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George K. Thompson and Frank S. Markhap,
Thompson-Markham Company v. Industrial
Commission of Utah, William M. Knerr, O. F.
McShane, Frank A. Jugler, E. A. Hodges : Brief of
Defendants

Utah Supreme Court

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IN THE

Supreme Court

OF THE

STATE OF UTAH

GEORGE K. THOMPSON and
FRANK S. MARKHAM, co-part-
nership doing business under the
firm name and style of THOMP-
SON-MARKHAM COMPANY,
Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION
OF UTAH, WILLIAM M. KNERR,
Chairman and member of said The
Industrial Commission of Utah, and
O. F. McSHANE and FRANK A.
JUGLER, members of said The In-
dustrial Commission of Utah, and
E. A. HODGES, State Metal Mine
Inspector,

Defendants.

No. 6221

BRIEF OF DEFENDANTS

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Attorney for Plaintiffs.
THE SUPREME COURT UTAH

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DEFENDANT'S BRIEF

STATEMENT OF THE CASE

In discussing this matter we shall refer to the plain-
tiffs as the Contractors, and to the defendants as the
Commission.

The Contractors have an agreement with the U. S.

Government to drive a tunnel through a mountain located about twenty miles south of Salt Lake City. When completed, this tunnel will be approximately three miles long, and will be used to convey irrigation waters from the Provo River to the Salt Lake valley. This controversy was brought on because of the fact that the Contractors insist on keeping their employees under ground more than eight hours. The Commission advised them that this was contrary to law, and threatened to take legal proceedings unless they desisted. The Contractors then made application to this court, and secured a temporary Writ of Prohibition. The Commission filed a general Demurrer and also an Answer to the Petition, all of which are set out in the Contractors' Brief which has been filed with this Court.

The law which the Commission claims the Contractors have violated is Chapter 59, Laws of Utah, 1937, and which, insofar as material here, reads as follows:

“The period of employment of working men in all underground mines or workings shall be not more than eight hours per day, such eight hour period shall be computed from the time men go under ground until they return to the surface, except in cases of emergency where life or property is in imminent danger; provided, however, when under ground hoists or pumps are in continuous operation, hoistmen and pumpmen employed on such hoists or pumps may be permitted to be underground not to exceed eight hours and thirty minutes. Any employer who violates any of the provisions of this section is guilty of a misdemeanor.”

The law relating to this subject was first enacted by the Legislature of 1896, shortly after the adoption of our State Constitution. Section 6 of Article XVI of the Constitution provides :

“The Legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines.”

In their brief the Contractors contend that the eight hour law passed in 1896 was to carry out the mandate of the constitutional provision above quoted. Undoubtedly, this constitutional provision caused the initiation of the legislation, but the legislaion of 1896 apparently restricted and enlarged upon the constitutional mandate. For instance, the Constitution directed that the legislation should provide for the health and safety of employes in “mines.” The legislation was restricted to “underground mines.” The constitutional provision was enlarged upon by extending the legislation to underground mines or underground workings.

In their brief the Contractors trace the history of this legislation back to its origin for the purpose of showing that it was the intention from the beginning that the law should apply only to mines and not to other underground workings. They refer to the titles of the various acts in the various compilations as “A DAY’S WORK—MINES AND SMELTERS.” A reference to these acts, however, will reveal that “mines and smelters” was not the title of the act, but was inserted in the law either by the engross-

ing clerks or by the printer. The title of the act under consideration reads as follows:

“AN ACT AMENDING SECTION 49-3-2, REVISED STATUTES OF UTAH, 1933, RELATING TO THE PERIOD OF EMPLOYMENT OF WORKING MEN IN UNDERGROUND MINES OR WORKINGS, AND IN SMELTERS AND IN ALL OTHER INSTITUTIONS FOR THE REDUCTION OR REFINING OF ORES OR METALS, PROVIDING THAT THE PERIOD OF EMPLOYMENT FOR UNDERGROUND MINES OR WORKINGS SHALL BE EIGHT HOURS PER DAY.”

The principal question to be solved in this matter is what did the Legislature intend by the use of the words “or works.”

We all agree that the Legislature intended “or underground works.” The Contractors say that the intention was that the “underground works” was intended to mean the underground works in connection with an underground mine. We say that the Legislature, by the use of the words “or underground works,” referred to similar underground works other than those found in mines. If the Legislature intended that this act should apply to mines only, then there was no occasion for inserting in the act “or underground works.” If they had used the words “The period of employment of working men in all underground mines shall be not more than eight hours per day,” no one would contend that it did not apply to every man working under ground in every mine. The word “mine” includes every tunnel, shaft, raise, drift,

and every other portion of the mine. One is just as much a part of the mine as the other, so that the legislators had something in mind when they inserted the words "or underground works". They realized that in this mountainous country many tunnels are being driven which do not have for their object the development of a mine. We refer, for instance to railroad tunnels, water tunnels, transportation tunnels. They knew that the same methods were used in the driving of these tunnels as are used in the driving of tunnels in search of minerals, and they knew that they were driven by miners, and that one was just as injurious to the health of these miners as the other. The statute should, therefore, be construed as though it read: "The period of employment of working men in all underground mines or other ground workings of a similar character shall be not more than eight hours per day."

The Contractors refer to the cases of the State of Utah vs. Holden, 14 Utah 71, and State vs. Holden, 14 Utah 96, and they claim that this court by these decisions has determined that the law under consideration refers only to mines.

In one of these cases an employer was convicted of working his employee more than eight hours per day in a mine, and in the other more than eight hours per day in a smelter. The court had under consideration the sole question as to whether or not the Legislature may limit the hours of employment in underground mines and smelters. In both cases it was definitely decided that the Legisla-

ture had such right, and that the act was a valid exercise of legislative authority. There was no question as to whether or not the act applied to underground works other than mines, and this court, in either case, did not mention the subject. True, in the course of the long opinions, statements were made to the effect that the act applied to employees in mines. It is such statements as these that the Contractors have selected from these decisions and cite them as holding that this court had already determined the issues involved in this action.

These cases were appealed to the Supreme Court of the United States and upheld by that court in *re: Holden vs. Hardy*, 169 U. S. 366. As stated above, all of these decisions hold that the Legislature may lawfully regulate the hours of labor, but they do not mention or even intimate what their ruling would be on the questions involved in the instant case.

Notwithstanding the fact that Utah and some of the other states have acts similar to the one under consideration, I have been unable to find any case deciding the point raised in these proceedings. Numerous tunnels have been driven in the mountains for purposes other than mining, and yet the question is raised in this court for the first time. It is reasonable to suppose that the persons who made these tunnels felt that they were amenable to the eight hour law and complied with the same, otherwise it would seem that the matter, long ago, would have been brought before the courts.

We submit, therefore, that the Utah cases above cited,

are authority only to the effect that the Legislature may enact laws of this kind. The same is true of the case of *Short vs. Mining Co.*, 20 Utah 20, cited by the Contractors. The question under consideration in this matter was not before the court nor considered by the court.

In their brief the Contractors next contend that this eight hour law is a penal statute, and being such it must be strictly construed. Then they cite cases from other courts which hold that penal statutes must be strictly construed.

In answer to this contention, however, we refer the court to Section 103-1-2 of the penal code of our Revised Statutes, which reads as follows:

“The rule of the common law that penal statutes are to be strictly construed has no application to these revised statutes. The provisions of these revised statutes are to be construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote justice.”

This appears to be a complete answer to the theory advanced by the Contractors that penal statutes must be strictly construed.

The Contractors next refer to the Missouri case of *State vs. Cantwell*, 78 S. W. 569. In this case the court was construing an eight hour law which definitely provided that it should relate only to tunnels, etc., being driven for the purpose of developing minerals. The defendant, as one of his defenses, claimed that it was an unlawful classification in that it protected miners in driving tun-

nels for mineral purposes, but did not protect miners who drive tunnels for other purposes.

To get around this objection the Supreme Court of Missouri said that railroad tunnels, water tunnels, etc., are only of temporary duration, while tunnels being driven to encounter mineral are permanent in their nature, and hence there was no unlawful classification.

The Supreme Court of Missouri and the Contractors overlook a vital point. They forget that all of these tunnels, mines, etc., are driven by men who make their livelihood by working beneath the surface of the earth; that when they complete one job, they go to another of the same or a similar kind. These tunnels are not constructed, for instance, by a group of farmers who go back to the farm when the work is completed. There is no reason why a miner in a water tunnel should not receive the same protection as a miner working in any other kind of tunnel.

The Legislature of Missouri in the enactment of this act must have felt that it would be construed to include all classes of tunnels unless it prescribed that it should apply only to tunnels being driven for mineral purposes, and hence it made the classification above mentioned. The Missouri case, however, is definite authority to the effect that the Legislature may limit the hours of employment in underground mines.

The Contractors also refer in their brief to a California case and a Wyoming case, but we cannot see that either of these cases has any bearing whatever on the question under consideration.

The Contractors next contend that if it should be decreed that the tunnel which they are driving comes within the purview of the eight hour law, then such law is unconstitutional for the reason that the Legislature is without power to limit the hours of labor in such a tunnel. They cite the various sections of our State Constitution and the Constitution of the United States relating to due process, the right to contract, etc., and they attempt to show there is no necessity for granting protection to miners engaged in the driving of such a tunnel, and they say that the Legislature in the enactment of the law did not make a finding to the effect that such labor is injurious to health of such miners.

This same objection has been raised in nearly every case where the subject has been under consideration. It has been repudiated by this court in the Holden case, *supra*, and in the recent case of McGrew, et al, vs. Industrial Com., 96 Utah 203. It has also been repudiated in a recent decision by the Supreme Court of the U. S. in re: West Coast Hotel Co., vs. Parrish, 300 U. S. 379, wherein Chief Justice Hughes used the following words:

“Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.”

And then again on page 399 of the Parrish case, the court says:

“The adoption of similar requirements by

many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

This court in the case of *State vs. Packer*, 297 Pac. 1013, used the following language:

"Where an act has a real and substantial relation to the police power, then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds, nor will the courts assume to determine whether the measures are wise, or the best that might have been adopted; or whether such laws are invalid on the ground of inexpediency, or whether they bear any real or substantial relation to the public welfare."

And again this court in the case of *Ashton-Jenkins Co. vs. Bramel*, 56 Utah 587, used the following words:

"Besides this, since when did the courts of this country become possessed of the power to determine the necessity of a statute or want of necessity in any particular case, and make that the controlling factor in determining whether or not the statute was unconstitutional? Such power does not belong to the courts. It is forbidden ground, upon which they dare not tread. The proposition is elementary."

This Court in the recent case of *McGrew vs. Industrial Com.*, 96 Utah 203, 85 Pac. 2nd 608, had under consideration the question of the right of the Legislature to

fix a minimum wage for women and miners. In upholding that right the court said:

“That the State may impose limitations and regulations on the right to contract has never been questioned but the question as to how far the State may go has been raised often. Many laws restricting this right have been upheld. The one most commonly called to mind is the Usury Law which prohibits contracts by which a man may receive more than a specified rate of interest for the money he lends. Many Sunday laws prohibit all contracts made on Sunday, one seventh of our natural life. Insurance rates and policy terms are regulated. Telephone charges, railroad rates, power, light, and gas rates are not only controlled and limited but prescribed and fixed by law.”

The Contractors lay great stress on the case of *In re Morgan* (Col.), 58 Pac. 1071, wherein the Colorado Supreme Court held a law unconstitutional which prescribed that eight hours should constitute a days labor in mines and smelters. This decision seems to stand alone.

We call the court's attention to 16 R. C. L. at page 487, wherein the author refers to the Colorado case above mentioned, and says:

“In a number of states wherein mining is carried on extensively there are statutes prohibiting the employment of workmen for more than eight hours per day in underground mines or workings or smelters or in institutions for the reduction or refining of ores or metals, except in cases of emergency where life or property is in imminent danger. Apparently but a single court has declared such a statute to be invalid, because the court entertained the extreme view that in a pri-

vate business attended with no injury to the public the legislature cannot prohibit an adult male from working more than eight hours per day on the ground that longer hours may or probably will injure his own health. As might have been expected, the effect of this decision was promptly obviated by a constitutional amendment directing the legislature to provide for an eight hour day in mines or underground workings, blast furnaces, smelters and ore reduction works, or other branches of industry or labor, that the legislature may consider injurious or dangerous to health, life or limb. Moreover, independently of express constitutional authority, the validity of statutes containing identical or similar provisions has been upheld by the federal supreme court and by all the state courts which had occasion to pass thereon."

The Contractors say that if the legislative act under consideration applies to the driving of a fifteen thousand foot tunnel, then it would apply to excavations for a house, a well, or a sewer trench. We are only concerned in this matter as to whether or not it applies to the tunnel in question, but we feel that it is no more applicable to the excavation for a house, or open sewer, or an ordinary well, any more than it would apply to an open-cut in a quarry, or the large open-cuts being made by the Utah Copper Company.

It is fundamental law that legislative acts are construed in accordance with the intention of the legislators. The courts often supply words in order to express the legislative intent, or they may strike out words in order to arrive at the legislative intent. In the case of *Dunn vs. Bryan*, 77 Utah 604, this court quotes with approval the following:

“It is a cardinal rule of construction that significance and effect shall, if possible, be accorded to every section, clause, word or part of the act.”

“The several provisions of the statute should be construed together in the light of the general purpose and object of the act and so as to give effect to the main intent and purpose of the legislature as therein expressed.”

“An interpretation which defeats any of the manifest purposes of the statute cannot be accepted.”

We call the courts' attention to the following words in 25 R. C. L. page 967 :

“It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed.”

And again on page 966 the following language is used :

“The application of the general rule that the intention of the legislature is to be determined from the language of the statute is not affected by the fact that the phraseology may be awkward, slovenly or inartificial. Language which has a distinct meaning, however awkward and inept, must be held to express the legislative will, and the facility with which the legislature might have expressed itself more appropriately or more directly will not authorize a court to disregard the natural sense of the words actually used.”

As stated above, the Legislative did not need to use

the words "or underground works" in order to reach every employee working under ground in every mine of the state. We must assume, therefore, that in the use of such words the law makers decided to go beyond what are ordinarily considered as mines. This court will take judicial notice that only a very small percent of the numerous tunnels, shafts, etc., ever develop into a mine. They are referred to by mining men as "prospects."

The court will take judicial notice that we have in this State numerous long tunnels which were driven for the sole purpose of conveying water in order to drain the properties which are being worked for mining purposes. We call your attention in particular to the Ontario drain tunnel, the Snake Creek drain tunnel, the Tintic drain tunnel, and the long drain tunnel now being driven by the International Smelting Company near Tooele, and which is known as the Elton Tunnel. Some of these tunnels are more than three miles long, and never encountered a hatful of ore. The Legislature knew of such tunnels, and knew that they were constructed by miners, and knew that the same methods were used in constructing them as are used in the construction of tunnels driven for the purpose of encountering commercial ores. Suppose, for instance, that in the driving of the instant tunnel, conditions seemed to justify an ore deposit about midway in the tunnel, and supposing that the owner of the ground decided to explore these conditions with the hopes of getting commercial ore. He would undoubtedly drive another tunnel through the same formations that the instant tunnel is

being driven. He would use the same methods for breaking the rock and bringing it to the surface. He would use miners experienced in underground mining. He may never encounter any ore or valuable mineral, and yet under the interpretation contended for by the Contractors, his men would be protected by the eight hour law, but the miners driving the water tunnel through the same formation under the same circumstances would receive no such protection.

The purpose of this legislation was to protect those workmen of the State who toil beneath the earth where the sunlight never strikes, and where the air is damp and polluted with powder smoke and other gases. We cannot believe that the Legislature intended this act to apply only where the underground work was being pursued for the purpose of encountering commercial ore.

The diseases which these underground miners most usually contract are miners consumption or silicosis. The court, we believe, will take judicial notice that these diseases are brought on by breathing fine, sharp particles of dust which cut and injure the lungs. These sharp particles of rock are caused by the drills and picks striking the hard rocks. The powder smoke, the damp air, and the sharp dust particles are present in all tunnels where picks, drills, and dynamite are used. It makes no difference whether the tunnel is being driven for the purpose of finding ore, or for the purpose of conveying water. They are all driven alike, and the same conditions exist in all.

These matters were known to the legislators, and it was for this reason that they used the words “or underground works”, so that they could protect underground miners throughout the State. Any other construction of the act is too narrow and will work to the injury of a large number of workmen underground whom the Legislature intended should receive protection.

Most respectfully submitted,

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