The Minnesota Supreme Court 1964-1965

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The Minnesota Supreme Court Note comprehensively surveys significant decisions of the 1964–1965 term. The decisions selected were thought to represent new developments in Minnesota law or otherwise to be of interest to members of the Minnesota Bar. The results reached by the court have been analyzed and evaluated in terms of their effect upon Minnesota law and are frequently compared with the law of other jurisdictions. While the decisions are discussed individually, they are arranged according to the general legal issue involved; this arrangement, however, is merely one of convenience, since many of the cases involve issues from several areas of the law.

I. CONSTITUTIONAL LAW

WAIVER: COURT WILL NOT CONSIDER ADMISSIBILITY OF DEFENDANT'S ADMISSIONS WHEN PROCEDURAL FORFEITURES WERE MADE IN THE TRIAL PROCEEDING.

In a prosecution for receiving the earnings of a prostitute, admissions made by defendant to police officers during detention and prior to representation by counsel were received in evidence without objection by defendant's court appointed attorney. No special instruction on the question of voluntariness was requested nor was exception taken to the charge as given. On appeal the defendant contended that he was deprived of a fair trial because the admissions did not meet the federal standard of voluntariness and should not have been received in evidence. The Minnesota

1. Minn. Stat. § 617.82 (1961) provides in part: “It shall be unlawful for any person to knowingly accept or receive, in whole or in part, his or her support or maintenance from the proceeds or earnings of any woman engaged in prostitution.”

2. For a statement of the charge, see Brief for Appellant, pp. 4–5, State v. Taylor, 133 N.W.2d 828 (Minn. 1965).

3. Factors that the United States Supreme Court has considered relevant in determining whether a confession is voluntary as a matter of law have been summed up recently as follows:

[Whether the police were guilty of physical or psychological coercion;]
Supreme Court affirmed, holding that the federal constitutional issue of the admissibility of the admissions could not be determined on appeal when defendant had neither objected to their reception at trial nor requested cautionary instructions as to their voluntariness. *State v. Taylor*, 133 N.W.2d 828 (Minn. 1965).

Minnesota applies the rule that the appellate court will not review matters which the defendant failed to raise below by objecting to the introduction of evidence, by requesting cautionary instructions with respect to the evaluation of the evidence, or by excepting to the charge as given. It should be noted, however, that the Minnesota court has modified the traditional rule in exceptional cases where the defendant has claimed a violation of fundamental law that substantially and materially prejudices his rights. It has been recognized that a mere failure to assert these rights at the proper time should not result in forfeiture.

Federal decisions indicate that the conventional notions of state procedural forfeiture will no longer bar collateral review of a constitutional issue not raised at the trial level; where post conviction relief based on constitutional claims has been sought, the federal courts have inquired into the facts and have made

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whether the defendant was denied access to counsel or friends; whether the defendant was held for an unreasonable period before arraignment; whether defendant was informed of his right to retain counsel and remain silent; and whether defendant's age, intelligence, and experience were less than normal.


4. See State v. Armstrong, 257 Minn. 295, 101 N.W.2d 398 (1960); State v. Rosenswieig, 168 Minn. 459, 210 N.W. 408 (1926); State v. Pearson, 153 Minn. 32, 189 N.W. 404 (1922); State v. Rue, 72 Minn. 296, 75 N.W. 235 (1898); State v. Mims, 26 Minn. 183, 2 N.W. 683 (1879).


6. See State v. Keaton, 258 Minn. 359, 365, 104 N.W.2d 660, 665 (1960); State v. Higgin, 257 Minn. 46, 52–53, 99 N.W.2d 902, 907 (1959); Note, 54 Harv. L. Rev. 1204, 1209–10 (1941). The federal courts apply this standard. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Civ. P. 52b.
their own determination of forfeiture. In *Fay v. Noia* the United States Supreme Court held that the jurisdiction of the federal district court in a habeas corpus proceeding is not foreclosed by the defendant's failure to raise the constitutional issue in the state proceedings unless the defendant has "deliberately bypassed" state procedure. In *Henry v. Mississippi* the Supreme Court strongly suggested that the state courts should abandon their contemporaneous objection rule and determine both whether a constitutional claim has been waived and whether, in the absence of waiver, the claim has substantive merit. The Court pointed out that since the state determination of forfeiture does not preclude consideration of defendant's constitutional claim in a federal habeas corpus proceeding, the state courts should modify their rules so as to make resort to a federal habeas corpus proceeding unnecessary.

The Minnesota court, in *Taylor*, adhered to the requirement of contemporaneous objection without referring to *Noia* and *Henry*. Thus, an examination of the policies underlying both the traditional rule and the suggested approach in *Henry* clearly appears to be warranted.

The rule requiring contemporaneous objection to the introduction of evidence allows the trial court a fair opportunity to rule on its admissibility. If the objection is well taken, the inadmissible evidence will be excluded from jury consideration and a reversal and new trial causing unnecessary proceedings will be avoided. The requirement of contemporaneous objections prevents the defendant's attorney from using inadmissible evidence as part of trial strategy to insure grounds for reversal in the event

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7. See United States v. Wiman, 304 F.2d 53 (5th Cir. 1962); United States v. Harpole, 263 F.2d 71 (5th Cir. 1959). In both cases, the court found that there had been no waiver and ordered a retrial.
9. [T]he federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. . . . [This may be done] only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. . . . [And a finding of deliberate by-passing may be based only] on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief.
11. Id. at 452-53.
of an adverse verdict. The rule requiring counsel to request particular instructions or to take exception to the court’s failure to do so discourages defendants from offering erroneous instructions in order to get reversible error in the record. Orderly administration of justice by forcing discussion of instructions when offered is thus encouraged.

There is a definite state interest in effecting orderly and less costly court proceedings by enforcing procedural forfeitures. However, the possibility that the defendant may obtain a hearing on his constitutional claims in a habeas corpus proceeding suggests that it would be more efficient to determine such questions on direct appeal. If the state hopes to terminate a substantial portion of its criminal litigation in its own courts, the state court cannot invoke a more stringent standard of forfeiture upon direct appeal than the federal courts would apply in a habeas corpus proceeding. An alignment of state and federal standards would

13. See Henry v. Mississippi, 379 U.S. 443 (1965); State v. Pearson, supra note 12; Note, 54 HARV. L. REV. 1204 n.2 (1941). But see State v. Pearson, supra (dissenting opinion). The dissenters felt that “if criticism is to be indulged it should be against the state in offering to put the erroneous testimony before the jury.” Id. at 39, 189 N.W. at 406.
16. Had objection been made in Taylor during the officer’s testimony about the defendant’s admissions, the objection would have called forth the single question of admissibility. The issue, in short, would have been expressly faced by the trial judge and the likelihood of achieving a correct result would have been maximized.
17. It can be argued that a determination on direct appeal is less efficient. Due to the defendant’s failure to raise the matter at the trial court, there is no evidence on record upon which the appellate court can adequately determine whether defendant’s constitutional rights have been violated.

[The association] which had previously been highly critical of the Court’s rulings in this area, rejected all “states’ rights” resolutions and adopted a resolution noting that release of state prisoners by federal courts could be avoided if the states adopted better procedures for reviewing convictions themselves.

eliminate the need to proceed with the case through federal courts already laboring under congested dockets. Abandonment of the contemporaneous objection rule would avoid the friction occasioned by a federal district court reversal of a state conviction. The danger that the procedural rules will be disregarded solely for strategical purposes is largely eliminated since the defendant will be bound by his waiver if he deliberately bypasses state procedure.

The necessity of affording the defendant a genuinely fair trial seems more important than the state’s interest in an orderly criminal procedure. Only in those cases where the defendant deliberately bypasses a state procedural rule should he be prevented from raising his constitutional claim on direct appeal. Several state courts have adopted the Court’s suggestion in Henry and have reviewed a defendant’s constitutional claim on direct appeal even though there was no objection below. It may be suggested that the defendant should be entitled to a direct state review only where the violation of his constitutional rights goes to the trustworthiness of the evidence and not where the federal rights are aimed at preventing improper police tactics. This distinction, however, would create difficult interpretive problems in deciding the proper effect that should be given constitutional rights.

Assuming arguendo that the Minnesota Supreme Court will ultimately adopt the Supreme Court’s suggestion in Henry, it appears that the defendant’s claim that the receipt of his ad-

21. The requirement of finding a deliberate bypassing of a state procedure in order to have an effective waiver promises to be a difficult interpretive problem. Although the facts of Noia fell within the Court’s own definition of waiver, relief was granted. See Comment, 24 Md. L. Rev. 46, 63–64 (1964).
missions into evidence constituted a violation of due process has substantial merit. A confession obtained from a defendant after he has been denied counsel, directly\(^2\) or indirectly,\(^6\) cannot be the basis of his conviction once the appointment of counsel has become required by the sixth amendment. In *Escobedo v. Illinois*,\(^7\) the point of necessary protection was reached when the investigation began to focus on the particular suspect then in police custody. This was unquestionably the situation of defendant in *Taylor* since his admissions were made at the time he was handed a copy of the warrant charging him with the offense. Because under some circumstances admissions may be treated as confessions,\(^2\) the fact that the admissions attributed to the defendant in the instant case were made prior to the appointment of counsel indicate that the admissions were inadmissible and that the defendant had been deprived of his constitutional rights.\(^9\)

26. *Massiah v. United States*, 377 U.S. 201 (1964); *People v. Dorado*, 394 P.2d 852, 40 Cal. Rptr. 264 (Sup. Ct. 1964). In *Dorado*, as in *Taylor*, the defendant failed to request counsel but the court was of the opinion that this did not distinguish the case from *Escobedo v. Illinois*, *supra* note 25. "We find no strength in an artificial requirement that a defendant must specifically request counsel; the test must be a substantive one: whether or not the point of necessary protection for guidance of counsel has been reached." *People v. Dorado*, *supra*, at 956. *But see State ex rel. Rasmussen v. Tahash*, No. 141, Minn., December 10, 1965, where the court indicated that defendant's constitutional rights are not violated unless the denial of his constitutional right to counsel was the result of affirmative conduct on the part of law enforcement officials.

In *Escobedo*, the Court referred throughout the case to defendant's utterances as a statement even though it was obviously an admission. The Court refused to draw such a meaningless distinction even though it had the opportunity. All incriminating statements elicited by police during interrogation after the right to counsel has been denied were held to be inadmissible. See *State v. Mendes*, 210 A.2d 50 (R.I. 1965).
29. The effectiveness of counsel after the two week period had elapsed was, at the least, materially damaged. "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." *Chafee, Documents on Fundamental Human Rights*, Pamphlet 2, at 541 (1961–1962). It is implicit in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that defendant's right to counsel at least begins at the time when he should be brought before a magistrate: "[Defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 345.
Though recognizing this possibility, the court justified its result on the ground that no miscarriage of justice resulted since there was other evidence of defendant's guilt and the admissions did not relate to a crucial issue.\textsuperscript{30}

The court, in so holding, ignored the well established principle that allowing an invalid, incriminating statement in evidence is never harmless error.\textsuperscript{31} Absent a special finding by the jury, there is no way of knowing precisely what part such evidence played in securing the conviction.\textsuperscript{32}

In conclusion, it is suggested that in the future the Minnesota Supreme Court should consider the federal court decisions as a basis for affording the opportunity to provide state procedures for a full airing of constitutional claims.\textsuperscript{33} An alignment of the state court's concept of waiver with that set out in \textit{Noia}, thereby enabling defendants to assert their constitutional claim for the first time on appeal, is preferable to forcing unsuccessful defendants into the federal courts on habeas corpus. The obvious result will be a federal decision overturning decisions of the state court with a consequent adverse effect on federal-state relations.

\textsuperscript{30} The court's conclusion that the admissions did not relate to the contested issue of whether, in receiving the money, defendant was acting as agent for the woman to redeem articles she had pawned or receiving the earnings of a prostitute seems to be inaccurate. The statement by the defendant upon receipt of the warrant charging him with receiving the earnings of a prostitute—"It looks like you have got me cold this time," 133 N.W.2d at 829—does go to the contested issue.


The Minnesota Supreme Court recently rejected an opportunity to adjust their concept of waiver concerning defendant's constitutional claims in \textit{State ex rel. Rasmussen v. Tahash}, No. 141, Minn., December 10, 1965. The court, in determining the question of the necessity of objection at trial relied on \textit{State v. Taylor}, stating:

\begin{quote}
In the absence of unusual circumstances, the admission of evidence even though prejudicial does not entitle the defendant to a new trial as a matter of right where no proper objection was made at trial, and this is the case even though valid objection to the evidence might have been made upon constitutional grounds.
\end{quote}

\textit{Id.} at 14.

Although this case was decided too late for full analysis in this note, it would seem that all the arguments advanced concerning Minnesota's standard for direct review of a defendant's constitutional claim where no proper objection was made at trial apply equally as well to the state court's collateral review of habeas corpus petitions.
II. CRIMINAL LAW

Trial Court Required to Allow Defendant Right to Allocution

During arraignment and on the advice of his court appointed defense counsel, the indigent accused pleaded guilty to a charge of burglary.¹ No presentence investigation had been conducted, and the district court did not hold a presentence hearing to determine if possible mitigating circumstances existed. The accused refused to testify, invoking his constitutional right against self incrimination. Rather than speaking on behalf of the accused before sentence was imposed by the court, defense counsel simply replied that the accused had asked him to request an immediate sentencing without further investigation. The accused was then sentenced to imprisonment for the maximum term. His subsequent petition for a writ of habeas corpus was denied by the district court. The Minnesota Supreme Court granted the writ and remanded for resentencing, holding that the accused had been denied his right of “allocution.” Minnesota ex rel. Searles v. Tahash, 136 N.W.2d 70 (Minn. 1965).

Under early English common law allocution consisted of the unqualified right of the accused to be asked, prior to sentencing, if he had anything to say as to why judgment of death should not be pronounced against him.² Failure of the record to indicate that allocution had been afforded was sufficient to warrant reversal of the attainder.³ In the early stages of English legal development,

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¹. MINN. STAT. ANN. § 611.07 (1968) provides the method for appointment of counsel for indigent defendants. In this case the county attorney nominated the counsel appointed by the trial court. The court disapproved of such a nominating procedure because it could suggest to the indigent defendant the possibility of collusion between defense and prosecution. Minnesota ex rel. Searles v. Tahash, 136 N.W.2d 70, 73, n.2 (Minn. 1965).

². 1 CHITTY, CRIMINAL LAW 699–700 (1847).

Early cases indicate the importance and nature of allocution. In The King v. Speke, 3 Salk. 358, 91 Eng. Rep. 872 (K.B. 1689–1712), the court reversed the attainder of a high treason conviction because the defendant was not asked what he had to say for himself and why sentence of death should not be pronounced against him. Accord, Anonymous, 3 Mod. 265, 87 Eng. Rep. 175 (K.B. 1689–1732); Rex & Regina v. Geary, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689–1712). Reversal of the attainder restored all of the defendant’s civil rights. See 1 CHITTY, CRIMINAL LAW 756 (1847).

For a comprehensive study of common law allocution and its origins see Barrett, Allocution, 9 Mo. L. Rev. 115 (1944).

³. 1 CHITTY, CRIMINAL LAW 699–700 (1847). Attainder referred to the status of a convicted criminal after sentence was pronounced for a capital
allocution was deemed essential because the accused was not represented by counsel⁴ and had no right to appeal.⁵ Moreover, if the accused were denied allocution, he would lose his chance to move in arrest of judgment⁶ or to plead a pardon.⁷ However, these traditional common law reasons for allocution are inapplicable to modern criminal procedure since right to counsel is guaranteed,⁸ and all states provide for some form of appeal.⁹ Furthermore, an executive pardon can be obtained at any time after conviction if the circumstances warrant such a remedy.¹⁰

The United States Supreme Court early adopted the English rationale that allocution was essential prior to pronouncing sentence; however, this right was afforded only in capital cases.¹¹ Rule 32(a) of the Federal Rules of Criminal Procedure, which superseded the federal common law right, extended allocution to noncapital cases: "[T]he court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." This statutory rule expanded the common law right by granting the defendant not only the right to speak, but also the right to present evidence in his behalf. In interpreting Rule 32(a), the United States Supreme Court has required the defendant to be asked directly whether he has anything to say before being sentenced.¹²

The effect of attainder was to take away most of the convicted's rights in remedy and all of his legal remedies. Id. at 723-26.

4. Not only was the defendant without counsel, but he was not allowed to call witnesses on his own behalf, to prepare his defense outside of the prison, or to be notified of the evidence to be presented against him. ¹ STÉPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 850 (1883).

5. See id. at 309-11.

6. Rex & Regina v. Geary, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689-1712). The only time a defendant could move in arrest of judgment was between the conviction and sentence. ¹ CMN., CRIMINAL LAW 661 (1847).

7. Rex & Regina v. Geary, supra note 6. See also ¹ CHITTY, CRIMINAL LAW 466-67 (1847).


9. See, e.g., MINN. STAT. § 632.01 (1961).

10. MINN. CONST. Art. 5, § 4.

11. Ball v. United States, 140 U.S. 118, 129-31 (1891). Ball is also cited as authority for the common law rule requiring the presence of the accused at the time of sentencing. Id. at 129-30.

Later cases clarified the right of allocution under federal common law. See Schwab v. Berggren, 143 U.S. 442 (1892) (allocution not required on appeal); United States v. Austin-Bagley Corp., 31 F.2d 229, 234 (2d Cir. 1929) (L. Hand, J., allocution not required in noncapital cases).

12. Green v. United States, 365 U.S. 301 (1961), 35 TUL. L. REV. 831 (1962). Green is significant because it clearly indicates the defendant has two
Notwithstanding the federal requirement, states have attached varying degrees of importance to allocution. The majority afford some form of allocution, either through common law or by statute. While some states make it mandatory in all felony convictions, others grant the right only in capital cases. It is generally held that failure to grant the right of allocution does not invalidate the judgment, but is only cause for resentencing. Unlike early common law, in some states the right is not absolute. Courts in these states require some evidence of prejudice before they will consider the merits of a contention that the formal requirements of allocution were not complied with at trial.

unqualified rights: (1) to make a statement on his own behalf; and (2) to present any information in mitigation of punishment. Green also states that the defendant has the burden of showing he was denied his right of allocution. The record indicated that the trial judge asked, "did you want to say something?" The Court held allocution had been afforded, since the question could have been directly addressed to the defendant and the defendant failed to show it was not.

The holding in Green has been embodied in the proposed federal rules which require that defendant’s counsel must have an opportunity to speak on behalf of the defendant. Also, the court is required to address the defendant personally and ask if he wishes to make a statement. Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure, Rule 32, 1964.

14. E.g., Perry v. State, 43 Ala. 21 (1869); Keech v. State, 15 Fla. 591 (1876); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); James v. State, 45 Miss. 572 (1871); State v. Ybarra, 24 N.M. 413, 174 Pac. 212 (1918); McCue v. Commonwealth, 78 Pa. 185 (1875).
15. E.g., CAL. PEN. CODE § 1200; IND. ANN. STAT. § 9-2205 (1956); IOWA CODE § 789.6 (1962); MO. SUP. CT. R. 27.09 (1953); N.Y. CODE CRIM. PROC. § 480; WASH. REV. CODE § 10.64.040 (1961).
16. E.g., Perry v. State, 43 Ala. 21 (1869); Cole v. State, 10 Ark. 318 (1850).
19. In Commonwealth v. Bannmiller, 391 Pa. 141, 145, 137 A.2d 236, 238 (1958), the court reasoned that even in capital cases the common law rule of allocution no longer is as inflexible as it once was; for under English common law the defendant could take no appeal and was not allowed the benefit of counsel. Failure to allow allocution is not error, even in a capital case, without some evidence of prejudice. Further, in Gannon v. People, 127 Ill. 507, 21 N.E. 525 (1889), the court pointed out that the accused always has counsel at trial; motions for a new trial or writ of error are made before sentencing and not at sentencing as at common law. Thus, omission of allocution is not as serious as it once was.

The change of position by the American Law Institute is indicative of the
Searles is the first case holding that the right of allocution exists in Minnesota, although it is the customary practice in the district courts to allow the accused an opportunity to speak prior to sentencing. When the court speaks of allocution, it endorses and relies on the federal cases interpreting Rule 32(a). Accordingly in Minnesota the right of allocution is twofold: (1) to make a statement in his own behalf; and (2) to present any information in mitigation of punishment.

Besides relying on common law development and the embodiment of allocution in the federal rules, the court states that section 631.20 of the Minnesota Statutes (1961) codifies this right. This statute provides that the trial court may, in its discretion, and upon the suggestion of either party, hear any circumstances which are properly relevant to mitigation of punishment. Basing the right to allocution on this statute seems rather tenuous, however, since the wording of the statute indicates that this procedure is entirely discretionary with the trial judge. Indeed the statute has been so interpreted. The most reasonable interpretation of the instant case is that the court has taken the procedure in section 631.20, which is somewhat similar to common law allocution, and has expanded it into a mandatory right of allocution.

In order to protect society and properly rehabilitate the trend toward placing less emphasis on the necessity of allocution. In the Model Code of Criminal Procedure § 389 (1930), allocution was required in all criminal cases. In a comment to the more recent Model Penal Code § 7.07 (Tent. Draft No. 2, 1954), the authors place great reliance on a presentence investigation report, presumably in place of allocution, which is not mentioned. They state that use of this device will provide the best method for the improvement of sentencing. They also consider a hearing with respect to mitigating circumstances is not well adapted to supply the needed information.

20. See State v. Larson, 171 Minn. 246, 213 N.W. 900 (1927), in which the court held a statement made prior to sentencing cannot be made the basis for a perjury conviction, since the defendant is not under oath when he makes such a statement.

21. 136 N.W.2d at 73; see note 12, supra.

22. 136 N.W.2d at 73.

23. [T]he court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct. Such circumstances shall be presented by the testimony of witnesses examined in open court.


offender, the objective of the sentencing process is to fit the punishment to the individual rather than to the particular offense.\textsuperscript{25} To do this it is of utmost importance that all available information be presented to the judge to enable him to effectively perform his sentencing function.\textsuperscript{26} The existing procedures in Minnesota to present this information to the court include questions asked by the clerk of court concerning the background of the accused,\textsuperscript{27} presentence investigation,\textsuperscript{28} and the courtroom hearing provided for in section 631.20. If these procedural devices are employed, the accused has had an ample opportunity to present any mitigating circumstances to the court.\textsuperscript{29} However, none of these procedures is mandatory: the accused may refuse to answer the questions of the clerk of court; the presentence investigation is discretionary with the trial judge;\textsuperscript{30} and the hearing under section 631.20 requires initiative from the accused or his attorney.

In \textit{Searles} none of the customary procedures for the presentation of mitigating circumstances was utilized by either the trial court or counsel for the accused. More significantly, although given the opportunity defense counsel made no statement in behalf of the accused.\textsuperscript{31} From these facts the court determined the accused had been deprived of his "right to have presented to the court all of the mitigating factors which might reasonably justify a sentence less than the maximum,"\textsuperscript{32} i.e., he had been

\textsuperscript{25} Sentencing Institute Program, 35 F.R.D. 381, 388 (1964).

\textsuperscript{26} Except in cases requiring life imprisonment, Minnesota trial judges are given wide latitude, within the maximum provided for a particular offense, in fixing the terms of imprisonment. \textit{Minn. Stat.} § 609.10 (1961).

\textsuperscript{27} \textit{Minn. Stat.} § 243.49 (1961). The procedure under this statute is mandatory, although the defendant may constitutionally refuse to answer the questions. The information revealed is not only useful to the judge at the time of sentencing, but the papers also serve as a warden's warrant to hold the prisoner.


\textsuperscript{29} In \textit{Green v. United States}, 365 U.S. 301 (1961), however, the Court stated that none of the innovations in criminal procedure lessened the importance of the defendant speaking personally. The Court said that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." \textit{Id.} at 304.

\textsuperscript{30} Although discretionary, this procedure is utilized in the majority of cases. The drafters of the proposed criminal code suggested that a presentence investigation be a mandatory requirement, but the legislature failed to adopt this proposal. \textit{Advisory Committee on Revision of Criminal Law, Proposed Minn. Crim. Code} § 609.115 (1963).

Under the Youth Conservation Act, however, a report similar to a presentence investigation is required. \textit{Minn. Stat. Ann.} § 242.18 (Supp. 1964).

\textsuperscript{31} See 136 N.W.2d at 72.

\textsuperscript{32} \textit{Id.} at 74.
denied his right of allocution. The court made no distinction between felonies and misdemeanors, and so allocution is apparently required in all criminal cases.

Since the court is primarily concerned with the right to mitigate, it does not indicate whether a "direct question" must be asked the accused—a requirement which exists in common law allocution and in federal practice. Apparently the rationale of this formal requirement is that it assures the "presence" of the accused at the time of sentencing and thereby enables the court to impress upon the accused and the public the serious nature of criminal law. This rationale seems illogical, however, since the presence of the accused can be readily ensured notwithstanding the right of allocution. If the defendant refuses to answer, as in the instant case, the requirement of a direct question alone would not seem to meet the standard required by the Searles court. The court apparently requires some form of a hearing such as section 631.20 provides, in which defense counsel has sincerely attempted to present mitigating circumstances.

Notably, in Searles denial of allocution was a sufficient basis for a writ of habeas corpus. In contrast, the failure to afford allocution in a federal criminal trial is subject to direct attack but not to collateral attack.

If available procedures for informing the court of possible mitigating circumstances were always utilized, there would be no need for the holding in the instant case. When these procedures are not voluntarily used by either the court or defense counsel, however, a mandatory right of allocution affords a necessary safeguard to the criminally convicted.

33. See Ball v. United States, 140 U.S. 118, 131 (1891).
34. It was relator's right to have presented to the court all of the mitigating factors which might reasonably justify a sentence less than the maximum. Here there was no presentence hearing to permit favorable consideration of relator's background, relator was given no opportunity to be heard, and counsel failed to speak on his behalf.
35. In Hill v. United States, 368 U.S. 424, 428 (1962), the majority stated that failure to grant allocution is "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." This was not a case in which the defendant was affirmatively denied the opportunity to speak, nor was there any claim that the defendant would have had anything at all to say if he had been formally invited. For a discussion of the Hill case, see 62 Colum. L. Rev. 884 (1962); 76 Harv. L. Rev. 83 (1962); 48 Iowa L. Rev. 172 (1962).
III. DISCOVERY — EVIDENCE

NAME OF EXPERT MUST BE DISCLOSED — EXPERT TESTIMONY AS TO SPEED HELD INADMISSIBLE

In a suit arising out of an automobile collision, defendant's pre-trial interrogatory requested the "names of any witnesses to the accident or to the facts pertinent to the above lawsuit." Plaintiff's answer to this interrogatory did not include the name of the expert witness he called at trial. Defendant asserted that since the expert had not been disclosed he should not be allowed to testify. During a weekend recess defendant was allowed to examine the expert. Following this, the expert was permitted to state his opinion, in answer to hypothetical questions and based on scientific calculations, that plaintiff was not speeding. The jury found for plaintiff and on appeal the Minnesota court granted a new trial, holding that without a reliable foundation an expert's calculation of speed is inadmissible, and that the name of an expert witness should be disclosed in the answer to a proper pretrial interrogatory. *Sanchez v. Waldrop*, 136 N.W.2d 61 (Minn. 1965).

Estimates of speed have generally been viewed as matters of common observation rather than expert opinion; it is settled in Minnesota that any person with reasonable intelligence and ordinary experience in life may express an opinion on speed. How-

1. Normally an expert's name is not given in response to an interrogatory requesting the names of persons with knowledge of relevant facts. Miller v. United States, 192 F. Supp. 218 (D. Del. 1961). In *Sanchez*, the Minnesota court ignored this fact in analogizing experts to factual witnesses.

2. In Minnesota, a party has a continuing duty to answer interrogatories, Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N.W.2d 110 (1963), 48 Minn. L. Rev. 174, and must supply all information he knows or that is known by his attorney, Lundin v. Stratmoen, 250 Minn. 555, 85 N.W.2d 828 (1957). The exclusion of a witness whose name was not disclosed has been sustained. Gebhard v. Niedzwiecki, *supra*.

3. The new trial was granted on the first of these grounds. However, the court's discovery statements also have the force of holding. Since the trial court has broad discretion to impose sanctions to enforce discovery rules, compare *Sanchez v. Waldrop*, 136 N.W.2d 61, 66 (Minn. 1963) with Gebhard v. Niedzwiecki, 265 Minn. 471, 480, 122 N.W.2d 110, 116 (1963), the failure to exclude the expert's testimony was not reversible error.


5. Greenberg v. Holfeltz, 244 Minn. 175, 69 N.W.2d 369 (1955); Hatley v. Klingsheim, 236 Minn. 370, 33 N.W.2d 123 (1952); Aasen v. Aasen, 228 Minn. 1, 36 N.W.2d 27 (1949); Daly v. Curry, 128 Minn. 449, 151 N.W. 274 (1915).
ever, expert calculations of speed were also held admissible by the Minnesota court in the leading case of *Moeller v. St. Paul Ry.*

Expert calculations are based on either the "conservation of momentum" theory\(^7\) or the "coefficient of friction" theory.\(^8\) Each theory utilizes a formula with several variables;\(^9\) lack of precision in measuring any of them will distort the estimate of speed. In *Storbakken v. Soderberg,*\(^10\) the Minnesota court questioned the accuracy of results predicated upon conservation of momentum principles.\(^11\) In *Grapentin v. Harvey,*\(^12\) and again in *Sanchez,* the court ruled inadmissible an expert's calculations using the "coefficient of friction" method. Both decisions emphasized the insufficient foundation for the opinion; in *Grapentin* the evidence failed to establish the amount of gravel on the road, and in *Sanchez* the amount of snow on the road was in dispute. However, the court in *Sanchez* also "demonstrated" the inherent unreliability of coefficient of friction calculations, commented on the potentially

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6. 218 Minn. 353, 363, 16 N.W.2d 289, 295 (1944). Expert testimony on speed is admissible "not as an exception to the opinion evidence rule made in cases calling for expert evidence, but under the exception existing when it is impossible to reproduce data." *Id.* at 295. For the rule in other jurisdictions, see Annot., 156 A.L.R. 382 (1945); Annot., 70 A.L.R. 540 (1931). See also Cook, *Speed Calculations and the Expert Witness,* 42 Neb. L. Rev. 100 (1963) (scientific theory and foundation for such testimony); Schoone & Schapiro, *Reconstruction of Automobile Accidents Through Lay and Scientific Testimony,* 47 Marq. L. Rev. 490 (1964) (excellent discussion focusing primarily on Wisconsin law).

7. The conservation of momentum theory is used to estimate speed by applying Newton's Laws to measurements of distance and direction traveled after a collision. *Cook, supra* note 6, at 117.

The theory has also been used to determine the point of impact. However, the Minnesota court has prohibited this use. *Carmody v. Aho,* 251 Minn. 19, 27, 86 N.W.2d 692, 697 (1957); *Beckman v. Schroeder,* 224 Minn. 370, 28 N.W.2d 629 (1947).

8. The coefficient of friction theory utilizes measurements of skid marks to calculate the speed of an automobile before the skid. *Cook, supra* note 6, at 108.

9. At least six variables are utilized in the coefficient of friction formula. *Id.* at 110.

10. 246 Minn. 434, 75 N.W.2d 496 (1956).

11. *Id.* at 489, 75 N.W.2d at 500. The court pointed to defects in the foundation for the expert's opinion, but concluded that the trial court did not abuse its discretion in permitting the jury to give the evidence such weight as it was entitled to under proper instructions. Two justices, concurring specially, argued that where an expert's opinion rests on inadequate or uncertain facts, it should not be admitted into evidence since its basic inaccuracy is likely to mislead the jury.

12. 262 Minn. 222, 114 N.W.2d 578 (1962).
prejudicial effect of scientific testimony, and expressed a clear preference for eyewitness estimates of speed. Thus, although Moeller was not explicitly overruled, it would appear that expert calculations will be admissible in Minnesota only in the rare case where exact measurements are made immediately following the accident and no eyewitnesses are present to testify.

The expert calculations in Sanchez were erroneous for an additional reason. Even with an accurate foundation, coefficient of friction calculations yield only a minimum figure. Therefore, expert analysis in this field is normally used offensively to show that defendant was going at least a certain rate. The defensive use put forward in Sanchez to prove that plaintiff could not have been speeding was scientifically inaccurate.

The question of whether names of expert witnesses are discoverable was considered for the first time by the Minnesota court in Sanchez. Rule 26.02 of the Minnesota Rules of Civil Procedure, which defines the scope of discovery, permits examination regarding the "identity and location of persons having..." In view of the importance normally accorded scientific training and knowledge, the jury could well have been misled into disbelieving all the witnesses who were present at the scene." Accord, Grapentin v. Harvey, 262 Minn. 222, 114 N.W.2d 578 (1962); Carmody v. Aho, 251 Minn. 19, 86 N.W.2d 692 (1957); Storbakken v. Soderberg, 246 Minn. 484, 75 N.W.2d 496 (1956); Beckman v. Schroeder, 224 Minn. 370, 28 N.W.2d 629 (1947).

13. 136 N.W.2d at 66.
14. 136 N.W.2d at 66.
15. Cook, supra note 6, at 105.
16. Discovery is restricted to materials which are relevant to the subject matter of the suit, see Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Wright, Minnesota Rules, 158 (1954, Supp. 1956); 2 Youngquist & Black, Minnesota Rules Practice 24 (1953), nonprivileged, see Snyker v. Snyker, 245 Minn. 405, 72 N.W.2d 357 (1955); Brown v. St. Paul Ry., 241 Minn. 16, 62 N.W.2d 688 (1954); Wright, Minnesota Rules 157 (1954, Supp. 1956); 2 Youngquist & Black, Minnesota Rules Practice 24 (1953), and which do not invade the "work product" of the lawyer, see Note, 48 MINN. L. REV. 977 (1964). Further restrictions are that experts' conclusions are not discoverable, Minn. R. CIV. P. 26.02, and that insurance coverage need not be disclosed, Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955). Minn. R. CIV. P. 26.02 has been liberally construed to effectuate the general purpose of fact disclosure, thereby eliminating surprise and narrowing issues. Jeppesen v. Swanson, 243 Minn. 547, 550, 68 N.W.2d 649, 651 (1955); see, e.g., Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N.W.2d 110 (1963) (continuing duty to disclose information); Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961) (impeachment evidence discoverable). See generally Hickman v. Taylor, 329 U.S. 495, 501 (1947); Wright, Minnesota Rules, 156 (1954, Supp 1956); Note, Developments in the Law—Discovery, 74 HARV. L. REV. 940, 944 (1961).

For a discussion of the relation between Minn. R. CIV. P. 26.02 and Fed.
knowledge of relevant facts.” Prior to Sanchez the court had held that the names of persons with first-hand knowledge of the occurrence must be disclosed. However it had not considered whether the names of persons to be called at trial were discoverable. Courts deciding this question have held that the decision to use a particular witness at trial need not be divulged.

In Miller v. United States a federal district court held that an exception to this rule is required when the potential trial witness is an expert. Knowledge of the expert’s name before trial was found to be necessary so that impeachment of his testimony, which usually consists of an attack upon his qualifications and experience, could be prepared. This reasoning was adopted by the Minnesota court in Sanchez. Discovery of an expert’s name will unquestionably facilitate investigation of his qualifications. Nonetheless, an expert may be impeached on other grounds, and few cases are likely to turn on his qualifications.

R. Civ. P. 26(b), see Note, 48 MINN. L. REV. 977 (1964). Since discovery rulings in Minnesota are not subject to interlocutory appeal, Brown v. St. Paul Ry., 241 Minn. 15, 62 N.W.2d 688 (1954), there is a dearth of Minnesota cases on discovery. As a result of this, and because the Minnesota rules are generally patterned after the federal rules, the Minnesota court tends to examine and follow the extensive federal case law where applicable, although the court is not strictly bound by it. See, e.g., Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961); Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955).


21. For a dramatic example of the need for thorough pretrial preparation for an expert witness, see NIZER, MY LIFE IN COURT 274-84 (1961).

22. 136 N.W.2d at 65.
The Sanchez court also reasoned that, since the names of all factual witnesses must be disclosed, the name of an expert should be disclosed to avoid placing him in a preferred position as a surprise witness. However, for discovery purposes, expert and factual witnesses should not be equated. Since the expert usually has no personal knowledge of facts relevant to the suit, disclosure of his identity is not necessary to prevent fact concealment. If the expert's opinion is based upon first-hand knowledge—for example, personal observations—his name should be discoverable under the ordinary rule applying to "persons having knowledge of relevant facts." Further, although discovery is normally used as a preliminary to future interrogation, Rule 26.02 limits future interrogation of an expert by denying discovery of his conclusions. While the rule may permit discovery of the factual or technical bases of his opinion, these could be available through independent sources.

23. 136 N.W.2d at 66.
25. It has been argued that the privilege should extend only to documents containing written conclusions and should not prevent discovery of experts' conclusions through oral and written interrogatories. See 2 Youngquist & Blaich, Minnesota Rules Practice 8 (Supp. 1965). However, if only written conclusions were to be protected, the provision would more appropriately be included in rule 34 or 45.02, governing production of documents, instead of in rule 26.02, which applies to all discovery devices. Cf. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 476 (1962). Moreover, the distinction makes little sense. It would be sheer hypocrisy to deny production of the document containing the expert's conclusions and allow oral discovery during which the deponent would read the same forbidden document. See E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 23 F.R.D. 237 (D. Del. 1959); Note, Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1034 (1961).
28. For example, in Minnesota accident reports must be filed and made
Introduction of an undisclosed expert witness is likely to disrupt opposing counsel's planned trial strategy. To the extent that his disruptive element is permitted, one of the purposes of discovery—the elimination of surprise and "sharp practices"—may be defeated.

Finally, counsel has an interest in the disclosure of experts who may be called at trial as a means of ascertaining whether expert analysis may be relevant to the action. In addition to preparing impeachment, counsel might seek independent expert analysis which could be used to combat the opposing expert or as an aid to settlement.

However, disclosure of the expert's name may be objectionable because it reveals counsel's opinion that expert analysis is relevant. To the extent that the work product doctrine prohibits any incursion into counsel's thought processes in anticipation of trial, discovery of the names of experts who may be called should not be permitted. It has been suggested, however, that the primary purpose of the work product doctrine is to "promote the effectiveness of the adversary system by safeguarding the vigorous representation of a client's case from the possibly debilitating effects of susceptibility to discovery." This purpose would be frustrated by a rule compelling disclosure of all experts who had expressed an opinion on the case. Counsel's efforts to obtain expert testimony might be deterred by the fear that he would be uncovering ammunition for his opponent. On the other hand, counsel's efforts would not be deterred by a rule compelling disclosure only of those witnesses expressing opinions favorable to his client's position.

available to parties to the accident. MINN. STAT. § 169.09 (1961). Presumably these reports will include measurements of skid marks. There is authority that discovery will be denied if other avenues are open for obtaining the desired information. Goldner v. Chicago & N.W. Ry., 13 F.R.D. 326 (N.D. Ill. 1953).


31. Id. at 1028.
The *Sanchez* opinion does not clearly state which of these rules the court adopted, but the case should be read as adopting the latter rule. First, the court's reference to experts who "may or may not be called" as witnesses cannot reasonably include experts who expressed opinions unfavorable to the client's case, since counsel would have no reason to call them. Second, if the trial court's only effective sanction for nondisclosure is limiting or excluding the expert's testimony, a rule compelling disclosure of adverse experts could not be enforced. Limited to disclosure of "friendly" experts, the *Sanchez* case does not unreasonably infringe upon work product principles. So long as counsel's vigorous representation is not deterred, such a justified incursion into his thought processes in anticipation of trial should be permitted.

It has been suggested that premature disclosure of an expert's name will lead to his harassment by opposing counsel, thereby compromising the policy of encouraging expert testimony. However, the argument that his name should therefore not be discoverable assumes that disclosure can serve no other purpose than harassment. Legitimate interests in discovery appear to outweigh the interest in protecting experts from potential harassment.

One possibility appears to have been overlooked by the court in *Sanchez*. As an alternative to use of discovery tools, disclosure of expert witnesses could be required at a pretrial conference where the court could exercise some discretion in the matter.

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32. 136 N.W.2d at 64.
33. It is different in the case of witnesses as to fact, but in the case of a witness as to opinion, if you are not going to permit the probing of his opinion by discovery process, I see no reason why his name and address should be made available and simply subject him to whatever pressure may be brought upon him by a party who wishes as much as possible to weaken the positiveness of the expert's opinion when it comes to trial. Pepper, *Discovery Procedure Symposium*, 5 F.R.D. 403, 406 (1946).
34. Ibid.
35. Since rule 16(4) (both Minnesota and federal) allows the court to limit the number of expert witnesses, the rule presumably permits the court to request the names of the experts. Although a pretrial conference is within the court's discretion, there is authority that upon a party's request it will be called. Cf. Bradford Novelty Co. v. Samuel Eppy & Co., 164 F. Supp. 798 (E.D.N.Y. 1958); Bowles v. Economy Util. Co., 9 Fed. Rules Serv. 34.41, Case 3 (W.D. Mo. 1946); 3 Moore, *Federal Practice* ¶ 16.07 (Supp. 1964).

In rejecting a proposed amendment to permit discovery of the names of expert witnesses, the advisory committee on the federal rules stated that the problem was taken care of with pretrial conferences. 8A Barron & Holtzoff, *Federal Practice and Procedure* 550 (1958).
This would provide a more flexible procedure than discovery for resolving competing interests and avoid the work product problems.

IV. ESTATES

EQUITABLE ADOPTION MUST BE BASED ON CONTRACT

Appellant claimed to be the adopted daughter of deceased entitled to a share of deceased's estate as a pretermitted heir,\(^1\) even though the deceased had never legally adopted her. The alleged adoption took place when deceased and his wife took appellant into their home with the consent of appellant's natural parents. Appellant was baptized as deceased's daughter, used his family name, and was announced as his daughter when married. After appellant's marriage, deceased was confined to a state mental hospital, and appellant took care of deceased's wife until her death. In 1951 appellant recovered over 4,000 dollars from deceased for services rendered to his wife. In that suit appellant declared that she was not deceased's daughter. In the present case, the Minnesota Supreme Court held that the facts were insufficient to establish a contract to adopt. Therefore, appellant was not entitled to the status of a pretermitted heir. \(\text{In re Estate of Rowe, 269 Minn. 557, 132 N.W.2d 180 (1964).}\)

Although adoption was unknown at English common law,\(^2\) Minnesota established statutory adoption procedures giving the adopted child all the rights of a natural child.\(^3\) Problems arose, however, when parties failed to comply with the statutory procedures. Occasionally a family, although intending to adopt, accepted a child into their home and raised him as their own without obtaining an official adoption decree. When the "adopting" parents died, courts were required to determine the foster child's rights in their estates. In order to avoid the harsh result of denying such a child a share in the estate after he had been considered a member of the family, courts developed the theory of equitable adoption.\(^4\)

Though such relief has been variously termed equitable adoption,\(^5\) contract to adopt,\(^6\) and adoption by estoppel,\(^7\) the courts

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1. \text{MINN. STAT. § 525.201 (1961).}
2. \text{In re Adoption of Jaren, 223 Minn. 561, 27 N.W.2d 656 (1947).}
4. \text{E.g., Dyne v. Vreeland, 11 N.J. Eq. 370 (1857).}
5. \text{Estate of Radovich, 48 Cal. 2d 116, 308 P.2d 14 (1957).}
6. \text{In re Estate of Firle, 197 Minn. 1, 265 N.W. 818 (1936).}
7. \text{In re Estate of Painter, 246 Iowa 307, 67 N.W.2d 617 (1954).}
have conditioned the grant of equitable relief on an underlying contractual obligation. The contract is not established unless the adopting parents promise to adopt the child and the natural parents agree to relinquish custody. The mutual promises provide sufficient consideration. The adopting parents must then accept and provide for the child as their own, and the child must assume the duties of a natural child. Upon the death of the adopting parents, the child is granted a share in the estate because "equity would treat as done what ought to have been done."

Unfortunately, the contractual justification breaks down when the status of the child is in question. If the remedy is viewed as an enforcement of a contractual obligation, the court should give the child the same status and rights he would have enjoyed had the contract been performed. Thus, the child would be treated as if legally adopted and entitled to all of the rights of a natural child. However, it is clear that under Minnesota law the unperformed contract to adopt does not create a legal adoption. Consequently, the equitably adopted child has no interest in the estates of the adopting parents' collaterals and retains all of his natural birthrights. Secondly, the court's recognition of and

10. Fisk v. Lawton, 124 Minn. 85, 90, 144 N.W. 455, 457 (1918).
11. Minn. Stat. § 259.29 (1961) provides:
   Upon adoption, such child shall become the legal child of the persons adopting him, and they shall become his legal parents with all the rights and duties between them of the natural parents and legitimate child. By virtue of such adoption he shall inherit from his adoptive parents and relatives the same as though he were the legitimate child of such parents, and in the case of his death intestate the adoptive parents and their relatives shall inherit his estate as if they had been his natural parents and relatives.
12. In re Estate of Olson, 244 Minn. 449, 70 N.W.2d 107 (1955).
13. Ibid. In the Olson case the court refused to enforce the contract against collaterals because the child had no equities against their estates. However, it is difficult to determine what equities a statutory proceeding would have added to the child's case. Probably, the policy behind the Olson case is that collaterals may have planned that their estate should pass by intestate succession under the assumption that the foster child would not share in it. If recovery were then allowed, some estate plans might be frustrated.
14. The Olson case held that an equitable adoption did not create the parent-child relationship between the adopting parents and child and that only the statutory proceeding could accomplish that result. Conversely, only the adoption proceeding can destroy the child's relationship with the natural parents and his blood relatives. Thus, a child adopted by contract should retain all rights against his natural parents and relatives while possessing contract rights against the adopting parents.
insistence upon a contract to adopt may conflict with the formal program of child custody. Usually, the true subject matter of a private contract is the custody of the child. However, in their attempts to meet the equities of the child, the courts will ignore the true subject matter.16 Minnesota statutes require court approval for all statutory adoptions16 and for all assumptions of care and custody of young children by anyone other than the natural parents or relatives.17 Also, any person, including a relative, who accepts permanent custody of a child must notify the commissioner of public welfare within thirty days.18 Any person who violates any provisions of the child custody statutes is guilty of a misdemeanor.19 Thus, it seems inappropriate for the court to rely upon, and thereby encourage, illegal private adoption “contracts” as a basis for equitable relief. Finally, although the child is said to occupy the position of a third party beneficiary to the contract between both sets of parents,20 under normal contract law, third party beneficiaries have rights but not obligations;21 yet, the courts state that the adoption contract will not be enforced unless the child has performed the normal obligations of a natural child.22 Even if the child is deemed to have assented to

15. See, e.g., In re Estate of Fredrick, 241 Minn. 55, 62 N.W.2d 361 (1954). But see Hooks v. Bridgewater, 111 Tex. 122, 29 S.W. 1114 (1921), where the true nature of the contract (custody of the child) was recognized and the contract declared invalid.


17. MINN. STAT. § 257.02 (1961) provides:

No person other than the parents or relatives may assume the permanent care and custody of a child under 14 years of age unless authorized to do so by an order or decree of court. Except in proceedings for adoption, no parent may assign or otherwise transfer to another his rights or duties with respect to the permanent care and custody of his child under 14 years of age. Any such transfer shall be void.

Under MINN. STAT. § 256.01 subd. 2. (2) (1961), the commissioner of public welfare is directed to “supervise the care of children in boarding and foster homes . . . .”

18. MINN. STAT. § 257.03 (1961).

19. MINN. STAT. § 257.123 (1961). A court may, however, allow a transfer made in violation of the statute. See State ex rel. Hanson v. Phelps, 166 Minn. 423, 208 N.W. 131 (1926), in which a child was transferred in apparent violation of MINN. STAT. § 257.03 (1961), but the court allowed the transfer because it was in the best interest of the child.


22. See In re Estate of Hack, 166 Minn. 55, 207 N.W. 17 (1926), where the court refused to find a contract because, inter alia, the child had left home at an early age.
his obligations, such assent may necessarily have to be constructed over a time prior to his attainment of the age of reason.\textsuperscript{23}

These problems lead to the conclusion that the court, in affording equitable relief, is motivated by factors other than strict contractual requirements.\textsuperscript{24} Though the contract rubric provides definite standards for avoiding an inequitable result while allowing enough latitude to decide each case on its merits, the real basis for relief should be identified so that the court may be presented with the proper equities.

Though the contract appears to be a legal fiction,\textsuperscript{25} the decedent’s intent that the child shall inherit is essential. Absence of such intent will prevent relief to a foster child even though it would not prevent a natural child’s inheritance.\textsuperscript{26} The distinction may be explained on the basis of the parties’ relationship. Society expects that natural parents will provide care and protection for their children,\textsuperscript{27} and there is a normal presumption that a parent

\textsuperscript{23} Cf. In re Estate of Norman, 209 Minn. 19, 295 N.W. 63 (1940), where the court said the petitioner could not have been a party to such a contract when she was a mere babe in arms.

\textsuperscript{24} An example of the importance of other factors may be found in comparing In re Estate of Fredrick, 241 Minn. 55, 62 N.W.2d 361 (1954), to Rowe. In both cases the child was referred to as a son or daughter, went to live with the foster parents at an early age, and assisted the foster parents after leaving home—in Fredrick by harvesting and paying for the mother’s last illness, in the instant case by taking care of the mother through several sicknesses. Finally, both children disavowed the parent-child relationship. In Fredrick the child referred to his natural brothers and sisters as next of kin in his war risk insurance policy and had his natural brother give the necessary parental consent when entering the Navy. However, in Rowe appellant claimed she was not an adopted daughter in her suit for recovery of services performed. In Fredrick a contract was found, and in Rowe no contract was found. Moreover, the Fredrick court went so far as to say that the evidence was even stronger than previous cases where recovery was granted. Therefore, it seems that in Rowe appellant asked for too much, whereas in Fredrick plaintiff asserted inheritance rights but did not seek payment for services rendered. Although Fredrick was decided under South Dakota law the Minnesota court stated that the evidentiary requirements were the same as in Minnesota.

\textsuperscript{25} There is no case in Minnesota in which a contract was introduced into evidence. All contracts have been inferred from fact. Brief for Appellant, p. 1, In re Estate of Rowe, 269 Minn. 557, 132 N.W.2d 180 (1964).

\textsuperscript{26} Compare \textit{Minn. Stat.} § 525.201 (1961). Since the unperformed contract to adopt does not confer a new legal status on the child, he should not be entitled to the benefits of the omitted child statute.

\textsuperscript{27} Any person who contributes to the neglect of a child is guilty of a misdemeanor. \textit{Minn. Stat.} § 260.27 (1961). Under this section a parent is obligated to provide proper care and protection. Annot., \textit{Minn. Stat. Ann.} §
intends his natural children to inherit. A foster child, however, is
cared for only because the foster parents voluntarily agreed to
accept the responsibility. Since their specific agreement was only
to provide care and protection, it is difficult to presume that the
foster parents intended to give inheritance rights also. Since the
foster child is already an object of the parents' generosity, it
seems preferable to require something more than the mere parent-
child relationship before allowing him to share as a natural child.
The additional requirement is the intent, which generally must
be proven by clear and convincing evidence. Consequently, if
the deceased died testate and did not mention the foster child in
the will, recovery will be denied. The mere fact that a will was
made detracts from the argument that the deceased would have
intended the child to share. Even when there is direct evidence
of a contract, the inheritance principle that a parent can spe-
cifically disinherit his children may preclude recovery. Conversely, relief is granted when the evidence indicates that the
adoptive parents intended to have the child take from the
estate. Thus, when an invalid will designated the child as benefi-
ciary, the court found a contract and awarded the child an
intestate share of the estate. When the parents die intestate,

260.27 (1961), citing 133-B-1 Ops. MINN. ATT'Y GEN., Feb. 5, 1945. Also a
court may order parents to support or contribute to the support of their
children if they are able. MINN. STAT. § 260.25 (1961).

28. See In re Estate of Hack, 166 Minn. 35, 37, 207 N.W. 17, 18 (1926).
29. E.g., In re Estate of Berge, 234 Minn. 31, 47 N.W.2d 428 (1951);
Odenbreit v. Utheim, 181 Minn. 66, 154 N.W. 741 (1915).
30. No Minnesota case has allowed recovery when a will of the deceased
limited the child's recovery or did not mention the child. See, In re Estate of
Rowe, 209 Minn. 557, 132 N.W.2d 180 (1964); In re Estate of Berge, supra
note 29; Holter v. Laugen, 157 Minn. 90, 195 N.W. 639 (1923); Odenbreit v.
Utheim, supra note 29.
31. In Holter v. Laugen, supra note 30, the child was willed $300.00 of a
$7,000 estate. The court found no contract in spite of evidence that decedent
specifically said he would give all he had to the child if she survived him. The
court merely argued that such statements may have been misunderstood.
32. Some states tax strangers to an estate at a higher rate than blood rela-
tives. Arguably, if the adopting parents intended the child to inherit as a
natural child, they would intend to have him receive the lower tax. However,
most states deny this right because no legal parent-child relationship was
created by the contract. E.g., Wooster v. Iowa State Tax Comm'n, 280 Iowa
797, 298 N.W. 922 (1941). At least one state has held for the lower tax rate.

Minnesota probably denies the lower tax benefit since the statute spe-
cifically provides that foster children have a lower tax exemption than natural
or legally adopted children. MINN. STAT. § 291.05 subd. 1. (4), (5) (1961).
33. Fiske v. Lawton, 124 Minn. 85, 144 N.W. 455 (1913).
continuous statements by the adopting parents of intent to leave property to the child may persuade the court to find a contract.\textsuperscript{34} If it could be shown that the adopting parents were aware of the intestacy provisions, their death without a will would be evidence of intent to give the child an intestate share in their estates. Other important factors bearing on intent include the mutual love and affection between parents and child and the existence of a normal parent-child relationship.\textsuperscript{35} Evidence may include school records, baptismal certificates, references to the child as a son or daughter, use of the adopting parent’s surname, and community recognition that the child was part of the family.\textsuperscript{36}

Just as the court is influenced by factors that tend to justify granting relief, proof of an absence of the normal parental relationship will compel the court to deny recovery. Thus, if the child leaves home at an early age,\textsuperscript{37} or the parents or child disavow the relationship, or, as in the instant case, the child sues for services rendered to the parents, there is little reason to allow the child an equitable share.\textsuperscript{38} Since the foster child is requesting equitable relief, a theory similar to “unclean hands” should apply.\textsuperscript{39} If the child has repudiated the parent-child relationship, it would be unconscionable to allow him to later assert the relationship to

\textsuperscript{34} E.g., \textit{In re Estate of Fredrick}, 241 Minn. 55, 62 N.W.2d 301 (1954); \textit{In re Estate of Firle}, 197 Minn. 1, 265 N.W. 818 (1936).

\textsuperscript{35} \textit{In re Estate of Fredrick}, supra note 31, is an example of a case in which the court emphasized the devotion between parents and child.

\textsuperscript{36} \textit{In In re Estate of Firle}, supra note 1, 265 N.W. 818 (1936), an insurance policy on the “son” with the “father” as beneficiary, and a baptismal record were introduced. In \textit{Rowe} appellant was attempting to prove a family relationship by introducing the baptismal record, wedding invitations and school records.

\textsuperscript{37} See \textit{In re Estate of Hack}, 166 Minn. 55, 207 N.W. 17 (1926), where the child left home at age sixteen.

\textsuperscript{38} In Soelzer v. Soelzer, 382 Ill. 393, 47 N.W.2d 458 (1949), the court considered scattered evidence of misconduct but held that it was not sufficient to refute direct evidence of the contract and performance thereof. Arguably, in \textit{Rowe} appellant's suite for services rendered was such misconduct, or at least could have estopped her from claiming on the contract. But see Lang v. Willey, 391 S.W.2d 301 (Mo. 1965), where plaintiff previously instituted an unsuccessful similar suit and the court argued that it indicated plaintiff believed there was an adoption contract.

\textsuperscript{39} Fiske v. Lawton, 124 Minn. 85, 90, 144 N.W. 455, 457 (1913), allowed enforcement of the contract because “equity regards that as done what ought to be done.” However, in the context of equitable adoption, specific performance of the contract is only employed in a very narrow sense. The court will not enforce the adoption or grant recovery against collaterals as a statutory adoption allows. Specific performance is only granted to enforce the property rights that would have been conferred in the adopting parent’s estate under the contract.
share in the estate. The fact that a natural child may recover regardless of his repudiations may speak for changing the intestacy statutes; but it does not necessarily follow that similar rights should be granted to unadopted children.

In the Rowe case it appears that the appellant failed to establish the requisite intent of the parties. First, the deceased's intent to adopt was not supported by evidence of any intent at the time of originally accepting appellant. Also, the existence of a will which failed to mention appellant supports an intent to exclude appellant from the estate. Finally, appellant's previous suit for services rendered approaches a repudiation of any parent-child relationship. Therefore, the Minnesota court properly found no contract of adoption.

V. INSURANCE

A. Effects of Compulsory Liability Insurance Upon Insurer's Policy Defenses

Plaintiff, operator of a one-car taxi business, was required by a municipal licensing ordinance\(^1\) to file a copy of an automobile liability policy with the city. The policy procured from defendant specifically described a Plymouth automobile as the insured vehicle. A "Temporary Substitute Automobile" clause extended coverage to operation of an automobile not owned by the plaintiff or her husband while used as a temporary replacement for the described automobile. When the insured vehicle became disabled, plaintiff borrowed an automobile owned by her husband but registered in the name of his used car business.\(^2\) While being driven by plaintiff's employee, the borrowed vehicle was involved in an accident in which a passenger was injured. In a declaratory judgment action, the trial court determined that the policy covered operation of the borrowed vehicle. On appeal, a divided Minnesota court reversed, holding that the borrowed vehicle was owned by plaintiff's husband regardless of the form of registration, and hence excluded from coverage by the express terms of the policy. Gabrelcik v. National Indem. Co., 269 Minn. 445, 131 N.W.2d 534 (1964).

A majority of the court regarded the policy as unambiguous and would go no further than to give effect to the plain meaning

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\(^2\) The insured vehicle was similarly owned by plaintiff's husband and in the name of Frank's Used Cars. However, it was used exclusively by plaintiff in her taxi business until disabled.
of its language. Justice Murphy, in a strong dissent, argued that an apparent ambiguity resulted from the insurer's use of a form policy designed to cover "pleasure and business" purposes to insure a commercial risk. The purpose of an exclusion from substitute automobile coverage is to prevent a family from insuring two vehicles for the price of one by claiming that a nondescribed vehicle involved in an accident was being used as a temporary substitute for the insured automobile. Such an exclusion was inappropriate to plaintiff's situation, since the dominant purpose of the contract was to insure against risks involved in the operation of her licensed taxi business, and only one car could be used for that purpose at a time. Accordingly, the limiting language should have been construed to give effect to the general insurance purpose of the agreement. Furthermore, the dissent argued, coverage should not be denied where the policy is secured to comply with a licensing ordinance requiring liability insurance for the protection of the public.

In response to the last argument, the majority suggested that public policy might dictate a contrary result in a suit against the insurer by an injured party with an unsatisfied judgment. This dictum is a significant pronouncement, since the Minnesota court has not previously considered the effect of compulsory liability insurance upon the availability of policy defenses against injured parties.

The rights of an injured party against a liability insurer ordinarily are derivative, arising only after judgment has been obtained against the insured. As a corollary, policy defenses avail-

5. As between actions by the insured and the injured person, different considerations are present when the policy of insurance is required as a condition for obtaining a municipal license to operate a vehicle for hire. In such a situation, as here, there is considerable authority holding that after the injured party has obtained a judgment against the insured, if it remains unsatisfied, he may collect it from the insurer and is not subject to policy defenses that the insured would be.
269 Minn. 445, 448 n.7, 131 N.W.2d 536 n.7.

The injured party need not obtain a judgment against insured to bring an
able against the insured may be asserted by the insurer in an action brought by the injured party. However, when the insurance contract is pursuant to an ordinance or a statute requiring liability insurance as a condition to issuance of a license, an injured party's claim may not be subject to policy defenses which would bar an action for indemnity by the insured. The courts justify this exception on the ground that permitting policy defenses to be asserted would defeat the objective of requiring insurance to protect members of the public injured by the negligence of the insured. Additionally it might be argued that, as between the insurer and the injured party, the former is in a better position to control conduct of the insured giving rise to a policy defense.

Cases in other jurisdictions appear to deny all policy defenses in such a situation. The insurer may not assert that the insured action against insurer if the state has a direct action or optional joinder statute. See Weiby v. Marfell, 172 F. Supp. 397 (D. Minn. 1958), aff'd 273 F.2d 327 (8th Cir. 1960); Curran v. Connecticut Indem. Co., 127 Conn. 682, 20 A.2d 87 (1941); White v. Boulton, 259 Minn. 335, 107 N.W.2d 370 (1961); Bassi v. Bassi, 165 Minn. 100, 205 N.W. 947 (1925); Utilities Ins. Co. v. Wilson, 207 Okla. 574, 251 P.2d 175 (1952). But see Stippich v. Morrison, 12 Wis. 2d 331, 107 N.W.2d 125 (1961) (if prejudiced, insurer may assert defenses after third party's intervention).

Such statutes and ordinances were held constitutional in Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U.S. 335 (1932); Packard v. Banton, 264 U.S. 140 (1924); Kruger v. California Highway Indem. Exch., 201 Cal. 673, 253 Pac. 602 (1927) ( jitney bus); Milwaukee Ins. Co. v. Morrill, 100 N.H. 239, 123 A.2d 163 (1956) (Safety Responsibility Act); Farm Bureau Auto Ins. Co. v. Martin, 97 N.H. 196, 84 A.2d 823 (1951) (Safety Responsibility Act); Pan-American Cas. Co. v. Basso, 150 Tex. 690, 252 S.W.2d 505 (1952) ( taxicab); see generally 12 Couch, INSURANCE § 45.658-.762 (1965); 7 AM. JUR. 2d Automobile Insurance §§ 140-43 (1963).

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procured the policy by fraud,\textsuperscript{11} that an improper party was driving,\textsuperscript{12} that the accident was outside the geographic limits of the ordinance,\textsuperscript{13} that the vehicle was not being used for carrier purposes,\textsuperscript{14} or that insured failed to give notice or cooperate.\textsuperscript{15} Courts have conceptualized these results by incorporating the licensing ordinance into the required liability policy.\textsuperscript{16} The intent of the licensing authority rather than that of the parties is regarded as controlling,\textsuperscript{17} and the ordinance determines the extent of insurer's defenses.

\textsuperscript{11} The rationale is that insurer is in a better position to protect against fraud than is the injured party. Other courts have said that the liability becomes absolute when the damage is done. See Atlantic Cas. Ins. Co. v. Bingham, 10 N.J. 460, 92 A.2d 1 (1952); Aetna Cas. & Sur. Co. v. O'Connor, 8 N.Y.2d 359, 207 N.Y.S.2d 679, 170 N.E.2d 681 (1960); Annot., 83 A.L.R.2d 1104 (1962).


\textsuperscript{14} Travelers Mut. Cas. Co. v. Thornsbury, 276 Ky. 762, 125 S.W.2d 229 (1939) (plaintiff struck by taxicab while not being used as such); Sordelett v. Mercer, 185 Va. 526, 40 S.E.2d 289 (1946) (truck driver using truck for own purpose); Rush v. Mielke, 234 Wis. 360, 291 N.W. 300 (1940).


\textsuperscript{16} Other defenses of an insurer have also been denied. See Butler v. Sequeira, 100 Cal. App. 2d 143, 225 P.2d 48 (1950) (injuries resulted from assault by driver rather than operation of taxicab); Maryland Cas. Co. v. Baker, 304 Ky. 296, 200 S.W.2d 757 (1947); Royal Indem. Co. v. Granite Trucking Co., 296 Mass. 149, 4 N.E.2d 809 (1936) (dated-back policy issued after accident); City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 254 Mich. 263, 237 N.W. 61 (1931) (expiration of the insured's license).

\textsuperscript{16} See, \textit{e.g.}, Thompson v. Amalgamated Cas. Ins. Co., 207 F.2d 214 (D.C. Cir. 1953); Marriott v. National Mut. Cas. Co., 195 F.2d 462, 466 (10th Cir. 1952); Haser v. Maryland Cas. Co., 78 N.D. 393, 53 N.W.2d 508 (1952); Utilities Ins. Co. v. Potter, 188 Okla. 145, 105 P.2d 259 (1940); Pan-American Cas. Co. v. Basso, 150 Tex. 690, 252 S.W.2d 505 (1952); see generally 12 \textsc{Couch, Insurance} 2d § 45.673 (1964).

However, the ordinance does not limit the effect of the policy. Board of Trade Livery Co. v. Georgia Cas. Co., 160 Minn. 490, 200 N.W. 639 (1924); Prisuda v. General Cas. Co., 272 Wis. 41, 74 N.W.2d 777 (1956).

\textsuperscript{17} City of Detroit v. Blue Ribbon Auto Drivers' Ass'n, 254 Mich. 263, 237 N.W. 61 (1931).
Although the Gabrelcik court spoke only of insurance policies required by municipal licensing provisions, its reasoning is equally applicable to state statutes requiring liability insurance for the protection of the public. For example, the Motor Carriers Act requires carriers to file a copy of an insurance policy with the Railroad and Warehouse Commission covering "injuries and damage to persons or property occurring on the highways, other than the employees of such motor carrier or the property being transported..." The carrier's permit or certificate is void unless insurance or other security is maintained in an amount set by the commission. The policy may be cancelled by the insurance company only if the carrier has failed to pay premiums or the vehicle has been withdrawn from service, and the company gives fifteen days notice to the insured and the commission. The provisions regarding the necessary coverage and the method of cancellation indicate that insurance is required for the benefit of the public rather than to protect the carrier. Thus, the rationale of the Gabrelcik dictum would compel denial of an insurer's policy defenses against a third party injured by the negligence of the carrier.

The Safety Responsibility Act requires proof of financial responsibility for reinstatement of a driver's license suspended for failure to satisfy a judgment resulting from a previous accident, failure to report an accident, or violation of any other law of the state. One means of establishing financial responsibility is by filing an insurance company's certificate that a motor vehicle liability policy is in effect. The policy must provide that the liability of the insurer is absolute when injury occurs, and that no violation of the policy by the insured shall void the policy. These conditions placed on the policy seem to indicate that the

19. An endorsement submitted to the commission by the insurance company must state:
   Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the insured, shall relieve the company from liability hereunder or from payment of any such final judgment.
insurance company cannot assert its policy defenses against an injured third party. 26 However, there is evidence that the statute has not been so administered. 27 Thus, the effect of the Gabrelcik dictum should be to compel an administration of the statute which conforms with its purpose and provisions.

In stating that an insurer's policy defenses might be denied in an action by an injured party after execution of a judgment against insured has been returned unsatisfied, the Gabrelcik dictum indicated that the court would follow the established Minnesota rule denying a direct action against the insurer. 28 Generally, it is said that the injured party is neither privy to, nor a third party beneficiary of, an insurance contract intended as protection for the insured. 29 However, since the primary objective of compulsory liability insurance is compensation of the injured party, several jurisdictions have regarded statutes or ordinances


A policy provision that the policy shall be deemed to conform to any financial responsibility act means only that the insurance afforded by the policy shall comply with the provision of the act if the law applied to the insured. State Farm Mut. Auto. Ins. Co. v. Bass, 192 Tenn. 558, 241 S.W.2d 568 (1951); Havlik v. Bittner, 272 Wis. 71, 74 N.W.2d 798 (1956). Contra, Farmers Ins. Exch. v. Ledesma, 214 F.2d 495 (10th Cir. 1954). The Safety Responsibility Act specifically preserves two defenses of the insurer: an insurer is free from liability if the vehicle was not designated in the policy, see Minn. Stat. § 170.40 subd. 2(1) (1961); and the policy may be cancelled if ten days notice is given to the commissioner of insurance, see Minn. Stat. § 170.41 (1961).

27. In Holland American Ins. Co. v. Baker, 139 N.W.2d 476 (Minn. 1966), insured was required to file evidence of financial responsibility before his driver's license would be issued to him. After procuring a liability policy from the insurer containing the usual substitute vehicle clause, insured was involved in an accident while driving the car of another. In a declaratory judgment action brought by the insurer against insured and an injured party, the trial court found that the car was a proper substitute within the policy provisions. The Minnesota court affirmed without mentioning the compulsory insurance factor, although the Gabrelcik dictum would appear to deny policy defenses in this situation as between this insurer and the injured party.


29. Ibid.
requiring insurance as authorizing direct actions against the insurer. Adoption of this rule in Minnesota would provide an expedient remedy in keeping with the policy underlying the Gabrelcik dictum.

B. Omnibus Clause "Use" of Auto by Signalman Requires Necessary Reliance on Signals by Driver

Plaintiff, operator of a drive-in theatre, stationed an employee with a flashlight near a public highway to indicate to passing motorists the location of the theatre entrance. A prospective patron turning off the highway into the theater was struck by another car. The injured motorist and injured members of his family sued both plaintiff and the employee signalman. Plaintiff then brought a declaratory judgment action seeking a determination that the omnibus clause of an automobile liability policy issued to the injured motorist by the defendant insurance company would obligate the latter to pay any sum recovered in the principal suit against plaintiff, and that the liability of plaintiff's business insurer be limited to recovery in excess of the policy issued by defendant insurance company. The Supreme Court held that the employee signalman was not using the automobile of the injured motorist within the meaning of the omnibus clause of the motorist's auto insurance policy. Therefore, the employers liability policy of the drive-in would provide primary rather than excess coverage if the signalman were found to be responsible for the accident. Nicolaet Properties, Inc. v. St. Paul Mercury Ins. Co., 135 N.W.2d 127 (Minn. 1965).

1. For a discussion of problems relating to primary and excess coverage, see Note, 38 MINN. L. REV. 838 (1954); 43 MINN. L. REV. 153 (1958); 32 MINN. L. REV. 510 (1948).
2. Questions of liability for an accident and insurance coverage are distinct. The former is governed by tort principles, the latter by contract construction. See Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 86, 94 n.3, 89 N.W.2d 412, 418 n.3 (1958).

It is to be noted that the court implicitly assumed that omnibus coverage of an additional insured extends to the latter's liability for injuries to the named insured. This is in accord with the majority rule, 7 APPELLEMAN, INSURANCE LAW AND PRACTICE § 4409, at 380-81 (1962) [hereinafter cited as 7 APPELLEMAN]; 12 COUCH, INSURANCE § 45:483 (2d ed. 1964) [hereinafter cited as 12 COUCH]. For authority to the contrary, see cases cited in 7 APPELLEMAN § 4409, at 378-80; 12 COUCH § 45:484. This is to be distinguished from the rule that in the absence of an omnibus clause there is no coverage for injuries to an insured through his permittee's negligence since only the insured's...
Evidently as a result of keen competition in the insurance business, an omnibus clause which extends coverage to "any person while using the automobile and any person or organization legally responsible for the use thereof" is commonly included in automobile policies. The courts have indicated that such omnibus clauses should be liberally construed. It is well settled that omnibus clause "use" goes well beyond the actual driving of a motor vehicle. It has been held to include sitting in the back seat of a parked automobile, closing a car door on plaintiff, and even loading and unloading a vehicle. Similarly, many courts have

liability is then covered, 12 Couch § 45:482, and the rule that an insurance policy may effectively exclude from coverage injuries to the named insured, 7 Appleman § 4409, at 377; 12 Couch §§ 45:485-88, or to members of his family or household, see Travelers Indem. Co. v. State Farm Mut. Auto. Ins. Co., 182 F. Supp. 881 (D. Minn. 1960); Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1955); Pearson v. Johnson, 215 Minn. 480, 10 N.W.2d 387 (1943); 7 Appleman § 4411, at 392; 12 Couch § 45:500.


4. Superficially it could be argued that the term "legally responsible for the use" of the automobile is broader than the term "using," so that a signalman who was not "using" the auto might yet be found "legally responsible for the use" of it by the driver. For example, if the driver justifiably relied upon the signalman's gestures the signalman might be found legally liable for the accident. However, the clause has been construed only to provide coverage for persons who are liable on the basis of traditional or statutory agency. See 7 Appleman § 4355; cf. Liberty Mut. Ins. Co. v. Steenberg Constr. Co., 225 F.2d 294, 297 (8th Cir. 1955); Nicollet Properties, Inc. v. St. Paul Mercury Ins. Co., 135 N.W.2d 127, 130 (Minn. 1965); Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 86, 93-94, 89 N.W.2d 412, 418 (1958). Thus a signalman's coverage could be only under the "using" term; the "legally responsible for the use" term would confer coverage upon the signalman's employer.

Often omnibus clauses add a requirement that the "use" be with the permission of the named insured. For treatment of the problem incident to such provisions, see authorities cited note 12 infra.


avoided the "sub permittee" permission problem by holding that the initial permittee, by riding in the automobile, continued "using" it with the permission of the named insured.  

Whether the directing of a vehicle's movement by hand signals is a "use" of the vehicle within the meaning of an omnibus clause has seldom been considered. However, two cases decided under Minnesota law have considered the question. In each, the signalman directed the backward movement of a truck when the driver had an obstructed view. In *Liberty Mut. Ins. Co. v. Steenberg Constr. Co.*, 11 the Eighth Circuit found the signalman to be "using" the truck, and in *Woodrich Constr. Co. v. Idemnity Ins. Co.*, 12 the Minnesota Supreme Court reached the same result.

Other jurisdictions have also decided the question. New Jersey has held that a signalman directing the movement of a crane when the operator could not see the work area was "using" the crane.  
The court reasoned that the operator was acting as a mere automaton; the signalman was actually governing the crane's movement.  

1 A New York decision reached a contrary result when a

cifically provide that loading and unloading is a "use." *Id.* § 45:123. See, *e.g.,* State Auto. & Cas. Underwriters v. Casualty Underwriters, Inc., 266 Minn. 536, 124 N.W.2d 185 (1963), 49 MINN. L. REV. 132 (1964).


12. 252 Minn. 86, 89 N.W.2d 412 (1958).


14. *Id.* at 20, 99 A.2d at 816. Less in point is an Illinois case holding a named insured sitting beside the driver of the former's automobile to be "operating" the car. See Snyder for use of Brooks v. United States Mut. Ins. Co., 312 Ill. App. 337, 38 N.E.2d 540 (1941). That case is distinguishable because there the owner had the "right to control the car and was still the director of the enterprise in which he and [the driver] . . . were jointly engaged." Probably also significant is the fact that it was the named insured's coverage which was at issue, since in such a case the policy of construction in favor of the insured is fully called into play as it is not when the person seeking to be favored is a stranger. See text accompanying notes 22–23 infra.

An example of liberality of construction in favor of the named insured is *Fidelity & Cas. Co. v. Lott,* 273 F.2d 500 (5th Cir. 1960), where it was held that the named insured's employment of his car as a gun rest was a "use" of it within his auto policy, so that liability for gunshot death of a passenger was covered.

In *Bachman v. Independence Indem. Co.*, 214 Cal. 529, 6 P.2d 943 (1931),
foreman indicated to a truck driver the amount of clearance between the truck and some overhead sprinklers while a driver’s helper directed backing into a garage. The court held that the foreman was not “using” the truck, for his “commonplace act of accommodation” in indicating the sprinkler clearance “did not take the control of the truck out of the hands” of the driver and the driver’s helper or make him a participant in that control.

The court in the instant case considered both Steenberg and Woodrich but found them distinguishable in that in the instant case the driver had full visibility and did not need or require directions such as those given in the two earlier cases; rather, the signalman, not being on the highway or stopping traffic, served only the same function as would a sign. In both prior cases the signalman had actually controlled the movement of the vehicle. The court held it was “too remote” to find the instant signalman was “using” anything other than his flashlight.

The case appears to distinguish between signalling so as to actually control the direction and movement of the vehicle when the operator has an obstructed view, and signalling so as to give information as a convenience, exemplified by the sprinkler-clearance signalman in the New York case and the entrance-indicating signalman in Nicollet Properties. This interpretation requires a finding that the court’s reference to the signalman’s not being on the highway directing traffic is surplusage. However, it seems clear that the court has established the test of signalman “use” to be whether the driver must rely on the signals because he cannot effectively maneuver the vehicle unaided. Thus, the fact that the signalman in Nicollet Properties may in some sense be said to have controlled the movement of the car if the driver relied upon his signal does not make the signalman a user of the car.

16. Id. at 265, 229 N.Y.S.2d at 251.
17. 135 N.W.2d at 133.
18. Id. at 132–38.
19. Although the sprinkler-clearance signalman directed the movement of the truck, the driver would doubtless have stopped had the former indicated there was no clearance. The reliance was not necessary since the driver’s helper could probably have watched the clearance as he guided the driver’s backward movement.
The test proposed in *Nicollet Properties* does not conflict with the policies underlying a liberal construction of the omnibus clause. The interest in protecting injured parties who would otherwise go uncompensated is not frustrated, for the accident will normally be within the coverage of an employer's liability policy. In the absence of such a policy, the principle of *respondeat superior* would still allow recovery against a financially responsible employer. It has been argued that since the named insured purchased omnibus clause protection to bring permittees within his coverage, and the insurer has no control over the identity of the permittees, protection should extend to all parties within the probable intent of the policy holder. Even assuming that probable intent is more than a *post hoc* rationalization, however, that intent would certainly not extend to including stranger signalmen as additional insureds.

The canon requiring strict construction against the insurer is not inconsistent with the result in *Nicollet Properties*. The canon is designed to deter the issuance of ambiguous policies which actually provide less than anticipated coverage; it should have application to the definition of "use" only when the prospective additional insured belongs to a class the insured would have wanted to receive the protection. Even courts firmly espousing this canon have stated that a strained or unwarranted construction of insurance provisions should be avoided.

The terms of an insurance policy should normally be given their natural and ordinary meaning, so that the insured may

20. See Schultz v. Krosch, 204 Minn. 585, 588, 284 N.W. 782, 784 (1939); *Blasfield*, op. cit. *supra* note 6, at 616.


24. See, e.g., Cain v. American Policy-Holders Ins. Co., 120 Conn. 645, 183 Atl. 408 (1936); Motor Vehicle Cas. Co. v. Smith, 247 Minn. 151, 157, 76 N.W.2d 486, 491 (1956). See generally 11 MERCER L. REV. 391, 393 (1960). It should be noted that the *Woodrich* court observed that its result was compelled by "the broad and common meaning of the word "use." Woodrich Constr. Co. v. Indemnity Ins. Co., 252 Minn. 96, 93, 89 N.W.2d 412, 418 (1958).

accurately determine the extent of his coverage and refrain from paying premiums for the protection of the few who might come within exotic interpretations of the terms of the policy. Granting that omnibus clause "use" is to be liberally construed, it need not be extended to cover such casual connections with a vehicle as occurred in the instant case. The case does, however, limit the earlier authority defining "use" in terms of control by defining control in terms of necessary reliance.

VI. MUNICIPAL CORPORATIONS

A. CITY ORDINANCE RESTRICTING PUBLIC WORKS EMPLOYMENT TO COUNTY RESIDENTS FOUND UNCONSTITUTIONAL

Plaintiffs, residents of Pine and Anoka Counties, were employed by a contractor who was constructing a high school building in the City of St. Paul. They were discharged from their jobs pursuant to a city ordinance which required that all contractors performing work for the city must employ only residents of Ramsey County, the county in which St. Paul is located. This county also includes other municipalities and rural areas. In an action brought by the plaintiffs against the City of St. Paul, this ordinance was declared unconstitutional and void. On appeal, the Minnesota Supreme Court affirmed. Construction & Gen. Laborers Union v. City of St. Paul, 134 N.W.2d 26 (Minn. 1965).

The equal protection and the privileges and immunities clauses of both federal and state constitutions require that legislative classifications embrace and uniformly affect all persons "similarly situated," and that distinctions separating those persons included from those excluded from such a classification must bear a "reasonable relationship" to legitimate objectives of the classification. Distinctions not based on such a relationship are capricious or arbitrary, and thus unconstitutional.

1. St. Paul is the largest of eighteen municipalities in Ramsey County.
In the instant case the court could find no justification for classifying persons entitled to work on St. Paul public projects on the basis of Ramsey County residence. The court, however, implicitly recognized the validity of a similar hypothetical classification based solely on St. Paul residence, but considered such a classification distinguishable from that in the instant case. This distinction was illustrated by a discussion of *Ebbeson v. Board of Public Education*,⁴ a Delaware decision which approved state specifications that restricted public bidding on a particular contract to citizens of Delaware. Such a restriction in favor of Delaware citizens was held valid on the theory that a state may prefer for employment purposes its own citizens, since they are owners in common of the public funds. As opposed to noncitizens, citizens should reasonably be able to benefit from the expenditure of such funds.⁵ In contrast to *Ebbeson*, the court reasoned the ordinance in the instant case not only favored residents from St. Paul, but also favored non-St. Paul residents living in Ramsey County, who are not common owners of the public funds of St. Paul.⁶ Accordingly, the court concluded there was no reasonable relationship

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⁴ 18 Del. Ch. 37, 156 Atl. 286 (1931).
⁵ In reaching its result the *Ebbeson* court relied heavily on *McCready v. Virginia*, 94 U.S. 391 (1876), and *People v. Crane*, 214 N.Y. 154, 108 N.E. 427, aff'd, 239 U.S. 195 (1915).

In *McCready* the United States Supreme Court held that a Virginia law was not unconstitutional which restricted the planting of oysters in its tidal waters to Virginia citizens. The Court reasoned that the right the people of Virginia enjoyed in the tidal beds was "a property right, and not a mere privilege or immunity of citizenship," and that the privileges and immunities clause does not invest "the citizen of one State . . . with any interest in the common property of the citizens of another State." 94 U.S. at 395.

In *Crane* the New York Court of Appeals upheld a statute that made it a crime for a contractor of any public work to employ aliens, and which required preference to be given to citizens of the State of New York. The *Crane* court applied the doctrine enunciated in *McCready* to the expenditure of public funds in the construction of public works. The court reasoned that the public funds were the common property of the citizens of the state and "in any distribution of that property, the citizen may be preferred." 214 N.Y. at 162, 108 N.E. at 429.

⁶ The court said:
[T]hose citizens who are residents of Ramsey County but not residents of St. Paul pay property taxes to the respective villages . . . in which they reside . . . . Thus, when the city limits contractors who are performing work under a contract with the city to employment of citizens of Ramsey County, it is . . . conferring a benefit upon citizens of separate jurisdictions from the city . . . .
from which to draw a distinction between residents of Ramsey County who live outside St. Paul and people, such as plaintiffs, who live outside Ramsey County. If, as in Ebbeson, the objective of an ordinance such as that in the instant case is to confer benefits upon St. Paul residents who are owners in common of the city's public funds, then non-St. Paul residents of Ramsey County are no more entitled to benefits of these funds than are residents of any other county. Both of these groups are "similarly situated" and thus must be uniformly treated in order for such an ordinance to be valid.

As stated above, the opinion in the instant case is entirely reasonable and consistent with previous authority. The closing sentence of the opinion, however, creates some confusion. This sentence — "We reach the conclusion that the ordinance involved on this appeal is, insofar as it discriminates between residents and non-resident citizens, unconstitutional and void" suggests that the basis of the court's holding rests not on the arbitrary discrimination against non-St. Paul residents living outside of Ramsey County, but rather on a distinction between St. Paul and non-St. Paul residents. Such an interpretation of the court's holding would contradict a well-known doctrine that municipalities can prefer for employment purposes their own residents. Such a residency requirement will provide an "incentive for better performance in office or employment and as well advance the economy of the locality which yields tax revenue."

The court's last sentence, however, need not be given so startling an interpretation if it is noted that early in the opinion the court pointed out that the St. Paul ordinance involved defined "resident" to mean a resident of Ramsey County. It would seem that the court's concluding sentence was meant to be consistent with this interpretation of "resident." It follows that the court was merely reiterating its holding that a classification which includes Ramsey County residents and at the same time excludes residents of other counties is invalid when it does not uniformly affect all such persons similarly situated. Moreover, the fact that

7. 134 N.W.2d at 32.
9. Kennedy v. City of Newark, supra note 8, at 184, 148 A.2d at 476.
10. 134 N.W.2d at 28.
the court distinguished *Ebbeson* rather than disagreed with it suggests that it had no intention of refuting the doctrine that a governmental unit such as St. Paul may favor its own constituents in an ordinance similar to that of the instant case.

B. **Restriction Upon City's Power To Alienate Easement Acquired by Condemnation**

A municipality contracted to sell land previously condemned for park and parkway purposes to a private party for development as a motel and filling station facility. Plaintiffs, as taxpayers, brought suit to enjoin the sale on grounds that a zoning ordinance reclassifying the property for the purchaser's use was invalid, and also that the interest taken by condemnation fifty years earlier was an easement for public purposes and therefore not alienable. The trial court found the rezoning ordinance valid and held that although the interest taken was an easement, it was alienable under the city's general power to sell real estate. On appeal, the Minnesota Supreme Court reversed, **holding** that an easement acquired by a municipality for park and parkway purposes can not be conveyed to a private person.¹ *Buck v. City of Winona*, 135 N.W.2d 190 (Minn. 1965).

In holding that the city's interest was limited to an easement, the court followed the decision in *Reed v. Board of Park Comm'r's*,² where it was held that only an easement was needed for park purposes. It is a general rule that the interest taken by a condemnor is determined by the statute authorizing the condemnation,³ and, in the absence of an express right to take a fee, only that interest is taken which is necessary to accomplish the purpose of the condemnation.⁴ This rule is intended to protect the condemnee by assuring that he will not be compelled to relinquish a greater interest in his property than is necessary.⁵ However, the rule has been criticized as tending to hamper public agencies by

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1. Since this issue was decisive, the court did not consider the validity of the rezoning ordinance, attacked by appellants in the trial court as illegal "spot zoning." For a discussion of spot zoning and its relationship to a comprehensive plan, see *Rathkopf, The Law of Zoning* ch. 26-3 to -23 (3d ed. 1962).
2. 100 Minn. 167, 110 N.W. 1119 (1907).
4. See Reed v. Board of Park Comm'r's, 100 Minn. 167, 169, 110 N.W. 1119 (1907); Fairchild v. City of St. Paul, supra note 3 at 543, 49 N.W. at 326.
restricting them to acquisition by condemnation of only the interest required by the exigencies of the moment.⁶ Arguably, where the statutory provision is unclear as to the interest to be taken, a fee rather than an easement should be allowed.⁷

After finding that only an easement was acquired, the court held the city's interest inalienable. In Minnesota, legislative authority is required for the sale of any municipally held land.⁸ However, the Buck opinion stated that the limitation upon the city's authority to sell stemmed not from the absence of a legislative grant of power, but from the nature of the interest condemned. The court reasoned that the city had nothing more to convey than a right to use the land for a public purpose, and that such a right could not conceivably be conveyed to a private person.⁹ Such an alienation would be inconsistent with the rights reserved to the underlying fee holder. However, in Buck the contemplated vendee of the easement was the underlying fee holder. In such cases, release of the city's interest poses no conceptual

⁶. But what is more disturbing is [plaintiffs'] . . . argument that, at the precise time that the state begins to condemn property, it must know exactly what use is to be made of all the land in a given tract; that it can take no greater interest in that land than the exigencies of the moment require; and that, if it acquires any larger interest, then it does so at its peril. Such an interpretation would unduly hamper public agencies.

⁷. Volden v. Selke, 251 Minn. 349, 353, 87 N.W.2d 696, 700 (1958). In Volden, plaintiffs sought a declaratory judgment that the state, in condemning their land for water storage and flood control purposes, had acquired only an easement of flowage and consequently could not validly authorize the removal of gravel from the land. The court rejected their contention, holding that the statutory language authorizing the taking was broad enough to cover acquisition of a fee interest. See generally 3 Nichols, Eminent Domain § 9.2(1) (3d rev. ed. 1964).

⁸. See Monaghan v. Armatage, 218 Minn. 108, 113, 15 N.W.2d 241, 244 (1944); accord, Worchester Elec. Co. v. Hancock, 151 Md. 670, 677, 135 A. 892, 894 (1927); Board of Trustees of Phil. Museums v. Trustees of University of Pa., 251 Pa. 115, 124, 96 A. 123, 125 (1915).

Another theory concerning the power of a municipality to dispose of its real property distinguishes between lands held in proprietary and governmental capacities. A municipality may exercise general powers, without authority from the legislature, over property held in a proprietary capacity. Property held in a governmental capacity is held by the municipality as an agent of the state, and cannot be sold without specific legislative authority. See 3 Antieau, Municipal Corporation Law § 20.19 (1965); Annot., 141 A.L.R. 1449 (1942).

⁹. 135 N.W.2d at 194.
difficulties, since the effect of the release is only to restore to the fee holder an unencumbered title to the land. The court suggested that the only method for the city to relinquish its easement is by a vacation proceeding authorized in the city charter. This proceeding requires an initiating petition, notice and hearing, and passage of an ordinance by the city council. Therefore, the city could not be permitted to relinquish its interest without observing these procedural safeguards which assure vacation will be exercised only for the general welfare. Furthermore, to permit the city to receive payment for relinquishing its interest to the fee holder would be repugnant to the nature of vacation proceedings.

This suggestion raises two problems. First, a Winona charter provision permits a majority of abutting landowners to block vacation proceedings, thereby effectively preventing the city from disposing of unneeded property and returning it to productive use and to the tax rolls. Second, the city’s inability to

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10. For a demonstration of a court’s willingness to disregard the restricted nature of a city’s interest where there is no possibility of prejudice to the reversioner vendee or to the general taxpayers, see East Chicago Co. v. City of East Chicago, 171 Ind. 654, 87 N.E. 17 (1909).

11. Winona, Minn. City Charter 1924, c. 4, § 11 (Minn. Special Laws 1887, c. 5, c. IV, § 11).

12. Ibid.

13. It is a general rule that vacation of municipal property must be exercised for the public good and not solely to serve private interest. Pederson v. Town of Radcliffe, 226 Iowa 166, 169, 284 N.W. 145, 147 (1939); In re Spears, 227 Mich. 525, 527, 198 N.W. 922, 953 (1924); 1 Antieau, op. cit. supra note 8, § 9.10. Commercial advantage to the city has been held an insufficient motive for vacation. Lerch v. Short, 192 Iowa 576, 577, 185 N.W. 129, 130 (1921); 1 Antieau, op. cit. supra at 582. Contra, People ex rel. Alexander v. City of Mt. Vernon, 404 Ill. 58, 58 N.E.2d 45 (1949).

14. 135 N.W.2d at 194.

15. “[N]o vacation of any street, alley, road or public ground or part thereof shall be ordered except upon written petition from a majority of the owners of the property fronting or abutting on such . . . public ground . . . .” Winona, Minn. City Charter 1924, c. 4 § 11 (Minn. Special Laws 1887, c. 5, c. IV, § 11). Minnesota follows the position that abutting owners acquire special rights in land devoted to use as a public park. See Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 (1901).

16. Municipally held easements may revert to the underlying fee owner by abandonment when the land is no longer needed for a public purpose. See Skelly Oil Co. v. Kelly, 134 Kan. 176, 180, 5 P.2d 823, 825 (1931); 3 Antieau, op. cit. supra note 8, § 20.15. Most courts hold mere nonuse insufficient to constitute abandonment of park property, requiring unequivocal acts evidencing intent to abandon or inconsistent with continued public use. See Ford v. City of Detroit, 273 Mich. 449, 452, 263 N.W. 425, 426 (1935); Village of Newport v. Taylor, 225 Minn. 299, 305-07, 30 N.W.2d 588, 592-93 (1948).
receive payment for relinquishing its interest may cause it to retain unsound enterprises when its investment in those enterprises could be more profitably diverted to new projects.\textsuperscript{17}

Underlying the \textit{Buck} decision is an obvious desire to protect the interests of the condemnee. Yet it is difficult to see how his interests would be prejudiced by a contrary rule. Where the condemnor acquires only an easement or a qualified fee, it is clear that the remaining estate is of little value. It is virtually impossible to predict when the public use will be abandoned, and in the meantime the condemnee can not make use of the land. Therefore the condemnee is likely to be compensated as fully as if an absolute fee had been taken. He can only receive a windfall if, upon cessation of the public use, the condemnor's interest must be released to him without payment.\textsuperscript{18} Furthermore, there is little danger that public agencies would abuse permission to condemn an alienable estate by reselling land to private developers for a profit.\textsuperscript{19} First, the original purpose justifying the condemnation

Other courts have based a finding of abandonment upon the practical impossibility of using the property for its devoted purpose. See Porter v. International Bridge Co., 200 N.Y. 234, 249–50, 93 N.E. 716, 720 (1910); 3 Antieau, \textit{op. cit. supra} note 8, § 20.15.

In \textit{Buck}, the trial court found that the tract in question was not useful for park purposes because the city already had sufficient park facilities, a highway had severed it from the main park area, and the marshy condition of the land made it impractical for use as a park. See Record, \textit{Buck v. Winona}, 135 N.W.2d 190 (Minn. 1965), findings of fact no. 7, 30, 31, 40, pp. 45–55. The attempted sale by the city would seem to fulfill the requirement of an act inconsistent with continued public use.

However, abandonment is not the answer to the municipality's dilemma. First, since the easement may only revert to the underlying fee holder, the issue of abandonment is most often litigated in an action brought by him to quiet title to the property. An efficient program of relinquishing the city's interest in unneeded property is therefore impossible when the city must rely upon holders of remote interests to take the initiative. Furthermore, the vacation procedure and the policies it reflects may be held to have preempted this area and precluded relinquishment of the city's interest by abandonment. See Rhyne, \textit{Municipal Law} § 21–9 (1957); cf. 3 Antieau, \textit{op. cit. supra} note 8, § 20.15.

17. See 10 U. Chi. L. Rev. 91, 92 (1942).

18. See \textit{ibid.}

19. Neither party questioned the power of the legislature to authorize the resale of condemned land, no longer needed by the city, to private third parties. Whereas most courts recognize this prerogative of the legislature, see Skelly Oil Co. v. Kelly, 134 Kan. 176, 5 P.2d 823 (1931); Matter of City of Rochester, 137 N.Y. 243, 33 N.E. 320 (1893), the issue often arises as to the good faith of the condemnation. A municipality may not condemn land with the intent to resell it to a private party even if full compensation is paid.
is subject to careful scrutiny by the courts; and second, any
danger of abuse can be averted by requiring that the condemnee
be given a right of first refusal if the land is subsequently offered
for sale to private parties. 20

It appears, therefore, that one of three solutions would be pref-
erable to the result in Buck. As a minimum, repeal of the charter
provision requiring consent of abutting landowners for vacation is
advisable. This would assure the municipality of one method of
restoring unneeded property to the tax rolls. A better solution
would be to permit the city to receive payment for release of its
interest to the underlying fee owner. Receipt of payment is not
necessarily inconsistent with the procedure for vacation, since
the procedural safeguards embodied in the charter provisions
could be construed as applying only where the city is attempting
to release its interest for nothing. The preferred solution, however,
would be to permit condemnation of a fee simple, subject to
careful court scrutiny and a right of first refusal for the condemnee
if the property is later offered for sale.

VII. PROCEDURE

A. Surviving Driver's Suit Against Decedent's Estate
Collaterally Estopped by Adverse Judgment in Prior
Wrongful Death Action

Following a fatal head-on collision a wrongful death action
was brought against the surviving driver, who moved to consoli-
date this suit with her own action against the decedent's estate.
Her motion was denied, and trial of the wrongful death action
resulted in a jury verdict for the decedent's trustee. In the sub-
sequent trial of the survivor's action the administrator of dece-
dent's estate moved for summary judgment. He asserted that the
issue of the survivor's contributory negligence had been neces-
sarily determined against her in the wrongful death suit. Sum-
mary judgment for the administrator was granted and a divided
supreme court affirmed, holding that the verdict against the sur-
viving driver in the wrongful death action established that her

Matter of City of Rochester, supra at 247, 33 N.E. at 521; see U.S. Const.
amend's V, XIV; Minn. Const. art. I, § 13; Cooley, Constitutional
Limitations 762 (7th ed. 1903). For clarification of the distinction between
taking private property for private use and the procedures followed in the
redevelopment and low cost housing projects, see Housing and Redevelopment
Authority v. Greenman, 255 Minn. 396, 96 N.W.2d 673 (1959). See generally

negligence caused the accident and collaterally estopped her from suing decedent's estate.\textsuperscript{1} Lustik \textit{v.} Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964).

Under the traditional rule of collateral estoppel, the determination of a litigated issue of fact essential to the verdict is conclusive between the parties and their privies in a subsequent action.\textsuperscript{2} The rule is intended to prevent relitigation\textsuperscript{3} and inconsistent results on identical fact issues.\textsuperscript{4} Historically, the requisites for its application were that the estoppel be mutual,\textsuperscript{5} that the party to be bound be a party or in privity with a party to the first suit,\textsuperscript{6} and that the issue be identical to one necessarily decided by the first verdict. More recently courts have abandoned strict adherence to the requirement of mutuality. In certain situations they have permitted a stranger to an action to assert a verdict against a party or his privy.\textsuperscript{7} Where the defendants in

\textsuperscript{1} Minnesota law separates a wrongful death fund from a decedent's estate; hence, the wrongful death trustee and the administrator are not in privity, although both litigate the conduct of the decedent. Olson \textit{v.} Linster, 259 Minn. 189, 107 N.W.2d 49 (1960) (semble); Philips \textit{v.} Aretz, 215 Minn. 325, 329, 10 N.W.2d 226, 228 (1943); Fehland \textit{v.} St. Paul, 215 Minn. 94, 102, 9 N.W.2d 349, 353 (1943). See 5 \textsc{Dunnell}, \textit{Minnesota Digest} (3d ed.) \S 2609 (1952). If they were in privity the case would call for application of ordinary principles of res judicata.


\textsuperscript{4} Bernhard \textit{v.} Bank of America, 19 Cal. 2d 807, 812-13, 122 P.2d 892, 899 (1942) (semble).

\textsuperscript{5} \textit{In re Trusteeship Under Will of Melgaard}, 200 Minn. 493, 503, 274 N.W. 641, 646 (1937); Gustafson \textit{v.} Gustafson, 178 Minn. 1, 226 N.W. 412 (1929); Thompson \textit{v.} Chicago, St. P. \& K.C. \textit{Ry.}, 71 Minn. 39, 97, 73 N.W. 707, 709 (1898); see 10 \textsc{Dunnell}, \textit{Minnesota Digest} (3d ed.) \S 5105 (1953).

\textsuperscript{6} Twin City Federal Savings & Loan Ass'n \textit{v.} Radio Service Labs., 242 Minn. 10, 11, 64 N.W.2d 32, 33 (1954).

successive actions are not in privity, but are in a derivative liability relationship, most courts apply collateral estoppel to a plaintiff who was unsuccessful in the first action.\textsuperscript{8} Several courts permit defensive use of a judgment against the plaintiff in a prior action when he seeks to litigate the same issue against another party.\textsuperscript{9} The Minnesota court has applied collateral estoppel in both situations.\textsuperscript{10} In \textit{Lustik} the court went one step further to permit defensive use of a judgment against the defendant in the prior action.\textsuperscript{11}

Estoppel of an unsuccessful defendant has been criticized on the ground that he may not have put forth his best case in the first suit. Lacking the initiative, a defendant may be prejudiced by the plaintiff’s choice of forum.\textsuperscript{12} Also, a defendant may not have an opportunity to present affirmative claims, arguments for

\begin{itemize}
  \item \textsuperscript{9} E.g., Riordan v. Ferguson, 80 F. Supp. 973 (S.D.N.Y. 1948); Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. (6 Harr.) 124, 172 Atl. 260 (Super. Ct. 1934).
  \item \textsuperscript{10} Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955) (judgment for corporation in derivative suit alleging fraud of accountants hired by corporation bars fraud action against accountants); Christianson v. Hager, 242 Minn. 41, 64 N.W.2d 36 (1954) (judgment for defendant in assault and battery action bars suit against park for negligent supervision); Myhra v. Park, 193 Minn. 290, 258 N.W. 515 (1935) (judgment adverse to plaintiff in action against master based upon act of servant bars subsequent action against servant).
  \item \textsuperscript{11} 269 Minn. at 522, 131 N.W.2d at 746. In support of this step, the court cited San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 755 (1958), and Abbott v. Western Nat’l Indem. Co., 165 Cal. App. 2d 302, 331 P.2d 997 (1958). These cases held that a judgment against defendant in a tort action precludes him from contending that he was not a tortfeasor in a subsequent action for indemnity. The court might have looked for additional support from cases holding that a criminal conviction may be asserted against the defendant in a subsequent action in which his commission of the crime is at issue. See, e.g., Teitelbaum Furs, Inc. v. Dominion Ins. Co., 38 Cal. 2d 601, 606, 25 Cal. Rptr. 555, 561, 375 P.2d 439, 441 (1962) (Traynor, C.J.) (conviction of arson bars action to recover fire insurance); Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927) (conviction of arson bars action to recover fire insurance); see generally Note, 39 Va. L. Rev. 995 (1953).
  \item \textsuperscript{12} See Lustik v. Rankila, 269 Minn. 515, 528, 131 N.W.2d 741, 749 (1964) (Gallagher, J., dissenting opinion); Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 303 (1957).
\end{itemize}
damages, and sympathetic appeals to the jury. If a plaintiff's "strategic use of the initiative" prevents the defendant from fairly litigating an issue, the defendant should not be estopped from relitigating the issue as a plaintiff. However, the Lustik court found that the surviving driver had a fair opportunity in the first case to litigate the question of her freedom from negligence. Even with a fair opportunity, a defendant may not put forth his best case in the first suit if, for example, the claim against him is small. Courts have not excused half-hearted defenses, however, perhaps because the future application of collateral estoppel should be foreseen.

A more specific objection to estoppel of an unsuccessful defendant arises where unusual rules of evidence or procedure favor the plaintiff in the first action. In Lustik, for example, the defendant's case in the wrongful death action was hampered by the statutory presumption that the deceased driver was exercising due care at the time of the accident. Although the presumption

13. These advantages are part of the initiative in any action. Currie, supra note 12, at 303–04. The majority indicated its awareness of this problem by suggesting a new procedure for wrongful death cases to avoid the presentation of damage claims to the jury by only one party. 269 Minn. at 517 n.4, 131 N.W.2d at 743 n.4.


15. 269 Minn. at 523, 131 N.W.2d at 746.


17. Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. (6 Harr.) 124, 134, 172 Atl. 260, 264 (1934); Lustik v. Rankila, 269 Minn. 515, 520–21, 131 N.W.2d 741, 745 (1964). See also Currie, supra note 12, at 303. Minnesota and most other states that have considered the question even apply collateral estoppel to issues decided by small claims courts. See Gollner v. Cram, 258 Minn. 8, 102 N.W.2d 521, (1960); Annot., 83 A.L.R.2d 977 (1962), supplementing 147 A.L.R. 196 (1943).

18. In the future no party should fail to realize that collateral estoppel may be applied against him in a subsequent action involving claims arising out of the same facts. Two motorists litigating the issue of fault in an accident suit, for instance, can hardly be surprised when a passenger in one of the cars seeks to apply the verdict against the loser.

19. Minn. Stat. Ann. § 609.04 (Supp. 1964). The presumption of decedent's due care has been the subject of much litigation and comment in Minnesota over the years. The Minnesota court first adopted the Thayer-Wigmore theory that a presumption operates only to change the burden of going forward with the evidence, disappearing when any competent evidence is introduced to refute it. See Knuth v. Murphy, 237 Minn. 225, 232, 54 N.W.2d 771, 776 (1952); Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 570, 289 N.W. 557, 561 (1939), 24 Minn. L. Rev. 651 (1940); IX Wigmore, Evidence § 2491 (3d ed. 1940). Accordingly, it was held reversible error to instruct on the presumption when the burden of proving contributory negligence already rests
is intended to apply exclusively to decedent's freedom from negligence, it may also affect the jury's evaluation of the survivor's conduct in a suit arising out of a head-on collision. Furthermore, assuming the judgment in the wrongful death action may be taken as fairly establishing the survivor's contributory negligence, it may not be taken as fairly establishing the decedent's freedom from negligence. Without the presumption operating in favor of decedent, a second jury might find both drivers were negligent. The survivor might then win on the issue of which driver had the last clear chance to avoid the accident. The possibility of invoking last clear chance was dismissed by the Lustik court, apparently on the ground that the first jury had found that the survivor's negligence proximately caused the accident. However, if both drivers were found negligent, a different


Application of the statute is limited to "any action . . . for negligently causing the death of a person . . ." Thus, the instruction is given in a wrongful death action brought by a trustee for the benefit of next of kin, but is not given in a surviving driver's action against the administrator of the decedent's estate.

If a two-car collision is due to the fault of one or the other or both of the drivers, the process which eliminates the conduct of one as causative inevitably casts responsibility on the other. An intersection collision, for example, may occur because one driver or the other failed to yield the right-of-way. If the jury is free to presume that a deceased driver had the right-of-way regardless of the evidence, it is bound to find that the other failed to yield. A head-on collision, as another instance, may occur because one driver or the other or both crossed the centerline. The statutory presumption may result in a jury finding that the decedent was in his own lane of travel at impact. If so, it must find the defendant driver to have been in the wrong lane to account for the accident. Thus, the residual effect of the presumption is to influence decision as to the negligence of both drivers.

269 Minn. at 529–30, 131 N.W.2d at 750 (Sheran, J., dissenting opinion).

21. 269 Minn. at 517–18, 131 N.W.2d at 743. The doctrine of last clear chance has not been favored in Minnesota which may account for the court's reluctance to apply it in Lustik. However, under the name "discovered peril" the court has recognized the doctrine in a limited sense. Turenne v. Smith, 215 Minn. 64, 69, 9 N.W.2d 409, 411 (1943); Fonda v. St. Paul City Ry. Co., 71 Minn. 488, 451, 74 N.W. 166, 170 (1898). The limitation is that the de-
finding of proximate cause would be possible.22

Prejudice to the surviving driver could have been avoided by permitting consolidation of his suit with the wrongful death action. However, the Minnesota court foreclosed this possibility by holding, in Lambach v. Northwestern Ref. Co.,23 that the two actions cannot be consolidated for trial because of the confusing jury instructions required.24 In Lustik, the court intimated that it might adopt a rule which would require that priority be given to trial of the surviving driver's contributory negligence and the decedent's negligence in the survivor's action.25 Such a rule would eliminate the "unseemly race to the courthouse"26 fostered by the Lambach decision. Also, it would permit the survivor to make "strategic use of the initiative"27 in litigating the issue of negligence.

However, new problems would be created by such a rule. First, continuation of the wrongful death action until the survivor's action has been tried and the possibilities of appeal exhausted would frustrate the trustee's legitimate attempt to secure funds promptly for the decedent's beneficiaries.28 Second, if the verdict in the survivor's action could be asserted as a bar to the wrongful death action, the trustee would have no opportunity to litigate the issue of decedent's negligence with the presumption operating in his favor.29 Arguably such a result would circumvent the legislator's purpose to actual awareness of the danger in time to avoid it. Gardner v. Germain, 264 Minn. 61, 64, 117 N.W.2d 759, 761 (1962); Medved v. Doolittle, 220 Minn. 352, 358, 19 N.W.2d 788 (1948).

22. See Brief for Appellant, pp. 9-10.
24. It should be noted that the confusion in jury instructions which led to the requirement of separate actions is not any greater than other jury instructions on complex issues. See MINNESOTA JURY INSTRUCTION GUIDES 307-08, 311-12 (1963).
25. 269 Minn. at 517 n.4, 131 N.W.2d at 743 n.4.
26. Lambach v. Northwestern Ref. Co., 261 Minn. 115, 125, 111 N.W.2d 345, 352 (1961) (concurring opinion). The race results from the fact that the first action brought will be given priority and its verdict is thus available to collaterally estop the second suit.
27. Currie, supra note 12, at 303.
28. The trustee usually files the wrongful death action as soon as possible in order to obtain the money for the widow and children; the surviving driver usually waits until he knows the full extent of his injuries.
29. The Lustik opinion did not foreclose the possibility that the trustee's action would not be barred by an adverse judgment in the survivor's action. 269 Minn. at 519, 131 N.W.2d at 743-44. However, a wrongful death action can be maintained only if the decedent "might have maintained an action,
litative intent embodied in the presumption.

In applying collateral estoppel to an unsuccessful defendant, the Lustik court adopted a three-element test formulated in Bernhard v. Bank of America, where Justice Traynor asked: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" This test allows a stranger to assert a prior verdict on a litigated fact issue defensively against either party to the first suit. It would also appear to encompass offensive use of a prior verdict by the plaintiff in the second suit.

If the Minnesota court elects to extend Lustik, it might distinguish between offensive use of collateral estoppel against plaintiffs and its use against defendants in the prior action. For

had he lived. . . ." Minn. Stat. Ann. 573.02(1) (Supp. 1965). If the survivor wins against the personal representative, who represents the decedent, then, arguably, the decedent could not have maintained the action had he lived.

30. 19 Cal. 2d 807, 122 P.2d 892 (1942). Several authorities have considered this case within the rule that a judgment in favor of an indemnitor precludes a later action against an indemnitee. Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir. 1964); Restatement, Judgments § 96(a) (1942); Currie, supra note 12, at 290; Seavey, Res Judicata with Reference to Persons Neither Parties nor Privies—Two California Cases, 57 Harv. L. Rev. 98, 101 (1943). However, in Professor Currie's opinion, the California Supreme Court did not intend to so limit its holding: "the question whether one was a party or in privity with a party to the prior action is relevant only with respect to the person against whom the plea is asserted . . . ." Currie, supra note 12, at 294.

The Bernhard decision has twice been cited with approval by the Minnesota court. Lustik v. Rankila, 269 Minn. 515, 520-22, 131 N.W.2d 741, 744, 745 (1964); Gammel v. Ernst & Ernst, 245 Minn. 249, 257, 72 N.W.2d 364, 369 (1955).

31. 19 Cal. 2d at 813, 122 P.2d at 895.

32. The result is supported by many writers. See Collins, supra note 2; Currie, Civil Procedure: The Tempest Brews, 53 Calif. L. Rev. 25 (1965); 27 Brooklyn L. Rev. 174 (1961); 35 Yale L.J. 607, 611 (1926). Several federal cases also have followed this approach. See Zdanok v. Glidden Co., 327 F.2d 944, 954 (2d Cir. 1964); Riordan v. Ferguson, 80 F. Supp. 973 (S.D.N.Y. 1948).


34. See Currie, supra note 12, at 290; Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 864-65 (1952). California and New York have refused to permit plaintiffs to avail themselves of prior plaintiffs' judgments against the same defendant. See Nevarov v. Caldwell, 161 Cal. App. 2d 763, 327 P.2d 111 (1958); Elder v. New York & Pennsylvania Motor Express, Inc., 284 N.Y. 360, 31 N.E.2d 158 (1940). However, two recent federal decisions, after citing Professor Currie's article, declined to make such a distinction. In
example, where a railroad sues the driver of an automobile involved in a grade crossing collision and loses on a finding of contributory negligence, injured passengers might be permitted to assert that judgment in subsequent actions against the railroad. If the driver brought the first action against the railroad, however, and won on a finding of the railroad's negligence, subsequent plaintiffs might be denied the right to assert collateral estoppel against the railroad in subsequent suits. A preferable solution would be to permit successive plaintiffs to assert a prior verdict against the same defendant only if the defendant lost the first case raising the contested fact issue. Of course, if the defendant won the first case but lost a subsequent one, the inconsistent results should preclude assertion of collateral estoppel by other plaintiffs.

B. TRIAL COURT HAS POWER TO CONSOLIDATE SEPARATE ACTIONS INVOLVING COMMON QUESTION OF DAMAGES

Plaintiff initiated separate actions seeking recovery for injuries suffered in two automobile accidents separated by three and one-half years. Because the second injury was to the same part of the body and was an aggravation of the first, the trial court ordered the two actions consolidated. The defendants in both actions

Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964), 64 COLUM. L. REV. 1141, 48 MARQ. L. REV. 115, 89 NOTRE DAME LAW. 492, 50 VA. L. REV. 777, it was held that a prior judgment establishing employees' rights under a collective bargaining agreement barred introduction of further evidence on the employer's liability in a suit by employees who were not parties to the first suit. The court pointed out that the plaintiffs were not deliberately harassing the defendant with successive suits and that there was no likelihood of a sympathy verdict in the case since both cases involved construction of an identical contract by a judge. In United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1963), 1964 DUKE L.J. 402, plaintiffs relied upon a prior verdict awarding damages against an airline whose plane was involved in a mid-air collision taking forty-nine lives. The prior suit involved twenty-four actions consolidated for trial. The airline admitted it had no new evidence. After noting that defendant had spent nearly four years preparing and fifteen weeks trying the first case, the court concluded that a sufficient "day in court" had been had to justify application of collateral estoppel. Professor Currie recently changed his position to approve this result. See Currie, Civil Procedure: The Tempest Brews, 53 CALIF. L. REV. 95 (1965).

36. See text accompanying notes 12–16 supra.
38. See 1964 DUKE L.J. 402, 404.
petitioned for a writ of prohibition which was subsequently issued restraining the trial court from proceeding with a consolidated trial. The Minnesota Supreme Court, in discharging the writ, held the consolidation order was not an abuse of the trial court's discretion. Schacter v. Richter, 135 N.W.2d 66 (Minn. 1965).

The trial court granted the consolidation order under Rule 42.01 of the Minnesota Rules of Civil Procedure, which provides:

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

Rule 42.01 was enacted for trial convenience and is intended to benefit not only the parties involved but also the administration of the court system.

The plaintiff moved for consolidation of his claims because of his apprehension that separate trials could possibly result in each jury finding that the defendant before it had been negligent, but also finding that the particular defendant had caused only an insubstantial portion of the damages sustained by the plaintiff. Accordingly, the total sum for his damages recovered by the plaintiff might be unfairly low for the cumulative injury proved to have been caused by both defendants. The defendants argued that consolidation was improper because the two actions, involving two separate torts, did not arise from the "same occurrence." They based this argument on the allegation that Rule 42.01 is complementary to the joinder rule and is designed to serve similar purposes. Since the joinder rule requires that any right to relief must arise out of the same transaction or occurrence, defendants argued Rule 42.01 should be subject to the limitations explicit in

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1. The writ of prohibition procedure was made necessary because there is no provision for appeal of a consolidation order under Minn. Stat. Ann. 605.09 (Supp. 1963).


3. An order of consolidation was sustained principally on the support of this argument in Way v. Waterloo C.F.&No. R.R., 239 Iowa 244, 258, 29 N.W.2d 867, 872 (1947).

4. 135 N.W.2d at 68.

5. Under Minn. R. Civ. P. 20.01 a plaintiff may join several defendants only if there is:

- asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.
that rule. Support for defendants’ position can be found in the procedural rules existing before the adoption of the present rules in which consolidation was in fact limited to cases where joinder was proper. Moreover, joinder and consolidation have an identity of purpose — trial convenience. Neither procedure, however, is intended to alter the rights of the parties.

The court rejected defendants’ argument on the basis of a literal interpretation of the wording of the rules. While joinder is limited to cases arising out of the same transaction or occurrence, consolidation requires only a “common question of law or fact.” The effect of joinder is to unify for all purposes the claims of the parties in a single action. Joinder is accomplished in the pleadings without leave of the court. Through the explicit limitation of the joinder rule to cases arising out of the same transaction or occurrence, the discretion available to the parties is clearly defined. Consolidation, on the other hand, may be had only upon order of the court. It results in a joint hearing or trial, but the two actions still retain their separate identity. It may be used to join the

6. See Minn. Rev. Laws § 4141 (1905). The authors of a treatise on Minnesota procedure apparently agree with defendants’ position:

The rule is complementary to the rules dealing with joinder of claims and parties. Liberal provisions have been made for the joinder of claims and parties in the interest of presenting all the controversies between the parties. Where those rules could have been complied with, but were not, and the separate actions present claims or defenses involving a common question of law or fact, the court has authority, upon its own initiative or upon motion, to order consolidated the actions or the trial or hearing of any or all matters in issue in the actions.

2 YOUNGQUIST & BLACK, MINNESOTA RULES PRACTICE 375 (1953) (authors’ comments to Rule 42.01). (Emphasis added.) But a federal district judge for the District of Minnesota has stated that it is not necessary that the actions might have been joined. Nordbye, Comments on Selected Provisions of the New Minnesota Rules, 36 MINN. L. REV. 672, 675 (1952).


8. For example, in Stanford v. TVA, 18 F.R.D. 152 (M.D. Tenn. 1955), the plaintiff alleged injury to his property caused by fumes emitted from two factories operated independently by the two defendants. It was held that joinder was improper because the claims of the plaintiff did not arise from a single occurrence or series of occurrences. Consolidation was granted, however, on the basis of common question of fact.

9. This effect may be altered by the court by dropping a party on grounds of misjoinder under MINN. R. CIV. P. 21 or by ordering a separate trial of any issue or claim under MINN. R. CIV. P. 20.02.

10. “Consolidation” can refer to a merger of two actions into one (as under the joinder rule), and also to a joining for purpose of trial with the actions retaining their separate character. It is to this latter use of the word
separate actions to any extent, provided it does not prejudice the rights of any party. Thus one or more phases of different actions may be consolidated. The wider scope of consolidation seems justified by the greater ease with which the procedure can be adapted to the individual cases at bar.

The defendants also contended consolidation was prejudicial because it seemed to shift the burden of proof from plaintiff to defendants. They argued consolidation would allow the plaintiff to prove the extent of his damages and then leave the defendants to apportion it among themselves — in effect making them adversaries. Even if such a contention has some foundation, in a consolidated trial the plaintiff still must prove, by a fair preponderance of the evidence, the extent of the damage caused by each defendant. The effect of consolidation will make rebuttal of that evidence by one defendant more difficult since that rebuttal will be opposed by the other defendant. But by increasing the number of parties directly interested in the disputed question, the likelihood of a thorough presentation of the evidence and an ultimately just result is increased rather than decreased.

The plurality opinion concludes the “common question of law or fact” requirement is the only absolute limitation imposed on the trial court’s discretion to consolidate; and this limitation was satisfied by the interrelated question of damages. The concurring opinion, however, would allow consolidation only as to the issue of damages, arguing that the liability issues in the two actions, which are completely unrelated, should be tried separately. Such a procedure is provided for in the rules. Certainly the possibility of inconvenience or prejudice is considerable.

Regarding inconvenience, the determination of the liability of either defendant may require protracted litigation. In such an event the other defendant will be subjected to the expense and

that Schacter refers, under Minn. R. Civ. P. 42.01. For an example of the type of order the trial court might make see Stanford v. TVA, 18 F.R.D. 152 (M.D. Tenn. 1955) (separate pleadings, motions, verdicts, judgments, etc.). See 2B Bahn & Holtzoff, Federal Practice and Procedure 941 (1961).

11. See 5 Moore, Federal Practice ¶42.02, at 1209 (2d. ed. 1964).
12. “While the concepts of joinder and consolidation complement each other and overlap, they are nonetheless distinct. Consolidation is wider in scope.” 135 N.W.2d at 69.
13. The concurring opinion assumed that the order of consolidation provided for separate trials on the question of liability. 135 N.W.2d at 71.
inconvenience of participating in such litigation even though he will not be able to contribute to a more expedient disposal of the liability issue. However, the possibility of inconvenience would seem to be minimal if the liability issues are not complex.

Prejudice may result if, for example, the evidence in a consolidated trial shows the negligence of one defendant to have been gross in comparison with that of another defendant. An unfair or unrealistic apportionment of damages between the defendants could result in such a case because the jury might not be able to disregard the clear disparity in culpability. In the event prejudice threatens, the trial judge can safeguard the interests of the parties by careful jury instruction, close supervision of the trial procedure, or even ordering a separation of issues that he had consolidated. However, the concurring opinion would require separation of the question of liability without requiring a specific allegation of prejudice or inconvenience that a consolidated trial might produce. Apparently the concurring opinion feels the possibility of prejudice on the question of liability is always strong enough to overcome any competing considerations in favor of consolidation of that issue in a single trial.

The dissenting opinion would disallow consolidation in Schacter on the ground that Rule 42.01 was not intended to require a defendant in one tort action to take part in litigation involving another defendant's independent tort. The dissent argued there was no common question of law or fact even in the damage issue since each defendant was only liable for the damages.)

15. While the trial judge may consolidate under Minn. R. Civ. P. 42.01, the court may also order a separate trial of separate issues under Minn. R. Civ. P. 42.02.

The plurality opinion was confident that the trial court was capable of fairly exercising its discretion to protect the rights of the parties and avoid prejudice. "It is not for an appellate court to anticipate or prohibit errors of the trial court or to interfere with its discretionary orders as to trial procedure." 135 N.W.2d at 70.

16. "[A] consolidated trial of the liability issue against both sets of defendants would be onerous . . . ." 135 N.W.2d at 71.

17. The viewpoint of the dissent is apparently followed in New York. In actions factually similar to the instant case the New York courts have denied consolidation, even for the issue of damages. See Abbatepolo v. Blumberg, 7 App. Div. 2d 847, 182 N.Y.S.2d 83 (1959); Gamble v. Fraleigh, 1 Misc. 2d 847, 146 N.Y.S.2d 146 (Sup. Ct. 1955). "The convenience of one trial does not overcome the prejudice that may result to appellants and the confusion which the jury will encounter in trying to determine the extent of injuries attributable to each. . . ." Pride v. Perras, 6 App. Div. 2d 842, 176 N.Y.S.2d 573, 574 (1958).

Although the plurality opinion distinguished the New York statute from
caused by his separate tort. But this argument is not relevant as to whether there is a common fact question. If the two injuries to plaintiff were interrelated, as was alleged, the damages from those injuries could not be determined independently. The plaintiff could prove damages as to each defendant only by showing which damages were caused by the other defendant. Accordingly a fact issue common to both actions does exist. The expediting policy of Rule 42.01 favors consolidation in Schacter, at least of the damage issue, if possible without prejudice to the rights of any party. The jury may be somewhat confused in trying to apportion the damages between the two defendants. However, this confusion could not be avoided by separate trials since each jury would still have to determine the extent of plaintiff's damages caused by the nonpresent defendant.18

The result of the unusual split of the court19 is to leave the discretion of Minnesota trial courts to grant consolidation undetermined. A majority of the court felt that under Rule 42.01 the trial court had the power to consolidate. A different majority thought that consolidation of the liability issue was improper since it would be unduly burdensome on the defendants. However, no majority of justices outlined the extent of consolidation permissible. The plurality opinion did not limit the trial court's discretion to consolidate the issues in Schacter. The concurring opinion would allow consolidation only of the damage issue after separate trials to determine the liability of each defendant. And the dissenting opinion took the position that the trial court was without power to consolidate any of the issues of the two actions. Thus the only safe conclusion a trial court can draw from Schacter is that it does not have discretion to consolidate the issue of liability when separate, independent torts are involved, but it may consolidate an issue of interrelated damages.

VIII. SALES

IMPLIED WARRANTY — LIABILITY OF BLOOD BANK SUPPLYING DEFECTIVE BLOOD

Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.1

MINN. R. CIV. P. 42.01, it seems clear that the New York decisions rest on the basis of prejudice and jury confusion rather than on any difference in the two statutes. 18. See Stanford v. TVA, 18 F.R.D. 152, 155 (M.D. Tenn. 1955).
19. Three justices joined in the plurality opinion; two concurred; and two dissented.

1. 132 N.W.2d 805 (Minn. 1965).
held that the implied warranties of fitness for purpose and of merchantability contained in the Uniform Sales Act do not apply to contaminated blood furnished by a nonprofit public service corporation. Plaintiff, after having received a transfusion ordered by her physician, contracted and died from serum hepatitis. Defendant blood bank was not claimed to be negligent in the processing or distribution of the blood. Plaintiff made payment for the blood directly to the blood bank rather than to the hospital in which she was a patient.

The “fitness for purpose” and “merchantability” warranties are expressed in technical sales language of “buyers” and “sellers.” Accordingly, the general rule has developed that in order for a claim for recovery to fall within the scope of these statutory warranties, there must first be a “sale” of goods. In determining whether a particular transaction was such a sale, courts have often denied warranty protection on the basis that the transaction should be considered merely a “service.” Contracts for construction, repairs, and professional services usually fall within this doctrine.

The court in the instant case concluded there was no sale of blood in the technical sense because it felt the furnishing of blood

2. The act provides that:
   (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

   MINN. STAT. § 512.15(1).

Section 2-315 of the Uniform Commercial Code provides a similar warranty, and is also phrased in terms of “buyer” and “seller”:

   Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

3. Some diseases which can be communicated by blood transfusions are susceptible to tests whereby their presence may be ascertained. Serum hepatitis, however, is a virus which medical science has been unable to detect in the blood. See 182 N.W.2d at 807.

4. See 17 MINN. L. REV. 210, 211 (1933). For a helpful article on the general problem of the scope of warranty protection, see Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 COLUM. L. REV. 653 (1957).

to be "more in the nature of a service than a sale of goods." The
court relied heavily on the leading case of Perlmutter v. Beth
David Hosp., the first decision to invoke the sale-service dichoto-
my with respect to blood administered to a hospital patient. In
Perlmutter an action under a theory of implied warranty was
brought against the hospital which provided the blood and ad-
mnistered its transfusion. The New York Court of Appeals denied
recovery, holding that a hospital which administers a transfusion
of blood to a patient is not making a sale, because such a transfu-
sion is merely incidental to the overall contractual obligation of
the hospital to provide "services." In the words of the Perlmutter
court, "when service predominates, and transfer of personal prop-
erty is but an incidental feature of the transaction, the transaction
is not deemed a sale within the Sales Act." Even if it is conceded that furnishing blood to a patient by a
hospital should be considered merely incidental to the general
services to be rendered, it would seem that the instant case is
readily distinguishable from Perlmutter. In the instant case the
furnishing of blood by the blood bank was not incidental to any
other services, since the blood bank did nothing more than supply
the blood. Consequently the service aspect of Perlmutter appears
inapplicable.

The Minnesota Supreme Court avoided this distinction by
stating that the blood bank in the instant case should not be
treated any differently than a hospital, since both are nonprofit
public service organizations. Thus it would seem the court con-

6. 132 N.W.2d at 810.
7. 308 N.Y. 100, 123 N.E.2d 792 (1954). In this 4-3 decision the dissent felt
there was both a contract for services and a separate contract for the sale of
blood. Thus even the dissent stayed within the confines of conventional sales
law. Notably the dissent assumed that the hospital would have a remedy over
against the blood bank which supplied the blood. Id. at 109, 110, 123 N.E.2d
at 797.

8. Id. at 104, 123 N.E.2d at 794.
9. The Perlmutter court said:

It was not for blood—or iodine or bandages—for which plaintiff
bargained, but the wherewithal of the hospital staff and the avail-
ability of hospital facilities to provide whatever medical treatment was
considered advisable. The conclusion is evident that the furnishing of
blood was only an incidental and very secondary adjunct to the serv-
ices performed by the hospital and, therefore, was not within the provi-
sions of the Sales Act.

Perlmutter v. Beth David Hosp., 308 N.Y. 100, 105, 123 N.E.2d 792, 795
(1954).
strues the sale-service dichotomy of *Perlmutter* as establishing a distinction in sales warranty law between transactions involving public service organizations and those involving commercial businesses. Indeed, the court seems to shift from the technical requirements of the Uniform Sales Act to a thinly disguised doctrine of charitable immunity.\(^{10}\)

Some jurisdictions have held that the doctrine of charitable immunity extends to warranty actions, since such actions sound in tort.\(^{11}\) It would have been difficult for the Minnesota court to apply this doctrine expressly, however, because in Minnesota charitable organizations are not immune from tort liability.\(^{12}\) Consequently, it would seem anachronistic to invoke such a long-discarded doctrine of law. However, the mechanical application of technical sales law allowed the court to avoid rendering a much needed decision concerning the relationship of strict liability to charitable organizations. It is obvious the court was strongly influenced by the fact that serum hepatitis in the blood is neither detectable nor preventable.\(^{13}\) Because breach of warranty gives rise to liability which does not depend upon any negligence or knowledge of defects on the part of the supplier of goods, the implied warranties of quality are essentially devices for imposing liability without fault. The real question that faced the court

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10. "We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose." 132 N.W.2d at 811.

In a recent case similar to the instant case, the Texas Supreme Court denied recovery against a blood bank, citing *Perlmutter* for the proposition that the blood bank was performing a "service." Golez v. J. K. and Suzy L. Wadley Research Institute and Blood Bank, 350 S.W.2d 573 (Tex. Ct. of Civ. App. 1961). This case may be distinguished from the instant case, however, since the blood bank in *Golez*, through the negligence of an employee, furnished blood of the wrong type. Notwithstanding negligence, the blood bank was not liable because under Texas law charitable corporations are immune from tort liability. Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943).


13. The *Perlmutter* court was also influenced by the fact there is no known method of detecting or preventing the contamination. 308 N.Y. at 106–07, 123 N.E.2d at 795.
was whether to impose strict liability on a charitable institution. The court could have rendered a sounder decision by completely avoiding the Uniform Sales Act and resolving the question of imposing strict liability on charitable organizations through a weighing of competing policy considerations.14

It can be argued in favor of the result in the instant case that the purpose of imposing strict liability does not extend beyond commercial enterprises. It is reasonable to charge such “enterprise liability” to an entrepreneur who can be expected to purchase liability insurance or pay damages from his profits. It is not so clear, however, that nonprofit organizations should be required to take such a risk. Arguably no more should be expected of a nonprofit organization than that all possible precautions to prevent or detect injuries have been taken. Moreover, the burden of the risk to the individual patient can be distributed through the use of personal health and life insurance plans.

On the other hand, the reasons for imposing liability without fault on commercial enterprises seem equally persuasive when applied to nonprofit organizations supplying needed services to the public. Compensating injured parties regardless of the existence of negligence, distributing the risk of injury throughout society, and ability to bear the loss15 are factors which can be as applicable to charitable organizations as to commercial enterprises. Indeed, in regard to distribution of risk, it seems just as compelling for nonprofit organizations to make restitution to those injured by their activities, since such organizations can spread the risk of injury by increasing their price for whatever service they supply. Those persons who have benefited from charitable services and have not suffered injury should be required to pay their small share to compensate others who, by mere chance, are not as fortunate. Risk distribution can be readily accomplished through liability insurance premiums or some kind of a compensation fund. Recipients of charitable aid are still likely

14. Arguably sales law is inapplicable to noncommercial operations such as the supplying of blood in the instant case. Indeed, mechanical adherence to the rules of sales law could lead to an incongruous result. For instance, assume that the instant case distinguished Perlmutter and held there was a sale of goods because the plaintiff dealt directly with the blood bank. Then the situation would arise where the hospital would not be liable and the blood bank would. Such a result would serve neither judicial consistency nor equal justice.

15. “There is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss.” POUND, THE SPIRIT OF THE COMMON LAW 189 (1921).
to pay a considerably lower price for it than for similar services from a commercial business. Moreover, it has been argued, although perhaps with little persuasiveness, that imposition of strict liability in this area will possibly provide charitable organizations with a further impetus to accelerate their attempts to detect or prevent impurities in the product they supply.\textsuperscript{16}

In particular, it seems that a hospital, blood bank, or any other supplier of blood should properly bear the loss since such an organization is well aware of the incidence of serum hepatitis or other contaminant contained in the blood. On the other hand, the recipient, as a matter of general medical practice, is not even informed that the danger exists.\textsuperscript{17} It seems unfair to expect an individual to be personally insured or otherwise prepared for a hazard of which he is totally unaware.

The instant case is demonstrative of a phenomenon common in sales warranty cases—a court struggling to reach a result it deems equitable and at the same time trying to stay within the literal language of technical sales law. The court might better have ignored the technical question of the existence of a sale and rather resolved the issue on the basis of whether or not to apply strict liability to a charitable organization. In all of the blood bank cases since Perlmutter, courts have mechanically applied the rules of sales law.\textsuperscript{18} It is hoped that in the future some court will throw off the shackles of technical sales law and, after a consideration of the competing social policies, settle this confused area of products liability law.

\section*{IX. STATUTE OF FRAUDS}

\textbf{Offering Letter Sufficient Memorandum When Supported by “Reliable Evidence”}

In \textit{Radke v. Brenon},\textsuperscript{1} defendant sent a written letter to plaintiff offering to sell certain real estate and, after some negotiating, plaintiff orally accepted the offer. When defendant refused to convey, plaintiff brought an action for specific performance. Although

\begin{itemize}
\item \textsuperscript{16} See Farnsworth, \textit{supra} note 4, at 672.
\item \textsuperscript{17} See 132 N.W.2d at 808.
\item 1. 134 N.W.2d 887 (Minn. 1965).
\end{itemize}
defendant pleaded a defense under the Statute of Frauds, on cross-examination during the trial he admitted that plaintiff had agreed to buy the land. The trial court granted specific performance. The Minnesota Supreme Court affirmed, holding on the facts that defendant’s initial letter of offer was sufficient to satisfy the requirements of the Statute of Frauds. In concluding that a completed contract existed, the Court primarily relied on defendant’s admission made during the trial.

The Minnesota Statute of Frauds provides that a contract for the sale of real estate is void in the absence of a written memorandum thereof. The purpose of the Statute is “to prevent men from being, through fraud or perjury, held liable for engagements which they never made.” It expressly requires the memorandum to state the consideration and to be subscribed by the vendor. In addition to these statutory requirements, the Minnesota court has required the contracting parties to be identified with reasonable certainty, the land to be sufficiently described, and the general terms and conditions of the transaction to be specified.

2. Minn. Stat. § 513.05 (1968) states in part: “Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made . . . .”

3. The Statute has been interpreted as meaning voidable rather than void: We believe the better rule to be that contracts which fall within the provisions of . . . the Statute of Frauds . . . are not void in the strict sense that no contract has come into being at all, but are merely unenforceable at the option of the party against whom enforcement is sought. Borchardt v. Kulick, 234 Minn. 308, 319, 48 N.W.2d 318, 325 (1951); accord, Royal Realty Co. v. Levin, 244 Minn. 288, 69 N.W.2d 667 (1956).


The purpose of the original Statute of Frauds was stated in its title and preamble: “An Act for Prevention of Frauds and Perjuries”—“for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury.” Statute of Frauds, 1677, 29 Car. 2, c.8. For a thorough historical discussion of the original effect of the Statute and the development of the rule that a party could admit the contract and still plead the Statute, along with an analysis of this rule and the recent minority rejection of it, see Stevens, Ethics and the Statute of Frauds, 37 Cornell L.Q. 355 (1952). See generally Degnan, The Evidence Law of Discovery: Exclusion of Evidence Because of Fear of Perjury, 43 Texas L. Rev. 435, 444 (1965).

5. 184 N.W.2d at 890; Doyle v. Wohlrabe, 243 Minn. 107, 66 N.W.2d 757 (1954); Scott v. Marquette Nat’l Bank, 173 Minn. 225, 217 N.W. 136 (1927); Swallow v. Strong, 83 Minn. 87, 86 N.W. 942 (1901).

The description of the realty need only provide “an adequate guide to locate and identify the property in the light of the surrounding circum-
Application of these requirements has varied somewhat. In some cases the court has taken a rigid approach, holding memoranda inadequate for slight technical defects, even though it was apparent that in fact a contract had been made. In other cases, however, the court has been more liberal, i.e., more inclined to accept memoranda which, though not technically perfect, gave some assurance that a contract had been completed and that its terms were sufficiently established. In a recent case, the court indicated a definite trend toward greater willingness to pierce technical defenses in order to reach an equitable result, as evidenced by its viewpoint that "this court . . . will not apply the statute in a rigid manner whereby it becomes a technical shield behind which nonperformance may be justified."

Until the instant case, however, the Minnesota Supreme Court had strictly maintained the position that an offer for the sale of land must be accepted in writing in order to avoid the Statute of Frauds. In discarding such a mechanical doctrine, the Radke court stressed that the Statute does not require the entire contract to appear in writing. Doyle v. Wohlrabe, supra at 111, 66 N.W.2d at 761. The general terms of the contract must appear with reasonable certainty. Id. at 110.

6. See Holliday v. Hubbard, 45 Minn. 333, 47 N.W. 1134 (1891); Taylor v. Allen, 40 Minn. 433, 42 N.W. 292 (1889); George v. Conhaim, 38 Minn. 333, 37 N.W. 791 (1888).

7. In D.M. Osborne & Co. v. Baker, 34 Minn. 307, 25 N.W. 606 (1885), a memorandum stating the consideration as "for value received" was considered adequate. Likewise, "credit given and to be given" was considered adequate in Midland Nat'l Bank v. Security Elevator Co., 161 Minn. 30, 200 N.W. 881 (1924). See generally Kingsley, Some Comments on the Section of the Minnesota Statute of Frauds Relating to Contracts, 14 Minn. L. Rev. 746, 759-60 (1930).

In Conlan v. Grace, 36 Minn. 276, 30 N.W. 880 (1886), the court defined the test of adequate "subscription" as whether or not the offeror intended to authenticate the document, saying, "If signed by the grantee's authority, or adopted by him as his signature, although written by another, it is a sufficient signing by the grantor." See also Annot., 171 A.L.R. 334 (1947); Restatement, Contracts § 210 (1932); 34 Minn. L. Rev. 277 (1950); 16 Minn. L. Rev. 325 (1932).

Only the vendor need sign. Krohn v. Dustin, 142 Minn. 304, 172 N.W. 213 (1919); Gregory Co. v. Shapiro, 125 Minn. 81, 145 N.W. 791 (1914); Wilson v. Hoy, 120 Minn. 451, 139 N.W. 817 (1913); Western Land Ass'n v. Banks, 80 Minn. 317, 83 N.W. 192 (1900).


9. Lake Co. v. Molan, 269 Minn. 490, 131 N.W.2d 734 (1964); Krohn v. Dustin, 142 Minn. 304, 172 N.W. 213 (1919); Ferguson v. Trovaten, 94 Minn. 209, 102 N.W. 373 (1905); Newlin v. Hoyt, 91 Minn. 409, 98 N.W. 329 (1904); Kileen v. Kennedy, 90 Minn. 414, 97 N.W. 126 (1903); Lanz v. McLaughlin, 14 Minn. 72 (Gil. 55) (1869).
to be in writing, but only that there must be a memorandum as evidence thereof. Consequently it is the task of the courts to determine the sufficiency of such a memorandum. The technical requirements of the Statute, reasoned the court, are only aids to discern the truth, and thus should not be blindly adhered to "if they lead to a conclusion repugnant to commonsense." Accordingly, the court examined the letter of offer with its enclosed sketch map of the land involved and determined it substantially satisfied the requirements. The court recognized the technical requirements of the Statute were perhaps not literally complied with. Such literal compliance, however, will be overlooked "if proof of the oral contract is clear and uncontradicted."

In finding the necessary "clear and uncontradicted" evidence of an oral contract, the court deemed defendant's admission of the contract at trial "most persuasive." Then the court mentioned, but did not expressly abolish or distinguish, the rule which provides a party is not, by admitting the contract, precluded from asserting the Statute of Frauds. This rule, which has been fol-

10. 134 N.W.2d at 891. The court quoted from 4 Williston, Contracts § 567A, at 20 (3d ed. 1961):

In brief, the Statute "was intended to guard against the perils of perjury and error in the spoken word." Therefore, if after a consideration of the surrounding circumstances, the pertinent facts and all the evidence in a particular case, the court concludes that enforcement of the agreement will not subject the defendant to fraudulent claims, the purpose of the Statute will best be served by holding the note or memorandum sufficient even though it be ambiguous or incomplete.

11. The offering letter included several deficiencies from which a technically inclined court could possibly have held it inadequate: the consideration was stated incorrectly; the land involved was vaguely described; and only a typewritten name rather than a signature appeared.

The court's willingness to allow the oral acceptance must have surprised both parties, since they both argued that a written acceptance was necessary. Brief for Petitioner, pp. 9–11; Brief for Respondent, pp. 10–11. In addition to arguing he had tendered a written acceptance, plaintiff also contended that he had done sufficient work on the land (filling low spots, planting trees, etc.) to take the contract out of the Statute under the doctrine of part performance. Moreover, he argued that there was an oral modification of the contract in order to explain the discrepancy concerning the amount of consideration. Brief for Respondent, pp. 5–12. Defendant in turn rebutted all of these arguments. Brief for Petitioner, pp. 5–8. The court, relying on plaintiff's admission, ignored these issues and treated the contract as being effective as of the date plaintiff orally accepted. The small discrepancy in consideration was not considered significant, 134 N.W.2d at 890–91.

12. 134 N.W.2d at 891.
13. Ibid.
14. See ibid. Apparently this rule originated from a fear that defendants
owed in Minnesota, as well as in a majority of states, has too often furthered fraud by permitting a defendant to repudiate an agreement which has been fairly entered into and is supported by a reasonable certainty of proof. As a result, the rule has been severely criticized, and some courts have entirely abolished it. Notably Minnesota's adoption of the Uniform Commercial Code constitutes an express legislative directive to abandon this rule in the area of sales of goods. And it would seem Radke has emasculated this rule in the area of real estate transactions almost to the point of abandonment. It is difficult to imagine a situation where reliance upon a party's admission could constitute a greater element of proof of an oral contract than it did in the instant case. Indeed it seems to be the only uncontradicted evidence of the contract besides the information contained in defendant's written offer.

Although Radke involved only the situation of an uncontradicted admission, it might otherwise be tempted to perjure themselves by denying the contract in order to invoke the Statute. See Stevens, supra note 4, at 360.


18. See, e.g., Stevens, supra note 4, at 361; Rabel, The Statute of Frauds and Comparative Legal History, 63 L.Q. Rev. 174 (1947). "[T]he true issue is whether the oral contract was made, not whether a writing had been executed. . . . [C]ourts have quite consistently held that when the first can be decided without danger of perjury . . . they will dispense with the second." Degnan, supra note 4, at 450. See also 2 Corbin, Contracts § 493 (1950); Williston, Contracts § 567A (3d ed. 1961).

It has been noted that the Statute is widely ignored by businessmen and resorted to by honest parties only as an auxiliary defense to unjust actions. Rabel, supra at 187.


20. Under Minn. Stat. § 336.2-201(8)(b), Code § 2-201(8)(b), a contract which does not satisfy the Statute of Frauds is enforceable if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court, that a contract for sale was made. Code § 2-201, comment 7 notes that such an admission does not establish the contract conclusively, but is merely evidential against the admitting party of the facts so admitted.

21. Plaintiff's testimony was also supported by evidence of a "stub abstract" which defendant furnished him, and by an acceptance letter from the plaintiff. The stub abstract, however, would seem to be of little value as evidence to support a finding that a contract was in fact entered into. And as for the acceptance letter, it was not uncontradicted evidence, since defendant denied receiving it.
dicted admission made during trial, its rationale is much broader. Arguably it stands not only for the proposition that an offering letter supported by an uncontradicted admission is a sufficient memorandum, but also for the proposition that a similar offering letter satisfies the Statute of Frauds whenever it clearly appears from the available evidence that an oral contract has in fact been completed, and thus can be enforced in accordance with its terms without fear of fraud. The court did not speak of the admission as essential to the sufficiency of the memorandum, but rather as evidence which was clear and uncontradicted. Thus the instant case would seem to be authority for upholding offering letters as sufficient memoranda when supported by reliable evidence, even though such evidence includes no admission.

The instant case is further evidence of the court's shift in emphasis from literal technicality to a practical determination of whether a contract can be established without fear of fraud. As such, Radke is a welcome decision and represents an interpretive evolution entirely consistent with the policy underlying the Statute of Frauds. It remains for future decisions to delineate how far the court intends to extend its more liberal attitude.

X. STATUTES

SAFETY RESPONSIBILITY ACT—SUBPERMITTEE'S DRIVING CONSTRUED TO BE WITH OWNER'S "CONSENT"

In Lange v. Potter, plaintiffs were injured when their auto collided with defendant's auto which was being negligently driven by a boy friend of defendant's daughter. Although the daughter had permission to drive her father's car, she had been expressly

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22. Although the instant case involved an admission in open court, probably any judicial admission would have the same effect. Cf. Phelps v. Benson, 252 Minn. 457, 90 N.W.2d 533 (1958) (admission in the pleadings). For instance, the rationale of the instant case would appear to extend to pretrial discovery proceedings, since under Minn. R. Civ. P. 26.04(2) the deponent is protected by basically the same procedural safeguards as he would enjoy in court.

Extrajudicial admissions pose a more serious question. Although they are exceptions to the hearsay rule, Hierl v. McClure, 238 Minn. 385, 56 N.W.2d 721 (1953), they come closer to the fundamental policies of the Statute of Frauds, since the witness who testifies to the admissions may be committing perjury. The credibility of such a witness must be carefully scrutinized, and the court must exercise considerable judicial caution in relying on such admissions. Indeed, such caution is dictated by Radke under its standard of "clear and uncontradicted proof."

1. 270 Minn. 173, 132 N.W.2d 734 (1965).
instructed on numerous occasions not to let anyone else drive the car. Contrary to these instructions, the daughter, upon her boy friend’s insistence, relinquished the operation of the car to him. At trial, the jury found, by special verdict, that the boy friend was driving defendant’s car without the implied consent of the owner. On appeal, the Minnesota Supreme Court reversed and held, as a matter of law, that the boy friend was “operating the vehicle with the owner’s consent” within the meaning of the Safety Responsibility Act, Minnesota Statutes section 170.54 (1961).

Prior to the passage of the Safety Responsibility Act of 1933, the liability of an automobile owner who allowed someone else to drive his car was limited to common law principles based upon either a principal-agent relationship, or the family car doctrine. Under the doctrine of respondeat superior, a principal was held liable for the negligence of an agent who was acting within the scope of his employment. When applied to automobile accidents, this theory was expanded to make the principal liable whenever a third person negligently operated the vehicle with the acquiescence or at the direction of the agent. The family car doctrine provided that the head of a family was liable for the negligence of any other member of the family operating the “family car” with consent. This doctrine of liability was also expanded to make the owner liable whenever the family car was operated negligently by a third party, and (1) the third party had permission from a family member, (2) that family member had permission from the owner to drive, and (3) that family member was present. Neither of


3. See Geiss v. Twin City Taxicab Co., 120 Minn. 388, 139 N.W. 611 (1918); Arcara v. Moresse, 258 N.Y. 211, 179 N.E. 389 (1932); Grant v. Knepper, 246 N.Y. 158, 156 N.E. 650 (1927).

4. The family car doctrine is limited to the case where the automobile is used by members of the family for the purpose intended by the head of the household. Kayser v. Van Nest, 135 Minn. 277, 146 N.W. 1091 (1914); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918); Lattin, Vicarious Liability and the Family Automobile, 26 Mich. L. Rev. 846, 851-68 (1928).

A third theory of liability is that an automobile is a dangerous instrumentality; therefore, the owner is charged with responsibility for any damages caused. E.g., Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832 (Fla. 1959).
these theories, however, was expansive enough to make the owner liable for the negligence of a mere "borrower."

The Safety Responsibility Act incorporates the respondeat superior and family car doctrines. Moreover, it goes beyond the common law to make the owner liable if anyone operates the vehicle with his consent, including a mere borrower. The act provides "whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such vehicle in the operation thereof." Although this statute expressly indicates an agency relationship, the test for liability is not the traditional "scope of employment" or "scope of authority," but rather "scope of consent." Accordingly the court in the instant case was faced with the question of whether implied consent was given to a subpermittee, the boy friend, notwithstanding the fact that the owner had expressly instructed the permittee, the daughter, not to let anyone else drive the car.

In finding the necessary implied consent, the court concluded that the statutory phrase "shall be operated . . . with the consent of the owner" encompasses a situation such as the instant case where the car was "being used for a purpose intended by both . . . [owner and his daughter]." Notwithstanding the father's restrictions, reasoned the court, the car was still being used for the intended purpose to allow the daughter use of a car to celebrate her birthday. Moreover, the court felt if a car owner could escape liability by placing "secret restrictions" on the permittee, such possible avoidance of liability would invite unwanted collusion.

In finding that "operation of the car" includes "use of the car

7. Ellingboe v. Guerin, 228 Minn. 211, 36 N.W.2d 598 (1949); Anderson v. Standard Oil Co., 204 Minn. 337, 283 N.W. 571 (1939); Flaugh v. Egan Chevrolet, Inc., 202 Minn. 615, 279 N.W. 582 (1939); 21 MINN. L. REV. 823 (1937). The term "borrower" is used to mean a person using another's auto for his own purposes, thereby excluding "uses" related to some purposes of the owner.
9. 270 Minn. at 178, 132 N.W.2d at 738.
10. 270 Minn. at 178, 132 NW.2d at 737.
for the intended purpose,” the court placed considerable reliance on certain New York and California decisions construing statutes which base liability on consented use or operation of the owner’s car.11 These cases held that even if the person operating the car does not have the consent of the owner, the owner is nonetheless liable since the permittee is still “using” the car regardless of who is the actual driver.12 In relying exclusively on the statutory word “using,”13 the New York and California courts, in situations similar to the instant case, imply that an owner can limit his consent to the actual operation of his car in the technical sense of who is the driver. Nonetheless consent to the “use” of the car imposes no such restrictions on its mechanical operation.14 In contrast to the New York and California statutes, the Minnesota statute only states that liability arises when the car is “operated” with the consent of the owner; the words “use” or “using” do not appear. It seems obvious that the court has construed “operation” in the Minnesota statute to be broader in scope than the technical definition found in the New York and California cases. Indeed, by relying on these decisions, the court apparently equates their interpretation of the phrase “use or operation” with the term “operation” as found in the Minnesota statute. In giving this term such a liberal construction, the court effectuates the statute’s general purpose, which is the protection of the public.15

11. N.Y. Vehicle and Traffic Law § 388 (1):
   Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.... (Emphasis added.)

Cal. Vehicle Code § 17150:
   Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

15. 270 Minn. at 178, 132 N.W.2d at 737; see also Foster v. Bock, 229
The defendant in the instant case relied on the Minnesota case of Foster v. Bock, where an owner was held liable for the negligent driving of a subpermittee. The Foster court emphasized the fact that the permittee had been given unlimited consent as to the operation of the car. Foster seems to suggest that had there been terms of qualification or limitation placed on the consent given to the permittee, a different result might have been reached. The court in the instant case avoids this suggestion by merely stating that the statute should be liberally construed.

The court limited its holding to the situation where the permittee, although not driving, is actually present in the car at the time of the accident. If the permittee is not present, arguably the owner would escape liability because the permittee would not be “operating” the car. It seems as persuasive to argue, however, that if the car is still being used for the consented purpose, then the permittee is “operating” the car even though not actually present. Granted the permittee would not directly control the mechanical operation of the car; but he would still have control over who would drive and for what purpose.

Although the court held that the owner may not restrict the manner of operation of his car when he relinquishes it to another, it is still open for him to restrict his consent to use for some specific purpose. Thus when the intended purpose of the owner is deviated from, he is not liable because the permittee has gone beyond the scope of consent. But even in this situation perhaps


16. 229 Minn. 428, 89 N.W.2d 862 (1949).
17. “The word ‘use’ is a term which, in the absence of qualifying words or circumstances, involves a broad consent as to the manner in which a car is to be operated on the highway.” Foster v. Bock, 229 Minn. 428, 433, 89 N.W.2d 862, 866 (1949). (Emphasis added.) From this language, the Foster court infers by negative implication that an automobile owner can limit consent given as to the operation of his car.
18. 270 Minn. at 178, 132 N.W.2d at 797.
19. Id. at 178, 132 N.W.2d at 798.
21. See Souza v. Corti, 22 Cal. 2d 454, 139 P.2d 645, 147 A.L.R. 861 (1943), in which the owner was held liable when a friend of his son was driving the car and the son was not present in the car.
22. See Carlson v. Fredsall, 228 Minn. 461, 37 N.W.2d 744 (1949), where the owner loaned his car to his brother who allowed a third party to use it for his own purposes. The owner was held not liable because the permittee was not in the car, and the use by the subpermittee was foreign to the purpose.
a car owner should be liable for injuries due to negligent operation of his car. Just as in the instant case the father could have known, or should have known, that his daughter might let another person drive, an owner should expect that one who has his consent to operate his car for some specific purpose might deviate from that purpose. The owner is certainly in a better position to provide adequate insurance protection than is the innocent injured party. And since it is the owner who relinquished his car in the first place, perhaps he should be held to an absolute duty to select only competent and responsible parties to drive or use his car.

It would seem, however, that imposing strict liability or absolute financial responsibility on car owners for any negligent operation of their cars, even if outside the scope of consent, would go beyond the language of the present Safety Responsibility Act. Thus, legislative action might well be merited so as to create absolute financial responsibility of auto owners for the protection of the general public.

of the owner. It is not clear which of these two justifications was primary, but the court held that when both were present, the owner was not liable.

24. Arguably, the car owner should not be held liable for the negligence of commercial garages to which he entrusts his car for service or repair. However, cases under a statute similar to Minnesota's have held him liable. Hudson v. Lazarus, 217 F.2d 844 (D.C. Cir. 1954); Jones v. King, 113 F.2d 522 (D.C. Cir. 1940). See also Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 382 (Fla. 1959) (something resembling conversion or theft needed to relieve owner).

25. Although liability insurance is readily available, Minnesota does not require financial responsibility until after a person has had an accident. Drivers' licenses are automatically revoked if the driver does not have liability coverage or cannot prove his financial responsibility by other means after an accident. Liability insurance acquired after the accident does not affect the driver's prior responsibility, of course, but it does serve as one type of proof of future financial responsibility—one of the prerequisites to reissuance of a driver's license. See MINN. STAT. §§ 170.21, .25, .33, .37, .40, .45 (1961).

Notably, most car owners are insured with policies containing an omnibus clause which covers a situation such as the instant case. Although omnibus clauses are given effect, they are not required in policies written in the state. E.g., Travelers Ins. Co. v. American Fid. & Cas. Co., 164 F. Supp. 393 (D. Minn. 1958); Peterson v. Maloney, 181 Minn. 437, 232 N.W. 790 (1930).

XI. TAXATION

A. COURT ATTEMPTS TO CLARIFY UNIFORMITY REQUIREMENTS FOR PROPERTY ASSESSMENTS

Minnesota's statutory system of real estate taxation provides that all taxable real property should be assessed on the basis of its market value.\(^1\) Notwithstanding this seemingly simple requirement of tax assessment, and contrary to the law, tax assessors from the various subdivisions of local government have generally determined the basis for real property taxation by assessing at a fraction of market value. Although subject to the discretion and well-intentioned idiosyncracies of multitudinous local assessing officials,\(^2\) this method has long been condoned by all three branches of state government. Consequently unequal and discriminatory assessment valuations have been established throughout the state. A private remedy is available to correct such inequalities between the taxpayers who must share the cost of government. This remedy, contained in chapter 278 of the Minnesota Statutes, enables individual taxpayers to obtain an equitable adjustment of any unfair valuation by court action and a concomitant recovery of any excess which has been paid.\(^3\)

_Dulton Realty, Inc. v. State_\(^4\) involved a chapter 278 proceeding in which certain owners of real property in the city of Duluth petitioned for property tax refunds. They alleged the existence of discriminatory assessments on their property upon which city, school district, county, and state mill rates had been applied. The city assessing officials had assigned valuations to their properties varying from 68 to 90 per cent of market value. The standard

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1. _Minn. Stat. Ann._ § 273.08 (Supp. 1964) requires the assessors to assess all real property at its "true and full value." This value is defined by _Minn. Stat._ § 273.11 (1961) to be the value attributable to the property if sold on the open market.

2. According to a study made in 1956, there were approximately 2,700 assessing officials in Minnesota. 270 Minn. at 20, 132 N.W.2d at 407, citing _GOVERNOR'S MINNESOTA TAX STUDY COMMITTEE, 1956 REPORT_ 156.

3. _Minn. Stat._ § 278.01 (1961) provides: "Any person having any estate . . . who claims that such property has been partially, unfairly, or unequally assessed . . . may have the validity of his claim . . . determined by the district court of the county in which the tax is levied . . . ." And _Minn. Stat._ § 278.12 (1961) further provides: "If upon final determination the petitioner has paid more than the amount so determined to be due, judgment shall be entered in favor of the petitioner for such excess . . . ."  

4. 270 Minn. 1, 132 N.W.2d 394 (1964).
ratio of valuation generally applied by the city assessor was 30 per cent for residential and 40 per cent for commercial property.\(^5\) In comparison, the prevailing standard ratio in other communities of the county was as low as 20 per cent. The trial court held the assessment valuations placed on petitioners' properties discriminatory and ordered a refund of taxes paid on the portion of any assessment valuations in excess of the 20 per cent county-wide standard. On appeal the Minnesota Supreme Court agreed that the assessment valuations were discriminatory, but held that the standard ratio for determining the amount of refund should have been 30 per cent. The court determined this to be the lowest percentage of market value applied to other property within the city of Duluth.

Prior to 1959 under Minnesota law a taxpayer had no standing to seek judicial relief for discriminatory assessments unless his property had been assigned an assessment valuation greater than its market value, even though other property in the area had been assigned valuations which were considerably less than market value.\(^6\) In the 1959 decision of *Hamm v. State,*\(^7\) however, the Minnesota court overruled this principle. It held that unconstitutional discrimination exists, for which judicial relief may be granted, whenever properties within a taxing district have been assigned valuations at substantially different rates, regardless of whether any valuations were in excess of market value.\(^8\) However, *Hamm* did not determine what constitutes the "taxing district" throughout which valuation rates must be uniform, nor did it resolve the issue of the measure of relief to be granted in a chapter 278 pro-

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5. In fact, most Duluth property has not been assessed on the basis of a standard ratio of market value. This method was introduced in 1956 and has since been applied only to newly assessed properties. Before 1956 properties were assessed by a comparison with similar properties in the same area already having an assessment valuation. This method of assessment was mainly reponsible for the unequal treatment of properties in Duluth, including that in the instant case. See Record, pp. 29-32, 104-05, 110-11, 157-60.


7. 255 Minn. 64, 95 N.W.2d 649 (1959).

8. In overruling the *Cudahy* decision, the *Hamm* court reasoned that such a rule violates both the equal protection clause of the United States Constitution and *Minn. Const.* art. 9, § 1, which provides that taxes "shall be uniform upon the same class of subjects . . . ." In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1922), the United States Supreme Court held that where plaintiff's property was assessed at 100% of its market value while other property in the county was assessed at 55%, the plaintiff was being unconstitutionally discriminated against.
ceeding. *Dultan* is the first case in which the court expressly considered these issues.⁹

In holding that the appropriate taxing district throughout which assessment valuations must be uniform is the local governmental unit, i.e., the city, town, etc., the court differed with the trial court's determination specifying the county as the appropriate unit. The trial court reasoned that neither the legislature nor the supreme court expressly established the proper unit. The facts that the counties are responsible for coordinating assessments, for compiling the composite mill rate from the component mill rates of the local units, and for collecting taxes suggest them as the appropriate taxing districts.¹⁰ In rejecting this reasoning the court argued, in the absence of statutory authority designating the county as the proper unit, the local municipal unit is more appropriate since county coordination of assessments does not extend to cities of the first class.¹¹ Further, while cities, villages, and towns are referred to as taxing districts in various statutes, nowhere is the county referred to as such. Accordingly the court ordered a refund of taxes based on the amount of assessment exceeding the "lowest percentage . . . applied to other property within . . . Duluth . . . which the record indicates was 30 percent."¹²

The court's use of 30 per cent as the lowest percentage of valuation applied to Duluth property is somewhat confusing, since the record apparently indicates that during the two years in question some properties within the city were valued as low as roughly 3 per cent of their market value.¹³ The 30 per cent figure is thus apparently the lowest percentage *regularly applied* to an appraised value, rather than the lowest percentage of market value at which *any* property in the city had in fact been assessed.¹⁴

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⁹. The court also considered the question whether assessors have the authority to create classifications of property to which they can apply different percentages of market value. The court held that such classifications could not be undertaken in the absence of legislative authority. 270 Minn. at 22, 132 N.W.2d at 409.

¹⁰. Record, pp. 231-33.

¹¹. See 270 Minn. at 17-18, 132 N.W.2d at 406.

¹². 270 Minn. at 21, 132 N.W.2d at 408.

¹³. During a 1960 reassessment conducted in a certain area of Duluth, it was necessary to raise the assessment of some property as much as 1400% in order to reach the standard rate. Record, p. 152. Consequently during 1958-59 this property must have been assessed at approximately 3% of market value.

¹⁴. See Record, pp. 115-16.
Assuming the court was aware of these facts, it would seem there is only one way to interpret its measure of relief. That is, when the court granted relief measured by the "lowest percentage applied to other property," it meant only a percentage applied by assessors to an appraised value, and not the lowest percentage of market value at which property had been assessed under the prior method. Indeed, this interpretation would be consistent with the court's concern about the threat of financial chaos to various governmental units. Moreover, this interpretation is consistent with the measure of relief granted by other courts which have been confronted by similar situations.

It would seem reasonable to infer, however, that the court was unaware of any valuation lower than 30 per cent since it considered 30 per cent to be the lowest valuation at which any Duluth property actually had been assessed. Moreover, use of the lowest percentage regularly applied would be directly contrary to the court's analysis in the Hamm decision. In Hamm the court concluded that discriminatory and unconstitutional taxation exists whenever property other than the petitioner's has been valued at a substantially lower percentage, even though petitioner's property has not been valued above the average.

15. The fact that 80% was not the lowest percentage at which property had been assessed can be found in Brief for Respondent, pp. 10–11.
16. 270 Minn. at 21, 132 N.W.2d at 408. (Emphasis added.)
17. See note 5 supra, for a brief discussion of two different methods of assessing property.
18. In favoring the city over the county as the taxing district, the court cautioned,

to now adopt the lowest percentage of market value used by any assessor in St. Louis County as the basis for equalization of the taxes levied on property within the city of Duluth... most certainly would result in a chaotic situation as to revenues required for the operation of various units of our state government.
270 Minn. at 21, 132 N.W.2d at 408.

The court also cited Southern Pac. Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963), in which a railroad, whose property was assessed at a greater percentage than average, was denied a refund for the sole reason that to grant such a refund would cause financial ruin to certain governmental units. See 270 Minn. at 21 n.20, 132 N.W.2d at 408 n.20.


20. Nowhere in Dulton does the court mention that some property in Duluth had been assessed at less than 30%. Indeed, the court stated that within the city of Duluth "assessors arbitrarily based their appraisals on percentages of market value ranging between 30 per cent and 90.3875 percent thereof..." 270 Minn. at 21, 132 N.W.2d at 408.

21. Notably, no other courts have been as generous in granting relief as
Where wide differences exist in the valuation rates of a taxing district, perhaps *Dutton* will provide the necessary impetus for local assessors to raise valuations which are substantially lower than the regularly applied rate. If local assessing officials fail to act, however, the resulting flood of refund petitions could result in a significant loss of tax revenue and a corresponding period of financial uncertainty.\(^{22}\) For example, adoption of the 3 per cent valuation indicated by the record in the instant case would probably entitle nearly every Duluth taxpayer to a tax refund.

If in a future case the court is confronted with the problem of whether to grant complete relief to a petitioner who alleges that other property in his taxing district is valued much lower than the ratio generally applied, the following solution is suggested. The court can require relief to be based on such a low valuation unless within a certain time period the assessing officials raise the valuation of the substantially undervalued properties to the percentage level regularly applied.\(^{23}\) If the local assessors were to respond by conducting such a revaluation, relief could justifiably be based upon the usual percentage of valuation. This solution would tend to eliminate the discriminatory effect of very low valuations without precipitating a flood of petitions for tax refunds.

Because school districts in many areas of the state overlap county lines, and municipalities often lie within more than one county, the court pointed out that designating the county as the taxing district would lead to inequality between residents of the same local district who live in different counties. The court recognized, however, that its decision to use the municipality as the

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22. By the middle of 1965 almost 300 petitions had already been filed in Hennepin County alone, many by large taxpayers. Minneapolis Star, June 2, 1965, p. 1A, col. 3. In Duluth alone the cases awaiting disposition could mean refunds of more than $1,000,000. Minneapolis Star, Jan. 26, 1965, p. 3A, col. 3.

23. Support for this solution can be found in the dicta of Township of Hilsborough v. Cromwell, 326 U.S. 620, 623 (1946), where the Court stated:

The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination.
taxing district may also be somewhat inequitable. 24 Perhaps the method employed by the supreme court is better than that of the trial court since normally municipal and school district mill rates are a substantially larger percentage of the composite mill rate than is the county mill rate. 25 But the court's method of equalizing valuations inherently remains inequitable in reference to the portion of tax assessment which applies to county taxes. Thus, neither the arguments for the city nor for the county as taxing district are entirely convincing.

Nevertheless, the court rejected an amicus curiae proposal which it conceded to be a sound recommendation that "would lessen many of the difficulties and much of the confusion now present in the matter of tax equalization . . ." 26 This proposal would treat each taxing district as a separate unit for purposes of applying an assessment valuation, and correspondingly would compute the amount of tax for each unit separately. Thus, if the total tax consists of levies by more than one taxing district, the mill rate of each district would be applied to the lowest assessment valuation prevailing in that district. 27 The court rejected

24. See 270 Minn. at 17, 21–22, 132 N.W.2d at 406, 408.
25. In Dulton the boundaries of the city and school district coincided, and the assessments for these two units constituted approximately three-fourths of the tax levy. In a case involving the assessment of rural property, however, using the township rather than the county as the taxing district might result in equal assessments for only a small percentage of the entire levy.
26. 270 Minn. at 23, 132 N.W.2d at 409.
27. A detailed explanation of this proposal can be found in Brief for Harry C. Hamm as Amicus Curiae, pp. 12–17, Dulton Realty, Inc. v. State, 270 Minn. 1, 132 N.W.2d 394 (1964). It is summarized by the court as follows:

In a proceeding brought under Minnesota Statutes c. 278 where the total tax imposed upon the property subject to the petition consists of a levy by more than one taxing district the levy by each such taxing district for the purposes of the proceeding shall be treated as a separate tax and the amount of each computed separately. If it is found that there has been discrimination against petitioner with respect to any such tax the amount of such tax to be imposed upon petitioner's property with respect to such taxing district shall be determined in the following manner regardless of whether such taxing district includes property in one or more assessor's districts: The amount of the tax to be imposed upon petitioner's property for each such taxing district shall be ascertained by applying the mill rate used by the county auditor with respect to the taxes levied by such taxing district for the year in question to an assessed value of petitioner's property determined by first applying the lowest standard of assessment (regardless of kind or class of property to which applicable) prevailing in the taxing district, or, if there is no standard of assessment prevailing in such district, then the lowest ratio of assessment applied to property of any kind or class
this apparently sound remedial solution because it felt such a solution could not be adopted without specific legislative authority. Since it would seem that the court has the power to formulate whatever remedy is appropriate to afford the most equitable relief, perhaps this rejection was unnecessary. Indeed, this is the traditional role of an equitable proceeding. Since, as the court expressly stated, statewide uniformity is contemplated by constitutional law, the use of either the city or the county as the taxing district will not provide as high a degree of tax equalization as can be effected by the proposal of the amicus curiae. Furthermore, such designation of the city, county, or any other local governmental unit is without express legislative authority. It would seem that if the court could designate the city or county as the proper taxing district, it could properly have adopted the proposal of the amicus curiae. The court did not have to legislate to accept this proposal. Rather, it only had to define a case by case method for computing relief which would most effectively eliminate discriminatory valuations. In fact, the proposed

in said district to the market value of petitioner's property, and by then applying thereto the class rate required by § 272.13, Minnesota Statutes. The judgment entered shall show the total tax to be imposed upon petitioner's property and if the total tax consists of levies by more than one taxing district, it shall show the tax to be imposed upon petitioner's property as determined by the court separately for the levy of each such taxing district.

270 Minn. at 22-23 n.21, 192 N.W.2d at 409 n.21.

For purposes of illustrating this formula, assume that it is being applied to a piece of Duluth property worth $10,000 which is being assessed at 40% of full and true value.

**Full and true value by school and city district standards:**

| i.e., 50% of market value (.50 x $10,000) | equals $3,000 |
| Assessed value for city and school levies: |
| i.e., 40% of full and true (.40 x $3,000) | equals $1,200 |

**Full and true value by county district standards:**

| i.e., 20% of market value (.20 x $10,000) | equals $2,000 |
| Assessed value for county and state levies: |
| i.e., 40% of full and true (.40 x $2,000) | equals $800 |

A literal interpretation of this formula would require the state levy to be applied to a statewide ratio rather than to the countywide ratio. The state mill rate, however, is such a small part of the whole levy in the instant case that it can be considered de minimus. See Brief for Harry C. Hamm as Amicus Curiae, supra p. 16.

28. 270 Minn. at 17, 182 N.W.2d at 406.

29. Ops. MN. ATT'Y GEN. 4 (Feb. 25, 1965) states the courts should only grant relief to taxpayers on a case by case basis. The amicus curiae proposal was precisely such a method. The court was asked only to use the proposed
method is arguably already supported by judicial authority.\textsuperscript{30}

The court’s plea for legislative action\textsuperscript{31} seems to indicate an awareness that its remedy in the instant case will not entirely eliminate the “confusion and inequality now present.”\textsuperscript{32} Since the legislature has failed to respond to the court’s plea for action, it is hoped that when a similar case arises in the future, the court will grant a more complete remedy such as that proposed by the amicus curiae.

**B. Determination of Unitary, Multistate Business for Purposes of Net Income Tax Allocation**

Minnesota, like other states, has encountered inherent difficulties in attempting to tax business profits on the basis of income producing activities carried on or conducted by a taxpayer within the state.\textsuperscript{1} If a trade or business is conducted wholly within the formula as a means of computing relief for the individual petitioners, not to establish it as a basis for levying taxes.

\textsuperscript{30}

Generally the nature of the case will itself conclusively fix the tax district. For example, if the tax is to pay general state expenses, the whole state will be the taxing district. If it be to pay the general expenses of a county or city, the whole county or city, respectively, will be the taxing district . . . . Taxing districts may be as numerous as the purposes for which the taxes are levied; and it is not essential that the political divisions of the state shall be the same as the taxing districts, but special districts may be established for special purposes, wholly ignoring the lines of the political subdivisions of the state. It is compulsory that these political subdivisions shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity.


\textsuperscript{31}

The Dulton court suggested that the legislature could enact a statute specifying a definite number of years during which assessing officials would be required to use a fixed percentage of market value and after which they would be required to use 100\% of market value. 270 Minn. at 21–22, 132 N.W.2d at 408. Bills were introduced in the legislature in response to the court’s urging, but none of them passed. See Minnesota Taxpayer’s Ass’n Legis. Bull., April 26, 1965, at H5-H7 & S7.

\textsuperscript{32}

state, income derived from it is assigned to Minnesota under Minnesota Statutes section 290.17(3) (1961). If the business is wholly without the state, income is assigned to other states. If, however, a trade or business is carried on partly within and partly without the state, income taxable to Minnesota is determined by subtracting allowable deductions from the gross income of the business, wherever derived, and apportioning the remaining net income on the basis of statutory formulas prescribed in section 290.19(1). These formulas are based upon three factors — the ratios of property, payroll, and sales within Minnesota to total property, payroll, and sales. It is further provided that an improper reflection of income assignable to Minnesota under the three-factor formulas may be corrected by use of a single factor formula based on gross receipts or the separate accounting method. The prescribed methods shall apply "wherever and in so far as the business carried on within this state is an integral part of a business carried on both within and without this state."

With respect to multistate businesses, problems arise in determining whether the Minnesota taxpayer is conducting separate and distinct businesses wholly within and wholly without the state, or whether he is conducting a single business partly within and partly without the state. The potential impact of this determination upon a taxpayer is readily apparent. If the profitability of his Minnesota business activities varies substantially from the profitability of his operations as a whole, income taxable determined by use of the three-factor apportionment formula will vary accordingly from taxable income determined by use of separate accounting.

Application of these statutory provisions has turned on the question of whether the taxpayer is conducting a "unitary business," in the sense that "operations conducted in one state benefit and are in turn benefited by the operations conducted in another state or states." This question was considered by the Minnesota

Historically, the unitary business concept developed in response to assertions that states, by apportioning the net income of multistate businesses, were attempting to tax extraterritorial values in violation of the due process clause. It was first applied to railroads on the basis of the physical unity evidenced by
court in two recent decisions involving multistate businesses.

In Maurice L. Rothschild & Co. v. Commissioner of Taxation, taxpayer operated three department stores in Illinois and three in Minnesota. The Minnesota stores had their own purchasing office and merchandise managers and buyers, and each store handled its own merchandising, accounting and personnel problems. However, the management of the Illinois and Minnesota stores frequently consulted on overall policy and the movement of items of merchandise. Slow moving items occasionally were shipped to other stores for faster disposition. All stores carried the same basic lines of men's and women’s clothing and men’s shoes, and no brand name was changed without approval of all the officers. The Minnesota Board of Tax Appeals found that volume purchasing benefited each store through price concessions, faster service on reorders and greater advertising allowances by the manufacturer. These factors, plus unity of ownership, were held sufficient to sustain the Board’s finding that taxpayers operated a unitary business subject to income apportionment.

The Rothschild decision extends the unitary business concept beyond its previous reach in Minnesota. In prior cases relied upon by the court, benefits from centralized organization were more apparent. For example, in Walgreen Co. v. Commissioner of

continuous track. See Norfolk & Western Ry. v. North Carolina, 297 U.S. 682 (1936); Pittsburgh, C., C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894); State Railroad Tax Cases, 92 U.S. 575 (1875). Express and steamship companies were brought within the unitary business rationale on the theory that there was a unit of use. See, e.g., Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897). Later, under the theory that there is a “going concern value attributable to the high rate of return earned by reason of central ownership and management,” Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn. L. Rev. 851, 863 (1941), the net income of firms engaged in manufacturing and selling was apportioned on the basis of factors such as property, sales, and payroll, e.g., Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920). Finally, centralized wholesale and retail sales activities were considered unitary businesses subject to income apportionment. This result was justified on the ground that sales in each state contributed to the firm’s net income through price concessions attributable to volume purchasing. See, e.g., Butler Bros. v. McColgan, 315 U.S. 501 (1942); Walgreen Co. v. Commissioner of Taxation, 258 Minn. 522, 104 N.W.2d 714 (1960). Thus, even where sales in a single state are made at a loss, the propriety of apportioning net income may not be impeached by reference to separate accounting principles. See Butler Bros. v. McColgan, supra.

6. 270 Minn. 245, 133 N.W.2d 524 (1965).
the taxpayer operated a nine-state retail drugstore business with a central office in Chicago. It also had centralized facilities for warehousing, personnel training and accounting. In Western Auto Supply Co. v. Commissioner of Taxation, taxpayer operated 257 retail stores in thirty states and the District of Columbia, with centralized management offices, purchasing and personnel departments, and warehouse facilities. These cases, unlike Rothschild, can be considered within the rationale of Butler Bros. v. McColgan. There the United States Supreme Court stated, with respect to a corporation operating wholesale merchandise stores in several states: "the operation of a central buying division alone demonstrates that functionally the various branches are closely integrated."

Whether the functional integration cited in Butler Bros. was keyed to centralized organization of the firm, it seems clear that the Minnesota court correctly read the case for a broader proposition. The significant point is, absent proof to the contrary, a state is justified in assuming that sales at each branch store contribute to cost savings, and hence to total income since more favorable prices are likely to be obtained by purchasing for all stores in the chain than by purchasing separately for the account of any one branch. Since this saving may be effected with or without centralized facilities, a state need not key its test of unitariness to the firm’s physical organization. It may look instead for economic evidence of mutual interdependence and benefit.

In Skelly Oil Co. v. Commissioner of Taxation, taxpayer was 7. 258 Minn. 522, 104 N.W.2d 714 (1960).
8. 245 Minn. 346, 71 N.W.2d 797 (1955).
10. Id. at 508. In Butler Bros., taxpayer attacked the constitutionality of California’s allocation of income on the ground that it “attributed to California income derived wholly from business done without that State.” Id. at 504. The Court responded by stating that “unity of use and management of a business which is scattered through several States may be considered when a State attempts to impose a tax on an apportionment basis.” Id. at 508. The facts supporting the finding of unitariness in Butler Bros. are relevant to the question of statutory interpretation raised in Rothschild because the same issue of unitariness is posed by the Minnesota statute. The Minnesota court has not taken the position that the taxing statute is coextensive with the limits of state power to tax under the due process clause of the fourteenth amendment. See Skelly Oil Co. v. Commissioner of Taxation, 269 Minn. 351, 131 N.W.2d 632 (1964).
11. 315 U.S. at 508–09.
12. 269 Minn. 351, 131 N.W.2d 632 (1964).
engaged in two activities—the production, which included the gathering and sale of crude oil and natural gas, and manufacturing, which included the refining of crude oil and the marketing of resulting refined products and related accessories. Only refining and marketing activities took place in Minnesota. Taxpayer's production and manufacturing departments were operated independently, although both were serviced by its administrative departments. Most of the production department's crude oil was sold to other refiners, and most of the manufacturing department's crude oil came from other producers; less than ten per cent of the crude oil produced by the taxpayer found its way into pipelines servicing taxpayer's refineries. Transfers of crude oil from the production department to the manufacturing department were recorded by the taxpayer at posted field prices, which were found to be bona fide competitive prices not subject to manipulation.

The Board of Tax Appeals found that taxpayer's business of producing was separate from that of manufacturing, but determined that the businesses were integrated "to the extent that production goes into marketing activities . . . ." Accordingly, the Board's order included in income subject to apportionment by Minnesota that portion of production income represented by the ratio of crude oil transferred to taxpayer's refineries to total sales of crude oil. The Minnesota Supreme Court reversed, holding that the Board's finding that the two businesses were separate precluded apportionment of any production income to Minnesota.

The Skelly decision proceeded from a more mechanical inquiry than that required by the mutual benefit test. A unitary business, the court reasoned, could only be understood to mean a single business, and this could not be the case in light of the finding that production and manufacturing were separate businesses. The court emphasized taxpayer's assertions that "production income was 'fully earned' at the point where the crude oil was available for sale or transfer at a posted field price" and that this income was "neither more nor less than what it would be if Skelly had no refineries . . . ."

The same assertions might be made with respect to a firm which transferred all crude oil produced by it to its own refineries, yet the customary practice would be to consider such a firm

13. Quoted id. at 362, 131 N.W.2d at 640.
14. Id. at 370, 131 N.W.2d at 644.
15. Id. at 370-71, 131 N.W.2d at 645.
16. Id. at 373, 131 N.W.2d at 646.
unitary for purposes of allocating income.\textsuperscript{17} The Board's order, therefore, appears to recognize this practice and the statutory language applying apportionment "wherever and in so far as the business carried on within this state is an integral part of a business carried on both within and without this state."\textsuperscript{18}

In defense of the \textit{Skelly} decision it may be argued that the need for income apportionment is lacking where the price of products sold by the manufacturing department can be allocated between production and manufacturing by reference to a posted competitive price for the crude oil. In other words, the competitive price structure for crude oil in \textit{Skelly} facilitates separate treatment of production and manufacturing income, although it does not compel such treatment. Further, by excluding production income from income apportionable to Minnesota, the court may have avoided problems of multiple taxation.\textsuperscript{19} Its decision also may have the salutary effect of simplifying tax reports, thereby alleviating another of the major burdens upon businesses subject to taxation by several states.\textsuperscript{20}

Reading the \textit{Skelly} and \textit{Rothschild} decisions together, it would appear that the court has placed itself in the somewhat anomalous position of demanding stronger proof of vertical business integra-

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18. MINN. STAT. § 290.19(2) (1961). (Emphasis added.)

19. Producing states imposed taxes on \textit{Skelly}'s entire production income earned within their borders as measured by the posted field prices. 269 Minn. at 358, 131 N.W.2d at 637. Although overlapping measures of net income may not invalidate state taxes, see Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461–63 (1959); Note, 75 HARV. L. REV. 953, 1013–15 (1962), Minnesota's failure to tax production income takes into account the reality of taxpayer's situation.

20. See Northwestern States Portland Cement Co. v. Minnesota, \textit{supra} note 19, at 474 (Frankfurter, J., dissenting). In \textit{Skelly}, for example, evidence indicated that the posted field prices were determinative of taxable income in production states, of fair market value for purposes of state severance or production taxes, of allowable depletion deductions under the Internal Revenue Code, and of production shares for royalty owners. 269 Minn. at 358, 131 N.W.2d at 637. Thus the taxpayer's books and records necessarily divided production and manufacturing operations on the basis of the posted field prices. While results of a taxpayer's accounting system may not be used to impeach the validity or propriety of a state's apportionment formula, Butler Bros. v. McCollan, 315 U.S. 501, 507–08 (1942), the burden to a taxpayer of preparing additional records for tax returns may be considered by a court in deciding whether to impose a different accounting system upon the taxpayer.
tion than of horizontal business integration. In the former case unitariness may be based upon some minimal benefit flowing from size, whereas in the latter case physical separation of operations and a well defined standard for determining the profit of each operation likely will preclude a finding of unitariness. This distinction appears to be without merit—particularly if the Skelly rationale is extended beyond the facts of that case to include the more typical forms of vertical integration. First, separate accounting is no more suitable for allocating the income and expenses of a vertically integrated firm whose various activities culminate in the sale of products than it is for allocating the income and expenses of a horizontally integrated firm selling products through several branches. In neither case does separate accounting reflect the value which may be added to each operation or unit by property, payroll, and sales in other areas of the business. Moreover, although the operating experience of various branches of a horizontally integrated firm may fluctuate from year to year, the tax revenues of each state involved are likely to balance over a period of years regardless of the method of apportioning income. Branches of a vertically integrated firm, however, are likely to have permanently different operating experiences. For example, sales operations may be consistently credited with a greater profit than manufacturing operations despite a greater proportionate investment of property and payroll in the latter. Thus, separate accounting will not strike a proper revenue balance between industrial states and market states. To remedy this situation, states should recognize the unitary nature of vertically integrated businesses at least as readily as they recognize the unitary nature of horizontally integrated businesses.


22. In Rothschild the taxpayer contended the Minnesota apportionment formula did not properly reflect income attributable to Minnesota for that year due to an abnormal insurance recovery for a fire in one of the Chicago stores. This abnormal recovery of some $300,000 represented the difference between the actual cost basis used by the negotiators in effecting a settlement with the insurance company for goods damaged and destroyed and the depreciated inventory basis used in taxpayer's accounting system. The court properly held, however, that the test of unitariness is not whether the operating experience of the parts of a business is the same in all places, but whether the parts are of mutual benefit to one another. 270 Minn. at 252-53, 133 N.W.2d at 529. It was further held that the Commissioner did not abuse his discretion in disallowing taxpayer's petition filed pursuant to Minn. Stat. § 290.19(1)(2)(b) (1961)—a relief provision which permits the Commissioner to determine net income by another method if the three-factor formula is
It may be argued that the Skelly decision could be limited in such a way as to minimize the force of the preceding analysis. The more typical forms of vertical integration, such as manufacture, distribution and sale of a line of products bearing the firm's identifying mark at all stages, would be considered evidence of a unitary business, while the Skelly treatment would remain available for firms dealing in succession stages with a completely fungible product bearing no brand identification until final sale, provided the firm's products were used interchangeably with those of competing firms at each stage.

This argument, however, goes only to the issue of administrative convenience. The competitive exchange of products at each stage of operations establishes a convenient standard for determining the profit attributable to each operation, but it does not preclude the possibility that each operation is dependent upon or contributes to the success of other operations. Where a substantial amount of internal dealing takes place between the branches of a firm, the benefits resulting from vertical integration should be considered in determining whether the entire business is unitary.

XII. TORT

A. DEFENDANT'S NOTICE TO MUNICIPALITY SUFFICIENT TO PRESERVE HIS THIRD PARTY CLAIMS FOR INDEMNITY OR CONTRIBUTION

Two automobiles, each driven by one of the plaintiffs, collided with a truck driven by the defendant. When plaintiffs brought personal injury actions against the defendant, he brought a third party claim for indemnity or contribution against the city of St. Paul. Defendant alleged the city caused the accident by negligently maintaining the highway. Pursuant to a statute governing claims against a municipality, defendant gave the city a written notice of his claim. However, none of the plaintiffs served notice of any claims against the city within the required thirty day period.¹

¹ Minn. Stat. § 465.09 (1961), provides that a plaintiff suing a municipality must give the municipality notice of his claim within thirty days of the alleged loss when claiming damages due to a defect in certain publicly main-
At trial the city was granted summary judgment on the ground that the relevant statutory notice requirement had not been satisfied. On appeal the Minnesota Supreme Court reversed, holding defendant’s notice was sufficient to preserve his third party claim for indemnity or contribution against the city. *White v. Johnson*, 137 N.W.2d 674 (Minn. 1965).

The majority did not squarely face the initial question of whether the contents and form of the notice given by the defendant was legally sufficient. The dissent argued that this notice, since it expressly claimed damages only to the defendant, failed to notify the city of the plaintiffs' damages. Because the plaintiffs' claims were the only ones relevant to the issues of contribution and indemnity, the dissent argued, the notice was insufficient as a matter of law. The purpose of the statute was not fulfilled if the form of this notice in fact deprived the city of the knowledge and opportunity to adequately investigate the accident within a short time after its occurrence. In such a case, the position of the dissent is quite persuasive. Without specifically answering the dissenting argument, the majority assumed that defendant's notice to the city was sufficient as a matter of fact. The court drew the inference that defendant had complied with the statute since the case was an appeal from a summary judgment in favor of the city.

The city argued it was not liable in contribution or indemnity because it was not “jointly liable” to plaintiffs. Absence of joint liability was alleged to be due to plaintiffs' noncompliance with the notice statute. This statutory defense, reasoned the city, precluded defendant from maintaining his claim for indemnity or contribution. The Minnesota Supreme Court rejected the city’s contention for two reasons. First, the court held that any negligence by the city created immediate liability toward the plaintiffs at the time of the accident. Thus plaintiffs’ failure to notify the city would not bar defendant’s claim, if defendant had in fact

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2. *187 N.W.2d* at 681 (dissenting opinion).
3. “The purpose of the statute is to enable the municipality to promptly investigate, while witnesses are available and before conditions have changed, to ascertain the existence and extent of any liability in order to prevent needless litigation by settlement of meritorious claims.” *137 N.W.2d* at 680.
4. *137 N.W.2d* at 678.
given timely notice. Second, the court held the city owed the defendant an independent duty to keep its highways safe, if on the the facts of the case an indemnity situation existed. Further, if defendant suffered a loss from a breach of this duty, he would have an actionable indemnity claim against the city, regardless of the nonexistence of joint liability to the plaintiffs in the main action.

The roots of contribution and indemnity lie in the equitable principle that no tortfeasor should pay more than his just share of a liability. That principle should control White, provided the city received the protection of adequate statutory notice. If the alleged negligence of the city concurred with that of the defendant to cause plaintiffs' injuries, contribution seems appropriate.

The major significance of White lies in the holding that even though the plaintiffs failed to notify the city, the city could still be liable to the defendant for a claim of contribution. Notwithstanding the fact that the city had a defense against a direct action by the plaintiffs, the court felt there was still joint liability at the time of the accident. The court distinguished American Auto. Ins. Co. v. Minneapolis, where neither the plaintiff nor the defendant notified the third party municipality of a claim against it and, therefore, the defendant could not maintain a third party claim for indemnity. If it is assumed, as the court did, that the notice in White was sufficient, that case is clearly distinguishable. In American Auto. Ins. Co. the concerned municipality received no timely notice whatsoever, whereas in White the city actually received notice from the defendant within the statutory limit. If the defendant gave the city adequate notice under the statute, the city received all the protection it was entitled to. Thus the purpose of the statute was fulfilled.

Although from a policy standpoint the distinction between White and American Auto. Ins. Co. gave substantial support for a different result in the two cases, a conceptual problem posed greater difficulties. The court was understandably reluctant to abandon the long-established requirement that joint liability is a prerequisite to contribution. On initial reaction, it seems there is no joint liability in White because the plaintiffs lost their claims

5. Drawing inferences in favor of the defendant, the court found that a possible claim for indemnity existed. 137 N.W.2d at 678.
6. See id. at 677; Note, Contribution and Indemnity Among Tortfeasors in Minnesota, 37 MINN. L. REV. 470 (1953).
7. 259 Minn. 294, 107 N.W.2d 320 (1961).
8. See 137 N.W.2d at 679-80, where the court discusses the nature and purposes of this notice statute.
against the city by failing to give notice. The court solved this dilemma by broadly defining the concept of joint liability. While the dissenting opinion stressed that joint liability means a plaintiff must have an enforceable cause of action against both tortfeasors, the majority distinguished "cause of action" from "liability." They indicated the former includes that which is necessary to enforce a claim through the courts; the latter, in contrast, "arises the moment the tort is committed . . . ." Thus, procedural and mechanical requirements necessary to prevail in court, such as the notice requirement in the White case, are not necessary for the existence of liability — at least as this term is used in the context of contribution litigation. Under such a standard, American Auto. Ins. Co. and White are not conceptually inconsistent. In American Auto. Ins. Co. joint liability may have existed. However, both the defendant and the plaintiff had lost their causes of action against the third party municipality since both had failed to notify the municipality of their claims. In White, only the plaintiffs' causes of action were lost.

The court refused to accept the city's contention that its defense against a claim by the plaintiffs barred defendant's contribution claim in a manner analogous to the bars on contribution stemming from personal defenses such as family immunities or employers' immunity under Workmen's Compensation Acts. The court simply stated that such immunities are based on "special relationships" which must be protected.' The court thought that protection for such relationships is necessary because they are "based upon well-established public policies, none of which is possessed by the city in this case." Certainly no special relation-
ship existed between the city and the plaintiffs which should preclude defendant's contribution claim. While there may be an important policy behind requiring notice to municipalities, the majority assumed this policy was met in the instant case by defendant's notice, at least for purposes of testing a summary judgment.

In reaching its alternative holding that the defendant might have an indemnity claim against the city, the court looked to established doctrines of indemnity. One of the several factual situations giving rise to indemnity occurs when the indemnitee's only negligence consists of the failure to discover the indemnitor's negligence. The court felt such a situation might have existed in the instant case. Moreover, the concept of joint liability presented little difficulty with respect to the issue of indemnity. Even in the absence of joint liability, the city could have breached a duty owed to the defendant which was "independent of any duty owed to plaintiffs." Lunderberg v. Bierman illustrates this independent duty principle in indemnity cases. There the defendant had entrusted her automobile to a garage owner for a mechanical checkup. While conducting a road test, an employee of the garage owner negligently operated the automobile, causing personal injuries to the plaintiff, another employee of the garage owner. Plaintiff sued defendant, the owner of the automobile who was liable under the safety responsibility act. Defendant in turn brought a third party complaint against the garage owner. There was no joint liability because the garage owner was immune from suit by the plaintiff under the Workmen's Compensation Act. Notwithstanding the absence of joint liability, the court held defendant was entitled to indemnity because the garage owner owed her an independent contractual duty to exercise due care while having custody of her car. The garage owner breached this duty when his employee negligently operated defendant's car and

Koenigs court indicated family harmony and affection were to be preserved even though the parties were not married until after the accident. In relying on Koenigs, the White dissent apparently rejects the majority's distinction between the White situation and the situation where a "special relationship" immunity exists.

15. See Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960), for a recent and comprehensive list of factual situations where indemnity is appropriate.

16. 137 N.W.2d at 680.

17. 241 Minn. 349, 63 N.W.2d 355 (1954).
caused the defendant to be liable for damages to the plaintiff. Although in most cases the "independent duty" refers to a duty imposed by contract or statute, there is no apparent reason to distinguish those duties from a tort duty such as existed in White.

The net result of White appears to be a broadening of both contribution and indemnity. The court's view of "joint liability" as the immediate wrongful acts giving rise to a claim, without the necessary procedural trappings to complete the technical cause of action, will probably save some worthy contribution claims which might otherwise be lost by failure of the plaintiff to technically perfect his cause of action against the third party tort-feasor. Additionally, the application of the independent duty principle to indemnity situations can be based on a tort duty between the indemnitor and the indemnitee.

B. PROTECTION OF LEGAL INTEREST IS DEFENSE TO SUIT FOR INTERFERECE WITH PROSPECTIVE ADVANTAGE

Plaintiff, a radio disc jockey, had been an employee of the defendant station owner. The employment contract contained a restrictive covenant providing that plaintiff, Bennett, could not, for a period of eighteen months after termination of the contract, seek employment with any radio station within a thirty-five mile radius of any city in which defendant, Storz Company owned or operated a broadcasting station. After Bennett's original contract had expired, the defendant offered to rehire him at a reduced salary. Bennett refused the offer and began employment negotiations with a competitor of defendant. Storz Company threatened


19. Even though the city owed defendant a duty to maintain its streets with due care, indemnity does not necessarily follow. Defendant's negligence must have been "passive," i.e., very slight, in comparison to the "active" negligence of the city. Unless the facts of a given case fall within this "active-passive negligence" dichotomy, indemnity will not be granted.

If the relative culpability between tortfeasors is such that indemnity is inappropriate, the independent duty principle does not apply to a claim for contribution; joint liability is always a necessary requirement. See Employers Mut. Liab. Ins. Co. v. Griffin Constr. Co., 280 S.W.2d 179 (Ky. 1955); Hendrickson v. Minnesota Power & Light Co., 253 Minn. 368, 104 N.W.2d 843 (1960); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 855 (1954); Annot., 53 A.L.R.2d 977 (1957).
to sue the competitor if they hired Bennett. KSTP withdrew from employment negotiations with the plaintiff. Bennett then brought suit alleging tortious interference with contractual relations. The trial court granted defendant's motion for summary judgment, holding that the presence of the restrictive covenant justified the defendant's conduct as a matter of law. On appeal, the Minnesota Supreme Court reversed, holding that the existence of a prima facie valid restrictive covenant in an employment contract could not, as a matter of law, justify interference with prospective advantageous relations. The court found that defendant's interference could be justified only if, in the opinion of the jury, the covenant was legally enforceable; and if the defendant had acted in good faith to protect its interest. The court indicated that the test of validity was the striking of a reasonable balance between the interests of the employer and the employee, with due regard being given to the nature of the employment and to the time and territorial extent of the restriction. Bennett v. Storz Broadcasting Co., 270 Minn. 525, 134 N.W.2d 892 (1965).

A person has a right to be secure in his contractual relations and to be free from unjustified outside interference. A similar right exists when the interference is with some prospective advantage other than that created in an existing contract. A defendant claiming justified interference has the burden of proving that he acted to protect some legal right equal or superior to the one he invaded. Even when such a right exists, the defendant must act in good faith — there can be no justification if the interference is motivated primarily by a desire to injure a competitor. Thus, when the court in Bennett speaks of "lawful justification" as being a jury question, the factual issue to be decided is whether the defendant's actions were justifiable if the restrictive covenant were valid.

4. Twitchell v. Glenwood-Inglewood Co., 131 Minn. 375, 155 N.W. 621 (1915); Heffernan v. Whittlsey, 126 Minn. 163, 148 N.W. 63 (1914); Faunce v. Scarles, 122 Minn. 343, 142 N.W. 816 (1913).

If the defendant's purpose is not legally justifiable, any manner of intentional interference with the plaintiff's interests will be sufficient to impose
The Minnesota court has never decided whether one person has a legal right to interfere with another’s contractual relations merely on the basis of a good faith belief in a previous contract which is later found invalid. However, the weight of authority indicates that a good faith belief in the validity of a contract does not justify such interference. While this has been stated as a general rule in the past, the reasons for it are illustrated best where, as in Bennett, the contract deals with an area in which contractual validity is very carefully scrutinized. Restrictive covenants ancillary to employment contracts have been viewed liability. See Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909). Even when the defendant has acted for a justifiable purpose, he must limit himself to legal means. See Sorenson v. Chevrolet Motor Co., 171 Minn. 200, 214 N.W. 784 (1927).


7. Covenants restricting trade ancillary to a contract of employment are usually distinguished from those accompanying a contract for the sale of a business. Compare Holliston v. Ernston, 124 Minn. 49, 144 N.W. 415 (1918), where an established business was sold with its good will and there was a valid covenant not to compete in a certain territory, “violation of a negative covenant such as this is deemed a sufficient ground for interference and injunctions are freely granted almost as a matter of course . . . .” 124 Minn. at 52, 144 N.W. at 416, with Peterson v. Johnson Nut Co., 204 Minn. 300, 285, 285 N.W. 561, 565 (1939). “[I]rrreparable injury, actual or threatened, must be shown before the employe [sic], who has covenanted not to compete after his term of employment will be enjoined.”

The reason usually given for this difference in the treatment of the two types of contracts is that unless the vendor is prohibited from competing, the vendee will not be able to obtain the full value of the good will he purchased. The good will accruing to an employee is considered merely incidental to his work which is thought to be the thing that the employer has purchased. The courts have also noted the relatively unequal bargaining power of the employer-employee as compared to the vendor-vendee relationship. In addition, an employee usually has no other means of support and thus may become a charge upon the state. See Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945); Swiggert & Howard v. Tilden, 121 Iowa 650, 97 N.W. 82 (1903); Standard Oil Co. v. Bertelsen, 186 Minn. 488, 243 N.W. 701 (1932); Arthur Murray Dance Studios v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 866 (C.P. 1952); cf. Queenan, Taxation of Covenants Not to Compete in the Sale of a Business, 4 Boston College Industrial & Commercial L. Rev. 267 (1962).

There remains, however, a strong minority of courts who refuse to distinguish between the two types of covenants. See, e.g., Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N.W. 412, (1911).
with disfavor by the courts. Such contracts are ordinarily considered contrary to public policy for it is thought desirable that citizens be free to pursue their choice of occupation. To permit a good faith belief in the validity of a restrictive covenant to constitute a defense may effectuate covenants that might otherwise be void. If the threat of suit may be based on a mere good faith belief in the enforceability of a restrictive covenant, a former employer is provided with a means of harassing an employee almost as effective as actual enforcement of the covenant.

Arguably, interference with contractual relations requires a

8. See DiAngeles v. Scuauzillo, 287 Mass. 291, 191 N.E. 426 (1934); Boone v. Krieg, 156 Minn. 83, 194 N.W. 92 (1923); 35 Am. Jur. Master & Servant § 90 (1941). However, equity will protect the employer against certain forms of unfair competition — the former employee may not use trade secrets or confidential information to his own advantage and, in general, may not use good will gained for the employer's business to his own advantage. New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac. 990 (1916); see Equipment Advertiser, Inc. v. Harris, 136 N.W.2d 302 (Minn. 1965); cf. Meyer v. Winburnh, 110 F. Supp. 957 (D.D.C. 1953), "It is not the purpose of injunctive relief to prevent competition of the defendant with the plaintiff. Its purpose is to preserve to the plaintiffs the fruits of the defendant's services, for which he was paid as an employee of the plaintiffs." Id. at 959.

Gibbons v. Hansch, 185 Minn. 290, 240 N.W. 901 (1932), suggests that after a sale of business, the vendor may not "specially" solicit the trade of those who were his old customers. In Sanitary Farm Dairies, Inc. v. Wolf, 261 Minn. 166, 112 N.W.2d 42 (1961), the court stated that in the so-called "route cases," the chief factor in determining to what extent an employee should be allowed to compete is whether his efforts substantially aided in the acquisition of new customers.


10. See National Benefit Co. v. Union Hosp. Co., 45 Minn. 272, 47 N.W. 806 (1891). The origin of this policy can be traced to the master-apprentice system that flourished in England and on the Continent from the 13th to the 16th centuries. A wise master usually tried to protect himself from the competition of an apprentice he had trained and who was familiar with his customers. But when a shortage of skilled workers resulted from the plagues of the 14th century, many masters tried to use covenants not to compete to assure themselves of skilled help by making it virtually impossible for the apprentice to work elsewhere. Suits to enforce such covenants arose in equity since an injunction was the most satisfactory method of enforcement. The courts of equity took a dim view of such procedures, however, expressing the fear that employees so restricted might become a charge upon the state — or be forced to leave the country in search of employment. See Davies v. Davies, [1887] 36 Ch. D. 359 (C.A.); Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 629-37 (1960).
balancing of interests similar to that in an action for malicious prosecution. In the latter case society’s interest in promoting justice allows a party to actually bring suit merely on the basis of a good faith belief.11 This social interest outweighs the expense and inconvenience incurred by the opposing party. One might argue by analogy that there is a strong social interest in allowing a person to notify others of what he reasonably believes to be his rights, and to threaten suit if those rights appear in danger. Allowing the threat of suit to be based on a good faith belief may even obviate the needless expense and inconvenience of actual litigation. An analogy to malicious prosecution in the present context, however, would be improper primarily because an actual suit to enforce the restrictive covenant results in a final decision as to the covenant’s validity, eliminating the danger of continued harassment. Although a former employer may be permitted to sue on the basis of such a mistaken belief, his own expenses and inconvenience incurred in the suit will cause him to evaluate carefully the necessity and practical value of enforcing the restrictive covenant. This deterrent is not present if the employer is allowed merely to threaten suit on the basis of a good faith belief. An employer’s mistaken assertion of his contract “rights” may be tolerated when he pursues a final and binding determination, but it need not be tolerated when he used his “right” to the injury of both the employee and third parties without risk to himself.

The possible unfairness to employees of permitting a good faith belief to justify threat of suit is apparent from Bennett. By the terms of the restrictive covenant, plaintiff was prohibited from competing with defendant regardless of the reason for leaving defendant’s employ. The evidence established that defendant had relegated plaintiff to an inferior position during the period near the contract’s expiration and had refused to exercise the options available under the original employment agreement. The employee did not choose to leave his employment and, practically, employment was no longer open to him. Thus, enforcement of the covenant would have denied plaintiff not only the right to improve his professional status, but also the right to preserve the status he had enjoyed.

If interference will be allowed only if the restrictive covenant is valid, the question then arises as to the standards to be used by the trier of fact to determine the validity of the covenant. Spe-
cifically, the issue is whether the standards of validity of the covenant as a defense to a suit for tortious interference ought to be the same as the standards used when the employer seeks an injunction to enforce the covenant. It may be asking a great deal of a defendant to require him to second guess a jury on a factual question about which reasonable men may differ. In Bennett the court admitted that the defendant had a contract which on its face provided a ground for interference. The validity of the covenant could only be determined by making a reasonable balance between the interests of the employer and employee.

It must be remembered, however, that the reason for requiring

12. The standard for issuing an injunction in Minnesota appears to depend largely upon the existence of damages to the employer. Damages can usually be shown by proof of a close customer-employee relationship upon which the business of the employer depends. See Thermorama Inc. v. Buckwold, 267 Minn. 551, 125 N.W.2d 844 (1964); Shalen v. Stratte, 188 Minn. 219, 246 N.W. 744 (1933); Andrews v. Cosgriff, 175 Minn. 431, 221 N.W. 642 (1938); Granger v. Craven, 159 Minn. 296, 199 N.W. 10 (1924). At least two Minnesota cases, however, have required that the employee be "unique" before injunctive relief will be granted. Several courts in other jurisdictions have criticized the use of such a requirement. See Wark v. Ervin Press Corp., 48 F.2d 153, 155-56 (7th Cir. 1931); accord, e.g., Sarco Co. v. Gulliver, 3 N.J. Misc. 641, 129 Atl. 399 (Ch. 1925), aff'd mem., 99 N.J. Eq. 432, 131 Atl. 923 (Cr. Err. & App. 1926); Foster v. White, 248 App. Div. 451, 290 N.Y. Supp. 394 (1936); Briggs v. Butler, 140 Ohio St. 499, 45 N.E.2d 757 (1942); Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N.W. 412 (1911); Annot., 9 A.L.R. 1456, 1460-63 (1920); cf. McCruer v. Super Maid Cook-Ware Corp., 62 F.2d 426, 429 (10th Cir. 1932); Safro v. Lakofsky, 184 Minn. 336, 238 N.W. 641 (1931).

An injunction is generally considered a very harsh remedy. See, e.g., Standard Oil Co. v. Bertelsen, 136 Minn. 483, 243 N.W. 701 (1932): it appears to be the only satisfactory remedy, although equity jurisdiction would permit the court to grant compensatory damages if necessary. See Wright v. Scotton, 13 Del. Ch. 402, 121 Atl. 69 (Sup. Ct. 1923); Peterson v. Johnson Nut Co., 209 Minn. 470, 477, 297 N.W. 178, 182 (1941); Stofflet v. Stofflet, 160 Pa. 529, 28 Atl. 857 (1894). But see Weatherford Oil Tool Co. v. Campbell, 340 S.W.2d 950 (Tex. Sup. Ct. 1960). Thus it might be concluded that where damages are available the standard for justification might be less stringent.

13. The defendant's belief in the validity of the covenant was probably supported by his earlier successful suit to enforce the same covenant against a Kansas City disc jockey in Storz Broadcasting Co. v. Radio Station KBKC, Inc., No. 29610, D. Johnson County, Kansas, Div. No. 1, 1960.

14. 270 Minn. at 536, 134 N.W.2d at 900.

15. Where the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between the parties, and not specifically injurious to the public, the restraint is reasonable and valid. Williams v. Thompson, 143 Minn. 454, 456, 174 N.W. 307, 308 (1919).
the covenant to be valid is to assure that the employee does not suffer and the employer does not profit unless the employer has an equal or superior protectible interest. If a jury is given standards less than those of enforceability, it is in effect being told that a good faith belief in the enforceability of the restrictive covenant is an adequate defense for interference with other contractual relations. Any standard short of enforceability allows the defense of reliance on an unenforceable contract. It would be anomalous to require a lesser burden of proof to justify interference than to enforce the covenant. Thus, the jury should be asked to decide whether the covenant would be valid and enforceable against the plaintiff. However, the covenant need not be enforceable in toto, but may be restricted in time and space to the extent necessary to protect the defendant's interests without placing an undue burden upon plaintiff or society.

The court in Bennett also required the defendant to act in good faith to protect his own interest and not to destroy plaintiff's employment opportunity. A small right or interest of the defendant increases the likelihood of a jury finding that the Storz Company did not act to protect its rights, while a large interest or right of defendant would have the opposite effect. Yet if any portion of the covenant can be found valid, and the Storz Company is found to have acted to protect its interest, the interference with plaintiff's contractual relations should be justified.

17. When an otherwise valid covenant contains unreasonably extensive restrictions, most courts will enforce a portion of the covenant if the restrictions are severable and some of them are reasonable. See, e.g., Edgecomb v. Edmonston, 257 Mass. 12, 153 N.E. 99 (1926); Indianhead Truck Lines, Inc. v. Hvidsten Transport, Inc., 268 Minn. 176, 128 N.W.2d 384 (1964); Fleckenstein Bros. Co. v. Fleckenstein, 76 N.J.L. 613, 71 Atl. 265 (Sup. Ct. 1909); Spinks v. Riebold, 310 S.W.2d 663 (Tex. Civ. App. 1958); cf. Larx Co. v. Nicol, 224 Minn. 1, 28 N.W.2d 705 (Sup. Ct. 1946). But see WAKE Broadcasters, Inc. v. Crawford, 215 Ga. 862, 114 S.E.2d 26 (1960); Wisconsin Ice & Coal Co. v. Lueth, 218 Wis. 42, 250 N.W. 819 (1933).

It is generally held, however, that when restrictions are not subject to division by the wording of the covenant, the courts will not take it upon themselves to enforce any part of the indivisible unreasonable restrictions. Compare Union Central Life Ins. Co. v. Ballistrieri, 19 Wis. 2d 265, 120 N.W.2d 126 (1963), with Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964). See generally 19 U. MIAMI L. REV. 318 (1965).
18. 270 Minn. at 532, 134 N.W.2d at 897.