1929

Utah Fuel Company v. Industrial Commission of Utah and Mrs. Lavona Jacobsen : Brief of Appellant

Utah Supreme Court

O.K. Clay; attorney for applicants

No. 4929

IN THE
Supreme Court
of the
STATE OF UTAH

Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH and MRS. LAVONA JACOBSEN, widow of Jacob Jacobsen, deceased, for and on behalf of herself, and Raymond L., Carrol, Jack, and Robert Jacobsen, children of deceased.

Defendants.

APPLICANT'S BRIEF

O. K. CLAY,
Attorney for Applicants.

SALT LAKE EFFICIENCY PTG. CO.

IN THE
Supreme Court
of the
STATE OF UTAH

UTAH FUEL COMPANY,
a corporation,
Plaintiff,

vs.

INDUSTRIAL COMMISSION OF UTAH, and MRS. LAVONA JACOBSEN, widow of Jacob Jacobsen, deceased, for and on behalf of herself, and Raymond L., Carrol, Jack, and Robert Jacobsen, children of deceased.
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APPLICANT'S BRIEF

STATEMENT OF THE CASE

The statement of the case, as made in Appellant's brief, is substantially correct. It omits, however, the essential facts that the children of deceased were deserted by him and left destitute in Hiawatha, Carbon

County, Utah; also that they were being supported in Seattle, Washington, by the parents and grandparents of the mother (wife of deceased). These facts show that the children have no property of their own, no means of support, and were "dependent" at the date of the death of deceased.

ARGUMENT

FINDINGS BY COMMISSION ARE CONCLUSIVE

The commission made its findings that the children of deceased were dependent upon him for their maintenance and support and this Court is bound by that finding. In a recent case, Banks vs. Industrial Commission, reported in the advance sheets of 278 P. at page 58, where there was some conflict in the evidence as to the cause of the death of deceased, and the Commission found as a fact that no accident causing the death of deceased had been proven, this Court said:

> "We have heretofore held (Kavalinakis vs. Industrial Commission, 67 Utah, 174, 246 P 698) that findings of fact by the Commission are conclusive on this Court, and cannot be disturbed except upon clear and convincing evidence that the Commission acted arbitrarily or capriciously, and without sufficient cause refused to follow uncontradicted evidence."

In the Kavalinakis case, supra, Mr. Justice Frick writes a very comprehensive and elucidative opinion. After quoting Sec. 6148, subdivisions C and D, Compiled Laws of Utah, 1917, as amended by Chapter 67, Session Laws of Utah, 1921, in which it is provided that the findings and conclusions of the Commission on questions of fact shall be conclusive and final, and shall

not be subject to review, and also quoting from Section 3149, C. L. U. 1917, providing that the Commission shall not be bound by the usual common law, or statutory rules of evidence, but may make the investigation in such manner as is best calculated to ascertain the substantial rights of the parties, says:

> "To confer upon the commission the latitude to make findings and arrive at conclusions of fact without regard to the rules of law or procedure would be utterly useless and illogical if this Court were permitted to review such findings and conclusions by applying to them the usual tests of law and procedure in determining their correctness or soundness. To do that would authorize the commission to arrive at a conclusion independently of the usual rules of law and procedure, while this Court would approve them if they conformed to the ordinary rules of law and procedure but would disapprove them if they failed to do so. * * * *
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> "By what has been said we do not wish to be understood as holding that there is no limit to the commission's power or authority in disregarding or in refusing to give effect to uncontradicted evidence. * * * * What we hold is that * * * we cannot set aside a finding or conclusion of fact merely because we are of the opinion that upon the face of the record the commission refused to give effect to certain uncontradicted evidence. Before we can set aside findings or conclusions of fact, the fact that the commission acted arbitrarily or capriciously must be so clear and convincing that but one conclusion is permissible, and that we would be required to issue a writ of mandate directing a specific finding of dependency, as we are empowered to do by subdivision (d) of section 3148, supra. * * * * We have so often held that

unless there is an entire absence of competent evidence to support a finding or decision of the commission we are powerless to interfere, that it seems a work of supererogation to even refer to those holdings."

In Utah Fuel Company vs. Industrial Commission, 194 P. 122, it is held:

"Where there is some substantial evidence as shown by the record, to support the findings of the Industrial Commission, the award will not be disturbed."

In Reteuna vs. Industrial Commission, 185 P. 535, it is held by this Court:

"Where there is testimony to support the conclusion of the Industrial Commission on a question of fact the Supreme Court will not review the commission's findings."

It will be noted that the commission found as a fact that these children "were dependent upon the decedent for their maintenance and support. Here we are not concerned with the sufficiency of the evidence, but only "that there is no testimony (evidence) sustaining or tending to sustain the conclusion and decision of said commission."

FINDING OF DEPENDENCY BY THE COMMISSION WAS ONE OF FACT

The Brief of Amicus Curiae contained in appellant's brief applied to the McGarry case reported in 222 P. 592, and dealt with the presumption of dependency referred to in subdivision B of Sec. 3140, C. L. U. 1917, as amended, and the authorities therein cited do not apply to the facts in the case at bar, or to the facts in the McGarry case as reported in 232 P. 1090.

As this Court will well remember, in the first McGarry case, 222 P. 592, there were no facts showing dependency except the relation of father and son. Upon the second appeal, reported in 232 P. the Court at page 1093 says:

> "Our decision upon the review of the first award was primarily based upon the fact that there was nothing to show that the applicant was in NEEDY circumstances or that his mother, who had obtained a divorce from her husband, was not abundantly able to support herself and the child. In other words, there was nothing to show that the child was actually dependent upon any one, unless it might be his mother, for support and maintenance. It is now made to appear that the child HAS NO MEANS OF ITS OWN; that its mother was unable to support it entirely and she was compelled to obtain assistance from the county to the extent of many hundreds of dollars. The child was only 3 or 4 years of age at the most when its father entirely abandoned it and its mother. Human experience teaches us that a child of that age, or even of the age it is now, is practically helpless, and lexicographers of the English language generally give to the word "dependent" a definition which covers and includes a helpless infant. The Industrial Act of Utah does not state the circumstances and conditions under which an actual dependency may be established. IT DOES NOT MAKE ACTUAL DEPENDENCY DEPEND UPON SOME SUPPORT FURNISHED THE APPLICANT BY DECEASED DOWN TO A RECENT DATE, nor has any respectable authority had the temerity to so interpret industrial acts unless the act itself prescribes such limitations, as in most of the states of the Union.

> "We are inclined to the views intimated in our former opinion, that where a mere infant, incapable of supporting itself and not competent either to claim or waive a right under the law, is abandoned by its father, whose duty under the law during his life was to support the child, such child, upon his father's death, within the purview of the Utah Industrial Act, BECOMES AN ACTUAL DEPENDENT WITHOUT REGARD TO THE QUESTION AS TO WHETHER HE HAS RECEIVED OR HAD THE PROMISE OF SUPPORT. Whether such child is wholly or partially dependent, of course, depends upon the facts of the particular case."

It will be noted that the logic of the Court applies peculiarly to the facts in the case at bar for the reason that the applicants, awarded compensation by the Commission, are infants of tender years, incapable of either claiming or waiving their rights under the law. Raymond is now 12 years of age, Carroll 10, Jack 8 and Robert 5, and at the time of the desertion of them by their father, the deceased, their ages were respectively 8, 6, 4 and 1. In the McGarry case, upon the evidence taken by the Commission in Idaho, it was shown as a fact that the minor was in destitute circumstances, and was wholly depending upon the mother for support. In the case at bar, the Commission has found that these minors are in destitute circumstances, are being supported by the parents and grandparents of the mother in Seattle. Of course, the fact that these children are being supported by grandparents or great grandparents does not change their status of dependency upon the deceased.

In Ocean Accident & Guarantee Corporation vs. Industrial Commission, 269 P. 77, where the children of deceased were being supported by a stepfather and the insurance carrier contended for that reason that they were not depending upon their father, the deceased, the Court at page 79 states:

> "The position of petitioner, if carried to its logical conclusion, would mean that if an abandoned child was supported by casual charity, it could not recover compensation for the death of the parent who deserted it. This is not the law. Young vs. Niddrie & Benhar Coal Co., 6 Butterworth's Compensation Cases, 774; McGarry vs. Indus. Com., 64 Utah, 592, 232 P. 1090, 39 A. L. R. 306."

The same doctrine is not only declared in the McGarry case, supra, but also in the case of State vs. Bess, 44 Ut. 39, 137 P. 829.

We submit that the McGarry case has laid down the law in this State relative to the dependency of children. There can be no dispute as to the holding in the first McGarry case, because Mr. Justice Thurman who wrote both opinions, states in the latter opinion, 232 P. 1090, just what was held in the first case, and in the latter case it was held specifically that it was the duty of the father to support a minor child, the only question being as to the child's dependency, and if the child has no means of its own, then it follows that it is in fact "dependent" upon the father for support, even if the father never in his whole life contributed one cent in the discharge of his parental duty. This is also the doctrine declared in the case of Burbidge vs. Utah

Light & Traction Co., 196 P. 556, where the Court says:

> "Whatever may be the rule in other states, the law in this state is that it is the duty of the father to support his minor children. It is made a criminal offense to wilfully fail to support one's minor children under the age of 16 years. Comp. Laws of Utah, 1917, Sec. 8112; State vs. Bess, 44 Utah, 39, 137 Pas. 829. See also Alvey vs. Hartwig, 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678, 14 Ann. Cas. 250."

We respectfully submit that the award should be affirmed.

O. K. CLAY,
Attorney for Applicants.