The Minnesota Supreme Court--1962-1963

Minn. L. Rev. Editorial Board

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The Minnesota Supreme Court
1962 - 1963

The Minnesota Supreme Court Note comprehensively surveys significant decisions of the 1962–1963 Term 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 and also to present perplexing questions common to most jurisdictions; accordingly, the decisions have been evaluated in terms of Minnesota law but the Minnesota Court’s results have frequently been compared with the law of other jurisdictions, so that the analysis is universally applicable. Also, the Note analyzes 1963 Minnesota legislative enactments that relate to the case problems and that reflect new answers to these problems. While the cases are discussed separately, they are arranged according to the general legal issue involved. In addition, the Note statistically summarizes all cases decided by the Court this Term.

THE TABLES

The data contained in the following Tables summarize the October, 1962 to October, 1963 Term of the Minnesota Supreme Court. So that the reader can evaluate these Tables comprehensively, the Review presents a detailed statement of their purposes and bases.

Tables I, II, and III concentrate primarily on patterns of opinion-writing and voting among the individual justices. Table I tabulates the written opinions of each justice according to the disposition represented and, also, categorizes the number of votes cast by him, indicating abstentions as well as dissents. Although Mr. Jus-
tice Nelson declared the Opinion of the Court most often, Mr. Justice Otis wrote the greatest number of opinions, dissenting more often than any other justice. In contrast, Mr. Chief Justice Knutson did not register a dissenting vote during the Term and Mr. Justice Nelson only dissented once. Table II lists the total number of decisions this Term and classifies them according to whether the opinion was unanimous, per curiam, or with a dissent or concurrence. Table III endeavors to determine the alignment among the justices by measuring the extent of their disagreements. It records the number of cases in which the justices voted for opposite dispositions plus the number of cases in which the justices voted for the same disposition but did not join in an opinion; that is, the total number of cases in which the justices disagreed. Although a clearly defined bloc is not discernible, Table III shows that Justices Otis and Murphy disagreed most often while, among the justices that were on the Court for the full Term, Justices Nelson and Knutson disagreed the fewest times.

Table IV categorizes by origin all of the cases disposed of by the Court this Term; the primary purpose is to show the number of cases appealed from each judicial district, commission, department, or board and the number of cases that originated in the Court itself. For this purpose, per curiam decisions and cases dismissed without consideration of the merits are counted as dispositions. Table IV also indicates the disposition ordered where the Court's decision required further consideration by the trial court.

Table V indicates the general subject matter of the main issue in all cases considered by the Court this Term, excluding the cases that originated in the Court itself; in areas of high interest the subjects are subdivided to indicate the subject matter more specifically. Table V shows that Criminal Law cases dominated although there also was a large number of Tort cases. Table V is also designed to indicate the relative success on appeal of cases appealed by the defendant below compared with those appealed by the plaintiff below. It shows that the defendant appealed more cases to the Court than did the plaintiff and that the defendant also was able to obtain a reversal in a greater proportion of the cases appealed.
Table I

**ACTION OF INDIVIDUAL JUSTICES**

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<th>Opinions Written</th>
<th>Votes</th>
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<td><strong>Totals</strong></td>
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* Mr. Justice Sheran was appointed to the Court January 9, 1903, replacing Mr. Justice Frank Gallagher who retired January 8, 1903 and was appointed Commissioner.

a. Includes concurrences.
b. Excludes cases when the justice was not a member of the Court at the time of the argument and submission of the case.

Table II

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**Table III**

**Alignment of Justices**

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</table>

*“D” represents cases before the Court in which the justices voted for opposite results. “C” represents cases in which the justices voted for the same result, but did not join together in an opinion. “T” represents the total number of cases in which the justices did not join together in an opinion, i.e., the total number of cases on which the justices disagreed. “N” represents the total number of cases in which both justices participated. This table excludes all per curiam decisions.*
Table IV

<table>
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<th>SOURCE OF CASES DISPOSED OF</th>
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</table>

a. Includes two cases that were reversed in part and affirmed in part, and a third case that was affirmed as to one plaintiff and reversed and a new trial granted as to the second plaintiff.

b. Case affirmed as to one plaintiff and reversed and a new trial granted as to the second plaintiff.

c. Includes one case that was remanded for trial without reversal.

d. Includes one case reversed in part and affirmed in part.

e. Includes one case where the appeal was dismissed for want of jurisdiction and a second that was dismissed because the appeal was frivolous.

f. Includes one case that was remanded without reversal or affirmance.

g. Both cases dismissed because appeal taken from a nonappealable order.

h. Case dismissed because appeal taken from a nonappealable order.

i. Includes two cases that were remanded for trial without reversal.
Table V*

**Final Disposition of Cases**

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<th>Subject Matter</th>
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<th>Disposition on Appeal</th>
<th>Cases Appealed by Plaintiff</th>
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* Excludes 18 cases that originated in the Supreme Court itself.
  a. Includes one case in which judgment was affirmed without prejudice to plaintiff's right to apply for vacation of judgment.
  b. Includes one case that was dismissed as frivolous.
  c. Case remanded without reversal or affirmance.
  d. Includes one case that was remanded without reversal or affirmance.
  e. Includes one case that was affirmed in part and reversed in part.
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<th>Cases Appealed by Defendant</th>
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<td>0</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Workmen's Compensation</td>
<td>11</td>
<td>3</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>179</td>
<td>48</td>
<td>20</td>
<td>72</td>
</tr>
</tbody>
</table>

f. Case remanded without reversal or affirmance.
g. Includes one case that was dismissed for want of jurisdiction and two cases that were dismissed because appeal taken from a nonappealable order.
h. Case dismissed because appeal taken from a nonappealable order.
i. Includes one case affirmed as to one plaintiff and reversed and a new trial granted as to another plaintiff unless a remittitur.
I. CIVIL DAMAGE ACT

A. OPERATOR'S LIABILITY FOR ILLEGAL SALE TO MINOR WHERE INTOXICANT CONSUMED BY ADULT COMPANION

By Drunkeness, Men do often times shorten their dayes; goe out of the ale-houses drunk, and break their Necks before they come home. Instances not a few might be given of this, but this is so manifest, a man need say nothing.1

Under the common law a person injured by an act of an intoxicated person has no remedy against the seller of the liquor.2 The rationale underlying this doctrine is that the act of drinking the liquor is more proximately the cause of injury than is the remote act of selling it.3 As a result of the temperance movement in the late nineteenth century, however, a number of states enacted legislation to control commercial liquor traffic; these laws, presently in force in several states,4 are variously referred to as Civil Damage Acts or Dram Shop Acts. They are directed at and impose liability on dram shop operators for injuries resulting from the illegal sale of intoxicating liquors. Although these acts are frequently so construed as to approach strict liability, only the Illinois statute creates liability regardless of the total absence of fault or wrongdoing by the dram shop operator.5 The Minne-

1. Bunyan, The Life and Death of Mr. Badman, in Life and Death of Mr. Badman and the Holy War 49–50 (1905).
5. Every person, who shall be injured . . . shall have a right of action . . . against any person . . . who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person . . . .


In interpreting this statute the Illinois Supreme Court has held that a
sota Civil Damage Act, in relevant part, provides:

Every . . . person who is injured in person or property, or means of support, by any intoxicated person . . . has a right of action . . . against any person who, by illegally selling, bartering, or giving intoxicating liquors, caused the intoxication of such person, for all damages sustained . . . 6

In Murphy v. Hennen,7 the Minnesota Supreme Court declared that the Civil Damage Act imposed liability on a dram shop operator who sold intoxicating drinks to a minor, although the liquor was consumed by the minor's obviously intoxicated adult companion who subsequently injured the plaintiffs. The Court concluded that defendant's liability could be premised either on the fact of an illegal sale to a minor or on the fact that defendant furnished liquor to an "obviously intoxicated" person.

The act provides an action for one injured by an intoxicated person against any person who caused the intoxication "by illegally selling, bartering, or giving intoxicating liquors." Furnishing or selling liquor to an "obviously intoxicated" person, as was the adult companion in this case, is illegal.8 Construing the statute to create liability where the dram shop operator has in effect furnished liquor to a person who the operator knows or ought to know is intoxicated, even though the liquor was in fact sold to another person, appears reasonable. To rule otherwise would allow an operator to escape liability merely by selling to a person legally entitled to be served who would then transfer the liquor to a person not so entitled to it because of intoxication or minority.

Although it appears justifiable to premise the defendant's liability in Murphy on a sale to an "obviously intoxicated" person, the Court was also required to consider whether liability could be predicated on the fact of an illegal sale to a minor, for the jury had been instructed that they could find liability upon either basis.9 The defendant argued that liability should attach under the act only when the liquor is consumed by a person not legally entitled to be served and that the subsequent transfer by the minor to his adult companion was an intervening act that became the cause of action arises if "the alcoholic liquors served to him in defendants' tavern contributed in some degree, no matter how slight, to his intoxication." Osborn v. Leuffgen, 381 Ill. 295, 298, 45 N.E.2d 622, 624 (1942). See also Moran, Theories of Liability, 1958 U. Ill. L.F. 191, 195-97.

7. 119 N.W.2d 489 (Minn. 1963).
9. 119 N.W.2d at 492.
proximate cause of the intoxication and of the resulting injury. The Court responded by pointing out that the act creates a right of action against the seller whenever there has been an illegal sale and that any sale forbidden by statute, such as a sale to a minor, constitutes an illegal sale under the act — the intended regulatory purpose of the statute\textsuperscript{10} would be thwarted if defendant's construction were adopted.

The Civil Damage Act seemingly reflects a legislative judgment that an unreasonable risk exists in selling intoxicants to minors — there is a belief that if a minor were served liquor he would cause an injury. In \textit{Murphy} the injury did not result from a risk that the legislature had contemplated in prohibiting such sales, for the person consuming the liquor and inflicting the injury was an adult. The Court's conclusion, however, is consistent with its established position concerning proximate cause: if a party commit an act that he "ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen."\textsuperscript{11} According to Minnesota doctrine, the existence of proximate cause depends on whether an efficient cause intervened — lack of foreseeability is irrelevant.\textsuperscript{12}

\textit{Murphy} indicates, however, that the efficacy of holding a remote illegal sale as the basis for imposing liability on the dram shop operator is doubtful—it is submitted that the act should impose liability only where the liquor is consumed by a non-entitled person. In \textit{Benes v. Champion}\textsuperscript{13} the Court found a seller of "moonshine" liquor liable under the act although the person consuming the liquor and causing the injury was not the buyer; any consumption would have constituted an illegal furnishing or sale since the liquor itself was illegal. In \textit{Murphy} the ultimate consumer was a person legally entitled to be served. The defendant's liability, therefore, should be based only on a finding that the ultimate consumer was, to the defendant's knowledge, obviously intoxicated. Such a construction would prevent an operator from

\textsuperscript{10} The Court has spoken frequently of the penal or admonitory objective of the Civil Damage Act. See Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 985 (1957); Adamson v. Dougherty, 248 Minn. 585, 81 N.W.2d 110 (1957); Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 75 (1953); Fox v. Swartz, 228 Minn. 238, 36 N.W.2d 708 (1949).

\textsuperscript{11} Christianson v. Chicago, St. P.M. & O. Ry., 67 Minn. 94, 97, 69 N.W. 640, 641 (1896).

\textsuperscript{12} Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961).

\textsuperscript{13} 186 Minn. 578, 244 N.W. 72 (1932).
escaping liability merely because the sale was made to a person entitled to be served rather than directly to either a visibly intoxicated person or a minor who, to the operator's knowledge, would consume the liquor. The same reasoning leads to the conclusion that any technically illegal sale should be ignored where the liquor is to be consumed, to the operator's knowledge, by an entitled person.

A myriad of conditions could result in a sale being illegal. Sales of intoxicating liquor without a license, during certain hours, to a student, to a prostitute, to a parolee, are among those sales declared to be illegal. To found liability upon the sole fact of any such sale without considering the relationship of the sale to the subsequent intoxication and injury places a severe burden upon the dram shop operator. In each case the operator's liability can most fairly be governed by his knowledge, actual or constructive, of the age, identity, or condition of the person who will consume the intoxicant.

Notably, several courts have recently utilized common-law principles of negligence to impose liability upon dram shop operators. In 1958 a Pennsylvania court had little difficulty in finding that the operator was negligent in serving liquor to a visibly intoxicated person. In the leading case of Rappaport v. Nichols, a Pennsylvania court had little difficulty in finding that the operator was negligent in serving liquor to a visibly intoxicated person. In the leading case of Rappaport v. Nichols, the operator's liability can most fairly be governed by his knowledge, actual or constructive, of the age, identity, or condition of the person who will consume the intoxicant.

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14. See text accompanying note 8 supra.
20. In previous cases the Court has appeared to require that the element of proximate causation exist. Ritter v. Village of Appleton, 254 Minn. 30, 93 N.W.2d 683 (1958); Hartwig v. Loyal Order of Moose, 253 Minn. 347, 356, 91 N.W.2d 794, 801 (1958). However, it is unclear whether the proximate cause requirement relates to the causation between the illegal sale and the intoxication or to the causation between the intoxication and the subsequent injury or to both. See Note, 46 Minn. L. Rev. 169, 193–98 (1961).
21. Such a test has been adopted by other courts in similar cases. See Johnson v. Gram, 72 Ill. App. 676 (1897); Sullivan v. Conrad, 79 Neb. 303, 112 N.W. 660 (1907); Fladeland v. Mayer, 102 N.W.2d 121 (N.D. 1960); Sibila v. Bahney, 94 Ohio St. 399 (1878). See also Note, 11 Drake L. Rev. 72 (1961).
22. See Waynick v. Chicago's Last Dept. Store, 269 F.2d 322 (7th Cir. 1959); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958), where recovery against the dram shop operator was allowed on common-law principles of negligence. See also Comment, 3 Ariz. L. Rev. 98 (1961).
a New Jersey court, after noting statistics on the relationship of intoxication to accidents, concluded that the unreasonable risk of harm resulting from a sale of alcoholic beverages to an intoxicated person or a minor “may be readily recognized and foreseen . . . .”

By taking judicial notice of the obvious dangers of intoxicating liquors, the Court could impose liability under the act in those circumstances where a degree of culpability may be attached to the person dealing illegally in intoxicating liquors without departing from traditional notions of proximate cause and without undermining the regulatory objectives of the Civil Damage Act.

B. SURVIVAL OF ACTION AFTER OPERATOR’S DEATH

The Minnesota Court, in *Dahl v. Northwestern Nat’l Bank*, considered the question of whether a cause of action created by the Civil Damage Act survives the death of the person against whom it arose. The plaintiff sought to recover from the representatives of the deceased dram shop operator under the provisions of both the license bonding statute and the Civil Damage Act. The Minnesota survival-of-action statute provides that a cause of action arising out of personal injuries or death that is based on the negligence of a decedent survives against his personal representatives; other actions based on injury or death die with the person against whom they existed. The statute also permits the survival of actions arising out of contract. The Court held that the action under the bonding statute survives the death of the operator because it is based on a breach of an implied contract, but that a civil damage action is premised on a strict liability concept rather than on either contract or negligence and therefore does not survive.

A comparison of the legislative and judicial histories of the Civil Damage Act and the license bonding statute as well as the

25. *Id.* at 202, 156 A.2d at 8.
27. 121 N.W.2d 321 (Minn. 1963).
   (d) That the licensee, will pay to the extent of the principal amount of such bond or policy, and damages for death or injury caused by or resulting from the violation of any provisions of law relating thereto, and in such cases recovery under this paragraph may be had from the surety on this bond or policy.
language of the two acts convincingly demonstrates that the Civil Damage Act is not based on contract. The first session of the Minnesota state legislature enacted a statute requiring that every applicant for a liquor license file a bond. If the licensee violated any provision of the bond, any person injured thereby could recover damages not to exceed the face value of the bond; this cause of action was early construed to be in contract. The present licensing law is a direct descendent of the earlier provision. The Civil Damage Act was passed subsequent to the licensing statute, and if the legislature had intended merely to enlarge upon the contractual liability of the earlier statute, it could easily have done so instead of creating an entirely new cause of action.

The language of the licensing statute is indicative of its contractual nature, for it specifies the covenants that the licensee must make, it stipulates the exact conditions that every bond must fulfill, and it expressly states that the bond is "for the benefit of all persons suffering damages by reason of the breach of the conditions thereof." In contrast, the Civil Damage Act is addressed to the public generally rather than to the licensee and does not impose any conditions that the licensee must fulfill. Instead, it creates a cause of action for any person injured as a result of the illegal sale of liquor.

In distinguishing the licensing statute from the Civil Damage Act, the Court relied on an additional argument that only generates confusion. The Court stated that the penal characteristic of the licensing provision is consistent with its contractual nature, whereas the compensatory objective of the Civil Damage Act is...
indicative that it sounds in tort. This distinction is not helpful, for the characterization of an act as "compensatory" is not a reason for concluding that it is not founded upon contract — indeed, contract actions are almost wholly compensatory. Second, even if a "compensatory" action were based on tort rather than contract, it must first be established that the Civil Damage Act is compensatory, proving this by reference to the tortious nature of the act is circular reasoning. Finally, the Court has not consistently interpreted the act to be compensatory. It has at times declared the statute to be remedial or compensatory in nature and thus to be liberally applied,\(^8\) and on other occasions it has characterized the act as penal or admonitory and therefore to be strictly construed.\(^8\) After an exhaustive review of the language of the Court in many of its decisions involving the act, the Court of Appeals for the Eighth Circuit concluded that

> These differing descriptions [of the nature of the act] naturally present some element of confusion as to the Minnesota court's basic attitude toward the Act. We suspect, however, that the inconsistency of characterization is more apparent than real and that the ostensible difference in expression has been due to the nature of the issue before the court . . . in the particular case.\(^8\)

Perhaps the only useful conclusions that can be drawn from a study of the cases are that the act may be construed either strictly or liberally and that the ultimate purpose of the act is a dual one: "to suppress the mischief and advance the remedy."\(^40\)

Although the history and language of the Civil Damage Act support the conclusion that it sounds in tort,\(^41\) whether the act creates a cause of action sufficiently like a common-law action

\(^{37}\) See, e.g., Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Mayes v. Byers, 214 Minn. 54, 7 N.W.2d 403 (1948).

\(^{38}\) See cases cited note 10 supra.

\(^{39}\) Village of Brooten v. Cudahy Packing Co., 291 F.2d 284, 292-93 (8th Cir. 1961).

\(^{40}\) Id. at 293; Note, 46 MINN. L. REV. 169, 170-74 (1961).

\(^{41}\) The only basis for contending that an action arising under the act is contractual is the legislative amendment to the licensing statute in 1945, which provided that a licensee could, at the option of the municipality, file a liability insurance policy in lieu of a bond. Minn. Laws 1945, ch. 313, § 1. This policy was for the benefit of any person possessing a cause of action under either the Civil Damage Act or the licensing provision. It is not totally unreasonable to argue that this amendment gave some contractual flavor to the act by making a claimant under that act a third-party beneficiary of the insurance contract. In view of the differing legislative and judicial histories and the divergence in language of the two acts, however, this amendment can reasonably be dismissed as an insufficient basis for concluding that the Civil Damage Act is contractual in nature.
based on negligence to allow it to survive the death of the dram shop operator is a closer question. At common law no tort action survived the death of the tort-feasor. Survival-of-action statutes, like the one in Minnesota, were adopted to alleviate the hardships resulting from the common-law doctrine. Most courts have required that all statutes in derogation of the common law be strictly construed, and therefore, one who seeks to maintain an action that is within the common-law prohibition must have the plain and express authorization of the statute. Thus, since the survival-of-action statute allows only those tort actions based on negligence to survive, the Minnesota Court has held that statutory actions based on liability without fault do not survive. The fundamental issue, however, is whether the act is wholly based on liability without fault or is in reality founded on a negligence concept. The "penal-compensatory" distinction is no more useful in resolving this question than in determining whether a cause of action is based on contract or tort. Even if the distinction were meaningful, the Court’s inconsistent interpretations render it valueless in attempting to characterize the Civil Damage Act.


43. The statutory changes of the common-law doctrine perhaps reflect a shift in emphasis from revenge to compensation. See Grant v. McAuliffe, 41 Cal. 2d 859, 867, 264 P.2d 944, 949 (1953). Courts had made exceptions to the doctrine “actio personalis moritur cum persona” even before the statutory changes. Barnes Coal Corp. v. Retail Coal Merchants Ass’n, 128 F.2d 645 (4th Cir. 1942); Tuttle v. Short, 42 Wyo. 1, 288 Pac. 524 (1930). The common-law doctrine was never favored by the courts. Sullivan v. Associated Billposters & Distribrs., 6 F.2d 1000 (2d Cir. 1925).

44. See McLellan v. Automobile Ins. Co., 80 F.2d 844 (9th Cir. 1935); In re Statler, 31 F.2d 767 (S.D.N.Y. 1929); Green v. Thompson, 26 Minn. 500, 5 N.W. 376 (1880); Hegerich v. Keddie, 99 N.Y. 260, 1 N.E. 787 (1885).

45. In Lavalle v. Kaupp, 240 Minn. 360, 61 N.W.2d 228 (1953), the plaintiff was bitten by defendant’s dog. MINN. STAT. § 347.22 (1981) provides that “if a dog . . . attacks or injures any person . . . the owner of the dog is liable in damages to the person so attacked or injured . . . .” The defendant died before trial, and the Court faced the question whether a cause of action arising under this statute survived the death of the dog owner. The Court concluded that, since the statute created a strict liability, the cause of action did not survive unless the injuries were caused by decedent’s negligence. See also Green v. Thompson, 26 Minn. 500, 5 N.W. 376 (1880).

46. What the legislature meant by using the word “negligence” in the survival statute is not certain. Possibly, the legislature failed to consider the question of whether actions based on strict liability statutes should survive and intended by the word “negligence” only to distinguish between those actions founded on fault—intentional torts and negligent torts.

47. See notes 37–40 supra and accompanying text.
While the cases offer little assistance in pinpointing the exact nature of the act, several factors suggest that negligence is at least one evil at which the statute is directed. Although the Court has caused some confusion by referring to the act’s compensatory, remedial, and penal objectives, it has consistently spoken of its regulatory nature. Such a characterization is not determinative that the act is based solely on negligence, but it is indicative of a belief that dram shop operators are capable of preventing injury by exercising care in selling intoxicants and that the imposition of liability will encourage a higher standard of care. Also, the requirement that the person be “obviously intoxicated” as an element of one type of illegal sale is evidence of a “fault” concept. Actual intoxication is not sufficient for liability; the person must be visibly intoxicated before the operator is liable for having unlawfully sold or furnished intoxicating liquor.

Some additional considerations might weigh in favor of treating the act as a negligence statute for the purpose of allowing the action to survive. The act provides a method of shifting losses to the business activity that is in part responsible for those losses and that can best bear the cost of them. Also, the compensatory objective of the act requires that the action be permitted to survive. Although these considerations might not be proper where an action is obviously beyond the protection of the survival provision, they ought to be relevant where, as here, the action is not clearly excluded from the statute.

Even if the Court were unwilling to accept the conclusion that all civil damage actions should survive as negligence actions, two

48. See, e.g., Adamson v. Dougherty, 248 Minn. 535, 542, 81 N.W.2d 110, 115 (1957); Hahn v. City of Ortonville, 238 Minn. 428, 437, 57 N.W.2d 254, 261 (1953).

49. This is not to suggest that all regulatory legislation is founded on a fault concept. Much of such legislation (e.g., pure food and drug laws) may represent no more than a legislative judgment that enterprise liability is economically feasible and desirable with regard to particular injuries. Other so-called “strict liability” statutes, however, appear concerned as well with preventing injury by coercing, through the strict liability mechanism, higher standards of care.

50. See note 8 supra and accompanying text.


52. The Court recognized this factor in its opinion in Dahl. See also Bliss, Enforcement of Judgments, 1958 U. Ill. L.F. 273, 279–84.

53. See note 37 supra and accompanying text.

54. The uncertainty of the question is further evidenced by the fact that Mr. Justice Murphy dissented in Dahl:

The fact that the Civil Damage Act removes an unwarranted immunity which the defendant enjoyed under the common law and that
other reasonable alternatives were available. First, it could have distinguished between those actions under the act that are based purely on a strict liability concept and those actions in which negligence may also in fact exist. To say that the act does not require negligence on the part of the dram shop operator in order to support the cause of action should not mean that negligence, where it does occur, is irrelevant. The existence of negligence depends, of course, on the circumstances of each case. A dram shop operator may in fact be negligent in serving liquor to a visibly intoxicated person; conversely, there may be no real fault where the operator, after a reasonable inquiry, sells intoxicants to a minor. Certainly it does not pervert the intent of the survival statute to allow an action at least where the operator was negligent. Second, the Court might have allowed the survival of the action based on common-law principles of negligence rather than on the act. There is no reason why an action under the act should be the exclusive remedy where negligence can be established, and there is recent authority in support of the allowance of a common-law negligence action, even in states with dram shop legislation.

C. Compensable Injuries to the “Person” and the “Means of Support”

The task of determining what kinds of damages are recoverable under dram shop acts is a recurring problem in most jurisdictions. The Minnesota Civil Damage Act allows recovery to it imposes strict liability should not compel us to view it as entirely unique or alien in nature. It may be true, as the majority opinion suggests, that it provides a form of social insurance, but it is also true that it finds justification in fundamental negligence principles which recognize that the violation of legal standards imposed by law may create foreseeable hazards which involve unreasonable risk to others. There is so much of the idea of fault, both in the substance of the action and in the procedures for enforcement of liability, that I feel a reasonable interpretation requires that it be considered as one “caused by the negligence of a decedent” within the purview of § 573.01.

121 N.W.2d at 324–25.

55. See text accompanying notes 20–25 supra.
56. See note 22 supra, for those cases that have upheld the existence of a cause of action based on the operator’s negligence.
57. See Waynick v. Chicago’s Last Dept. Store, 269 F.2d 322 (7th Cir. 1959).
58. See, e.g., Iszler v. Jorda, 80 N.W.2d 665 (N.D. 1957); Annot., 64 A.L.R.2d 705 (1959) (right to recover under dram shop acts for death of intoxicated person); Annot., 6 A.L.R.2d 798 (1949) (what constitutes “injury to person or property” within dram shop acts).
specified persons who are “injured in person or property, or means of support.” State Farm Mut. Auto. Ins. Co. v. Village of Isle and Bundy v. City of Fridley posed questions concerning the meaning of the terms “injured in person” and “means of support.”

In State Farm the plaintiff sued the dram shop operator whose illegal sale induced her husband’s intoxication, which was the proximate cause of an accident where he sustained injuries. Plaintiff alleged that as a result of the accident she suffered a loss of consortium and mental anguish and that the damages resulting from her injuries were recoverable under the act. The trial court instructed the jury that “injury to the person” is limited to the mental anguish proximately resulting from the accident in question that the plaintiff has suffered and will suffer in the future. On appeal, the Court held that neither loss of consortium nor mental suffering gave rise to recoverable damages under the Civil Damage Act.

In holding that loss of consortium suffered by a wife is not compensable under the act, the Court reasoned that such a loss is not really an “injury to the person,” but is merely a consequential item of damage and, further, that under longstanding common-law principles only the husband has a right to recover for loss of consortium. The Court was in agreement with the great majority of jurisdictions that deny recovery for the wife’s loss of consortium on the basis of common-law doctrine. A variety of reasons are given for this result: that the damage is too remote; that while the husband has a right to the wife’s services, the wife has no corresponding right; and that no new rights were created.

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60. 122 N.W.2d 36 (Minn. 1963).
61. 122 N.W.2d 585 (Minn. 1963).


64. See, e.g., Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915).
by the Married Women's Acts.\(^6\) While the denial of recovery for the wife's loss of consortium may be both illogical and antiquated,\(^8\) the well-settled law makes the Court's holding on this issue not unreasonable.\(^7\)

In determining whether the plaintiff sustained any "injury to person," the Court also considered her claim of damages for mental suffering and held that there was insufficient evidence to support an award for such damages. The decision indicates that recovery under the act would be denied, absent a physical injury, even though a woman whose husband has been seriously injured might be required "to expend both her physical and nervous resources to meet a new responsibility."\(^8\) This result is in accord with the Minnesota rule that mental suffering may be compensated only when accompanied by a physical injury to the plaintiff\(^9\) — the mental anguish must be evidenced by some physical ailment. Although this limitation has often been questioned,\(^7\) it has been consistently followed and there is therefore little possibility of an exception under the Civil Damage Act.

Thus, in *State Farm* the plaintiff was denied compensation both for loss of consortium and for mental suffering because of the Court's strict adherence to doctrine. Although both rules are subject to valid criticism, perhaps an action that frequently is based on liability without fault provides an unsympathetic setting for their being overruled.

Both *State Farm* and *Bundy* involved the interpretation of the

\(^{65}\) See, *e.g.*, Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628 (1922); Nash v. Mobile & O. Ry., 149 Miss. 823, 116 So. 109 (1928).

\(^{66}\) In support of this position, see Holbrook, *The Change in the Meaning of Consortium*, 22 Mich. L. Rev. 1 (1923); Lippman, *The Breakdown of Consortium*, 80 Colum. L. Rev. 651 (1930).

\(^{67}\) Even if the damages for a wife's loss of consortium were normally recoverable, the injury would not be compensable under the Civil Damage Act because the act creates actions only for injuries "to person or property, or means of support." Minn. Stat. § 340.95 (1961). As the court correctly noted in *State Farm*, loss of consortium is a consequential intangible injury — there appears to be no authority for the proposition that injury to the person is anything more than injury to the body.

\(^{68}\) 122 N.E.2d at 43.

\(^{69}\) Smith v. Carlson, 209 Minn. 268, 296 N.W. 132 (1941); Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N.W. 542 (1902); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1892).

The same rule prevails in the majority of jurisdictions. See generally Annot., 64 A.L.R.2d 100, 126 (1959).

"means of support" phrase in the act. In *State Farm* the plaintiff claimed damages for having been forced to sell a jointly owned homestead in order to pay her husband's medical expenses. The Court sustained the award of such damages: Because the medical expenses were paid from jointly owned funds that would otherwise have been available for plaintiff's support, the depletion of those funds could logically be designated an injury to plaintiff's "means of support." While this result\(^7\) conforms with the compensatory objective\(^2\) of the act, it also permits the intoxicated person in effect to recover for his injuries. The Court had previously held that the intoxicated person may not sue under the act,\(^7\) for to allow recovery would not discourage intoxication and carelessness. Yet by simply allowing his spouse to pay medical bills, the intoxicated person may in effect obtain the benefits of the civil damage action. Of course, it is obvious that the intoxicated person profits indirectly whenever his wife or children recover for loss of means of support. Thus, if recovery to the spouse is to be allowed, as in *State Farm*, there may no longer be any real basis for denying recovery in a direct action by the intoxicated.

\(^7\) Other courts have also reached the conclusion that the payment of medical expenses is recoverable under dram shop acts. See *Kelly v. Hughes*, 33 Ill. App. 2d 314, 179 N.E.2d 273 (1962); *Coleman v. People*, 78 Ill. App. 210 (1898); *Spencer v. Johnson*, 185 Mich. 85, 151 N.W. 684 (1915).

\(^72\) See note 37 *supra* and accompanying text.

\(^78\) *Randall v. Village of Excelsior*, 258 Minn. 81, 108 N.W.2d 181 (1960). The Court also held in *State Farm* that an insurer of an injured intoxicated person has no greater rights against the dram shop operator than does the insured. *State Farm* was a consolidated action: *State Farm Mut. Auto Ins. Co.* attempted to obtain reimbursement from the liquor vendor for the amount that the insurer paid to its intoxicated insured in settlement for his injuries, and the wife of the intoxicated insured attempted to recover from the vendor for loss of support, mental suffering, and loss of consortium. In denying reimbursement to the insurer, the Court relied on *Empire Fire & Marine Ins. Co. v. Williams*, 121 N.W.2d 580 (Minn. 1963), decided the same day. The insurer in *Empire* was denied reimbursement on the theory that an insurer has only the rights of a subrogee, and since the intoxicated person has no rights under the Civil Damage Act, his insurer may not recover. The Court distinguished the situation in *Empire* from that in *Village of Brooten v. Cudahy Packing Co.*, 291 F.2d 284 (8th Cir. 1961), in which the insurer of the employer of the injured intoxicated person was allowed to recover from the dram shop operator for its payments to the employer for the losses that he incurred as a consequence of the injury to his employee. The Court concluded that the insurer in the latter case was subrogated to its insured, the employer, who was "injured in person" and who could thus have recovered directly from the liquor vendor; whereas in *Empire* and *State Farm* the insurer was subrogated to a person, the injured intoxicated insured, not protected by the act.
cated person for loss of means of support.

In State Farm the jury was instructed that "means of support"
includes all such means of living as would enable one to live in the
degree of comfort suitable and becoming to his station in life. It is said
to include anything requisite to housing, feeding, clothing, health, pro-
per recreation, vacation, traveling expense or other proper cognate pur-
poses.\textsuperscript{74}

The defendant contended that the term "means of support" does
not contemplate evaluation of all the factors enumerated by the
court and that the instruction should be limited to "actual sup-
port in terms of money contributions referrable to those things
necessary for livelihood."\textsuperscript{75} In affirming the jury's award, the
Court approved the trial court's charge as encompassing the rele-
vant factors in ascertaining damage under the support provision.
Moreover, the Court found that the injured party's income, his
ability to do physical labor, his habits and health prior to his
injury, and his life expectancy were additional facts to be con-
sidered. Use of these factors in evaluating injury to means of
support appears to be consistent with the tests applied in other
jurisdictions under similar dram shop acts\textsuperscript{76} and accords with the
Court's decision in \textit{Ritter v. Village of Appleton}.\textsuperscript{77} There the
Court, in evaluating the amount of plaintiff's loss of means of
support, accepted evidence establishing the deceased's age, his
exact life expectancy, and the precise nature of the business as-
sets that had contributed to plaintiff's support and maintenance
of her station in life. Further, the Court has often allowed in evi-
dence these same factors in determining the propriety of awards
of support money in separation and divorce proceedings.\textsuperscript{78} Thus,
the Court's approval of the trial instruction is in accordance with
both its past decisions and those of other jurisdictions and ap-
ppears well calculated to aid a jury in making an intelligent award
under the support provision of the act.

In Bundy v. City of Fridley the plaintiffs, whose ten year-old

\textsuperscript{74} 122 N.W.2d at 88.
\textsuperscript{75} 192 N.W.2d at 39.
\textsuperscript{76} See, e.g., McMahon v. Sankey, 133 Ill. 636, 24 N.E. 1027 (1890); Brock-
way v. Patterson, 72 Mich. 122, 40 N.W. 192 (1888); Whipple v. Rosen-
stock, 99 Neb. 153, 155 N.W. 898 (1918); Schneider v. Hosier, 21 Ohio St.
98 (1871); Garigan v. Kennedy, 19 S.D. 11, 101 N.W. 1081 (1904).
\textsuperscript{77} 254 Minn. 30, 93 N.W.2d 683 (1953).
\textsuperscript{78} See, e.g., Eck v. Eck, 252 Minn. 290, 90 N.W.2d 211 (1953); Kruse-
mark v. Krusemark, 232 Minn. 416, 46 N.W.2d 647 (1951); Mckay v. Mc-
key, 228 Minn. 26, 36 N.W.2d 17 (1949); Hempel v. Hempel, 225 Minn.
287, 80 N.W.2d 594 (1948).
son was struck and killed by an intoxicated driver, brought a civil damage action against the dram shop operator for damages to "means of support." Although the plaintiffs stipulated that their son did not contribute financially to the family support, they did allege that he performed small household services and that he contributed to the enjoyment of family life. The Court affirmed the trial court's dismissal of the action:

"to recover in an action for injury in "means of support" the plaintiff must show that in consequence of the wrongful acts . . . the plaintiff's standard of living or accustomed means of maintenance has been lost or curtailed so that he has been reduced to a state of dependence by being deprived of the support which he had theretofore enjoyed."

Damages for loss of future support are clearly recoverable as "loss of means of support." The cases establishing that rule, however, have dealt with the possible future incapacity of the present wage-earner as a result of an injury caused by an intoxicated person. No court appears to have concluded that the speculative loss of future earnings of a child who has not been the family wage-earner is within the meaning of "means of support." Such a result would considerably broaden the more restricted recovery judicially contemplated by that term. However, it would appear no more difficult for the Court to allow recovery under the Civil Damage Act for the loss of the child's anticipated future earnings than it would be to allow compensation, as the Court has done, for the same loss in an action under the Wrongful Death Act. That statute allows recovery to a surviving spouse or next of kin for all "pecuniary loss" resulting from the wrongful death of any person. The Court has held that the "pecuniary loss" language supports an award for anticipated earnings of a child. Thus, the "loss of means of support" provision of the Civil Damage Act would appear to be an even stronger basis for such damages. Unfortunately, although the plaintiffs did rely on the Wrongful Death Act, they did not advance this argument.

79. 122 N.W.2d at 588–89.
80. See notes 76–78 supra and accompanying text.
82. When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had he lived, for an injury caused by such wrongful act or omission. The recovery . . . shall not exceed $25,000, and shall be for the exclusive benefit of the surviving spouse and next of kin . . . .

MINN. STAT. § 573.02 (Supp. 1962).
The plaintiffs contended that the “means of support” provision of the Civil Damage Act is coextensive in coverage with the “pecuniary loss” phrase in the Wrongful Death Act with respect to loss of aid, comfort, and companionship. Recently, in *Fussner v. Andert*, the Court, in assessing damages under the “pecuniary loss” provision, held that the jury could consider not only the financial contribution, but also the aid, comfort, and companionship furnished by the deceased child to the family. In *Bundy*, however, the Court reasoned that since the legislature “expressly enumerated the distinct types of injuries for which recovery [under the Civil Damage Act] could be had, without employing the general phrase” of the Wrongful Death Act, it did not intend to equate the terms—if the legislature had so intended, it could easily have allowed recovery for “pecuniary loss” by using the appropriate language. The reasoning is not persuasive, for the Court could have broadly construed the “loss of support” provision as readily as it did the “pecuniary loss” limitation in *Fussner*. Certainly loss of comfort, aid and companionship can as easily be read into “loss of means of support” as into “pecuniary loss.”

Thus, the Court’s conclusion that the “loss of means of support” provision of the Civil Damage Act does not include the loss of either a child’s anticipated future earnings or his comfort, aid and companionship appears to be inconsistent with the more liberal interpretation of similar language in the Wrongful Death Act. There are, however, reasons for interpreting the language of the Civil Damage Act more restrictively than that of the Wrongful Death Act. Wrongful conduct on the part of the defendant must be established to recover under the latter act, and contributory negligence is a defense; neither is relevant under the Civil Damage Act. The maximum amount of damage under the Wrongful Death Act is $25,000; the Civil Damage Act has no limitation. Therefore, the Court is probably wise in providing some limitations on the liability of a Civil Damage Act defendant, because such a defendant cannot avail himself of the defenses and limitations of liability that protect the Wrongful Death Act defendant.

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83. 261 Minn. 347, 113 N.W.2d 355 (1961), 47 Minn. L. Rev. 323.
84. 122 N.W.2d at 588.
85. See note 82 supra; cf. Foley v. Western Alloyed Steel Casting Co., 219 Minn. 571, 18 N.W.2d 541 (1945).
87. See note 82 supra.
II. CRIMINAL LAW

A. AVAILABILITY OF CORAM NOBIS AS A POST-CONVITION REMEDY

In *State v. Tellok,* the Minnesota Court reviewed the requirements for the criminal writ of error coram nobis. After pleading not guilty to a charge of rape, petitioner pled guilty on the advice of counsel to the lesser crime of carnal knowledge and was sentenced to seven years in the state prison. Six months later he petitioned pro se for a writ of error coram nobis, basically alleging a denial of due process of law. In unanimously affirming the denial of the petition, the Court held that coram nobis was unavailable in the absence of newly discovered facts that would have changed the result at trial.

The writ was originally used to correct trial judgments where unknown facts that would have altered the judgment were subsequently discovered. Once available in all suits, it has now been expressly abolished in civil actions at both federal and state levels. In criminal cases, however, coram nobis has recently been revived and expanded, probably to provide a procedure for making constitutional claims that cannot be raised by habeas corpus. The post-conviction remedy of habeas corpus is only available where a prisoner is attacking his present detention as a violation

1. 118 N.W.2d 347 (Minn. 1962).
2. See 2 TIDD, PRACTICE OF COURT OF KING'S BENCH IN PERSONAL ACTIONS 1082–84 (1799), in which it was stated that “if a judgment in the King's-Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error coram nobis . . . .” See also Donoghue & Jacobson, Coram Nobis and the Hoffner Case, 28 ST. JOHN'S L. REV. 234, 235–37 (1954).
3. FED. R. CIV. P. 60(b). MINN. R. CIV. P. 60.02 is identical to federal rule 60(b).
5. See YOUNGQUIST & BLACK, MINNESOTA RULES PRACTICE 350 (1953), in which the authors commented that “the last sentence [of Rule 60.02] abolishes the procedures of the old ancillary or independent remedies available at common law and equity.” Cf. Sheffield v. Mullin, 28 Minn. 251, 9 N.W. 756 (1881); Grant v. Schmidt, 22 Minn. 1 (1876).
of his constitutional rights; it is not available where the offender has been paroled or has served his sentence. Habeas corpus plainly fails to provide a method for vindicating the interests of the released offender.

The United States Supreme Court has asserted that the states are constitutionally obligated to provide adequate post-conviction remedies for state prisoners alleging that their conviction was in violation of due process of law. Of course, if the state offender is no longer in custody, federal habeas corpus is not available and the Supreme Court's stated reason for failing to compel state post-conviction remedies seems less cogent. Also, in United States v. Morgan the Supreme Court recognized coram nobis as a federal post-release remedy. To guarantee the adequate post-conviction remedies required by the Constitution, then, a state perhaps should provide coram nobis at least in post-release cases.

In Minnesota the status of coram nobis is unclear. The Court's detailed description of coram nobis in Tellock coupled with the sheer number of writs presented to the Court suggest that this remedy may exist in Minnesota. The Court, however, has never granted a writ of error coram nobis in a criminal case. In addition, all of the petitions before the Court have been brought by

8. See Minn. Stat. § 589.01 (1961), which allows a writ of habeas corpus only if the person is "imprisoned or otherwise restrained of his liberty." Cf. State v. Konshak, 136 Minn. 381, 162 N.W. 383 (1917). See also Note, The Relation Between Habeas Corpus and Coram Nobis in New York, 34 Cornell L.Q. 596 (1949).
12. Before the Tellock case was decided, the Minnesota Court had considered a writ of error coram nobis in the following criminal cases: State v. Alm, 263 Minn. 249, 116 N.W.2d 656 (1962); State v. Becker, 263 Minn. 168, 115 N.W.2d 920 (1962); State v. Pederson, 262 Minn. 506, 115 N.W.2d 466 (1962); State v. Sovard, 262 Minn. 265, 114 N.W.2d 276 (1962); State v. Castle, 262 Minn. 298, 109 N.W.2d 593 (1961), cert. denied, 368 U.S. 978 (1963); State ex rel. Thomas v. County of Ramsey, 259 Minn. 107, 107 N.W.2d 590 (1961) (per curiam); State ex rel. Gaulke v. County of Winona, 259 Minn. 193, 106 N.W.2d 562 (1960), cert. denied, 365 U.S. 848 (1961); State ex rel. Elkins v. County of Ramsey, 257 Minn. 21, 99 N.W.2d 855 (1959); State ex rel. Hammond v. County of Hennepin, 256 Minn. 539, 89
the petitioner pro se; the Court has always considered these petitions on the merits, but whether coram nobis is available to a Minnesota offender represented by an attorney remains questionable.

The Minnesota Court has at least assumed that coram nobis was available in criminal cases to provide a remedy where a newly discovered fact proves the defendant’s innocence. In denying the writ in recent years, the Court has negatively developed certain requirements that must be satisfied before the writ is available. The writ is not to substitute for an appeal based on issues of law contained in the record, and therefore the basic requirement is that the petition must raise an issue of fact rather than an issue of law; however, the Court has denied coram nobis petitions only twice because they raised legal rather than factual issues. Secondly, the newly discovered fact must be one that was unknown by the petitioner and the court when the offender was convicted.

N.W.2d 452 (1959); State ex rel. Soward v. County of Hennepin, 252 Minn. 378, 90 N.W.2d 307 (1958); State ex rel. Barness v. County of Hennepin, 252 Minn. 174, 89 N.W.2d 166 (1958); State v. Kubus, 243 Minn. 370, 88 N.W.2d 217 (1955).

Since the Tellock case, the Minnesota Court has considered four more petitions: State v. Osgood, Doc. No. 38572, Minn., August 28, 1963; State v. Roy, 122 N.W.2d 615 (Minn. 1963); State v. Olson, 120 N.W.2d 311 (Minn. 1963); State v. Cage, 117 N.W.2d 919 (Minn. 1962). In these latter four cases, the Court did not deny the petition “assuming it’s available” as they did in Tellock, but rather denied the petition because the cases did not fit into the limitations expressed in Tellock.

13. See cases cited note 12 supra.

14. In New England Furniture & Carpet Co. v. Willcuts, 55 F.2d 983, 987 (D. Minn. 1931), the writ was described as follows:

In modern practice, the writ of error coram nobis may be defined as a common-law writ issuing out of a court of record to review and correct a judgment of its own relating to some error in fact as opposed to error in law, not appearing on the face of the record, unknown at the time without fault to the court and to the parties seeking relief, but for which the judgment would not have been entered. Although this was a civil action, this quotation has been included in criminal cases. State v. Tellock, 118 N.W.2d 247, 252 (Minn. 1963); State v. Kubus, 243 Minn. 370, 881, 88 N.W.2d 217, 218–19 (1955); cf. State ex rel. Barness v. County of Hennepin, 252 Minn. 174, 176, 89 N.W.2d 166, 167 (1958). See generally Note, State Post-Conviction Remedies, 61 Colm. L. Rev. 981 (1961).


The Minnesota Court has applied this requirement to deny coram nobis petitions where the defendant alleged coercion by the prosecuting attorney,\textsuperscript{17} a new alibi,\textsuperscript{18} or merely his innocence.\textsuperscript{19} In conjunction with this latter requisite, the Court has insisted that the newly discovered fact could not have been uncovered by diligent search at the time of trial;\textsuperscript{20} therefore, the Court has refused to grant the writ where the petition alleged the discovery of a witness without indicating why the witness could not have been produced at the trial.\textsuperscript{21}

The Court also has required that the petitioner pursue the remedy within a reasonable time after discovering the new fact.\textsuperscript{22} Such a requirement is difficult to justify, however, for it is often highly prejudicial to the released offender and severely restricts coram nobis as a post-release remedy. For example, a released offender may have little motivation to attack his conviction at the time a new fact is discovered, but if he were subsequently subjected to an increased sentence by an habitual offenders act, he should still be able to test the conviction by coram nobis.

Finally, the Minnesota Court has vaguely indicated that the newly discovered fact must be significant enough so that the defendant’s innocence would likely be proven. This requirement has a sound historical basis, but it is possibly inconsistent with a post-release usage of coram nobis and, in fact, the Supreme Court affirmed coram nobis in \textit{Morgan} although this requirement was not satisfied.\textsuperscript{23}

The expanding role of coram nobis as a post-release remedy,

\textsuperscript{18} State ex rel. Barness v. County of Hennepin, 252 Minn. 174, 89 N.W.2d 166 (1959).
\textsuperscript{19} State ex rel. Elkins v. County of Ramsey, 257 Minn. 21, 99 N.W.2d 895 (1959).
\textsuperscript{20} State v. Becker, 263 Minn. 168, 115 N.W.2d 920 (1962); State v. Pederson, 262 Minn. 568, 115 N.W.2d 466 (1962).
\textsuperscript{21} State v. Olson, 120 N.W.2d 311 (Minn. 1963), in which the writ was denied because the defendant did not state why the new facts could not have been produced at the original trial.
\textsuperscript{22} In \textit{Tellock} the Court stated that the petitioner must “pursue his rights with reasonable diligence or they are barred.” 118 N.W.2d at 332; see Farnsworth v. United States, 232 F.2d 59 (D.C. Cir. 1956), 45 Geo. L.J. 127; \textit{cf.} State ex rel. Gaulke v. County of Winona, 259 Minn. 183, 106 N.W.2d 569 (1960), \textit{cert. denied}, 365 U.S. 848 (1961). See generally Annot., 62 A.L.R.2d 432 (1958).
however, is where the petition alleges that the conviction was in violation of the federal constitution and habeas corpus is unavailable. In Minnesota a violation of due process may be raised by the remedy of habeas corpus, unless the petitioner is not then in custody. The released offender, however, may still have valid interests in vacating his conviction: to eliminate the social stigma aimed at a former "convict"; to practice medicine, law, or other professions; or to avoid an increased penalty under an habitual offenders act. Yet, the only remedy that might be available under these circumstances is the writ of error coram nobis. In Morgan, a similar fact situation, the Supreme Court recognized the problem and approved the use of coram nobis for federal convictions. The Minnesota Court also is apparently cognizant of the offender's right to a post-release remedy; the Court at least indicated in Tellock that if the petitioner's fundamental rights had been violated, then some remedy would be available. The requirements to issuance of this writ where a new fact is discovered, however, have little utility where a violation of due process is alleged—applying these historical requirements in such a case fails to close the gap in the available post-conviction remedies.

24. The new Minnesota Criminal Code provides that when a convicted defendant is discharged "such discharge shall restore him to all his civil rights and to full citizenship, with full right to vote and hold office . . . ."; therefore the loss of civil liberties is not so important in Minnesota. Minn. Sess. Laws 1963, ch. 753, § 609.165.


26. United States v. Morgan, 346 U.S. 502 (1954), in which the Supreme Court stated that "although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." 346 U.S. at 512–13.

27. See State v. Becker, 263 Minn. 168, 115 N.W.2d 920 (1962), where the court felt that the claim of lack of due process should have been asserted by a writ of habeas corpus and not by coram nobis.

28. In Tellock the Court denied the petition where the petitioner alleged that he was arraigned while handcuffed, that he was denied counsel for five days, and that there was nonphysical coercion by the county attorney. Cf. State v. Castle, 260 Minn. 293, 109 N.W.2d 593 (1960), cert. denied, 368 U.S. 978 (1962), in which the Minnesota Court denied a petition that alleged excessive bail, inadequate counsel, and denial of right to speedy trial.

The New York courts appear more liberal in granting the writ for violations of due process or procedural irregularities. The writ was granted to an offender who was deprived of the right to counsel in People v. Silverman, 3 N.Y.2d 290, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957); People v. Guariglia, 303 N.Y. 338, 102 N.E.2d 580 (1951); to an offender who was deprived of
B. PRESENTENCE EXAMINATION RECORDS SUFFICIENT COMPLIANCE WITH THE ARRAIGNMENT STATUTE

The recurring problem of what is sufficient compliance with the Minnesota arraignment statute was considered by the Court in State v. Roy. At arraignment the petitioner, charged with second degree forgery, was not represented by counsel; after the clerk read the charge, the court entered a plea of not guilty and appointed a public defender as required by law. When the petitioner reappeared with court-appointed counsel, he withdrew his plea of not guilty and entered a plea of guilty. In a petition for a writ of error coram nobis eight years later, the petitioner alleged that at his original appearance the clerk failed to read fully the information so as to inform him of his crime as required by the Minnesota statute.

The arraignment statute provides:

The arraignment shall be made by the court, or by the clerk or county attorney under its direction, and shall consist in reading the indictment to the defendant, and delivering to him a copy thereof and of the endorsement thereon, including the list of witnesses endorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment; provided, if the defendant waives the reading of the indictment, it need not be read to him.

The court did not determine if the petitioner was serving this sentence or a subsequently imposed sentence, stating that a writ of error coram nobis was not applicable in either case because he was raising only errors of law as opposed to questions of fact, see State v. Tellock, 118 N.W.2d 347 (Minn. 1962), and because he had not
The Court, however, affirmed the denial of the petition and held that substantial compliance with the arraignment statute was sufficient where the record of the presentence examination revealed that the petitioner was fully aware of the crime charged.

The purpose of the arraignment, historically, was to identify the accused, inform him of the charge, and invoke his plea. Technical objections were often held sufficient to vitiate an arraignment because the accused was not entitled to many of the contemporary "rights," such as being represented by counsel or being heard as a witness, and because the courts often compensated for the disproportionate punishments imposed by the law for relatively insignificant crimes. The purpose of arraignment now is still some-

pursued his rights with reasonable diligence, see State ex rel. Gaulke v. County of Winona, 269 Minn. 183, 106 N.W.2d 560 (1960), cert. denied, 365 U.S. 848 (1961). However, the court did not dismiss the case because the writ petitioned for was unavailable but continued to the arraignment issue. See text following note 13 supra, for a discussion of the writ of error coram nobis.

33. See note 29 supra, for the text of the statute. The Minnesota statute apparently requires that the indictment be read unless the defendant affirmatively waives it. On the other hand, in New York the statute states that "if the defendant demand it, the indictment must be read." N.Y. CRIM. CODE § 306; see People v. Moylan, 4 Misc. 2d 747, 162 N.Y.S.2d 479 (Bronx County Ct. 1956). A third type of statute is used in Illinois, where there is no provision for reading the indictment, but a copy will be given to the defendant upon his request. Here also, the defendant apparently must make a request for the copy or the right is deemed waived. People v. Clark, 405 Ill. 488, 91 N.E.2d 409 (1950); Bartley v. People, 156 Ill. 234, 40 N.E. 831 (1895); 38 ILL. STAT. ANN. § 729 (1935).


35. In early England a plea had to be invoked at the arraignment before the trial could start, and therefore, the defendant could not waive the arraignment. If the defendant refused to plead, physical force was used until a plea was obtained. Of course, this procedure had long been eliminated by modern statutes which provide that if the defendant refuse to answer an indictment by a plea of not guilty, the plea must be entered by the court. E.g., MINN. STAT. § 609.34 (1961). See generally PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 164–66 (1953).

36. At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical ob-
what similar, to notify the defendant of the charge; but courts presently give little credence to technical objections, for more direct safeguards are now available to defendants.

In *Garland v. Washington* the United States Supreme Court adopted essentially a "fair trial" test as a constitutional standard for arraignments. The Supreme Court held that the lack of a formal arraignment does not deprive the accused of due process of law as long as he had "sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." By this test, which is apparently applied in most jurisdictions requiring only substantial compliance with arraignment statutes, due process is not violated unless the arraignment procedure results in an "unfair trial." Nevertheless, the due process requirements

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38. See State v. Heffelfinger, 197 Minn. 173, 226 N.W. 751 (1950); State v. Comings, 54 Minn. 359, 56 N.W. 60 (1899).


40. 232 U.S. at 645. In the *Garland* case, the first indictment was voided when a new trial was awarded and there was no new arraignment or plea upon the second indictment. According to the Supreme Court, this did not deny the defendant a fair trial. Accord, Beaty v. United States, 203 F.2d 652, 654 (4th Cir. 1953) (where the trial was held without an arraignment); Merritt v. Hunter, 170 F.2d 789, 741 (10th Cir. 1948) (where the defendant did not enter a plea although his counsel entered a plea for him); see Crain v. United States, 162 U.S. 625 (1896) (which was directly overruled by the Court in *Garland*). One court has taken the apparent position that due process is never violated by technically faulty arraignments. See People v. Singleton, 21 Misc. 2d 950, 198 N.Y.S.2d 414 (Schenectady County Ct. 1960), in which the court stated that "ignorance of the defendant as to the nature of the charge and its consequences is of no moment." 21 Misc. 2d at 951, 198 N.Y.S.2d at 415.

41. See, e.g., Arbuckle v. State, 80 Miss. 15, 31 So. 437 (1901); State v. Frazier, 339 Mo. 966, 98 S.W.2d 707 (1936).

42. Cf. Adamson v. California, 332 U.S. 46 (1947); Hurtado v. California, 110 U.S. 516 (1884). The "fair trial" test is the same that had been used until recently where dealing with the right to counsel. See Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Betts v. Brady, 316 U.S. 465 (1942), (overruled by Gideon v. Wainwright, 372 U.S. 335 (1963).)

laid down by the Supreme Court are merely "minimum protection," and they do not justify state decisions that ignore a statutory mandate. Clearly, where the legislature determines that more than the minimum due process requirements are necessary, it may expressly require a higher statutory standard.43

By avoiding a literal interpretation of the arraignment statute, the Minnesota Court has apparently adopted the "fair trial" view espoused by the Supreme Court in Garland.44 Although the Court recognized in Roy that it would be "better practice" to conform strictly to the arraignment statute, it still approved a number of cases holding that the failure to comply does not of itself require a new trial.45 The Roy majority found that the record of the presentence examination showed that the defendant fully understood the crime of which he was accused and that, therefore, the arraignment was adequate. As support, they relied on cases holding that stipulations in the arraignment record that the defendant was "duly arraigned" constitute sufficient proof of compliance with the statute46 and a case holding that a plea of guilty in open court with the advice of counsel is sufficient proof that the defendant

44. In Roy the majority stated that "arraignment, in this state, is not from the standpoint of due process a critical stage of the proceedings . . . ." 122 N.W.2d at 619. But see State ex rel. Becker v. Tahush, 122 N.W.2d 100 (Minn. 1963), in which the Court felt that the arraignment and plea were the "critical period of the proceedings." 122 N.W.2d at 108-04. Whether the arraignment is a "critical period" in Minnesota or not, minimal due process requirements clearly may not be avoided and legislative standards should not be sidestepped.
45. See, e.g., State ex rel. Welper v. Rigg, 254 Minn. 10, 17, 99 N.W.2d 198, 203 (1959) (the information joined two separate crimes); State ex rel. Adams v. Rigg, 252 Minn. 288, 287, 89 N.W.2d 898, 902 (1958) (defendant was not informed before he was arraigned that he had a right to counsel); State ex rel. Schwank v. Utecht, 283 Minn. 434, 436, 47 N.W.2d 99, 101 (1951) (defendant entered no formal plea of guilty).
46. State ex rel. Rajala v. Rigg, 257 Minn. 372, 101 N.W.2d 608 (1960); State ex rel. May v. Swenson, 242 Minn. 570, 65 N.W.2d 657 (1954); State v. Barnett, 198 Minn. 336, 258 N.W. 508 (1953). In these three cases, however, the Court based its presumption of regularity on the arraignment transcript, and it did not consider the record of the presentence examination, as it did in the Roy case, to determine if the defendant had been "duly arraigned." This distinction would seem to be important for the basic issue in Roy should be whether the defendant had notice of the charged crime prior to his plea. 122 N.W.2d at 616. See Beaty v. United States, 203 F.2d 652 (4th Cir. 1953); Smith v. Lawrence, 123 F.2d 892, cert. denied, 317 U.S. 638 (1942); People v. Hall, 186 Misc. 62, 58 N.Y.S.2d 581 (Onandaga County Ct. 1946); 14 AM. JUR. CRIMINAL LAW § 292 (1936).
understood the nature of the crime. On the basis of the defendant's admissions at the presentence examination, then, the Court refused to grant a hearing, for to do so would be "exalting the shadow of a meaningless technicality for substance."

The dissenters favored a hearing to determine whether in fact there had been compliance with the arraignment statute; reliance on statements such as "the defendant was duly arraigned," which are routinely entered by the clerk, was improper. Furthermore, even if the words "duly arraigned" were of significance, the Court failed to distinguish between reliance on the presentence examination and reliance on the arraignment proceedings to determine whether the defendant was fully aware of the crime charged; "admissions made by the petitioner after the plea of guilty was entered" do not prove knowledge of the crime charged at the time of the arraignment. In effect, the dissent implied that substantial compliance with the statute would not be sufficient. A hearing, therefore, should have been held to determine whether the arraignment was waived or the information was in fact fully read — the mere statement "you are charged with forgery in the second degree" was not sufficient compliance with the statute.

Proponents of the substantial compliance approach argue basically that the statutory arraignment formalities are not necessary because there can be no harm if the defendant had a "fair trial." But the legislature has clearly specified the applicable standard

49. 122 N.W.2d 615, 621 (Otis, J., dissenting). Justices Murphy and Rogosheske concurred in the dissenting opinion of justice Otis.
50. 122 N.W.2d at 620 (dissenting opinion).
51. For examples of situations where the defendant waived the formalities, see, e.g., State v. Gage, 264 Minn. 196, 177 N.W.2d 919 (1962) (plea of guilty on advice of counsel admits all facts well pleaded); State *ex rel.* Williams v. Rigg, 256 Minn. 558, 99 N.W.2d 450 (1959) (defendant waives right to plead by appearing at the trial on the merits); State *ex rel.* Savage v. Rigg, 250 Minn. 370, 84 N.W.2d 640 (1956), cert. denied sub nom. Savage v. Minnesota, 355 U.S. 918 (1958) (plea of guilty on advice of counsel waives right to have indictment read). See also Beaty v. United States, 203 F.2d 652 (4th Cir. 1953) (right to be arraigned and to make a plea is waived by going to trial); People v. Jacoby, 304 N.Y. 38, 105 N.E.2d 618, 118 N.Y.S.2d 17, cert. denied sub nom. Jacoby v. New York, 344 U.S. 864 (1952), 37 Minn. L. Rev. 392 (1953) (defendant's affidavit, prepared by his father and minister, was a sufficient information). See generally Orfield, The Constitutionality of Waiver of Indictment in Federal Criminal Cases, 21 ROCX. MR. L. REV. 76 (1949).
52. 122 N.W.2d at 620 (dissenting opinion).
of fairness. In addition, Minnesota procedure differs from the Federal Rules of Criminal Procedure, for the latter require the trial judge to determine whether the defendant understood the charge.\textsuperscript{53} Such a safeguard may protect the defendant if the "reading" requirement were relaxed, yet until Minnesota adopts the federal procedure the courts should require in every case that the indictment be either fully read or intelligently waived.\textsuperscript{54} If the courts continue to allow merely substantial compliance with the arraignment statute, however, they should at least require that such compliance be shown by the arraignment record rather than the presentence examination record.

C. FOREIGN FELONY CONVICTIONS AND THE HABITUAL OFFENDER PROVISIONS

In State v. Briton\textsuperscript{55} the Court narrowly construed the Minnesota habitual offender provisions\textsuperscript{56} as applied to persons who had committed prior felonies in another state. Defendant had been convicted under an Iowa statute\textsuperscript{57} that defined larceny of property valued at more than 20 dollars to be a felony; the corresponding Minnesota statute defined the stealing of property to be a felony only if the property was valued at more than 25 dollars.\textsuperscript{58} At trial for a subsequent alleged Minnesota felony, the trial court determined, on the basis of a finding as to the actual value of the property taken, that the prior Iowa conviction constituted a Minnesota felony. On appeal the Court reversed,\textsuperscript{59} holding that

\begin{itemize}
  \item \textsuperscript{53} \textit{Fed. R. Crim. P.} \textit{11.}
  \item \textsuperscript{54} \textit{Scott, supra} note \textit{43}, at \textit{511–12}.
  \item \textsuperscript{55} \textit{121 N.W.2d} \textit{577} (Minn. 1963).
  \item \textsuperscript{56} See Minn. Sess. Laws \textit{1927}, ch. \textit{286}, which applied to every person who, after having been convicted in this state of a felony or an attempt to commit a felony, \textit{or, under the laws of any other state or country, of a crime which, if committed in this state, would be a felony} \textit{[italics added]}, commits any felony or attempts to commit any felony, in this state . . . .
  \item \textsuperscript{57} \textit{Iowa Code} §§ \textit{709.1–2} (1962).
  \item \textsuperscript{58} Minn. Rev. Laws § \textit{5082} (Dunnell \textit{1905}) defined grand larceny in the second degree as stealing "property of the value of more than \textit{\$25.00}, but not exceeding \textit{\$500}, in any manner whatever," and provided for punishment by imprisonment in the penitentiary, making it a felony under Minn. Rev. Laws § \textit{4747} (Dunnell \textit{1905}).
  \item \textsuperscript{59} A second issue dealt with in the Briton case concerned a defect in the information. Although the information alleged "uttering" a forged instrument, violative of \textit{Minn. Stat.} § \textit{620.19} (1961), it referred to a statute dealing with forgery itself, violative of \textit{Minn. Stat.} § \textit{620.10} (1961). The Minnesota Court
if by definition the relevant foreign statute governing the defendant's offense might have included an act that was not a Minnesota felony, the Minnesota habitual offender provisions could not be applied.

Habitual offender acts commonly impose an increased sentence for a second felony conviction. Some states have increased a felon's sentence on the basis of a prior, foreign felony conviction even though the prior crime would not have been a felony in the sentencing state. In other states, including Minnesota, the habitual offender act applies only where the crime committed in the foreign jurisdiction is a felony in the sentencing state. If the prior foreign crime is by definition less than the corresponding felony in the sentencing state, most of these latter states examine the fact allegations in the indictment or the information to determine whether the act committed was in fact a felony in their state. In Briton, however, the Minnesota Court determined that

held that the defendant's demurrer should have been sustained because two separate and distinct offenses were alleged, and the defendant could not properly 'prepare his defense. See State v. Suess, 236 Minn. 174, 52 N.W.2d 409 (1952); State v. Hedstrom, 233 Minn. 17, 45 N.W.2d 715 (1951); Chute v. State, 19 Minn. 230 (1873).

In a subsequent case, State ex rel. Masters v. Tahash, Doc. No. 39129, Minn., Aug. 23, 1963, a petitioner for a writ of habeas corpus alleged that a similar defect in his indictment deprived the court of jurisdiction. The Court distinguished the Briton case on the basis that the defendant had demurred to the information and had alleged at that time that he was prejudiced in developing his defense; while in the Masters case the petitioner had not been prejudiced, had not demurred, and did in fact realize with which crime he had been charged. Accord, State v. Snyder, 113 Minn. 244, 129 N.W. 375 (1911).


61. See State v. Prince, 64 Idaho 348, 132 P.2d 146 (1942), in which a conviction of a felony in Oregon was sufficient to satisfy the act and the prosecution did not need to show that the crime would have been a felony in Idaho. Accord, Hahn v. People, 126 Colo. 451, 456, 251 P.2d 316, 318 (1952); Kelley v. State, 204 Ind. 619, 624, 185 N.E. 453, 458 (1933); State v. Stiff, 148 Kan. 224, 228, 80 P.2d 1089, 1091 (1938), rehearing denied, 148 Kan. 457, 83 P.2d 424 (1938); Fennen v. Commonwealth, 240 Ky. 530, 42 S.W.2d 744 (1931) (by implication); Paxler v. State, 174 Ariz. 396, 418, 224 P.2d 542 (1950). However, these states did not have a statute such as Minnesota's, which requires that the act "if committed in this state, would be a felony . . . ." See note 55 supra.


63. See, e.g., In re Hanicar, 29 Cal. 2d 403, 176 P.2d 58 (1946); In re Taylor, 64 Cal. App. 2d 47, 148 P.2d 143 (1944); People v. Casey, 399 Ill. 374, 77 N.E.2d 812 (1948); People ex rel. Warner v. Jackson, 284 App. Div. 923,
extrinsic evidence, such as the foreign indictment, may not be considered by the sentencing court. According to the Court, any other approach might often require a difficult retrial of the actual value of property in issue during the previous trial. Furthermore, in the initial trial the offender would not have contested the value of the property involved if the value of the property allegedly stolen and the value admittedly stolen constituted the same degree of the offense in that state.

The Court indicated that a similar New York decision, People v. Olah, supported its conclusion. Olah was the only case to clearly prohibit an out-of-state conviction in a prior felony information if the foreign statutory definition of the offense was less than the corresponding definition of the sentencing state. The New York court interpreted the language of the habitual offenders act to require that the foreign definition of the crime, rather than the act itself, invariably constitutes a New York felony. Although


the Minnesota statute contained similar language, the cogent dissent in Ola addressed to the statutory interpretation argument may have persuaded the Minnesota Court to base its result on the sound policy considerations implicit in the New York decision.

Recidivist acts have often been criticised for their mechanical application to all persons whether or not the offender deserves increased punishment. The revised habitual offender provisions of the new Minnesota Criminal Code partially resolve this criticism. The code provides, for example, that an offender may not be sentenced to an "extended term of imprisonment" if his previous convictions had not occurred within ten years of his latest crime. Further, on the basis of a required presentence investigation, the court must be satisfied before sentencing that the defendant is disposed to violence and that an extended term of imprisonment is necessary for his rehabilitation or for the public safety. The code has also redefined the term "felony" to be a crime for which a "sentence of imprisonment for more than one year may be imposed"; however, the possibility still remains that a prior foreign felony conviction in which the value of the goods

66. N.Y. PEN. LAW § 1941 provides as follows:

A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or county, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense . . . . Compare this with the Minnesota Habitual Offenders Act. Minn. Sess. Laws 1963, ch. 753, §§ 609.155–16.

67. In the Ola case the court was split four to three with justices Conway, Lewis and Dye dissenting. People v. Olah, 300 N.Y. 96, 103, 107, 89 N.E.2d 329, 332, 335 (1949).


69. Minn. Sess. Laws 1963, ch. 753, § 609.155(1). The "extended term" is determined by taking the maximum term authorized for the crime committed and multiplying this by the number of prior felonies, but it cannot exceed 40 years.


72. Minn. Sess. Laws 1963, ch. 753, § 609.16(3)(b). See generally Pirsig, supra note 68, at 461–63. If the prior conviction was for a federal violation the crime apparently need not be a felony in Minnesota as is required for a foreign crime. See Minn. Sess. Laws 1963, ch. 753, § 609.155(4)(2)(c).

73. Minn. Sess. Laws 1963, ch. 753, § 609.02(2).
was not contested by the defendant might not have been a Minnesota felony.

As a result of the *Briton* decision, the new Minnesota habitual offender provisions probably may not be enforced on the basis of foreign felony convictions in states where the relevant crime is defined as a felony more strictly than in Minnesota. Although such an interpretation might be characterized as bringing about lighter treatment in Minnesota because the law is more severe in another state, it conforms to the recently expressed legislative policy of removing unreasonable harshness from the habitual offender provisions. Either a retrial of the value of goods stolen long ago or a dependence on an often inaccurate indictment would result in inequitable application of the habitual offender penalties. Furthermore, even if it may be assumed that a large number of habitual offender informations are presently based on foreign crimes that fail to satisfy the *Briton* standard, sentencing courts may still use their discretion to increase the sentence by imposing the maximum possible term if the presentence investigation indicates such a necessity.

III. EMINENT DOMAIN

A. APPORTIONMENT OF CONDEMNATION DAMAGES TO INCLUDE REVERSIONER

In *State v. Independent School Dist.* the Court held that a possibility of reverter is a property interest protected by the constitutional provision against a “taking” without just compensation and measured by the difference between the value of the land as restricted in its use and as applied to its best practicable use. The defendants owned land that was to revert to the grantor if the grantee or its assigns ever ceased using it as an athletic field and playground for the children of the school district. The plaintiffs claimed that their reversionary interest became possessory upon condemnation because the land was no longer to be used for the restricted purpose.

Courts have generally held that the condemnation of a defeasible fee for a use inconsistent with the condition of the fee does not

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1. 123 N.W.2d 121 (Minn. 1963).

2. This would be the measure in fact only if a single jury determined both the value of the property taken and the value of the two interests. If two juries, or a board of appraisers and a jury, respectively determine the value of the property and the value of the two respective interests, the division of the condemnation award determined by the one would be in proportion to the interests as determined by the other. For example, if the appraisers awarded
cause a reversion of the estate. Perhaps this result is explained simply by the courts' "general impatience ... with these particular devices and their disposition to restrict what they call 'forfeiture' whenever possible," but the result is otherwise justifiable. The primary purpose of a use restriction is to coerce the grantee and his assigns to use the land in a given manner — reversion is arguably a penalty for the wilful failure to do so. When the state appropriates property for public use, however, the alteration in use is not due to an act of the grantee. To consider condemnation as terminating the defeasible interest would be to penalize the holder for an occurrence over which he had no control; whatever interest the grantee had in the land is "taken" by the state and he should be compensated for it.

The general rule is that the entire condemnation award goes to the holder of the defeasible fee. The various bases given in justification of the rule are that a future interest such as a reversion is

§100,000 and a jury determined that the fee simple determinable was worth $90,000 and the possibility of reverter worth $30,000, the owner of the fee simple determinable interest would be entitled to $90,000 or 3/4 of the $100,000 and the owner of the possibility of reverter would be entitled to 1/4 of the $100,000. See 123 N.W.2d at 129-30.


5. The conveyance in State v. Independent School Dist. states the following:

Provided, however, that this conveyance is made upon the express condition that said premises forever shall be used by the grantee or its assigns as an athletic field and playground for the school children of said . . . [school district] and that if said premises ever cease to be so used, or if said premises . . . are ever used by the grantee . . . for any other purpose, then the estate . . . shall revert . . .

123 N.W.2d at 123.

6. 43 Colum. L. Rev. 137, 138 (1943).

not a true property interest, that the condemnation makes the performance of the condition impossible, or that the interest is so contingent and speculative that an ascertainment of its value is impracticable.¹⁰

The Restatement of the Law of Property, however, recognized the possibility of reverter as a property interest and proposed a more equitable measure of damages: If the occurrence of the terminating event is imminent,¹¹ the holder of the possibility of reverter shares in the condemnation award; if such occurrence is improbable, the reversioner receives nothing, for his interest is deemed valueless.¹² The Restatement rule at least provides a means of giving damages to the reversioner if the termination is imminent, but it fails to designate how his interest should be valued. In fact, the rule has been criticized for leaving “a puzzling challenge to court and jury.”¹³ Moreover, when the termination is improbable, the Restatement analysis would result in the holder of the defeasible interest receiving a windfall: The measure of damages for a fee simple absolute upon condemnation is the “fair market value of the land for its highest and best available use . . .”¹⁴ and the defeasible interest holder would receive the full recovery although his damages were merely the value of the land as restricted in its use.

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8. Woodville v. United States, 152 F.2d 735 (10th Cir. 1946); Fifer v. Allen, 228 Ill. 507, 81 N.E. 1105 (1907); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (1878); Browder, supra note 4, at 473.

9. Woodville v. United States, 152 F.2d 735, 738 (10th Cir. 1946); Browder, supra note 4, at 478.


11. One court found the filing of a petition to discontinue service with the public utilities commission to be an indication that reversion was imminent. Chew v. Commonwealth, 400 Pa. 307, 161 A.2d 621 (1960). But see City of Santa Monica v. Jones, 104 Cal. App. 2d 465, 232 P.2d 55 (Dist. Ct. App. 1951). Another court found that reversion was probable from the fact that the school district was seeking dissolution. United States v. 2184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942).


The Minnesota Court, in *State v. Independent School Dist.*, opined that the *Restatement* rule did not adequately protect the rights of the reversioner. The Court recognized the possibility of reverter as a property interest15 that possessed the same qualities as other property in every respect — it was “descendible, devisable, and alienable in the same manner as estates in possession”18 — and therefore reasoned that it should be protected by the constitutional prohibition against “taking” without just compensation.17 As a result the defeasible fee holder ought to receive only the value of the land as used for its restricted purpose while the holder of the reversion should get the difference between that value and the value of the estate used for its best purpose. This would clearly avoid giving a windfall to the holder of the present estate, but it perhaps gives too much recognition to the value of the future estate. The Court’s analysis simply assumes that any difference between the value of the restricted estate and the fee simple absolute should go to the holder of the future estate.

The difficulty with this analysis is, however, that “value” in a condemnation proceeding is measured by market price. Since the future estate would have a measurable market price only if the defeasible fee holder were likely to violate the use restriction, the future estate has no significant “condemnation” value unless reversion is predictable. By granting the reversioner the difference in market value between the restricted and unrestricted estate, the Court would be giving the reversioner a windfall — an approach that would certainly encourage speculation in future estates. Perhaps, then, the best result would be obtained by using a combination of the *Restatement* rule and the rule developed by the Court: The holder of the defeasible interest would always receive only the value of the land put to its restricted use, while the holder of the future estate would also receive compensation, but only if reversion were predictable. Thus, any windfall would accrue to the state.

Even the rule suggested by the Minnesota Court was qualified to include a greater award to the holder of the future estate when the present estate was about to be abandoned.18 All three alternatives are therefore subject to the same criticism levied at the *Restatement* rule — measurement of the value of the possibility of

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3. 123 N.W.2d at 129–30.
reverter is left a "puzzling" question. Yet the valuation standard suggested by the Minnesota Court does appear to provide a workable answer. If the land were capable of being used more profitably unrestricted than restricted, then as reversion becomes more imminent the future estate acquires value which reflects the opportunity to use the land in a more profitable manner. Although the standard requires two determinations of value rather than only one, the value of the future interest can be ascertained by looking to the difference between the two values.¹⁹

There being no constitutional objection to giving either the holder of the future estate nothing²⁰ or the holder of the present estate less than the full value of the land put to its most profitable use,²¹ the reasonable conclusion seems to be that the holders of the various interests should be compensated for any "values" taken and that the state, if anyone, ought to receive the benefit of any windfall.

IV. EVIDENCE

A. CONFESSION'S "VOLUNTARINESS" VITIATED BY MISLEADING POLICE REPRESENTATIONS

In State v. Biron¹ the Minnesota Court ruled that the "voluntary" character of a confession was vitiated because the police interrogators had misleadingly offered the defendant leniency. The interrogators, for example, impressed on the defendant that if he confessed the charge might be reduced from murder to manslaughter—"it could be as serious as murder or it could be as easy as manslaughter"²²—or he might be tried as a juvenile.²³

19. Basically, three other approaches have been suggested. One rule, premised on the holder of the present estate reinvesting the condemnation award in other property for the same restricted use, would merely give the holder of the future estate the same interest in the new property as he had in the old property. Browder, supra note 4, at 472. See also note 13 supra. A second rule would give the grantee that proportion of the award that his purchase price bore to the value of the land at the time he acquired his possessory interest. See note 13 supra. One court in administering what might be denominated "barnyard equity" gave the reversioner the value of the land and gave the holder of the present estate the value of the building on the land. United States v. 2184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942).

20. See cases cited note 7 supra and accompanying text.

21. See text accompanying note 11 supra.

¹. Doc. No. 38808, Minn., August 16, 1968. At latest report defendant's counsel has moved to quash the indictment under Minn. Stat. § 628.09 (1961) on the ground that illegal evidence was placed before the grand jury. This motion was denied.
The defendant—who was eighteen years old, had a ninth grade education, and was under parole supervision as a juvenile offender—was arrested for the robbery-beating of an elderly woman, who later died. At police headquarters the defendant was questioned immediately. He denied his guilt and asked to communicate with an attorney, and although a telephone was available, he made no call. Later that evening defendant was questioned again, and confronted with a recorded confession of one of his alleged companions that named defendant as an accomplice.

The following day, the police took a sample of the defendant’s hair and then indicated that hair comparisons had implicated him, saying that “we can throw the key away because you’re not smart enough to try and help yourself.” That evening, after being informed that his statement would be used against him in court, defendant confessed. An hour later, however, the confession was repudiated.

The due process clause of the Constitution requires state criminal procedures to conform with certain fundamental principles of justice that are requisite to a fair trial. One such fundamental principle is that a person shall not be convicted on the basis of a coerced confession. The policy underlying this principle is not


3. .... Judge Arthur will look over the whole thing, and he will say, “Well, here this boy is 18 but he’s just not very much older than the other two. I will handle all three of them.” You get the drift? But, this we can’t do if you don’t tell us. We can’t go there and do that for you. You’ve got to tell us what went on.

Id. at 6-7.

4. Id. at 5.


The Supreme Court applies the “rule of automatic reversal” if it finds a criminal confession to be “involuntary.” The conviction will be reversed even though it is “convincingly supported by other evidence,” Culombe v. Connecticut, 367 U.S. 568, 621 (1961), because “where, as here a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession.” Payne v. Arkansas, 356 U.S. 560, 567–68 (1958). It has been suggested that the rule is also designed to deter prosecutors from introducing confessions of questionable validity in order to guarantee a conviction. See Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219, 299–42 (1962); Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Cur.
merely that an "involuntary" confession is untrustworthy, but primarily that the exclusion of such confessions deters police from employing techniques that are inconsistent with the civilized standards of conduct required by the due process clause. A confession is "involuntary" if the totality of circumstances indicates that the confessor's will was "overborne." In applying this test, courts are not bound by the factual determinations of the trial

L. Rev. 317, 339–54 (1954). That prosecutors have not infrequently yielded to the temptation may be seen from the fact that of the 22 state convictions reversed by the Supreme Court on "coerced confession" grounds, the defendants in exactly half of these cases were again convicted of the same (seven) or of a lesser included offense (four). See Ritz, State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems, 19 WASH. & LEE L. REV. 202, 208–09 (1962).

In Biron the Court reversed without considering whether the rest of the evidence was sufficient to sustain a conviction, reasoning that "the principle at stake is more important than the expense and inconvenience which will be involved in a new trial." Doc. No. 38808, at 12. See Haynes v. Washington, 373 U.S. 508 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).


8. See Rogers v. Richmond, 365 U.S. 534 (1961); Ashcraft v. Tennessee, 322 U.S. 148 (1944); Paulsen, The Fourteenth Amendment and the Third Degree, 6 STAN. L. REV. 411 (1954); The Supreme Court, 1961 Term, 70 HARV. L. REV. 54, 110 (1962). In Gallegos v. Colorado, 370 U.S. 49 (1962), the Supreme Court stated that the fifth amendment privilege against self-incrimination was also a policy factor. See Brown v. Mississippi, 297 U.S. 278 (1936).

Recently, the Supreme Court discussed the use of improper methods as follows:

This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any case essential to the detection or solution of the crime or to the protection of the public.


court or jury and, thus, appellate courts conduct an independent examination of the record to determine whether the circumstances show as a matter of law that the confession was "involuntary." The United States Supreme Court has considered several factors relevant to this inquiry: whether the police were guilty of physical or psychological coercion; whether the defendant was denied access to counsel or friends; whether the defendant was held for an unreasonable period before arraignment; whether defendant


In state courts the general practice is to submit disputed fact issues as to the voluntariness of a confession to the jury. Paulsen, supra note 8, at 423. Paulsen questions whether such a practice is itself a denial of due process because if the jury rejects the confession as involuntary, the effect of the confession nevertheless remains in their minds. See Tooisgah v. United States, 137 F.2d 713 (10th Cir. 1943); Wagner v. United States, 110 F.2d 595 (5th Cir.), cert. denied, 310 US. 643 (1940).

11. See authorities cited note 10 supra.


14. See Payne v. Arkansas, 356 U.S. 560, 567 (1958). In Crooker v. California, 357 U.S. 433 (1958), the Supreme Court held that it was not a denial of due process of itself to refuse access to counsel during the period intervening between arrest and arraignment, unless the defendant shows that substantial prejudice resulted from such a denial. A different rule may apply to post-indictment denial of counsel. See 61 Col. L. Rev. 744 (1961). For a discussion of when the right to counsel "begins" and related interrogation-confession problems, see Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 33-61 (1963).


"Prompt arraignment" has a fourfold purpose: (1) to inform defendant of the charges against him; (2) to advise him of his right to retain counsel; (3) to require the state to show probable cause for defendant's detention; and (4) to allow defendant's release on bail.

Rothblatt & Rothblatt, Police Interrogation: The Right to Counsel and to Prompt Arraignment, 27 Brook. L. Rev. 24, 34 (1900). The McNabb-Mallory rule requires that confessions obtained in violation of the prompt arraignment rule be excluded from evidence in federal prosecutions. See 68 Yale L.J. 1003 (1959). However, the exclusionary rule applied in the federal courts is not imposed on state courts by the due process clause. Gallegos v. Nebraska, 342 U.S. 55 (1951). Minnesota rejected the McNabb-Mallory rule in State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (1944); 222 Minn. 261, 24 N.W.2d 846 (1946). The Schabert case stated that arraignment must be prompt, but that failure to observe the rule was only a factor in determining voluntariness.

Opponents of the McNabb-Mallory rule argue that it is essential to criminal detection that the police be allowed to interrogate suspects in pri-
was informed of his right to retain counsel and remain silent; and whether defendant's age, intelligence, and experience were less than normal.\textsuperscript{17}

In \textit{Biron} the Court independently examined the facts, expressly following the standards for review recently set forth by the Supreme Court in \textit{Haynes v. Washington}.\textsuperscript{18} The Minnesota Court relied on the record as a whole in reaching its decision, but emphasized the persuasive nature of the false statements made by the police. In the Court's analysis, police representations "calculated to sell the defendant on the idea that he ought to sign a confession'\textsuperscript{19} caused it to be "involuntary." The Court's approach is supported by another recent decision of the Supreme Court, \textit{Lynumn v. Illinois}.\textsuperscript{20} In that case, defendant, a widow with two small children, confessed after arresting officers had promised leniency if she would co-operate, but had threatened to take away her children and imprison her for ten years if she refused. The Court reversed her conviction, reasoning that without the aid of counsel the defendant could not know that the police lacked authority to fulfill either their promises or their threats.

The police methods used in \textit{Biron} quite likely caused the defendant to believe that their promises of leniency would be honored, especially in light of the defendant's age, lack of education, and inexperience. The Supreme Court apparently has placed great weight on such factors as an element in determining the "voluntariness" of a confession.\textsuperscript{21} In a notable example, \textit{Gallegos v. Colorado},\textsuperscript{22} the defendant, fourteen years old, was arrested for assault and robbery and was kept in custody for one week without the aid of counsel. He immediately confessed orally and later, after being advised of his constitutional rights, signed a written confession. The robbery victim subsequently died, and the defendant was convicted of first degree murder. The Supreme Court, how-

\begin{footnotesize}
18. 373 U.S. 605, 518 (1963); see authorities cited note 8 supra.
21. See cases cited note 15 supra.
22. 370 U.S. 49 (1962) (4-5 decision).
\end{footnotesize}
ever, reversed his conviction, stressing that the defendant was not equal to the knowledge and experience of the police and was unable, without the aid of counsel, to understand the consequences of his confession. The import of the Gallegos decision seems to be that a youthful defendant’s confession made without the aid of counsel will not be admitted into evidence.23

The Minnesota Court did not specifically inquire whether the defendant in Biron was within the rationale of decisions such as Gallegos, but it would seem that the misleading police questioning coupled with the background and inexperience of the defendant amply support the conclusion that the confession was “involuntary.”24 However, both the rights of defendants and the permissible scope of police interrogation would be better served if the Court had clarified its standards for rejecting confessions. Although the Court apparently applied the “voluntariness” standard based on police methods, the Court also stated that “the trustworthiness of a confession should not in every instance be discounted because investigative officers in their interviews might have made discursive or imprecise statements to the defendant.”25 The Court’s statement does not necessarily indicate an adoption of the “reliability” standard, but such confusing references should be omitted for it seems clear that many confessions that are completely reliable may not be admitted under the “voluntariness” standard.26 Indeed, the Supreme Court has held that to instruct a jury passing on the admissibility of a confession solely in terms of its “reliability” or “trustworthiness” is not permissible.27 The Minnesota Court could significantly clarify the requirements for the admissibility of confessions (a) if it would make plain that “reliability” or “trustworthiness” is no longer the sole touchstone and (b) if it would discard the “coercion”-“voluntary” terminology and instead enumerate the kinds of police misconduct that evoke such conclusionary language.

23. Cf. 15 ALA. L. REV. 234, 237 (1962). This result would seem to follow even in the face of an express waiver of counsel. Since the theory of the Gallegos case is that immature defendants are unable to protect themselves, it would seem to follow that they are also unable to make an intelligent waiver. 76 HARV. L. REV. 54, 110 (1962).

24. See Kamisar, supra note 9, at 754–59.


B. WAIVER OF ATTORNEY-CLIENT PRIVILEGE BY ATTORNEY'S DISCLOSURE

The implied authority of an attorney to waive the attorney-client privilege of his client by divulging a confidential communication to a third party not in concert of interest with the client was considered in Sprader v. Mueller.28 Plaintiff's attorney had accommodated the County Attorney by giving him a copy of a statement made by the plaintiff to an investigator hired by her attorney.29 At trial, defendant's counsel offered to prove by an employee of the County Attorney's office: that the County Attorney's files contained a statement by the plaintiff;30 that plaintiff's attorney had voluntarily released the statement to that office; and that the statement contained facts impeaching plaintiff's testimony.31 The trial court sustained an objection to the offer on the ground that the statement was a privileged communication. On appeal, however, the Court reversed and remanded, holding that the privilege had been waived by the attorney.

The Minnesota statute32 on privilege basically provides that neither an attorney nor his employees may be examined as to any communication made to the attorney by the client or about any advice given in the course of professional duty, unless the client consents. A client's confidences are protected so as to encourage full disclosure, thereby enabling the attorney to fully assess the legal problem.33 The privilege attaches only to communications that are made in confidence and are for the purpose of securing legal advice.34 Once established, the privilege belongs to the cli-
ent, and he may waive it expressly or waive it impliedly by acts that are not consistent with secrecy. For example, the client may waive the privilege in court by testifying on direct examination to privileged matters or out of court by disclosure to a third party.

The out-of-court disclosure voluntarily made by the client's attorney has caused much concern — on the basis of the attorney's implied authority to make a disclosure the client's privilege might be waived. One view is that the statute conferring the privilege cannot extend it to third parties because the statute does not make the client's communication itself privileged, but only prevents the attorney to whom the confidence was made from testifying. Wigmore opposes this interpretation of the statute for it allows a clear evasion of the client's privilege if the out-of-court disclosures of his attorney were indirectly admitted into evidence.

35. "Waiver" has been defined as the intentional relinquishment of a known right with full knowledge of its existence, including all the facts. In relation to the law of privileged communications, the principle is firmly anchored only when the client elects to make an intentional waiver of confidentiality, or when he takes a position which would give him an advantage to which he is not entitled and which he would not be able to maintain in the absence of the protection of his confidences from disclosure.

36. In deciding [what is a waiver by implication] ... There is always also the objective consideration that when [the client's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.

8 Wigmore, op. cit. supra note 33, § 2327.

37. See State v. Tall, 43 Minn. 273, 45 N.W. 449 (1890); 16 Minn. L. Rev. 818, 823–24 (1932).

38. See Note, Waiver of Attorney–Client Privilege on Inter–Attorney Exchange of Information, 63 Yale L.J. 1030, 1031 & n.5 (1954).

39. Wigmore states the problem thus:

Clearly the privilege could not permit an evasion by receiving the voluntary extrajudicial disclosures of the attorney. ... On the other hand, the attorney must be credited with some authority for negotiating with the opposing party, and in the cause of such negotiations it becomes necessary to make communications and to deliver documents or copies which ... may afterwards with propriety form the subject of proof as part of the transactions between the parties. Indeed, to refuse to examine them would often be to sanction the breaking of faith with the opponent. How can these opposing considerations be reconciled?

8 Wigmore, op. cit. supra note 33, § 2325.

through the testimony of third persons.\textsuperscript{41} Wigmore finds an exception, however, where the attorney’s disclosure is to an adversary;\textsuperscript{42} in such a case, the client’s privilege is lost on the theory that his attorney had implied authority to waive it.\textsuperscript{43}

In two previous cases, the Minnesota Court had considered attorneys’ out-of-court disclosures of their clients’ privileged communications as a question of waiver. In Schmitt v. Emery,\textsuperscript{44} the Court held that it did not constitute a waiver for the attorney to furnish a copy of his client’s privileged statement to a joint defendant for the limited purpose of assisting the latter in preparing a common defense.\textsuperscript{45} In a later case,\textsuperscript{46} however, the Court held that it was a waiver of the client’s privilege for two adversary insurance companies to exchange the privileged statements of their insureds.

In Sprader the Court considered the separate questions of whether the plaintiff’s attorney as her agent had implied authority to waive her privilege and whether her attorney’s disclosure did constitute a waiver.\textsuperscript{47} The Court recognized that an attorney often needs the implied authority to waive his client’s privilege in order to make voluntary disclosures of privileged matters for legitimate bargaining purposes within the limits of professional propriety.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{41} See note 39 supra.
\item \textsuperscript{42} \textsuperscript{8 Wigmore, op. cit. supra note 33, § 2325(1).}
\item \textsuperscript{43} [A]ll disclosures (oral or written) voluntarily made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation . . . are receivable as being made under an implied waiver of privilege, giving authority to disclose the confidences when necessary in the opinion of the attorney.
\item \textsuperscript{8 Wigmore, op. cit. supra note 33, § 2326; accord, Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).
\item \textsuperscript{44} 211 Minn. 547, 2 N.W.2d 413 (1949).
\item \textsuperscript{45} The copy is given and accepted under the privilege between the attorney furnishing it and his client. For the occasion, the recipient of the copy stands under the same restraints arising from the privileged character of the document as the counsel who furnished it, and consequently he has no right, and cannot be compelled, to produce or disclose its contents.
\item \textsuperscript{Id. at 554, 2 N.W.2d at 417.
\item \textsuperscript{46} Halloran v. Tousignant, 230 Minn. 399, 41 N.W.2d 874 (1950).
\item \textsuperscript{47} The Court assumed that the plaintiff’s statement was privileged even though she did not make it directly to her attorney. See State v. Anderson, 247 Minn. 469, 78 N.W.2d 380 (1956); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942), 26 Minn. L. Rev. 744.
\item \textsuperscript{48} See notes 39 & 43 supra.
\end{itemize}
The Court therefore held that in *Sprader* it was proper for the plaintiff’s attorney to disclose a privileged statement in exchange for information relevant to the defendant’s liability. This holding seems to conflict with the underlying policy of the statute—encouraging full disclosure. Nevertheless, it seems reasonable to confer such an authority on an attorney because its exercise must be in good faith and the attorney is probably better qualified than the client to evaluate the benefits of a disclosure. Moreover, the Court’s holding is consistent with an attorney’s authority to make admissions and otherwise control the management of his client’s litigation. Also, the general policy of narrowly construing the attorney-client privilege because its existence by itself obstructs the ascertainment of truth supports the Court’s result.

Consistent with its liberal construction of the attorney’s power as agent, the Court also held that plaintiff’s attorney had waived the privilege by disclosing her statement to the Assistant County Attorney, who was a stranger to the litigation. The Court’s characterization of the Assistant County Attorney as a stranger distinguishes *Sprader* from the *Schmitt* case, which seems correct for disclosure to a joint defendant as in *Schmitt* presents a distinctive fact situation. If the Court had held that the disclosure of a privileged communication to a joint defendant for purposes of preparing a common defense was a waiver, future joint defendants could circumvent the rule by merely retaining a common attorney. Moreover, in the *Schmitt* case the Court also placed some reliance on the fact that the attorney’s disclosure had been for a limited purpose only. In this respect *Sprader* is similar, but it seems clear that a distinction based on the purpose of the disclosure should not be the test of waiver. If purpose were the test, the client might retain the benefit of his privilege even though his attorney had already disclosed information out of court in order to gain a tactical advantage for his client. The standard of waiver that the Court seems to have adopted in *Sprader*, however, re-

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49. 8 Wigmore, *op. cit. supra* note 33, § 2326.


51. See 63 *Yale L.J.* 1030 (1954). The holding of the *Schmitt* case arguably was not based on its special factual situation, but on the unexpressed rationale that because of the identity of the recipient—a joint defendant—it was reasonable to assume that the disclosure would not end up in evidence and consequently was not a waiver. There is no direct authority for such a rule, and it seems so restrictive that only disclosure to an adversary would come within it and result in a waiver.

52. Id. at 1034–35.

53. 8 Wigmore, *op. cit. supra* note 33, § 2327.
quires the attorney to conduct himself consistently with the secrecy of the attorney-client privilege. Thus, the client in Sprader could not receive the benefit of an out-of-court exchange by his attorney without losing the benefit of her privilege. Yet the holding will not result in unfairness to the client, for he will be protected by the requirement that the attorney's disclosure must be made in good faith and for a legitimate bargaining purpose.

C. STANDARD FOR ADMISSION OF EVIDENCE BEFORE A STATE ADMINISTRATIVE BODY

At the Licenses Committee of the Minneapolis City Council meeting to consider revocation of petitioner's liquor license, police files were introduced as evidence that his premises had been used as a resort for prostitutes. These files contained three types of evidence: daily written reports of members of the morals squad; transcribed statements of convicted morals offenders; and extracts from police reports quoting third persons. On this evidence, corroborated in part by the testimony of the head of the Minneapolis Morals Squad, the City Council voted to revoke petitioner's license. The Minnesota Court, in Sabes v. City of Minneapolis, affirmed the City Council's revocation, holding that although it was based in part on hearsay evidence, it was supported by "substantial competent evidence."

Administrative bodies in Minnesota are not confined to the strict exclusionary rules of evidence applicable to judicial proceedings; nevertheless, their findings must be based in part on evidence of a legal and substantial character. The Court has indi-

54. See note 36 supra.
55. Minn. Stat. § 340.14(2) (1961) is violated if a liquor licensee permits his premises to be used as a resort for prostitutes. The Minneapolis, Minn., Ordinance Code § 851.420 (1960) permits the City Council to revoke liquor and other licenses for any violation of Minnesota law relating to the sale of liquor or to the conduct of the business of the licensee.
56. 120 N.W.2d 871 (Minn. 1963).
57. State ex rel. Hardstone Brick Co. v. Department of Commerce, 174 Minn. 200, 219 N.W. 81 (1928); State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 313 N.W. 857 (1911); State ex rel. Hart v. Common Council, 53 Minn. 236, 55 N.W. 118 (1893); see Note, Evidence Before Administrative Tribunals in Minnesota, 23 Minn. L. Rev. 68 (1938).
58. Hughes v. Department of Pub. Safety, 200 Minn. 10, 273 N.W. 618 (1937); State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 313 N.W. 857 (1911). The Minnesota Court has employed the verbal formula that an administrative finding be based on "substantial competent evidence." The requirement means that some of the evidence supporting the finding must comply with the strict exclusionary rules employed in jury trials. See Hughes v. Department of Pub. Safety, supra. In other jurisdictions the requirement is known as the "residuum rule." See 2 Davis, Administrative Law § 14.10 (1958).
cated that the latitude allowed state and local administrative bodies in their consideration of technically incompetent evidence depends on the ability of the body to weigh the probative value of such evidence, the policies underlying the body's function and the question before it. In proceedings to revoke liquor licenses, the Court has held that the City Council exercises a quasi-judicial function in determining whether the licensee's continuance in business is detrimental to the public good.

In the Court's view of Sabes, the significant question was whether the evidence supporting the Council's decision complied with the "substantial competent evidence" requirement — at least part of the evidence must conform to the technical exclusionary rules used in formal judicial proceedings. The Court acknowledged that nearly all of the evidence on which the revocation rested was hearsay. It found substantial competent evidence to support the revocation, however, by applying the statutory codification of the common law "official documents" exception to the hearsay rule. The Court construed the "official documents" exception as applicable to the daily written reports of members of the morals squad recorded in the course of their investigation and arrest. Although most hearsay exceptions are based on a finding of necessity, the written observations of the morals squad officers are admitted out of expediency. Repeated appearances by public officers to testify on the facts contained in their records interferes with their efficiency. Moreover, the lack of cross-examination is offset by the probable trustworthiness of their records.

59. Jacobs v. Village of Buhl, 199 Minn. 572, 273 N.W. 245 (1937), exemplifies the importance that the policy underlying an administrative function may assume in determining the admissibility of evidence. In the Jacobs case, the Court upheld the admission of the deceased's statement in a workmen's compensation proceeding. The Court felt justified in extending the res gestae concept to include the deceased's statement made 45 minutes after the fall because of the purpose of the Workmen's Compensation Act to compensate injured workmen.


61. Moskovitz v. City of St. Paul, 218 Minn. 543, 549, 16 N.W.2d 745, 748 (1944); State ex rel. Sholund v. City of Duluth, 125 Minn. 425, 147 N.W. 820 (1914).

62. The original record made by any public officer in the performance of his official duty shall be prima facie evidence of the facts required or permitted by law to be by him recorded . . . .


63. See Olander v. United States, 210 F.2d 795, 801 (9th Cir. 1954); 5 Wigmore, EVIDENCE §§ 1680–85 (3d ed. McNaughten rev. 1961). This is con-
The remaining evidence — transcribed statements of convicted morals offenders and extracts from police reports quoting third persons — was not within the statutory exception, however, and the Court concluded that it was patently hearsay and therefore inadmissible. Yet, regardless of the Council’s admission of such evidence, the Court determined that it did not invalidate the competent evidence admitted. The question, then, of whether an administrative body’s admission of too much incompetent evidence would require a reversal by the Court is still unsettled. If a finding were not reversed in such a case, the party called before an administrative body would have no protection from the admission of incompetent evidence, except the self-restraint of the administrative body itself.

A better approach might be for the Court itself to determine whether the supporting evidence is reliable, thereby making the technical exclusionary rules irrelevant. The Court would then be able discriminately to reverse cases in which evidence lacking probative value had been admitted. The diversity of administrative bodies in both composition and purpose makes it desirable that the Court adopt such a flexible rule. Moreover, an analysis of the evidence is clearly within the discretion of the reviewing court. In such a judgment the relevant factors are: the ability of the administrative body to evaluate evidence; the quasi-consistent with the Court’s construction of the analogous statutes providing hearsay exceptions for business and hospital records is consistent. Boutang v. Twin City Motor Bus Co., 248 Minn. 240, 80 N.W.2d 80 (1957); Chillstrom v. Trojan Seed Co., 242 Minn. 471, 65 N.W.2d 888 (1954); Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688 (1954).

64. One reason the Court might refuse to reverse and remand is that, unlike a jury case where on retrial the evidence will be heard by a new jury, the same administrative body would rehear the case, and it seems likely that this body would be unable to review the evidence with a fresh mind.

65. See note 4 supra; 2 Davis, op. cit. supra note 58, § 14.10, at 293 (1958). This seems to be the standard of the original draft of the Model State Administrative Procedure Act § 9(1) (1946): “Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs.” Compare, Federal Administrative Procedure Act § 7(c), 60 Stat. 241 (1940), 5 U.S.C. § 1006(c) (1958): “Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . . .” For an analysis of the various standards, see Merrill, Hearing and Believing: What Shall We Tell the Administrative Agencies?, 45 Minn. L. Rev. 525 (1961).

judicial procedures of the body; the importance of the subject matter; and the policy underlying the creation of the body. The Court should extend this analysis to all of the evidence to determine whether the evidence supporting the body's finding is reliable and discard the requirement that an administrative finding need be supported only by a residuum of competent evidence. The rules designed to exclude hearsay evidence from a lay jury should probably not be applied to an administrative body whose members are, in most instances, experts capable of exercising a sophisticated judgment. In the Sabes case the City Council had exercised a quasi-judicial function, and therefore requiring the Council's findings to be supported by competent evidence was consistent with the purpose of the hearing.

In conclusion, the Court should utilize its discretion regarding the issue of admissible evidence in an administrative proceeding, basing its judgment upon such considerations as the character and purpose of the agency as well as the question that is to be resolved. Such an approach eliminates any need to invoke the residuum rule. Applying this standard, a reviewing court should not reverse a finding unless a clear abuse of discretion is indicated.

67. Note, 23 Minn. L. Rev. 68, 72-75 (1938).
68. 2 Davis, op. cit. supra note 58, § 14.10, at 293. Davis suggests the following analysis should be applied by a reviewing court:
(a) the alternative to reliance on the incompetent evidence; (b) the state of the supporting and opposing evidence, if any; (c) the policy of the program being administered and the consequences of a decision either way; (d) importance or unimportance of the subject matter and consideration of economy of government; (e) the degree of efficiency or lack of efficiency of cross-examination with respect to particular hearsay declarations.

Id. at 296.

69. Even though the jury-trial rules of evidence have been tailored to the particular needs of juries, the residuum rule requires the use of those rules in cases in which no jury sits. And even though the jury-trial rules have been designed to guide admission or exclusion of evidence, not evolution of evidence, the residuum rule requires use of those rules for evaluation of evidence.

70. Consider, for example, the fact situation presented in Rhodes Pharmaceutical Co.-v. FTC, 208 F.2d 382 (7th Cir. 1954): To disprove the government's allegation that it was falsely advertising, a drug company conducted a survey of 300 consumers to determine the impression made on them by its advertisements. If opinion evidence of this sort were the only evidence available on which to base an administrative finding, the requirement of the residuum rule would probably not be fulfilled. See Note, Public Opinion Surveys as Evidence: The Pollsters Go to Court, 66 Harv. L. Rev. 489 (1953).
D. Duty To Amend Rule 33 Depositions Upon Discovery of Newly Acquired Information

Rule 33 of the Minnesota Rules of Civil Procedure and the resultant duty to amend the answers to interrogatories upon the discovery of new information was considered by the Court in Gebhard v. Niedzwiecki. Prior to trial defendant’s counsel had served interrogatories on plaintiff and his attorneys, requesting the names and addresses of persons having knowledge of relevant facts; plaintiff’s attorneys answered the interrogatories to the fullest extent of their knowledge, but when a later investigation uncovered another prospective witness, they failed to amend the answers.

At trial the court suppressed the testimony of this witness, finding that the “spirit” of rule 33 created a continuing duty to amend the answers. On appeal the Court affirmed and held that a party answering an interrogatory must disclose after-acquired information if it is material and if the failure to amend would render the original answers untruthful, unreliable, or inaccurate.

The initiation of discovery proceedings under Minnesota rule

71. Minn. R. Civ. P. 33 provides as follows:
   Any party may serve upon any adverse party written interrogatories to be answered by the party served... who shall furnish such information as is available... The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories... The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.
72. 192 N.W.2d 110 (Minn. 1963).
73. Apparently, the interrogatories served upon plaintiff and his attorneys did not contain a demand for amendment in the case of newly acquired information.
74. 122 N.W.2d at 114–15. The Court supplied two versions of its holding. First, it held that the duty exists where the information is material or where the original answer would otherwise be untrue, unreliable, or inaccurate. Id. at 114. However, the Court stated elsewhere that the information must be material and must render previous answers untrue, unreliable, or inaccurate. Id. at 115. The Court probably meant to use the word “and” in both instances, for it also said that “the application of this rule should not require the disclosure of every bit of information discovered after the answers are served.” Ibid. If the Court had meant to use the word “or,” any information that made earlier answers inaccurate, unreliable, or untrue would have to be furnished, regardless of how trivial it might be. Because the Court did not require disclosure of all information, it probably intended that the requirement of materiality apply in addition to the other requirements.
33, and similar rules, early in the litigation may result in the acquired information later becoming inadequate, incomplete, or untrue. One of the main purposes of Rule 33, however, "is the discovery of facts which will enable litigants to prepare for trial free from the element of surprise" — clearly the "spirit" of the rule requires some procedure to guarantee that the depositions are true at the time of trial as well as when answered. If pre-trial conferences are an established practice in the jurisdiction, supplemental information might be obtained there. This procedure, of course, does not solve the problem if no pre-trial conference is held or if information is acquired after the conference. To alleviate this problem, therefore, the federal rules have been held to create a continuous duty to disclose information where the interrogatories contain a demand for amended answers. Also, repeated requests for information may be submitted to the respondent up to the time of trial, unless the rule or statute provides differently.

In the *Gebhard* case, the Court rejected both written demands for continuing answers in the original interrogatories and repeated sets of interrogatories as unnecessarily burdensome methods of

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75. See, e.g., Fed. R. Civ. P. 33, which the Minnesota Court considers to be substantially identical to the Minnesota rule. 122 N.W.2d at 114. See 2 Youngquist & Black, Minnesota Rules Practice 146 (1953); Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn. L. Rev. 633 (1952).


78. But see N.J. Rules 4:23–12, which require the service of amended answers not later than ten days prior to the trial if after the pre-trial conference a party receives information that renders the previous answers incomplete.


80. The possibility of utilizing such a procedure in order to obtain supplemental information was recognized by the Court in *Gebhard*. 122 N.W.2d at 114. See Novick v. Pennsylvania R.R., 18 F.R.D. 296 (W.D. Pa. 1955); Capone v. Norton, 3 N.J. 54, 88 A.2d 710 (1951); Troutner v. Philadelphia Transp. Co., 5 Pa. D. & C. 2d 545 (Columbia County Ct. 1950). In Smith v. Superior Court, 189 Cal. App. 2d 6, 11 Cal. Rep. 165 (Dist. Ct. 1961), the court interpreted § 2030 of the California Code of Civil Procedure as requiring a court order before a party could demand continuing interrogatories. Under that statute a court order would also be necessary for a party to serve the same respondent with more than one set of interrogatories.
disclosure. Instead, the Court found a continuous duty to disclose after-acquired information of a material nature without a demand from the proponent that the interrogatories be continuous. This procedure places the burden of disclosure on the party best able to bear it. Clearly, a respondent aware of recently acquired information or newly discovered witnesses can amend his answers more readily than the proponent can decide which questions require continuing answers or which must be served again.

Although the Court indicated that there is no continuing duty to disclose "every bit of information discovered after the answers are served," some question still remains as to whether the Court might not have in effect made the duty overly comprehensive. The failure to disclose a prospective witness, as occurred in Gebhard, is inherently material, but the materiality of much other information is not as easily determined. Thus, until the "material" standard is more clearly delineated, respondent may be forced to amend answers each time information of the slightest significance is acquired or risk the sanction of suppression.

In considering the appropriate sanction for violation of the duty imposed by Rule 83, the Court adopted the position that evidence should be suppressed in cases where nondisclosure is willful and the party guilty of the violation seeks to benefit from it after the harm cannot be undone. Even though the Court also suggested that a continuance might be the proper sanction if nondisclosure resulted from an "honest mistake" and the harm done was not irreparable, suppression could effectively become the common sanction because of the difficulty of convincing a court that amended answers were overlooked or that the significance of the

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83. 122 N.W.2d at 115.

new information was misunderstood. If suppression of testimony causes attorneys to disclose all relevant after-acquired information, the Gebhard case will have achieved a praiseworthy increase in the pre-trial exchange of information. Another objective of the discovery process, however, is a fair determination of the merits on the basis of all material information. Thus, if suppression of evidence as a result of procedural violations often brings about an "inaccurate" result, the sanction applied might be improper. Even where the failure to disclose additional information is willful, a continuance at the respondent's expense should be sufficient, unless the harm done to the proponent is irreparable. A continuance could conceivably encourage full disclosure just as readily as suppression without risking a decision based on only part of the facts.

V. INSURANCE

A. INSURER MUST DEFEND ACTION AGAINST INSURED KNOWN TO BE WITHIN POLICY COVERAGE

Most liability insurance policies contain provisions granting the insurer the right to control litigation against the insured for all claims within the policy coverage. Under such provisions the insurance company must defend whenever the facts of an injury as alleged in the complaint come within the coverage of the policy. When a complaint, however, alleges a claim not covered by

87. The Court might profitably have adopted the more flexible approach of the New Jersey Superior Court in Abbatemarco v. Colton, 31 N.J. Super. 181, 106 A.2d 12 (App. Div. 1954); the court found the appellant's nondisclosure to be willful, but the information involved was so crucial to the case that it declared a mistrial to allow the appellant to bring the evidence in a later action.
the policy but the actual facts known to the insurer suggest or do constitute a claim covered by the insurance contract, the insurer's obligation to defend is not clear.\textsuperscript{3}

The Minnesota Court considered one aspect of this problem in \textit{Crum v. Anchor Cas. Co.}\textsuperscript{4} The plaintiffs were sued by a part-time employee for damages allegedly caused by the plaintiffs' negligence in maintaining their premises, which were insured by a liability policy with defendant. The employee's complaint stated a cause of action covered by the policy and the insurer therefore undertook plaintiffs' defense: The insurer sought to establish that the employee was acting within the scope of her employment at the time of the injury, for the liability policy expressly excluded claims covered by the Workmen's Compensation Act or claims arising out of an employee's course of employment. Although a deposition taken from the employee conclusively established that the injury was not suffered while in the service of the insured,\textsuperscript{5} the insurer withdrew from the case when the employee later amended her complaint to allege a claim within the Workmen's Compensation Act.\textsuperscript{6} The plaintiffs settled with the employee and commenced this action for indemnity. The Court held that if the insurer know that the actual facts are in conflict with the allegations of the complaint and that the facts, if established, would present a claim within the policy coverage, the insurer must either undertake to defend the action or seek an independent adjudication between the insured and itself as to its duty to defend.

The allegations of the complaint have generally been held to govern the insurer's duty to defend,\textsuperscript{7} but a growing minority of

3. See generally \textit{7A APPLEMAN, op. cit. supra} note 1, §§ 4681–86.
4. 119 N.W.2d 703 (Minn. 1963).
5. Prior to taking the deposition, the insurer asserted as a defense to the action that the caretaker's exclusive remedy was under the Workmen's Compensation Act. 119 N.W.2d at 705. When the deposition was taken from the injured party, counsel for the insurer was in full charge of the plaintiff's defense and his questions were primarily directed toward procuring an admission from the injured party that she was an employee and within the scope of her employment. Her answers conclusively established the contrary.
6. The plaintiff did not carry workmen's compensation insurance, and under \textit{Minn. Stat.} § 176.031 (1961) an employer not maintaining workmen's compensation insurance and failing to self-insure is subject to an action in the courts for damages. In such an action, it is not necessary to plead or prove freedom from contributory negligence.
courts have held the actual facts to be determinative. The majority rule basically subsumes the historical objective of pleading; on this subsumption it is often stated that the formal complaint offers the only clear and certain standard by which the insurer's duty can be established. The Court in Crum reasoned, however, that in a liberal-procedure jurisdiction a rule based on the known facts is requisite. The complaint may provide a definite standard under strict rules of pleading that require a lengthy complaint and allow only few amendments, but Minnesota's modern rules of procedure permit loosely drawn pleadings and liberal amendments even after judgment; thus, the complaint is not always an adequate basis for determining whether the injured party's claim is within the policy coverage. Although cognizant that an insurer's obligation to defend is not always clear from the facts until the case is actually tried, the Court concluded that these doubts should be resolved in favor of the insured.

The Crum case clearly evinces the shortcomings of the majority rule; by alleging a claim not covered by the policy, the injured party maneuvers the insured into a tactical dilemma. The insurer is then able to withdraw, forcing the insured to secure his own counsel to defend the action — for no matter what facts are discovered during the pre-trial proceedings, the insurer cannot be compelled to defend until the injured party amends his complaint. If the injured party settle out-of-court or win at trial without amending his complaint, the insurer cannot be forced to indemnify the insured unless coverage is proved in a separate pro-

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13. See Bituminous Cas. Corp. v. Travelers Ins. Co., 122 F. Supp. 197, 201 (D. Minn. 1954). The insured can prove facts of coverage at trial so that the insurer must indemnify, but, of course, trial is too late for the insured to assert his right to be defended.
ceeding against the insurer. Yet the prospect of waging this battle against the insurance company might deter the injured party from amending his complaint so that the allegations constitute a claim within the policy coverage.

In the context of *Crum* this analysis is certainly convincing, but in most cases the injured party would readily accommodate the insured and allege a claim within the policy coverage, for a judgment against a solvent insurance company usually assures collection. Furthermore, the discovered facts are not often likely to be as plain as in *Crum*; the facts themselves may be difficult to establish or there may be a question whether the facts as established present a claim within the policy language. To require the insurer to defend any suit that the insured claims is within the policy coverage ignores the underlying basis for the defense clause and places the insurer in a severe tactical plight. The defense clause is in the insurance contract not because the insured bargained for it, but because the insurer sought to control litigation that might result in its liability. If the insurer, however, defend an action that might not in fact be within the coverage, the insurer would possibly be estopped from denying lack of coverage. Since the insurer is not as a matter of course entitled to either defend the action under a non-waiver agreement or stay the action until it can secure a declaratory judgment defining its duty to defend, at the outset of the action it must decide whether to lose control of the litigation or defend and perhaps be estopped from denying non-coverage.

Once the insurer undertakes to defend the action, a complex problem of conflicting interests between the insured and insurer emerges. The insured aims for either nonliability or coverage to be proved, while the insurer strives to prove either nonliability or

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15. Cf. 7A Appleman, op. cit. supra note 1, at § 4681, at 423.


non-coverage. Upon the discovery of actual facts that remove an action from the coverage of the defendant insured’s policy, the insurer may withdraw from the case; therefore, the conflict arises whether the jurisdiction follows the majority rule or the minority rule — the conflict is a natural concomitant of the scheme. The Minnesota Court suggested that the solution to this problem is a recognition of insurance counsel’s duty to the insured: Where a conflict exists between the interests of the insurer and the insured, insurance counsel cannot take a position vis-a-vis the injured party adverse to the interests of the insured.20

Again the Court’s solution is reasonable within the facts of Crum. In a case, however, that presents a close question of policy coverage — either because of disputed facts or because of ambiguous policy language — the Court’s approach appears to force the insurer to make an absolute and irrevocable decision as to whether it will defend and be estopped from asserting non-coverage or lose control over the litigation.

B. INSURER’S RIGHT TO SUBROGATION BARRED BY STATUTE OF LIMITATIONS

The workmen’s compensation statutes of most states permit an employee who receives an injury covered by workmen’s compensation to pursue both his statutory and common-law remedies.21 The Minnesota statute provides in part:


Another situation of conflict occurs where the injured party alleges two theories, one within and one without coverage. The insurer must defend the whole case. Christian v. Royal Ins. Co., 185 Minn. 180, 240 N.W. 365 (1932).

20. As long as we follow the practice under which an insurer in this type of action may not be joined as a party defendant, an attorney retained by an insurer to defend its insured, so long as he represents the insured, is under the same obligations of fidelity and good faith as if the insured had retained the attorney personally.


Where an injury or death for which compensation is payable is caused under circumstances which created a legal liability for damages on the part of a party other than the employer, . . . legal proceedings may be taken by the employee or his dependents against the other party to recover damages, notwithstanding the payment by the employer or his liability to pay compensation.22

Further, in Minnesota the employer may deduct from the compensation payable by him any amount that the employee recovers from the tort-feasor; or, if workmen's compensation were paid to the employee, the employer is subrogated to the employee's claim against the tort-feasor.23 The Minnesota Court has extended this statutory right so as to subrogate the employer's insurer as well.24

A problem might arise under this statutory-common-law scheme where the employee settles with the tort-feasor and signs a release without the employer's or his insurer's consent.25 The settlement and release, at common law, would cut off the employer's right of subrogation, although the employer would therefore be released from later liability to the employee.26 Under workmen's compensation statutes silent as to the parties' rights where settlements were made without the consent of the employer, how-

22. Minn. Stat. § 176.061(5) (1961). Subdivisions 1, 2, 3, and 4 apply only where the employer and the party legally liable are engaged in the furtherance of a common enterprise or the accomplishment of related purposes on the premises. See McCourtie v. United States Steel Corp., 253 Minn. 501, 93 N.W.2d 552 (1958).

23. If the action against such other party is brought by the injured employee or his dependents and a judgment is obtained and paid and settlement is made with the other party, the employer may deduct from the compensation payable by him the amount actually received by the employee or dependents after deducting costs, reasonable attorney's fees, and reasonable expenses incurred by the employee or dependents in making collections or enforcing liability. . . . If the injured employee or his dependents agree to receive compensation from the employer or institute proceedings to recover the same or accept from the employer any payment on account of such compensation, the employer is subrogated to the rights of the employee or his dependents.


ever, most courts have rejected the common-law doctrine; rather, they have held that the employer or insurer still has a valid claim against the tort-feasor and that the employee may still collect the workmen’s compensation payable to him less his settlement.27 This result is plainly consistent with the policies underlying the statutes: The employee should only be able to collect either workmen’s compensation or tort damages, whichever is greater, thus avoiding both a double recovery by the injured party28 and a fortuitous meed to the tort-feasor through the workmen’s compensation act.29

In American Mut. Liab. Ins. Co. v. Reed Cleaners30 an employee of the insured sustained an injury covered by the Workmen’s Compensation Act. The employee settled and released the tort-feasor without the insurer’s consent and without informing the tort-feasor that his injury was covered by workmen’s compensation. Four years after the accident plaintiff insurer received notice that the employee had filed a claim for workmen’s compensation; three years after that and a year after the statute of limitations on the employee’s tort claim had run, the referee’s findings and the determination awarding benefits were filed. The employer then served a complaint on the tort-feasor. The employer’s insurer was later substituted as plaintiff in the action. The insurer argued


28. See Wandersee v. Brellenthin Chevrolet Co., 268 Minn. 19, 102 N.W.2d 514 (1960); McCoid, supra note 21, at 492.

23. See Wandersee, supra note 21, at 451.

29. 122 N.W.2d 178 (Minn. 1963).

30. The court’s opinion does not make clear what caused the delayed notice to the insurer. Minn. Stat. § 176.141 (1961) provides that unless knowledge or notice of injury is received by the employer within 90 days of the injury, the employee is not entitled to compensation. Minn. Stat. § 176.185(4)(1) (1961) provides for a compulsory provision in insurance policies to the effect that notice to or knowledge by the employer is notice to or knowledge by the insurer. The cause of plaintiff’s ignorance for such a long period of time would therefore seem to be the employer’s failure to pass the employee’s claim on to its insurer. Assuming that notice of the injury were seasonably given to the employer, it is not unlikely that such notice would not include the fact that a negligent third party was involved.
that its action was one for indemnification which arose upon the finding that workmen's compensation was due the employee. The Minnesota Court held, however, that the insurer's right was one of subrogation and that because a subrogee has no greater rights than the subrogor, the claim was barred by the six-year statute of limitations.²

As it seemed clear that the insurer's claim of subrogation would be barred, the plaintiff sought to persuade the Court that Lang v. William Bros. Boiler & Mfg. Co.³ was controlling. In that case, which involved the nature and extent of an insurer's rights against a tort-feasor, the Minnesota Court declined to apply the common-law rule of subrogation to cut off the insurer's claim and referred to the insurer's right as one of "indemnification." Further, the Court apparently granted the insurer a "quasi-contractual right."

² Arguably, since the courts are willing to abrogate the common-law rule by permitting subrogation even after a release, they should be equally willing to give the subrogee the full benefit of the right and begin the statute of limitations running at the time of adjudication of the insurer's liability to the injured party. Such an argument must, of course, be balanced against the policy underlying the statute of limitations—preventing litigation of "stale" claims—and the desire to protect the person with whom the injured party settled and released.

³ The Court's clear holding on the issue of the statute of limitations in Reed Cleaners was clouded by its distinction of Lang v. William Bros. Boiler & Mfg. Co., 250 Minn. 521, 85 N.W.2d 412 (1957), on the ground that in Lang, the tort-feasor knew of the presence of insurer and his subrogation right at the time of settlement, whereas in Reed Cleaners, the third party was entirely unaware of any possible liability to another party.

The Court, in Lang, intimated that the presence of the insurer in the case before settlement should be irrelevant. The dictum arose within a discussion of Patterson v. O'Neil, 151 Minn. 15, 185 N.W. 948 (1921). In that case, the employee settled with the third party before the insurer intervened in the suit. The employee then claimed his workmen's compensation. The Court held that he was entitled to compensation payments minus the settlement amount and then went on to state in dictum that the employer had lost his subrogation rights. After discounting that language in Patterson, the Court stated in Lang:

The case probably is distinguishable from the one now before us on the ground that, in the Patterson case, the employer had not intervened or asserted his rights in any way, although failure to do so prior to a settlement, in the absence of estoppel or laches, should not be held to bar such rights.

²⁵⁰ Minn. at 530–31, 85 N.W.2d at 419. The element of the third party's knowledge raises two questions: what will the result be in a case where the insurer brings a complaint within the time allotted by the statute of limitations against a third party who procured a release without knowledge of the insurer's possible presence, and what result will obtain when an insurer serves a complaint after the running of the statute on a third party who had knowledge of the insurer's presence.

³ 250 Minn. 521, 85 N.W.2d 412 (1957).
to indemnification for future payments.\textsuperscript{34}

Indemnification is an independent right existing between two parties who owe the same obligation, one being primarily liable and the other secondarily liable. Upon discharge of the duty by the party secondarily liable, a right of indemnification arises in his favor against the person primarily liable.\textsuperscript{35} Subrogation, however, is a derivative right, which transfers the rights that an injured party has against the one primarily liable to the party who has compensated the injured party—\textsuperscript{36}—the party primarily liable and the subrogee need not owe the injured party the same duty. The employer's statutory liability for injuries sustained in the course of employment is clearly not coextensive with the tort-feasor's liability. Moreover, the Court has repeatedly noted that the statute explicitly grants the employer a right of subrogation.\textsuperscript{37} Therefore, the Court certainly had a sound conceptual basis for identifying the insurer's right as one of subrogation;\textsuperscript{38} however, the Reed Cleaners decision placed ultimate liability for the injury on the employer, which is contrary to the policy underlying the statute.\textsuperscript{40}

The equities of Reed Cleaners are evenly balanced. The defendant tort-feasor settled the employee's claim approximately one year after the collision, and as far as is apparent from the trial court's findings of fact, the tort-feasor regarded the matter as completely closed until it was served with this complaint. On the other hand, the referee's determination was not filed until after the statute.

\textsuperscript{34} See 42 Minn. L. Rev. 678, 681 (1958). Although Lang may be read either to create a new cause of action each time a future payment is made by the insurer or merely to consider future payments as an element of damages in the present suit, the latter appears to be the more reasonable interpretation. Also, Lang may be distinguished from Reed Cleaners on the ground that the tort-feasor in the former case had knowledge of the insurer's interest in the action that was settled. See note 31 supra.

\textsuperscript{35} See RESTATEMENT, RESTITUTION § 76 (1937).

\textsuperscript{36} See HARRIS, SUBROGATION §§ 4–6 (1889); SHELDON, SUBROGATION § 223 (2d ed. 1893).


\textsuperscript{38} E.g., City of Red Wing v. Eichinger, 163 Minn. 54, 56, 203 N.W. 622, 623 (1925); Fidelity & Cas. Co. v. St. Paul Gas Light Co., 152 Minn. 197, 199, 188 N.W. 265, 266 (1922).

\textsuperscript{39} The majority of courts have identified the right as subrogation. E.g., Lee Way Motor Freight, Inc. v. Yellow Transit Freight Lines, Inc., 251 F.2d 97 (10th Cir. 1957); Exchange Mut. Indem. Ins. Co. v. Central Hudson Gas & Elec. Co., 248 N.Y. 75, 152 N.E. 470 (1928). However, a few courts have spoken in terms of a right to indemnity. E.g., Travelers Ins. Co. v. Northwest Airlines, Inc., 94 F. Supp. 620 (W.D. Wis. 1950), 35 Minn. L. Rev. 694 (1951).

\textsuperscript{40} See text accompanying notes 27–28 supra.
ute of limitations had run, and even though the Court criticized both the employer and insurer for not taking action at the time the employee filed his claim, apparently there was no action that they could take. Although it is unclear in Minnesota, a claim generally does not accrue to the employer at least until a judgment under the Workmen's Compensation Act has been entered against him. As a result, the plaintiff insurer would probably not have had standing to either sue the defendant tort-feasor or even seek a declaratory judgment before the Industrial Commission had awarded workmen's compensation benefits.

The Court's holding in Reed Cleaners on the subrogation issue seems to accord with both Minnesota precedent and the results in other jurisdictions. While this result might do an injustice to insurers, most courts have reasoned that, in light of statutory language granting only "subrogation," the legislature is the proper body to give insurers the right of indemnity. Assuming that the employee's workmen's compensation claim is preserved, if the insurer were not permitted to sue the tort-feasor, the employee stands to recover and at the same time the tort-feasor's liability is discharged; such a result could arguably lead to fraud and collusion between injured employees and their tort-feasors. Admittedly, if the tort-feasor were in fact unaware of the insurer's subrogation claim and the insurer were permitted to sue, the tort-feasor would be inequitably prejudiced, but only to the extent that he relied on the finality of the settlement with the injured party. Absent such reliance, the tort-feasor is in no worse position than one who has been subjected to suit by the insurer within the statute of limitations.

41. The wording of the statute, that "if the injured employee or his dependents agree to receive compensation from the employer or institute proceedings to recover the same or accept from the employer any payment on account of such compensation, the employer is subrogated . . . ." might suggest that the employer's right accrues earlier than judgment of an award. MINN. STAT. § 176.061(5) (1961). However, the Court has never passed on this question, and dictum in one case suggests otherwise. City of Red Wing v. Eichinger, 163 Minn. 54, 56, 203 N.W. 622, 623 (1925).


43. E.g., Joseph Schlitz Brewing Co. v. Chicago Rys., 307 Ill. 322, 138 N.E. 658 (1922); Fidelity & Cas. Co. v. St. Paul Gas Light Co., 152 Minn. 197, 188 N.W. 265 (1922); 26 MINN. L. REV. 768 (1942).

VI. JURISDICTION

A. FOREIGN TRUSTEES AMENABLE TO PERSONAL SERVICE OF PROCESS

Historically, the personal jurisdiction of a state was based on its sovereign power over persons by virtue of their presence, their domicile, their consent, their appearance, or their action within the state. Corporations, where acting outside the state of incorporation, however, did not have a legal existence and therefore could not fit any of these categories of personal jurisdiction. Yet corporations are guaranteed due process of law and personal judgments could not be entered against them unless the court had personal jurisdiction. Therefore, although a corporation had been permitted the privileges and benefits of doing business within a foreign state, it was not subject to suit therein.

To secure personal jurisdiction over a corporation that was doing intrastate business within one state although incorporated in another, states enacted statutes requiring corporations to expressly or impliedly consent to suit within the state as a condition for doing business. This statutory requirement, however, could not provide a means of obtaining jurisdiction over corporations engaged in interstate business without placing an unconstitutional burden on interstate commerce; as a result, the courts developed the presence theory of jurisdiction over foreign corporations. The theory was based on the fiction that a corporation was a legal person; thus, a corporation, like a natural person, would be subject to the jurisdiction of a foreign state whenever it was “present.” The United States Supreme Court, however, rejected the presence the-

8. Corporations are not entitled to the guarantees of the privileges and immunities clause, which is applicable only to citizens. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178-82 (1869). States could therefore exclude foreign corporations.
ory, in *International Shoe Co. v. Washington*, because the determination of whether a corporation was present for purposes of the due process clause begged the question — "presence" was merely descriptive of the activities within the state that were deemed sufficient to satisfy due process. As an alternative, the Court suggested that a corporation would be subject to personal jurisdiction, although not served within the state, whenever the corporation has had sufficient contacts with the state so that maintenance of the suit would not offend "fair play and substantial justice."

The doctrine of *International Shoe* has been expanded to confer jurisdiction over nonresident corporations having only the most minimal contacts with the forum state. The major inquiries now are whether the plaintiff has a legitimate interest in securing relief in the selected forum and whether the choice of forum imposes an unreasonable burden on the nonresident defendant. Although the development of the *International Shoe* doctrine has been in the context of jurisdiction over corporations, there are now indications that this due process standard may also be applicable to individuals.

In *Danov v. ABC Freight Forwarding Co.* the Minnesota Court considered whether it could constitutionally enter a personal judgment against nonresident trustees. An ex-employee sued his former corporate employer and the trustees of a profit-sharing trust, alleging that he was entitled to a distribution of trust assets.

12. Id. at 816–17.
13. Id. at 816.
14. McGee v. International Life Ins. Co., 355 U.S. 220 (1957), which required only a minimal isolated activity, has resulted in near nationwide service of process for many insurance companies. In such cases a finding of no jurisdiction would deny residents their only forum although suit in a foreign state would not cause undue inconvenience to the defendant. Cf. *Mulvane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), although arguably sui generis since the determination involved a common trust fund and thereby an unusually large number of interested parties, this case stressed mainly the importance of "notice" in determining the jurisdictional issue. See also text accompanying note 23 infra. The federal standard of "fair play and substantial justice" has been accepted in Minnesota. *Paulos v. Best Secs., Inc.*, 260 Minn. 283, 109 N.W.2d 576 (1961).

15. See Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 306 (1962). It should be noted, however, that the United States Supreme Court recently stated that it still required that the defendant have some contact with the forum before jurisdiction over him could constitutionally be exercised. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); see note 28 infra.
16. See text accompanying notes 22–26 infra.
17. 122 N.W.2d 776 (Minn. 1963).
Although the corporate employer was subject to suit in Minnesota because of its substantial contacts arising out of its Minnesota business, the principal parties in interest, the trustees, were domiciled in New York and the situs of the trust was New York. The trustees contended that the Minnesota Court could not, therefore, constitutionally adjudicate their rights. The Court held that because of the corporate defendant’s obligations under the trust agreement, it was a Minnesota agent of the trustees; therefore, the trustees were amenable to personal service in Minnesota.

The Court in *Danov* had a sound basis for holding that the corporation was the agent of the trust. The corporation was obligated to hire employees, determine their eligibility to participate in the plan, submit information to the trustees, and exercise judgment in terminating employment. This being the case, the trust was doing sufficient business within the state through its agent to give the Minnesota courts statutory jurisdiction. Also, the activi-

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18. The Court’s finding that the corporation was the agent of the trustees made the nonresident trustees amenable to personal service in Minnesota by virtue of Minn. Stat. § 540.152 (1961), which provides that:

The transaction of any acts, business, or activities within the State of Minnesota by any officer, agent, representative, employee or member of any union or other groups or associations . . . shall be deemed an appointment by such union or other groups or associations of the secretary of state of the State of Minnesota to be the true and lawful attorney of such union or other groups or associations, upon whom may be served all legal processes or notices in any action or proceeding against or involving said union or other groups or associations growing out of such acts, business, or activities within the State of Minnesota . . . .

Although this statute seemed to be designed primarily for labor organizations, it was interpreted by a federal court to pertain as well to a nonresident partnership. Minnesota Wood Specialties, Inc. v. George S. May Co., 117 F. Supp. 601 (D. Minn. 1954). This construction was justified on the bases that the use of disjunctive language indicated the intent of the legislature not to limit the statute to labor organizations, that the language of the Uniform Partnership Act defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit,” and that such a result “satisfies natural justice.” *Id.* at 609 n.3. In State v. Ritholz, 257 Minn. 201, 100 N.W.2d 722 (1960), this rationale was approved by the Minnesota Court, which stressed the definition in the Uniform Act but omitted the argument based on “natural justice.” In *Danov* the Court extended the statutory construction to include nonresident trustees.

The Court might also have exercised jurisdiction over the trustees by virtue of Minn. Stat. § 531.05(2) (1961) on the theory that the trust itself was property within the State. See text accompanying notes 22–26 infra.

Arguably, a court may exercise jurisdiction as long as it does not violate due process to do so, thus avoiding the necessity of fitting the parties within the particular language of a jurisdiction statute. But cf. Wuchter v. Pizzutti, 276 U.S. 13 (1928).
ties of the corporate agent in Minnesota would have satisfied the "substantial connection" standard, so that the Minnesota courts had constitutional jurisdiction over an action arising out of those contacts.19

The plaintiff had asserted that the Minnesota courts had jurisdiction over the trustees on the basis of the corporation's complete control of the trustees. Although the Court resolved the jurisdictional issue on the ground that the corporation was the agent of the trustees, the plaintiff's argument seems to have some merit. Since the corporation's employment practices benefited from the activities of the profit-sharing trust that were carried on in Minnesota and with Minnesota residents, the corporation should bear any resulting liability. If, as plaintiff alleged, a corporation exercises "control" over a related subsidiary organization whose activities give rise to a cause of action, the separation should be ignored for jurisdictional purposes. The trustees in Danov were also officers of the corporation, and therefore, there is a strong possibility that such control existed. Thus, as the corporation had undoubtedly enjoyed "the privilege of conducting activities within the forum State,"20 the Minnesota courts should not be denied jurisdiction over the trustees.21

Arguably, the trustees could have been subject to personal service in Minnesota even if the trust were considered to be an independent entity. An adjudication of the rights in a trust has traditionally been based on in rem jurisdiction, which required a finding that the situs of the res is the forum.22 In Mullane v. Central Hanover Bank & Trust Co.,23 the United States Supreme Court suggested, however, that due process did not depend on the categorization of jurisdiction as in rem or in personam, but that the test should be based on a weighing of conflicting interests.24 The Mullane approach was applied in Atkinson v. Superior Court,25

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21. The argument has not, however, been received favorably by the courts. See Echeverry v. Kellogg Switchboard & Supply Co., 175 F.2d 900 (2d Cir. 1949); Hudson Minneapolis, Inc. v. Hudson Motor Car Co., 124 F. Supp. 720 (D. Minn. 1954). But see Foster, Personal Jurisdiction Based on Local Causes of Action, 1956 Wis. L. Rev. 522, 563, and cases cited nn.140–51.
24. Id. at 313.
in which the California Supreme Court determined that California courts had jurisdiction over a New York trust fund. The court ignored the concept of “situs of the trust” and relied on local contacts that satisfied “fair play and substantial justice”—a test usually reserved for in personam jurisdiction.\footnote{26}

In \textit{Atkinson} the plaintiff sued to enjoin his employer from making payments to a trust, pursuant to an agreement between the employer and the union, until the completion of plaintiff’s pending suit against the union—the trustee was a necessary party to the action for injunction. The facts that the employer’s obligations to the trust arose out of plaintiff’s California employment, that the work giving rise to the payments was done in California, and that the principal defendant and the employer-stakeholder were before the court were cited in favor of taking jurisdiction.\footnote{27} In \textit{Danov} the funds similarly moved from Minnesota to New York according to an agreement entered into in Minnesota; upon plaintiff’s discharge, the funds were supposed to move back into Minnesota pursuant to the same agreement; the trust \textit{res} consisted partly of plaintiff’s contributions from Minnesota earnings; and the relationship between the trust and the corporation indicated that the trust was enjoying the privileges of doing business in Minnesota. The analysis of the trustees’ contacts with Minnesota in \textit{Danov} clearly indicates even a stronger basis for asserting jurisdiction than in \textit{Atkinson} itself.\footnote{28}

Jurisdiction has also been determined by considering the type

\footnote{26. 49 Cal. 2d at 345, 316 P.2d at 964. In New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916), the United States Supreme Court established that although a state may assert jurisdiction over the property of a nonresident that is within the forum and may apply that property to satisfy a claim against the nonresident, the state has no jurisdiction to adjudicate adverse rights in that property. Thus, even if the court in \textit{Atkinson} had jurisdiction over the \textit{res}, it should not have been able to adjudicate the interests of the foreign trustees in the \textit{res}. \textit{Dunlevy}, however, has perhaps been transcended by the expanding concept of personal jurisdiction. Currie, \textit{Justice Traynor and the Conflict of Laws}, 13 Stan. L. Rev. 719, 774 (1961); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 960 (1960); see text accompanying notes 9–15 supra.}

\footnote{27. 49 Cal. 2d at 347, 316 P.2d at 966.}

\footnote{28. In Hanson v. Denckla, 357 U.S. 235 (1958), the United States Supreme Court apparently rejected the \textit{Atkinson} approach and held that Florida did not have jurisdiction over a Delaware corporate trustee. Yet, on the facts, \textit{Atkinson} and \textit{Hanson} are not irreconcilable—the former presented the stronger case for jurisdiction. See Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909, 963–65 (1960). Also, the Supreme Court declined to review \textit{Atkinson} subsequent to the \textit{Hanson} determination. Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958).}
of action involved and the interest of the forum in the outcome of the litigation. 29 In Danov, the Minnesota interest was to protect the rights of a resident individual involving a relatively small claim that might have gone unredressed if the forum had not exercised its jurisdiction. 30 Moreover, Minnesota was a convenient forum and the trustees should have contemplated being imposed upon to litigate claims arising in that state.

Thus, it appears that the Minnesota Court could have premised its jurisdiction on various theories. In addition to holding that the corporation was the agent of the trust, the Court could have held that the corporation and the trust were in fact only one entity, thereby giving rise to personal jurisdiction since the corporation conducted substantial business in Minnesota. Although the United States Supreme Court has not passed on the Atkinson theory, the expanding nature of personal jurisdiction over individuals and corporations indicates that such a result might well be approved by the Court.

B. Jurisdiction Over Foreign Buyer Corporation Violative of Due Process

Defendant, an Ohio corporation, had written to several Minnesota firms inviting business negotiations, and in response, plaintiff corporation 31 sent its agent to defendant's place of business to discuss terms. An agreement was reached, merchandise was ordered, and delivery was effected in Ohio. Defendant later refused to pay certain promissory notes executed pursuant to the transaction and plaintiff sued on the notes in Minnesota. On appeal from a denial of defendant's motion to quash service of process and dismiss the action for lack of jurisdiction, the Minnesota Court held, in Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc., 32 that the requirements for jurisdiction over a nonresident corporate defendant had not been satisfied; therefore, service of

29. This is particularly true in an extensively mobile and well-regulated business such as insurance. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950). It could be argued that the trust fund in Danov should be treated in the same manner for it provides a form of unemployment insurance in conjunction with the Minnesota system of compensation.
30. See note 37 infra.
31. The named plaintiff in this action was the Fourth Northwestern National Bank. Atland Manufacturing Co. negotiated notes to the bank, which are the subject matter of this suit. The bank reassigned the notes to Atland [hereinafter referred to as the plaintiff corporation] whom the parties have treated as the proper substituted plaintiff under MINN. R. CIV. P. 25.08.
32. 117 N.W.2d 732 (Minn. 1962).
process violated the due process clause of the fourteenth amendment. Further, the Court stated that even if jurisdiction could have been constitutionally asserted, Minnesota was an inconvenient forum and the action could have been dismissed on the basis of *forum non conveniens*.

Before a court can enter a personal judgment against a corporation, of course, it must have jurisdiction; otherwise, the adjudication would deny the corporation due process of law. The Minnesota due process clause has been interpreted to be coextensive with the federal due process standards as set out by the United States Supreme Court in *International Shoe Co. v. Washington*; the corporation's contacts with the forum state must be of such a nature that maintenance of a suit will not offend "traditional notions of fair play and substantial justice." The Minnesota statute providing for jurisdiction over foreign corporations, states:

> If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota . . . such acts shall be deemed to be doing business in Minnesota [and shall subject that corporation to personal service in Minnesota for] . . . any actions or proceedings against the foreign corporation arising from or growing out of such a contract . . . .

The question, then, is whether the jurisdictional statute applies to the facts of *Hilson* and if so, whether the defendant had sufficient contacts with Minnesota so that an adjudication of its rights in a Minnesota court would not offend due process of law.

Arguably, the reason Minnesota seeks jurisdiction over foreign corporations is to protect Minnesota residents, by providing a means of redress in local courts, from faulty products that might be sold in Minnesota. If the law were otherwise and the claim were

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32. See note 7 *infra*.
33. 326 U.S. 310 (1945). In Schilling v. Roux Distrib. Co., 240 Minn. 71, 59 N.W.2d 907 (1953), the Court considered in detail the question of whether it could assert jurisdiction over a foreign corporation and the theoretical bases for doing so. The Court applied the *International Shoe* standard; hence, there do not appear to be any state due process restrictions greater than those required by the federal constitution.
34. 326 U.S. at 316.
37. See Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 571, 580, 104 N.W.2d 888, 894 (1960): While recognizing the merit of protecting rights of foreign corporations not doing business here, we feel that such considerations are outweighed by the general objective of our single-act statute, that is to
small or the injured resident were in poor financial condition, the wrong might not be remedied. In *Hilson*, however, the plaintiff corporation presumably was sophisticated in business dealings and could foresee and sustain the burden of a foreign suit. Thus, in view of the underlying policy of the statute, perhaps it should not be applied to benefit the plaintiff in *Hilson*.

Limiting the statute to suits against sellers of goods entering Minnesota would also deny the benefit of the statute to Minnesota sellers who had made contracts with foreign corporations for the sale of goods. If any casual foreign purchaser of Minnesota goods were subjected to suit in Minnesota, the domestic seller would be in such an advantageous bargaining position that it is not unlikely that foreign purchasers would curtail their buying activities within the state. This fact has been recognized by other jurisdictions; for example, in *Conn v. Whitmore*, cited by the Court in *Hilson*, the Supreme Court of Utah refused to give full faith and credit to an Illinois judgment entered against a Utah buyer that was obtained under a statute similar to Minnesota's. The court expressly recognized that to permit a state to exercise jurisdiction over casual nonresident buyers would ultimately dis-

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38. Domestic corporations are, of course, entitled to the protection of the statute as are natural persons. See Dahlberg Co. v. Western Hearing Aid Center, Ltd., 259 Minn. 330, 107 N.W.2d 381, cert. denied, 360 U.S. 901 (1961). However, facts such as business sophistication and ability to sustain a foreign suit might mitigate in favor of disclaiming jurisdiction. See note 15 supra and accompanying text.

39. The courts' trend towards the relaxation of the amount of contact with the state required to obtain jurisdiction over the seller has not been paralleled where buying is the activity concerned. See Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., 203 F. Supp. 539, 541 (D. Mass. 1962). Otherwise, the buyer, assuming knowledge of the law, might avoid products from the forum state. Subjecting the seller to the possibility of suit, however, is the price for the protection and benefit received from the foreign state. See Hanson v. Denckla, 357 U.S. 235, 253 (1958); 100 U. PA. L. REV. 598, 601 (1952).


41. 117 N.W.2d at 736.

suade customers from doing business across state lines. Therefore, where the plaintiff is a seller rather than a resident buyer, as was the case in *Hilson*, the protective policy underlying the statute is not applicable.\(^4\)

The Minnesota Court, in *Dahlberg Co. v. Western Hearing Aid Center, Ltd.*,\(^4\) considered the question of whether the statute should be applied to a nonresident buyer in a suit by a resident corporate plaintiff; it was held that there was proper service under the statute.\(^4\) The defendant in *Dahlberg*, however, had substantial contacts with Minnesota: the contract was executed in Minnesota; notes were not only payable in Minnesota, but were also executed and delivered there; several meetings between plaintiff and defendant were held in Minnesota; the goods were delivered f.o.b. Minnesota; and there was an extended course of business dealings between the parties resulting from collaboration on advertising and promotion programs. In *Hilson*, the only contacts the defendant had with Minnesota were the initial solicitation and the designated place of payment of the notes. Thus, the Court could have decided *Hilson* by reasoning that the legislature did not intend the statute to provide for jurisdiction over a nonresident buyer having as few contacts with the state as the *Hilson* defendant.

The *International Shoe* standard for due process has now been expanded to require only the most minimal contacts with the forum before jurisdiction may be constitutionally exercised.\(^4\) For example, in *McGee v. International Life Ins. Co.*,\(^4\) the United States Supreme Court held that California could constitutionally adjudicate the rights of a Texas insurance company that had no office in California, solicited no business in California, and had only one policy held by a California resident. This departure from the strict jurisdictional requirements of *Pennoyer v. Neff*\(^4\) appears to be justifiable since modern transportation and communication have made it much less burdensome for a party to defend himself in a state where he engages in economic activity. Thus,

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44. 259 Minn. 330, 107 N.W.2d 381, cert. denied, 366 U.S. 961 (1961).
46. See text accompanying notes 9–15 supra.
47. 355 U.S. 220 (1957).
48. 95 U.S. 714 (1877). See notes 1–5 supra and accompanying text.
the facts that the defendant corporation in *Hilson* had solicited offers in Minnesota and had made notes payable in Minnesota might satisfy the substantial contacts requirement of due process.

The Court's conclusion, however, that the defendant would be denied due process if jurisdiction were assumed is not without support. The United States Supreme Court, in *Hanson v. Denckla*, 49 emphatically stated that it would be a mistake to assume that the recent liberal trend of courts towards more readily assuming jurisdiction "heralds the eventual demise of all restrictions on the personal jurisdiction of state courts," for a defendant may not be required to litigate in a foreign tribunal "unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." 50 The Minnesota Court pointed out that the defendant in *Hilson* had not received any of the benefits or protections offered by the forum nor had it exercised any privilege giving rise to an obligation therein. 51 The Court properly dismissed the only significant contact, the fact that the notes were payable in Minnesota: "Fixing the place of payment at plaintiff's business residence is hardly the kind of commercial benefit to defendant that must be balanced by a countervailing capitulation to jurisdiction. . . ." 52

Even if the statute could be constitutionally applied to make the defendant amenable to service in *Hilson*, the Court indicated that it would dismiss the action under the doctrine of *forum non conveniens*. 53 This doctrine allows a court discretionary power to decline jurisdiction wherever it appears that the cause may be tried more conveniently elsewhere. 54 The issue to have been adjudicated at the trial in *Hilson* was whether there was a breach of warranty. The physical evidence relevant to the issue consisted of heavy machinery that was in Ohio and would have needed transport to Minnesota for the trial. Further, defense witnesses, residing in the Ohio area, were not likely to come to Minnesota, whereas they probably would have appeared in an Ohio adjudication. The Court also considered that since the plaintiff was a

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50. *Id.* at 251.
51. 117 N.W.2d at 784-85.
52. 117 N.W.2d at 786.
53. 117 N.W.2d at 786-87.
corporation, it might better be able to sustain an action in a foreign jurisdiction than would an individual.\textsuperscript{55}

Although the Court clearly reached the correct result, there are several difficulties with basing the decision on \textit{forum non conveniens}. If a defense were frivolous, a dismissal on \textit{forum non conveniens} would inequitably deny access of residents to their own forum even though jurisdiction could constitutionally be exercised.\textsuperscript{66} A forum, moreover, will rarely deny its own citizens access to its courts and usually will refuse to entertain the action on \textit{forum non conveniens} only when all parties are nonresidents.\textsuperscript{67} Also, the doctrine has been strictly applied in Minnesota and does not seem to be in judicial favor.\textsuperscript{68} The better decision would be either to find that the statute was not designed to protect the plaintiff in \textit{Hilson}, or to hold that jurisdiction could not be exercised without violating the due process clause of the fourteenth amendment.\textsuperscript{69}

\textsuperscript{55} See note 38 supra and accompanying text. The effect of such a rationale does not appear to have been considered with respect to a closely held corporation.

\textsuperscript{56} The Court in \textit{Hilson} did not appear to doubt the veracity of Hilson Industries' substantive defense. 117 N.W.2d at 737. See also authorities cited note 54 supra.

\textsuperscript{57} See generally Note, 15 Minn. L. Rev. 83 (1930).

\textsuperscript{58} Minnesota courts were at one time bound to accept jurisdiction over controversies any time the parties met the statutory requirements. Borton v. Chicago R.I. & P. Ry., 180 Minn. 52, 230 N.W. 457 (1930), 15 Minn. L. Rev. 115. In 1954, the Court overruled Borton in Johnson v. Chicago B. & Q.R.R., 243 Minn. 65, 66 N.W.2d 763 (1954), holding that the district courts may exercise discretion to decline jurisdiction in some cases. However, in Hill v. Upper Mississippi Towing Corp., 252 Minn. 165, 89 N.W.2d 654 (1959), 43 Minn. L. Rev. 160, the Court limited Johnson to cases in which the defendant was amenable to involuntary service of process in a forum more convenient than Minnesota. See generally Note, 43 Minn. L. Rev. 160 (1959).

\textsuperscript{59} Defendant also argued that to exercise jurisdiction in this case would unduly burden interstate commerce. Although the argument has been made rather frequently, the United States Supreme Court has usually disposed of it by considering whether the defendant has had sufficient contacts to warrant the forum exercising jurisdiction. \textit{E.g.}, Denver & R.G.W.R.R. v. Terte, 284 U.S. 284 (1932) (Suit against two railroads: one did not operate any line in the forum state, but did own property, maintained offices, and employed agents who solicited traffic while in the forum state; the other was licensed to do business in the forum state and did in fact conduct business therein. The Court held that the latter was subject to the forum's jurisdiction, but the former was not.); Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21 (1927) (Railroad was incorporated in forum state and owned and operated railroad therein. The Court held that the state's exercise of jurisdiction was proper.); Davis v. Farmers Co-op. Equity Co., 262 U.S. 312 (1923) (Railroad neither owned nor operated railroad in forum — only maintained agent to solicit busi-
VII. SOVEREIGN IMMUNITY

A. IMMUNITY ABROGATED BY COURT THEN LEGISLATURE

Legal scholars en masse consider governmental tort immunity to be archaic — "whether this immunity is an absolute survival of the monarchical privilege . . . or rests on abstract logical grounds, . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State." Yet the doctrine lingers still, although judicial and legislative inroads have so riddled it with exceptions as to cause harsh inequities. Most courts have declined to abolish governmental immunity completely, however, contending that this was a legislative and not a judicial function, while the legislatures have also failed to abrogate the immunity, apparently giving heed to the neglected problem of definiteness therein. The Court held that to exercise jurisdiction would violate the commerce clause. Thus, it would appear that if the corporation has had sufficient contacts to satisfy due process, there would be no violation of the commerce clause by exercising jurisdiction. See generally Farrier, Suits Against Foreign Corporations as a Burden on Interstate Commerce, 17 Minn. L. Rev. 381 (1933).

1. For a survey of the literature, see Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law & Contemp. Prod. 214 (1942).

2. Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). Historically, the doctrine of sovereign immunity stems from the English king's personal immunity from the jurisdiction of the king's courts. However, the application of the doctrine in the United States, where such a prerogative is unknown, is "one of the mysteries of legal evolution." Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4 (1924). In recent times, perhaps the only proponent of the doctrine has been Mr. Justice Holmes, who philosophized that the sovereign was immune from suit "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

3. In Minnesota, for example, there is a judicially developed distinction applied to municipal corporations between governmental functions, which are immune from tort liability and proprietary functions, which are not. See Snider v. City of St. Paul, 51 Minn. 466, 53 N.W. 763 (1892).

4. E.g., Minn. Laws 1961, ch. 230, § 3(4), which specifies that the procurement of insurance constitutes a waiver of the defense of governmental immunity to the extent of the coverage.

5. In Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 217-18, 350 P.2d 457, 460, 11 Cal. Rep. 59, 92 (1961), the court noted that the application of the then existing California rule of sovereign immunity, which embodied the governmental-proprietary distinction, would deny recovery to one injured in a county hospital while allowing recovery to one injured in a city hospital.

The Minnesota Court had likewise indicated that the abolition of governmental immunity was a legislative task;8 nevertheless, in Spanel v. Mounds View School Dist.,9 the Court prospectively overruled this defense, except for discretionary acts and acts of the state itself, effective as of the adjournment of the 1963 Minnesota legislative session.

In reaction to the catalytic Spanel decision, the Minnesota legislature wholly recodified the law of governmental immunity10 so that basically municipalities would be subject to liability for their torts and the torts of their agents acting within the scope of their employment,11 effective January 1, 1964.12 The legislature, however, continued the immunity for certain significant claims: (1) any claim covered by the workmen’s compensation act; (2) any claim in connection with the assessment or collection of taxes; (3) any claim based on snow or ice conditions, unless affirmatively caused by the negligent acts of the municipality; (4) any claim based on an act or omission by a public officer, exercising due care, in the execution of a valid or invalid statute; (5) any claim based on the performance or nonperformance of a discretionary function.

7. Cf. Davis, Tort Liability of Governmental Units, 40 MINN. L. REV. 751, 792 (1956). In 1961 the California Supreme Court overruled the doctrine of sovereign immunity, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 350 P.2d 457, 11 Cal. Rep. 89 (1961); later that same year the California legislature re-enacted the immunity as it existed as a rule of decisions before Muskopf, for a period ending 90 days after the close of the 1963 legislative session. CAL. CIV. CODE § 22.3. The California court has interpreted this as a moratorium to give the legislature time to determine what legislation may be necessary as a result of the abolition of sovereign immunity. Corning Hosp. Dist. v. Superior Court, 57 Cal. 2d. 488, 370 P.2d 325, 20 Cal. Rep. 621 (1962). California then appointed a Law Revision Commission to consider legislative solutions. See, e.g., CAL. LAW REVISION COM’N, A STUDY RELATING TO SOVEREIGN IMMUNITY (Jan. 1963). See also Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. L. REV. 463 (1963).


9. 118 N.W.2d 795 (Minn. 1962).


11. For the purposes of this act, ‘‘municipality’’ means any city . . . any village, borough, county, town, public authority, public corporation, special district, school district, however organized, or other political subdivision.” Minn. Sess. Laws 1963, ch. 798, § 1(1).

12. The effective date of the act was postponed until January 1, 1968 for school districts and drainage districts and related public corporations. Until the act becomes effective, the doctrine of sovereign immunity from tort liability as a rule of decisions of the courts of Minnesota prior to Spanel is to be reinstated. Minn. Sess. Laws 1963, ch. 798, §§ 12–14.
As suggested by the Court in *Spanel*, the act required prompt notice of a claim to be given and provided a monetary limit on the amount of liability. Also, the act permitted any municipality to procure insurance covering those torts for which the municipality would be immune from liability and exceeding the maximum limit of liability; however, the procurement of such insurance constitutes a waiver of the defense of immunity to the extent of the coverage.

Clearly, governmental units should not be liable in damages for all injury to private interests caused by their acts. To hold a state liable to a business adjacent to a highway for the resultant loss if the state relocates the highway, for example, would be patently impracticable. Nor would a standard of liability predicated on the negligence or fault of the governmental unit be feasible; again, payment of damages to the business adjacent to a highway would still be impracticable even if a court were to find that the relocation of the highway was an abuse of discretion. The customary answer to this problem of defining limits of liability, which is embodied in the *Federal Tort Claims Act*, has been that governmental units should be liable if a private party would be liable in the same circumstances. Perhaps this approach is sound, but it fails to frame a system of liability and immunity for those many governmental functions that have no private counterpart. Moreover, a governmental unit differs significantly from a private party, for it is financed by equitable taxation, not by private investment; as a result “a large enough governmental unit is the best of all possible loss spreaders.” For this reason, exceptional losses fortuitously inflicted by governmental activity should not be borne by the individual—the basis for governmental liability should be equitable loss spreading.

The Minnesota act bases liability on the municipality’s “torts and those of its officers, employees and agents acting within the scope of their employment or duties.” Similarly, the *Federal

13. Notice of the claim must be given within 30 days from the date of the alleged injury, unless incapacitated, if an action is to be maintained. Minn. Sess. Laws 1963, ch. 798, § 5.

14. The liability of any municipality is limited to $25,000 for a claim of wrongful death, $50,000 for any other claim, and $300,000 for all claims arising out of a single occurrence. Minn. Sess. Laws 1963, ch. 798, § 4(1).


Tort Claims Act, which authorizes tort claims against the federal government, confers jurisdiction upon the district courts for injury caused by the wrongful act of "any employee of the Government while acting within the scope of his office or employment."\(^8\)

The FTCA clause has been interpreted as limiting the government's liability to claims based on respondeat superior principles;\(^9\) therefore, liability from governmental ownership of property\(^\text{20}\) or absolute liability for ultra-hazardous activities,\(^\text{21}\) for example, has been rejected. Yet upon an underlying basis of equitable loss spreading, a governmental unit should clearly be liable for such claims. The language of the Minnesota statute, however, should not permit the FTCA result, for the act indicates that the municipality is liable both for its torts and the torts of its agents acting within the scope of employment. The act, then, should be read to fashion municipal liability on broad tort-law concepts supplemented by the doctrine of respondeat superior. Moreover, the underlying rationale of respondeat superior\(^\text{22}\) is basically the same as the proper basis for governmental liability, to spread the loss among the ultimate recipients of the services.

Although the Minnesota act bases liability on broad tort-law concepts, it also provides that for certain enumerated claims the municipality is to be liable only in accordance with other applicable statutes or is to be immune from liability. Municipalities are thereby immune from tort liability but subject to statutory liability for both workmen's compensation claims\(^\text{23}\) and tax claims.\(^\text{24}\)

Tort liability probably should defer to statutory systems of claim settlement if they are consistent with equitable loss spreading. Accordingly, the workmen's compensation act is basically scheduled risk distribution; and governmental loss spreading requires equitable taxation, which is best achieved by an independent review-

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\(^9\) See United States v. Hull, 195 F.2d 64, 67 (1st Cir. 1952) (Magruder, J.); In re Texas City Disaster Litigation, 197 F.2d 771, 776 (5th Cir. 1952), aff'd sub nom. Dablehite v. United States, 346 U.S. 15 (1953).
\(^\text{20}\) See United States v. Dooley, 231 F.2d 423 (9th Cir. 1956); Ray v. United States, 228 F.2d 574 (5th Cir. 1955), cert. denied, 351 U.S. 908 (1956).
\(^\text{21}\) See cases cited note 18 supra; Peck, Absolute Liability and the Federal Tort Claims Act, 9 STAN. L. REV. 433 (1957).
\(^\text{24}\) E.g., Minn. Stat. § 274.01 (Supp. 1862) establishes a board of review that is authorized to review the assessment of property, adding property that has been omitted and correcting assessments, so that each "shall be entered on the assessment list at its full and true value."
The exceptions provision of the act, however, creates an unjustified immunity for claims based on accumulations of ice and snow. By present Minnesota tort law, a municipality is liable for harm caused by dangerous accumulations of ice and snow only if they were not eliminated within a reasonable time. On a loss spreading approach, a governmental unit should be liable at least for such claims — nor would the basic provision of the act extend liability beyond such claims, for it imposes liability only for a municipality’s “torts.” Indeed, this exception apparently creates an immunity where formerly the municipality was liable.

In addition, the act retains governmental immunity for two major categories of claims patterned after exceptions in the Federal Tort Claims Act — claims based on the execution of a statute and on a discretionary act. Specifically, the Minnesota act protects an “act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute.” The invalidity of a law plainly should not be the basis for governmental liability; for example, a finding that a law is invalid should not subject the government to liability for harm resulting from its enforcement. The converse, however, is not true, for a government should not always be immune from liability where it is acting in accordance with a valid statute. By analogy to governmental liability for the taking of property, the government perhaps should also be liable for personal harm incurred through the execution of a valid law. In essence, then, the standard is meaningless in light of the proper basis for liability.

The immunity for claims based on the “performance or the failure to exercise or perform a discretionary function,” however, sets an efficacious basis for liability. The very nature of governmental activity requires that some decisions be beyond judicial review — the delineation probably should be based on “discretionary” acts as the Court indicated in Spanel. The losses that result from discretionary decisions are usually well spread and, when they are not, they probably should still be borne by those upon whom they fall. Moreover, the “discretionary function” immunity lends itself to judicial development and possibly that is what is needed, for defining limits of liability is “surely difficult enough to

require the development of law through case-to-case adjudication.”

The Minnesota legislature also failed to abrogate the immunity from tort liability of the state itself, possibly on the basis of dictum in *Spanel*. Certainly the compelling reasons for subjecting a municipality to liability apply to the state itself; in fact, the state is a more efficient loss spreader than are lesser governmental units. In *Spanel*, however, the Minnesota Court intimated that the federal constitution prohibits a suit against the state without its consent; but the Constitution only prohibits such suits in the federal courts. Unfortunately, the Minnesota legislature might have relied on the Court’s decision in retaining the immunity of the state itself.

VIII. TRUSTS AND WILLS

A. APPORTIONMENT OF STOCK AND CAPITAL-GAINS DIVIDENDS

The creation of a trust with different principal and income beneficiaries often leads to disputes between these parties as to whether particular distributions of trust assets are “principal” or “income.” If the trust *res* is similar in nature to land, the principal is fixed and the rents and profits are clearly income, but if the trust *res* contains intangible assets such as stocks and bonds, the proper allocation between principal and income is more difficult. Two such apportionment problems were presented to the Minnesota Court by *In re Trust for Gardner*:

29. Davis, *supra* note 7, at 811. Because the doctrine of governmental immunity is judge-made and because the courts have often adhered to the immunity despite legislative attempts to limit the immunity, see e.g., *People v. Superior Court*, 29 Cal. 2d 754, 759, 178 P.2d 1, 4 (1947) (“there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort”), it has been suggested that this solution is unworkable. Davis, *supra* note 7, at 811. The Minnesota Court, however, has indicated a tendency to restrict immunity. Cf. *McCorkell v. City of Northfield*, Doc. No. 38767, Minn., Aug. 16, 1963, in which the Court held that the duty to protect those confined in jails imposed by *Minn. Stat.* §§ 642.02–09 (1961) impliedly waived the governmental immunity.

30. The Court specified that its decision did not abolish sovereign immunity as to the state itself, quoting *Berman v. Minnesota State Agricultural Soc’y*, 93 Minn. 125, 127, 100 N.W. 732 (1904): “since the adoption of the eleventh amendment to the Constitution it has been uniformly held that a suit by an individual cannot be maintained against a sovereign state without its consent.”

31. U.S. Const. amend. XI.

1. 123 N.W.2d 69 (Minn. 1963).

2. According to one writer, a stock dividend does not distribute property, but simply dilutes the
and capital-gains dividends\(^3\) should be allocated to the "principal" or the "income" beneficiaries.

In general, where the trust instrument is indefinite, two basic procedures have been developed to determine the apportionment of stock dividends—the Pennsylvania rule and the Massachusetts rule. The Pennsylvania rule\(^4\) bases the apportionment on the source of the dividend. A stock dividend would be considered "income" if it were declared out of earnings that accrued to the declaring corporation during the term of the trust; conversely, if the dividend were declared from earnings that had accrued prior to the creation of the trust, it would be deemed "principal."

This procedure provides an equitable apportionment formula,\(^5\) but it is often very difficult to apply.\(^6\) As a result, the Massachusetts rule evolved, whereby all stock dividends were allocated to prin-

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3. Capital-gains dividends are distributions of profits that have resulted from the sale of appreciated securities. See Shattuck, \textit{Capital Gain Distributions—Principal or Income?}, 88 \textit{TruTS \\& Estates} 160 (1949).

4. This rule was first articulated in Earp's Appeal, 28 Pa. 368 (1857).


7. Because it is virtually impossible to "segment" the retained earnings of a corporation, courts which applied the Pennsylvania rule were forced to resort to arbitrary presumptions—such as the presumption that a dividend is declared out of the most recent earnings. Further, an apportionment under the Pennsylvania rule required a determination of the "intrinsic value" of the investment both at the date of purchase and after declaration of the dividend. Those determinations were complicated by such considerations as whether the corporation maintained its inventory on a LIFO or a FIFO basis, whether there had been capital gains or surplus contributions that did not result from earnings, and other factors that, as a practical matter, were indeterminable. See 3 \textit{Scott, Trusts} § 296.6 (2d ed. 1958).
principal. Basically, then, the Pennsylvania rule strives for equitable apportionment whereas the Massachusetts rule aims at administrative expediency. 9

The Minnesota courts originally followed the Pennsylvania rule; however, in 1951 the Minnesota legislature substantially enacted section five of the Uniform Principal and Income Act, which adopts the Massachusetts rule. 10 The Gardner trust was created when the Minnesota courts still followed the Pennsylvania rule but the stock dividends in question were declared both before and after Minnesota adopted the Massachusetts rule. The Minnesota statute further provides that the Massachusetts rule is to be applied to all trusts silent as to stock dividends unless this would "deprive persons of property without due process of law."11 If the income beneficiary had vested rights in certain stock dividends, the retroactive application of the Massachusetts rule to the Gardner trust might deprive him of property in violation of his constitutional rights. 12 Basically, the only rights of either the income or

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9. Goodwin v. McGaughey, 108 Minn. 248, 122 N.W. 6 (1909). This rule was applied in In re Trust of Koffend, 218 Minn. 206, 15 N.W.2d 690 (1944); In re Trusts of Whitacre, 208 Minn. 286, 293 N.W. 784 (1940).

10. MINN. STAT. § 501A.7(2) (1961) provides that "all dividends on shares of a corporation forming a part of the principal, which are payable only in shares of the corporation, shall be deemed principal."


12. In In re Crawford's Estate, 352 Pa. 458, 67 A.2d 124 (1948), a Pennsylvania court held that the Uniform Principal and Income Act could be constitutionally applied only to trusts created after its enactment because the income beneficiary was held to have a vested right in the stock dividends. See Franklin v. Margay Oil Corp., 194 Okla. 519, 158 P.2d 489 (1944) (the allocation of oil and gas royalties). See also King, Uniform Principal and Income Act, Section 5: Constitutionality of Its Retroactive Application, 1960 Wash. U.L.Q. 339. However, in In re Allis' Will, 6 Wis. 2d 1, 94 N.W.2d 226 (1959), 58 Mich. L. Rev. 282, it was held that the earlier rule created no vested rights because it was merely for convenient trust admiration. Soon after this decision, the Pennsylvania court reversed In re Crawford's Estate, supra, and adopted the In re Allis' Will holding. In re Catherwood's Trust, 405 Pa. 61, 173 A.2d 86 (1961), 7 Vill. L. Rev. 497. But see 34 Temp. L.Q. 70 (1960). In overruling Crawford, the court found the precedents relied on in that decision to be distinguishable:

the rights therein held vested and beyond the reach of legislative interference were rights in property, whereas the rights claimed in Crawford were to a rule of law and a method of interpretation. 405 Pa. at 70, 173 A.2d at 90. The court reasoned that the income beneficiary had a vested right in all income arising from the trust, but that he did not
the principal beneficiary are those conferred expressly by the settlor. Absent an expression of the settlor’s intent, however, rules of law were needed, such as the Pennsylvania and Massachusetts rules, that have been characterized as the presumed intent of the settlor and that therefore confer the same rights on the beneficiaries as if they had been expressly granted in the trust instrument.

The Court recognized that although the settlor’s intent is generally controlling, it should be sought “with a reasonable mixture of common sense.” If the settlor had felt strongly about the apportionment of stock dividends, she probably would have expressed her intent in the trust instrument. Of course, she may also have felt strongly about their apportionment but merely did not contemplate a change in the law, or she may have preferred allocation as determined by the law in force either when the trust was created or at the time the dividends were declared. Absent any clear evidence of the settlor’s intention, however, the Court based its opinion on perhaps the only rational premise: “it is doubtful whether testatrix had any clear intention in mind at the time the will was executed.”

Clearly, then, the settlor’s intent as manifested in the trust instrument was too indefinite to confer vested rights to stock dividends on the income beneficiary. The only vested rights of the income beneficiary were acquired by application of the rules of law dictating the settlor’s presumed intent. The Court held, therefore, that those stock dividends declared by the corporation when Minnesota followed the Pennsylvania rule to which the income beneficiary was entitled by that rule should be allocated to the income beneficiary. Conversely, those stock dividends that were not declared until after enactment of the Massachusetts rule have vested rights in any particular rule or formula for ascertaining what was income. The court also noted that after its decision in Crawford, it was the only jurisdiction that had held the retroactive application of the Uniform Principal and Income Act to be unconstitutional. 405 Pa. at 76, 173 A.2d at 98.

13. Minn. Stat. 501.47(1)(2) (1961) provides: “A specific provision, contained in any trust instrument or agreement or in any will, which governs the allocation of principal and income, controls such allocation notwithstanding this section.”
15. 123 N.W.2d at 78.
should be allocated to the principal beneficiary because the income beneficiary had no right that attached to the dividends at the time they were declared.\textsuperscript{17}

\textit{In re Trust for Gardner} also presented the question of whether capital-gains dividends declared by an incorporated, regulated investment company and by a Massachusetts trust, an unincorporated, regulated investment company, should be allocated to "principal" or "income."\textsuperscript{18} The Court defined capital-gains dividends as being "derived from the profit or gain made in the purchase and sale of securities due to the appreciation in value thereof while held by the fund."\textsuperscript{19} These dividends are usually distributed in the form of additional shares of stock or in cash, at the stockholders option. The apportionment of a capital-gains dividend clearly evinces the adverse interests of the income and principal beneficiaries: the income beneficiary claims that the dividend is tantamount to a cash dividend declared out of profits from the sale of inventory; the principal beneficiary contends that the dividend is a return of capital due to the liquidation of capital assets.\textsuperscript{20}

The Minnesota statute provides that

\begin{quote}
where a trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, such dividend shall be considered a cash dividend and shall be deemed income irrespective of the option selected by the trustee.\textsuperscript{21}
\end{quote}

Because the capital-gains dividends were in optional form, the Court held that such dividends received from regulated investment companies were to be distributed to the income beneficiary. Implicit in the Court's holding is the premise that because the statute governing optional dividends fails to mention capital-

\textsuperscript{17} The Court recognized the difficulty of trustees who had distributed or were under court order to distribute stock dividends to the income beneficiary under the Pennsylvania rule. As to those distributions made under court order, there is no problem if the time for appeal has expired. If the distribution has been ordered, but not yet made, the Court indicated that the proper procedure would be to petition for a change in instructions in accordance with \textit{Gardner}. As to distributions made without court supervision, the Court indicated that either the doctrine of ratification or that of laches would protect the trustee. 123 N.W.2d at 75.

\textsuperscript{18} A regulated investment company is defined in Int. Rev. Code of 1954, § 851.

\textsuperscript{19} 123 N.W.2d at 78.

\textsuperscript{20} Compare Shattuck, \textit{Capital Gain Distribution—Principal or Income?}, 88 Trusts & Estates 160 (1949), with Young, \textit{A Dissent on Capital Gain Distributions}, 88 Trusts & Estates 280 (1949). See also 31 Rocky Mt. L. Rev. 224 (1959).

gains dividends, there should be no distinction between ordinary dividends and capital-gains dividends from a regulated investment company. The premise seems to be well founded, for the capital-gains distribution of a regulated investment company is in essence a distribution of the gains realized from dealings in its inventory. The distribution of gains of a non-investment corporation realized by the sale of inventory would clearly be allocable to income. The fact that the inventory of a regulated investment company consists of assets entitled to capital-gains treatment should not dictate that a distribution of those gains be allocated to the principal of the shareholder trust.\textsuperscript{22}

A different rule might be applied to Massachusetts trusts, for the statute refers only to "corporations," which, of course, does not literally include a Massachusetts trust. If a share of ownership in a Massachusetts trust represents a "true participation in a pool of investments,"\textsuperscript{23} an investment therein should be treated as a direct investment in the individual assets of the company. Under this concept of ownership, the gains realized from the sale of an individual asset of the company, a capital gain, would clearly be allocated to the principal of the trust.\textsuperscript{24}

The Court reasoned, however, that although the statute referred only to corporations, the share owners of the Massachusetts trust probably considered their interests to be no different from an investment in an incorporated, regulated investment company and, moreover, there is no "logical reason why the same rule should not apply to a Massachusetts trust operating exactly as does the corporate entity. . . ."\textsuperscript{25} Thus, although there may be a cognizable, theoretical distinction with respect to the nature of ownership in the two types of regulated investment companies, the Court looked to the substance of the relationships and adopted a rule that will facilitate the administration of trusts. Capital-gains distributions in the form of optional stock or cash dividends are therefore to be allocated to the income beneficiary of the recipient trust, whether received from an incorporated investment company or a Massachusetts trust.

\textsuperscript{22} \textit{But see} Shattuck, \textit{supra} note 20.

\textsuperscript{23} Ewart, \textit{Principal and Income Problems of Trustees With Mutual Fund Dividends}, \textbf{95} TRUSTS \\& ESTATES 1025 (1956).

\textsuperscript{24} See \textit{In re Trust of Koffend}, 218 Minn. 206, 223, 15 N.W.2d 500, 509 (1944); cf. 3 Scott, \textit{Trusts} § 256.8, at 1824 (2d ed. 1959).

\textsuperscript{25} 123 N.W.2d at 88.
B. Doctrine of Dependent Relative Revocation

Effects Intent of Testator

Decedent had executed four wills, each purporting to be his last will and testament and each containing a clause expressly revoking all prior wills. In the district court, the fourth will was ruled invalid, as being procured by undue influence; the second and third wills were ineffective, for their proponents had failed to assert them; and the first will was admitted to probate. On appeal the Minnesota Court, in In re Estate of Anthony, determined that the second and third wills were effective to revoke the first will although they were incapable of passing decedent's estate, unless the decedent intended the revocation clauses to be inoperative if the instruments were not effective in toto.

The Minnesota statute providing for the revocation of wills states that

no will in writing shall be revoked or altered otherwise than by some other will in writing; or by some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed . . .

The several instruments executed subsequent to the first will were not capable of disposing of decedent's estate and therefore could not qualify as a "will in writing." Prior to the enactment of this statute, however, the Court had held that an instrument, executed in compliance with the required statutory formalities, is valid as a revocation of an earlier will "whether it might or might not . . . be allowed as a will disposing of the estate." The fact that Minnesota has now codified the requirements for revocation, including a provision for revocation by instruments other than wills, further indicates the propriety of the Court's holding that the subsequent instruments were capable of revoking the first will.

Upon finding the subsequent instruments within the purview

26. 121 N.W.2d 772 (Minn. 1963).
29. See In re Lubbe's Estate, 142 So. 2d 130 (Fla. App. Ct. 1962), in which the court stated that generally when a second will is properly executed according to the statute, with an express revocation clause, though it should be prevented from operating by the incapacity of the devisee or any other matter dehors the will, the former will is nevertheless revoked by it. Id. at 136; accord, In re Heazle's Estate, 72 Idaho 307, 309, 240 P.2d 821, 823 (1952); Crawford's Estate v. Crawford, 225 Miss. 208, 82 So. 2d 823 (1955); Atkinson, Wills 882 (2d ed. 1953).
of the "some other writing" clause, the Court could have held that the revocation clause in the third will caused the estate to pass by the laws of intestacy. In some cases, however, such a result might cause an obvious perversion of the testator's intention; for example, a testator who destroyed a will believing it to be another instrument probably did not intend for his estate to pass by the laws of intestacy. For this reason, courts have often inquired into the testator's intent. The Statute of Wills, however, reflects the judgment that some persons who stand to benefit from the disposition of an estate will act in their self-interest — the statute is designed to deny them the opportunity. The courts must therefore balance their objective of effectuating the intent of the testator against the possibility of encouraging fraud. The result of this balancing process has been embodied in the judicial doctrine of dependent relative revocation. The doctrine provides that in certain cases where a dispositive provision fails, the related revocation also fails if the testator would have preferred a previously valid testamentary disposition over intestacy.

Basically, three fact situations might give rise to an inquiry into the intent of a testator: the execution of a revocatory instrument under mistake of fact; the execution of a revocatory instrument under mistake of law; and the execution of a subsequent will that fails to dispose of the estate. Where there has been a revocation under a mistake of fact, most courts have required, as prerequisite to an inquiry into the testator's intent, that the factors as to which the testator was mistaken be indicated on the face of the instrument and that these factors induced the revocation.

For example, a statement in the subsequent instrument to the effect that "my son being dead, I hereby revoke my prior

30. See Atkinson, Wills § 97 (2d ed. 1963); Model Probate Code 298 apps. (Simes 1946); Evans, The Probate of Lost Wills, 24 Neb. L. Rev. 283 (1945).
32. Id. § 88.
34. E.g., Schneider v. Harrington, 320 Mass. 723, 71 N.E. 2d 242 (1947); In re Marvin's Will, 172 Wis. 457, 179 N.W. 508 (1920).
will” would satisfy the requirement. By so limiting the cases to be considered, the courts avoid contravening the policy of the Statute of Wills with respect to the issue of mistake, for this question lends itself to objective proof. Moreover, the prospective heirs cannot fabricate a mistake because the motivating fact must appear on the face of the revoking instrument.

Certainly a testator might be mistaken as to the law as well as to the facts. For example, a revoking instrument might have dispositive provisions drafted so as to violate the rule against perpetuities. The existence of a mistake should be relatively clear in this case — testators do not intend to execute invalid wills. Arguably, the third fact situation should be analyzed the same as a mistake of law. The situation arises where the dispositive provisions of the revoking instrument are ineffective for some extrinsic reason; for example, the testator executes a will including a bequest to charity and then dies within a statutory period that invalidates the charitable bequest. To call this a mistake would be erroneous, for a person cannot be mistaken as to facts, or rules of law applied to facts, that are not yet in existence. If the testator were presented with the facts as they ultimately occur, however, it is likely that he would prefer a re-examination of his will — as testators do not intend to execute invalid wills they certainly do not intend to make wills that will not pass their estate. Further, to nullify the effect of the revocatory clause in the second instrument to avoid intestacy is no greater evil than in the case of mistakes of law.

Once it is determined that the courts should seek the testator’s intent, it becomes necessary to consider the nature of evidence that should be considered. To permit the prospective beneficiaries to introduce extrinsic evidence of the testator’s intent would contravene the policy of the Statute of Wills. Perhaps the more reasonable approach would be to look only to the testamentary instruments themselves to determine intent — if no clear answer can be gleaned from them, then the estate should pass under the laws of intestacy.

38. See Note, 2 Va. L. Rev. 327, 330 & n.17 (1915).
41. See McGill v. Trust Co., 94 N.J. Eq. 657, 121 Atl. 760 (Ch. 1923), modified, 96 N.J. Eq. 331, 125 Atl. 108 (Ct. Err. & App. 1924); Ely v. Megie,
In the case of a revocation under mistake of fact, the hypothetical will stating "my son being dead, I hereby revoke my prior will" clearly indicates that the inquiry should be limited to the instruments. For if it can be determined from the faces of the two instruments that the son had a clear interest in the first will, or that the son had only a minor interest in the first will, but the major beneficiaries remained unchanged, it would seem contrary to the testator's intent to permit the revocation. Similarly, in cases of mistake of law and failure of dispositive provision, the testator's intent would seem to be embodied in the second instrument. Thus, if the beneficiaries under the first and second wills are substantially identical, the testator's intent that they should take rather than an intestate disposition would appear clear. Moreover, such an objective standard is clearly within the policy of the Statute of Wills, for it limits the opportunity for fraud and perjury.

In *Anthony*, the Court held that on remand the district court should seek the testator's intent to determine whether the revocatory clauses of the second and third wills should be given effect. An analysis of the four wills, however, shows little, if any, similarity. Unless the testator's intent is clear from the faces of the


45. A comparison of *Anthony* with the leading decision of Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357 (D.C. Cir. 1950) might best illustrate the results of the application of dependent relative revocation under these criteria. In *Linkins*, the testatrix executed three wills, the last will containing a clause expressly revoking all prior wills. All three wills provided for disposition of one half of the residual estate to two religious institutions. These gifts failed because the last will was executed within a statutory period that invalidated the charitable bequest. All beneficiaries of the residual estate under all three wills were identical. Clearly the testatrix's intent was to benefit the religious institutions—if this objective may not be achieved under the last valid instrument, but may be done under the prior valid instruments, the courts should see that it is done.

46. The first will bequeathed all of testator's property to his sister for life, with a remainder to the Evangelical Lutheran Church; the second gave the property to three of testator's nephews; the third made specific bequests of one hundred dollars each to a cousin, nephew, niece, and brother, with the residue
various instruments, the estate should pass by intestacy.\textsuperscript{47} To permit extrinsic evidence would be to invite the very evils the Statute of Wills was designed to prevent.

to the Lutheran Bible Institute; and the fourth bequeathed all of the estate, in equal shares to two of decedent's brothers.
