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Taxation - Tax Titles - Improper Notice of Expiration of Period of Redemption Under North Dakota Law

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TAXATION—TAX TITLES—IMPROPER NOTICE OF EXPIRATION OF PERIOD OF REDEMPTION UNDER NORTH DAKOTA LAW. In the notice of the expiration of the period of redemption to the former owner of land sold for delinquent taxes, the county auditor included all property taxes plus hail tax assessments levied against the land up to the time of the notice, as a pre-requisite for redemption, whereas only the amount of taxes plus interest and penalty at the time when the land was sold should have been stated. An action to quiet title brought by the former owner for the benefit of his grantee was unsuccessful in the district court, and on appeal to the supreme court it was *held*, that the judgment be reversed. The inclusion of such amounts in the notice of the expiration of the period for redemption vitiated the notice, and the tax deed subsequently issued thereon to the county was void, so that a purchaser from the delinquent taxpayer will prevail over the holder of the county deed. *Morehouse v. Paulsen*, 28 N. W. 2d 608 (N. D. 1947).

That tax redemption statutes will be strictly construed in the interest of the redemptioner has so definitely been determined it no longer remains a matter of issue. *Baeverstad v. Reynolds*, 73, N. D. 603, 18 N.W. 2d 20, 21 (1945); *Trustee Loan Co. v. Millie Botz*, 37 N. D. 230, 164 N.W. 14 (1917); *Martin v. Barbour*, 140 U. S. 634, 35 L. Ed. 546, 11 S. Ct. 944 (1891). The reason for the development of this rule is well expressed in 2 *Blackwell, Tax Titles*, sec. 728 (2d ed. 1898) in which is stated, ". . . the sale of land for taxes is the nearest approach to tyranny that exists in a free government." It must be borne in mind that tax titles are largely governed by the statutes of the several states. The complaint in the case under discussion was not filed in district court until July 17, 1946, approximately five years after the deed was issued to the county. Certain limitation and curative statutes such as N. D. Rev. Code (1943) sec. 57-4511 and sec. 57-2429 have a marked effect upon whether a defect in the notice of expiration of redemption will be fatal to the tax deed. A tax deed void by reason of some *jurisdictional defect* cannot become valid by mere lapse of time. *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049 (1899); *Sweigle v. Gates*, 9 N. D. 538, 84 N.W. 481 (1900); *Power v. Kitching*, 10 N. D. 260, 86 N.W. 737, 88 Am. St. Rep. 691 (1901). The word jurisdictional is not used here in its usual form as pertaining to the power of a court to hear, determine, and enforce a judgment rendering on such hearing. The exact legal significance of the word varies with the circumstances under which it is used, and jurisdictional defect here means the nonperformance of an act by an official of the county in tax sale proceedings which is inherently necessary under due process. The three year limitation of action against tax deeds provided for in N. D. Rev. Code (1943) sec. 57-4511 should have been invoked, therefore, unless the tax deed in this case was void by reason of jurisdictional defects. It has been held that if the required notice of the expiration of the time of redemption was never given, the statute of limitations will not perfect the deed; but, if the notice was in fact given, though the proof thereon made and filed with the treasurer was defective in some particular capable of being cured by amendment, then the statute will apply. *Slyfield v. Healy*, 32 F. 2 (1886); *Saranac Land and Timber Co. v. Roberts*, 177 U. S. 318, 20 S. Ct. 642, 44 L. Ed. 786 (1900). In this state the test as to what constitutes a jurisdictional defect was laid down in the case of *Nind v. Meyers*, 15 N. D. 400, 109 N.W. 335 (1906). There the court said, "The jurisdictional defects, which cannot be thus barred without adverse possession consist of the nonperformance of some of those things which are inherently or consitutionally necessary to the sale. The nonperformance of some act which is not inherently or constitutionally necessary to the right to sell, but which the legislature in its discretion may or may not require, is not a jurisdictional defect as that term is used in construing and applying statutes like sec. 57-4511." But Cf. *Eaton v. Bennett*, 10 N. D. 346, 87 N.W. 188 (1901); expressly overruled in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N.W. 350 (1906). In *Monroe v. Donovan*, 31 N. D. 228, 235, 153 N. W. 461 (1915), although not deciding that precise issue the opinion stated that the

legislature might have, had it desired, omitted any provision for notice of the expiration of the time of redemption, since that was not a constitutional requirement under due process, and it is uniformly held that the legislature has power by a subsequent statute to cure irregularities in tax proceedings, the necessity of which might have been dispensed with or declared immaterial by prior statute. *Saranac Land and Timber Co. v. Roberts*, 177 U. S. 318, 20 S. Ct. 642, 44 L. Ed. 786 (1900); *Shattuck v. Smith*, 6 N. D. 56, 69 N.W. 5 (1896); *Never v. Cornwall*, 10 N. D. 123, 86 N.W. 227 (1901); *Wells Co. v. McHenry*, 7 N. D. 256, 74 N.W. 241 (1898). From what has been stated above, it seems that the defect attacked in the case under discussion was not a jurisdictional one, since if the legislature may dispense with the notice of expiration of the period of redemption entirely, then under the test laid down in *Nind v. Meyers*, 15 N. D. 400, 109 N.W. 335 (1906), it would seem that an error in the notice of expiration of the period of redemption would not be such a jurisdictional defect as is normally necessary to cause the limitation statute to be inoperative. However, in two comparatively recent cases, *Fish v. France*, 71 N. D. 499, 2 N. W. 2d 537 (1942) and *Hodges v. McCutcheon*, 72 N. D. 150, 5 N.W. 2d 83 (1942), which are very similar to the case under discussion here, except that the notice of expiration of the period of redemption included taxes *prior* to the taxes for which the property was sold at the tax sale, instead of subsequent as in the present case, the court held that such a defect would not start the statute running. Upon petition for rehearing the court in the *McCutcheon Case* expressly stated that such a defect which vitiates the notice of expiration of redemption is a jurisdictional defect, and thus left no doubt as to the law in this state.

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TORTS—BREACH OF STATUTORY DUTY—CONTRIBUTORY NEGLIGENCE AS DEFENSE. Plaintiff's husband died of burns received from explosion of gasoline and kerosene mixture sold in violation of a statute enacted for the protection of the public and describing certain precautions to be used in handling and labeling volatile oils distilled from petroleum. In an action by plaintiff for damages for death, the trial court directed a verdict for the defendant oil company. On appeal to the supreme court it was *held*, that the judgment be reversed and a new trial granted. Contributory negligence is available as a defense even though defendant violated a statute. Plaintiff is entitled to new trial of issues raised in view of courts statement of the law on this point. *Dart v. Pure Oil Co.*, 27 N.W. 2d 555 (Minn. 1947).

Broadly speaking, whether contributory negligence is a defense to a statutory tort depends upon the intent of the legislature in enacting the statute; those statutes not permitting the defense are based either upon the principle that certain classes of people are protected because of their inability to protect themselves, Restatement Torts, § 483 (1934), or upon other grounds of public policy. In the first classification are included child labor acts, *Dusha v. Virginia & Rainy Lake Co.*, 145 Minn. 171, 176 N.W. 482, 23 A.L.R. 632 (1920); statutes protecting intoxicated persons, *Mayes v. Byers*, 214 Minn. 54, 7 N.W. 2d 403, 144 A.L.R. 821 (1943); *Hauth v. Sambo*, 100 Neb. 160, 158 N.W. 1036 (1916); and statutes forbidding sale of dangerous articles to minors, *Pizzo v. Wiemann*, 149 Wis. 235, 134 N.W. 899, 38 A.L.R. (N.S.) 678, Ann. Cas. 1913C 803 (1912). Those instances forbidding the defense upon other grounds of public policy include willful violation of safety statutes for protection of employees, *Western Anthracite Coal and Coke Co. v. Beaver*, 192 Ill. 333, 61 N.E. 335 (1901); *Chicago-Coulterville Coal Co. v. Fidelity and Casualty Co. of New York*, 130 F. 957 (C.C.W.D. Mo. 1904); absolute liability of railroads for fires set by its locomotives, *Mathews v. Missouri Pacific Ry. Co.*, 142 Mo. 645, 44 S.W. 802 (1897); absolute liability of railroads for failure to build fences or erect