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Statutory Construction--Applicability of Workmen's Compensation Act to Interstate Employees Engages in Intrastate Work at Time of Injury

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the right of the public to assess against land for public use is paramount to *any* vested right of ownership.¹⁴ A third case decides that as no notice is required to anyone for general taxes,¹⁵ the reason for which is mere maintenance of government, no notice should be required in special assessments to an interested party, such as a mortgagee, because he is theoretically receiving an enhancement to the value of the property held under lien.¹⁶

However, there must be some other reason back of this nominal rationale. Courts have sympathized with the position of the mortgagee, but regret their inability to assist him.¹⁷ Do not the courts seem to balance the purely contingent and defeasible right of the mortgagee against the administrative inconvenience to be caused by the requirement of notice to the lienholder? Couple also the fact that it would by analogy lead to the same requirement for all other lienholders and it seems fit to require that the mortgagee to on the "qui vive" rather than to adopt another prerequisite to the validity of an essentially difficult administrative function. In any event it would appear that the rule of *Mortgage Company of Maryland v. Lory* will remain settled law for West Virginia.

—HENRY P. SNYDER.

STATUTORY CONSTRUCTION—APPLICABILITY OF WORKMEN'S COMPENSATION ACT TO INTERSTATE EMPLOYEES ENGAGED IN INTRASTATE WORK AT TIME OF INJURY.—In *Towns v. Monongahela Railway Company*¹ an employee, who was engaged at time in both interstate and intrastate work, sued his interstate employer. A hand car, which he and others were busily pumping along the main line towards an unfinished sidetrack,² was

¹⁴ *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33 (1894); *Wilson v. Cal. Bank*, 121 Cal. 630, 54 Pac. 119 (1898); *Norwich v. Hubbard*, *supra* n. 12; *People v. Weber*, 164 Ill. 412, 45 N. E. 723 (1897); *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767 (1898). Does this consist with the idea that notice should be prerequisite to the exercise of this public right?

¹⁵ *DILLON*, *op. cit. supra* n. 2; *McQUILLIN*, *op. cit. supra* n. 2.

¹⁶ *Supra* n. 8.

¹⁷ *Norwich v. Hubbard*, *supra* n. 12.

¹ 153 S. E. 919 (W. Va. 1930).

² The siding, in process of *original* construction for a plant shipping its products in both interstate and intrastate commerce, was as yet unconnected to the main line. It was not, therefore, an instrumentality of interstate commerce. *McKee v. Elec. Ry. Co.*, 78 W. Va. 131, 88 S. E. 616 (1916); 2 *ROBERTS*, *FEDERAL LIABILITY OF CARRIERS* (2nd ed. 1929) § 761.

derailed when the forman failed to see the signal for an open switch. The character of his work at the time of injury was so clearing intrastate,³ that it was previously held error to have submitted that question to the jury.⁴ Recovery for the foreman's negligence, which must therefore be based on common law principles as administered by state courts rather than on federal law,⁴ was denied. Since the Workmen's Compensation Act clearly excludes such employees from its operation,⁵ the coercive feature of the act⁷ does not apply here to deny the railway company its common law defense of the fellow servant rule.

This decision as to the construction of the state law merely reiterates others.⁸ In *Barnett v. Coal and Coke Railway Company*⁹ the court said that the act¹⁰ had been so framed to avoid conflict

³ Towns was bound for intrastate work and was paid for the time spent in getting there as if actually on the job.

⁴ *Towns v. Monongahela Ry. Co.*, 105 W. Va. 572, 144 S. E. 289 (1928).

⁵ "The common law rule, absolving the master from liability for injuries to a servant caused by the negligence of a fellow servant, was abolished as to all interstate employees of carriers" by § 1 of the Federal Employers' Liability Act. 2 ROBERTS, *op. cit. supra* n. 2, § 799.

⁶ W. Va. Acts 1925, c. 68, § 52.

⁷ W. VA. CODE ANN. (Barnes, 1923) c. 15P, § 26, denies such common law defenses as the fellow servant rule to employers included within the operation of the act who have not elected to pay premiums into the fund.

⁸ Interstate employers not included within the operation of the compensation act are not denied common law defense in action by their employees. *Adams v. Kentucky & West Virginia Power Co.*, 102 W. Va. 36, 135 S. E. 662 (1926) (employee engaged in interstate work, recovery at common law sustained); *Shaffer v. Western Maryland Ry. Co.*, 93 W. Va. 300, 116 S. E. 747 (1923) (employee engaged in interstate work, recovery based on federal act sustained); *Halley v. Ohio Valley Elec. Ry. Co.*, 92 W. Va. 172, 114 S. E. 572 (1922) (employee engaged in interstate work, recovery based on federal act sustained); *Smith v. United Fuel Gas Co.*, 91 W. Va. 52, 112 S. E. 205 (1922) (employee engaged in interstate work, federal act not relied upon, recovery denied); *Miller v. United Fuel Gas Co.*, 88 W. Va. 82, 106 S. E. 419 (1921) (employee engaged partly in intrastate and partly in interstate work, state act depriving employer of common law defenses inapplicable, recovery denied); *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S. E. 549 (1919) (employee's general work wholly intrastate, state act applied unconditionally, recovery sustained); *Suttle v. Hope Natural Gas Co.*, 82 W. Va. 729, 97 S. E. 429 (1918) (employee's general work wholly intrastate, state act applicable unconditionally); *Barnett v. Coal & Coke Ry. Co.*, 81 W. Va. 251, 94 S. E. 150 (1917) (employee engaged partly in intrastate and partly in interstate work, state act inapplicable).

⁹ *Barnett v. Ry. Co.*, *supra* n. 8, at 259. Here employer's counsel in their brief suggested that "one obvious purpose of excluding these twilight zone relationships from the normal application of the law is to relieve those responsible for the administration of the statute from the extremely difficult task of deciding how near the line of interstate commerce their jurisdiction extends."

¹⁰ W. Va. Acts 1913, c. 10, § 52.

with congressional jurisdiction over interstate commerce.¹¹ The language of the amended act, which governed the Towns Case, is even more compelling as to construction.¹² After making the usual provision for an election to come under the operation of the act, Section 52 concludes: "the act shall not apply to *employees of employers engaged in interstate commerce*".¹³ This proviso,¹⁴ striking expressly at the Towns situation, has since been changed to read: "the chapter shall not apply to *employees of steam railroads, steam railroads partly electrified, or express companies engaged in interstate commerce*".¹⁵

The legislature, in this instance, seems to have been overzealous to avoid the possibility of encroaching upon federal jurisdiction. In avoiding a difficult situation,¹⁶ it has denied this employee the benefit of the state law and has left him without any remedy; yet, Towns is certainly a proper subject for the application of the humanitarian principles which underlie the compensation act. Should not the same coercion apply to deny his interstate employer the common law defense of the fellow servant rule as applies to those employers already included within the act? In both cases *intrastate* work is involved. And the very federal law,¹⁷ as to which

¹¹ An Ohio statute was similarly construed when the court took judicial notice of the legislative journals to find that by deliberate action the general assembly had inserted words of limitation upon the operation of the act. *Conrole v. Norfolk & Western Ry. Co.*, 216 Fed. 823 (1914).

¹² W. Va. Acts 1925, c. 68, § 52.

¹³ Italics here and subsequently are ours.

¹⁴ Previously the cases distinguished between an employee of an interstate employer whose general work was *wholly intrastate* and clearly separable from work in interstate commerce, and such an employee engaged partly in intrastate and partly in interstate work. As to the former the act was said to apply unconditionally; as to the latter only conditionally upon an election. *Miller v. Gas Co.*, *Roberts v. Gas Co.*, *Suttle v. Gas Co.*, *Barnett v. Ry. Co.*, all *supra* n. 8. The proviso would now seem to prevent the application of the act unconditionally even to the former type.

¹⁵ W. Va. Acts 1929, c. 71, § 52.

¹⁶ "In such cases it is nearly always difficult to mark out the dividing line between intrastate and interstate commerce, and to tell where a given service in the one leaves off and the other begins. There is what has been termed a 'twilight zone'—a sort of no man's land. . . ." *Halley v. Elec. Ry. Co.*, *supra* n. 8, at 182.

¹⁷ If the federal act is inapplicable in the Towns Case, because the application of that act depends upon the *character of the work at the time of injury* which was there intrastate; then, the state act should not exclude Towns from its benefits simply because he had an interstate employer. To do so substitutes *character of employer* for *character of work*.

the legislature was so careful, is only applicable when the character of the work at the time of injury is clearly *interstate*.¹⁸ Why not, then, amend the state law to cover expressly all situations beyond the purview of the federal law so as to carry out thoroughly and harmoniously the admitted social policy of placing the risk of industrial accidents upon industry?¹⁹

—A. BERNARD SCLOVE.

TAXATION—THE TAXING SITUS OF INTANGIBLES.—A resident of Illinois dying there, possessed bonds, promissory notes, and certificates for money on deposit all physically within the state of Missouri. Illinois collected an inheritance tax on all his intangibles including those above-mentioned in Missouri. Missouri also asserts a right to tax the intangibles within her boundaries. *Held*, said bonds, notes, and certificates of deposit were not within the jurisdiction of Missouri for taxation purposes. The Court said the bonds, notes and certificates of deposit were merely evidence of the debts and like all intangibles their *situs* for taxation was the domicile of the creditor; to allow Missouri to collect the tax would violate the "due process" clause of the Fourteenth Amendment. *Baldwin v. State of Missouri*.²

¹⁸ "Under the Employers' Liability Act a right of recovery exists only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed in such commerce." *Pedersen v. Delaware L. & W. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, Ann. Cas. 1914 C, 153 (1913). "The true test of employment in such commerce (interstate) in the sense intended is, was the employee, at the time of injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" 2 ROBERTS, *op. cit. supra* n. 2, § § 723 724, 727.

¹⁹ "The Workmen's Compensation Law was passed pursuant to a widespread belief in its value as a means of protecting workingmen and their dependents from want in case of injury when engaged in certain specified hazardous employments." *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351 (1916), *aff'g* 168 App. Div. 403, 153 N. Y. Supp. 505.

¹ 281 U. S. 586, 50 Sup. Ct. 436 (1930), Mr. Justice Holmes, Brandeis and Stone dissent. Holmes in his opinion laments the reversal of *Blackstone v. Miller*, *supra*. He says, "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable".