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NEGLIGENCE-CONTRIBUTORY NEGLIGENCE-CUSTOMARY VIOLATION OF STATUTE BY DEFENDANT AS BEARING ON ISSUE OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE

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NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CUSTOMARY VIOLATION OF STATUTE BY DEFENDANT AS BEARING ON ISSUE OF PLAINTIFF'S CONTRIBUTORY NEGLIGENCE—Plaintiff's empty truck, proceeding uphill, collided

on plaintiff's side of the road with defendant's loaded truck which was traveling in the opposite direction. Both trucks were engaged in the same road-surfacing project. The road had a washout on defendant's side. Defendant's answer alleged that there was an established custom under which drivers of empty trucks yielded the right of way to drivers of loaded trucks when about to meet in a narrow or defective place in the highway; that defendant relied upon such custom which plaintiff failed to observe; and that the plaintiff's failure to observe the custom constituted contributory negligence. The trial court granted the plaintiff's motion to strike these allegations on the ground that they constituted no defense for defendant's failure to obey a statute.[1] On appeal, *held*, reversed. While the custom pleaded cannot be invoked to prove that defendant exercised due care, it can be considered in determining whether plaintiff was free from contributory negligence. *Langner v. Caviness*, (Iowa 1947) 28 N.W. (2d) 421.

Although there is some authority for the proposition that a driver may place absolute reliance on others to observe the laws of the road fully and operate their vehicles with due care,[2] it is generally held that such assumption cannot be made where it appears, or reasonably should appear, that the other party is not going to obey the statute.[3] There is little authority on the question whether evidence of customary violation of a statute by persons in defendant's circumstances is admissible to show absence of due care on the part of the plaintiff when plaintiff knows, or should know, of the custom. Cases cited in the principal case support admission of the evidence for such purpose.[4] In determining what a driver must do to exercise due care for his own safety, it would seem material to consider what reasonable expectations he might entertain concerning the probable conduct of the party who approaches from the opposite direction. Whether one may reasonably expect another to act in a certain way should be determined by reference not only to the conduct required of him by statute, but also by the action customarily taken by persons in his position.[5] While cases

[1] Iowa Code (1946) § 321.298 ("Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway, shall give one-half of the traveled way thereof by turning to the right").

[2] Ford v. Tremont Lumber Co., 123 La. 742, 49 S. 492 (1909); Zorn v. Britton, 120 Fla. 304, 162 S. 879 (1935); 7 TULANE L. REV. 463 (1933); 19 TULANE L. REV. 300 (1944).

[3] Kerr v. Hayes, 250 Mich. 19, 229 N.W. 430 (1930); Eaton v. Ambrose, 133 Me. 458, 180 A. 363 (1935); 38 AM. JUR. 871; 14 BOST. UNIV. L. REV. 155 (1934); 4 DUKE B.A.J. 38 (1936).

[4] Hensen v. Connecticut Co., 98 Conn. 71, 118 A. 464 (1922); Tobin v. Goodwin, 157 Wash. 658, 290 P. 215 (1930); Mann v. Standard Oil Co., 129 Neb. 226, 261 N.W. 168 (1935). While these cases do not involve direct holdings on the same facts as the principal case, they do support its decision. See also Pollock v. Hamm, 177 Ark. 348, 6 S.W. (2d) 541 (1928), holding that evidence of customary violation of statute was admissible on question whether violator was contributorily negligent. For decisions in accord with the principal case where the master-servant relationship exists, see 33 L.R.A. (n.s.) 646 (1911); Abbott v. McCadden, 81 Wis. 563, 51 N.W. 1079 (1892).

[5] Muir v. Cheney Bros., 64 Cal. App. (2d) 55, 148 P. (2d) 138 (1944).

may be found [6] containing the flat statement that evidence of a custom contrary to statute is inadmissible, the reason for such holding is that its introduction was sought for the purpose of proving that the defendant was not negligent, even though he violated the statute.[7] Thus, these cases are properly decided. But they do not consider the exact question involved in the principal case. Although admission of such evidence may result in the defendant's successful evasion of the statute as concerns civil liability, this result is in accord with the theory behind the doctrine of contributory negligence,[8] and there is little reason to regard statute law with more sanctity than common law. Whether the defendant's negligence consists of breach of statute or of a common law duty has no final bearing on the question of liability; the plaintiff's contributory negligence may defeat recovery in either case. Danger of misuse of such evidence by the jury will be present only in states which follow the rule that violation of a statute is merely evidence of negligence, and such danger can be avoided by proper instructions. While the fact that one has the statutory right of way tends to make his assumption that others will give way to the right in obedience to the statutory duty a reasonable assumption, nevertheless courts should not sanction the closing of one's eyes to obvious danger by strict reliance on statutory right of way, when one should know that under the circumstances others customarily do not, and probably will not, obey the statute. "In many cases to insist on a technical right of way would be the height of recklessness." [9]

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[6] Casey v. Boyer, 270 Pa. 492, 113 A. 364 (1921); Frame v. Arrow Towing Service, 155 Ore. 522, 64 P. (2d) 1312 (1937).

[7] Since custom is only evidence of what is proper and reasonable, if a statute has set the standard of reasonable conduct a customary violation of the statute cannot lower this standard. Myrtle Point Transportation Co. v. Port of Coquille River, 86 Ore. 311, 168 P. 625 (1917); Muir v. Cheney Bros., 64 Cal. App. (2d) 55, 148 P. (2d) 138 (1944); 2 WIGMORE, EVIDENCE, 3d ed., § 461 (1940); 1 THOMPSON, NEGLIGENCE, 2d ed., § 32 (1901).

[8] PROSSER, TORTS 393 (1941); 2 TORTS RESTATEMENT 1227 (1934).

[9] 14 BOST. UNIV. L. REV. 155 at 158 (1934).