ask the trial court that he be relieved of further duties. If, however, he believes that the defendant has been deprived of a fair trial and a reasonable basis exists upon which there may be a reversal, he should proceed with the appeal. If, upon such appeal, we are satisfied that the review was sought in good faith and upon reasonable grounds, we are then authorized, under § 611.07, subd. 2, to order payment for the services of the attorney and the expenses of the appeal. While we realize that compensation of counsel appointed to represent indigent defendants in criminal matters is often

inadequate, the duty to accept such appointment and to conduct such defense with the same diligence as if being paid privately is one resting on attorneys as members of a profession which has always been willing to provide protection for the rights of citizens. If both bench and bar approach this problem in that light, it is possible that a solution for this difficult problem can be found without either depriving indigent convicted persons of the right of review in meritorious cases or burdening the courts with reviews in cases which have no merit."

SHUMWAY v. NELSON
259 Minn. 319, 107 N.W. 2d 531
January 27, 1961

This case involved a husband and wife killed in an automobile accident. Plaintiff as trustee for the heirs of the wife brought the action under the death by wrongful act statute (Minnesota Statutes, Section 573.02) against the administrator of the husband's estate.

The question before the court was whether the rule of law precluding tort actions between spouses denied recovery in this case. The court held that § 573.02 permitted recovery in this case, but in discussing the marital immunity doctrine had this to say (259 Minn. 321):

> "* * * At common law a wife could not maintain an action to recover damages against her husband for injuries received as a result of his tortious conduct because of the then prevailing concept of the legal identity of husband and wife. In the majority of jurisdictions this rule still prevails, being justified on the ground that it promotes marital harmony. In some jurisdictions the rule has been abrogated either by statute or by particular construction placed upon the so-called married women's acts.
>
> "Minnesota has, for many years, followed the majority view, although recognizing in more recent decisions that the rationale of the common-law rule is no longer persuasive. We have frequently suggested that any change in the doctrine of marital immunity is properly a legislative rather than a judicial function."

STATE v. TOWNSEND
259 Minn. 522, 108 N.W. 2d 608
March 17, 1962

Defendant was convicted of abandonment of his minor children under Minnesota Statutes, Section 617.55, which reads in part (259 Minn. 523):

> "Every parent, including the duly adjudged father of an illegitimate child and a parent who in an action for divorce or separate maintenance or in a neglect, delinquency or dependency proceeding for his or her child in Juvenile Court has been judicially deprived of the actual custody of such child, or other person having legal responsibility for the care or support of a child who is under the age of 16 years and unable to support himself by lawful employment, who fails to care for and support such child with intent to abandon and avoid such legal responsibility for the care and support of such child;* * * is guilty of a felony * * *. Desertion of and failure to support a child or pregnant wife for a period of three months shall be presumptive evidence of intention to abandon or to avoid legal responsibility for the care and support of the child."

A companion statute, Minnesota Statutes, Section 617.56, provides that every person having legal responsibility for the care or support of a child who is under 16 years of age and unable to support himself by lawful employment, who willfully fails to make proper provision for such child is guilty of a misdemeanor.

Defendant had previously been divorced, with custody of the minor children awarded to the wife. He had had prior convictions: One of nonsupport under § 617.56, and one of abandonment under § 617.55. The court found that the

record did not indicate that failure to support his children was willful or that it was coupled with an intent to abandon.

The court criticized § 617.55 as follows (259 Minn. 529):

> "* * * Section 617.55 provides that desertion of and failure to support a child for a period of 3 months shall be presumptive evidence of intention to abandon or to avoid legal responsibility for the care and support of the child. It must be clear to anyone familiar with criminal law and procedure that this statement is of no consequence. The only effect of such a presumption is to shift the burden of proof and the state cannot shift to one accused of a crime the burden of proving his innocence. See, State v. Higgin, 257 Minn. 46, 99 N.W. (2d) 902."

The court pointed out (on page 530):

> "Clearly, where the charge is desertion or abandonment under § 617.55, intent to commit the offense must be proved to sustain the conviction. The failure to provide support under § 617.56, as pointed out, must be coupled with willfulness to constitute an offense. We think the offense of nonsupport generally presupposes and is predicated on the ability to support. The state must furnish proof beyond a reasonable doubt as to every essential element involved in the crime charged. While it is claimed that the defendant is an able-bodied man, it has not been shown that under present circumstances he is possessed of sufficient funds or of sufficient opportunity or ability to earn anything but the barest means required for his own existence. Had he sufficient funds or sufficient earning power no doubt grounds would exist for instituting a prosecution under the proper statute and in all likelihood would justify a conviction if all essential elements were established by sufficient proof. Statutes in most jurisdictions, as in this one, make failure to support a child a criminal offense providing the party charged is able to supply the need and there is also intent to escape his obligations. However, the intent to abandon and the failure to support

must be contemporaneous to constitute the offense charged a felony.

"Whether intentional abandonment of a child can be committed by a parent who has been divested of all paternal rights, his only surviving paternal duties being defined by a decree of divorce, has not been fully considered by this court since State v. Sweet, supra, although § 617.55 has been amended several times in an attempt to give the terms "abandonment" and "desertion" a legal meaning beyond that in the law dictionaries and in many responsible legal authorities.

"It is still possible in the instant case to proceed under § 617.56 or by punitive contempt proceedings under the original divorce decree.

"* * * It is almost a canon of the criminal law that no man is to be held guilty of a crime by a forced construction of a statute which brings him within its provisions when upon the letter thereof he falls wholly within its purview. State v. Shouse, 268 Mo. 199, 186 S.W. 1064.

"That matter, however, does not have to be finally determined on this appeal. Certainly §§ 617.55 and 617.56 may be brought into harmony by the legislature as originally intended, giving desertion and abandonment their proper setting and giving greater discretion to the courts in the matter of imposing heavier penalties in aggravated cases of willful failure to support under § 617.56, which is the offense most generally encountered by the courts in this field, where the custody of the child has been taken from a parent by decree of the court.

"It is generally known among members of the bench and bar that a revision of the criminal code is under consideration in this state. These statutes may well be given consideration by those charged with revision studies in order that the questions that have troubled the courts may be solved through harmonizing these statutes, eliminating useless and ineffective presumptions, and providing penalties that will both legally and reasonably solve the different situations."

STATE v. RED OWL STORES, INC.
262 Minn. 31, 115 N.W. 2d 643
February 9, 1962

This case involved the sale by defendants at either wholesale or retail, without benefit of a license from the board of pharmacy, of 18 prepackaged medicines known by certain trade names (such as Bromo Seltzer, Anacin, Aspergum, Bromo Quinine, Vick's Cough Syrup, and the like).

One of the issues before the court was whether the drugs in question are exempted from application of the pharmacy act, Minnesota Statutes, Chapter 151. The pertinent provisions of the act, involved in the action, follow:

> "151.15 It shall be unlawful for any person to compound, dispense, vend, or sell at retail, drugs, medicines, chemicals, or poisons in any place other than a pharmacy, except as provided in this chapter.
>
> "No proprietor of a pharmacy shall permit the compounding or dispensing of prescriptions or the vending or selling at retail of drugs, medicines, chemicals, or poisons in his pharmacy except under the personal supervision of a pharmacist or of an assistant pharmacist in the temporary absence of the pharmacist."
>
> "151.01 * * *
>
> "Subd. 2. The term 'pharmacy' means a drug store or other established place regularly registered by the state board of pharmacy, in which prescriptions, drugs, medicines, chemicals, and poisons are compounded, dispensed, vended, or sold at retail.
>
> "Subd. 3. The term 'pharmacist' means a natural person licensed by the state board of pharmacy to prepare, compound, dispense, and sell drugs, medicines, chemicals, and poisons.

"Subd. 4. The term 'assistant pharmacist' means a natural person licensed as such by the state board of pharmacy prior to January 1, 1930, to prepare, compound, dispense, and sell drugs, medicines, chemicals, and poisons in a pharmacy having a pharmacist in charge.

"Subd. 5. The term 'drug' means all medicinal substances and preparations recognized by the United States pharmacopeia and national formulary, or any revision thereof, and all substances and preparations intended for external and internal use in the cure, mitigation, treatment, or prevention of disease in man or other animal, and all substances and preparations, other than food, intended to affect the structure or any function of the body of man or other animal.

"Subd. 6. The term 'medicine' means any remedial agent that has the property of curing, preventing, treating, or mitigating diseases, or that is used for that purpose."

"151.26 * * * nothing in this chapter shall prevent the sale of common household preparations and other drugs, chemicals, and poisons sold exclusively for use for non-medicinal purposes.

"Nothing in this chapter shall apply to or interfere with the manufacture, wholesaling, vending, or retailing of non-habit forming harmless proprietary medicines when labeled in accordance with the requirements of the state or federal food and drug act; nor to the manufacture, wholesaling, vending, or retailing of flavoring extracts, toilet articles, cosmetics, perfumes, spices, and other commonly used household articles of a chemical nature, for use for non-medicinal purposes."

The defendants in this case contended that the 18 products involved were "non-habit forming harmless proprietary medicines" excepted by § 151.26. The court held that they were not proprietary medicines within the meaning of that section, and remarked, concerning the statutes in question (115 N.W. 2d 656):

"* * * We are led to the further conclusion that there are today few, if any,,proprietary medicines within the meaning of the Pharmacy Act as we have construed it. We are not provided with a history of the origin of the exemption or the reasons why the legislatures had from their first enactments allowed unsupervised sales of such drugs and medicines. It may be assumed that the exception was a concession felt to be desirable at a time when society was largely rural, doctors were few and far between, and the legislature sought to make so-called patent and proprietary medicines and other home remedies generally available for purchase in rural and outlying communities. Obviously, the exemption in § 151.26 permitting the unsupervised sale of proprietary medicines, if not obsolete, is now radically restricted in its application. The secrecy which was once the identifying characteristic of the proprietary no longer exists. The reputed medical value of the proprietary which lay in its mystique can no longer stand the test of medical scrutiny. It is apparent that we are dealing here with an antiquated statute, certain provisions of which serve no real purpose under existing social conditions. It not only appears that the proprietary may have lost its identity but that the social conditions which were thought to justify unsupervised sales of it no longer exist. The act should be amended to conform to the realities of our day. Certainly there is no need for an exemption of true proprietaries which may have secret ingredients far more toxic and dangerous than the 18 products under consideration."

The court concluded (page 658):

"* * * Moreover, it is not within the province of this court to amend or engraft a new provision on a statute merely because a present provision in it may become stale or obsolete.[11] Where with the passage of time and the advance of science and the medical arts a provision in a statute becomes obsolete and may no longer have practical application, as appears here, courts are not free to substitute a new and different provision in place thereof. To do so here would involve the obligation of defining terms and establishing standards as to what particular drugs and medicines may be sold in licensed pharmacies and what drugs and medicines, if any,

may be sold elsewhere. The important underlying problems here are legislative in nature.[12] It is for the legislature and not the courts to establish policies and standards with reference to the sale of drugs and medicines."

IN RE RICHFIELD FEDERATION OF TEACHERS
263 Minn. ___, 115 N.W. 2d 682
June 1, 1962

Before the court for review was an order of the state labor conciliator, calling for an election by employees of a school district to select a representative to meet with the school board for the purpose of discussing conditions of employment.

The court held that the labor conciliator has no implied authority under Minnesota Statutes, Section 179.52, to specify units of representation for purposes of implementing the provisions of the act governing meetings between public employers and employees. It had this to say about section 179.52 (115 N.W. 2d 684):

> "* * * Since the members of the Association and the Federation are public employees, they are prohibited by law from participating in a strike against their employer, the Richfield School Board. Having been denied the benefits available to employees in private industry under the Labor Relations Act, c. 179, public employees have been accorded the right to pursue grievance procedures prescribed in §§ 179.51 to 179.58. Under § 179.52,
>
> "'* * * public employees shall have the right to designate representatives for the purpose of meeting with the governmental agency with respect to grievances and conditions of employment.* * *' (Italics supplied.)
>
> The statute further provides that when a question concerning the representation of employees is raised, an interested party may request the Conciliator to investigate 'such controversy' and certify the representatives that have been designated. For

this purpose the Conciliator shall conduct an election."

court then concluded (page 685):

"* * * Under the Labor Relations Act applicable to private industry, the Conciliator has the duty of designating the appropriate unit to select a representative to negotiate with the employer. § 179.16, subd. 2. That statute specifically excludes supervisory employees in choosing a bargaining agent. There is no comparable provision authorizing unit representation under the act governing public employees. This may lead to some awkward and unwieldy situations. Large units of government employ many persons whose skills, training, and experience vary greatly, and whose individual duties may range from the most menial assignments to the most highly specialized professional responsibilities. In such situations unit representation would seem logical and desirable. While we leave to future legislatures the task of anticipating and preventing the problems which may result from the failure to authorize unit representation, it is well to point out that nothing in the act prevents public employees from agreeing among themselves on what crafts, professions, or groups shall constitute a unit for purposes of meeting with their employer. If under such circumstances a controversy arises over the percentage of the unit for whom one or more of the designated representatives purports to speak, there is no reason why the jurisdiction of the Conciliator cannot be invoked to investigate and hold an election with a view to certifying the extent of support which each representative has within that particular unit."

Spanel v. Mounds View
School District No. 621, et al
117 N.W. 2d ___
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 of immunity as to some or all units of government for a limited or indefinite period of time."