The Minnesota Supreme Court 1961-1962

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The Minnesota Supreme Court

1961-1962

With this Note, the MINNESOTA LAW REVIEW resumes its analysis of recent decisions of the Minnesota Supreme Court [hereinafter referred to as the Minnesota Court or simply the Court]. The cases selected were thought to represent new developments in Minnesota law or otherwise to be of interest to members of the Minnesota Bar. The results reached by the Court have been analyzed and evaluated in terms of their effect upon Minnesota law and, frequently, are compared with the law of other jurisdictions. While the decisions are discussed separately, they are arranged according to the general type of legal issue involved; this arrangement, however, is merely one of convenience since many of the cases involve issues from several areas of the law. The cases discussed were selected from both the 1961 and the 1962 terms of the Court.*

I. CONTRACTS

A. ACCORD AND SATISFACTION: CREDITOR'S ACCEPTANCE OF PART PAYMENT

In Winter Wolff & Co. v. Co-op Lead & Chem. Co., the Minnesota Court declared that whether a debt is liquidated or unliquidated, if the debtor offers a payment that he claims is payment in full, the creditor's acceptance of that offer is an accord.


1. 261 Minn. 199, 111 N.W.2d 461 (1961). This case is discussed in 47 IOWA L. REV. 1103 (1962).
and satisfaction. Plaintiff had partially performed on a contract to deliver a specified amount of copper tubing to the defendant. Upon plaintiff's breach of this contract, a dispute arose as to the amount defendant owed for plaintiff's partial performance. Defendant wrote plaintiff offering to settle the account for a certain amount and enclosed a check that bore the words "payment in full to date." Plaintiff cashed the check and sued for an additional amount. The trial court held that the debt was unliquidated and that the acceptance by the creditor of part payment, by cashing the check, consummated an accord and satisfaction. On appeal, a five to two majority of the Minnesota Court affirmed, stating that even if this had been a liquidated debt, plaintiff's retention and collection of the tendered check would have constituted an acceptance of an offer to settle the indebtedness.

The acceptance by a creditor of a part payment offered by a debtor as payment in full of a past-due unliquidated debt generally constitutes an accord and satisfaction. A majority of courts, however, have refused to apply a similar rule in the case of a liquidated debt. These courts reason that the creditor's promise to discharge a liquidated debt is not supported by legally sufficient consideration. The creditor has neither received anything to which he was not already entitled nor has the debtor incurred any additional legal detriment. Nevertheless, a substantial minority of jurisdictions, as a result of judicial decision or by statute, recognize that a creditor's agreement to accept a lesser sum as full payment

2. A debt is unliquidated if a genuine dispute exists as to the amount due on an account. See, e.g., Oien v. St. Paul City Ry., 198 Minn. 363, 270 N.W. 1 (1936). A debt is liquidated if the amount owed can be exactly ascertained from an agreement or by legal or arithmetic rules. See, e.g., Huo Chin Yin v. Amino Prods. Co., 141 Ohio St. 21, 46 N.E.2d 610 (1943).


5. See 1 WILLISTON, CONTRACTS § 120 (3d ed. 1957).

6. See, e.g., Dreyfus v. Roberts, 75 Ark. 354, 87 S.W. 641 (1905); Clayton v. Clark, 74 Miss. 499, 21 So. 565 (1897); Frye v. Hubbell, 74 N.H. 358, 68 Atl. 325 (1907).

7. See, e.g., CAL. CIV. CODE § 1524; GA. CODE § 20-1204 (1933); ME. REV. STAT. ANN. ch. 113, § 64 (1954); MONT. REV. CODES ANN. § 58-504 (1962); N.Y. PERS. PROP. LAW § 33-b; N.D. CENT. CODE § 9-13-07 (1959); VA. CODE ANN. § 11-12 (1956).
of a liquidated debt will not fail for lack of adequate consideration. In these jurisdictions, a creditor's acceptance of partial payment tendered as payment in full for a liquidated obligation effectuates an accord and satisfaction. The Minnesota Court apparently adopted this position in *Rye v. Phillips*. In the syllabus to that case, the Court said:

The rule [is] discarded that a promise of the creditor to accept and of the debtor to pay something less than the sum due on a liquidated debt is not binding for want of consideration, even though the promise is performed and the debt is formally released.

In the *Winter Wolff* case, both the majority and dissent reaffirmed the dictum of *Rye v. Phillips*; the Court split on the question of whether a creditor's mere retention and collection of the debtor's check for a part of the debt admittedly due, but tendered as "payment in full," is a sufficient acceptance of an offer of settlement to constitute an accord and satisfaction. As to *Rye v. Phillips*, the Court said:

Where two parties in the position of debtor and creditor, having full knowledge of the facts and dealing fairly with each other, settle an account, even though it may be called a liquidated one, by the offer of one party to pay a definite amount and the acceptance of that offer by the other party, there is no logical or legal reason why they should not be permitted to do so.

This statement leaves little doubt that the doctrine of *Rye v. Phillips* is law in Minnesota; as the Court stated, "to now revert to the rule which we had followed prior to the *Rye* case would be a step backward."

According to the majority in *Winter Wolff*, "a creditor's retention of a check offered in full settlement of a liquidated debt by a debtor constitutes an acceptance of an offer to settle the indebtedness."

This language apparently overrules part of the Court's recent holding in *Cut Price Super Markets v. Kingpin Foods, Inc.* In that case, plaintiff sent a check for part of a liquidated claim to the defendant with the notation that it was in full payment of all liabilities. The Court held that negotiation of the check did not constitute an accord and satisfaction. The language in *Winter Wolff*...

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8. See, *e.g.*, Dreyfus v. Roberts, 75 Ark. 354, 87 S.W. 641 (1905); Metropolitan Life Ins. Co. v. Perrin, 184 Miss. 249, 183 So. 917 (1938).
10. *Id.* at 567, 282 N.W. at 459.
11. 261 Minn. at 209, 111 N.W.2d at 467.
12. *Id.* at 208–09, 111 N.W.2d at 467.
13. *Id.* at 209, 111 N.W.2d at 467.
Wolff is difficult to reconcile with the Court's requirement in Cut Price that a mutual agreement or compromise is necessary to support an accord and satisfaction.\textsuperscript{15} Although the Court attempted to distinguish Cut Price on the grounds that in that case "other things were involved than the settlement of a liquidated debt,"\textsuperscript{16} the underlying facts of the two cases are essentially identical—both cases involved the retention by a creditor of a check offered by a debtor in full satisfaction of a liquidated debt.\textsuperscript{17}

As a result of the decision in Winter Wolff, when a check is sent by a debtor to a creditor for a sum admittedly due upon the condition that it be accepted in full payment of a claim, liquidated or otherwise, the creditor may reject the offer and return the check, or he may accept and cash the check. The former may be bothersome and frustrating to the creditor, but if he accepts and cashes the check, with knowledge of the condition, an accord and satisfaction results, and the debtor cannot be held for any deficiency.

In a strong dissent, Justice Otis refused to accept this result because he felt that "under circumstances such as these there is no logical reason why the creditor should not retain what . . . belongs to him, without forfeiting his right to sue for the balance."\textsuperscript{18} He also objected to the application of the Rye v. Phillips dictum because Rye concerned an express agreement, whereas in Winter Wolff the creditor merely retained a check that was tendered by the debtor as "payment in full." All prior Minnesota decisions finding an accord and satisfaction involved some type of express promise or mutual agreement between the parties to settle a liquidated or unliquidated debt.\textsuperscript{19}

\textsuperscript{15} The rule has always been clear that the mere retention by the creditor of money to which he is entitled absolutely will not amount to an accord and satisfaction although tendered or transmitted to him as payment in full of demand. In an accord and satisfaction, it is the mutual agreement of the parties to the terms of the compromise and not the dispute which furnishes the consideration for the release. In this case the defendant paid what he admitted to be due and no more. This did not even present a compromise nor can it be an accord and satisfaction.

\textsuperscript{16} Id. at 356, 98 N.W.2d at 269.

\textsuperscript{17} 261 Minn. at 209, 111 N.W.2d at 467.

\textsuperscript{18} Although the debt in Winter Wolff was in fact determined to be unliquidated, the Court assumed it to be liquidated for the purpose of affirming the dictum in Rye v. Phillips.

\textsuperscript{19} See, e.g., Beck Elec. Const. Co. v. National Contracting Co., 143 Minn. 190, 173 N.W. 413 (1919). In Rye v. Phillips, which was the sole basis for the position taken in Winter Wolff, the Court was dealing with an expressly adopted new contract. Cf. Shema v. Thorpe Bros., 240 Minn. 459, 465, 62 N.W.2d 86, 90 (1954), where the Court stated that
Instead of allowing summary judgment in favor of a debtor merely upon the stipulation that the creditor knowingly accepted a check marked "payment in full" for an amount admittedly due him, the dissent would adhere to the approach of the *Cut Price* case and require proof of an actual mutual agreement to support any accord and satisfaction, whether the debt was liquidated or otherwise. This position would discourage the "overreaching debtor" from withholding what is actually owing the creditor in situations where economic necessity relegates the creditor to an unequal bargaining status. Such may be the case where an employee's fear of losing his means of livelihood or his lack of reserve funds may prevent him from protesting a deficiency in his paycheck or where a financially burdened beneficiary of an insurance contract may, out of necessity, accept a part payment and later be unable to collect the amount actually payable. The position of the dissent, that both parties should actually have a voice in framing a settlement, would substantially lessen the danger of economic coercion in such situations.

B. INFANT DONEE BENEFICIARY: RESCISSION OF EXECUTORY CONTRACT

In *Lehman v. Stout*, the Minnesota Court determined that an executory contract to convey real property to an infant, third party donee beneficiary who has not actually acted in reliance on the contract may be rescinded without his assent. Appellants orally agreed to provide a home for testator, to operate his farm, and to maintain a household for him during his lifetime. In return, the testator promised to pay to the appellants "good wages" and to convey the southwest quarter section of his land to the appellant.

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20. Where the parties negotiate and reach a mutually agreeable compromise, with or without consideration, each having had a voice in considering and framing the terms of the proposed settlement, it should end the controversy.


22. "Cases in this category [insurance contracts] show a greater awareness by the courts of the existence of the overreaching debtor, perhaps because the relative inequality of bargaining power is unmistakable." *Id.* at 105.

lant's minor son. Subsequently, the parties entered into a written contract providing that the appellants were to care for the testator for the rest of his life; at the same time, the testator conveyed the northwest quarter section of his land to the appellants. After the death of the testator, his executor challenged appellants' title to the northwest quarter section. The trial court found for the executor on the ground that the written contract and conveyance, by imposing substantially the same duty upon appellants as that required by the oral agreement, was not supported by consideration. On appeal, the Minnesota Court reversed, holding that the oral agreement was integrated into the written contract, and the consideration for the oral agreement had been modified by the parties and substituted as consideration for the written contract. At the time the written contract was executed, the minor son did not have a vested interest; therefore, the parties to the original contract could rescind it by mutual agreement.  

Where two parties enter into a contract for a third party donee beneficiary, a majority of courts have held that the contracting parties may rescind their contract at any time prior to acceptance or reliance upon the contract by the donee beneficiary.  

24. The trial court also awarded the southwest quarter section of the testator's land to the appellants' minor son pursuant to the terms of the original agreement. The validity of this determination was not attacked in the appeal. The Court said:

We recognize that there has been no appeal from the judgment awarding the southwest quarter to James [the minor son] and intimate no opinion as to whether our decision will have any effect on that judgment.

261 Minn. at 392, 112 N.W.2d at 646. MINN. STAT. § 605.08 (1961) allows only six months after the entry of a trial court judgment for appeals from the district courts. Unless the executor can sustain a motion to open up the judgment on the oral agreement under MINN. R. CIV. P. 60.02, the appellants will receive the benefit of both the oral and written contracts.  


26. See, e.g., Pruitt v. Pruitt, 91 Ind. 595 (1883); Logan v. Glass, 136 Pa. Super. 221, 7 A.2d 116 (1939); Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440 (1903); RESTATEMENT, CONTRACTS § 142 (1932).

The rights of a beneficiary under a life insurance policy have uniformly been held to be vested, and they may not be rescinded by the insured unless a power to rescind is reserved in the policy. See 2 WILLISTON, CONTRACTS § 396 (3d ed. 1959). But see McCulloch v. Canadian Pac. Ry., 53 F. Supp. 534, 545 (D. Minn. 1943), where Judge Nordbye said:
not be revoked without the donee's consent, and since the purpose of a third party donee beneficiary contract is in essence a gift of a contract right, some courts have treated it in the same manner as a gift of property. This reasoning is especially strong as to the infant donee beneficiary since an infant assumedly possesses less knowledge in contractual matters than does his adult counterpart. However, this gift analogy does not control in the normal contract setting. Generally, when a gift is executed, the donee accepts the gift and obtains possession from the donor. There is then some form of delivery and an element of reliance through continued possession, a factor usually not present in a donee beneficiary contract situation.

The Court in Lehman, in determining that the oral contract could be rescinded, thus terminating the rights of the infant donee beneficiary, relied upon the early Minnesota case of Emkee v. Ahston. In Emkee, a farm was conveyed by parents to their son in return for his promise to make payments after his parents' death to his brothers and sisters, these obligations being made liens on the land. Two years later, the farm was reconveyed by the son to the parents, who subsequently conveyed it to a third party purchaser. The latter sued to remove the liens representing the interests of the brothers and sisters. The Court affirmed a trial court determination in favor of the purchaser, holding that the liens were terminated by the reconveyance to the parents, and stated that "to be irrevocable and beyond recall the transaction must be fully completed ...." In applying the Emkee decision to the facts of the Lehman case, the Court determined that since the oral contract between the appellants and the testator had not

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27. BROWN, PERSONAL PROPERTY § 38 (2d ed. 1955).
28. See Pruitt v. Pruitt, 91 Ind. 595 (1883); CORBIN, CONTRACTS § 814 (1950).
31. 139 Minn. 443, 166 N.W. 1079 (1918).
32. Id. at 445, 166 N.W. at 1079.
been fully performed at the time of the execution of the written contract, the parties were free to terminate the interest of the infant donee beneficiary under the oral contract.

The Court's reliance on the *Emkee* case indicates that Minnesota will continue to follow the majority rule that an executory contract on behalf of an infant donee beneficiary may be rescinded by the parties at any time prior to acceptance or reliance by the donee beneficiary.33 Furthermore, the fact that the Court discounted the possibility of detrimental reliance by the infant donee beneficiary because of his very youth34 shows that it is unwilling to presume acceptance on the part of such donee beneficiary.35 Consequently, infant donee beneficiaries will be afforded no greater protection than their adult counterparts in Minnesota.

C. RELEASE AGREEMENTS: VACATING FOR MISTAKE OR IMPROVIDENCE

In two recent decisions involving the setting aside of release agreements, the Minnesota Court reached divergent results. In *Doud v. Minneapolis St. Ry.*,36 the Court vacated a stipulation of settlement made pursuant to a release agreement under a mutual mistake. A minor was injured while riding as a passenger in an automobile that collided with the defendant's bus. After long periods of hospitalization and examination, he executed a court-approved compromise and settlement releasing the defendant from all claims for damages.37 Several months later, he died of a heart

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33. The Court did indicate, however, that in the case of insurance policies, unless the right to change the beneficiary is reserved, the rights of the beneficiary are vested and may not be rescinded. 261 Minn. at 393, 112 N.W.2d at 646. See Stahel v. Prudential Ins. Co., 189 Minn. 405, 249 N.W. 713 (1933).

34. The Stouts testified that James helped Coleman dress and undress, assisted him in getting in and out of bed, and occasionally operated the farm machinery. However, inasmuch as James was 6 years old when he moved to Minnesota, these services were only those which any child would perform for a member of the family and were certainly not rendered in reliance on Coleman's commitment under the contract with the Stouts.

261 Minn. at 393, 112 N.W.2d at 646.

35. See note 27 *supra* and accompanying text.


37. The release freed the defendant from:

. . . all liability, claims, suits, causes of action or demands arising out of and resulting from injuries, known and unknown and which may arise or become known in the future, together with all consequences of known or unknown injuries whether such consequences are now anticipated or not. . . .

*Id.* at 345–46, 107 N.W.2d at 524. The defendant paid only $3,745.50 under the settlement; at the time of the boy's death, additional damages, in-
injury resulting from the accident. The Court found that this heart injury was neither known nor contemplated by the parties at the time they executed the release. In Schoenfeld v. Buker, however, the Court found that the trial court had not abused its discretion in refusing to set aside a stipulation of dismissal on the grounds of mutual mistake and improvidence. Appellant had been involved in an automobile accident and was being sued by five persons injured in the accident whose total claims far exceeded the limits of his liability insurance coverage. On the advice of counsel, the appellant agreed to a compromise settlement, and in a stipulation of dismissal, released any cause of action that may have accrued to him as a result of the accident. Three years later, apparently as a result of an injury caused by the accident, appellant went blind and sought to have the stipulation of dismissal set aside. The Court denied his motion, finding that neither mutual mistake nor improvidence was present.

A stipulation of settlement may be set aside (1) for fraud or collusion, (2) for mistake, or (3) for improvidence. In the Doud and Schoenfeld cases, the Court considered only the latter two grounds. A release executed as part of a settlement of a personal injury claim can be vacated for mutual mistake if the discovery of an unknown injury indicates that both parties were mistaken at the time of the release as to the extent of the injuries.

cluding hospital and doctor bills arising from the unknown injury that resulted in his death, were in excess of $8,000.

38. Death followed an operation to remove a thoracic aneurysm, a "circular out-pouching of [the] aorta . . . [which] results in a lateral pressure upon the tissue surrounding the aortic artery . . . ." Id. at 344, 107 N.W.2d at 523.

39. 114 N.W.2d 560 (Minn. 1962).

40. The claims against the appellant totaled over $100,000; the extent of appellant's insurance coverage was $40,000. The settlement was for $19,125. Id. at 563–64.

41. The stipulation of dismissal provided that:

I [appellant] do hereby release and forever discharge Dorothy Buker and Edwin Buker from all claims, demands and right of action whatsoever, which I ever had, which I now have or can have on account of injury or injuries both known and unknown to person, damage to property, loss of services and medical expense sustained by me . . . .

Id. at 562. Compare the release agreement in the Doud case, note 37 supra.

42. Keller v. Wolf, 239 Minn. 397, 399, 58 N.W.2d 891, 894 (1953).

43. See Aronovitch v. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953); Larson v. Stowe, 228 Minn. 216, 36 N.W.2d 601 (1949); accord, Clancy v. Pacenti, 15 Ill. App. 2d 171, 145 N.E.2d 802 (1957); Denton v. Utle, 350 Mich. 332, 86 N.W.2d 537 (1957); Kirchgestner v. Denver & R.G.W.R.R., 118 Utah 20, 1218 P.2d 685 (1950), rev'd on other grounds on rehearing, 118 Utah 41, 1233 P.2d 699 (1951); Doyle v. Teasdale, 263 Wis. 328, 57 N.W.2d 381 (1953). A release may be set aside for unilateral mistake only if there has been concealment, or at least knowledge, on the part of one
Even though a release purports to bar recovery for both known and unknown injuries, it will not be effective if other evidence indicates that the parties did not intend to settle all such unknown claims; whether the parties so intended is usually a question of fact.\(^4\)

In the *Doud* case, the evidence showed that at the time of the execution of the release, neither party knew of the heart injury that resulted from the accident and ultimately caused the death.\(^4\) For this reason, the express language of the release barring claims for unknown injuries was ignored and the release was vacated. In *Schoenfeld*, however, the Court stressed the fact that during the negotiations for the settlement, the respondents had neither requested a medical examination of the appellant nor otherwise attempted to obtain information as to his claimed injuries. Accordingly, the Court felt that the settlement was based upon "full consideration and evaluation of all its features" rather than upon a mistaken medical prognosis.

To establish improvidence as a ground for vacating a release, a party must show that his "absence of calculation or a thoughtless exercise of discretion" brought about an inequitable result "that in good conscience ought not to be allowed to stand."\(^7\) Important considerations include the seriousness of the injury, the extent of the damages, and the likelihood of being able to establish a right of recovery.\(^8\) In the *Schoenfeld* case, the Court rejected the appellant's contention that the settlement was improvident on the party that the other is mistaken as to a material fact. See Keller v. Wolf, 239 Minn. 397, 58 N.W.2d 891 (1953); Hanson v. Northern States Power Co., 198 Minn. 24, 268 N.W. 642 (1936); Nadeau v. Maryland Cas. Co., 170 Minn. 326, 212 N.W. 595 (1927); RESTATEMENT, CONTRACTS § 503 (1932). The Court in *Schoenfeld* refused to apply the doctrine of unilateral mistake because it found that the respondents had not taken advantage of the appellant's mistake for the purpose of enriching themselves.

\(^4\) Even though a release expressly covers unknown injuries, it is not a bar to an action for such unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when the settlement was agreed upon, but that, if the parties did in fact intentionally agree upon a settlement for unknown injuries, such release will be binding. Aronovitch v. Levy, 238 Minn. 237, 246, 56 N.W.2d 570, 576 (1953). See Larson v. Stowe, 228 Minn. 216, 36 N.W.2d 601 (1949).

\(^5\) Aronovitch v. Levy, 238 Minn. 237, 246, 56 N.W.2d 570, 576 (1953).

\(^6\) Prior to the deceased's release from the hospital, a chief surgeon had suspected the presence of a thoracic aneurysm. However, there was no evidence that this suspicion had been conveyed to the deceased's personal physician.

\(^7\) Keller v. Wolf, 239 Minn. 397, 402, 58 N.W.2d 891, 895 (1953).

\(^8\) *Id.* at 403, 58 N.W.2d at 896.
ground that respondents' lowering of their claims to come within the appellant's insurance limits constituted a distinct benefit to the appellant. The Court noted that if no settlement had been made, the appellant might well have been liable to the respondents in excess of his insurance coverage.49

The different results in the Doud and Schoenfeld cases can be explained in terms of judicial policy.60 In Doud the party releasing claims for injury was a minor who had been hospitalized intermittently for treatment and observation for a period of eighteen months. The economic pressures of such long periods of disability and hospitalization may result in rash and imprudent settlements.61 In recognition of this problem, the Court in Doud admittedly applied "a more liberal rule" to set aside the release than it did in Schoenfeld.62 In Schoenfeld, the appellant had bargained for a release solely to escape the likelihood that a court would find him liable for damages exceeding the limits of his insurance

49. The record indicates that appellant was well aware of the fact that the Buker car had the directional right-of-way. A reading of the record leads to the conclusion that plaintiff's own insurance carrier and its attorney, as well as his own personal counsel, in their evaluation of the probable liability in view of the circumstances of the accident believed that the primary responsibility was appellant's. This conclusion is supported by the fact that his personal attorney joined in signing the stipulation. 114 N.W.2d at 564.

50. Another explanation for the different results is that in both cases the Court was affirming a judgment of the trial court. As the Court said in its syllabus in Schoenfeld, "the vacation of stipulations is a matter resting largely in the discretion of the trial court and its action will not be reversed unless it can be shown that the court acted in such an arbitrary manner as to frustrate justice." 114 N.W.2d at 561.

51. Sometimes advantage has been taken of his [claimant's] weakness and ignorance; and the possibility of this, even though not definitely proved, has made courts readier to hold that the release was executed on a mistaken basic assumption as to the nature of the injury.

3 Corbin, Contracts § 598, at 587 (1950).

52. The Court in Doud adopted the policy set forth in a prior Minnesota case, Larson v. Stowe, 228 Minn. 216, 36 N.W.2d 601 (1949):

In the case of prolonged disability from injuries, the compelling need for immediate cash provides an economic compulsion that may lead to hasty and improvident settlements, even though fraud and undue influence be wholly absent. It is submitted that by reason of the special interest of the public in preventing injured persons from unnecessarily becoming burdens upon society in consequence of their improvident settlement of injuries, the well-developed tendency of the law—which though acknowledged in practice is usually not acknowledged in name—is to adopt a more liberal rule for the setting aside of releases in these cases than otherwise obtains. 259 Minn. at 347, 107 N.W.2d at 525.
coverage. The economic pressure behind the release resulted from appellant's fear of excess liability rather than from a need for immediate financial assistance; the Court was understandably reluctant to allow appellant to attack the validity of a release that was currently protecting him from liability.

D. USURY: GUARANTOR OF CORPORATE OBLIGATIONS NOT ENTITLED TO USURY DEFENSE

In Dahmes v. Industrial Credit Co., the Court interpreted the Minnesota statute that precludes a corporation from interposing the defense of usury in an action to enforce a debt to also prohibit individual guarantors of corporate obligations from asserting the defense of usury. Defendant made a loan to a corporation secured by an assignment of the accounts receivable. Plaintiffs, who were the sole stockholders of the corporation, entered into a separate agreement with the defendant, designated as a guaranty of the corporate obligations, that made plaintiffs' liability direct and unconditional. As further security for this agreement, plaintiffs executed two promissory notes that were secured by two real estate mortgages. Plaintiffs brought an action to have these notes and mortgages declared void because they provided for a usurious rate of interest. The trial court found that the loan was made to the plaintiffs rather than to the corporation and thus held the notes and mortgages void. The Minnesota Court reversed the trial court's finding and held that the loan was made to the corporation and the plaintiffs were only guarantors of that obligation.

States may regulate interest rates through the enactment of usury laws by virtue of their police powers. Such laws are a recognition of the inequality in bargaining power that may exist between the borrower and the lender, and their purpose is to protect

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53. 261 Minn. 26, 110 N.W.2d 484 (1961).
54. MINN. STAT. § 334.021 (1961): No corporation shall hereafter interpose the defense of usury in any action. The term "corporation," as used in this section, includes any association or joint stock company having any of the powers and privileges of corporations not possessed by an individual or a partnership.
55. The trial court also found that the notes were given without consideration and that one note and one mortgage were procured by the fraud of the defendant. The Minnesota Court reversed the trial court on these findings as well as on the question of usury.
56. The Court handed down an opinion on October 21, 1960, affirming the trial court. That opinion was subsequently withdrawn, and on September 8, 1961, this opinion was substituted for it. Justice Thomas Gallagher wrote a dissenting opinion.
the impecunious individual from borrowing beyond his ability to repay. Several states have now enacted statutes depriving corporations of the defense of usury. Such statutes have been held constitutional if they are not arbitrary and apply to all corporations equally. The denial of the defense of usury to corporations is justifiable because a corporation is usually in an equal bargaining position with its lender since it generally borrows to engage in a profitable business venture rather than to avoid financial ruin. Stockholders of a corporation are protected from the consequences of ruinous debt by their limited liability and, thus, do not need the protection of usury laws. Furthermore, in a capitalistic economy, corporations should be free to pay whatever rate of interest is necessary to attract capital to finance speculative business ventures.

The determinative issue in the Dahmes case was whether the plaintiffs were primarily or secondarily liable for the corporate debt. The plaintiffs contended that they should be allowed to plead usury as a defense because the loans were made to them personally rather than to the corporation or, alternatively, because they were co-obligors with the corporation and primarily rather than secondarily liable on the notes. The Court, however, concluded that there was no evidence to support plaintiffs' claim that the loans were made to them personally. The majority and the

58. See generally Kelso, Social and Economic Background of the Small Loan Problem, 8 LAW & CONTEMP. PROB. 14 (1941); Legislation, 24 FORDHAM L. REV. 715, 716 (1956).
63. There is no showing that the proceeds of the loans went to the plaintiffs individually rather than to the corporation as working capital. To the contrary, the indebtedness of the corporation to the plaintiffs was subordinated to the claim of the defendant against the corporation. The very nature of the transaction, i.e., accounts receivable financing, indicates that the loans were genuine corporate obligations. The factual situation here is substantially different from that in cases where the corporation is specifically formed to act as a conduit for borrowed funds or is otherwise used for the obvious purpose of circumventing the usury laws.

261 Minn. at 32, 110 N.W.2d at 488.
dissent agreed that where a statute makes the defense of usury unavailable to a corporation, it is also unavailable to a surety, guarantor, or endorser, of the corporate indebtedness. However, if an individual is a co-maker of a note or a co-obligor of the indebtedness and therefore primarily liable, he may avail himself of the defense of usury. The reasoning underlying this distinction is that since the principal obligation of the corporation is not subject to the defense of usury, it is not affected by the agreement of the guarantor who assumes the full contract of the corporation, where the individual is primarily liable, however, he does not assume the obligation of the corporation, but undertakes a liability of his own.

By the terms of the alleged guaranty agreement, plaintiffs' liability was to be "direct and unconditional" and enforceable without requiring defendant "first to resort to any other right, remedy or security." The Court recognized that the mere formal designation of an agreement as a "guaranty" does not make it such, but a guaranty may be either conditional or absolute. Under a conditional guaranty, the guarantor becomes liable only upon the happening of some stated contingency; an absolute guarantor becomes liable merely upon default of the debtor. The Court construed the language of the agreement to mean only that plaintiffs were absolute guarantors and not that they were primarily liable for the corporate obligation.

Justice Thomas Gallagher, in dissent, contended that the language of the contract made clear the intent of the parties to make plaintiffs co-obligors. He feared that lenders will seize upon this decision to legally charge usurious interest to owners of small corporations. If an individual owner of a small corporation desires a loan for personal use, a lender could compel him to borrow


68. The Court noted that unless there is language clearly indicating that a guaranty is to be conditional, it will be considered absolute. See Holbert v. Wermerskirchen, 210 Minn. 119, 297 N.W. 327 (1941).
through the corporation and then individually guarantee repayment; thus, the borrower would not be able to assert the defense of usury. This problem can be alleviated, however, if the Court will inquire into the transaction to determine whether the loan was in fact made to the individual and whether the proceeds of the loan were used for personal or corporate purposes. The Court did make this inquiry in Dahmes; continued surveillance should be sufficient to preclude the result feared by the dissent.

E. USURY: USURIOUS INTEREST NOT A REASONABLE EXPENSE OF OBTAINING MONEY LENT

In Kroll v. Windsor, the Minnesota Court held that usurious interest incurred by a lender incident to making a loan could not be charged to the borrower as an actual and reasonable expense of obtaining the money lent to the borrower. Plaintiff transferred certain lots to a third party for 3,900 dollars and concurrently signed a contract for deed to repurchase the same lots in six months for 4,850 dollars plus five percent interest. Out of the proceeds of this transaction, plaintiff lent 2,000 dollars to the defendant, who agreed to repay 2,450 dollars plus five percent interest in six months. The defendant failed to repay the loan. When plaintiff brought suit to recover the principal and the interest, defendant alleged that the loan agreement was usurious and therefore void. The trial court, on the basis of amended findings, ordered judgment for plaintiff. On appeal, the Minnesota Court reversed, reasoning that since the plaintiff could recover the usurious interest she paid to her lender, she should not be reimbursed for this amount from her borrower.

To establish that a loan transaction is usurious, a borrower must prove that he is under an unconditional obligation to repay a sum of money plus interest that is in excess of the legal rate. He need not prove that the lender intended to charge a usurious rate; when it is established that the rate is usurious, an unlawful intent is presumed. The loan agreement in the Kroll case provided that

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70. 259 Minn. 200, 107 N.W.2d 53 (1960).
71. Under MINN. STAT. § 334.03 (1961), all usurious contracts are void.
72. Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944).
the defendant was to pay over 500 dollars for the use of 2,000 dollars for six months—an amount far in excess of the eight per-cent statutory maximum.

A lender can avoid the defense of usury by proving that those charges assessed the borrower in excess of the maximum rate of interest were necessary to reimburse the lender for the actual and reasonable expenses incident to the loan.

The general rule is that a loan is not rendered usurious by the fact that the borrower is required to pay a reasonable compensation in excess of interest for services and expenditures incurred by the lender in connection with the loan, where there is no intent to evade the law, and the required payment does not result in giving to the lender a greater return for the use of the money than is allowed by law.74

Such expenses include those that the lender incurs in securing the money lent.75 In Kroll, the only expense plaintiff incurred incident to the loan was the 900 dollar cost of securing and using the 3,900 dollars from which she subsequently made the loan to defendant. The trial court found that the transaction in which plaintiff acquired this money amounted to a loan from a third party; thus, the interest that plaintiff paid was an expense incident to the loan, and she could seek reimbursement from the defendant for the bonus paid with respect to the money lent to him.76

The Minnesota Court assumed that the trial court's finding as to the nature of the transaction between the plaintiff and the purchaser of the lots was correct, but held that the usurious interest charges paid by the lender could not be considered an actual and reasonable expense incident to the loan that could be passed on to the borrower. The Court believed that to allow the lender to collect for this expense would frustrate the legislative policy underlying the usury statute. The plaintiff's so-called "expenses" were not

74. Hatcher v. Union Trust Co., 174 Minn. 241, 244, 219 N.W. 76, 77-78 (1928). See also Annot., 105 A.L.R. 795 (1936); Annot., 63 A.L.R. 823 (1929); Annot., 53 A.L.R. 743 (1928); Annot., 21 A.L.R. 797 (1922). For a thorough discussion of additional circumstances under which a borrower may legally be charged more than the maximum interest rate in a given transaction, see Chakales v. Djiovanides, 161 Va. 48, 170 S.E. 848 (1933).

75. See Stevens v. Staples, 64 Minn. 3, 65 N.W. 959 (1896).

76. The trial court found that the extra $450 charged to the defendant "represented one-half (½) of the cost to plaintiff of the loan made" to her, and "that at the time the defendant obtained said loan of $2000 from the plaintiff, he understood that said sum of $450 was to be paid by him to the plaintiff so that he would bear one-half (½) of the cost to the plaintiff of the loan made" to her. Record, vol. 9, p. 53. The trial court had originally found the transaction to be usurious and void, but it later reversed its decision and held its original findings to be not sustained by the evidence.
expenses at all, for under the Minnesota usury law, she was not bound to repay either the principal or the usurious interest charged to her.\(^{77}\) and if she already paid them, she could recover the full amount of the interest charged.\(^{78}\) The Court concluded that if it allowed plaintiff to recover, she could then recover the interest she had paid to her lender, and "thus be enriched far beyond the rate permitted by statute."\(^{79}\)

Although the Court treated the plaintiff's method of raising the money to lend to the defendant as a loan agreement, it indicated in dictum that the result of the case would have been the same if the transaction were viewed as a sale and repurchase agreement. The Court reasoned that:

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\text{[If the transaction by which plaintiff secured the money which she loaned was not in itself a loan but was, as it appeared to be on its face, a sale of certain lots with a right to repurchase them at a greater price, then the difference in sales and purchase prices was not a cost to plaintiff of obtaining the money loaned. In that event, this amount would not be an actual expense to plaintiff of the loan to defendant, and the agreement between the parties would be clearly usurious.}^{80}\]

This reasoning seems to ignore the case of *Stevens v. Staples*,\(^{81}\) where the lender sold certain securities to procure funds to be lent to the borrower. The Minnesota Court held that a bonus paid to

\(^{77}\) See Minn. Stat. § 334.03 (1961).

\(^{78}\) See Minn. Stat. § 334.02 (1961).

\(^{79}\) 259 Minn. at 202, 107 N.W.2d at 55. Apparently no other state has decided whether a lender may transfer usurious interest to a borrower. In Chakales v. Dijovanides, 161 Va. 48, 86, 170 S.E. 848, 861 (1933), the Virginia court cited Shirley v. Spencer, 9 Ill. (4 Gilm.) 583 (1847), as authority for the view that, if the lender is forced to pay a usurious rate of interest to get the money to be loaned by him to the borrower, he may contract with the borrower to make good to him the excess above lawful interest actually paid by him without rendering the loan made by him usurious.

In *Shirley v. Spencer*, a debtor authorized his creditor to borrow enough money to cover their debt on the best available terms; the creditor was subsequently allowed to recover the amount of the debt plus usurious interest he paid to a second lender. The Illinois court has interpreted the Shirley case to mean only that an agent who borrows money for his principal at usurious rates and subsequently repays the loan with interest can recover the full amount paid, despite the usurious nature of the loan agreement. Shirley v. Welty, 19 Ill. 622 (1858). There is no indication that the Illinois court would expand the rule of these cases to the extent suggested in Chakales. Under Illinois law, however, a borrower cannot recover usurious interest already paid; therefore, the argument of the Minnesota Court that usurious interest paid by a lender to secure funds lent to a borrower does not constitute an expense to the lender would be unavailable. See Ill. Rev. Stat. ch. 74, § 6 (1961), Cook v. Wolf, 296 Ill. 27, 129 N.E. 556 (1921), Carter v. Moses, 39 Ill. 539 (1864).

\(^{80}\) 259 Minn. at 202, 107 N.W.2d at 55-56.

\(^{81}\) 64 Minn. 3, 65 N.W. 959 (1896).
the lender as reimbursement for losses sustained in this sale did not constitute usury, even though it brought the compensation paid for the loan above the legal limit. Since the plaintiff in Kroll had signed a contract for deed, she was obligated to repurchase the lots by the time of the trial as a loss, and the transaction was very similar to that in the Stevens case.

If the transaction in Kroll is viewed as a sale and repurchase agreement rather than a usurious loan, the loss accruing to the lender as a result of the transaction should be treated as a reasonable expense incident to the loan of the money. Requiring the borrower to compensate the lender for such a loss shows "no intent to evade the law" and "does not result in giving to the lender a greater return for the use of the money than is allowed by law"; therefore, it is not contrary to the policy of the usury statute. Thus, the dictum of the majority in Kroll seems too broad if applied to all sale and repurchase agreements.

82. This issue was raised on demurrer, and the Court held that this was improper procedure; after a subsequent trial on the merits, the Court sustained a finding that the bonus was intended to reimburse the lender for expenses incurred in procuring the money lent to the borrower. Stevens v. Staples, 69 Minn. 178, 71 N.W. 929 (1897).


84. Justice Thomas Gallagher and Chief Justice Dell dissented, stating that Stevens v. Staples governed this case. The dissent, however, addressed itself only to the dictum of the majority without indicating whether it adopted the interpretation of the sale and resale necessary to support the dictum. If the dissenters meant to accept the trial court's interpretation of the transaction, they ignored the majority's strong argument that usurious interest paid by a lender should not be considered an actual and reasonable expense of the lender in procuring the funds involved.

85. The device of a sale and repurchase agreement can be used very easily to disguise a usurious interest charge. Courts should scrutinize such agreements carefully to be certain that they have a legitimate purpose and are not merely a device to exact more than the legal rate of interest. In Kroll, the great disparity between the sale and the repurchase prices and the short duration of the agreement indicate an attempt to avoid the usury statute.

86. It could be argued that since the repurchase provision is for the lender's benefit, it is not an expense of the loan that can be assessed to the borrower. Cf. Smith v. Eason, 223 Ark. 747, 268 S.W.2d 389 (1954), where the lender mortgaged some of his real estate to obtain the money lent; the Arkansas court concluded that the expenses for examination and preparation of an abstract and for legal advice in preparing a note and mortgage were incurred by the lender for his own benefit and could not be charged to the borrower as a reasonable expense of procuring the money lent. This case seems unsound because at least the legal expenses would not have been incurred if the loan had not been made; likewise, the repurchase agreement, although for the lender's benefit, would not be made absent the subsequent loan.

87. See text accompanying note 74 supra.
II. CRIMINAL LAW

A. DOUBLE JEOPARDY: INDICTMENT FOR ASSAULT FOLLOWING BURGLARY ACQUITTAL BASED ON SAME OCCURRENCE

In State v. Robinson, the Minnesota Court examined the constitutional prohibition on double jeopardy and the application of collateral estoppel to criminal prosecutions. The defendant was charged with second degree burglary in 1959 pursuant to an indictment alleging that he broke and entered complainant's home with the intent to assault her daughter, but he was acquitted after a jury trial. In 1960, defendant was indicted for indecent assault arising from the same occurrence. The defendant moved to dismiss the second indictment on the ground that it constituted double jeopardy and was barred by the doctrine of res judicata. The trial court denied the motion, but certified the question to the Minnesota Court. The Court, citing State v. Hackett, summarily dismissed the double jeopardy issue, but it did consider whether implicit in defendant's acquittal from the burglary charge was a finding that he had established an alibi that would bar a subsequent prosecution for assault because of the operation of res judicata or collateral estoppel. The Court held that if only one issue is raised by a defendant in a criminal prosecution and that issue is adjudicated in

1. 114 N.W.2d 737 (Minn.), cert. denied, 371 U.S. 815 (1962).
2. The subject of both the 1959 and 1960 indictments was an entry into complainant's home in 1959. In June of 1960, someone again "invaded" complainant's home. Defendant was then apprehended. He was not indicted, however, for the 1960 entry.
3. MINN. CONST. art. I, § 7, implemented by MINN. STAT. § 610.21 (1961). The Court specifically expanded the question to include a consideration of the fifth and sixth amendments to the United States Constitution.
4. Defendant had also moved to dismiss the 1960 indictment on the ground that he was denied a speedy trial under U.S. CONST. amend. VI and MINN. CONST. art. I, § 6, because he was not taken into custody or indicted until more than a year after the alleged offense. This question was also certified. The Court rejected this contention, stating that the primary purpose of the constitutional guarantee of a speedy trial is to protect against prolonged incarceration after a defendant is taken into custody, and therefore, it does not attach before a defendant is taken into custody. 114 N.W.2d at 743.
5. 47 Minn. 425, 50 N.W. 472 (1891). Hackett held that MINN. STAT. § 621.12 (1961) authorized a prosecution and conviction for grand larceny subsequent to an acquittal for a concomitant burglary. The Court expressly declined to overrule this decision despite defendant's contention that it is "archaic." 114 N.W.2d at 739.
6. While it is somewhat unclear what interrelation the Court in Robinson ascribed to the two doctrines, it seemed to adhere to the view of the United States Supreme Court in Hoag v. New Jersey, 356 U.S. 464 (1958), that collateral estoppel is an aspect of the broader doctrine of res judicata. 114 N.W.2d at 740–41.
his favor, the adjudication is conclusive in any subsequent criminal action. The case was remanded with leave to the trial court to dismiss if it found that defendant's alibi was the only issue raised or submitted at the first trial.

Chief Justice Knutson, concurring specially,\(^7\) agreed that the second prosecution was not barred under \textit{State v. Hackett}.\(^8\) He would not have applied collateral estoppel, however, because he believed that defendant's plea of not guilty in the first prosecution had placed every material allegation in issue, thereby requiring the state to prove all allegations beyond a reasonable doubt and making it impossible to determine whether the jury had acquitted the defendant because he established an alibi or because they found the state's evidence insufficient as to one or more essential elements of the indictment. Justice Thomas Gallagher, in dissent,\(^9\) believed that since the alibi appeared from the record to be the only contested issue in the first trial and since the evidentiary facts necessary to convict under both indictments were the same, the prior acquittal barred the second prosecution.

The doctrines of res judicata and double jeopardy are civil and criminal counterparts.\(^10\) In civil suits, the doctrine of res judicata, with its rules of merger and bar, precludes a suit when there has been a prior judgment on the merits upon the same cause of action between the same parties and the issues raised in the later suit might have been litigated in the prior suit.\(^11\) In criminal actions, the doctrine of double jeopardy,\(^12\) with its subsidiary rules of former conviction and former acquittal, precludes later prosecution.

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\(^7\) 114 N.W.2d at 743, stating that former Chief Justice Dell, who resigned before this opinion was issued, agreed with him.


\(^9\) 114 N.W.2d at 745, joined by Justice Nelson.


\(^12\) U.S. CONST. amend. V; MINN. CONST. art. 1, § 7. Double jeopardy has a constitutional basis, but res judicata and collateral estoppel do not. See, \textit{e.g.}, \textit{Hoag v. New Jersey}, 356 U.S. 464, 471 (1958) (the United States Supreme Court entertained "grave doubts whether collateral estoppel can be regarded as a constitutional requirement"); People v. De Sisto, 214 N.Y.S.2d 858 (Kings County Ct. 1961) (an excellent discussion of double jeopardy and collateral estoppel in criminal cases). \textit{But see}, Mayers & Yarbrough, \textit{supra} note 11, at 39–41.
for the same offense. Collateral estoppel, employed in a subsequent civil action based on a different cause of action or in a subsequent criminal action for a different crime, deems the issues actually litigated and determined in a prior action conclusive.

The constitutional and statutory prohibitions against double jeopardy generally do not apply unless the subsequent indictment is for the same specific statutory offense as the first indictment. The difficulty with this requirement is that with the increasing "proliferation" and "fractionalization" of criminal statutes, a

13. Sealfon v. United States, 332 U.S. 575 (1948); People v. De Sisto, 214 N.Y.S.2d 858, 867 (Kings County Ct. 1961); Mayers & Yarbrough, supra note 11, at 3 n.10; Note, 24 MINN. L. REV. 522, 546 (1940).

14. RESTATEMENT, JUDGMENTS § 68 (1942). See Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941). In criminal actions, collateral estoppel generally arises only where there is a prior acquittal, since the defendant's right of confrontation may prevent the state from using a prior conviction as collateral estoppel. A prior conviction may, however, establish facts that are favorable to the defendant in the second prosecution. People v. De Sisto, 214 N.Y.S.2d 858, 888 (Kings County Ct. 1961).

15. Most of the constitutional provisions protect against second jeopardy for the "same offense." But whether or not those precise words are used, it has been held that since the doctrine of double jeopardy is so deeply rooted in English and American history, its significance and scope is determined not by dictionary construction of the words used, but by reference to its origin and growth.

People v. De Sisto, 214 N.Y.S.2d 858, 867 (Kings County Ct. 1961). See Green v. United States, 355 U.S. 184, 200 (1957). "Whether the crimes constitute the 'same offense' is most often a factual test." People v. De Sisto, supra. The same offense rule is frequently referred to as the "same evidence" rule, id. at 869, and was first stated in Rex v. Vandercomb & Abbott, 2 Leach 708, 711, 168 Eng. Rep. 455, 457 (1796); "Unless the first indictment was such as the prisoner might have been convicted upon the proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." See Note, 24 MINN. L. REV. 522, 546 (1940), for a discussion of this test.

Minnesota follows the narrow construction that the "same offense" means the same specific criminal offense. State v. Thompson, 241 Minn. 59, 62 N.W.2d 512 (1954); State v. Utecht, 221 Minn. 138, 21 N.W.2d 239 (1945); State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937); State v. Hackett, 47 Minn. 425, 50 N.W. 472 (1891).

16. We have witnessed in both state and federal jurisdictions, the steady proliferation of statutory offenses occasioned by nothing more than careful bill draftsmanship. With such fractionalization of the definitions of crime, it becomes possible for a single act or a series of acts with a single motivating intent to constitute multiple statutory violations . . . .

“prosecutor may, with little imagination and even less research, reindict for a different offense if his first venture was unsuccessful, even though the defendant is being retried for essentially the same anti-social conduct.”

In an attempt to avoid this danger of piecemeal prosecution, some jurisdictions have abandoned the narrow “same statutory offense” requirement in favor of the “same transaction rule”—a plea of double jeopardy will be sustained if both offenses are part of the same criminal transaction. However, the results reached in cases following this rule lead to the conclusion that it does not differ in substance from the “same statutory offense” rule. A better alternative is that “when a single act or a series of acts violates separate statutes, the constitutional protection against double jeopardy should apply if the separate crimes thus resulting are committed with a common motivating intent directed toward a single ultimate goal.” This test would aid in minimizing prosecution and court expense, and more important, it would reduce unwarranted harassment, strain, and expense to the accused.

This liberal approach to the prohibition on double jeopardy could be used to overcome the difficulty the Court in Robinson found in the application of collateral estoppel—whether the issue in the second prosecution was resolved by the jury in the defendant’s favor in the first prosecution. If the “same offense” re-
requirement is broadly interpreted, courts could generally use double jeopardy to bar the second prosecution on the basis of the judgment alone and need not make a determination of the particular issue forming the basis for the original adjudication for collateral estoppel purposes.23 The same basic policy considerations of eliminating undue harassment, strain, uncertainty, and expense,24 plus the basic tenet of fair play that a defendant should not be forced to twice "run the gauntlet,"25 underlie both doctrines; therefore, the constitutional protection against double jeopardy should be applied whenever the facts permit.

B. RIGHT TO COUNSEL: RIGHT OF INDIGENT DEFENDANT TO COUNSEL AND TRANSCRIPT ON APPEAL

In State v. Dahlgren,26 the Minnesota Court clarified its policy in regard to the rights of indigent defendants to a transcript of the evidence and to appointed counsel.27 A defendant who had been represented by a public defender28 was convicted of third degree burglary. He secured a writ of error and asked the Court to appoint counsel to assist him with his appeal. The Court did not

the grounds of an alibi would be if the court submitted the case to the jury on the theory that unless they found an alibi they must find defendant guilty as charged. Were such an instruction given, it is obvious that we would promptly reverse.

23. What is clearly evident therefore is that those jurisdictions which give a broader construction to "same offense" will have few occasions to consider the doctrine of collateral estoppel. Thus New York's Appellate Courts have had little occasion to apply the rule. On the other hand in the federal jurisdiction with the narrow construction of double jeopardy safeguards, issues of collateral estoppel arise more frequently. People v. De Sisto, 214 N.Y.S.2d 858, 883-84 (Kings County Ct. 1961).

24. See Mayers & Yarbrough, supra note 11, at 31-33.


27. MINN. CONST. art. I, § 6, provides that "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense." The sixth amendment to the federal constitution expressly guarantees the right to counsel in all criminal prosecutions and a denial of this right in a federal court vitiates the entire proceedings. Johnson v. Zerbst, 304 U.S. 458 (1938). In addition, the due process clause of the fourteenth amendment requires the appointment of counsel in state courts if the necessity for counsel is found to be vital and imperative. Powell v. Alabama, 287 U.S. 45 (1932). For a discussion of the historical background of the right to counsel, see Note, 13 STAN. L. REV. 522, 529-30 (1961). See generally The Right to Counsel: A Symposium, 45 MINN. L. REV. 693 (1961).

appoint counsel, but remanded the case to the trial court "to take such corrective action as it deems advisable . . . ."\textsuperscript{29} The transcript of the trial revealed sufficient error to warrant a new trial,\textsuperscript{30} in which the defendant would again be assisted by a public defender. The Court took the opportunity to specify in detail the rules governing the application by indigent persons convicted of a felony or a gross misdemeanor for the appointment of counsel to assist them with their appeals or for a trial transcript furnished by the state.

The constitutional right of an indigent defendant to have a transcript provided at state expense stems from the decision of the United States Supreme Court in \textit{Griffin v. Illinois}.\textsuperscript{31} That case held that the federal constitution does not require state governments to afford criminal appeals, but if a state does allow such appeals,\textsuperscript{32} it denies due process and equal protection if it does not afford indigent defendants appellate review equal to that available to those persons able to finance their own appeals. Prior to the \textit{Griffin} decision, the Minnesota Court held that the state was neither authorized nor compelled to pay the expenses of an indigent's appeal.\textsuperscript{33} In response to \textit{Griffin}, the Minnesota legislature amended section 611.07 of the Minnesota Statutes to provide a prisoner with a free transcript upon a showing of indigence and a reasonable need for a transcript to present the alleged errors upon review. This statute does not require that a complete transcript be provided in all cases.\textsuperscript{34} The defendant must show a need for the

\textsuperscript{29} 259 Minn. at 310, 107 N.W.2d at 299.

\textsuperscript{30} Hearsay statements admitted under the guise of impeachment of a surprising witness constituted reversible error. See State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939).


\textsuperscript{32} The right to appellate review in Minnesota is granted by MINN. STAT. § 632.01 (1961).

\textsuperscript{33} State \textit{ex rel.} Koalska v. Rigg, 246 Minn. 234, 74 N.W.2d 661 (1956); State v. Lorenz, 235 Minn. 221, 50 N.W.2d 270 (1951).

\textsuperscript{34} While an indigent prisoner should be furnished such part of the transcript as is necessary to adequately present the questions which he in good faith wishes to have us review, the expense of a complete transcript should not be imposed upon the counties of this state where it is not necessary in order to present such questions. The proper procedure ought to be that a defendant who wishes a review by this court should, in his application to the trial court, indicate what questions he wishes to have us review and what part of the transcript is necessary in order to present such questions.

State v. James, 252 Minn. 243, 245-46, 89 N.W.2d 904, 906 (1958); accord, 259 Minn. at 313, 107 N.W.2d at 303; State \textit{ex rel.} Elkins v.
entire transcript by explaining why the synopsis of the testimony, plus the judgment roll and any other reports made available to him, are insufficient for a proper presentation of the questions he wishes to have reviewed.

The right of an indigent defendant charged with a felony or gross misdemeanor to have counsel appointed to assist in his defense is also governed by section 611.07. This provision permits counsel to be appointed either before the preliminary hearing or any time thereafter that the defendant establishes that he is an indigent. While this statute provides compensation for court-appointed counsel who assist the defendant in the trial court, it does not provide compensation for appellate counsel unless the appellate counsel is the same counsel appointed to assist the defendant in the trial court. Thus, if a defendant was not represented by court-appointed counsel at the trial or if the appointed counsel is unwilling to pursue an appeal, the Court may appoint appellate counsel, but is powerless to authorize compensation for him.

County of Ramsey, 257 Minn. 21, 99 N.W.2d 895 (1959); State v. Johnson, 255 Minn. 173, 96 N.W.2d 389 (1959).

35. MINN. STAT. § 243.49 (1961) provides that when a defendant is convicted by trial or plea of guilty and sentenced to the state prison or reformatory, the court is required to furnish as part of the commitment record such synopsis of the record as it deems important.


37. MINN. STAT. § 611.07 (1961):
Compensation, not exceeding $25 per day for each counsel for the number of days he is actually employed in the preparation of the case, and not exceeding $50 per day for each day in court, together with all necessary and reasonable costs and expenses incurred or paid in said defense shall be fixed by the court in each case.

The Court in Dahlgren admitted that the compensation provided is "often inadequate." 259 Minn. at 318, 107 N.W.2d at 307. See Note, 13 STAN. L. REV. 522, 537 (1961). "Inadequate fees for assigned counsel result in minimal case preparation and a tendency to dispense with preliminary hearings and trials to avoid heavy personal expenditures." Id. at 563-64; see Cuff, Public Defender System: The Los Angeles Story, 45 MINN. L. REV. 715, 719 (1961). But see BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 214 (1955), for the view that adequate compensation for appointed counsel would merely benefit the least capable criminal lawyers.

38. The Court in Dahlgren was well aware of this problem and attempted to solve it by appealing to the professional conscience of the members of the bar.

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.


39. 259 Minn. at 313, 107 N.W.2d at 303.
If an indigent defendant is entitled to have the Court appoint counsel to assist him with an appeal, he may frequently be tempted to make a non-meritorious appeal. Normally, the expense involved would deter a defendant from making such appeals. An indigent, however, "has everything to gain and nothing to lose." While the Court in Dahlgren recognized that such a situation would be a burden on both public funds and the court calendars, it further recognized the danger of precluding meritorious appeals by indigents. In order to balance the interest of the public with the right of the indigent to appeal, the Court felt that the trial court should furnish it with a synopsis of the testimony that would apprise the Court of the probable merit of the defendant's appeal. Accordingly, the Court specified in detail what a trial court convicting a person of a gross misdemeanor or a felony should include in its synopsis.


41. 259 Minn. at 315, 107 N.W.2d at 304.

42. See Boskey, supra note 38, at 786:
The indigent is badly in need of counsel's help—first, in deciding whether the case contains something warranting an appeal, and then (assuming an appeal is lodged) in making a sufficient and professional appellate presentation of the issues. Though his case may be saturated with reversible error, this fact would often be of little avail to an indigent defendant if he were deprived of the assistance of counsel in connection with the appeal. Moreover, refusal to furnish counsel to indigent defendants at this critical stage of the proceedings would be countenancing serious discrimination between the rich and the poor when liberty is at stake.

43. 259 Minn. at 316, 107 N.W.2d at 305. The Court stated that the synopsis should include:

1. A record of everything said at the time of arraignment.
2. A narrative statement prepared by the court reporter of the testimony of each witness who appeared at the trial. This need not be long but should succinctly state what the testimony of the witness was.
3. If there is any argument, rulings, or contention concerning the admission or rejection of any item of evidence, such should be set forth in full.
4. All motions made at the completion of the trial, including motions for new trial; the rulings thereon; the court's memorandum thereon; and all motions for full or partial transcript or for the appointment of counsel after trial, and the court's reasons for denying the same, should be set forth in full.
5. If objection is made to the argument of the prosecuting attorney, such objections and the portions of the argument to which objection is made, if it is reported by the court reporter, should be set forth in full.
claims and is also comprehensive enough to avoid the cost of providing entire transcripts where an indigent does have a meritorious appeal.

Although the fact that the Court in Dahlgren has outlined a better method for handling indigent appeals is desirable, a basic deficiency remains—the inability of the Court to provide compensation for appellate counsel appointed to assist persons impoverished after their trials or whose trial counsel are derelict in their duty to pursue a meritorious appeal. The legislature should act to cure this deficiency.

C. RIGHT TO COUNSEL: STATUTORY RIGHT TO BE INFORMED APPLIED TO MISDEMEANORS

In State v. Moosbrugger, the Minnesota Court held that when a person accused of a misdemeanor under a state statute makes his initial appearance to be charged, the court must inform him of his right to counsel and ask him if he wishes to exercise

(6) All instructions requested by defendant which are denied should be set forth in full.

(7) The statute now requires the inclusion of the instructions of the court, which should be made a part of this synopsis, and if the jury comes in for additional instructions after originally retiring the jury's requests and any further instructions given should be set forth in full.

(8) A record of the statements and questions propounded at the time defendant is sentenced, together with the remarks of the trial court, should be included with the synopsis.

(9) Whenever a defendant is charged with the commission of prior felonies under § 610.31 a complete transcript of the proceedings thereon, showing compliance with the statutory requirements, should be furnished.

(10) If the attorney appointed to represent the defendant upon the trial requests to be relieved, his requests, with the reasons therefor and the action taken by the trial court thereon, should be included as part of the report so made.

Compare the procedure adopted by the California Supreme Court in People v. Hyde, 51 Cal. 2d 152, 154, 331 P.2d 42, 43 (1958):

It is our opinion that appellate courts, upon application of an indigent defendant who has been convicted of a crime, should either (1) appoint an attorney to represent him on appeal or (2) make an independent investigation of the record and determine whether it would be of advantage to the defendant or helpful to the appellate court to have counsel appointed. This investigation should be made solely by the justices of the appellate courts. After such investigation, appellate courts should appoint counsel if in their opinion it would be helpful to the defendant or the court, and should deny the appointment of counsel only if in their judgment such appointment would be of no value to either the defendant or the court.


44. 116 N.W.2d 68 (Minn. 1962).
that right. Defendant was charged with driving while under the influence of alcohol in violation of the Highway Traffic Regulation Act. He entered a plea of guilty in municipal court and was sentenced to 30 days in the workhouse. Subsequently, he sought to vacate the proceedings in the municipal court on the ground that he had neither been represented by counsel nor asked if he wished the assistance of counsel as required by section 630.10 of the Minnesota Statutes. The trial court refused his motion, ruling that section 630.10 does not apply to municipal court prosecutions for misdemeanors. On appeal, the Minnesota Court reversed and held that the statute "was intended to apply and should apply" to a prosecution for a misdemeanor.

The Minnesota Constitution grants an unqualified right to counsel in all criminal prosecutions, but this provision merely declares that the right to counsel exists and imposes no duty on a court to inform the accused of his right. However, requires that upon arraignment, an accused must be informed of his right to counsel and must be asked if he wishes to exercise that right. This statute has been applied in prosecutions for

46. The defendant had tried to get counsel before his appearance, but was unsuccessful. The municipal court had no knowledge of such efforts. 116 N.W.2d at 69.
47. If the defendant shall appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel.
49. Minn. Const. art. I, § 6, provides: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense." See note 27 supra.
50. See 116 N.W.2d at 70; State ex rel. Welper v. Rigg, 254 Minn. 10, 93 N.W.2d 198 (1958); State ex rel. Schwanke v. Utecht, 233 Minn. 434, 47 N.W.2d 99 (1951).
51. A failure by the court to comply with these requirements does not necessarily result in a denial of due process under the Minnesota Constitution. See State ex rel. Adams v. Rigg, 252 Minn. 283, 89 N.W.2d 898 (1958); State ex rel. Welper v. Rigg, 254 Minn. 10, 93 N.W.2d 198 (1958). In State ex rel. May v. Swenson, 242 Minn. 570, 65 N.W.2d 657 (1954), a defendant convicted of murder attacked his conviction for want of due process because he "was not informed that he had the right to counsel of his own choice . . . ." The Court rejected this argument, saying that:

If relator had been denied counsel entirely, there is little doubt that . . . the conviction would have been void. Here, however, relator at all crucial times was represented by a lawyer appointed by the court. It is not to be overlooked that it is not every denial of constitutional or statutory right, M.S.A. § 630.10, that violates the due process clause of Amend. XIV so as to deprive the court of its jurisdiction
felonies, but in *State v. Martin* and *State ex rel. Weich v. City of Red Wing*, it was held to be inapplicable to municipal ordinance violations because it refers to arraignments. The Court in *Martin* said that "arraignments are in district court on indictment or information." Indictments and information are used to prosecute a person for a public offense; municipal ordinances are not public offenses and are prosecuted in municipal or justice courts.

In *Moosbrugger*, the Court declared for the first time that the provisions of section 630.10 are applicable to prosecutions for misdemeanors. The State, conceding that a prosecution for driving while under the influence of alcohol is a criminal prosecution for purposes of the constitutional right to counsel, argued that the *Martin* and *Weich* cases and the use of the term "arraignment" in other criminal statutes make section 630.10 applicable only to prosecutions in the district court under indictment or information. The Court concluded, however, that "arraignment" under section 630.10 means "the initial appearance of an accused before a committing court to answer the charges brought against and subject its judgments to collateral attack in a habeas corpus proceeding."
him.\textsuperscript{61} It distinguished the \textit{Martin} and \textit{Weich} cases on the ground that prosecutions under municipal ordinances are sui generis,\textsuperscript{62} and noted that some statutory provisions refer to arraignments in municipal courts.\textsuperscript{63} The Court found support for its decision in the legislative intent underlying this section to impose “an affirmative duty on the court to alert the defendant to his constitutional guarantee.”\textsuperscript{64}

In view of the purpose of the right to counsel, the decision in \textit{Moosbrugger} seems desirable. Since the case involved a criminal prosecution, failure to inform the defendant of his right to counsel would lead to the anomalous result that a defendant would have a constitutional right to counsel, but the court would have no duty to inform him of this right. “The purpose of the guarantee of the right to counsel is to protect accused from a conviction resulting from his own ignorance of legal and constitutional rights.”\textsuperscript{65} An accused who would be prejudiced by not having counsel may be unaware of his constitutional rights.\textsuperscript{66} Thus, an implementing statutory device is needed to ensure the efficacy of the constitutional right to counsel, which is merely declarative.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{61} 116 N.W.2d at 72.
\item \textsuperscript{62} Ibid.; see State v. Ketterer, 248 Minn. 173, 177–79, 79 N.W.2d 136, 139–40 (1956). For an analysis of the nature of municipal ordinance violations, see Note, 47 MINN. L. REV. 93, 95 (1962).
\item Even though the Court refers to prosecutions under municipal ordinances as sui generis, dicta in both \textit{Moosbrugger} and \textit{Martin} indicates that the Court would extend the application of § 630.10 to certain municipal ordinance violations. “It might be observed that good practice in such prosecutions, when punitive ordinances are involved, would be to adhere to the spirit of § 630.10.” 116 N.W.2d at 72. “It should be said, however, that, irrespective of statute, situations may arise where a trial judge in a municipal court could very properly, and should, make such suggestion [under § 630.10] to defendant.” 223 Minn. at 417, 27 N.W.2d at 160.
\item \textsuperscript{63} MINN. STAT. §§ 633.08, 488A.27(1), 488.17(1) (1961).
\item \textsuperscript{64} 116 N.W.2d at 70.
\item \textsuperscript{65} State ex rel. Baker v. Utech, 221 Minn. 145, 151, 21 N.W.2d 328, 332 (1946); see State ex rel. May v. Swenson, 242 Minn. 570, 65 N.W.2d 657 (1954). See also Williams v. Kaiser, 323 U.S. 471 (1945); Smith v. O'Grady, 312 U.S. 329 (1941).
\item While it may be conceded that a person should be deemed to know the substantive criminal law, it would seem unfair to require him to know all its procedural safeguards as well. One of the most important tasks of counsel is to inform the accused of his constitutional and statutory rights. If the defendant does not even know that he has a right to the aid of one who is acquainted with these rights, it would seem that these other rights are of little value. Comment, The Right to Counsel in Misdemeanor Cases, 48 CALIF. L. REV. 501, 514 (1960).
\item \textsuperscript{67} In many states, however, the court has no duty to inform an accused of his right to counsel. See, \textit{e.g.}, Patterson v. State, 157 Fla. 304, 25 So. 2d 713 (1946); Newell v. State, 209 Miss. 653, 48 So. 2d 332 (1950);
A further anomaly arises, however, when the implication of this decision to the rights of indigent defendants is considered. If section 630.10 is read in conjunction with section 611.07, which provides that counsel will be provided upon request for an indigent charged with a felony or gross misdemeanor, a situation arises in which the court must inform an indigent charged with a misdemeanor that he has a right to counsel, but may not appoint counsel to assist him. This problem may be corrected by extending the right to counsel to indigents charged with misdemeanors; its existence does not denote a defect in the *Moosbrugger* decision.

III. EVIDENCE AND PROCEDURE

A. CONSOLIDATION: EFFECT OF STATUTORY PRESUMPTION OF DECEDENT’S DUE CARE

In *Lambach v. Northwestern Ref. Co.*, the Minnesota Court held that a wrongful death action brought by a decedent’s trustee could not be consolidated for trial with an action brought by a third person against the personal representative of the decedent’s estate. A wrongful death action arising out of a three-vehicle highway collision that caused injury to the driver of one vehicle and the death of the driver of another was brought by the decedent’s statutory trustee against the appellants (Northwestern Refining Company and its employee, who was the driver of the third vehicle). This action was consolidated for trial with a personal injury action brought by the injured driver against the administratrix of the decedent’s estate and the appellants. The Minnesota Court reversed jury verdicts against appellants in both actions and ordered separate trials. The confusion created by the inconsistent application of the statutory presumption of decedent’s due care in a wrongful death action where representatives of the decedent occupy roles as both plaintiff and defendant makes rational jury instructions impossible and may prevent a jury from reaching a correct verdict.

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68. For a discussion of the desirability and feasibility of so extending the right to counsel, see Comment, supra note 66, at 514. In the federal courts, an indigent charged with a misdemeanor may be entitled to appointed counsel. *Id.* at 505. See also Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).


4. Commissioner Magney wrote the opinion of the Court, although he
The Minnesota Court has adopted the Thayer-Wigmore theory that a presumption is only "a mere 'procedural device' for allocation of the burden of going on with evidence." In *TePoel v. Larson*, the Minnesota Court, following this doctrine, held that the common-law presumption of due care of a decedent in a wrongful death action can have no evidentiary weight and a jury instruction that such a presumption exists is reversible error. In response to the *TePoel* decision, the Minnesota legislature created a statutory presumption of due care on the part of a decedent in a wrongful death action and required a jury instruction on the presumption. This statutory presumption was apparently intended to have the same, evidentiary effect as presumptions had before the Court adopted the Thayer-Wigmore theory.

In *Lambach*, an action in which the decedent's trustee is entitled to a jury instruction on the presumption of due care (the wrongful death action) was consolidated with an action in which the presumption does not exist (the personal injury action). The Court felt that "it is simply impossible for a court to instruct on or a jury to deal with [this] legal inconsistency ...."
Rule 42.01 of the Minnesota Rules of Civil Procedure allows consolidation of actions involving a common question of law or fact. This is one of the many provisions in the rules designed to prevent multiplicity of action and piecemeal litigation of lawsuits. Actions consolidated under Rule 42.01 retain their separate and independent identity, and the fundamental rights of the litigants do not change when their actions are consolidated. The power of the trial court to consolidate is discretionary and may even be exercised upon its own motion, an order of consolidation can be reversed only when the trial court has abused its discretion.

was on the wrong side of the road at the time of the accident in violation of the Highway Traffic Regulation Act. MINN. STAT. § 169.18(5) (1961). Under MINN. STAT. § 169.96 (1961), violation of the act is prima facie evidence of negligence which is conclusive if not rebutted. Since in Lambach there was evidence that appellant's vehicle had forced decedent across the center line, see 261 Minn. at 118-20, 111 N.W.2d at 347-48, the prima facie evidence is not conclusive; the jury is, however, instructed that the violation is prima facie evidence. Becklund v. Daniels, 230 Minn. 442, 42 N.W.2d 8 (1950). The conflict between this presumption and the statutory presumption of due care could not have been the basis of the decision in Lambach, for the conflict will still be present in the wrongful death action when the actions are tried separately.

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A Minnesota statute superseded by the rules provided for consolidation of actions only when the parties in both actions were identical and when the causes of actions could have been joined. Minn. Rev. Laws § 4141 (Dunnell ed. 1905). Freedom of consolidation was formerly almost identical to that under Rule 42.01, however, since the Minnesota Court found an "inherent power in [a court's] discretion to direct the trial together of cases . . . which arise out of the same state of facts although the rights or liabilities of the parties may differ." Ramswick v. Messerer, 200 Minn. 299, 301, 274 N.W. 179, 180 (1937); accord, Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 482, 43 N.W.2d 807, 816 (1950).

12. See Coble v. Lacey, 257 Minn. 352, 101 N.W.2d 594 (1960); Simon v. Carroll, 241 Minn. 211, 62 N.W.2d 822 (1954); cf. MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958); 5 MOORE, FEDERAL PRACTICE ¶42.02, at 1209 (1951). Under pre-rule practice, the Minnesota Court distinguished between consolidation of actions, under which the actions were merged, and consolidation of trials, under which the actions retained their separate identity. Chellico v. Martire, 227 Minn. 74, 34 N.W.2d 155 (1948); Ramswick v. Messerer, 200 Minn. 299, 274 N.W. 179 (1937). Although the Court spoke only of consolidation of trials in Coble v. Lacey, supra, and Simon v. Carroll, supra, it probably would follow the federal rule and allow all actions consolidated under Rule 42.01 to retain their separate identity. See 2 PIRSIG, MINNESOTA PLEADING § 1904 (Supp. 1962).

Consolidation may not be ordered, however, if it would burden "the parties, the court and the jury with an overcomplication of issues and necessary instructions."  

The Court's disposition of the Lambach case appears to be the wisest one. Actions should not be consolidated when the different relative positions of the parties would be confusing to the jury. Moreover, in the consolidated action involved in Lambach, the representatives of the decedent were working at cross-purposes against the other plaintiff, who was attempting to prove that the decedent was negligent. The difficulty stemmed only from the inconsistent use of the statutory presumption, however, and not from any inherent unsoundness in evidentiary presumptions themselves. Justice Knutson suggested that:

"Even though the jury were convinced that [the decedent] ... was guilty of contributory negligence which proximately contributed to the accident, it could still find in his favor on the theory that the presumption of due care had not been rebutted."

But the evidentiary presumption "only takes the place of evidence," if the jury were convinced that the decedent was guilty of contributory negligence, the presumption could not force them to find otherwise. Although Rule 42.01 was intended to en-

14. See Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944). The order of consolidation is not appealable, but it may be reviewed on an appeal from any final order or judgment. Ibid.


18. 261 Minn. at 124, 111 N.W.2d at 351 (concurring specially). For criticism of an evidentiary presumption of due care in favor of a decedent in a state like Minnesota that places the burden of proving contributory negligence on the defendant, see 60 MICH. L. REV. 510 (1962).

19. Aubin v. Duluth St. Ry., 169 Minn. 342, 348, 211 N.W. 580, 583 (1926). In Aubin, the Minnesota Court held that the presumption does not change the standard of proving contributory negligence from "a fair preponderance of the evidence" to "clear proof." Compare Roeck v. Halvorson, 254 Minn. 394, 95 N.W.2d 172 (1959), 44 MINN. L. REV. 352, where the Court held that the statutory presumption does not preclude a trial court from finding contributory negligence as a matter of law.

20. 261 Minn. at 127, 111 N.W.2d at 353 (Dell, C.J., concurring specially).
courage consolidation and prevent multiplicity of litigation, it should not be invoked when consolidation would confuse a jury and make its task more difficult, and thereby possibly result in prejudice to the parties.

B. DISCOVERY: INFORMATION TO BE USED FOR IMPEACHMENT

In Boldt v. Sanders, the Minnesota Court permitted discovery of information to be used by deponent for impeachment purposes. Plaintiff sought to recover damages for personal injuries incurred in an automobile collision. Prior to the trial, he attempted to discover by written interrogatories whether defendant knew if plaintiff had suffered any injury before the accident; if defendant had such knowledge, he was requested to supply supporting factual material. Defendant refused to answer, claiming that the information requested was impeachment evidence and was known to the plaintiff, but the trial court issued an order to compel an answer. The Minnesota Court, in discharging defendant's writ of prohibition, stated that all information admissible at the trial is subject to discovery unless it is privileged.


As members of this court we know that the consolidation of some cases has resulted in more confusion, longer and more complicated trials, with perverse verdicts, than existed under the old practice.

It is a matter of common knowledge that some lawyers and judges, as well, claim that the rules have not accomplished the purpose for which they were promulgated. They also contend, and with some justification, that the consolidation of cases, discovery and pretrial procedure, as well as the use of other of the rules, have resulted in more confusion, more work for the courts and the lawyers, more expense to the litigants, and also delays and appeals, than existed under the prior statutory practice and procedure.

261 Minn. at 128-29, 111 N.W.2d at 354. See also the comments of Justice Murphy in Lott v. Davidson, 261 Minn. 130, 141, 109 N.W.2d 336, 343-44 (1961).


23. MINN. R. CIV. P. 33.

24. The interrogatory in question was as follows: "Do you have information indicating that the plaintiff Ella Boldt was injured at any time prior to the accident described in Plaintiffs' complaint?" A second interrogatory asked for the date and place of any such injury, and the name and address of each physician who rendered treatment for the injury. 261 Minn. at 161-62, 111 N.W.2d at 226.

25. Defendant applied for an alternative writ of prohibition that would have entitled him to interlocutory review of the trial court's order to permit discovery. There are three requirements that must be satisfied before the court will issue such a writ:
Three questions are presented to a court by cases involving the scope of discovery. First, whether the information is within the scope of the discovery process. Second, whether other factors exist that the court, officer, or person is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized by law; and (3) that it will result in injury for which there is no other adequate remedy.


A number of state courts now permit use of the extraordinary writs of prohibition or mandamus to grant immediate review of discovery rulings. This trend has apparently developed because review by appeal from the final judgment frequently will not eliminate prejudice to a party. A trial court's abuse of its wide discretion over discovery may not require a new trial, and even if a new trial is granted, all the parties will have the evidence erroneously discovered. See Brown v. St. Paul City Ry., 241 Minn. 15, 27-32, 62 N.W.2d 688, 697-99 (1954). In contrast, the federal courts do not generally permit interlocutory review of discovery rulings. See Developments in the Law—Discovery, 74 HARV. L. REV. 942, 996-97 (1961). See also Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 MINN. L. REV. 633, 654-60 (1952); Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751, 776 (1957); Note, 35 NEB. L. REV. 469, 479-84 (1956).

There is considerable controversy over the use of the extraordinary writs to review a discovery ruling. It has been argued that interlocutory review of discovery rulings may often be sought merely for harassment of an opponent or delay of the trial. See Wright, supra at 776.

26. There are four principal methods available to a party seeking to discover information. (1) A party, except for the initial 20 day prohibition on plaintiff, may take the deposition of any person by oral examination or written interrogatories without leave of court. MINN. R. CIV. P. 26.01. (2) A party, without leave of court, may request an adverse party to furnish answers to written interrogatories. MINN. R. CIV. P. 33; see Lundin v. Stratmoen, 250 Minn. 555, 85 N.W.2d 828 (1957). (3) A party may move for the court to order, after good cause is shown, the production of relevant documents or other tangible things in the control of a party. MINN. R. CIV. P. 33; see Webster v. Schwartz, 249 Minn. 224, 81 N.W.2d 867 (1957); Snyker v. Snyker, 245 Minn. 405, 72 N.W.2d 357 (1955). See generally 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 796 (rev. ed. Wright 1961). (4) A party, without leave of court, may request a party to admit the genuineness of certain documents or the truth of relevant factual matters. MINN. R. CIV. P. 36; see Fireman's Fund Indem. Co. v. Caruso, 252 Minn. 435, 90 N.W.2d 302 (1958).

27. The scope of discovery generally includes any information, not privileged, that will be either admissible at the trial or lead to the discovery of admissible evidence. By use of the discovery devices, a party may acquire all facts and information relevant to the subject matter of the pending litigation. MINN. R. CIV. P. 26.02; see, e.g., Halloran v. Blue & White Liberty Cab Co., 253 Minn. 436, 444, 92 N.W.2d 794, 799 (1958); In re Estate of Sandstrom, 252 Minn. 46, 62, 89 N.W.2d 19, 28 (1958); Zuber v. Northern Pac. Ry., 246 Minn. 157, 168, 74 N.W.2d 641, 650 (1956). Compare FED. R. CIV. P. 26(b).

In regard to the scope of discovery, see generally Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 41 MICH. L. REV. 205, 208, 215 (1952); Louisell, Discovery and Pre-Trial Under the
ist that would require a court to deny discovery of the information in question. 28 Third, whether the language of the rule is sufficiently ambiguous to allow the court, after consideration of other factors, reasonably to conclude that the information is not within the scope of discovery. 29 The primary consideration in determining the scope of discovery in a particular situation is whether the matter to be discovered has evidentiary value in some way relevant to the subject matter of the action. It is sufficient that the information "appears reasonably calculated to lead to the discovery of admissible evidence"; the information sought need not itself be admissible at the trial. 30

Although in earlier decisions the Minnesota Court suggested that the discovery process should be given broad scope in order to make all relevant information available to the parties before trial, 31 the Court has also stressed the fact that discovery has ultimate and necessary boundaries. Thus, in Jeppesen v. Swanson, 32 the Court refused to permit the plaintiff to discover the limits of defendant's motor-vehicle insurance policy. The Court reasoned that such information is not relevant to the subject matter involved in an action for damages for personal injuries and was only sought for the purpose of determining whether the case should be settled. Other important exemptions from discovery include privileged matters, 33 conclusions of an expert witness, and the attorney's

[Countervailing interests deserving of protection must be weighed in determining not only the general outer limits of the discovery process but also whether material falling within these limits should nevertheless be nondiscernable in a particular case.]

31. E.g., Baskerville v. Baskerville, 246 Minn. 496, 506, 75 N.W.2d 762, 769 (1956); Jeppesen v. Swanson, 243 Minn. 547, 550, 68 N.W.2d 649, 651 (1955). In Jeppesen, the Court stated: "Within the scope in which they operate, the rules should be given liberal construction so as to effectuate the purpose for which they were adopted . . . . to secure the just, speedy, and inexpensive determination of every action." Id. at 550, 68 N.W.2d at 651.

33. 261 Minn. at 165, 111 N.W.2d at 228. The Minnesota Court
work-product. In addition, the discovery procedures may not be used to harass or embarrass a witness.

The decision in Boldt that impeachment evidence is within the scope of the discovery process is supported by the language of Rule 26.02. Moreover, making such information subject to discovery aids in eliminating the "surprise element" from trials. As the Court stated, a refusal to permit discovery of impeachment evidence "would be judicial retrogression undermining the whole purpose of the rules of civil procedure. It would inevitably lead us back to the

has stated that the word "privileged" as used in the Minnesota Rules of Civil Procedure is to have the same meaning as it has in the law of evidence. Brown v. St. Paul City Ry., 241 Minn. 15, 32, 62 N.W.2d 688, 700 (1954). See Brown v. St. Paul City Ry., 241 Minn. 15, 32, 62 N.W.2d 688 (1954); 41 MINN. L. REV. 823 (1957). The Federal Rules of Civil Procedure do not contain any protection, with the exception of the attorney-client privilege, of matter prepared in anticipation of litigation. Such matter is, however, protected in the federal courts by a Supreme Court decision that has generally been interpreted as prohibiting the discovery of any matter gathered for trial purposes. Hickman v. Taylor, 329 U.S. 495 (1947). However, while the Minnesota Rules prohibit any discovery of matter prepared for trial, the Hickman rule permits discovery of the attorney's work-product when the party seeking the information shows good cause for permitting discovery. For example, the federal courts consider good cause to exist where the information sought can only be obtained from the adverse party or where discovering the evidence by his own efforts would involve unreasonable time and expense for a party. See, e.g., Sharon Steel Corp. v. Travelers Indem. Co., 26 F.R.D. 113 (N.D. Ohio 1960); 2A BARRON & HOLTZOFF, op. cit. supra note 26 at 145-59; Taine, Discovery of Trial Preparations in the Federal Courts, 50 COLUM. L. REV. 1027, 1032 (1950); Developments in the Law—Discovery, 74 HARV. L. REV. 940, 1027-46 (1961); Note, 68 HARV. L. REV. 673, 680 (1955); Note, 50 YALE L.J. 708, 709 (1941).

'poker hand' concept of litigation, rewarding artifice and camouflage.\(^{37}\)

Although the Court may be correct in its holding that information to be used by the deponent for impeachment purposes is within the scope of discovery, policy grounds do exist for denying such discovery. To allow one party to discover impeachment information possessed by another may impair the effectiveness of the impeachment device. The threat of impeachment of a party or witness during the trial serves to discourage him from giving false testimony in support of groundless or weak claims. Impeachment of the testimony of a witness allows the jury to appraise more accurately the veracity of the claims and the other testimony put forth by a party.\(^{38}\) Discovery of impeachment information will allow a party basing claims on false or weak testimony an opportunity to better conceal that testimony\(^{39}\) and thus protect his witness from impeachment. If the party discovers that his opponent knows of no impeachment information, he may be encouraged to retain as a part of his case any claims based on false or weak testimony.\(^{40}\) The effect

37. 261 Minn. at 164, 111 N.W.2d at 227–28. This reasoning seems questionable, however, since the person seeking to discover impeachment information should know that if his witnesses are going to present weak or false testimony that they are always faced with the possibility of being impeached. This criticism assumes, however, that the party is intentionally presenting false testimony. \textit{Cf.}, ABA, CANONS OF PROFESSIONAL ETHICS 15, 22, 39. The Court's reasoning in regard to elimination of the “surprise element” is sound if a witness presents erroneous testimony due to mistaken recall of certain events and not because of any intended fabrication of testimony, or if he gives impeachable testimony based on mistaken recall of certain events. In these situations, discovery probably should be allowed in order to give both parties an opportunity to correct unintended errors in their witnesses' testimony.


39. See Brief for Relator, p. 10, Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961), wherein it was stated:

The only possible explanation for this line of inquiry [as presented in the interrogatories submitted by the plaintiff] is that if a party is untruthful about himself and if that party is able to learn (by discovery of times, places, witnesses, etc.) the extent to which his adversary is aware of the untruthfulness, then the party may safely retain his undiscovered falsehoods and may devise means to avoid the consequences of the discovered falsehoods. Obviously, discovery was not designed for any such purpose.

40. The party then has some assurance that false or weak testimony will not be impeached. See Sorensen v. Sullivan, File No. 551110, Minn. Dist. Ct., Aug., 1960 (Nicholson, J.), sustaining an objection in a personal injury action to an interrogatory asking if defendant had taken any photographs of the plaintiff.
of allowing discovery of impeachment information upon the im-
peachment process should at least have been considered by the
Court as a possible ground for restricting the scope of discovery.\textsuperscript{41}

\textbf{C. EVIDENTIARY ADMISSIONS: UNFAVORABLE INFERENCE FROM
FAILURE TO PRODUCE EVIDENCE}

In \textit{Kmetz v. Johnson},\textsuperscript{42} the Minnesota Court modified the rule permitting counsel or the court to inform the jury that an unfavorable inference may be drawn against a party who fails to produce evidence within his possession or control. \textit{Kmetz} involved an action for damages for personal injuries. Although the jury found the defendant negligent, the trial court denied recovery because the jury, in a special verdict, also found the plaintiff contributorily negligent. Plaintiff appealed and assigned as error the trial court's refusal to allow him to argue to the jury that an unfavorable inference should be drawn from defendant's failure to introduce photographs of the skid marks at the scene of the accident. The Minnesota Court affirmed and declared that unless a party makes an effort to obtain, by discovery or a demand at the trial, documentary evidence within the possession of his opponent,\textsuperscript{43} he may not com-

\textsuperscript{41} Of course, certain evidence may be useful for substantive purposes as well as impeachment purposes. Where the evidence is most likely to be useful only as substantive evidence, it should definitely be subject to discovery. Where there is doubt over whether the evidence will serve as substantive or impeachment information, it probably should not be discoverable. See Bogatay v. Montour R.R., 177 F. Supp. 269, 270 (W.D. Pa. 1959), where the court stated:

\begin{quote}
We think that defendant's position that it should not have to disclose this evidence because of its potential impeaching value is under the circumstances well taken. While it is also possible that this evidence might be used for substantive purposes and as an affirmative defense . . ., we do not think that that necessarily appears at this time; but to the contrary it appears that the interrogatory as framed appears to be eliciting more probable impeachment matter, and it is for the defendant to choose whether it will use the evidence for impeachment or as a substantive defense. We feel the real purpose of interrogatories is to enable each side to gain the information necessary for it to fairly prepare its case, and at this time do not see why it is necessary for the plaintiff to know whether or not the defendant has observed him carrying on any activity in order for him to fairly prepare his case.
\end{quote}

The court in \textit{Bogatay} went on to state that by the time of the pre-trial conference, the defendant will have had opportunity to make an election between using the information as substantive evidence, which must then be disclosed at the conference, or as impeaching evidence, which need only be disclosed to the court to determine whether the evidence is in fact of a substantive or impeachment nature.

\textsuperscript{42} 261 Minn. 395, 113 N.W.2d 96 (1962).

ment to the jury that they should draw an unfavorable inference from the failure of his opponent to produce that evidence.\textsuperscript{44}

The unexplained failure\textsuperscript{45} of a party in a civil or criminal case to produce evidence within his possession and control that he would normally be expected to produce gives rise to the inference that such evidence would be unfavorable to his case.\textsuperscript{46} This inference is permissive\textsuperscript{47} and does not "act as a substitute for affirmative proof but rather [is] to be used by the jury in weighing the evidence actually produced."\textsuperscript{48} A party may comment on the inference himself\textsuperscript{49} or ask the court to instruct the jury to draw the inference\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{44} The Court also rejected plaintiff's other assignments of error, holding, \textit{inter alia}, that "the jury could accept as much of the testimony of either party as it believed to be true." 261 Minn. at 398, 113 N.W.2d at 98.
\item \textsuperscript{45} In Hall v. City of Austin, 73 Minn. 134, 75 N.W. 1121 (1898), the Court held that a party is permitted to explain to the court his failure to call a witness or produce documents that presumably would be favorable to him.
\item \textsuperscript{46} The rule became well settled as a part of the English common law. Armory v. Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722); Ward v. Apprice, 6 Mod. 264, 87 Eng. Rep. 1011 (Q.B. 1705). See, e.g., Connolly v. Nicollet Hotel, 258 Minn. 405, 104 N.W.2d 721 (1960); Blumberg v. Palm, 238 Minn. 429, 56 N.W.2d 412 (1953); Fonda v. St. Paul City Ry., 71 Minn. 438, 74 N.W. 166 (1898); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Kirby v. Tallmadge, 160 U.S. 379 (1896).
\item \textsuperscript{47} See generally 1 JONES, EVIDENCE §§ 25–30 (5th ed. 1958); McCORMICK, EVIDENCE § 249 (1954); 2 WIGMORE, EVIDENCE §§ 285–91 (3d ed. 1940).
\item \textsuperscript{48} Courts frequently use the term "presumption" when referring to the failure of a party to produce evidence at a trial. This is, however, a misnomer because the failure to produce evidence raises a permissive rather than a mandatory inference. A permissive inference is "an inference that may be drawn from the facts and not a true deduction." Zuber v. Northern Pac. Ry., 246 Minn. 157, 167, 74 N.W.2d 641, 650 (1956); 1 JONES, EVIDENCE §§ 9–11 (5th ed. 1958); 33 MINN. L. REV. 423, 425 (1949).
\end{itemize}
if his opponent (1) fails to call a witness who has knowledge about certain facts in issue;\(^5\) (2) fails to produce voluntarily documentary evidence in this control, or suppresses or destroys such evidence;\(^2\) (3) fabricates testimony;\(^3\) or (4) in a civil case, fails to testify as a witness himself.\(^4\)

Guide recommends that the court give no instruction with respect to this inference.

\(^5\) Shockman v. Union Transfer Co., 220 Minn. 334, 348, 19 N.W.2d 812, 820 (1945); Rice v. New York Life Ins. Co., 207 Minn. 268, 274, 290 N.W. 798, 801 (1940); M & M Sec. Co. v. Dirnberger, 190 Minn. 57, 62, 250 N.W. 801, 803 (1933); Owosso Sugar Co. v. Drong, 163 Minn. 216, 217, 203 N.W. 610, 611 (1925); The New York, 175 U.S. 187 (1899); cf. Dubois v. Clark, 253 Minn. 556, 558, 93 N.W.2d 533, 536 (1958); Nelson v. Ackermann, 249 Minn. 582, 592–93, 83 N.W.2d 500, 510 (1957). Counsel may not argue that the inference can be raised, however, if the testimony that the witness could give is privileged. MCCORMICK, EVIDENCE § 249, at 535 (1954). See Merrill v. St. Paul City Ry., 170 Minn. 332, 212 N.W. 533 (1927).

\(^2\) Fonda v. St. Paul City Ry., 71 Minn. 438, 452, 74 N.W. 166, 170 (1898) (dictum); F. R. Patch Mfg. Co. v. Protection Lodge, No. 215, I.A. M., 77 Vt. 294, 60 Atl. 74 (1905); cf. McHugh v. McHugh, 186 Pa. 197, 197, 40 Atl. 410 (1898). The Minnesota Court requires exclusive control and possession of documentary evidence before the inference can be drawn against the nonproducing party. 261 Minn. at 401, 113 N.W.2d at 101; Blumberg v. Palm, 238 Minn. 249, 254, 56 N.W.2d 412, 415 (1953); Vorlicky v. Metropolitan Life Ins. Co., 206 Minn. 34, 40, 287 N.W. 109, 112 (1939); Peterson v. Skarp, 117 Minn. 102, 104, 134 N.W. 503, 504 (1912). Where documentary evidence is not produced or is destroyed, the inference may be used as evidence of the contents of the document. See MCCORMICK, EVIDENCE § 250 (1954); 2 WIGMORE, EVIDENCE § 291 (3d ed. 1940).

The truth is that there is no reason why the utmost inference logically possible should not be allowable, namely, that the contents of the document (when desired by the opponent) are what he alleges them to be, or (when naturally a part of the possessor's case) are not what he alleges them to be. Id. at 186.

Some courts also permit use of the inference when the evidence actually produced is relatively weaker than other available evidence; the jury may then infer that the stronger evidence would have been prejudicial to the non-producing party. See, e.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939); Runkle v. Burnham, 153 U.S. 216, 225 (1894); Clifton v. United States, 45 U.S. (4 How.) 242 (1846).

\(^3\) Kulberg v. National Council of Knights & Ladies of Security, 124 Minn. 437, 442, 145 N.W. 120 (1914) (dictum); McHugh v. McHugh, 186 Pa. 197, 40 Atl. 410 (1898).

\(^4\) Blumberg v. Palm, 238 Minn. 249, 56 N.W.2d 412 (1953); James v. Warter, 156 Minn. 247, 194 N.W. 754 (1923); McHugh v. McHugh, 186 Pa. 197, 40 Atl. 410 (1898); Kirby v. Tallmadge, 160 U.S. 379, 383 (1896); cf. Hall v. City of Austin, 73 Minn. 134, 75 N.W. 1121 (1898).

In criminal actions, where consideration must be given to the constitutional rights of the defendant not to testify against himself, the inference is not permitted. MINN. STAT. § 611.11 (1961). See State v. Jansen, 207 Minn. 250, 256, 290 N.W. 557, 560 (1940); Connelly v. Nicollet Hotel, 258 Minn. 405, 414, 104 N.W.2d 721, 728 (1960) (dictum); Graves
The Court in *Kmetz* denied counsel the opportunity to comment to the jury on the inference because of the availability of discovery procedures to obtain the evidence. Although the Court acknowledged that the inference "obtains with most force to the case of documentary evidence in the exclusive possession and control of the party," it noted that the inference may not be drawn if the evidence is "equally available to both parties." The liberal discovery provisions of the rules of civil procedure make documentary evidence available to both parties, even though within the possession of only one. Thus, the Court refused to permit counsel to comment to the jury on the inference unless the party had made an attempt to secure the evidence from his opponent.

A further ground for the Court's refusal to allow mention of the inference in the absence of an attempt to obtain the evidence by discovery was the effect of the inference on the burden of proof. When a party does not have the burden of persuasion in a case, he is not obligated to produce any evidence; instead, he may rely upon the weaknesses in his opponent's case. The Court reasoned that to raise the inference against such a party without a demand for production of the evidence would be unfair because "it does not appear that the party was not willing to produce." Since raising the inference in such a situation may have the effect of arbitrarily shifting the burden of producing evidence, the effect of the

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55. Compare Brown v. Bertrand, 254 Minn. 175, 94 N.W.2d 543 (1959), in which the Court denied a new trial because appellant's newly discovered evidence could have been obtained before trial by the use of interrogatories or depositions.

56. 261 Minn. at 401-02, 113 N.W.2d at 100, citing Fonda v. St. Paul City Ry., 71 Minn. 438, 452, 74 N.W. 166, 170 (1898).

57. 261 Minn. at 402, 113 N.W.2d at 101; see Peterson v. Skarp, 117 Minn. 102, 104, 134 N.W. 503, 504 (1912).

58. 261 Minn. at 403, 113 N.W.2d 96, 101 (1962).


60. 2 Wigmore, EVIDENCE § 291, at 185.

61. The Court quoted the following excerpt from 2 Wigmore, EVIDENCE § 290, at 179:

The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury. A party may legally sit inactive, and expect the opponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden.
decision in *Kmetz* is to minimize the unfavorable inference as "a strategic device to be used to the disadvantage of an opponent."\(^2\)

By stressing that discovery makes documentary evidence available to both parties and thus precludes the use of the inference, the Court was merely extending its decision in *Ellerman v. Skelly Oil Co.*\(^3\) In the *Ellerman* case, the Court refused to allow the inference to be drawn against an employer for failing to call a former employee as a witness on the ground that the employee was no longer within the control of the employer and thus could have been called by either party. Professor McCormick describes this reason for denying the inference as inaccurate because "the inference is frequently allowed when the witness could be called or subpoenaed by either party";\(^6\) he says that the Court probably meant only that if the witness is likely to be impartial, the inference may not be raised.\(^6\) The decision in *Kmetz*, however, should not be subject to this ambiguity. The Court will not permit a party to raise an unfavorable inference over unproduced documentary evidence unless he has attempted to secure such evidence by discovery or a demand at the trial. The inference will then be denied when he is able to secure the evidence through discovery and the evidence is thus "equally accessible" to both parties.

**D. FINDINGS: TRIAL COURT'S OBLIGATION TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Minnesota Court in *Allen v. Village of Savage*\(^6\) held that findings of fact and separate conclusions of law are not required where there is no conflict in the evidence and the basis of the trial court's decision is clear from the record. The trial court dismissed plaintiff's action to enjoin a municipality from operating a liquor store on a parcel of land dedicated for public use.\(^6\) On

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\(^2\) cf. Nelson v. Ackerman, 249 Minn. 582, 592, 83 N.W.2d 500, 507 (1957).

\(^3\) 227 Minn. 65, 34 N.W.2d 251 (1948), 33 MINN. L. REV. 423 (1949); Annot., 5 A.L.R.2d 895.

\(^4\) MCCORMICK, EVIDENCE § 249, at 534 (1954); accord, 2 WIGMORE, EVIDENCE § 288, at 169–71:

It is commonly said that no inference is allowable where the person in question is *equally available* to both parties; particularly where he is actually in court . . . . Yet the more logical view is that the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.

\(^5\) MCCORMICK, EVIDENCE § 249, at 534.

\(^6\) 261 Minn. 334, 112 N.W.2d 807 (1961).

\(^6\) Plaintiff claimed to be the owner of a reversionary interest in a
appeal, plaintiff argued that the trial court's failure to make findings of fact and conclusions of law pursuant to Rule 52.01 of the Minnesota Rules of Civil Procedure constituted reversible error. The Minnesota Court affirmed the dismissal and concluded that since the basis of the trial court's decision was clear, "nothing could be now accomplished by reversing the case in order that the trial court may be required to" make findings of fact and conclusions of law upon which its order for judgment is based.

Rule 52.01, which is substantially the same as Rule 52(a) of the Federal Rules of Civil Procedure, provides in part that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . . Requests for findings are not necessary for purposes of review.

The courts have generally held that findings of fact and conclusions of law are not required where the issues of fact decided and the law applied is clear from the record. This result seems to ignore the intent of the drafters of Rule 52.01 since its literal language square that had been dedicated to the village of Savage by common-law dedication. Although he did not claim an interest in that portion of the property on which the liquor store was located, his interest in adjacent property was sufficient to allow him to attack the use of the property for a liquor store as inconsistent with the use intended by the dedication.

The first sentence of this section, providing for findings, was superseded by Rule 52.01 as to procedure in the district courts.

Rule 52.01 also provides that the trial court's findings of fact shall be conclusive unless they are clearly erroneous; the appellate court must also give weight to the trial court's evaluation of the credibility of the witnesses; findings of a referee are to be considered as findings of the court; and findings are not required "on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." MINN. R. CIV. P. 52.01.

guage requires findings of fact and conclusions of law in all cases.73

One of the objectives of Rule 52.01 is to aid the reviewing court in understanding the basis for the trial court's decision.74 The Allen case allows the appellate court to disregard the absence of findings if it believes that the basis of the lower court's decision is made clear by the record. The absence of specific findings of fact and conclusions of law creates a greater possibility that the trial court's decision will be misunderstood by the reviewing court than if such findings were included. This increased possibility of an erroneous decision does not seem to be justified since no burden is imposed on the parties by remanding the case to the trial court for findings of fact and separate conclusions of law.75

In addition to aiding the appellate court in its task of review, perhaps a more important purpose of Rule 52.01 is "evoking care on the part of the trial judge in ascertaining the facts."76 The importance of fact-finding to obtaining a just result in a case was emphasized by Judge Frank:

[A]n impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are "clearly erroneous."77

When attempting to fulfill the requirement of Rule 52.01, the trial judge may realize that his impressions of the facts from the evidence were erroneous. Therefore, the provisions of Rule 52.01 should be strictly adhered to even in cases where the facts "appear" to be clear from the record.

73. Rule 52.01 did not alter the Minnesota law in this regard. See Streissguth v. Chase Sec. Corp., 198 Minn. 17, 268 N.W. 638 (1936); Chilson v. Travelers Ins. Co., 180 Minn. 9, 230 N.W. 118 (1930); Lowe v. Nixon, 170 Minn. 9, 230 N.W. 118 (1930); Jackson v. Minnetonka Country Club, 166 Minn. 323, 207 N.W. 632 (1926).

74. Asch v. Housing & Redevelopment Authority, 256 Minn. 146, 155, 97 N.W.2d 656, 664 (1959); see United States v. Horsfall, 270 F.2d 107 (10th Cir. 1959); Cross v. Pasley, 267 F.2d 824 (8th Cir. 1959); Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 27 (1940).

75. This requirement does place an additional burden upon the judge, but Judge Nordbye has written that he does "not believe that any undue burden will rest upon the trial court in strictly adhering to the requirements of the rule in disposing of non-jury cases." Nordbye, supra note 74, at 32; see ABA, PROCEEDINGS OF THE CLEVELAND INSTITUTE ON THE FEDERAL RULES 316-17 (1938).


77. Ibid.
A further purpose of requiring separate findings of fact and conclusions of law is to eliminate the doctrine of "implied findings." Such a requirement makes clear what is decided "not only for the purposes of the particular action, but also for the purpose of applying the doctrine of estoppel to future actions." Although these elements may be inferred from the record or from the information in the judgment roll, "nothing should be left to implication." The exact issues determined in a case should be made clear through separate findings without the necessity for a search of the entire record of the case.

The Court in Allen limited its holding to cases where the record clearly indicates the basis of the court's decision. However, even this limited abrogation of the mandatory language of Rule 52.01 would not seem to be justified in view of the purposes of the Rule.

E. Judgments: Negligence Judgment as Bar to Civil Damage Action

In Lund v. Village of Watson, the Minnesota Court held that recovery of a judgment in a prior common-law negligence action does not preclude a subsequent suit under the Minnesota Civil Damages Act. Plaintiff, who was injured in an automobile accident, recovered a judgment in a common-law negligence action against the intoxicated driver of the other automobile; she then brought a civil damage action against the municipal liquor store from which the negligent driver had purchased the intoxicants. The defendant store moved to dismiss the civil damage action and contended that the plaintiff was precluded from suing under the Civil Damage Act by acceptance of the common-law negligence judgment from the driver. The Court reversed a district court order dismissing the civil damage action and concluded that although the plaintiff was not to be compensated in excess of her actual damages as ascertained by the jury in the civil damage action, she was not

80. MINN. STAT. § 548.08 (1961), requires the district clerk to compile a judgment roll comprised of the pleadings, a copy of the judgment, the decision or report, and all additional orders of the court affecting the judgment and the merits of the action.
82. Id. at 21, 289 N.W. at 781.
83. 260 Minn. 273, 109 N.W.2d 564 (1961).
precluded from bringing the civil damage action by the judgment in the common-law negligence action.

In earlier Minnesota cases, the Court has permitted a plaintiff to maintain a civil damage action even though he has recovered a judgment in a prior wrongful death action. In those cases, the Court reasoned that the Wrongful Death Act and the Civil Damage Act are sufficiently different in "scope and purpose" that each may be the basis of a separate cause of action. It pointed out that the Wrongful Death Act is essentially an extension of a decedent's common-law negligence action for the benefit of his surviving spouse or next of kin, while the Civil Damage Act is a penalty measure that makes the liquor distributor liable regardless of fault. Although the prior recovery in Lund was in a common-law negligence action rather than an action under a statute, the Court concluded that the same reasons and purposes that justify allowing a civil damage action to be maintained after the plaintiff has recovered in a prior wrongful death action "apply with equal force where one action is based upon the Civil Damage Act and the other on a different common-law theory of liability."

The Court accepted the general common-law rule that where the injury inflicted on the plaintiff is indivisible, a release or satisfaction of a judgment against one of two tortfeasors bars any action against the other for the same injury, but it precluded application of the rule in Lund because of the "highly penal nature" of the Civil Damage Act. This abrogation of the general rule does not seem necessary to protect or promote the "penal nature" of the Civil Damage Act. The penal aspect of the Act does not extend to the measure of damages in a civil damage action, for only compen-

85. E.g., Ritter v. Village of Appleton, 254 Minn. 30, 93 N.W.2d 683 (1958); Hartwig v. Loyal Order of Moose, 253 Minn. 347, 91 N.W.2d 794 (1958); Adamson v. Dougherty, 248 Minn. 535, 81 N.W.2d 110, 42 MINN. L. REV. 145 (1957). See also Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961); Ruditis v. Gallop, 269 F.2d 50 (8th Cir. 1959).

86. MINN. STAT. § 573.02 (1961).


88. 260 Minn. at 281, 109 N.W.2d at 570.

89. See Muggenburg v. Leighton, 240 Minn. 21, 60 N.W.2d 9 (1953); Driessen v. Moening, 208 Minn. 356, 294 N.W. 206 (1940); Smith v. Mann, 184 Minn. 485, 239 N.W. 223 (1931); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N.W. 337 (1928). See authorities cited in 260 Minn. at 279 n.2, 109 N.W.2d at 569 n.2. If the plaintiff enters into a covenant not to sue one defendant, however, this does not discharge the other defendants. Joyce v. Massachusetts Real Estate Co., supra.

90. 260 Minn. at 280, 109 N.W.2d at 569.
satory damages are recoverable. At common law, the plaintiff who was injured by an intoxicated person could not sue the liquor distributor; merely making the liquor dealer liable to suit for causing the intoxication of the tortfeasor imposes "upon the tavern keeper a disciplinary sanction." Thus, the penal policy of the Civil Damage Act is satisfied by the fact that the liquor dealer is available for suit in the first instance.

Although the result in Lund cannot be justified by the "penal nature" of the Civil Damage Act, it does recognize that the general common-law rule is unduly harsh in many cases. In Lund there was medical testimony in the original action that the plaintiff had sustained medical expenses of 50 dollars; in the civil damage action, plaintiff contended that in fact she had incurred medical expenses of 2,317 dollars. The Minnesota Court, in the recent case of Doud v. Minneapolis St. Ry., held that a stipulation of settlement would not bar recovery for injuries that were unknown when the release agreement was signed. The Court recognized that:

In the case of prolonged disability from injuries, the compelling need for immediate cash provides an economic compulsion that may lead to hasty and improvident settlements . . . . It is submitted that by reason of the special interest of the public in preventing injured persons from unnecessarily becoming burdens upon society in consequence of their improvident settlement of injuries, the well-developed tendency of the law . . . is to adopt a more liberal rule for the setting aside of releases . . . .

This judicial policy could be extended to the case where the plaintiff has recovered a judgment from an intoxicated driver and subsequently seeks to recover under the Civil Damage Act. If the plaintiff can prove that the liquor store owner has caused him additional damages, the fact that he has partially recovered in a prior action against the intoxicated driver would not prejudice the defendant in the civil damage action. Allowing consecutive suits against the intoxicated driver and the liquor store owner who both have

91. Ritter v. Village of Appleton, 254 Minn. 30, 93 N.W.2d 683 (1958); Hartwig v. Loyal Order of Moose, 253 Minn. 347, 91 N.W.2d 794 (1958); Adamson v. Dougherty, 248 Minn. 535, 81 N.W.2d 110 (1957). Cf., MINN. STAT. § 340.12 (1961), which requires a liquor dealer to post a bond and imposes liability, to the extent of the bond upon the liquor dealer and his sureties, for injuries caused by the dealer's illegal sale of liquor. See Philips v. Aretz, 215 Minn. 325, 10 N.W.2d 226 (1943).


93. 260 Minn. at 281, 109 N.W.2d at 570.

94. 259 Minn. 341, 107 N.W.2d 521 (1961), noted pp. 262-66 supra.

95. 259 Minn. at 347, 107 N.W.2d at 525.
contributed to a single indivisible injury would not permit double recovery since "the issue of whether the prior settlement, either by judgment or release, amounts to full compensation of plaintiff's damages is a question of fact to be determined in the second action." 96

This analysis would not, however, permit the plaintiff to bring an action under the Civil Damage Act after recovery from the intoxicated person if he knew the extent of his injuries at the time of the first recovery. If the plaintiff is unable to collect the first judgment, he is not precluded from bringing a second action against another tortfeasor. 97 If the first judgment is satisfied, however, the plaintiff should be precluded from obtaining a second jury determination on the amount of his damages. 98 The measure of damages un-

96. 260 Minn. at 283, 109 N.W.2d at 571.
97. See Prosser, Torts § 46, at 242 (2d ed. 1955): "[I]t is now held everywhere that an unsatisfied judgment against one tortfeasor does not bar an action against another."

The Illinois court holds that acceptance of a judgment from a common-law defendant precludes a subsequent action under the Illinois Dram Shop Act for the same injury. McClure v. Lence, 349 Ill. App. 341, 110 N.E.2d 695 (1953); Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947). Joinder of the intoxicated driver and supplier is required if the plaintiff wishes to proceed against both. Ruediger v. Klink, 346 Mich. 357, 78 N.W.2d 248 (1956), allowed joinder of actions against an intoxicated driver and the liquor distributors that had served him under a statute permitting joinder of parties when "sufficient grounds . . . appear for uniting the causes of action in order to promote the convenient administration of justice."

MINN. R. Civ. P. 20.01 would seem to allow joinder of the intoxicated person and the liquor distributor. It allows joinder of defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same . . . series of transactions . . . and if any question of law or fact common to all of them will arise in the action . . . . Judgment may be given . . . against one or more defendants according to their respective liabilities.

Arguably, if the defendants' liability to the plaintiff is not the same joinder should not be allowed. The Minnesota Court agreed with this position in Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955). However, the Michigan court in Ruediger considered this problem and concluded that there would be "no practical difficulty in conduct of trial of the respective causes of action together. . . ." 346 Mich. at 367, 78 N.W.2d at 252. See generally Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev.
der the Civil Damage Act is the same as in a common-law action;
therefore, where the plaintiff was aware of the extent of his injury in the first suit and the judgment from that suit has been satisfied, he has presumably been fully compensated for his injury. Since the measure of damages in a wrongful death action and a civil damage action is different, however, the satisfaction of a judgment rendered in the prior wrongful-death action should not bar a subsequent civil damage action. In future cases where the plaintiff is bringing a civil damage action after recovery in a prior action, the Court should attempt to base its result on policy considerations that may justify a second suit rather than upon a confusing characterization of the Civil Damage Act.


99. Minn. Stat. § 340.95 (1961), provides that the "injured . . . person . . . has a right of action, in his own name . . . for all damages, sustained . . .; and all suits for damages under this section shall be by civil action." (Emphasis added.)

100. Cf. note 18 supra. In Clark v. Halstead, 276 App. Div. 17, 93 N.Y.S.2d 49 (1949), the court assumed that the plaintiff's judgment in a prior action was recovery in full for his ultimate injuries.

It could be argued that the measure of damages in a common-law action and a civil damage action is not the same where one of the defendants may be liable for punitive damages. However, if the plaintiff feels that he has a claim for punitive damages against one of the defendants, he may sue the defendant in the first instance.

101. The prior [wrongful death] action was instituted for the benefit of the widow and funeral creditors of the decedent, as well as for his minor heirs, whereas the present [civil damage] action was instituted for the sole benefit of the latter. Such factors, of course, may have some bearing in determining whether plaintiff already has been fully compensated for the damages claimed herein.

Adamson v. Dougherty, 248 Minn. 535, 543, 81 N.W.2d 110, 115 (1957). But cf., Porter v. Sorell, 280 Mass. 457, 182 N.E. 837 (1932). Under the Civil Damage Act, the injured person has a right of action in his own name for all damages sustained, while under the Wrongful Death Act the action is brought by an appointed trustee for the exclusive benefit of the surviving spouse and next of kin, and damages are limited to $25,000 measured by the pecuniary loss to the beneficiaries of the action. See Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961), noted pp. 323–27 infra. Arguably, recovery under the Wrongful Death Act is full compensation because the legislature has determined that amount to be maximum damages for loss of life. See 42 Minn. L. Rev. 145, 147 (1957).
IV. GOVERNMENT REGULATION

A. LABOR RELATIONS: AUTHORITY OF STATE LABOR CONCILIATOR IN DISPUTES OF PUBLIC EMPLOYEES

In *In re Richfield Fed'n of Teachers*, the Minnesota Court for the first time reviewed the authority of the State Labor Conciliator over controversies involving the representation of public employees before their employer under the "no-strike" provisions of the Minnesota Labor Relations Act. The Richfield Education Association and the Richfield Federation of Teachers, both of whom represent teachers in the Richfield school district, failed to arrive at a mutually satisfactory salary schedule for joint presentation to the Richfield Board of Education. Thereupon both organizations petitioned the State Labor Conciliator to investigate and certify a representative to meet with the School Board, pursuant to section 179.52 of the Labor Relations Act. The Federation's petition suggested the secondary teachers as a bargaining unit; the Association's petition suggested that the bargaining unit consist of all "certified personnel," including all elementary and secondary teachers, administrators, and others with teaching contracts. The Conciliator ordered an election in a unit composed of the secondary teachers. The Association then secured a writ of prohibition.

1. 115 N.W.2d 682 (1962).


3. Such a presentation by the two associations had been a customary practice for a number of years. 115 N.W.2d at 683.

4. This section is part of the "no-strike" statute. Section 179.52 tempers the prohibition against strikes by public employees insofar as it allows "public employees . . . the right to form and join labor organizations, and . . . the right to designate representatives for the purpose of meeting with the governmental agency with respect to grievances and conditions of employment. . . ." Section 179.52 further provides that when a question concerning the representative of employees is raised, the State Labor Conciliator "shall . . . investigate such controversy and certify to the parties in writing, the name or names of the representatives that have been designated or selected . . . and shall take a secret ballot of employees to ascertain such representative." Compare Mo. CONST. art. 1, § 29. See generally Anderson, supra note 2, at 604; Cornell, supra note 2, at 54.

5. The School Board had applied for, and received, a writ of certiorari from the district court of Ramsey County to review the Conciliator's order. The proceedings in the district court were stayed upon the Association's application for a writ of prohibition.
The Court found that the Association had withdrawn its petition at the beginning of the hearing before the Conciliator. Since the Federation's petition had alleged that the Association was also asserting a right to represent the faculty, the withdrawal of the Association's petition ended the controversy over representation.\(^6\) The Court made the writ of prohibition absolute, holding that under its decision in *Nemo v. Local Joint Executive Bd.*,\(^7\) the Conciliator has no jurisdiction to conduct an election unless a controversy over representation exists. In a controversy over the representation of public employees in meetings with their employers, the Conciliator has no authority to designate units of representation.\(^8\)

Under the "no-strike" provisions, public employees have the right to form labor organizations and to designate representatives for the purpose of meeting with their public employers with respect to grievances and conditions of employment; the employer is then required to meet with these representatives.\(^9\) In the event of a dispute between the employer and employees or between the employees with regard to representation, the State Labor Conciliator is authorized to conduct an investigation, to provide for a hearing, and to certify the proper representative.\(^10\)

\(^6\) In deciding that no controversy existed, the Court further outlined the scope of employer-employee negotiations under the Public Employees Act. While recognizing that the Conciliator would have jurisdiction over a "controversy" if an employer refused to meet with a purported representative, it stated that the School Board's willingness to meet with representatives of both the Federation and the Association "in itself would seem to obviate the need for an election." It then augmented its finding of "no controversy" by pointing to the Association's concession that the Federation represents a majority of the secondary teachers.

\(^7\) 227 Minn. 263, 271, 35 N.W.2d 337, 342 (1948). In *Nemo*, a proprietor of a restaurant petitioned the Conciliator for an investigation and for certification of a bargaining agent. The Court said, "it seems apparent that under our act [MINN. STAT. § 179.16 (1961)], before there can be an investigation or election, there must be a controversy." Accord, *Ny-Lint Tool & Mfg. Co.*, 77 N.L.R.B. 642 (1948); In the Matter of Park & Tilford Import Corp., 47 N.L.R.B. 411 (1943).

\(^8\) The Court also held that, since the undisputed facts in *Richfield Teachers* showed that the Conciliator was about to act without sufficient authority, and that the proceedings through the district court would lead to injurious delay, the writ of prohibition was a proper remedy. For a general statement of the conditions under which a writ of prohibition may issue, see State v. Hartman, 261 Minn. 314, 112 N.W.2d 340 (1961).

The opinion in *Richfield Teachers* was substituted for an opinion filed on February 16, 1962; it deleted the portion of the original opinion that stated that the grievance procedures of the "no-strike" provisions were modified by the provisions of MINN. STAT. § 125.12(2) (1961), which require all teachers to sign separate employment contracts. The two opinions are otherwise essentially identical.


\(^10\) MINN. STAT. § 179.52 (1961).
provisions are generally similar to that part of the Minnesota Labor Relations Act that is applicable only to private employees, they do not specifically authorize unit representation. The portion of the act dealing with private employees does authorize unit representation for employer units, craft units, and plant units, and further, excludes supervisory employees from collective bargaining with the employer.

The major issue facing the Court in Richfield Teachers was whether the Conciliator, under the "no-strike" provisions, could designate a bargaining unit, which in turn would elect an exclusive representative to meet with the School Board. Because these provisions are silent on the issue of unit representation, the Court, although noting that "unit representation would seem logical and desirable," refused to construe the statute to authorize the Conciliator to designate units among employees to determine representation for meetings with their public employers. Although the literal wording of the Court's denial of unit representation for public employees seems further to define the function of a public employee-employer meeting as something apart from collective bargaining, dicta in the opinion would seem to permit

13. MINN. STAT. § 179.16(2) (1961).
15. 115 N.W.2d at 686. The Court recognized that the diversity of skills among the employees of large government units would often make bargaining units desirable and therefore invited the legislature to consider the problem of unit representation for public employees.
16. The Court cited Wheeler v. Greene, 280 U.S. 49, 51 (1929), for the proposition that the omission in the public employees statute was intentional. The Court felt that to incorporate the unit designations in the private employees act into the public employees act would be judicial amendment and not statutory construction. Cf. State v. Moseng, 254 Minn. 263, 269, 95 N.W.2d 6, 11 (1959).

Because of the distinctions between private and public employment collective bargaining is not really descriptive of labor relations in public employment. Collective conferences, collective negotiation, collective dealing and even collective begging have been used to describe the public employer-employee relations.

Anderson, Labor Relations in the Public Service, 1961 Wis. L. REV. 601,
some unit representation. The Court said, "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."18 The Court further stated that in the event of a dispute over the percentage of a unit that a designated representative in fact represents, the Conciliator would have jurisdiction to investigate and hold an election to determine the amount of support each representative had within the unit. One difficulty with this method of unit representation is that the employer need not accept the unit designation made by the employees, but may insist upon meeting with a single representative.19

Assuming that the public employers do not insist upon one representative,20 then if the public employees would agree upon units of representation, they could also provide for such unanimity within the unit that the representative could be designated the exclusive bargaining agent of the employees within the unit.21 Such a result could certainly aid in making collective bargaining by public employees in Minnesota a reality.22

18. 115 N.W.2d at 686.
19. See 115 N.W.2d at 686:

In the instant case there are less than 500 employees involved, most of them teachers, and we are not persuaded that, even if the employer insists on meeting with only one representative, inequitable consequences will follow.

Since MINN. STAT. § 179.52 (1961) provides that "the governmental agency shall be required to meet with the representatives of the employees," the Court's statement that the employer can insist upon "meeting with only one representative" may appear questionable. Moreover, this section further provides that in the event of a dispute over representation, the Labor Conciliator may be requested to investigate, provide for a hearing, and "take a secret ballot of employees to ascertain such representatives." Since a secret ballot would be unnecessary unless a single representative were to be designated, the statute does support the Court's statement.

20. The School Board, the employer in the Richfield Teachers case, did not so insist, but was "willing to meet with representatives of both the Federation and the Association . . . ." 115 N.W.2d at 685.

21. See Note, 45 MNN. L. REV. 249, 272–73 (1960), for the view that in Minnesota public employers may agree upon one union as the exclusive bargaining agent for the employees. But see City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Elec. Ry. Employees, 30 Ohio Op. 395, 407 (C.P. 1945). The right to designate an exclusive bargaining agent has been described as one of the major elements in the collective bargaining process. Goldberg, Constructive Employee Relations in Government, 8 LAB. L.J. 551 (1957). Cf. § 1(a) of the collective bargaining agreement of February 20, 1958, between the City of Philadelphia and the American Federation of State, County and Municipal Employees, as quoted in Cornell, supra note 2, at 58.

22. Cf. Note, 45 MNN. L. REV. 249, 250 (1960), which declared that
B. PUBLIC HEALTH: SALE OF TRADE NAME DRUGS IN FOOD STORES

In State v. Red Owl Stores, Inc., the Minnesota Court held that certain pre-packaged trade name drugs could only be sold by a licensed pharmacist. The Court concluded that the preparations were drugs and thus not exempted from the Pharmacy Act as "non-habit forming harmless proprietary medicines," but refused to enjoin the respondent's food markets from selling such drugs. A trial court order denying an injunction was affirmed because no provision is made in the act for injunctive relief; punishment for a violation is limited to criminal prosecution for a

"the Minnesota legislature has taken a major step toward instituting collective bargaining in the field of public employment by enacting sections 179.51 to 179.58 of the Minnesota Statutes—the so-called 'no-strike' provisions."

23. 115 N.W.2d 643 (Minn. 1962). This case first came before the Court in 1958. State v. Red Owl Stores, Inc., 253 Minn. 236, 92 N.W.2d 103 (1958); 25 BROOKLYN L. REV. 340 (1959); 8 BUFFALO L. REV. 298 (1959); 28 FORDHAM L. REV. 161 (1959); 16 WASH. & LEE L. REV. 302 (1959). There the Court reversed the trial court's dismissal of the State's request for an injunction. At the close of the State's case, the record indicated that the defendant was guilty of violating the provisions of the Pharmacy Act; therefore, the Court held that the State had established a prima facie case for injunctive relief and granted the appellant a new trial. This case is an appeal from the second trial in which the trial court found that the sale of these drugs at defendant's food markets did not constitute a sufficient danger to the public health to justify injunctive relief.

24. MINN. STAT. § 151.15 provides that "it shall be unlawful for any person to . . . sell at retail, drugs . . . in any place other than a pharmacy, except as provided in this chapter."

25. MINN. STAT. § 151.26 (1961). Since the Court was not furnished with the legislative history of this exemption, it "assumed" that the statute was intended to make "home remedies generally available for purchase in rural and outlying communities." On that basis, it concluded that the exemption for proprietary drugs was "antiquated" and served "no real purpose under existing social conditions."

26. Groves-Kelco, Inc., a wholesaler distributing these drugs to Red Owl, was a co-defendant. The 18 drugs involved were: Bromo Seltzer, Anacin, Aspergum, Thrifty Spot Aspirin Compound Tablets, Alka-Seltzer, Bufferin, 4-Way Cold Tablets, Bromo Quinine, Pepto-Bismol, Pinex, Vick's Cough Syrup, Vick's Va-Tro-Nol, Murine, Castoria, Ex-Lax, Feen-a-mint, Sal Hepatica, and Lysol.

Red Owl has since acquired Snyders Drug Stores, Inc., as a subsidiary. The Minnesota State Board of Pharmacy refused to re-issue licenses to Snyders on the ground that "Red Owl has a past history of violating the state pharmacy law and the federal food and drug act." The district court for Ramsey County reversed, stating that the Board acted outside the scope of its authority and that Red Owl's past breach of the pharmacy law "had no real effect on the health and welfare of the people of Minnesota and thus did not afford the Board a reason or justification for not granting licenses to Snyders." The Court found no evidence showing "that Red Owl has ever been charged with or convicted of any violation of the pharmacy law." Minneapolis Star, Dec. 18, 1962, p. 1, col. 2, p. 4, col. 3.
misdemeanor. In the absence of a statutory provision, courts will not grant injunctive relief against criminal acts unless those acts constitute a public nuisance, and the Court in Red Owl found that the sale of the drugs in question at unlicensed outlets did not present a danger to public health sufficient to make it a public nuisance.

Many states have statutes providing that the retail sale of harmful drugs must be made by a licensed pharmacist and can only be made when prescribed by a physician. Such statutes, since they have a reasonable relation to protection of the public health, are a constitutional assertion of a state's police power. Statutes that require all drugs to be sold in licensed outlets, however, have been held unconstitutional. Thus, statutes regulating the sale of drugs generally contain a provision permitting any retail merchant to sell "patent" and "proprietary" medicines.

Courts, however, have not agreed on which drugs fall within the proprietary and patent exemption. In most states, the exemption includes all harmless drugs sold in their original package. Minnesota and a few other jurisdictions exempt only those harmless pre-packaged drugs in which the manufacturer has some right

27. Minn. Stat. § 151.29 (1961). Where sale of drugs is made at any place other than a pharmacy, or where a sale is made in a pharmacy, but not under the supervision of a pharmacist, and death results from such a violation, the penalty is a gross misdemeanor. Minn. Stat. § 151.16 (1961).
30. State v. Zotalis, 172 Minn. 132, 214 N.W. 766 (1927); State v. Donaldson, 41 Minn. 74, 42 N.W. 781 (1889).
of ownership in the method of preparation. The Court in Red Owl continued to adhere to this restrictive interpretation of proprietary and patent drugs. It concluded that the drugs in question were not exempt from the Pharmacy Act because any manufacturer with proper training and equipment could produce nearly identical preparations, and therefore, the manufacturers of these


35. In State v. Donaldson, 41 Minn. 74, 80-81, 42 N.W. 781, 783 (1889), the first case in which the Court was confronted with the problem, Justice Mitchell stated:

This language, however, is dictum; the Court refused to decide which interpretation of "proprietary and patent" its decision was predicated upon. Id. at 83, 42 N.W. at 783-84. The Court first accepted the restrictive interpretation in State v. F. W. Woolworth Co., 184 Minn. 51, 237 N.W. 817 (1931), and State v. S. S. Kresge Co., 184 Minn. 59, 237 N.W. 820 (1931). In less than six months, however, the Court apparently withdrew from a firm stand on the restrictive definition:

The word "proprietary" as applied to medicines necessarily implies that the medicine has been compounded by a manufacturer who prepared the medicine according to his own formula, . . . though probably it is not necessary that the formula should be the exclusive property of the maker or that the process be secret. It may have a character of its own according to the reputation of the manufacturer and the nicety with which it is prepared . . . . Obviously our . . . [statute] contemplated that proprietary medicines would be sold on the reputation and standing and under the name of their manufacturer.

Tiedje v. Haney, 184 Minn. 569, 575, 239 N.W. 611, 613-14 (1931). This language was subsequently criticized in Culver v. Nelson, 237 Minn. 65, 75-76, 54 N.W.2d 7, 13 (1952), and thereafter Minnesota has applied the restrictive construction. See Weigel, supra note 32, at 51; Note, 17 N.Y.U. INTRA. L. REV. 15, 17 (1961); Note, 63 YALE L.J. 550, 551 (1954).

36. Ole Gisvold, Ph.D., of the College of Pharmacy of the University of Minnesota, testified that with available scientific methods and instruments a quantitative and qualitative analysis of the 18 drugs under consideration could be made; that he could identify both active and
drugs could have no rights of ownership in the method of preparation. Such an interpretation of the proprietary and patent exemption does not seem to be consistent with the protection of the public health. Because of the great advances in chemical analysis, only the most complex preparations may be proprietary and patent drugs under this interpretation. There seems to be more danger in the unrestricted sale of such complex medicines than in the sale of those preparations listed in the United States Pharmacopoeia that the Court does not regard as proprietary.  

As justifications for its strict interpretation of the Pharmacy Act, the Minnesota Court has suggested that the pharmacist knows where to procure pure drugs and that the pharmacist is better equipped to advise the purchaser as to his needs. In Red Owl, the Court added that "the fact that they [proprietary drugs] are sold by licensed pharmacists should be a warrant as to their quality." The thrust of this argument, however, is weakened by a provision in the Pharmacy Act that relieves the pharmacist of liability for the quality of all drugs sold in the original package of the manufacturer. The pharmacist is not under a duty to analyze the contents of drugs or warn purchasers of the possible harm that may result from their use. The Court has itself recognized that there is no pharmaceutical skill involved in the sale of harmless trade name drugs in the original package: "One man can do it just as well as another, if he can read the label on the package and make change with the purchaser."

To require the sale of harmless, pre-packaged drugs to be made by a licensed pharmacist seems to have no reasonable relation to the purpose of the Pharmacy Act of protecting the public health.  

inactive ingredients and determine the amount of each contained in the product.

115 N.W.2d at 654.

37. The purpose of the United States Pharmacopoeia (U.S.P.) is to set forth uniform standards for drugs and medicines and to establish tests for their quality and purity. In State v. F. W. Woolworth Co., 184 Minn. 51, 54, 237 N.W. 817, 818 (1931), the Court held that milk of magnesia prepared according to the formula required by the U.S.P. was not a proprietary medicine because "any manufacturer could make exactly the same preparation under the United States Pharmacopoeia formula."

41. See State v. Donaldson, 41 Minn. 74, 42 N.W. 781 (1889); accord, West v. Emanuel, 198 Pa. 180, 180, 47 Atl. 965 (1901).
42. State v. Donaldson, 41 Minn. 74, 81, 42 N.W. 781, 783 (1889).
43. Even if defendant were to hire registered pharmacists and set aside an area within its stores for drug sales, it could not become a licensed pharmacy. Under a State Board of Pharmacy regulation, a corporation that is not owned and controlled by pharmacists registered in Minnesota may
The Minnesota Court should re-examine its interpretation of the patent and proprietary exemption and adopt the common usage interpretation which defines patent and proprietary drugs as all harmless, pre-packaged medicines properly labeled with directions for use.

V. LEGAL ETHICS

A. DISBARMENT: MENTAL CONDITION AS A DEFENSE

The Minnesota Court in *In re Streater* held that mental condition is not a mitigating circumstance in disbarment proceedings. Streater, a Minnesota attorney, was charged in disbarment proceedings with collecting fees for handling the probate of certain estates that he had failed to close and with soliciting estate planning business. Although Streater pleaded no defense to the charges, he asked the Court to dismiss the proceedings and allow him to resign from the bar because of mitigating circumstances consisting of mental and emotional disturbances that, in the opinion of his psychiatrist, made it impossible for him to practice law. In addition, Streater pointed out that he was no longer engaged in the practice of law and had no intention of returning to practice. The referee at the hearing recommended that Streater be allowed to resign his membership in the bar. The Court refused to follow this recommendation and, stressing its duty to the public to deter misconduct by attorneys, entered a judgment of disbarment.

A court is vested with the inherent power to discipline one of its officers to maintain its own integrity, and since the attorney is an officer of the court, he is subject to disbarment or other disbarment or other disbarment or other disposition. The court's power is not statutory; although the legislature has passed laws specifically dealing with disbarment, the Court is not bound by such laws. Courts in some jurisdictions follow statutes that regulate disbarment proceedings, not because the laws are valid or binding, but because they are reasonable and just in their application, tend to promote an orderly and systematic procedure, and are sound expressions of public policy. See, e.g., *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928); *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917).
An order of disbarment is made primarily to protect the public interest in the administration of justice rather than to punish the attorney for his misconduct; an action in disbarment is not an adversary proceeding, but is an inquiry into the fitness of the officers of the court to continue as a member of the bar. Where there are mitigating circumstances, however, a court may impose penalties less severe than disbarment, such as censure and suspension of the attorney. The test to be applied in all disciplinary proceedings is whether the deportment of the attorney charged with misconduct meets the standards established by the Canons of Ethics.

In a recent Illinois case where disciplinary proceedings were brought against an attorney, the court held that mental illness is a mitigating circumstance to a charge of misconduct. The Illinois court reasoned that suspension rather than disbarment is a more appropriate sanction in such cases because it allows reinstatement of the attorney if he is subsequently rehabilitated. The holding of the Minnesota Court in Streater, however, does not preclude "the salvage of professional talents." Whether a Minnesota attorney is suspended or disbarred for misconduct caused by mental illness, he may be readmitted to the bar upon proof of competency before a hearing examiner.

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4. See In re Rerat, 232 Minn. 1, 4, 44 N.W.2d 273, 275 (1950); In re Smith, 220 Minn. 197, 19 N.W.2d 324 (1945); In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933).
5. In re Hanson, 258 Minn. 231, 103 N.W.2d 863 (1960); In re Williams, 221 Minn. 554, 23 N.W.2d 4 (1946); In re Smith, 220 Minn. 197, 19 N.W.2d 324 (1945); cf. In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1933).
6. E.g., In re Rerat, 232 Minn. 1, 4, 44 N.W.2d 273, 275 (1950); In re Rerat, 224 Minn. 124, 28 N.W.2d 168 (1947); In re McDonald, 204 Minn. 61, 282 N.W. 677 (1938).
7. See In re Swagler, 239 Minn. 566, 58 N.W.2d 272 (1953); In re Smith, 184 Minn. 87, 237 N.W. 877 (1931); In re McVeety, 170 Minn. 211, 211 N.W. 652 (1927); In re Ginsberg, 141 Minn. 271, 169 N.W. 787 (1918). Cf. In re Rice, 241 Minn. 386, 63 N.W.2d 41 (1954).
8. In re Peterson, 260 Minn. 339, 345, 110 N.W.2d 9, 13 (1961); In re Rerat, 232 Minn. 1, 5, 44 N.W.2d 273, 275 (1950). These cases require that the proof of misconduct must be "cogent and compelling." Cf. In re Greathouse, 189 Minn. 51, 248 N.W. 735 (1935). Minnesota adopted the canons of professional ethics of the American Bar Association "as the standard of professional conduct of attorneys at law" on May 2, 1955. Canons of Professional Ethics, 241 Minn. xvii (1954).
9. In re Bourgeois, 182 N.E.2d 631 (Ill. 1962), overruling In re Patlak, 368 Ill. 547, 15 N.E.2d 309 (1938), in which the court had held that mental illness was not a mitigating circumstance.
10. 182 N.E.2d at 654. This distinction between disbarment and suspension seems questionable since Ill. Rev. Stat. ch. 110, § 101.59 (1961), allows attorneys who have been disbarred to be reinstated.
11. See Minn. Sup. Ct. R. 21. Minnesota permits reinstatement to the
In addition to protecting the public interest in the administration of justice, disbarment of attorneys found guilty of misconduct has a deterrent effect on other attorneys. To preserve this deterrent, the Minnesota Court has consistently refused to consider mental illness either as a defense or as a mitigating circumstance to a charge of misconduct. The Court in *Streater* reasoned that to allow an attorney found guilty of misconduct to quietly resign from the bar would not deter other attorneys from committing similar acts of misconduct to the injury of the public. While the public disgrace that accompanies disbarment undoubtedly gives it a greater deterrent effect than resignation, the Court's reasoning seems to ignore the nature of the mitigating circumstance urged by Streater. He contended that his misconduct was *caused* by mental illness; the added deterrent effect of disbarment will not prevent other attorneys from becoming mentally ill. Thus, where the attorney charged with misconduct is able to prove that the misconduct was caused by mental illness, the more reasonable sanction would seem to be to allow him to resign from the bar.12

In re *Strand*, 259 Minn. 379, 107 N.W.2d 518 (1961); In re *Constantine*, 258 Minn. 582, 103 N.W.2d 196 (1960); In re *Priebe*, 213 Minn. 75, 5 N.W.2d 396 (1942); In re *McDonald*, 208 Minn. 330, 294 N.W. 461 (1940). See the *Strand* and *Constantine* opinions for statements of evidence deemed sufficient to show reformation, thus warranting reinstatement. See Drinker, Legal Ethics 49 (1953), where it is argued that a disbarred attorney should never be reinstated unless the court concludes that the disbarment was erroneous.

12. In re *Manahan*, 186 Minn. 98, 242 N.W. 548 (1932); In re *Fitzgibbons*, 182 Minn. 373, 234 N.W. 637 (1931). When misconduct is coupled with mental instability, the Minnesota Court has treated the instability as an additional reason for disbarment. In re *Chmelik*, 203 Minn. 156, 280 N.W. 383 (1938). Whether mental disability alone is a ground for disbarment is not clear; however, mental incompetency that affects an attorney's professional ability probably would be a basis for disbarment. See In re *Williams*, 221 Minn. 554, 560, 565, 23 N.W.2d 4, 7, 9 (1946), where the Court disbarred an attorney on the basis of gross negligence and sheer professional incompetence.

Other courts have also taken the position that insanity is not a bar to discipline. Louisiana State Bar Ass'n v. Theard, 222 La. 237, 62 So. 2d 501 (1952); In the Matter of Nicolini, 262 App. Div. 114, 28 N.Y.S.2d 272 (1941); In the Matter of Dubinsky, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938). But see In the Matter of Sherman, 58 Wash. 2d 1, 354 P.2d 888 (1960); cf. Theard v. United States, 354 U.S. 278 (1957) (semble). However, some courts are willing to recognize mental disturbances as mitigating circumstances in disciplinary proceedings. E.g., In the Matter of Fleckenstein, 34 N.J. 20, 166 A.2d 753 (1961); In re *Creamer*, 201 Ore. 343, 270 P.2d 159 (1954). But see In the Matter of Bivona, 261 App. Div. 221, 25 N.Y.S.2d 130 (1941).

13. In rejecting mental condition as a mitigating factor, the Court may have been guarding against the possibility of an attorney feigning mental illness when charged with misconduct. However, requiring proof of mental
A. NEGLIGENCE: STANDARD OF CARE FOR A MINOR

In *Dellwo v. Pearson*, the Minnesota Court concluded that a minor defendant was required to exercise the same degree of care as an adult when operating an automobile, powerboat, or airplane. Plaintiff sued to recover damages for personal injuries caused by the allegedly negligent operation of a powerboat by the defendant, a twelve-year-old boy. The jury returned a verdict for the defendant; on appeal, the plaintiff argued that the trial court's jury instruction on the issue of proximate cause was erroneous. The Court agreed that the trial court erred in its instruction on proximate cause and remanded for a new trial in which the minor defendant's negligence was to be determined on the basis of an "adult standard of care."

An adult is required to exercise the degree of care that persons of ordinary and reasonable prudence would exercise under the same or similar circumstances. Because of their undeveloped physical and mental capacities, minor plaintiffs generally were exempted from this rule, and were only required to exercise that standard

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2. Defendant . . ., operating a boat with an outboard motor, crossed behind plaintiffs' boat. Just at this time [plaintiff] felt a jerk on her line which suddenly was pulled out very rapidly. The line was knotted to the spool of the reel so that when it had run out the fishing rod was pulled downward, the reel hit the side of the boat, the reel came apart, and part of it flew through the lens of [plaintiff's] glasses and injured her eye.
3. The precise holding of the Court that foreseeability of the injury is not the test of proximate cause was well settled by prior decisions of the Minnesota Court. See, e.g., Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Mickelson v. Kernkamp, 230 Minn. 448, 42 N.W.2d 18 (1950); Christianson v. Chicago, St. P. M. & O. Ry., 67 Minn. 94, 69 N.W. 640 (1896).
5. See generally 2 HARPER & JAMES, TORTS § 16.8, at 924-28
of care exercised by a child of similar age, intelligence, and experience under like circumstances. This modified standard of care was later extended to minor defendants. The justification for qualifying the standard of care imposed upon minor defendants was the social desirability of having minors develop their mental and physical skills through experience in an adult environment. The growth of children's ability to accept adult responsibility would be deterred if they were burdened with the heavy liability that may be incurred by requiring them to meet the adult standard of care.

Although there has been some conflict in prior Minnesota decisions regarding the modified standard of care for minor defendants, the Court in Deliwo made clear that minor defendants will no longer have the benefit of such a standard when operating a powerboat, automobile, or airplane. The Court reasoned that to protect the public from "the hazards of automobile traffic, the frequency of accidents, [and] the often catastrophic results of accidents . . ., a minor is to be held to the same standard of care as an adult." Apparently, the Court felt that imposing a higher

(1956); HOLMES, THE COMMON LAW 109 (1881); PROSSER, TORTS § 31 (1955); Bohlen, Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924); Schulman, The Standard of Care Required of Children, 37 Yale L.J. 618 (1927); Terry, Negligence, 29 Harv. L. Rev. 40, 47 (1915); Wilderman, The Question of an Infant's Ability To Be Guilty of Contributory Negligence, 10 Ind. L.J. 427 (1935).


8. See generally 2 Harper & James, op. cit. supra note 5, at 903; HOLMES, op. cit. supra note 5, at 109; Prosser, op. cit. supra note 5, at 128; James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 16-17 (1951).

9. This reasoning is of doubtful validity today because of the increased availability of insurance that covers nearly all kinds of activity. The cost of insurance for minors is generally borne by others. See James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549, 554-56 (1947).


11. 259 Minn. at 458, 107 N.W.2d at 863; see Betzold v. Erickson,
standard of care upon minor defendants while operating these vehicles would either discourage them from engaging in such activities or encourage more rapid development of responsible conduct.

The Court, however, adhered to the position that the degree of care required of a minor plaintiff should be determined by the modified standard. The policy reasons underlying the need for a higher standard of care are not applicable when a minor is a plaintiff. Since it is the minor who is injured, imposing a higher degree of care would neither afford the public greater protection nor be in accord with one of the major objectives of modern tort law—compensation of injured persons. Application of the modified standard of care to minor plaintiffs would allow recovery where the plaintiff has been injured by the defendant’s negligence and the minor has exercised the degree of care that his mental and physical capacities permit.

The Court recognized the inequity of making an injured person bear the loss from an injury caused by a minor who is not required to exercise the degree of care demanded of others engaged in the same activity. To eliminate this inequity, the objective of compensation should prevail over the objective of matching subjective-fault with liability. A tentative revision of the Restatement of Torts has recognized this policy and imposes an adult standard of care upon the minor when he is engaged "in an activity which is


12. As the Court noted in Dellwo, earlier Minnesota decisions permitting a lower standard of care for minors had almost without exception involved the issue of contributory negligence on the part of a minor plaintiff. The Court pointed out that a modified standard of care is "proper and appropriate for such situations." 259 Minn. at 457, 107 N.W.2d at 863. See Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919), which held a minor plaintiff to the modified standard of care, and was cited with apparent approval in Dellwo.

13. 1962 DUKE L.J. 138, 142–43. The Minnesota Jury Instruction Guide takes the contrary position. However, if the plaintiff’s contributory negligence has injured the defendant and the defendant counterclaims, the plaintiff’s liability to the defendant should be determined by use of the adult standard of care.

14. See 2 HARPER & JAMES, op. cit. supra note 5, § 16.2 at 903–04; Green, The Thrust of Tort Law, Part I, 64 W. VA. L. REV. 1 (1961). See James, supra note 9, at 2, where he approves use of a double standard of conduct for minors. He argues that in regard to minor plaintiffs, a subjective test of fault should be used in order to aid in compensating the injured minor. But an objective test of fault is necessary when a minor has injured someone, or the loss from a minor’s misconduct is thrown on the injured party.

15. 259 Minn. at 458, 107 N.W.2d at 863.

16. See James, supra note 9, at 2.
normally undertaken only by adults, and for which adult qualifications are required.\footnote{17} Although the Court refused to adopt such a broad rule and limited its holding to minors engaged in the operation of automobiles, airplanes, and power boats,\footnote{18} the reasoning of the \textit{Dellwo} case would seem to apply in all circumstances where the minor is engaged in an activity that is likely to cause substantial harm if performed with less care than that required of an adult of ordinary prudence.\footnote{19}

**B. Wrongful Death Action: Marital Immunity Doctrine Inapplicable to Statutory Trustee**

In \textit{Shumway v. Nelson},\footnote{20} the Minnesota Court considered whether personal immunities, which would bar actions between living parties, preclude actions arising under the Wrongful Death Act.\footnote{21} A husband and wife were killed in an automobile accident, and the wife's statutory trustee sued the husband's estate to recover for the death of the wife. Since an action for wrongful death may be brought only "if the decedent might have maintained an action had he lived . . . \footnote{22} the administrator of the husband's estate argued that the present action was barred because the marital immunity doctrine would bar any action between husband and wife had they lived.\footnote{23} The trial court denied defendant's motion for

\footnotesize{17. \textit{RESTATEMENT (SECOND), TORTS} § 283A, comment c (Tent. Draft No. 4, 1959).

18. The Court was careful to limit the scope of the decision to the named vehicles. No opinion was given in regard to a general standard of care for minors, and the Court expressly left open the question of whether to adopt the standard of care for children that is advocated in the \textit{RESTATEMENT OF TORTS}.

19. This analysis would appear to support the conclusion that minor defendants should be held to an adult standard of care in any activity in which they engage. Nevertheless, the policy to compensate is not so strong that it should always be emphasized over the objective of matching subjective fault with liability. The law can neither ignore the physical and mental infirmities of children, nor deny children an opportunity to act as children in certain activities. When children ride tricycles, wagons, or foot-scooters or engage in other such "childhood activities," the probability of great harm, even if they are negligent according to the adult standard of care, is small. Because the harm is likely to be less serious, there is less reason to emphasize the need to compensate injured persons and less reason to have a rule aimed at either encouraging minors to act with adult prudence or discouraging minors from engaging in such activities. Minor defendants, therefore, should not be required to meet the adult standard of care when they engage in activities that involve small probability of causing substantial harm.


22. \textit{Ibid}.

23. By similar reasoning, the administrator also contended that the doctrine barring actions between parent and minor child precluded this action}
judgment on the pleadings or summary judgment. On appeal, the Minnesota Court affirmed, holding that because the statute creates an entirely new cause of action and because any recovery could not benefit the deceased wife, the legislature could not have intended the marital immunity doctrine to bar the action. The Court said the conditional clause refers to the factual circumstances underlying both the cause of action on behalf of the next of kin and defenses to that action, but it does not refer to personal immunities existing between the decedents.24

At common law, the rule disallowing actions between husband and wife was based on the notion that husband and wife comprise a “single legal identity.”22 This fiction was abolished when the states enacted married women’s acts, giving the wife a separate legal existence.26 Yet the rule itself has not been entirely eliminated. While most jurisdictions have construed these statutes to permit a wife to maintain various property actions against her husband, they have not conceded that the married women’s acts abrogate the common-law rule with respect to tort actions for personal injuries.27 Notwithstanding sweeping language to the contrary in an
early case construing the Minnesota Married Women’s Act, the Minnesota Court has adopted the majority position that the marital immunity doctrine continues to operate in cases of personal torts.

This persistence of the marital immunity doctrine is often explained in terms of public policy. Courts reason that without this rule the state’s interest in promoting family peace and felicity would be frustrated because personal tort actions might disrupt family harmony. In Shumway, the Court recognized this remaining justification for the rule and reasoned that the legislature could not have intended the marital immunity doctrine to apply where its justification is nonexistent. When death severs the marital relationship the danger of family disharmony disappears.

Even the public policy rationale for the much-criticized marital immunity doctrine seems unconvincing, however. Barring an action between spouses would neither preserve nor restore family harmony since the fact that one spouse is willing to bring an action against the other indicates that family harmony has already been disrupted. If the doctrine were worth preserving, it should preclude all actions between spouses, not just personal tort actions; property actions and tort actions equally endanger domestic tranquility. The danger of family disharmony, moreover, is considerably lessened by the advent of liability insurance. The Minnesota Court has not given great weight to the public policy basis for the rule. In Albrecht v. Potthoff, a wife sued her husband for their daughter’s wrongful death; the Court refused to apply the marital immunity doctrine on the ground that this was not an action between husband and wife since the wife brought the action in her capacity as adminis-

131 Atl. 432 (1925); King v. Gates, 231 N.C. 537, 57 S.E.2d 765 (1950); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920). These cases more accurately reflect the purpose of the married women’s acts—to give the married woman the same legal existence she had when unmarried. See Gillespie v. Gillespie, 64 Minn. 381, 67 N.W. 206 (1896).
28.
30. See Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956).
31. McCurdy, supra note 25, at 1053.
32. See Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); 32 Temp. L.Q. 226, 227 (1959).
33. 192 Minn. 557, 257 N.W. 377 (1934).
tratrix of her daughter's estate. The wife, however, would have been the sole beneficiary in the event of recovery; if the possibility of family discord is persuasive, the Minnesota Court would have disallowed the action.

Judicial abolition of the marital immunity doctrine in Minnesota is unlikely, for the Court has indicated that altering it is a legislative function.\(^3\) Although *Shumway* is technically limited to cases arising under the Wrongful Death Act,\(^3\) the Court's reasoning suggests that it will continue to further restrict the application of the marital immunity doctrine. The doctrine should not be applied whenever the reasons that justify it are nonexistent.\(^3\)

C. **Wrongful Death Action: Measure of Damages for Death of a Minor**

In *Fussner v. Andert*,\(^3\) the Minnesota Court liberalized the measure of damages for the death of a minor child under the Wrongful Death Act.\(^3\) In an action to recover for the wrongful death of a nineteen-year-old girl, the trial court gave an instruction to the jury based on the strict pecuniary loss standard previously followed in Minnesota.\(^3\) The jury returned a verdict in the

\(^{259}\) Minn. at 321, 107 N.W.2d at 533; Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956).

\(^{35}\) Our decision herein is necessarily limited to actions brought under the death-by-wrongful-act statute and is not intended to resolve the question of whether a surviving spouse may maintain an action herself against the estate of a decedent spouse for his alleged negligence. 259 Minn. at 324, 107 N.W.2d at 534.

\(^{36}\) For example, a surviving spouse should be allowed to maintain a personal tort action against the deceased spouse's estate. See *Johnson v. Peoples First Nat'l Bank & Trust Co.*, 394 Pa. 116, 145 A.2d 716 (1958). A subsequent divorce should also remove the disability of one spouse to sue the other for personal injuries sustained before or during coverture. *Contra*, *Strom v. Strom*, 98 Minn. 427, 107 N.W. 1047 (1906).

\(^{37}\) 261 Minn. 347, 113 N.W.2d 355 (1961).

\(^{38}\) When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided . . . may maintain an action . . . [to recover] such an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death. MINN. STAT. § 573.02(1) (1961). (Emphasis added.)

\(^{39}\) The instruction given was as follows:

If you award the plaintiff damages they must be in an amount which will fully, fairly and adequately reflect the present monetary value of any future contributions in money or services which you find Sandra would have made to her father during the remainder of their lives had she not been killed in this accident. In other words, if your verdict is for the plaintiff you must decide from the evidence what pecuniary or financial loss the plaintiff has sustained, but you may not include any amount as compensation for the father's grief, sorrow or mental
amount of 3,000 dollars. The father appealed, claiming that the instruction given was "antiquated" and resulted in an inadequate verdict. The Court agreed and remanded the case for a new trial in which the jury was to be instructed that:

[T]he survivor may be compensated not only for actual pecuniary loss of contributions and services but should be compensated as well for loss of advice, comfort, assistance, and protection which the jury might find to be of pecuniary value and which the survivor could reasonably have expected if the decedent had lived.\(^4\)

At common law, no action would lie for the death of a human being.\(^1\) Lord Campbell's Act\(^2\) was enacted to end the anomaly of allowing recovery for a non-fatal injury, but not for an accidental death. Similar statutes were enacted in the United States.\(^3\) Most of these statutes, however, prescribed the measure of damages allowable in general terms.\(^4\) In Blake v. Midland Ry.,\(^5\) Lord Campbell's Act was construed to limit recovery to the probable pecuniary loss to the beneficiary as a result of the death. This "pecuniary loss rule" has been adopted in Minnesota and most other American jurisdictions;\(^6\) moreover, the Minnesota legislature

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4. Id. at 359, 113 N.W.2d at 363.
6. For a complete description of the early statutes see TIFFANY, op. cit. supra note 41, at xix–lxxi.
amended the Wrongful Death Act in 1951 to include the words "pecuniary loss." Under the pecuniary loss rule, juries were instructed to compute damages by considering all the facts and circumstances of each case, but to exclude damages for solace, pain and suffering of the decedent, and the loss of his comfort and companionship.

Despite the instruction based on the pecuniary loss standard, juries often awarded verdicts, which the Minnesota Court upheld, "which have apparently exceeded the measure permitted by the strict pecuniary-loss rule." The Court in Fussner examined a number of cases sustaining verdicts under the Wrongful Death Act and concluded that:

[D]amages are awarded not only on the basis of contributions and such services as the evidence may establish but for those additional elements of loss within the broad definition of society and companionship which include aid, advice, comfort, and protection which the survivor might reasonably expect from the decedent and which, while not having an easily determined market value, are fully justified since they are elements of loss for which money can supply a practical substitute.

U.L. REV. 254 (1959); Note, 22 U. CHI. L. REV. 53 (1955). Tiffany argues that the pecuniary loss standard should not be construed strictly, as it was meant to be only a shorthand way of restricting damages to material as opposed to sentimental losses. TIFFANY, op. cit. supra note 41, at 332.

47. MINN. STAT. § 573.02(1) (1961).
48. See Noe v. Great Northern Ry., 168 Minn. 259, 262, 209 N.W. 905, 906 (1926).
49. See the instruction given by the trial court in Fussner, note 39 supra. Some jurisdictions further require application of the "child labor" measure of damages under which the jury must deduct the probable cost of raising the child from the projected value of his contributions. See, e.g., Thompson v. Town of Fort Branch, 204 Ind. 152, 178 N.E. 440 (1931); Carnego v. Crescent Coal Co., 164 Iowa 552, 146 N.W. 38 (1914); Note, 54 NW. U.L. REV. 254, 259 (1959). This measure was discarded by Michigan in Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).
50. 261 Minn. at 354, 113 N.W.2d at 360; see, e.g., Tollefson v. Ehlers, 252 Minn. 370, 90 N.W.2d 205 (1958); Schroht v. Voll, 245 Minn. 114, 71 N.W.2d 843 (1955); Moore v. Palen, 228 Minn. 148, 36 N.W.2d 540 (1949).

The obvious conclusion would seem to be that in most cases a scrupulous adherence to the pecuniary loss test would result in a minus . . . . Yet juries are instructed to determine damages by this test and recoveries are allowed which supposedly result from the test but which actually must be based upon other considerations. Thus the use of this test in most of the children-death cases seems to be a fiction and damages are probably based upon emotional factors.


51. 261 Minn. at 358–59, 113 N.W.2d at 362. See Note, 16 MINN. L. REV. 409, 412–13 (1932):

A tendency to extend the theory of pecuniary loss to embrace any elements that would have been productive of material benefit renders
Rather than reverse the trend of these cases, the Court decided to liberalize the jury instruction. This decision accords with the "duty" of the Court to construe this statute liberally "in light of current social conditions." Furthermore, under the old instruction recovery for loss of advice, comfort, assistance, and protection depended upon the fortuitous selection of a jury that would ignore the limitation of the instruction given, since the Court would sustain a verdict whether the jury was liberal in awarding damages or strictly adhered to the pecuniary loss limitation. Thus, the decision is grounded "in the interest of fairness and uniformity."

The decision in Fussner seems both desirable and justifiable. It recognizes that most juries, even though instructed in terms of pecuniary loss, will consider other losses in computing damages for wrongful death. Furthermore, it avoids the possibility that strict application of the pecuniary loss rule in actions for the wrongful death of either minor children or elderly persons could result in the same anomaly that led to the enactment of the wrongful death statutes. Since minor decedents generally render few economic services for their survivors, the pecuniary loss from their death would be negligible, but if they were merely injured, the damages recoverable could be substantial. Since the legislature specifically incorporated the pecuniary loss rule into the Wrongful Death Act in 1951, the Court's decision to expand the scope of that rule may be criticized as contrary to the intent of the legislature, particularly since the action is wholly a statutory remedy. However, even if the legislature intended by this amendment to prevent further decisions allowing recovery for more than the actual pecuniary loss, the Court

the loss of the society, comfort, protection and companionship of the deceased compensable in some jurisdictions, although this view is sometimes qualified to include only the pecuniary value shown to inhere in such elements, and to exclude compensation predicated upon the loss of such factors regarded in their sentimental aspect.

The Court in Fussner has adopted the latter qualification. See text accompanying note 40 supra. Accord, Wycko v. Gnodtke, 361 Mich. 331, 340, 105 N.W.2d 118, 122-23 (1960), where the court said that "human companionship . . . has a definite, substantial, and ascertainable pecuniary value . . . ."

52. 261 Minn. at 354, 113 N.W.2d at 359; see Shumway v. Nelson, 259 Minn. 319, 107 N.W.2d 531 (1961), noted at pp. 320-23 supra.
54. 261 Minn. at 359, 113 N.W.2d at 362.
55. See note 50 supra and accompanying text.
56. See 261 Minn. at 353, 113 N.W.2d at 359; Note, 54 Nw. U.L. Rev. 254, 257, 260 (1959).
by upholding "excessive" verdicts, has ignored that intent. As long as the Court is willing to affirm these verdicts, its revision of the jury instruction is defensible as providing uniformity among survivors who seek recovery. The legislature, if dissatisfied with this decision, may, of course, amend the Wrongful Death Act to lower the maximum limit on recovery for the death of minor children.57
