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CONTRIBUTORY NEGLIGENCE AS DEFENSE TO VIOLATION OF STATUTE

By WILLIAM L. PROSSER*

Dart v. Pure Oil Co.[1] is by way of being a celebrated case. After it was once argued before the supreme court of Minnesota, Justice Youngdahl left the bench to become governor. Whether on his departure the court found itself evenly divided as to the disposition of the case, whether its possible implications made the judges desire to be sure of their ground before coming to a decision, or whether there were other reasons for seeking further clarification of the issues, is of course a matter of conjecture. For whatever reason, the court ordered the case rebriefed and reargued, and took the unusual step of inviting three members of the bar of Minnesota[2] to file briefs as amici curiae. As word spread around the state that the decision might be of considerable importance in the field of tort litigation, other attorneys became interested and asked leave to file additional briefs as amici. All such requests were granted, and in the end the court found itself with a large number of friends. Altogether some eighteen individual attorneys and firms[3] appeared in the case.

Its essential facts were quite simple. The defendant Pure Oil

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1. (Minn. 1947) 27 N. W. (2d) 555.
2. Mr. De Parcq, Mr. Mulally, and the writer.
3. The alignment was as follows:

For the plaintiff: Charles T. Wangensteen of Chisholm; David A. Bourgin and Gust A. Koski of Virginia; William H. De Parcq of Minneapolis; T. O. Streissguth of New Ulm; Frank E. McAllister, John Edmund Burke and Clifford W. Gardner of St. Paul.

For the defendant: W. O. Bissonett and the firm of Gillette, Nye, Harries & Montague of Duluth; J. H. Mulally and Philip Stringer of St. Paul; Wright W. Brooks, Paul J. McGough and the firm of Faegre & Benson of Minneapolis; Roger L. Dell and Chester G. Rosengren of Fergus Falls.

For the defendant on the law and the plaintiff on the facts: the writer.

Company sold to the Dispen Grocery a quantity of what purported to be kerosene, and the Dispen Grocery resold a can of it to the plaintiff's intestate. There was evidence that the liquid in the can was a mixed product containing some gasoline, with a flash point falling within the statutory definition of gasoline,[4] and that its sale as kerosene violated a Minnesota statute.[5] There was also evidence, nearly all of its circumstantial, that the defendant had violated other provisions of the statute[6] by delivering gasoline in a container which was not painted red, by not painting its gasoline pipes red, by not attaching red tags to the gasoline faucets of its tank wagons, and by pumping gasoline through the pipes used for other petroleum products. Plaintiff's intestate made use of the liquid in the can to start a fire, and was killed by the resulting explosion. There was evidence, again almost entirely circumstantial, tending to show that he was negligent in doing so.

On this record the trial court directed a verdict for the defendant and denied a motion for a new trial. In his accompanying memorandum Judge Hughes concluded that the evidence clearly showed that the intestate had knowingly poured the liquid upon an open flame, and that even though he believed it to be kerosene this was contributory negligence as a matter of law. On appeal plaintiff's counsel boldly contended that whenever an action is founded upon intentional acts of the defendant which violate a statute, it must be regarded as an action for an intentional or "wilful" tort, to which contributory negligence cannot be a defense.

It was this contention which engaged the attention of the supreme court and led it to call upon its friends. If the contention were to be upheld, it is obvious that the consequences would be sweeping. In nearly all automobile cases, in nearly all railway cases, in many street railway cases, in many cases of accidents arising out of the condition of premises or the sale of goods or fires or explosions or unusual events of any kind, the action is founded upon the defendant's violation of a statute. In fact it is safe to say that today negligence actions are very much in the minority in which there is not some claim of violation of a statute, ordinance or regulation. Viewed in this light the contention was no less than a challenge to the entire doctrine of contributory negligence and a proposal for its abolition in the majority of negligence cases. Counsel who came to the aid of the plaintiff argued persuasively that the

4. Minn. Stats. 1945, § 296.01, subd. 3.
5. Minn. Stats. 1945, § 296.05, subd. 2.
6. Minn. Stats. 1945, § 296.22, subds. 1, 2 and 3.

progress of the law, in Minnesota as elsewhere, has been in this direction, that the step had already been taken in *Flaherty v. Great Northern Ry. Co.*,[7] about which there is more to say later, and that the state was now ready to have the rule declared.

As the battle of the briefs developed, an additional argument was advanced on behalf of the plaintiff, to the effect that the particular statute involved was enacted for the purpose of protecting purchasers of petroleum products from their own "inability to exercise self-protective care," and that under the rule stated by the Restatement of the Law of Torts[8] and previously recognized by the Minnesota court,[9] the legislature must be taken to have intended that contributory negligence should not be available as a defense. Over this contention also, much ink was shed by interested and industrious advocates on both sides.

The decision rejected both contentions, and concluded that the defense of contributory negligence was open to the defendant. It was held, however, that on the evidence in the record the issue of contributory negligence was one of fact for the jury, and that it was error to direct the verdict. The case was sent back for a new trial. The opinion of Justice Frank Gallagher is a painstaking effort to review and classify the law upon the whole problem of contributory negligence as a defense where a statute is violated. Some consideration of it may be in order.

Violation of Statute as a Tort

There has been much discussion[10] of the theoretical problem of why the violation of a purely criminal statute which says nothing about tort liability should ever give rise to it. The reason usually given by the courts is that the legislature intended to provide such liability, or that such an intent is to be "presumed." Ordinarily this is the barest fiction, since the obvious conclusion to be drawn from the silence of the statute as to any civil remedy is that the legislators intended not to provide it, or at least that they did not have the question in mind and had no intentions at all. Anyone who has met with legislative committees or has had any experience in drafting statutes will have a strong suspicion that the latter is the truth.

7. (1944) 218 Minn. 488, 16 N. W. (2d) 553.
8. Section 483.
9. In Mayes v. Byers, (1943) 214 Minn. 54, 7 N. W. (2d) 403.
10. Thayer, Public Wrong and Private Action, (1914) 27 Harv. L. Rev. 317; Lowndes, Civil Liability Created by Criminal Legislation, (1932) 16 Minn. L. Rev. 361; Morris, The Relation of Criminal Statutes to Tort Liability, (1933) 46 Harv. L. Rev. 453; Notes, (1932) 32 Col. L. Rev. 713; (1935) 19 Minn. L. Rev. 666; (1928) 13 Corn. L. Q. 634.

Again, it is said that the reasonable man will obey the criminal law, and that one who does not is not acting as a reasonable man, and therefore must be negligent. This is a poor explanation for the cases in which criminal statutes have been held to give rise to actions for trespass, fraud or other torts not based on negligence at all, or for the refusal to permit even a negligence action where the statute is found not to be intended to protect the class of persons in which the plaintiff is included,[11] or not to be intended to protect them against the particular risk.[12] It breaks down entirely in the occasional case[13] where the court has rebelled against a preposterous statute such as a speed limit of six miles an hour still on the books, and has refused to permit even a finding of negligence by the jury.

No doubt the most tenable explanation is that the court finds in the statute an expression of a policy for the protection of a particular class of people against the forbidden conduct, and that in furtherance of that policy it is proceeding by a species of judicial legislation well grounded in precedent, to afford an additional remedy of its own. If there has to be a theory, this one at least preserves some leeway for discrimination, and avoids the straitjacket of any reasoning which would result in a rigid rule allowing a tort action for all damage resulting from any criminal act.

All of the discussion has centered around actions for negligence. It seems almost entirely to have overlooked the fact that a violation of a statute is not necessarily to be classified as negligence, but may afford a basis for actions for other torts. The opinion in the *Dart Case* is unique, so far as the writer can discover, in its recognition of this fact. It begins by saying[14] that

"Broadly speaking and subject to exceptions and limitations as applied to it, when a statute is passed the courts generally tend to associate it with the type of common-law liability most closely re-

11. Hamilton v. Minneapolis Desk Mfg. Co., (1899) 78 Minn. 3, 80 N. W. 693; Everett v. Great Northern R. Co., (1907) 100 Minn. 369, 111 N. W. 281; Westlund v. Iverson, (1922) 154 Minn. 52, 191 N. W. 253; Akers v. Chicago, St. P., M. & O. R. Co., (1894) 58 Minn. 540, 60 N. W. 669.

12. Gorris v. Scott, (1874) L. R. 9 Ex. 125; Robertson v. Yazoo & M. V. R. Co., (1929) 154 Miss. 182, 122 So. 371; Crosby v. Great Northern R. Co., (1932) 187 Minn. 263, 245 N. W. 31; Ingalsbe v. St. Louis-San Francisco R. Co., (1922) 295 Mo. 177, 243 S. W. 323, 24 A. L. R. 1051; Larrimore v. American Nat. Ins. Co., (1939) 184 Okla. 614, 89 P. (2d) 340.

13. Stevens v. Luther, (1920) 105 Neb. 184, 180 N. W. 87. Cf. Walker v. Lee, (1921) 115 S. C. 495, 106 S. E. 682; Malloy v. New York Real Estate Association, (1898) 156 N. Y. 265, 50 N. E. 853 (reasonable substitute safeguard). The Kentucky rule that violation of an ordinance is not even evidence of negligence may be traced to a speed limit of six miles an hour. Louisville & N. R. Co. v. Dalton, (1897) 102 Ky. 290, 43 S. W. 431, 19 Ky. L. Rep. 1318.

14. Dart v. Pure Oil Co., (Minn. 1947) 27 N. W. (2d) 555, 558.

lated to the statute. For example, a statute prohibiting going on property and cutting timber is thought of as in the classification of a trespass statute; one prohibiting the receiving of bank deposits after insolvency as a fraud statute; one prohibiting the blocking of public highways as a public nuisance statute; and one laying down rules of safety for the protection of the public or any class or group of individuals, as in the present case, as a negligence statute."

This is obviously right, and it is surprising that no one appears to have said it before. Its truth is most evident where the statute merely enacts a rule already existing at common law. Even in the absence of a statute drivers must keep to the right side of the road, and when they do not do so they are found to be negligent. When the legislature declares the rule it does not change the nature or theory of the action to be brought for its violation. At most it removes any possible doubt as to the rule and takes away from the jury any issue as to whether such conduct is negligence. At common law the acceptance of deposits by the directors of an insolvent bank falls in the category of fraud, as non-disclosure of a fact which they are under a duty to disclose. When such conduct is penalized by statute the nature of the civil action which will lie for it, whether it be in deceit, quasi-contract or constructive trust, is not changed. When the legislature goes beyond existing rules and establishes new ones, as for example by a blue sky law,[15] or a statute prohibiting the operation of buses or taxis without a license,[16] the courts must inevitably tend, so far as the civil action for the violation is concerned, to look for the field of tort liability which it most nearly resembles and into which it would fall if the rule had developed at common law. The process is a natural one, and perhaps the only resort in the absence of a more definite guide in the statute itself.

It follows that the violation of a statute is not always to be classified as negligence. It may be treated as trespass, conversion, fraud, nuisance, libel or slander, malicious prosecution or perhaps any other tort. All of the rules, qualifications, limitations, exceptions

15. "The action is in tort according to the Supreme Court of Minnesota. The basis of the tort is fraud. The fraud consisted of sales of corporate stock to the plaintiff without divulging to him that it was not registered as required by the Minnesota law. * * * When an express provision of the law is violated in a sale of securities subject to registration under the Blue Sky Law, the term 'fraud' is an appropriate characterization of the disobedience." Shepard v. City Co. of New York, (D.C. Minn. 1938) 24 F. Supp. 682. Accord, Hertz Drivurself Stations v. Ritter, (C.C.A. 9th 1937) 91 F. (2d) 539; MacDonald v. Reich & Lievre, Inc., (1929) 100 Cal. App. 736, 281 Pac. 106.

16. Puget Sound Traction, L. & P. Co. v. Grassmeyer, (1918) 108 Wash. 482, 173 Pac. 504.

and other variations applied to that particular tort in ordinary cases are picked up and incorporated, and are applied to the action to the extent that they are consistent with the language of the statute and its apparent purpose.[17] It is a logical conclusion that contributory negligence is of importance only in those cases in which it would be available as a defense if the statutory rule were one developed by the common law.

Violation of Statute as Negligence

By far the greater number of actions based on the violation of a statute are negligence actions. The reason is the obvious one, that most statutes are enacted for the protection of the public or of particular groups or classes of individuals against damage to person or property, and the conduct which they prohibit is unreasonable conduct closely related to common law negligence. Normally the similarity is so clear that there is no reason even to discuss it, and "safety" statutes are assumed as a matter of course to give rise to negligence actions.

Negligence is merely a departure from a standard of conduct required by the law for the protection of others against unreasonable risk of harm. The standard may be one set by the common law as the traditional standard of the reasonable man of ordinary prudence; or it may be laid down by the legislature. When this is done, the effect of the statute is merely to declare that certain conduct is required as a standard, from which it is negligence to deviate. When the common law rule requiring drivers to keep to the right is enacted as a statute, the rule is not changed in character or quality. A departure from it is still ordinary negligence, similar in all respects to a departure from the common law rule.[18] Justice Mitchell stated

17. Something like this idea is expressed by Lehman, J., in Tedla v. Ellman, (1939) 280 N. Y. 124, 19 N. E. (2d) 987, 990: "On the other hand, where a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property, but merely codifies or supplements a common-law rule, which has always been subject to limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under conditions where observance might cause accident."

18. Restatement of Torts (1934), § 285; Lowndes, Civil Liability Created by Criminal Legislation, (1932) 16 Minn. L. Rev. 361; Morris, The Relation of Criminal Statutes to Tort Liability, (1933) 46 Harv. L. Rev. 453; Notes, (1935) 19 Minn. L. Rev. 666; (1932) 32 Col. L. Rev. 712; (1928) 13 Corn. L. Q. 634; Prosser, Torts (1941), 264-265.

this very clearly in the leading Minnesota decision,[19] in language which is quoted in the *Dart Case*:

"Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. * * * The only difference is that in the one case the measure of legal duty is to be determined upon common law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or in other words, negligence per se. * * * All that the statute does is to establish a fixed standard by which the facts of negligence may be determined."

"Negligence per se" as applied to the violation of a statute has been a source of confusion to generations of law students, to the bar and even to the courts. It refers to the rule, now accepted in most states[20] including Minnesota,[21] that the declaration of the standard of conduct by the legislature removes it from any determination by the jury, and that upon proof that the statute is violated negligence must be found without argument, as a matter of law. The rule applies to a violation by the plaintiff[22] as well as by the defendant. It has reference only to the proof of negligence, and not to its effect. "Negligence per se" is not liability per se, and even though the violation is "conclusive evidence" of negligence and a peremptory instruction must be given on that issue, there remain in the case all of the other issues, such as assumption of risk, con-

19. Osborne v. McMasters, (1889) 40 Minn. 103, 41 N. W. 543, at page 105.

20. Martin v. Herzog, (1920) 228 N. Y. 164, 126 N. E. 814; Schell v. Du Bois, (1916) 94 Ohio St. 93, 113 N. E. 664; Klatt v. N. C. Foster Lumber Co., (1897) 97 Wis. 641, 73 N. W. 563; Annis v. Britton, (1925) 232 Mich. 291, 205 N. W. 128; Note, (1932) 32 Col. L. Rev. 712.

21. Osborne v. McMasters, (1889) 40 Minn. 103, 41 N. W. 543; Schaar v. Conforth, (1915) 128 Minn. 460, 151 N. W. 275; Elmgren v. Chicago, M. & St. P. R. Co., (1907) 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N.S.) 754; Sandhofner v. Calmenson, (1927) 170 Minn. 69, 212 N. W. 11; Healy v. Hoy, (1910) 112 Minn. 138, 127 N. W. 482; Note, (1935) 19 Minn. L. Rev. 666, 686.

22. Restatement of Torts (1934), § 375; Lloyd v. Pugh, (1941) 158 Wis. 441, 149 N. W. 150; Monroe v. Hartford Street R. Co., (1903) 76 Conn. 201, 56 Atl. 498. Prior to 1931 the Minnesota decisions were in considerable confusion, and there were a number of cases, such as Dohm v. R. N. Cardozo & Brother, (1925) 165 Minn. 193, 206 N. W. 377, holding that a violation by the plaintiff was merely evidence of negligence. In Mechler v. McMahon, (1931) 184 Minn. 476, 239 N. W. 605 the court was confronted with violations by both plaintiff and defendant, each of which raised the issue of both negligence and contributory negligence. It reviewed the decisions, confessed error, and declared that each violation was negligence as a matter of law in both respects. This decision has since been followed in Minnesota. See Note, (1935) 19 Minn. L. Rev. 666, 693.

tributory negligence and proximate cause,[23] which would remain if the defendant's conduct had merely been so clearly unreasonable that the issue must be taken away from the jury at common law. In short, such "negligence per se" is merely ordinary negligence, whose existence is established by proof of the violation, but which once proved does not differ in its legal consequences from negligence at common law.

Friends of the court in the *Dart Case* contended with considerable ingenuity that the violation of a statute is "intentional" misconduct, which should fall under the rule recognized in Minnesota[24] as elsewhere[25] that contributory negligence is not a defense to an intentional tort; or at least that it is "wilful" or "wanton" and on that basis equally not subject to the defense.[26] Ignorance of the law of course excuses no one; and it may even be assumed in the case of carriers, oil companies and similar defendants, that they do in fact know the law and are well advised of what it requires them to do. But the law and their knowledge of it does not alter the character of their conduct itself, any more than it would be altered by legal advice as to what the common law requires. If there is no statute and the defendant intentionally fails to guard his elevator shaft, his failure is common law negligence. It is not intended to injure anyone, or to invade anyone's rights, and the defendant is proceeding under an optimistic hope that nothing unpleasant will happen. When the legislature lays down the standard of care by a statute requiring him to guard the shaft, his intentional failure to do so is still optimistic and intended to injure no one. It

23. Assumption of risk: White v. Cochrane, (1933) 189 Minn. 300, 249 N. W. 328; Le Doux v. Alert Transfer & Storage Co., (1927) 145 Wash. 115, 259 Pac. 24; Knipfer v. Shaw, (1933) 210 Wis. 617, 246 N. W. 328.

Contributory negligence: Browne v. Siegel, Cooper & Co., (1901) 191 Ill. 226, 60 N. E. 815; Keenan v. Edison Electric Illuminating Co., (1893) 159 Mass. 379, 34 N. E. 366; Narramore v. Cleveland, C. C. & St. L. R. Co., (C.C.A. 6th 1899) 96 Fed. 298.

Proximate cause: Holman v. Chicago, R. I. & P. R. Co., (1876) 62 Mo. 562; cf. Weeks v. McNulty, (1898) 101 Tenn. 495, 48 S. W. 809; Hinton v. Southern R. Co., (1916) 172 N. C. 587, 90 S. E. 756; Powers v. Standard Oil Co., (1923) 98 N. J. L. 730, 119 Atl. 273; Sullivan v. Boone, (1939) 205 Minn. 437, 286 N. W. 350.

24. Lambrecht v. Schreyer, (1915) 129 Minn. 271, 152 N. W. 645; Mueller v. Dewey, (1924) 159 Minn. 173, 198 N. W. 428.

25. Ruter v. Foy, (1877) 46 Iowa 32; Steinmetz v. Kelly, (1880) 72 Ind. 442, 37 Am. Rep. 170; Birmingham Railway, L. & P. Co. v. Jones, (1906) 146 Ala. 277, 41 So. 146; Brendle v. Spencer, (1899) 125 N. C. 474, 34 S. E. 634.

26. Atchison, T. & S. F. R. Co v. Baker, (1908) 79 Kan. 183, 98 Pac. 804; Ziman v. Whitley, (1929) 110 Conn. 108, 147 Atl. 370; Mihelich v. Butte Electric R. Co., (1929) 85 Mont. 604, 281 Pac. 540; Walldren Express & Van Co. v. Krug, (1920) 291 Ill. 472, 126 N. E. 97.

is not suddenly transformed into an "intentional" tort analogous to assault and battery or deceit.

The intent which will preclude the defense of contributory negligence is not the intent to do an act, or to do a forbidden act; it is the intent to do harm to another, or to invade his rights.[27] "Wilful" and "wanton," however the terms may have been misused in Minnesota,[28] both carry the idea of reckless disregard of consequences in the face of a known risk, so great as to make it highly probable that harm will follow.[29] Driving through traffic at a speed of eighty miles an hour is certainly "wilful" or "wanton" negligence; but a statute fixing a speed limit of twenty does not supply the risk and the state of mind necessary to make "wilful" or "wanton" the conduct of a man who drives at twenty-five. The supreme court of Minnesota,[30] together with many other courts,[31] has long since rejected the contention that the existence of the statute adds anything to the quality or character of the act itself.

Contributory Negligence as a Defense

Contributory negligence is, then, available as a defense in the normal action for negligence based on the violation of a statute. There are few propositions of law better supported by the decisions

27. "The plaintiff's contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person." Restatement of Torts (1934), § 481.

28. The Notes in (1924) 8 Minn. L. Rev. 239 and (1939) 24 Minn. L. Rev. 81 have pointed out at length the fact that, beginning with a misinterpretation of the duty to discovered trespassers in Studley v. St. Paul & Duluth R. Co., (1892) 48 Minn. 249, 51 N. W. 115, Minnesota has developed its own doctrine of "wilful" or "wanton" negligence as a substitute for the doctrine of "discovered peril" found in other states in connection with the last clear chance. An entirely artificial meaning has been assigned to the term, that of ordinary negligence or inadvertence after discovery that another is in danger. This use of the term has been criticized not only in the Notes cited, but by Jaggard, J., dissenting in Anderson v. Minnesota, St. P. & S. S. M. R. Co., (1908) 103 Minn. 224, 114 N. W. 1123. The court has recognized the anomaly of its definition in a case arising in another jurisdiction. Pickering v. Northern Pacific R. Co., (1916) 132 Minn. 205, 156 N. W. 3.

29. Restatement of Torts (1934), § 500, Special Note; Birmingham Railway & Electric Co. v. Bowers, (1895) 110 Ala. 328, 20 So. 345; Aiken v. Holyoke Street R. Co., (1903) 184 Mass, 269, 68 N. E. 238; Thomas v. Margoni, (1938) 285 Mich. 547, 281 N. W. 321; Biddle v. Voyd, (Del. Super. 1938) 199 Atl. 479.

30. Judson v. Great Northern R. Co., (1895) 63 Minn. 248, 65 N. W. 447; Olson v. Northern Pacific R. Co., (1901) 84 Minn. 258, 87 N. W. 843.

31. Payne v. Vance, (1921) 103 Ohio St. 59, 133 N. E. 85; Browne v. Siegel, Cooper & Co., (1901) 191 Ill. 226, 60 N. E. 815; Smith v. Central of Georgia R. Co., (1910) 165 Ala. 407, 51 So. 792; Gartin v. Meredith, (1899) 153 Ind. 16, 53 N. E. 936; Gipson v. Southern R. Co., (C.C. Ala. 1905) 140 Fed. 410; Brown v. Chicago & N. W. R. Co., (1901) 109 Wis. 384, 85 N. W. 271.

of Minnesota. The opinion in the *Dart Case* lists a dozen of them, dealing with the violation of ordinances regulating the speed of trains;[32] statutes requiring railway crossing signals[33] or the maintenance of crossing gates or flagmen[34] or crossings free from ice, snow or cinders;[35] a statute requiring elevator gates to be guarded,[36] and even a statute requiring a county auditor to give notice before the sale of land for taxes.[37] There are of course many hundred more. The example which will readily occur to anyone is that of the statutes regulating traffic and the condition and operation of motor vehicles, as to which most lawyers would be definitely astonished at the suggestion that contributory negligence is not a defense. And if it be objected that the present Highway Traffic Act makes a violation only evidence of negligence for the jury, the answer is that the rule was the same under the former statutes, the violation of which was held to be negligence as a matter of law.[38]

32. The court cites Weyl v. Chicago, M. & St. P. R. Co., (1889) 40 Minn. 350, 42 N. W. 24; Greenwood v. Chicago, R. I. & P. R. Co., (1905) 95 Minn. 284, 104 N. W. 3. A similar decision is Studley v. St. Paul & Duluth R. Co., (1892) 48 Minn. 249, 51 N. W. 115.

33. The court cites Judson v. Great Northern R. Co., (1895) 63 Minn. 248, 65 N. W. 447; Olson v. Northern Pacific R. Co., (1901) 84 Minn. 258, 87 N. W. 843; Carnegie v. Great Northern R. Co., (1914) 128 Minn. 14, 150 N. W. 164; Capretz v. Chicago Great Western R. Co., (1923) 157 Minn. 29, 195 N. W. 531; Munson v. Minneapolis, St. P. & S. S. M. R. Co., (1924) 170 Minn. 513, 212 N. W. 946; Franklin v. Minneapolis, St. P. & S. S. M. R. Co., (1930) 179 Minn. 480, 229 N. W. 797. Similar decisions are Howe v. Minneapolis, St. P. & S. S. M. R. Co., (1895) 62 Minn. 71, 64 N. W. 102; Buran v. Great Northern R. Co., (1897) 67 Minn. 434, 69 N. W. 1149; Nelson v. St. Paul & Duluth R. Co., (1899) 76 Minn. 189, 78 N. W. 1041, 79 N. W. 530; Sandberg v. St. Paul & Duluth R. Co., (1900) 80 Minn. 442, 83 N. W. 411; Schmitt v. Great Northern R. Co., (1901) 83 Minn. 105, 85 N. W. 935; Carlson v. Chicago & N. W. R. Co., (1905) 96 Minn. 504, 105 N. W. 555; Pogue v. Great Northern R. Co., (1914) 127 Minn. 79, 148 N. W. 889; Wesler v. Chicago, St. P. M. & O. R. Co., (1919) 143 Minn. 159, 173 N. W. 865; Anderson v. Great Northern R. Co., (1920) 147 Minn. 118, 179 N. W. 687; Engstrom v. Canadian Northern R. Co., (1922) 153 Minn. 146, 189 N. W. 580, 190 N. W. 68; Molden v. Minneapolis, St. P. & S. S. M. R. Co., (1924) 160 Minn. 471, 200 N. W. 740; Bailey v. Minneapolis, St. P. & S. S. M. R. Co., (1926) 166 Minn. 118, 207 N. W. 26; Jones v. Great Northern R. Co., (1929) 178 Minn. 322, 227 N. W. 45.

34. Schneider v. Northern Pacific R. Co., (1900) 81 Minn. 383, 84 N. W. 124.

35. Akerson v. Great Northern R. Co., (1924) 158 Minn. 369, 197 N. W. 842.

36. The court cites Schutt v. Adair, (1906) 99 Minn. 7, 108 N. W. 811. A similar decision is Security Trust Co. v. St. Paul Building Co., (1911) 116 Minn. 295, 133 N. W. 861.

37. Foster v. Malberg, (1912) 119 Minn. 168, 137 N. W. 816.

38. Sorenson v. Sanderson, (1929) 176 Minn. 299, 233 N. W. 145 (right of way); Rosenau v. Peterson, (1920) 147 Minn. 95, 179 N. W. 647 (right of way); Syck v. Duluth Street R. Co., (1920) 146 Minn. 118, 177 N. W. 944 (right of way); Ward v. Bangel, (1930) 181 Minn. 32, 231 N. W. 244

It would be reasonable to conclude that the availability of the defense in the normal case is as well settled in Minnesota as any rule of law can be, and that any change overruling so many decisions must necessarily be a matter for the legislature. In two comparatively recent cases, however, the court has unexpectedly stated in broad terms that contributory negligence is never a defense where the action is founded upon an "intentional violation of a statute." Counsel in the *Dart Case* made use of these decisions as a springboard for a frontal attack upon the entire doctrine.

The first of the two was *Hanson v. Hall*[39] in 1938. In the course of a labor dispute a group of strikers blocked the public highway with a truck, and the plaintiff negligently drove into it. The court, after declaring[40] that the obstruction was a public nuisance and an intentional invasion of the plaintiff's right to use the highway, proceeded to say:[41]

"Where an action is based on an unintentional invasion of another's right, the contributory negligence of plaintiff is a proper off-set to defendants' liability. * * * But where the action is based on an invasion which is both intentional and criminal, the mere negligence of the person whose rights are invaded is no adequate defense."

This was followed, in 1944, by *Flaherty v. Great Northern Railway Co.*[42] The defendant, in violation of a statute[43] making such conduct a misdemeanor, blocked a public street with its train for more than ten minutes, and the plaintiff negligently drove into the side of a standing freight car. The court again stated that the obstruction was an invasion of the plaintiff's rights, and said:[44]

"The defense of plaintiffs' contributory negligence was not open to defendant. Where injury is sustained as the result of intentional obstruction of a highway in violation of the statute, the contributory negligence of the person injured is no defense. *Hanson v. Hall,* 202 Minn. 381, 279 N. W. 227, supra. The evidence here conclusively shows that plaintiffs' injuries were sustained as the result of the defendant's intentionally obstructing the street with the train or the freight car, as the case might be, in violation of statute.

"It is only where defendant's acts constitute an intentional violation of statute that the defense of contributory negligence is not open to him. *Hanson v. Hall,* supra."

(parking without lights); Elvidge v. Strong & Warner Co., (1921) 148 Minn. 184, 181 N. W. 346 (keeping to right in turning a corner).

39. (1938) 202 Minn. 381, 279 N. W. 227.
40. At 202 Minn. 385.
41. At 202 Minn. 385-386.
42. (1944) 218 Minn. 488, 16 N. W. (2d) 553.
43. Minn. Stats. 1941, § 616.31.
44. At 218 Minn. 494-495.

The court then proceeded to distinguish the statute regulating traffic on the ground that it specifically provides that a violation shall be only prima facie evidence of negligence, "with the consequence that contributory negligence is not a defense in actions based on a violation thereof."[45]

It is at once apparent that both of these cases lie in the field of public nuisance, and that the statutes violated were nuisance statutes. This is expressly recognized in *Hanson v. Hall,* and the *Flaherty* decision does no more than follow the earlier case. The opinion in the *Dart Case* distinguishes both as nuisance cases,[46] and so lays at rest any idea that they represent a new doctrine and a departure from the established rule.

This is perhaps not enough. It is now generally recognized[47] that "nuisance" is a type of injury rather than a separate kind of conduct, and that either a public or a private nuisance may be created by acts which are intentional in the sense that they are intended to invade the rights of another, or merely negligent because they involve a foreseeable risk of such invasion, or not even negligent but so far extra-hazardous or anti-social as to give rise to strict liability or "liability without fault" of the kind which is forever associated with the name of *Rylands v. Fletcher.*[48] It is equally well recognized that where the conduct which creates a nuisance is mere negligence, the defense of contributory negligence is open;[49] and this is true of a public[50] as well as a private

45. At 218 Minn. 495.

46. "The principal distinction between the case before us and the Hanson and Flaherty cases is that in both of the latter cases the statute involved provided that a violation of it constituted a public nuisance. Minn. St. 1945 and M. S. A. 616.01. In those cases the court determined that the negligent acts constituted a nuisance and were wilful and intentional. * * *

"The decisions in these cases were confined to the situations involved in each particular case. The court did not hold in either case that contributory negligence is not a defense to even wilful negligence in all cases, but merely determined that contributory negligence was not available as a defense where the wilful negligence constituted a nuisance." Dart v. Pure Oil Co., (Minn. 1947) 27 N. W. (2d) 555, at 562.

47. Notes, (1935) 28 Ill. L. Rev. 372; (1935) 23 Cal. L. Rev. 427; (1935) 19 Minn. L. Rev. 249; (1937) 35 Mich. L. Rev. 684; (1940) 26 Corn. L. Q. 163; (1940) 38 Mich. L. Rev. 1337; (1940) 17 N. Y. U. L. Q. Rev. 302; Prosser, Torts (1941), 597-598.

48. (1866) L. R. 1 Ex. 265, aff'd (1868) L. R. 3 H. L. 330.

49. Crommelin v. Coxe & Co., (1857) 30 Ala. 318, 68 Am. Dec. 120; Smith v. Smith, (1824) 2 Pick. (Mass.) 621, 13 Am. Dec. 464; Irwin v. Sprigg, (1847) 6 Gill (Md.) 200, 46 Am. Dec. 667; Niagara Oil Co. v. Ogle, (1911) 177 Ind. 292, 98 N. E. 60; Rischer v. Acken Coal Co., (1910) 147 Iowa 459, 124 N. W. 764; Higginbotham v. Kearse, (1931) 111 W. Va. 264, 161 S. E. 37.

50. McFarlane v. City of Niagara Falls, (1928) 247 N. Y. 340, 160

nuisance. As a matter of fact the earliest case[51] in English or American law in which contributory negligence was recognized as a defense involved the obstruction of the public highway. There is thus no magic in the word "nuisance" which disposes of the issue; it is on the contrary a mere invitation to inquire further into the nature of the defendant's conduct.

In both the *Hanson* and the *Flaherty* cases, however, the nuisance was intentionally created. In *Hanson v. Hall* the blockade of the highway was directed at the plaintiff and intended to prevent his passage; and in the *Flaherty Case* the court refers throughout to "intentional" obstruction, and leaves no doubt that it considers that the defendant consciously and deliberately exceeded the ten minutes permitted by the statute. The railway intentionally invaded the right, which the plaintiff shared with the rest of the public, to use the highway; and when harm resulted from such an invasion, it could not be heard to say that the plaintiff should have exercised more care. The question is left open whether contributory negligence could be set up if it were found that through mere mistake, inadvertence or failure to take account of time the railway company had left its train standing for eleven minutes instead of ten; and when the case arises the answer may quite possibly be yes.

It is difficult to feel entirely happy about the *Flaherty Case.* Apart from some confusion as to "intentional violation," it is not clear that the statute properly had anything to do with the case at all. In other jurisdictions it is quite generally held that a statute limiting the time during which a railway train may block a crossing is intended only to prevent delays of traffic and may give rise to an action for such delay,[52] but is not intended to protect anyone against personal injury from running into the train. Such injuries are held not to be within the risk at which the statute is directed,[53] and it

N. E. 391, 57 A. L. R. 1; Delaney v. Philhern Realty Holding Corp., (1939) 280 N. Y. 461, 21 N. E. (2d) 507; Hill v. Way, (1931) 117 Conn. 359, 168 Atl. 1; Mayor of Baltimore v. Marriott, (1850) 9 Md. 160, 66 Am. Dec. 326; City of Lebanon v. Twiford, (1895) 13 Ind. App. 384, 41 N. E. 844; Town of Gilmer v. Pickett, (Tex. Civ. App. 1921) 228 S. W. 347.

51. Butterfield v. Forrester, (1809) 11 East 60, 103 Eng. Rep. 926.

52. Patterson v. Detroit, L. & N. R. Co., (1885) 56 Mich. 172, 22 N. W. 260.

53. Cf. Restatement of Torts, § 286 (c); Crosby v. Great Northern R. Co., (1932) 187 Minn, 263, 245 N. W. 31; Westlund v. Iverson, (1922) 154 Minn. 52, 191 N. W. 253; Gorris v. Scott, (1874) L. R. 9 Ex. 125; Robertson v. Yazoo & M. V. R. Co., (1929) 154 Miss. 182, 122 So. 371; Ingalsbe v. St. Louis-San Francisco R. Co., (1922) 295 Mo. 177, 243 S. W. 323; Larrimore v. American Nat. Ins. Co., (1939) 184 Okla. 614, 89 P. (2d) 340.

affords no basis for an action for them.[54] The common sense of this position lies in the obvious fact that it is pure fortuitous accident that the particular driver arrives at the fifteenth minute instead of the fifth, and that the length of time does nothing to increase the likelihood that any one individual will run into the train. But with the statute removed from the case after ten minutes, the obstruction of the highway becomes a public nuisance at common law, and this in turn has been overlooked by the other courts.

It is also difficult to justify the distinction made in the *Flaherty Case* by which a violation which by provision of the statute itself is merely evidence of negligence, as in the Minnesota Highway Traffic Act, is treated as subject to the defense of contributory negligence, while a violation which is "negligence per se" is not. The difference is only one of proof; and whether the negligence is found as a fact by the jury or is found as a matter of law by the court, no reason is apparent for any difference in its effect. There is no authority outside of the *Flaherty Case* to support such a distinction.

The Exceptional Statutes

There remain for consideration a group of unusual and exceptional statutes in which, although the action is founded on negligence, the court has found a legislative intent to remove the defense of contributory negligence. Such statutes are treated as analogous to those fixing the age of consent to intercourse.[55] They are construed to place the entire responsibility upon the defendant, and to require him to protect not only plaintiffs who are exercising reasonable care but those who are contributorily negligent as well.

In such cases an intent always is attributed to the legislature.

54. Fox v. Illinois Central R. Co., (1941) 308 Ill. App. 367, 31 N. E. (2d) 805; Megan v. Stevens, (C.C.A. 8th 1937) 91 F. (2d) 419; Denton v. Missouri, K. & T. R. Co., (1913) 90 Kan. 51, 133 Pac. 558; Fountain v. Houston, E. & W. T. R. Co., (Tex. Civ. App. 1927) 298 S. W. 630; Webb v. Oregon-Washington R. R., (1938) 195 Wash. 155, 80 P. (2d) 409; Pennsylvania R. Co. v. Huss, (1932) 96 Ind. App. 71, 180 N. E. 919; Jones v. Atchison, T. & S. F. R. Co., (1929) 129 Kan. 350, 282 Pac. 593.

In many cases the decision has been on the ground that the violation of the statute is not the "proximate cause" of the injury. Hendley v. Chicago & N. W. R. Co., (1929) 198 Wis. 569, 225 N. W. 205; Gilman v. Central Vt. R. Co., (1919) 93 Vt. 340, 107 Atl. 122; Simpson v. Pere Marquette R. Co., (1926) 276 Mich. 653, 268 N. W. 769.

55. Cf. Gaither v. Meacham, (1926) 214 Ala 343, 108 So. 2; Bishop v. Liston, (1924) 112 Neb. 559, 199 N. W. 825; Hough v. Iderhoff, (1914) 69 Or. 568, Pac. 931; Glover v. Callahan, (1937) 299 Mass. 55, 12 N. E. (2d) 194; Restatement of Torts, § 61. And see Restatement of Torts, § 483, Comment *d*.

Sometimes, as in the Federal Employers' Liability Act,[56] the statute contains express language leaving no doubt. Sometimes a clue to the intent is found in some provision of the statute, as in the Minnesota case of *Mayes v. Byers*,[57] where the act required a saloon-keeper to post a penal bond and gave the injured plaintiff an action on the bond. More commonly the statute itself is silent, and the legislative intent is found from its character and obvious purpose, and from the background of the social problem and the particular hazard at which it is directed. Courts are no more ignorant than ordinary mortals of what is going on in the world and why laws are passed; and while they do not call it judicial notice, they apply this knowledge in determining what result the legislature is seeking to accomplish. In this sense it always has been and always will be true that "Th' Supreme Coort follows th' iliction returns."[58]

The typical cases are those of the child labor acts. These are found to be intended to place all responsibility upon the employer, so that he is liable for injury to the child even though he has acted in good faith and has employed the infant in ignorance of his age.[59] To this extent they impose strict or absolute liability. In Minnesota[60] as elsewhere,[61] it has been held that the evident purpose of the statute would be defeated if the employer were permitted to set up the contributory negligence of the child, and that the legislature must be taken to have intended that no such defense should be

56. 35 Stat. 65 (1908) 45 U. S. C. § 51 et seq. (1940). The act provides that contributory negligence is not a complete defense but goes only to reduce the damages.

57. (1943) 214 Minn. 54, 7 N. W. (2d) 403. See infra, note 63.

58. Finley Peter Dunne, Mr. Dooley's Opinions (1906), 26.

59. Beauchamp v. Sturges & Burns Mfg. Co., (1911) 250 Ill. 303, 95 N. E. 204; Krutlies v. Bulls Head Coad Co., (1915) 249 Pa. 162, 94 Atl. 459, L. R. A. 1915F 1082; Blanton v. Kellioka Coal Co., (1921) 192 Ky. 220, 232 S. W. 614; Dusha v. Virginia & Rainy Lake Co., (1920) 145 Minn. 171, 176 N. W. 482; Restatement of Torts, § 286, Comment *d*; (1930 39 Yale L. J. 908.

60. "The purpose of the statute is to protect children in life and limb, by prohibiting their employment in dangerous occupation where, because of their immaturity, they are likely inappreciative of risks and prone to be careless and heedless. So the statute altogether prohibits their employment and makes it a misdemeanor. A very great weight of authority establishes the doctrine that an employer who violates such a statute cannot assert contributory negligence nor the assumption of risks as a defense." Dusha v. Virginia & Rainy Lake Co., (1920) 145 Minn. 171, 172, 176 N. W. 482. Accord, Weber v. J. E. Barr Packing Corp., (1931) 182 Minn. 486, 234 N. W. 682.

61. Lenahan v. Pittston Coal Mining Co., (1907) 218 Pa. 311, 67 Atl. 642; Marino v. Lehmaier, (1903) 173 N. Y. 530, 66 N. E. 572; Pinoza v. Northern Chair Co., (1913) 152 Wis. 473, 140 N. W. 84; Karpeles v. Heine, (1919) 227 N. Y. 74, 124 N. E. 101; Louisville, N. & St. L. R. Co. v. Lyons, (1913) 155 Ky. 396, 159 S. W. 971; Terry Dairy Co. v. Nalley, (1920) 146 Ark. 448, 225 S. W. 887; American Car & Foundry Co. v. Armentraut, (1905) 214 Ill. 509, 73 N. E. 766.

available. Statutes prohibiting the sale of firearms and similar dangerous articles to minors[62] are held, for obvious reasons, to stand on the same footing, as are acts requiring precautions for the protection of intoxicated[63] or unusually ignorant[64] people.

It is such decisions that have led the Restatement of Torts[65] to state the principle as follows:

"If the defendant's negligence consists in the violation of a statute intended to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute."

This statement is perhaps a bit too narrow. It may be suggested that "inability to exercise self-protective care" is not necessarily the sole criterion by which an intent to abrogate the defense can be determined. In other jurisdictions statutes requiring railways to fence their tracks for the protection of livestock[66] or making them

62. Pizzo v. Wiemann, (1912) 149 Wis. 235, 134 N. W. 899; McMillen v. Steele, (1923) 275 Pa. 584, 119 Atl. 721. In the latter case it was held that while the negligence of the minor himself would be no defense, the defendant could set up the contributory negligence of an injured adult. This clearly indicates the policy found in the statute.

63. Davies v. McKnight, (1892) 146 Pa. 610, 23 Atl. 320; Hauth v. Sambo, (1916) 100 Neb. 160, 158 N. W. 1036.

In Mayes v. Byers, (1943) 214 Minn. 54, 7 N. W. (2d) 403, an ordinance requiring stairways in "on sale" liquor establishments to be well lighted was construed as intended to impose strict responsibility upon the owners for the protection of intoxicated persons, so that their contributory negligence was not a defense. The court cited the Restatement of Torts, § 483 as stating "the general principle of law applied in these cases," and said:

"* * * The legislation and ordinance here considered manifest a recognition that strict regulation and control are needed for the safety and welfare of patrons who frequent the premises of 'on sale' liquor dealers and that, with their minds and judgment often affected by the excessive use of intoxicants, they cannot be left to their own self-protection. * * * Responsibility for the safety of such persons is placed squarely upon the proprietor of the business—the man to whom the profits of the business go. To insure that responsibility, a bond is required to be made expressly for the benefit of those injured. If these very same people should now be denied the right of recovery in cases where contributory negligence or intoxication could be shown, the very object of this legislation would be substantially defeated."

64. In Bennett Drug Stores v. Mosely, (1942) 69 Ga. App. 347, 20 S. E. (2d) 208, the court had before it a statute providing that no poison should be sold unless upon due inquiry it should be found that the purchaser knew its character. The court cited the Restatement, found a legislative intent to protect ignorant purchasers against their own inability to protect themselves, and held that contributory negligence was no defense.

65. Restatement of Torts (1934), § 483. In Comment *b* the child labor acts are given as the only illustration.

66. Flint & Pere Marquette R. Co. v. Lull, (1874) 28 Mich. 510; Congdon v. Central Vt. R. Co., (1883) 56 Vt. 390, 48 Am. Rep. 793; Welty v. Indianapolis & V. R. Co., (1886) 105 Ind. 410, 4 N. E. 410; Atchison, T. & S. F. R. Co. v. Paxton, (1907) 75 Kan. 197, 88 Pac. 1082; Quackenbush v. Wisconsin & M. R. Co., (1888) 71 Wis. 472, 37 N. W. 834.

liable for fires[67] are held quite consistently to make the defendant fully responsible and to relieve the plaintiff of the defense of contributory negligence. Minnesota, so far as can be discovered, stands quite alone in permitting the defense as to both types of statute.[68] It can scarcely be pretended, in any particular instance, that the plaintiff is incapable of doing whatever a reasonable man would do to keep his cattle off of the track or to prevent the fire from spreading to his barn. The intent to eliminate the defense is found rather from the fact, which the court knows as well as anyone else, that such statutes are passed for the very purpose of relieving adjoining landowners of the onerous burden of taking precautions, and of requiring the railway company to pay its way by assuming the burden or be liable for the damage resulting from its failure to comply.

In Minnesota, as in many other states, it was formerly held[69] that factory acts and similar regulations requiring employers to guard dangerous machinery or to take other steps for the safety of workmen were no exception to the general rule, and were subject to the defense of contributory negligence. A change in social viewpoint and in the attitude of both courts and legislatures toward labor, too familiar to call for any expatiation, has induced a strong and increasing minority of the courts[70] to reconsider their earlier decisions, and to hold that such statutes place full responsibility upon the employer, and that their whole purpose and intent would be defeated and nullified if contributory negligence were to be available as a defense. Stress has been laid upon the fact that the employee, because of economic necessity, is not free either to choose his employment or to leave it; upon the impossibility of his being

67. West v. Chicago & N. W. R. Co., (1887) 77 Iowa 654, 35 N. W. 479; Bowen v. Boston & A. R. Co., (1901) 179 Mass. 524, 61 N. E. 141; Matthews v. Missouri Pac. R. Co., (1897) 142 Mo. 645, 44 S. W. 802; Peter v. Chicago & N. W. R. Co., (1899) 121 Mich. 324, 80 N. W. 295.

68. In three early decisions the Minnesota court held that contributory negligence was a defense to the violation of a fencing statute. Whittier v. Chicago, M. & St. P. R. Co., (1878) 24 Minn. 394; Johnson v. Chicago, M. & St. P. R. Co., (1882) 29 Minn. 425, 13 N. W. 673; Moser v. St. Paul & Duluth R. Co., (1890) 42 Minn. 480, 44 N. W. 530. In L. R. Martin Lbr. Co. v. Great Northern R. Co., (1913) 123 Minn. 423, 144 N. W. 145, it was held without discussion that it was a defense to the violation of a fire statute.

69. Anderson v. C. N. Nelson Lumber Co., (1896) 67 Minn. 79, 69 N. W. 630 heads a series of decisions which are overruled, and many of them listed, in Suess v. Arrowhead Steel Products Co., (1930) 180 Minn. 21, 230 N. W. 125.

70. Osborne v. Salvation Army, (C.C.A. 2d 1939) 107 F. (2d) 929; Carterville Coal Co. v. Abbott, (1899) 181 Ill. 495, 55 N. E. 131; Casper v. Lewin, (1910) 82 Kan. 604, 109 Pac. 657; Chicago-Coulterville Coal Co. v. Fidelity & Cas. Co., (W.D. Mo. 1904) 130 Fed. 957.

constantly and forever on the alert for dangers; and upon the social policy, expressed in the workmen's compensation acts, that "the cost of the product shall bear the blood of the workman." While this is no doubt "inability to exercise self-protective care" in the broadest sense, it certainly differs from the inability of the child, and the decisions find the "intent" of the statute rather from its background of social policy than from any anticipated incapacity of the plaintiff for care in any particular instance. In *Suess v. Arrowhead Steel Products Co.*[71] the Minnesota court, on the basis of nothing more than "the public policy of the state, as gathered from legislation enacted during the last 20 years and more," overruled a long line of earlier decisions and held that assumption of risk is not a defense where such a statute is violated. While the question of contributory negligence has not arisen, the language of the decision[72] leaves no room for doubt that that defense too is now removed.

The statute in which such an intent is to be discovered is definitely the exception rather than the rule. The writer has found only those mentioned. When we come to ordinary public safety regulations, such as the petroleum statute violated in the *Dart Case,* the special considerations and the background of policy which are found in the child labor acts and the other statutes are lacking. It is not enough to say that the regulation is intended for the protection of purchasers. Traffic statutes are intended for the protection of other drivers and pedestrians; railway crossing statutes are intended for the protection of those who are to cross; every safety statute is intended for the protection of somebody. Something more is needed. Such petroleum regulations have been held quite consistently to impose no absolute responsibility, and contributory negligence has been held to be a defense.[73] A diligent search for

71. (1930) 180 Minn. 21, 230 N. W. 125.

72. "The public policy of the state, as gathered from legislation enacted during the last 20 years and more, is to make the employer liable for injury to an employee caused by the violation by the employer of a statute requiring him to provide and maintain safe premises and appliances for the protection of his employees, and that the defense of assumption of risk should not apply in such cases." Suess v. Arrowhead Steel Products Co., (1930) 180 Minn. 21, 25, 230 N. W. 125.

73. Morrison v. Lee, (1911) 22 N. D. 251, 133 N. W. 548; Gulf Refining Co. v. Jinright, (C.C.A. 5th 1925) 10 F. (2d) 306; Peterson v. Standard Oil Co., (1910) 55 Or. 511, 106 Pac. 337; Parton v. Phillips Petroleum Co., (1937) 231 Mo. App. 585, 107 S. W. (2d) 167; Gibson Oil Co. v. Bush, (1928) 175 Ark. 944, 1 S. W. (2d) 88; Olena v. Standard Oil Co., (1926) 82 N. H. 408, 135 Atl. 27.

Under the Minnesota statute the question had been left open in Farrell v. O. G. Miller Co., (1920) 147 Minn. 52, 179 N. W. 566, and was not con-

any decisions holding that because of the highly dangerous character of explosive petroleum mixtures a special policy is to be discovered placing sole responsibility upon the dealer, has produced only one Wisconsin case[74] declaring the violation to be "gross negligence."

The consumers of kerosene are not normally children; they are not intoxicated; they are not employees compelled by economic necessity to work in a place of danger; they are no more ignorant, and no more unable to protect themselves than ordinary members of the community. A rather close analogy is suggested to the pure food acts in various states, which obviously are intended for the protection of purchasers no more able to protect themselves than purchasers of petroleum. It has consistently been held[75] that contributory negligence is a defense to their violation. Furthermore, as the opinion in the *Dart Case* points out,[76] the duty imposed by the petroleum statute is not limited to consumers, and might give rise to an action by any passing member of the public injured by an explosion in a filling station.

The Evidence

Dart v. Pure Oil Co. is to be tried again. It would be entirely improper to express here any opinion on the facts which might be regarded as intended to influence the decision. This is particularly true where the second trial may add new evidence or throw a different light on the testimony in the first. The writer must emphatically disclaim any such intention. However, the evidence as to the facts

sidered in Getz v. Standard Oil Co., (1926) 168 Minn. 347, 210 N. W. 78; but in Riggs v. Standard Oil Co., (C.C. Minn. 1904) 130 Fed. 199, the federal court clearly held that contributory negligence was a defense.

74. Knecht v. Kenyon, (1923) 179 Wis. 523, 192 N. W. 82.

75. Friedman v. Beck, (1937) 250 App. Div. 87, 293 N. Y. S. 649; Kelley v. John R. Daily Co., (1919) 56 Mont. 63, 181 Pac. 326; Kurth v. Krumme, (1944) 143 Ohio St. 638, 56 N. E. (2d) 227; Tate v. Mauldin, (1930) 157 S. C. 392, 154 S. E. 431. The Minnesota court has held that the pure food act permits the defense of contributory negligence on the part of a dealer. Neiman v. Channellene Oil & Mfg. Co., (1910) 112 Minn. 11, 127 N. W. 394.

76. "We can visualize many instances where a violation of the statute might affect the rights of the general public even though the injured person was not at the time a user of the product. For example, if a pedestrian was passing an oil station, even though he was not at the time a purchaser or user of volatile oils, and an explosion occurred at the oil station as the result of a violation of the statute in connection with the negligent handling of kerosene or gasoline, can it be said that the statute was not for his protection as a member of the general public as well as for one who was actually buying or using the product at the time of the explosion? We think not." Dart v. Pure Oil Co., (Minn. 1947) 27 N. W. (2d) 555, 562-563.

of contributory negligence brought before the supreme court presents rather an interesting question; and since it is a matter of public record and has served as a battlefield for a considerable number of attorneys, it is not improper to review it.

The decedent Dart lived in a small cabin north of Hibbing. The cabin was heated by a small stove. Some time before his death he had bought the can of "kerosene," and there was no evidence that he ever knew or suspected that it was anything else. On the day of the accident, October 16, 1943, two employees of a lumber company drove up to the cabin about 8:30 in the morning to deliver some lumber and briquets. As they approached they saw that there was no smoke in the chimney. The decedent came out in his night clothes and gave them some instructions. Shortly afterwards he came out again to get some of the briquets. He said that he was having a hard time getting his fire started; that he had only green popple wood; that "it was pretty hard to start," and that maybe the coal would help to get it going. It might be inferred that he had just then started the fire. He reentered the cabin. After a lapse of time variously estimated at five, seven of ten minutes,[77] the visitors heard a muffled explosion and a scream. When they rushed into the cabin they found the decedent covered with the contents of the petroleum can and in flames. They got him outside, extinguished the flames by rolling him in the sand, and hurried him to a hospital, where he died.

Subsequently the cabin was examined by four witnesses. They found the stove door open. Tilted into it was the kerosene can, with its bottom blown out. The indications were quite definite that the explosion had occurred while Dart was pouring the liquid from the can into the stove, and that it occurred inside of the can itself. There was expert testimony that a flame or spark could ignite gasoline vapor and follow it back into the can.

There was no fire in the stove. The fuel was laid, with green popple wood underneath and briquets on top. It was not disarranged.[78] The wood was not charred.[79] It "had a little black smoke on it,"[80] or "some black marks like smoke,"[81] but it did not appear to have been burned.[82] Two witnesses testified that it looked "as

77. Record, 170, 171, 191, 215.
78. Record, 545, 754.
79. Record, 209, 790.
80. Record, 543, 790.
81. Record, 551-552.
82. Record, 543, 551-552.

though there had not been any fire on the wood,"[83] and "it had not gone that far."[84]

What actually happened in that cabin no one will ever know. But on this circumstanstial evidence, with nothing more in the record, it was contended on behalf of plaintiff that the jury might reasonably conclude that the fire had not burned steadily and continuously during the ten, seven or even five minutes which had elapsed since it was started. It was argued that even green wood, burning for that length of time, could be expected to show more than "a little black smoke," particularly after an explosion. It was contended that the jury might conclude that Dart had seen no fire, embers or spark, and that he had reasonably believed that he was pouring kerosene onto an extinct fire.

On the way to the hospital the decedent said that "he had heard of that happening to other people but he never thought he would fall for such a game."[85] At the hospital he told the doctor that "he poured some kerosene into the fire of a stove and the explosion resulted."[86] It was contended that both of these statements were ambiguous, so far as they might indicate Dart's knowledge that the fire was not out, and that the jury might understand them to mean merely that he knew retrospectively that there was an active fire in the the stove, not that he had known it at the time.

Our ancestors and our rural contemporaries have made a great deal of law on the general subject of lighting fires with kerosene. One gathers the impression that they have blown themselves up with monotonous regularity. It is uniformly held, in recognition of the survival of several generations who have done it, that it is not negligence as a matter of law to pour kerosene on dead fuel and apply a match to it.[87] On the other hand the dangerous character of the liquid is a matter of such common knowledge that no ordinary man can be permitted to claim ignorance of it,[88] and except for two

83. Record, 544, 551-552.
84. Record, 551-552.
85. Record, 202-203, 221-222.
86. Record, 768.
87. Peplinske v. Kleinke, (1941) 299 Mich. 86, 299 N. W. 818; Pierce Oil Co. v. Taylor, (C.C.A. 8th 1920) 264 Fed. 829; Peterson v. Standard Oil Co., (1910) 55 Or. 511, 106 Pac. 337; Fairbanks, Morse & Co. v. Gambill, (1920) 142 Tenn. 6, 222 S. W. 5; Waters-Pierce Oil Co. v. Deselms, (1909) 212 U. S. 159; Farrell v. O. G. Miller Co., (1920) 147 Minn. 52, 179 N. W. 566.
88. Riggs v. Standard Oil Co., (C.C. Minn. 1904) 130 Fed. 199; Morrison v. Lee, (1907) 16 N. D. 377, 113 N. W. 1025, 13 L. R. A. (N.S.) 650; Goode v. Pierce Oil Corp., (1926) 171 Ark. 863, 286 S. W. 1009; Parton v. Phillips Petroleum Co., (1937) 231 Mo. App. 585, 107 S. W. (2d) 167; see Jennings v. Standard Oil Co., (1934) 206 N. C. 261, 173 S. E. 582.

decisions[89] the courts have held consistently that it is negligence as a matter of law to pour kerosene on live coals or a visible flame.[90] Stress is always laid on the plaintiff's knowledge or reason to believe that there was an active fire; and where such knowledge or reason is lacking it has been held to be error to give a peremptory instruction.[91]

There is an interesting Louisiana decision[92] in which the plaintiff's daughter lighted a fire in a heater in his bedroom, and went back to bed. Some thirty minutes later the plaintiff went to the heater, found that it was not giving off heat, opened it and satisfied himself that the fire had gone out. He then poured onto the wood about half a pint of what he believed to be kerosene, and was injured by the ensuing explosion. The court held that he was not required as a matter of law to take the wood out of the stove to make sure that the fire was extinct, and that the jury might properly find that he has used reasonable care.[93] In the *Dart Case* it was contended that one entirely possible explanation of the accident was that the decedent had done the same thing.

The supreme court, in reversing the directed verdict, said very

89. In Douglas v. Daniels Bros. Coal Co., (1939) 135 Ohio St. 641, 22 N. E. (2d) 195, and Dronette v. Meaux Bros., (1924) 156 La. 239, 100 So. 411, the question was held to be one for the jury.

90. Riggs v. Standard Oil Co., (C.C. Minn. 1904) 130 Fed. 199; Parton v. Phillips Petroleum Co., (1937) 231 Mo. App. 585, 107 S. W. (2d) 167; Goode v. Pierce Oil Corp., (1926) 171 Ark. 863, 286 S. W. 1009; Crouch v. Noland, (1931) 238 Ky. 575, 38 S. W. (2d) 471; Olena v. Standard Oil Co., (1926) 82 N. H. 408, 135 Atl. 27.

91. "On the other hand, even if there were evidence to show that the explosion was caused because the inflammable liquid was poured either upon fire or embers, the request ignores the element that the fire or embers in the stove were apparent to the decedent, Lawrence E. Clarke, upon the exercise of ordinary care. In other words, it would not be negligence to pour gasoline or kerosene into a stove in which there was a fire burning, or in which there were live coals or embers, unless the party doing it knew of such fire or embers or could have known thereof by the exercise of ordinary care. The Court did not err in refusing the request." Paragon Refining Co. v. Higbea, (1925) 22 Ohio App. 440, 153 N. E. 860.

92. Frazier v. Ayres, (La. App. 1945) 20 So. (2d) 754.

93. "We think that Frazier was not called upon to do more than he did to determine if there was any fire in the stove prior to pouring the liquid therein. He observed that the pine splinters had burned and that the wood nearest the door was charred. He saw no evidence of fire either from the front or through the opening at the top. The stove was not giving off heat. He could have done but one thing more. He could have removed the wood from the stove. Few persons, if any, who understand the nature of kerosene would have done this prior to pouring kerosene on the wood. They would have felt perfectly safe in not doing so. It did not reflect lack of due care for Frazier to do no more than he did." Frazier v. Ayres, (La. App. 1925) 20 So. (2d) 754, 761.

little about the merits of the case,[94] but evidently felt that the jury should be permitted to hear these arguments, or at least that there was so much uncertainty as to just what did occur[95] that the presumption that the decedent had exercised due care for his own safety[96] was not clearly and definitely overthrown.

CONCLUSION

The writer is no friend of the defense of contributory negligence. He dislikes it because it places upon the plaintiff, who usually is least able to bear it, the entire burden of a loss which is caused by the fault of both parties. He has long advocated the adoption in Minnesota of a statute apportioning damages between the parties according to their estimated fault, in line with the "comparative negligence" acts which are in successful operation in a number of other states.[97] Such statutes do no more than sanction what everyone knows that juries actually do whenever they are given the chance. The reports from the other states, and particularly from insurance companies doing business in Wisconsin, indicate that the original opposition to the statute has disappeared; that liability in some cases has been compensated by a reduction of verdicts in others; that liability insurance rates in these jurisdictions are not disproportionate to those elsewhere; and that the habitual defend-

94. "We believe, in view of our ruling with reference to the law of negligence and contributory negligence applicable in this case, that the record raises sufficient issues of fact to warrant a new trial. We base our conclusion on the questions raised in the record as to the liability of defendants and the contributory negligence of decedent. Additional evidence may be available. Therefore, we conclude that in the interest of justice a new trial should be granted, and it is so ordered." Dart v. Pure Oil Co., (Minn. 1947) 27 N. W. (2d) 555, 563.

95. In its speculative character and its uncertainty as to just what did occur, the case resembles Getz v. Standard Oil Co., (1926) 168 Minn. 347, 210 N. W. 78, and Kentucky Independent Oil Co. v. Schnitzler, (1925) 208 Ky. 507, 271 S. W. 570, where the issue of contributory negligence was held to be for the jury.

96. Getz v. Standard Oil Co., (1926) 168 Minn. 347, 210 N. W. 78; Jasinuk v. Lombard, (1933) 189 Minn. 594, 250 N. W. 568; Klare v. Peterson, (1924) 161 Minn. 16, 200 N. W. 817; Pattock v. St. Cloud Public Service Co., (1922) 152 Minn. 69, 187 N. W. 969.

97. Wisconsin, Nebraska, South Dakota, Mississippi. Virginia and Georgia have such statutes applicable to railway crossing accidents only. There are general comparative negligence acts in British Columbia, New Brunswick and Nova Scotia, and Ontario has a statute combining comparative negligence with contribution between joint tortfeasors. See Gregory, Loss Distribution by Comparative Negligence, (1936) 21 Minn. L. Rev. 1.

The "comparative negligence" idea is of course familiar in the Federal Employers' Liability Act, 35 Stat. 65 (1908) 45 U. S. C. §§ 51-59 (1940) and its Minnesota equivalent, the state railway labor act, Minn. Stats., 1945, § 219.79. Also in the Merchant Marine Act, 41 Stat. 1007 (1920) 46 U. S. C. § 688 (1940).

ants have no complaint. The supreme court of Minnesota once appealed to the legislature[98] for the adoption of a comparative negligence act; but because of unfounded fears and the inherent conservation of the bar the appeal has gone unheeded.

If it had been held in the *Dart Case* that contributory negligence can never be a defense where the defendant has intentionally done an act which violates a statute, what would have been the result? With the defense suddenly and spectacularly eliminated in a very large percentage of all negligence actions, would not the opposition to the comparative negligence act have collapsed like a house of cards, and the defendants have clamored for its passage? Would not the legislature, faced with such a sweeping and drastic change in the law, have been compelled at last to face the issue and put the house in order? It is at least a very interesting topic for speculation.

The opinion in *Dart v. Pure Oil Co.* is an excellent one, which does much to clarify a subject that has been especially confused and tangled in Minnesota. In the existing state of the law it seems clearly right. But from the point of view of the ultimate future, it is perhaps too bad that it did not go wrong.

98. "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment notwithstanding the verdict. It would be hard to imagine a case more illustrative of the truth that in operation the rule of comparative negligence would serve justice more faithfully than that of contributory negligence. We but blind our eyes to obvious reality to the extent that we ignore the fact that in many cases juries apply it in spite of us. But as long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case." Holt, J., in Haeg v. Sprague, Warner & Co., (1938) 202 Minn. 425, 429-430, 281 N. W. 261.