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Note and Comment

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NOTE AND COMMENT

SPECIAL ASSESSMENTS UPON CEMETERIES.—Though the power to tax cemeteries would seem to be entirely clear, very commonly land devoted to such purpose is declared by constitution or statute to be exempt. See COOLEY, TAXATION, (3rd ed.) 354. So also in the case of special assessments such land, in the absence of a clear exemption, is liable thereto. *Bloomington Cemetery Assoc.* v. *People*, 139 Ill. 16, 28 N. E. 1076; *Mullins* v. *Cemetery Assoc.*, 239 Mo. 681, 144 S. W. 109; *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y. 503; *Lima* v. *Lima Cemetery Assoc.*, 42 Oh. St. 128, 51 Am. Rep. 809. It may be suggested, in view of the theory upon which special assessments go, that the owner of the land gets back the amount assessed in benefits from an enhanced value of the property, land dedicated to cemetery purposes perpetually would not be subject to such assessments. This contention was urged in *Garden Cemetery Corporation* v. *Baker*, 218 Mass. 339, 105 N. E. 1070 (1914), and under the facts there presented was rejected, the court distinguishing *Mount Auburn Cemetery* v. *Cambridge*, 150 Mass. 12. Where all the lots are sold and used for burial and under the law the company cannot divert the land to other uses, perhaps the argument might be difficult to meet. Exemption from special assessment, then, in general, it would seem, must be found, if at all, in some provision or provisions of the

constitution, statutes, or charter, or in some inherent difficulty in the collection of the assessments.

Exemption from "assessments," it is held, will exempt from special assessments. *State* v. *St. Paul,* 36 Minn. 529, 32 N. W. 781; *In re New York,* 192 N. Y. 459, 85 N. E. 755; *Swan Point Cemetery* v. *Tripp,* 14 R. I. 199. But an exemption from "taxation" does not have the same result. *Bloomington Cemetery Assoc.* v. *People, supra; Lima* v. *Lima Cemetery Assoc. supra; Mullins* v. *Mount St. Mary's Cemetery Assoc., supra.* And in *Baltimore* v. *Green Mount Cemetery,* 7 Md. 517, it was held that a statute providing that land forever appropriated and set apart as a cemetery so long as used as such "shall not be liable to any tax or public imposition whatsoever," did not exempt from special assessments. As to the effect of an exemption from "execution" the courts are not agreed. That such exemption includes special assessments was held in *In re Sixth Ave. West, Seattle,* 59 Wash. 41, 109 Pac. 1052, where the statute provided that any part of a burial ground appropriated as burying place for any particular person or family "shall not be liable to be taken or disposed of by any warrant or execution, for any tax or debt whatever," the court, however, holding the unsold portions of the cemetery liable to the assessment; and in *Union Dale Cemetery Company's Case,* 227 Pa. St. 1, 75 Atl. 835, where the charter of the company exempted the land of the company and the burial lots therein "from execution, attachment, taxation, or any other lien or process." In the latter case the court said that a confirmation of the assessment would mean the fastening of a lien on the land, which if not paid would lead to a sale, for "the right of lien includes the power to sell, else the lien would be a nullity." On the other hand it has been held that such exemption from execution does not include special assessments. *Bloomington Cemetery Assoc.* v. *People, supra,* holding such exemption only relieves from sale on *fi. fa.; Mullins* v. *Mount St. Mary's Cemetery Assoc., supra; Lima* v. *Cemetery Assoc. supra,* holding that there could be no sale to pay the assessment, but that the city could collect "by appointment of a receiver, by sequestration, or such other appropriate remedy as equity may afford, without in any way disturbing the resting place of those reposing in 'the city of the dead'." There was a statute in Ohio which gave remedy for recovery of the assessment by action. See *infra.*

The main question came before the Supreme Court of Michigan in *Woodmere Cemetery Ass'n.* v. *Detroit,* (Sept. 26, 1916), 159 N. W. 383. The cemetery Association having failed to pay a special assessment for paving a street upon which the cemetery abutted, the city sold the land and bid it in, there being no other bidders. The association by bill in equity asked to have the sale set aside and to remove the cloud created by the apparent liens held by the city. The lower court granted the relief prayed for, holding that the city had not proceeded according to law in levying the assessment and that the cemetery property was exempt from any such sale. By an evenly divided court the Supreme Court affirmed the decree. The four judges for affirmance went on the ground that land used for cemetery pur-

poses was "exempt from the particular tax by virtue of a settled state policy evidenced by the provisions in the charter of complainant and in other state statutes." The other judges while agreeing that the land could not be sold for the purpose of collecting the assessment, were of opinion that the land was subject to the assessment which should be collected by way of a decree that such special assessment was a debt due from the association to the city.

HOWELL'S MICH. STATUTES, § 13025, provide that "all cemeteries, tombs, and rights of burial, while in use as repositories of the dead" shall be "exempt from levy and sale under any execution, or upon any final process of a court." It was upon this statute, upon the case of *Avery* v. *Forest Lawn Cemetery Co.*, 127 Mich. 125, 86 N. W. 538, applying the statute in an action seeking a sale of cemetery land to pay a debt, and upon the limitations on the association's power to sell and use the land for nothing but cemetery purposes, that the prevailing judges relied in holding the land exempt from the assessment.

That the cemetery should be exempt from *sale* would seem, for obvious reasons, a very proper conclusion. No doubt a court would be astute to find ground on which to base such a determination. But does it necessarily follow that because the land is held exempt from sale that therefore there is no liability for such assessments? In DILLON, MUNICIPAL CORPORATIONS, (§ 822) on the basis of *McInerny* v. *Reed*, 23 Iowa 410, it is said that "where the charter of a city conferred upon it the power 'to levy and collect' a special tax for local improvements and declared such tax to be *'a lien'* upon the real estate upon which it should be assessed, and no mode of collection was prescribed, and no power to collect by sale existed, the court was of opinion that the lien might be *enforced in equity*, and the power 'to collect' be exercised by the corporation by a suit in its name." This was approved and adopted by the Ohio court in *Lima* v. *Cemetery Assoc., supra.* But in *Cave Hill Cemetery Co.* v. *Gosnell*, 156 Ky. 599, 161 S. W. 980 (1913), in an action on a warrant against the Cemetery Company for its part of the cost of paving a street, the lower court held the cemetery subject to the lien, though not subject to a sale therefor, on the authority of *Louisville* v. *Nevin*, 10 Bush. 549, and ordered the company, it appearing that it had funds, to pay the amount of the assessment into court within twenty days. The Supreme Court reversed the decision, saying that "To require the cemetery company to pay the apportionment warrant when its land is not subject to a lien would be in effect to make the owner of the property personally liable for the amount sued for. But we have often held that the owner is not personally liable for the cost of a street improvement. * * * To require the cemetery company to pay the money into court is only in another form to subject its property to a lien. All the funds in the hands of the cemetery company are held in trust to maintain the cemetery and to require these funds to be paid out for other purposes is to require the trustee to divert the funds from the trust to which they were dedicated."

However it may be in cases of the character just referred to, there would seem to be no reasonable basis for denying the power of the legislature, in

the absence of constitutional restrictions, to provide for the recovery of the amount of such assessments by appropriate actions designed to that end. The exemption, to whatever extent it is granted, is wholly a matter of favor, which can be extended upon such terms as the legislature may see fit. The Ohio statute (§ 3898, P. & A. ANN. GEN. CODE) which provides that *any* unpaid special assessment may be recovered by suit against the landowner was upheld as constitutional in *Hill* v. *Higdon,* 5 Oh. St. 243; *Gest* v. *Cincinnati,* 26 Oh. St. 275. Of course if *all* of the funds of the cemetery company were held in trust for special purposes, the remedy may be of no avail.

The Detroit city charter (§ 221) provides that "the said receiver shall have power in the name of the city of Detroit to prosecute any person refusing or neglecting to pay such taxes or any special assessment by a suit in the circuit court for the County of Wayne, and he shall have, use, and take all lawful ways and means provided by law for the collection of debts, to enforce the payment of any such tax or any special assessment." Assuming the validity of such charter provision, may it not well be that by a proceeding thereunder and the assistance of the powers of a court of equity along the line of the doctrine of *McInerny* v. *Reed, supra,* and *Lima* v. *Cemetery Assoc., supra,* it would be possible to reach non-trust funds of the Association?

R. W. A.

THE RIGHT TO EMPLOY INCONSISTENT DEFENSES.—The case of *McAlpine* v. *Fidelity and Casualty Company of New York,* 158 N. W. 967, decided July 28, 1916, by the Supreme Court of Minnesota, sets forth clearly what should be the modern doctrine respecting inconsistent defenses. In an action on an accident policy for death resulting through accidental means, the defendant alleged that the death was caused by suicide and further that it was caused by the beneficiary. The court denied the plaintiff's motion that the defendant be required to elect upon which claim it would rely, the motion being based upon the ground that the two defenses were inconsistent. The Supreme Court held that the ruling of the lower court was correct.

The Minnesota statute reads as follows: "The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed." (R. L. 1905, § 4132, G. S. 1913, § 7758). This provision is very similar to that found in many other state codes, and nowhere does it make the requirement of consistency among defenses. Whatever rule has come to be effective, is the result of construction, and under earlier Minnesota decisions the rule was established that separate defenses must be consistent. *Booth* v. *Sherwood,* 12 Minn. 426; *Steenerson* v. *Waterbury,* 52 Minn. 211, 53 N. W. 1146; *Rees* v. *Storms,* 101 Minn. 381, 112 N. W. 419.

The common law rule was that a defendant could plead only one defense without infringing the rule against duplicity. By the statute of 4 Anne, a party was allowed "to plead as many several matters thereto as he shall

think necessary for his defense." However, they could not be inconsistent with one another. Even what is known as inconsistency by implication of law was at first not allowed. This rule was later relaxed so as to allow all those not inconsistent in fact. The rule in equity is very similar to the related rule under the Statute of Anne, and provides that two defenses are inconsistent and cannot be pleaded together when, if the evidence supporting one is true, the evidence supporting the other cannot be true in point of fact. 48 L. R. A. 183, Notes III, IV, and V.

Textwriters have disagreed upon the weight of authority, both as to allowing inconsistent pleas, and as to what constitutes such inconsistency as will prevent defenses being joined under Code procedure. POMEROY in his work on CODE REMEDIES (4th ed.) § 598, citing cases to support him, states this to be the rule: "Assuming that defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority that, unless expressly prohibited by statute, they may still be united in one answer. It follows that the defendant cannot be compelled to elect between such defenses, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency." To the contrary is the following, "under the new procedure there is some contrariety in the decisions but the rule established by the weight of authority both in reason and in numbers, is in harmony with the rule in equity, that two defenses so inconsistent in point of fact that both cannot be true, so that the establishment of one is the destruction of the other, cannot be joined." PHILLIPS, CODE PLEADING, § 261. In the latter work, commenting upon the above statement of Mr. POMEROY, the author says: "He has overlooked the distinction between contradictory facts and logical inconsistency; and has reached a conclusion that is not warranted, and that is not sustained by the cases he cites to support it. It would be a reproach to our system of procedure if defendants were allowed to set up defenses *ad libitum*, without regard to whether they were true or false, consistent or inconsistent; and such license is not to be drawn from the spirit of the codes, and is not sanctioned by the weight of authority." Citing, BLISS, PLEADING, 344; BOONE, PLEADING, 78; SWANN, PLEADING, 267.

A great number of cases have apparently allowed inconsistent defenses, 48 L. R. A. 185, Note VI, a. But the courts deciding them have made quite indefinite and unsatisfactory statements as to what constitute inconsistent defenses, and an examination of the decisions shows that in many of them, and probably in a majority of them, the defenses were really not inconsistent in fact, but only in law. Logical inconsistencies and inconsistencies by implication of law have always been allowed.

There are thus developed two distinct questions,—(1) are the defenses pleaded inconsistent? and (2) if so, can they be pleaded together? And it is very noticeable that while many courts profess to disallow inconsistent defenses, they are almost invariably successful in finding that the defenses before them are susceptible of such a construction as to make them consistent. In many instances they have gone to almost absurd lengths to sustain the rule in theory while denying it any effective force in practice. *Loveland* v.

Jenkin-Boys Co., 49 Wash. 369; *Bank of Glencoe* v. *Cain*, 89 Minn. 473, 95 N. W. 308; *Bank* v. *Closson*, 29 Oh. St. 78.

The very fact that so many courts have held defenses to be consistent, when in fact they probably were not, is a very persuasive argument in favor of the conclusion reached by the principal case. The Supreme Court of Minnesota there held that the general rule (as to inconsistent defenses) should and would not be applied "so as to prevent a meritorious defense or work manifest injustice." The end sought was a speedy trial on the merits, not an artistic and symmetrical system of pleading. Their attitude is well expressed thus: "Naturally enough the legal mind revolts at a rule of pleading which requires a defendant to choose which of two defenses he will interpose, though both cannot be true, and neither is within his knowledge, at the peril of losing all if he mistakes, for when called upon to elect he is having his final day in court." It is inconsistent with the spirit of the modern procedure to refuse to allow a defendant to plead inconsistent defenses, when there is a real doubt in the pleader's mind as to what the evidence will disclose. At least, he should be allowed to state them in the alternative, stating also the reason for so doing. There is the same reason for allowing alternative statements of defenses as for allowing alternative statements of the right of action. Michigan, by its new Court Rules following the JUDICATURE ACT OF 1915, has fully abandoned the rule of consistency and allows inconsistent counts and defenses to be freely pleaded and presented to the jury. (Rule 21, § 7.) New Jersey, in its recent PRACTICE ACT, has done the same thing. (Laws, 1912, Chap. 231, § 24.) It is to be hoped that the recent Minnesota rule will have many followers, who will frankly allow inconsistent defenses instead of going to doubtful extremes in trying to adhere to the old rule by calling inconsistent defenses consistent. H. G. G.

ORAL CONTRACT TO MAKE A DEVISE OR CONVEYANCE OF LAND.—Damages can never be recovered at law for breach of a contract which does not comply with the Statute of Frauds. On the other hand, if suit is brought in equity for specific performance, such relief will be granted under some circumstances. In a recent case, the plaintiff, the niece of the deceased, was treated by him as a member of the family. During girlhood and even after marriage, she performed many services of a personal nature for the deceased and wife. In compensation for these services, the deceased orally promised to will all of his property to the plaintiff. The deceased however made no will. Upon his death, the plaintiff brought an action against the administrator for specific performance of the oral contract. *Held*, that this relief should be granted. *Rine* v. *Rine* (Neb. 1916), 158 N. W. 941. In another recent case, the facts of which were precisely similar, the New Jersey court refused to decree specific performance. *Boulanger* v. *Churchill* (N. J. 1916), 97 Atl. 947. These two contrary decisions offer an opportunity for an inquiry into the theory or theories upon which equity, under some circumstances, gives effect to an oral contract to convey or devise lands in spite of the Statute of Frauds.

Most courts hold that the Statute of Frauds applies to oral contracts to devise lands as well as to oral contracts to convey lands. *Judy* v. *Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; *Berge* v. *Hiatt's Adm.*, 82 Ky. 666; *contra, semble, Soper* v. *Galloway*, 129 Ia. 145, 105 N. W. 399. An early case, decided nine years after the enactment of the Statute of Frauds, held that, in an action for specific performance, the taking of possession by the vendee was a sufficient act of part performance to take the agreement out of the operation of the statute. *Butcher* v. *Stapely*, 1 Vernon 363 (1685). But there has since grown up a grave conflict as to what particular acts of part performance are necessary. It is well settled in England and in the great majority of American jurisdictions that the payment of purchase money, in full or in part, is not sufficient. *Britain* v. *Rossiter*, 11 Q. B. Div. 123, 131; *Cooper* v. *Colson*, 66 N. J. Eq. 328, 58 Atl. 337; *Bake* v. *Wiswell*, 17 Neb. 52. The contrary view has been taken in Delaware, probably in Georgia and by statute in Iowa. *Houston* v. *Townshend*, 1 Del. Ch. 416, 12 Am. Dec. 109; *Rawlins* v. *Shropshire*, 45 Ga. 182; IOWA CODE, § 4626. The majority view is no doubt the better, for the payment of money is an equivocal act, *i. e.*, it does not necessarily refer to a contract for the sale of the particular land; and the rule also works no great injury as the vendee can recover the purchase price in an action at law. *Hull* v. *Thomas*, 82 Conn. 647; *Mills* v. *Joiner*, 20 Fla. 479.

The English view and that of some of the American courts is that possession taken by vendee in pursuance of an oral contract will take the case out of the statute. *Clinan* v. *Cook*, 1 Sch. & Lef. 22, 40; *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 266; *Pugh* v. *Good*, 3 W. & S. (Pa.) 56, 37 Am. Dec. 534. There are many dicta following the English view but in most of the cases there were other acts of part performance in addition to taking possession by the vendee. The courts of Massachusetts, Texas, and Kansas insist that possession by the vendee must be accomplished by such circumstances as would lead to irreparable injury in case the relief is denied. *Burns* v. *Daggett*, 141 Mass. 368; *Weatherford Co.* v. *Wood*, 88 Tex. 191; *Baldridge* v. *Centgraf*, 82 Kans. 240. In the following cases, substantial payments or improvements were required in addition to possession by the vendee. *Dunckel* v. *Dunckel*, 141 N. Y. 427; *Derr* v. *Ackerman*, 182 Pa. 591; *Holmes* v. *Caden*, 57 Vt. 111. The following cases illustrate the rule in their respective states that possession must be accompanied by at least substantial payment (nothing said concerning improvements). *Wright* v. *Raftree*, 181 Ill. 464; *Nelson* v. *Shelby Co.*, 96 Ala. 515 (statutory); *Wallace* v. *Scoggins*, 17 Ore. 476. In Kentucky, Mississippi, North Carolina and Virginia (by statute, CODE § 2413), nothing except fraud will take the case out of the Statute of Frauds and the doctrine of part performance is thoroughly repudiated. The application of this rule may no doubt seem to work great hardship but it is the only rule in which the courts do not rewrite the Statute of Frauds.

In the principal cases however, possession by the plaintiff cannot take the case out of the statute for it is part of the agreement that the devisor is to remain in possession and any possession taken by the plaintiff would not be

exclusive. The cases in which possession by the plaintiff is impossible must be considered separately and, as the principal cases suggest, there is a conflict of authority in the decisions. Even where the consideration on the part of the plaintiff consists of past services of a very personal nature and he has given up his home or business in order to render them, there is a grave conflict. The following cases are in accord with the principal Nebraska case: *Lloyd* v. *Hollenbeck,* 98 Mich. 203; *Best* v. *Gralapp,* 69 Neb. 811 (not cited in principal case); *Pflugar* v. *Pultz,* 43 N. J. Eq. 440 (see valuable note). On the other hand, the following cases take a contrary view: *Grant* v. *Grant,* 63 Conn. 530; *Wallace* v. *Long,* 105 Ind. 522; *Baldwin* v. *Squier,* 31 Kans. 283; *Orabill* v. *Marsh,* 38 Oh. St. 331. It is interesting to notice that without a review of the authorities, the court in the principal New Jersey case decides contrary to a line of at least five decisions in its own state. Under the circumstances of an admitted conflict, it is well to inquire into the theory upon which equity will decree specific performance of oral contracts required to be in writing by the Statute of Frauds. By granting relief equity is clearly rewriting the Statute of Frauds, and there must be some theory upon which it proceeds to do so. Furthermore, it would seem that if equity does this on one ground in cases in which possession is possible it ought logically to be on the same ground in cases in which it is not possible for the plaintiff to take possession. There are at least two distinct theories suggested by the cases. The first is that equity will seek a substitute for the writing required by the statute, *i. e.,* such acts of part performance as are referable to a contract concerning this particular land. This is no doubt the theory underlying the English, the New York and the Illinois groups of cases, *supra.* The second theory is the one suggested by the principal Nebraska case, that equity will decree specific performance where otherwise the injury to the plaintiff would be, in fact, irreparable. The Massachusetts doctrine is perhaps a combination of both theories but no court adopts the theory of irreparable injury alone, where possession is possible.

It would seem then that in cases in which possession is impossible, the courts should refuse to grant specific performance unless there are other acts which are referable only to a contract for the land in question. It cannot be said that the services performed in the principal cases are referable only to a contract for a devise of the particular lands. Hence, if the New Jersey court in the principal case proceeded on the theory of part performance referable to the contract, it was right in denying relief. But in the principal Nebraska case, the court shifted over to the theory of irreparable injury in cases in which possession is impossible. This seems illogical, but justice is no doubt obtained in this manner. There are at least two variations or combinations of these theories. In the leading English case of *Maddison* v. *Alderson,* L. R. 8 App. Cases 467, Lord SELBORNE insists that there must be such acts of part performance as are clearly referable only to a contract concerning this particular land. If this is shown, then he will consider whether more substantial justice would be accomplished by granting specific performance than by refusing it. This is in reality a combination

of both views. On the other hand, Lord BLACKBURN recognized that it is settled law that a change of possession will take a case out of the Statute of Frauds, but he regards this as an anomaly and refuses to extend it to cases in which there is no change of possession. This is a limitation of the first theory.

When the plaintiff has rendered ordinary personal or professional services, the value of which can be readily estimated, his injury is not irreparable, and specific performance should be denied under any of these theories. Where the services are very personal, however, such as the care of an aged person, especially when it necessitates an abandonment by the plaintiff of his business or his home, it is no doubt just to grant specific performance. As POMEROY says: "There are things which money cannot buy; a thousand nameless and delicate services and attentions incapable of being the subject of explicit contract, which money with all its peculiar potency, is powerless to purchase." T. E. A.

WHAT CONSTITUTES INTERSTATE COMMERCE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT OF 1908?—The material provisions of the act are "That every common carrier by railroad while engaged in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death, resulting in whole or in part from the negligence of any of the officials, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines * * *" COMPILED STATUTES 1913, §§ 8657-8665. As stated in the case of *Pederson* v. *Delaware, L. & W. R. Co.*, 197 Fed. 537, 117 C. C. A. 33, "the object of this act was to broaden the right to relief for damages suffered by railroad employees in interstate transportation." This act, unlike the one condemned in *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, deals only with the liability of a carrier engaged in interstate commerce (*Mondou* v. *New York, N. H. & Hartford Co.*, 223 U. S. 1, 38 L. R. A. N. S. 44, 32 Sup. Ct. 169, 56 L. ed. 327), the old one being condemned because of its being an attempt to regulate liability for injuries not only from interstate traffic, but also from intrastate traffic. And to recover, plaintiff must not only be employed by such interstate carrier, but must himself have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged; it is on this question—the relation of the plaintiff himself to such interstate commerce—that most of the cases turn in the interpretation of the statue. *Pedersen* v. *Delaware &c. Co., supra.* The court must find that he himself was at the time of the injury engaged in interstate commerce. *Lucchetti* v. *Philadelphia & R. Ry. Co.*, 233 Fed. 137.

An engineer hauling cars engaged in both interstate and intrastate commerce was held by the North Carolina Supreme Court to have been engaged in interstate commerce in *Horton* v. *Seaboard Air Line Ry.*, 157 N. C. 146, 72 S. E. 958. And it is settled that if one is engaged at the time in inter-

state commerce, the fact that at the same time he is engaged in intrastate commerce will not put him beyond the protection of the statute. Accordingly it is held that a brakeman on a train containing cars loaded with interstate freight is engaged in "interstate commerce" within the act, even though the train runs only between intrastate points. *Waters* v. *Guile*, 234 Fed. 532; *Behrens* v. *Ill. Cent. R. Co.*, 192 Fed. 581. The North Carolina courts hold *contra* to this, however, in the case of *Zachary* v. *North Carolina R. Co.*, 156 N. C. 496, 72 S. E. 858, holding that a fireman killed while attending his engine, which was about to haul some freight which was interstate commerce, was not so engaged in interstate commerce, as his run was to have been wholly intrastate. In *Van Brimmer* v. *Texas & P. Ry.*, 190 Fed. 394, it was held that a brakeman injured while making a flying switch to set out a car transported wholly in interstate traffic was not within the statute, even though such car were a part of a train carrying both interstate and intrastate commerce. This can be reconciled with the later case of *Waters* v. *Guile, supra*, only upon the theory that at the time of the inury the plaintiff was engaged, not as a brakeman on the train, but simply as to the one car which was at the time being "spotted." Otherwise it is in accord with the North Carolina case above. In case the brakeman is injured while "spotting" a car which itself is being shipped to another state, even though it be at the time a part of an intrastate train, there can be no doubt but that he is within the protection of the statute. *Rich* v. *St. Louis & S. F. R. Co.*, 166 Mo. App. 397, 148 S. W. 1011; *Nashville, C. & St. L. R. Co.* v. *Banks*, 156 Ky. 609, 161 S. W. 554. In *Montgomery* v. *Southern Pacific Co.*, 64 Ore. 597, 131 Pac. 507, the Oregon supreme court held that members of a switching crew engaged in switching cars loaded, or to be loaded, with interstate commodities, and injured while hauling them to another place within the state, from which an interstate train could more conveniently take them, were engaged in interstate commerce.

Where a shipment from one point to another, both within the state, in the course of transportation passed through another state, it was held to be an interstate shipment within the statute. *Louisville & N. R. Co.* v *Allen*, 152 Ky. 145, 153 S. W. 198.

Where an employee engaged in interstate commerce has been ordered to report, or by custom or necessity does so, and is injured while on his way to his post, the general rule is that he is at the time engaged in interstate commerce, and is protected by the statute. *Lamphere* v. *Oregon R. & Nav. Co.*, 196 Fed. 336; *Illinois Central R. Co.* v. *Nelson*, 203 Fed. 956; *Missouri, K. & T. Ry. Co. of Texas* v. *Rentz* (Tex. Civ. App. 1912), 162 S. W. 959.

An electric Interurban Railway is held to be a "railroad" within the statute. *Mc Adow* v. *Kansas City Western Ry. Co.* (Mo. App. 1914), 164 S. W. 188.

Where a railroad is engaged in transporting logs from a woods to a distant mill, within the state, the fact that such logs are there made into lumber which then becomes a part of interstate commerce does not bring such railroad within the statute as being engaged in interstate commerce. *Bay* v. *Merrill & Ring Lumber Co.*, 211 Fed. 717.

As regards employees working on instrumentalities which have not yet been used and made an actual part of a carrier's interstate system, the general rule seems to be that such employees are not engaged in interstate commerce within the statute. Such was the case in *Raymond* v. *Chicago, M. & St. P. Ry. Co.*, 233 Fed. 239, where a laborer working in a tunnel which, when completed, would be used by a railroad company engaged in both interstate and intrastate commerce, as part of its line, was held not within the statute, the reason being that there was no assurance that such tunnel would ever be completed, or even if it were, that it would ever be used and made a part of such interstate system. In *Thompson* v. *Columbia & P. S. R. Co.*, 205 Fed. 203, it was held that a workman killed while repairing a bridge on the line over which interstate commerce was carried by defendant was within the act, on the ground that such bridge had already been made a part of such interstate system. *Pedersen* v. *Delaware, etc. Co., supra,* was a case of an employee injured while laying an additional track over a bridge which had always supported other tracks used in interstate commerce by the defendant, and the court held that the plaintiff was not engaged in repairing the bridge, which was then a part of the interstate system, but was engaged in laying a new track, which had not yet become a part of such interstate system, and therefore not within the protection of the statute. The fact that he was injured by an interstate train was immaterial.

Regarding the nature of employees engaged in repairing instrumentalities of interstate carriers, which have already been used and made a part of such system, but which are for the time being out of such use, there is much conflict of opinion. In *Pierson* v. *New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233, the New Jersey court said: "The final test is the relation of the employee's work to interstate transportation *at the time of the injury.* The repairing of an instrument of commerce, which is used sometimes in interstate transportation, whether it be the road-bed of a railroad, or a car or an engine which is run over it, is not an *engaging* in commerce, but a preparation for engaging therein in the future." The Wisconsin court, in *Ruck* v. *Chicago, M. & St. P. R. Co.*, 153 Wis. 158, says: "It is the use to which the appliance or instrumentality is put *at the time,* rather than the nature of the instrumentality itself, which determines whether or not it is employed in interstate commerce; and where such instrumentality at the time repairs are being made upon it, is not being used to facilitate interstate commerce, but is being repaired to make it ready for either inter- or intra-state use, as occasion may require in the future, an employee engaged in such repairs is not employed in interstate commerce within the meaning of the statute. He must be employed directly in transportation, or in some act directly facilitating such transportation." The decision in that case was that a railroad employee repairing cars at its repair shop when the cars are not *en route* is not within the statute.

On the other hand, it was held in *Montgomery* v. *Southern Pacific Co., supra,* that "all employees who participate in the maintenance or operation of the instrumentalities for the general use of an interstate railroad are en-

gaged in interstate commerce within the act. And DOHERTY, in his work on "THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES," speaking of what employees are included as "engaged in interstate commerce," says: " * * * mechanics, or car repairmen, while engaged in work upon interstate cars or other interstate instrumentalities, and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train, are also included." And the great weight of decisions supports this latter view, that the control of Congress extends not only to the interstate commerce itself, but also to the control of the instrumentalities through which such commerce is carried on. That the following are included: a pumper of water for interstate trains, *Horton* v. *Oregon, Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, in which case the court said: "it is not the source of the injury which determines, but rather the *effect of the injury upon interstate* commerce;" one repairing the track of an interstate carrier, *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. 893; one engaged in repairing a switch used both in inter- and intra-state traffic, *Colasurdo* v. *Cent. R. R. of N. J.*, 180 Fed. 832; one repairing a boiler regularly used in interstate traffic, in shops of railroad, *Law* v. *Cent. R. R. Co.*, 208 Fed. 869, 126 C. C. A. 27; a servant putting in new block system of signals over interstate line, *Grow* v. *Oregon Short Line R. Co.*, 44 Utah 160, 138 Pac. 398; one repairing a telegraph line of an interstate road, by which trains were directed, *Deal* v. *Coal & Coke R. Co.*, 215 Fed. 285; one sweeping snow from a switch of an interstate line, *Hardwick* v. *Wabash R. Co.*, 181 Mo. 156, 168 S. W. 328; an engineer making a test run of an engine to be used exclusively for interstate commerce, such test run being wholly within the state, *Lloyd* v. *Southern Ry. Co.*, 166 N. C. 24, 81 S. E. 1003. Probably the most extreme decision under this doctrine is that of *Cousins* v. *Ill. Cent. R. Co.*, 126 Minn. 172, 148 N. W. 58, in which it was held that an employee of an interstate carrier injured while wheeling coal for the shop in which the other employees were repairing cars used in interstate commerce, was so engaged in interstate commerce as to come within the act. Summing up the better and more generally recognized rule, the court in *Northern Pacific Ry. Co.* v. *Maerkl*, 198 Fed. 1, 117 C. C. A. 237, says: "it is equally plain that those engaged in the repair of such car are as much engaged in interstate commerce as * * * any of the operatives who [after it is returned again to such active service] handle it in such traffic." The Texas court in *Missouri, K. & T. Ry. Co. of Texas* v. *Denahy*, (Tex. Civ. App. 1914), 165 S. W. 529 holds: "that such employee is so engaged [in interstate commerce] when such car is *intended* to be used in interstate commerce on being repaired." And the spirit of that decision seems to be that if such car had previously, and up to the time of internment for repairs, been used in interstate commerce, then the presumption is that it is intended to be kept in such service, unless it be affirmatively shown by the defendant that the contrary is true. This view is the better, and is the one almost universally followed by the courts. H. R. H.