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Torts - Breach of Statutory Duty - Contributory Negligence as Defense

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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

cattle guards, *Chapin v. Ann Arbor Railroad Co.*, 167 Mich. 648, 133 N.W. 512 (1911); and workmen's compensation statutes which specifically eliminate the defense. At least one case states that, if defendant's violation of a statute imposing both civil and criminal liability amounts to "gross" negligence, contributory negligence is not a defense. See *Ludke v. Burck*, 160 Wis. 440, 152 N.W. 190, 192, L.R.A. 1915D 969, 38 A.L.R. 1425 (1915); Cf. *Pinoza v. Northern Chair Co.*, 152 Wis. 473, 140 N.W. 84 (1913). But it follows that such would be the case only in those few jurisdictions, Prosser, Torts, p. 257 (1941), recognizing degrees of negligence. However, the usually followed canon is that statutes in derogation of the common law are to be strictly construed, and that the intention to exclude the defense of contributory negligence must, therefore, be clearly shown. *Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F. 2d 985 (C.C.A. 9th 1933). Where a certain act or omission is declared illegal by a statute which is silent as to a civil remedy for its violation, all courts seem to hold that, in the absence of defendant's gross negligence or willful injuring, contributory negligence is a defense. *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N.E. 815 (1901); *Thorton v. Cleveland, C.C., & St. L. Ry. Co.*, 131 Ind. 492, 31 N.E. 185 (1892); Notes, 9 L.R.A. (N.S.) 338 (1907), L.R.A. 1915E 500, 5 L.R.A. (N.S.) 186 (1907). The courts are split where the statute, silent as to the effect of contributory negligence, provides that the violator of the duy imposed by it shall be answerable in damages for any injury caused thereby. It is a question of statutory construction, and most cases hold that contributory negligence is a defense. *Schutt v. Adair*, 99 Minn. 7, 108 N.W. 811 (1906); *Morrison v. Lee*, 22 N. D. 251, 133 N.W. 548, 38 L.R.A. (N.S.) 412 (1911).

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