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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

NOVEMBER 1974

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November 15, 1974

The Honorable Alec G. Olson
President of the Senate

and

The Honorable Martin O. Sabo
Speaker of the House of Representatives

State Capitol
Saint Paul, Minnesota 55101

The Revisor of Statutes transmits herewith her Report to the Legislature as required by Minnesota Statutes, Section 482.09 (9), concerning statutory changes recommended or discussed or statutory deficiencies noted in opinions of the Supreme Court of Minnesota between November 15, 1972, and November 15, 1974.

Respectfully submitted,

Esther M Tomljanovich

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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 the legislature by November 15 of each even numbered year 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 November 15 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 November 15, 1972, and ending November 15, 1974, together with a statement of the cases and the comment of the court, are set forth on the following pages, in the order of the sections discussed.

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IN RE APPLICATION OF SHIPKA, 217 N.W. 2d 511, February 1, 1974

The applicant was granted a bank charter. Several objecting parties appealed to the supreme court. The court noted that Minnesota Statutes, Section 45.07, provides for appeal only in the case of denial of an application for a charter. The court declared the provision a legislative oversight and decided the case on the merits. It observed that, "A legislative clarification would be most helpful". 217 N.W. 2d 511, note 1. The following amendment would accomplish the clarification.

> 45.07 CHARTERS ISSUED, CONDITIONS. If the applicants are of good moral character and financial integrity, if there is a reasonable public demand for this bank in this location, if the organization expenses being paid by the subscribing shareholders do not exceed the necessary legal expenses incurred in drawing incorporation papers and the publication and the recording thereof, as required by law, if the probable volume of business in this location is sufficient to insure and maintain the solvency of the new bank and the solvency of the then existing bank or banks in the locality without endangering the safety of any bank in the locality as a place of deposit of public and private money, and if the department of commerce is satisfied that the proposed bank will be properly and safely managed, the application shall be granted otherwise it shall be denied. ~~In case of the denial of the application,~~ the department of commerce shall specify the grounds for the <u>grant or</u> denial and the supreme court, upon petition of any person aggrieved, may review by certiorari any such order or determination of the department of commerce.

FISHER v. INDEPENDENT SCHOOL DISTRICT NO. 118, 215 N.W. 2d 65, February 1, 1974

Fisher was a tenured school teacher dismissed because her teaching position was discontinued. The school district received her request for a hearing pursuant to Minnesota Statutes, Section 125.12, Subdivision 4, on March 29 and set the hearing for 4:00 P.M. on March 30. Fisher urged that the hearing was untimely and unreasonable. The supreme court agreed. Justice Yetka, in a concurring opinion with three other justices, commented, "I believe much of the fault here lies with the statute. The legislature should not only set out the number of days a teacher may have to request a hearing after notice of proposed termination, but should also have set forth the number of days required for notice to the teacher of the date set for the hearing pursuant to her request for such a hearing." 215 N.W. 2d 70. Amendments to section 125.12, subdivision 4, in 1973 and 1974 did not affect the problem.

FOESCH v. INDEPENDENT SCHOOL DISTRICT NO. 646

Foesch was dismissed because of a reduction in the total number of elementary teachers in the district. She argued that the number of teachers in her grade, the second, was increased. "Discontinuance of position" was then governed by Minnesota Statutes, Section 125, Subdivision 6. It is now governed by subdivision 6b of the same section.

State ex rel. Ging v. Board of Education, 213 Minn. 550, 7 N.W. 2d 544 (1942) classified general teaching positions as primary, intermediate and grammar. The classification has underlain the laws for dismissal because of discontinuance of position in their many changes since 1942. In the Foesch opinion the Ging classification was abandoned and the court alluded to the possibility of legislative clarification.

MINNESOTA BOARD OF BARBER EXAMINERS v. LAURANCE, May 24, 1974

The Board of Barber Examiners sued Laurance, a cosmetologist, to prevent him from trimming men's hair. It cited Minnesota Statutes, Section 155.02, Subdivision 2 which limits cosmetologists to trimming women's hair. The supreme court found the limitation an unconstitutional violation of equal protection, an invasion of the right to follow a common occupation and unjustified by public health, safety or welfare. It described an asserted distinction between trimming and cutting as "nebulous". The objectionable subdivision reads as follows:

> Subd. 2. Any person who engages in the practice, for compensation or other reward, in any one or any combination of the following practices: arranging, dressing, curling, waving, cleansing, singeing, bleaching, coloring, or similar work upon the hair of any living person by any means, or hair trimming of women, as a part of women's hairdressing; the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, aided with the hands or mechanical or electrical apparatus, or appliances used in massaging, cleansing, stimulating, manipulating, exercising, beautifying, the scalp, face, neck, arms, hands, bust, or upper part of the body for the purpose of beautification, shall be defined as and construed to be practicing hairdressing and beauty culture. (Emphasis supplied)

CARLSON v. SMOGARD, 215 N.W. 2d 615, February 22, 1974

Minnesota Statutes, Section 176.061, Subdivision 10, part of the workmen's compensation law, provides that when a third party is sued by an employee, an employer or both, for a compensable injury, the third party cannot seek indemnity or contribution from the employer. The supreme court held this unconstitutional because the third party was deprived by statute of a common law right without a substitute remedy being provided.

The subdivision is designed for a situation in which an employee sues a third party who is in a close contractual relationship with the employer, for instance, a subcontractor. In Carlson v. Smogard, the third party was a complete stranger to the employment relationship. He maintained a serious claim against the employer.

The language of subdivision 10 formerly appeared in subdivision 2 where by a reference in subdivision 4 its effect was limited to described economic relationships. The separation of the language and loss of the limiting reference was caused by Laws 1969, Chapter 936, Sections 3 and 4. The problem could be remedied by moving the language back into subdivision 2 or by reenacting subdivision 10 and adding a reference in subdivision 4. Subdivision 10 having been found unconstitutional it cannot be amended.

PATNODE v. RICHARD OSIER CONSTRUCTION CO., 296 Minn. 478, 206 N.W. 2d 350, April 6, 1973

Two employers were found equally liable for workmen's compensation. Pending their appeal and following the suggestion of the compensation judge one of them made payments to the employee anticipating reimbursement from the other pursuant to Minnesota Statutes, Section 176.191 upon disposition of the appeal. On appeal both employers were found free from liability. The statute provides for reimbursement only when liability is found. Therefore no reimbursement was allowed. This provision is a deterrent to advance payments and could be a burden on injured claimants. The supreme court observed,

> "Corrective legislation should be considered to preserve the commendable practice of advance payments by amending section 176.191 to prevent what has occurred here." 296 Minn. 481

IN RE SCARRELLA, 221 N.W. 2d 562, August 6, 1974

Scarrella and others attempted to file as candidates for judicial office. Their affidavits stated that they were "learned in the law as defined by ... law ...". The supreme court found that "learned in the law" is a phrase to be defined by construction of Article VI, Section 7 of the Constitution. The phrase means admitted or entitled to be admitted to practise as an attorney at law in the State of Minnesota. An amendment of the affidavit to conform to this construction was suggested. Minnesota Statutes, Section 202.04, Subdivision 1, Clause (i) prescribes the form of the affidavit.

MATTSON v. McKENNA, September 6, 1974

Mattson was a candidate for the Democratic Farmer Labor nomination for election as state auditor. The names of candidates were arranged alphabetically in Ramsey and St. Louis Counties and a result of all the circumstances was that Mattson's name never appeared opposite that of the incumbent, convention endorsed candidate for governor, Anderson. The supreme court denied relief to Mattson and advised the legislature of the treatment to be anticipated for problems of this kind.

"5. Although we do not reach the question of feasibility in this case, it may be useful to the legislature to note that in the absence of clear legislative direction corrective action will not be ordered in cases such as this unless we are satisfied that the change can be made in an acceptable way within the time available, at a cost which is reasonable considering the danger of unfairness to be apprehended."

IN RE PETITION OF NISKANEN, August 16, 1974

In an adoption proceeding Bianca Niskanen's petition to adopt her grandchildren was denied and the children were adopted by two other couples. She also asked for rights to visit the children. Since the adoption law contemplates the complete integration of the adopted child into the adopting parents' family there is no provision for visitation in these circumstances. Minnesota Statutes, Section 259.29. Justice Yetka, concurring specially, described the result as "almost barbaric and one literally crying out for some legislative reform."

IN RE ESTATE OF LEA, September 20, 1974

In this will contest, one of the interested parties was allowed to testify about his conversations with the deceased, to show the foundation for his opinion about the competence of the deceased. On appeal, other parties argued that the contents of the conversations had themselves been the basis of the court's decision. Minnesota Statutes, Section 595.04, the "Dead Man's Statute" generally prohibits interested parties from giving evidence of conversations with deceased or insane persons. The statute has been persistently criticized by commentators and courts who point out that it excludes useful evidence that should be admitted subject to the usual methods of testing veracity and establishing weight. In Lea, the supreme court said, "This court in turn urges that the Minnesota Legislature give serious consideration to the repeal of Minn. St. 595.04."

MARIER v. MEMORIAL RESCUE SERVICE, INC., 296 Minn. 242, 207 N.W. 2d 706, May 25, 1973

In this motor vehicle collision case the plaintiff was found 33-1/3 percent negligent. Each of two individual defendants was also found 33-1/3 percent negligent. Minnesota Statutes, Section 604.01 allows recovery when the negligence of the person injured is less than that of the person from whom recovery is sought.

604.01 COMPARATIVE NEGLIGENCE; EFFECT. Subdivision 1. SCOPE OF APPLICATION. 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, <u>if such negligence was not as great as the negligence of the person against whom recovery is sought,</u> but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award. (Emphasis supplied).

The court found that the language of this and the construction of the predecessor Wisconsin Statute, Wis. Stat. 1969, Section 895.045, precluded recovery against either negligent defendant and precluded cumulation of their negligence to escape the limitation on the plaintiff's recovery. To avoid this result when the negligence of the plaintiff and one or more defendants is identical the supreme court suggested an amendment like that accomplished by Laws of Wisconsin 1971, Chapter 47.

"895.045 CONTRIBUTORY NEGLIGENCE. 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~~ greater than 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."

STATE v. WELKE, 216 N.W. 2d 641, March 1, 1974

This case is the Minnesota Supreme Court's most recent encounter with the obscenity problem. In 1973 the United States Supreme Court adopted new constitutional limitations on what may be proscribed as obscene. Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. ed. 2d 419 (1973), and companion cases. The Minnesota court construed a Minneapolis ordinance practically identical to Minnesota Statutes, Section 617.241, to incorporate the new limits.

Justice Otis concurred in the result. Among other observations he asserted that, "the majority opinion adopts the extreme perimeters of laws which the [United States] Supreme Court holds, by way of dictum also, it would tolerate .....". He urged that the ordinance and statute are no longer viable and concluded,

> "In sum, I respectfully protest against abdicating our prerogative and our duty to scrutinize and decide for ourselves these important issues on a case-by-case basis. By pursuing the course we adopt, we deny the public its right to notice of what rules of conduct we intended to consider in this decision. More important, we invade a legal thicket without the benefit of hearings, such as the legislature requires, and without the benefit of a consideration of briefs and arguments by counsel who are experienced and knowledgeable in dealing with this difficult and volatile field of human behavior." (emphasis supplied) 216 N.W. 2d 650

STATE, BY SPANNAUS v. CARTER, 221 N.W. 2d 106, August 2, 1974

In this condemnation proceeding, the condemnee asked to be allowed attorney's fees as part of his damages. The supreme court observed that the matter is governed by statute and reviewed the special situations when attorney's fees are allowed. It did not allow the condemnee's claim. It concluded,

> "We are not unmindful of the plight of the landowner who may be forced to obtain counsel to protect his rights when his property is condemned for public use. In every case, he is an involuntary party to the proceedings and, in many instances, is a reluctant litigant when he refuses to accept the state's offer or the award of the commissioners. Reform in this area appears long overdue. As a taxpayer, a landowner bears part of the expense of the very proceedings brought against him by the state, which includes representation on behalf of the state by the attorney general. Yet, the landowner must bear the cost of his own legal counsel. Appellants' arguments are eloquent and persuasive, but they should be directed to the legislature, not the courts." (Emphasis supplied) 221 N.W. 2d 108

AUTOMOTIVE MERCHANDISE, INC. v. SMITH, 297 Minn. 475, 212 N.W. 2d 678, November 9, 1973

The plaintiff sued Smith under the replevin law to recover personal property. For procedural reasons the defendent was unable to raise any constitutional question on appeal. The supreme court cited Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. ed. 2d 556 (1972) and commented "The Fuentes decision rendered unconstitutional state replevin proceedings where no preseizure hearing was held" 297 Minn. 476, and "We are inclined to observe that the replevin procedures provided by statute in Minnesota do not meet the tests required by the Fuentes case." 297 Minn. 447.