

1940

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
Plaintiffs

Utah Supreme Court

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Recommended Citation

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In the Supreme Court of the State of Utah

GEORGE K. THOMPSON and FRANK S.
MARKHAM, co-partnership doing busi-
ness under the firm name and style of
THOMPSON-MARKHAM COMPANY,

Plaintiffs,

vs.

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

Defendants.

No. 6221

PLAINTIFFS' BRIEF

STATEMENT OF THE CASE

Plaintiffs, under a contract with the United States of
America, Department of Interior, Bureau of Reclamation,
are engaged in the construction of a certain tunnel known

as the Alpine-Draper Tunnel, Salt Lake Aqueduct, which forms a part of the project known as the Deer Creek Project, having for its purpose the conveyance and transportation of water from the Deer Creek Reservoir in Provo River, Utah County, for use by subscribers of water in Salt Lake County. Said tunnel, when completed, will run from a point in the vicinity of Alpine, Utah County, Utah, to a point in the vicinity of Draper, Salt Lake County, Utah. Said tunnel projects through the elevation separating said points, and when completed, will have an approximate length of 15,000 feet, and will be approximately seven (7) feet in diameter. Said tunnel will be a straight bore, and will be lined and re-enforced with concrete and steel.

The tunnel is being driven for the purpose of conveying water, only; and not for the purpose of exploring for, or discovering mineral values, or to develop or operate a mine, and is not connected at all with any mining venture.

In the prosecution of said work, plaintiffs require their employees to work eight hours per day at their place of employment within the tunnel, and to change shifts at the place of employment within said tunnel, and not at the portal of said tunnel. The time consumed by the workmen in going from the portal to the place of employment, and returning therefrom to the portal, is not computed as a part of said eight hour period.

Defendants claim jurisdiction under the eight hour law, Section 49-3-2 Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, to require plaintiffs to work their employees not more than eight hours per day, said eight hours to be computed from the time said employees enter the portal of the tunnel, until they return to said portal, and claim jurisdiction to enforce said eight hour

law as interpreted by said defendants, and threaten to institute numerous prosecutions against plaintiffs unless they cease to work said employees not to exceed eight hours, from the time they enter the portal until they return to the portal of said tunnel. For the Court's convenience we set out plaintiffs' petition as "Exhibit 1" and defendants' answer as "Exhibit 2."

STATEMENT OF THE QUESTION INVOLVED

The question involved is, have plaintiffs the right to permit and require their employees to work eight hours per day at their place of employment within said tunnel, exclusive of the time required in going from the portal of said tunnel to the place of employment, and returning from the place of employment to the portal of said tunnel.

ARGUMENT

THE ALTERNATIVE WRIT OF PROHIBITION SHOULD BE MADE PERMANENT BECAUSE,

1. Section 49-3-2 Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, has no application to a tunnel such as the one being driven by plaintiffs. Said act applies only to underground mines or underground workings connected with mining.

2. Said Section is a penal statute, and must be strictly construed, and will be interpreted as being limited only to such classes of employment as come clearly within the terms of the act.

3. If Section 49-3-2 Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, applies to a tunnel such as plaintiffs are driving, the act violates Sec-

tions 1, 3, 7, and 24 of Article one of the constitution of Utah, and the 14th Amendment of the constitution of the United States.

I.

THE LEGISLATIVE ENACTMENT HAS NO APPLICATION TO A TUNNEL SUCH AS THE ONE BEING DRIVEN BY PLAINTIFFS.

The act which plaintiffs are charged with violating, Section 49-3-2 Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, reads as follows:

"49-3-2. A DAY'S WORK—MINES AND SMELTERS. The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, and 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 underground until they return to the surface, except in cases of emergency where life or property is in imminent danger; provided, however, when underground 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 Constitution, Article 16, deals with the general subject of labor.

Section six (6) of that Article is as follows:

"Sec. 6. (EIGHT HOURS A DAY'S LABOR ON PUBLIC WORKS.) Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the State, County or Municipal governments; **and the Legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines."**

The framers of the Constitution gave a mandate to the Legislature to provide for the health and safety of employees in **factories, smelters and mines.**

That mandate is specific; there was no general mandate to the Legislature to pass laws to provide for the health and safety of employees in all underground workings. Underground workings, not connected with mining, were not included in the mandate of the Constitution, any more than was farming or cattle raising.

The first legislature of Utah, in 1896, (Chapter 72, Laws of Utah, 1896, at Page 219) enacted a law entitled, "An act regulating the hours of employment in underground mines, and in smelting and ore reduction works," as follows:

"Section 1. The period of employment of working men in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Section 2. The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Section 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of Sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor."

The Supreme Court of the State of Utah, interpreted the above mentioned act in the cases of **State of Utah v. Holden** 14 Utah, 71, 46 Pac. 756 and **State v. Holden** 14 Utah, 96, 46 Pac. 1105.

The first mentioned case was Habeas Corpus. Plaintiff was charged with employing a workman in underground mining more than eight hours per day, in violation of Section 1 of the act.

The second case was appeal. Defendant was charged with employing a workman in his concentrating mill, for the reduction of ores, more than eight hours per day, in violation of Section 2 of the act.

In the first mentioned case, the Court said, at Page 95 of the 14th Utah Reports:

“The section of the statute whose constitutionality is involved in this case includes all employees and employers engaged in working underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. The provision of the state constitution quoted makes it the duty of the legislature to ‘pass laws to provide for the health and safety of employees in factories, smelters and mines.’ And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the lawmaking power.”

In the second mentioned case, the Court said, at Page 98 and 99 of the 14th Utah Reports:

“The people of the state, in their constitution, made it mandatory upon the legislature to ‘pass laws to provide for the health and the safety of the employees in factories, smelters and mines . . .’ The law in question is confined to the protection of that class of people **engaged in labor in underground mines, and in smelters and other works** wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.”

We submit that the 1896 statute was enacted in pur-

suance of the constitutional provision, Article 16, Section 6; and had for its purpose, and its sole purpose, the fulfillment of that mandate. That it was intended only to apply to the industries named in the constitution, to-wit, factories, smelters and mines. The Supreme Court of this state, so interpreted the act. At Page 83 of 14th Utah Report, in commenting on the constitutional provision, the Court said:

“The second clause of the Section commands the legislature to pass laws ‘for the health and safety of employees in factories, smelters and mines.’ **This provision must be regarded as an expression of the will of the people of the state with respect to the subjects and objects of legislation named in it; Any law adapted to the preservation of the health or safety of employees in factories, smelters, or mines is within the scope of this provision. The law must be connected with some of the objects named, and calculated to effect that purpose.** If it is not so connected and adapted, the court has the right to hold that it is not within the scope of the provision.”

Appeals were taken from the decisions in the Holden cases heretofore mentioned to the Supreme Court of the United States, and that court, in the case of **Holden v. Hardy**, 169 U. S. 366; 42 L. Ed. 780; 18 Sup. Ct. 383, quoted approvingly from the decisions of the Utah Court, and at Page 389 (18 Sup. Ct. Rep.) used the following language:

“The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in smelting, reduction or refining of ores or metals.”

The first legislative enactment of the eight hour law (Laws 1896) was interpreted by the Supreme Court of this state in October 1896, as applying only to underground

mines, and the Supreme Court of the United States interpreted the law in conformity with the decision of this court.

The legislative department of the State of Utah must be presumed to be familiar with the interpretation placed upon the language "underground mines or workings" by this court.

In Revised Statutes of Utah, 1898, under Title 36, (LABOR), Chapter 2 (EIGHT HOUR LAW) Section 1337 entitled "In Mines and Smelters," reads in part as follows:

"The period of employment of working men in all **underground mines or workings**, and in smelters . . . , shall be eight hours per day"

In Compiled Laws of Utah, 1907, the subject under consideration is found in Title 43 (LABOR), Chapter 2 (EIGHT HOUR LAW), Section 1337, which reads in part as follows:

"(1337.) **IN MINES AND SMELTERS.** The period of employment of working men in all **underground mines or workings**, and in smelters . . . , shall be eight hours per day"

This subject is found in Compiled Laws of Utah, 1917, under Title 58 (LABOR), Chapter 3 (EIGHT HOUR LAW), Section 3667, which reads in part as follows:

"**3667. (1337.) IN MINES AND SMELTERS.** The period of employment of working men in all **underground mines or workings**, and in smelters . . . , shall be eight hours per day"

This subject is again found in Revised Statutes of Utah, 1933, under Title 49 (LABOR), Chapter 3 (EIGHT HOUR LAW), Section 49-3-2, which reads in part as follows:

"49-3-2 Id. **IN MINES AND SMELTERS.** The period of employment of working men in all under-

ground mines or workings, and in smelters , shall be eight hours per day ”

It will be observed, that the Title of Chapter 59, Laws of Utah, 1937, is “Eight Hour Law,” and the caption of the amended Section is “A DAY’S WORK — MINES AND SMELTERS.”

It is significant that in every statute regulating hours of labor, from the enactment in 1896 to that in 1937, that the words “underground mines or workings” appear identical in each enactment.

No clarifying amendment has been made by the legislature to extend the meaning of the term. Nor has there been one change in the language used, indicating that the legislature intended it to apply to any underground workings not connected with mining.

There is a strong presumption, that the legislative department must have concurred in the interpretation placed upon the statute by the judicial department, otherwise, over the intervening period of 43 years, that department would have made clear its intention to apply the eight hour law to underground workings not connected with mining.

It would have been simple indeed, had the legislature desired to enlarge the scope of the law as enacted in 1896 to have used appropriate language for that purpose.

Had the legislature intended to make the law applicable to other underground workings it would not have repeated the identical language which the court had theretofore interpreted as applicable only to mines.

The meaning and application of the statute in question must be considered in light of the judicial construction placed upon the words “underground mines or workings.”

This rule of construction is stated in 59 C. J. Sec. 613 in the following language:

“When a statute has been construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally . . . ; and when **words have a well-settled meaning, through judicial construction** they must be understood, when used in a statute, to have that meaning, unless a different meaning is unmistakably indicated”

In a footnote to the above quotation in 59 C. J., the case of **Plaster & M. F. G. Company v. Juab County**, 33 Utah 114, 93 Pac. 53 is cited. This court, at Page 119 of the Utah Report said:

“ . . . In view that the decisions of courts are but the reflection of the common understanding with respect to particular things and the terms used in any industry, business or calling, and are thus simply reduced to legal terms, we think that if the courts have construed and applied what is meant by the terms ‘mine’ and ‘mines,’ then this meaning must control, and especially so when the term is used in some **statute or constitution**. This must be so for the simple reason that the term will then have acquired a legal meaning, which, unless the contrary clearly appears from the context, must be deemed to be the meaning intended to be applied to it in the law in which it is found.”

The term “underground mines or workings” was declared by this court in the Holden cases to apply only to underground mines. The re-enactment by the legislature with the identical words as interpreted by the court must be construed to apply only to mines.

The 1896 law was re-enacted in Revised Statutes 1898, as Section 1337. And this court in the case of **Short v. Mining Co.** 20 Utah, 20, after quoting Section 6 of Article 16 of the Constitution of Utah said, at Pages 26 and 27:

“The act in question was enacted as a police regulation, and for the public good in the interest of public policy. The experience in the past few years in the **business of mining and smelting and underground workings of mines** shows that such business can no longer be carried on with due regard to the safety and health of those miners engaged in such business without special protection and restraint against the danger necessarily incident to such employment.... The employment of operatives when too long pursued, in smelters and underground mines is **considered by the legislature** as detrimental to the health of the employees.... It was therefore considered that the employment of men **in smelters and underground mines**, for a period of more than eight hours per day, was detrimental to the health of such persons.”

Again, in the Short case, this court construed the language “underground mines or workings” as applying only to underground mines. And again and again since that decision the legislature continued to use the same language in re-enacting the eight hour law.

If the statute in question is ambiguous reference to the title, chapter and section headings of every revision since the act of 1896, will disclose that the legislature was regulating the hours of **Labor in Mines and Smelters**.

In Vol. 25 R. C. L. Sec. 267 at Page 1031 the author says:

“It is, however, now the generally accepted view both in England and in this country that the title of an act is so far a part of the same that it may be resorted to where the meaning of the act is ambiguous, for the purpose of ascertaining the true meaning. As said by Chief Justice Marshall in an early case: ‘Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration.’ ”

The word "workings" used in the act appears to have been given no technical meaning by the legislature, and its association with the other words of the act "underground mines or workings," considered with the title of the section, clearly indicates that such word has reference only to mines.

In Words and Phrases, 1st series, Vol. 8, Page 7522 appears the following:

"The term 'workings,' as used in the act relating to mines and mining, includes all the excavated parts of a mine, those abandoned as well as the places actually worked." P. & L. Dig. Laws Pa. 1894, Vol. 2, Col. 3110.

Technical words relating to an art, science or trade when used in a statute dealing with the subject matter of such art, science or trade, are ordinarily to be taken in their technical sense, and will be so construed, unless the context or other considerations show a contrary intent.

Lewis Sutherland Statutory Construction, 2nd Ed.
Sec. 393.

When general words follow particular words, the latter are given the meaning of the former.

Lewis Sutherland Statutory Construction, 2nd Ed.
Sec. 424.

The application of the statute in question, to every case in which work is, or may be carried on under ground would reduce the act to an absurdity. Every sewer constructed by a sewer district would technically place workmen under ground. Even a man engaged in digging a well would be engaged in an underground working used in the broad non-technical sense, and if employed for that purpose, would be subject to this law. Excavations for basements and ex-

cavations in connection with the construction of dams, under an interpretation of the act as contended for by defendants, may well be termed underground workings.

The Supreme Court of Nevada interpreted the Nevada eight hour law which provided:

“The period of employment of working men in all underground mines or workings shall be eight hours per day.”

In the case of **Ex parte Boyce**, 27 Nev. 299, 75 Pac 1, after expressly approving the Holden cases and quoting at length from them, the court used this language:

“ The language forbids any person from working in underground mines, smelters or mills for the reduction of ores more than eight hours per day We may consider the protection of the health and lives of that large portion of the people in this state who delve in the earth in search of the precious metals that help enrich the commerce of the world, and who there and in the smelters and ore reduction works come in contact with poisonous minerals, and breathe dust, foul air, and obnoxious fumes and gases. In this connection it should be remembered that the statute applies to underground mines, and not to placer claims, or to men working in the open above the surface.”

II.

CHAPTER 59, LAWS OF UTAH, 1937, IS A PENAL STATUTE AND MUST BE STRICTLY CONSTRUED.

The Utah eight hour law being penal, will be interpreted as applying only to such classes of employment as come clearly within the terms of the act.

Strictly construed, the act in question applies only to underground workings connected with mines. In the case of **Ex parte Twing**, Cal. 204 Pac. 1083, the court said:

"But penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication....Haxfield v. United States, 197 U. S. 442, 49 L. Ed. 826."

A statute somewhat similar to the one in question was construed by the Missouri court in the case of **State v. Cantwell**, 78 S. W. 569. That court said:

"It is insisted that this Act makes a distinction between those working under ground in search of minerals and those working under ground not in search of minerals. This Act applies only to the class searching for minerals—after that class it makes no distinction. The Legislature doubtless realized the necessity of the provisions of this Act being made applicable to those in search of minerals. The operations of mines is a permanent business, lasting frequently for many years. On the other hand the digging of a well or the running of a tunnel is not to be classed as a business, it is work that is completed in a comparatively short time. Hence, there was absolutely no reason or necessity for including in the Act those who might in the construction of railroads or other works incidentally be required to work beneath the surface of the earth."

By an Act of the Nevada Legislature of 1909, provision was made for the office of Inspector of Mines, authorizing investigations requiring certain regulatory measures with respect to the operations of mines.

In 1911 the Legislature added numerous provisions prohibiting certain things with reference to the operation of mines. Section 22 of that act reads:

"Use of gasoline under ground is prohibited."

In 1931 the Legislature again amended the act and attempted to provide that all of its provisions should, "be extended to and imposed upon the owner, constructor, contractor, subcontractor * * * and/or employee as the case

may be of all such tunnels, drifts, and other underground excavations and workings where persons are employed at work in this State.”

In the construction of Boulder Dam, the contractor used gasoline propelled trucks in underground excavations in carrying out his contract with the United States. The Mine Inspector sought to impose the provisions of the law above mentioned, particularly the prohibition against the use of gasoline under ground, to meet which the contractor brought injunction.

In the trial of the case the defendant conceding for the sake of argument that the 1931 act was unconstitutional, contended that the original act of 1909 as amended by the acts of 1911 and 1913, prohibiting the use of gasoline under ground would be applicable to the work being carried on by the contractor for the Boulder Dam, but the court refused to adopt such contention, holding:

“Even if we assume that the title of the original act creating the office of inspector of mines was sufficiently broad to justify the incorporation therein of the amendments of 1911 and 1913 above referred to, and that such amendments, did not violate the Constitution of Nevada, **it is clear that the intention of the Legislature was to control mining operations, and that the provision that ‘no gasoline should be used under ground’ except under prescribed conditions must be held to apply to such operations only.** The fact that similar operations, such as tunnel work, might be subject to the same hazards as in the case of mines, does not justify the application of the section prohibiting the use of gasoline underground to something other than mines if it were the intention of the Legislature in the first place to apply the rule to mines only. If this matter, of the applicability of the prohibition as to gasoline underground to tunnels, is in doubt, under section 22 as originally added by amendment in 1911, the amendment of 1913 (St. Nev. 1913, C. 224 (Comp. Laws Nev. 1929 4229)) to section 22, which made an exception to

the general rule prohibiting gasoline underground in favor of small gas engines, in mines at no greater depths than 250 feet when appropriate provision was made to take care of the exhaust as required by the act, clearly shows that the intention was to confine the prohibition of the act to underground operation in mines. That is to say, the amended section 22 clearly applies to mines only. We would not be justified in extending the meaning of the Legislature beyond its original intent as expressed in the act of 1909 as amended in 1911 and 1913,” “Six Companies Inc. v. Stinson,” 2nd Fed. Supp. 689.

Wyoming has strictly construed its eight hour day for coal miners by holding that miners and laborers are not covered by the words “any owners, lessees, or operators, his or her agent, employees or servants.” **State v. Thompson**, 15 Wyo. 136; 87 Pac. 433.

In **Ex parte Martin** (Cal.) 106 Pac. 235 the California statute (St. 1909 P. 279 C. 18) read:

“Section 1. That the period of employment for all persons who are employed or engaged in work in underground mines in search of minerals, whether base or precious, or who are engaged in such underground mines for other purposes, or who are employed or engaged in other underground workings whether for the purpose of tunneling, making excavations or to accomplish any other purpose of design, or who are employed in smelters and other institutions for the reduction or refining of ores or metals, shall not exceed eight hours within any twenty-four hours . . . etc.”

The court commented on the case of **Holden v. Hardy**, *supra*, and at Page 238 said:

“It may be questioned whether in view of the title of the act, the limitation of hours applies to all underground work, or only to that performed in mines.”

In **Ex parte Martin** (Cal.) 106 Pac. 238, a case involving the statute quoted above, the petitioner was charged with having required a miner to work eight full hours at the face of a drift in a mine in addition to the time necessarily occupied in traversing the shaft, underground drifts and tunnels, between the surface of the mine and the face of said drift. The time so occupied in going to and from the place of work was in excess of thirty (30) minutes.

Petitioner applied for a writ of Habeas Corpus and the writ issued.

The court in its opinion said:

“We think the petitioner’s contention that no violation of the act is here charged is correct and should be sustained. The act provides that the period of employment of persons employed or engaged in work in underground mines, etc., shall not exceed eight hours in any twenty-four hours. The purpose of the act is, as has been pointed out in the opinion in Cr. No. 1539, the protection of the health of men working in underground mines. **The injury to health which seems to have been apprehended is that which would be encountered by one subject to the strain of performing manual labor under detrimental conditions.** Giving to the words of the act their ordinary and reasonable meaning, the limitation of time is to be construed as referring to the time when men are actually engaged in work, not when they are going to or from their work. There is nothing in the language of the act which would justify a more restricted interpretation.”

Nor can it be contended that plaintiffs’ employees are working in underground mines. The term mine has a very specific meaning.

A mine is defined by Black’s Law Dictionary as:

“A pit or excavation in the earth, from which ores or other mineral substances are taken by digging.”

The same work defines mining as "The process or job of excavating from earth the precious or valuable metals either in their native state or in their ores."

If the act of 1896 interpreted by this court in the Holden cases, *supra*, applied only to underground mines, the act of 1937 adding the words "such eight hour period shall be computed from the time men go under ground until they return to the surface," cannot be interpreted as any evidence of the legislative intention to extend the application of the act to any employees except those engaged in underground mining.

The only reasonable interpretation of the 1937 act is that it was a further exercise of the state's police power with respect to the industry being regulated. Suppose that the legislature, instead of the language used, had said:

"The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, and the period of employment of working men in all underground mines or workings shall be not more than seven hours per day"

Clearly, this language could not be intended as an enlargement upon the objects sought to be regulated. We submit that the language used in the statute is a further limitation upon the employment legitimately subject to regulation, and not an extension of the regulation to other employments.

In interpreting the 1937 Act, the court will observe that it contains language appropriate only to underground mines. The Act provides:

"When underground 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."

The court will take judicial notice that the workings of plaintiffs afford no opportunity for hoists. Hoists are appropriate equipment in underground mines, not in a tunnel such as the one under consideration. The very use of that word would seem a potent argument that the Section applies only to underground mines or underground workings connected with mines.

III.

IF SECTION 49-3-2 REVISED STATUTES OF UTAH, 1933, AS AMENDED BY CHAPTER 59, LAWS OF UTAH, 1937, APPLIES TO A TUNNEL SUCH AS PLAINTIFFS ARE DRIVING, THE ACT VIOLATES SECTIONS 1, 3, 7, AND 24 OF ARTICLE ONE OF THE CONSTITUTION OF THE STATE OF UTAH, AND THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Our Constitution, Sec. 1, Article 1 declares:

"All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protests against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

Sec. 3, Article 1 of our Constitution declares:

"The State of Utah is an inseparable part of the federal Union, and the Constitution of the United States is the supreme law of the land."

Section 7, Article 1 of our Constitution declares:

“ No person shall be deprived of life, liberty, or property, without due process of law.”

Sec. 24, Article 1 of our Constitution declares:

“ All laws of a general nature shall have uniform operation.”

The Fourteenth Amendment to the Constitution of the United States declares:

“Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

The validity of Chapter 59, Laws of Utah, 1937, as a proper police regulation of plaintiffs' employees, does not follow from the decisions in the Holden cases, supra. If the purpose of the act is to extend the application of the eight hour law to underground tunnels not connected with mining, its validity is not established by the fact that the act which is amended was held valid.

In 16 C. J. S. Section 195, Page 564, it is said:

“ A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, nor by being enacted under a title that declares a purpose which would be a proper object for the exercise of the power. Also, the public purpose necessary to support

an exercise of the police power is not imparted into a legislative act merely because it supercedes an act which had such public purpose."

We are not contending that a statute reasonably limiting the period of employment of all employees within the state would necessarily be invalid. That question is not before the court. What we do contend, is that the inclusion of plaintiffs' employees in the section limiting the period of employment in underground mines is not evidence of the validity of the regulation as to plaintiffs, any more than would be a provision that **the period of employment of working men in all underground mines, in all mercantile institutions and on all farms shall be not more than eight hours per day.**

We are not unmindful of the difficulty of fixing the limits within which the police power may be exercised, but we do submit that it has limitations.

The court has always reserved to itself the power of deciding whether a given statute is to be accepted as a legitimate exercise of the police power of the state. In **Mugler v. Kansas** 123 U. S. 623, at Page 661, the Supreme Court of the United States said:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute . . . the courts must obey the constitution rather than the lawmaking department, and must upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose' . . . are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to

be restrained The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution.”

The bounds of the police power are not clear cut, and the rules which limit its exercise under the constitution are not easy of application, but rules have been announced.

This court, in the case of **McGraw et al v. Industrial Commission**, 96 Utah 203, observed:

“This conception of the point at which the police power is held in check by the due process clause steers a course between the sophistry that rights are fixed or immutable, and not to be determined in relation to the public welfare, and the idea, rejected under our system, that the legislature itself is the sole judge of the extent of the police power.”

To admit that the legislature is the final judge of the extent to which it may go under the police power, is to break down every constitutional guarantee and to substitute the legislature for the constitution and the judiciary.

Standards by which the constitutionality of a statute enacted under the police power of a state is tested, require:

1. That the means must have a substantial relation to the end.
2. That fundamental rights must not be infringed.
3. That the law in question must not be arbitrary, unreasonable, or oppressive.

It was said by Justice Holmes in **Otis v. Parker**, 187 U. S. 606, at Page 608:

“It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts.”

In **Eubank v. City of Richmond** 226 U. S. 137 at Page 143, it was said that the police power:

“Has its limits and must stop when it encounters the prohibitions of the constitution.”

In **Atlantic Coast Line R. R. v. City of Goldsboro**, 232 U. S. 548 at Page 559, the court said:

“ If there is wanton or arbitrary interference with private rights, the question arises whether the lawmaking body has exceeded the legitimate bounds of the police power.”

In **Truax v. Corrigan**, 257 U. S. 312 at Page 319, the court said:

“ The legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guarantee of due process in the Fourteenth Amendment is intended to preserve.”

In the case of **Muller v. Oregon**, 208 U. S. 412, the court sustained an act of the Oregon legislature prohibiting the employment of women in any mechanical establishment, or factory or laundry more than ten hours during any one day.

The court, in its opinion, observed that limitations upon hours of labor in the employment of women and children are quite general, and at Page 420 and 421 said:

"Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take **judicial cognizance of all matters of general knowledge.**"

Probably the ultimate test in determining whether a statute enacted under the police power violates the constitutional guarantees, is **the experience, the conscience, and the good sense** of the judges. Precedent is seldom available in any given case, and the purposes of the legislature are in most cases matters of either presumption or conjecture.

In the case of **In re. Morgan** (Colo.) 58 Pac. 1071, the Colorado Court held that a statute making it unlawful to work more than eight hours per day in mines and smelters, was in violation of the state constitution guaranteeing liberty and the right to acquire, possess and protect property. The Colorado Court considered the Holden cases, *supra*, and in its opinion said:

"If, in our constitution there was, as there seems to be in that of Utah, a specific affirmative provision enjoining upon the general assembly the enactment of laws to protect the health of the classes of workmen therein enumerated, it might be that acts, reasonably appropriate to that end, would not be obnoxious to that provision of our constitution forbidding class regulation, for it could hardly be said that a classification made by the constitution itself was arbitrary or unfair or that it clashed with another provision of the same instrument inhibiting class regulation."

But the present act, if it applies to plaintiffs' employees, does not come within the classification required by our constitution to be given special protection. As heretofore pointed out, plaintiffs are not engaged in mining; and the only classifications mentioned in Section 6 of Article 16 are employees in factories, smelters and mines.

If any presumptions arise from the language in Section 6 of Article 16, it is that the legislature should provide for the health and safety of the employees in factories, smelters and mines and for no others.

Certain it is, that as to other employments, there is no blanket authority given for their regulation such as the constitution provides for employees in factories, smelters and mines. As to other employments, the court should at least be satisfied that the legislature has deliberately considered the same; has considered the necessity of extending such police measures to them and determined upon a factual basis that regulation is necessary.

We look in vain, to find any legislative declaration that employment in a tunnel such as plaintiffs are digging is injurious to the health and safety of workmen therein. The legislature has failed to indicate that in its judgment such occupation requires such regulation.

The Supreme Court of this state found ample authority in Section 6, Article 16 of the constitution for reasonable regulation with respect to employees in factories, smelters and mines. At least this court, before subjecting plaintiffs to the penal statute in question, should require more than the bald limitation of hours as to plaintiffs' employees.

Before proceeding further, let us observe that defendants' answer admits all allegations of plaintiffs' petition, ex-

cept their wrongful claim to jurisdiction for enforcement of the statute.

Defendants admit that the tunnel has for its only purpose the conveyance of water; that it is being worked from both portals; will be, when completed, 15,000 feet in length and 7 feet in diameter. That it is not a mine or connected with any mining enterprise; that there are no stopes, drifts or shafts, but that the tunnel is a straight bore and will be lined and reinforced with concrete and steel.

Considering the facts in this case, the size of the tunnel, the fact that it is straight, that there are no drifts, no shafts, no stopes; that there are no holes in which foul air may accumulate or in which men must work, can the court say that there is any reasonable or valid basis in fact to warrant the extension to plaintiffs' workings of the regulation limiting the period of employment in underground mines?

No public purpose, with respect to such industry, has been commanded in the constitution. The legislature has made no finding of that necessity, has never declared that such workings are dangerous or unhealthy.

Do the facts known to the court fit the language of the Nevada Court in **Ex parte Boyce**, supra.... "We may consider the protection of the health and lives of that large portion of the people in this state who delve in the earth in search of precious metals.... and who there, come in contact with poisonous minerals and breathe dust, foul air and obnoxious fumes and gases?"

Do the facts before this court make the language of the Missouri Court in **State v. Cantwell**, supra, appropriate to this tunnel....? "The legislature doubtless realized the necessity of the provisions of this act being made applicable to those in search of minerals. The operations of mines

is a permanent business, lasting frequently for many years. On the other hand, the digging of a well or the running of a tunnel is not to be classed as a business, it is work that is completed in a comparatively short time”

Can this court fail to say that the conditions in plaintiffs’ workings are so different from those in underground mines — the public necessity so lacking — that to apply the limitation on hours of labor justified in the latter to the former is arbitrary, unreasonable and void? The court will take judicial notice that mining in this state constitutes a major industry. The court will likewise take judicial notice that the digging of a tunnel such as the one now under consideration is the exceptional, the unusual thing.

Unless the court entertains the view that the legislative declaration is conclusive evidence of the constitutionality of its action, it must construe this statute as having no application to plaintiffs.

But there is a further reason why we believe this act can not be upheld as a valid exercise of the police power.

Suppose the act in question limited the period of employment in all underground mines or workings to four hours in each twenty-four. Unless the court is willing to say that the law is constitutional because the legislature passed it, it could not be sustained. The court would undoubtedly see in such legislation a capricious, arbitrary and unreasonable limitation on the constitutional rights of plaintiffs.

The act in question requiring that:

“Such eight hour period shall be computed from the time men go under ground until they return to the surface,” is arbitrary and bears no reasonable relation to any legitimate end within the legislative power.

The legislature has not pretended to determine that the time used by workmen in going from the surface to their place of work, and returning to the surface, is detrimental to the health or safety of such employees or against the public welfare.

This act does not, as its title would indicate, fix a standard day's work of eight hours or of seven hours. The period which constitutes a maximum day's labor is not declared by the act, but must be determined by subtracting a variable period from eight hours. It does not declare the period of time that workmen in such a tunnel may work. It declares only, that they may labor not longer than the difference between eight hours and the time used in going into and coming out of said tunnel. The employee working at the entrance of this tunnel may work eight hours, while one employed at a point far distant from the entrance may be prohibited from working in excess of 4, 5, 6 or 7 hours, depending on the time consumed in traversing the course from the surface to his place of work and returning therefrom.

The court will take judicial notice that the employees are not working while coursing this distance; that whether they walk or ride in on flat cars, they are not subjected to that fatigue and exhaustion which alone justifies such legislation.

This court, in the **Holden Cases**, *supra*, could not have had in mind the time consumed in coursing such a tunnel when it said:

“The law in question is confined to the protection of that class of people engaged in **labor** in underground mines,” and, “if men engaged in underground mining are liable to be injured in their health or otherwise, by

too many hours labor each day, a law to protect them should be aimed at that wrong."

The constitution requires the legislature to pass laws to provide for the health and safety of employees in factories, smelters and mines. The 1937 act still permits working men in smelters and reduction and refining plants to work eight hours per day, but limits the time a man may work in underground mines or workings to a shorter period.

The constitution made no classification in favor of employees in underground mines. The legislature has by implication created a classification favoring such employees. The act in question is arbitrary, capricious and unreasonable, it arbitrarily furthers the interest of a particular class of employees.

Unless this court would sustain a law which computed the eight hour period from the time such workmen left home until they returned to their homes, or from the time they reached the employer's premises until they left the premises, the court can not find legal justification for this act.

In terms of its lowest denomination, this act is a shorter than eight hour law. It may be seven hours and fifty minutes per day, seven hours and thirty minutes per day, seven hours per day, six hours per day, five hours per day or four hours per day, depending on the variable period required or used in travelling underground and in returning to the surface.

Statutes limiting hours of labor in undertakings carried on by the state are upheld not as an exercise of the police power, but as an assertion by the state of its right to regulate conditions upon which its work will be done.

Statutes regulating hours of labor of women have been sustained upon the ground of natural or assumed disabilities of the so-called weaker sex.

Statutes regulating hours of labor in dangerous or unhealthful industries have been sustained as a protection to health and safety of such laborers.

But if the statute imposing such regulation has no real or substantial relation to the objects justifying it, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution. **State v. Packer Corporation**, 77 Utah, 500, 510.

The statute in question is denoted a labor law. It purports to declare what constitutes a day's work. Nothing outside the act is required to show the fallacy and the unreasonableness of the limitation contained in the act. This act fixes a period of less than eight hours as a day's work in underground mines and workings. No shorter than an eight hour day applies to smelters and factories. A day of less than eight hours has no reasonable relation to the health and safety of employees or to the public welfare.

It is not inconceivable that this act may well constitute a complete prohibition of labor in certain underground mines or workings; it is certain that in every case it will constitute a varying limitation upon the hours of labor ranging in periods from eight hours to a complete prohibition.

The court must, in every case presented, hold the legislative egg claimed to be sustained under the state's police power before the candle of the constitutional guarantees, and determine whether the legislative enactment constitutes a legitimate exercise of the police power, or is merely

meddlesome interference with business or the right to bargain for services.

The court must look beyond form to substance. The act in question is not a labor act—it is an exemption from the labor act. It is a legislative fiat that that which is not labor shall be called labor and paid for as labor. It is unreasonable and unwarranted interference with plaintiffs' right to secure eight hours of labor instead of securing only four or six or seven hours' labor, labelled by the legislative meddling, as eight hours. This act certainly singles out that class of employers operating underground mines or workings, and infringes their constitutional rights by extending special consideration to their employees not extended to any other class of employees within the state, and without any apparent or justifiable reason for so doing.

It is a legislative attempt to reclassify the classification named in the constitution "employees in factories, smelters and mines," without apparent reason or justification and in a manner entirely arbitrary and capricious.

It certainly singles out that class of employees who work in underground mines or workings for special consideration and discriminates against employers of such labor.

In **Saville v. Corless**, 46 Utah 495, 499; 151 Pac. 51, this court said:

"If there be one thing more than others to be guarded against encroachment it is the federal and state Constitutions. These we are all sworn to protect and defend. To disobey them is to jeopardize fundamental rights and liberties of the people, imperil their welfare and happiness, and to menace the very existence of governments."

In the case of **State v. Henry**, (N. Mex.) 25 Pac. 2nd 204, 208, the court had for interpretation a statute prohibit-

ing the working of male employees in mercantile establishments more than eight hours a day, or 48 hours in a week of six days. The court reviewed the authorities and said:

"The statute before us bears no evidence of a legislative purpose by it to safeguard health, morals, or safety. No claims are here made that it was so intended or will so result. Facts of which we may take judicial notice, and none other are before us, do not argue, and we are unable to concede, that the health, morals, or safety of the general public or of the class regulated are at all involved in the sustaining or the overthrow of the act; or that there is involved any other specific object for which we have become accustomed to some yielding of the principles of personal liberty and of private property."

In the case of **Gasque, Inc. v. Nates**, (S. C.) 2 S. E. 2nd 36, decided March 1939, the statute prohibited the employment of employees of enumerated manufacturing and mercantile establishments for more than 56 hours per week or 12 hours per day.

Plaintiffs, as employers affected by the limitation on hours of labor, brought injunction against the Commissioner of Labor to prevent the enforcement of the act. The court held:

1. That the act deprived plaintiffs of their property without due process of law, and denied them the equal protection of the law.

In the course of its opinion, the court said:

"Neither counsel for the plaintiffs nor the Commissioner of Labor have cited to the Court any decision where any court has ever held valid a regulation of the hours of labor of all employees within a State, . . .

"Many other Courts have similarly held that the general regulation of the hours of labor in private industry in which the Court can see no direct relation

to the public health, welfare or morals, is not a proper exercise of the police power and must be held invalid as in violation of the constitutional protection of the individual

"It is also worthy of note that there are no real recitations in this Act indicating that it was passed upon any theory that work for more than fifty-six hours in any week was injurious to the health or dangerous to the life of the employees. Nor is there anything in the Act indicating a purpose to relieve unemployment. Nor is there anything showing a purpose to protect the public from any evil results of longer hours of work.

"The Court cannot conclude that it is dangerous to the health or safety of the employees or the public for an employee to work more than fifty-six hours in any one week in all of the manufacturing and mercantile establishments covered by the terms of the Act

"It is true that the Legislature has the power in passing a law to make a classification of its citizens and the constitutional provisions are not violated by such classification if the law as passed is applicable alike to all persons of the given class, **but the Courts of the State and of the United States have always held that such classification cannot be made arbitrarily, but must rest upon some difference which bears a reasonable and just relation to the Act in which the classification was proposed**

" 'Equality in right, privilege, burdens and protection is the thought running through the Constitution and laws of the state; and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the Constitution.'

" 'A law is not constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those that stand in the same relation to the subject of the law. The Legislature may classify, for the purpose of legislation, if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently from others, **but this**

classification must be based upon differences which are either defined by the Constitution, or are natural or intrinsic, and which suggest a reason that may rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification. The clause must be characterized by some substantial qualities or attributes, which render such legislation necessary or appropriate for the individuals of the class.'

"It is also true that the right of the Legislature to classify is much broader in the field of taxation than it is in criminal statutes such as this."

The South Carolina Court found that the classifications upon which exemptions were based were arbitrary and without reasonable basis, and observed:

"....There would seem to be no reason why a truck driver for a laundry should be exempt, while a truck driver for a dry cleaning plant should be regulated. There would seem to be no reason why brick and tile works should be regulated and employees of saw mills, turpentine plants and logging industries should be exempt. Cotton gins and oil mills are not as healthful places of employment as book stores or filling stations, yet the gins and oil mills are exempt while the book stores and filling stations are regulated.... the court cannot say that the industries included within the provisions of the Act are of such a character as to justify the Legislature in saying that work in these industries for more than fifty-six hours per week jeopardizes the health of the employee, while work for more than fifty-six hours in the exempted businesses does not."

The North Carolina Court did not surrender its judgment and its knowledge of facts or public opinion to the legislative branch. We submit that the classification in favor of employees in underground mines or workings is as arbitrary as those in the statute of North Carolina, and also reclassifies what the Constitution has already classified.

In **Adair v. U. S.**, 208 U. S. 161, 28 S. Ct. 277, 280 the court said:

“The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”

Does not the Act now before the Court do exactly what the *Adair* case, *supra*, said might not be done?

In **United States v. Butler**, 297 U. S. 1, 56 S. Ct. 312, 318 the Supreme Court used this language:

“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, **the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged** and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. **The only power it has, if such it may be called, is the power of judgment.** This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

When the court lays the Constitution beside this statute, does the statute square with the constitution? Is the Act—computing as a part of the eight hour period time when the employee is not working—for the health or safety of the employee? Is it for the peace, health, safety or welfare of the state? Does it combat unemployment by increasing employment?

Is the limitation on the hours of labor of plaintiffs' employees incidental to the welfare of the state, or is said limitation the ultimate end?

If the Court, by laying the Constitution beside the Statute, can see in said legislation only the extension of special privileges to employees in underground mines or workings, then the act must be held invalid.

We respectfully submit that the Act in question has no application to plaintiffs' employees, and as applied to plaintiffs is unconstitutional and void. The writ should be made permanent.

Respectfully submitted,

GEO. W. WORTHEN,
Attorney for Plaintiffs.

APPENDIX

"EXHIBIT I"

No. 6221

(Title of Court and Cause)

PETITION FOR WRIT OF PROHIBITION

Plaintiffs complain of defendants and respectfully petition this Honorable Court for a writ of prohibition and allege as follows, to-wit:

I.

That petitioners are co-partners doing business under the firm name and style of Thompson-Markham Company and that petitioners have complied with the laws of the State of Utah with respect to obtaining a license as contractor and have obtained from the Department of Reg-

istration of the State of Utah a license to engage in business in the State of Utah as contractors.

II.

That heretofore plaintiffs entered into a contract in writing with the United States of America, Department of Interior, Bureau of Reclamation for the construction by plaintiffs of two certain tunnels known as Olmsted and Alpine-Draper Tunnels, Salt Lake Aqueduct, in connection with and as part of a project known as the Deer Creek Project, having for its purpose the conveyance and transportation of water from the Deer Creek Reservoir on Provo River in Utah County, State of Utah, for use by subscribers of said water in Salt Lake County, State of Utah.

III.

That plaintiffs are now engaged in the execution of said contract and particularly engaged in the construction of that part of said project known as the Alpine-Draper Tunnel; and that under the said contract and the plans and specifications therefor, said tunnel runs from a point in the vicinity of Alpine, Utah County, State of Utah, to a point in the vicinity of Draper, Salt Lake County, State of Utah, and projects through the elevation separating said two above-named points, and said tunnel proceeds and will be constructed when completed at a grade of four feet per mile and will have when completed a length of approximately 15,000 feet; that said tunnel so being constructed is approximately seven feet in diameter and is being supported and will be supported when completed with steel ribs from two feet to six feet apart, and is to be lined and reinforced with concrete.

IV.

That said work is being prosecuted with two separate crews of laborers or workmen, one operating from the Alpine portal and one operating from the Draper portal, the present total number of workmen engaged being in excess of seventy individuals, approximately forty-eight of said workmen working inside the tunnel, and which said workmen and laborers consist in the main of drillers, machine men, timber men, carpenters, cement men, mucking machine tenders, common laborers and foremen.

V.

The minimum wages to be paid by plaintiffs to said employees are fixed by the terms and provisions of said contract, with which wage scale plaintiffs are complying, and said contract requires that plaintiffs shall fully complete said work within 650 calendar days from the date of receipt of notice to said contractors to commence work, said notice having been given to plaintiffs December 30, 1938; and that by the terms and provisions of said agreement heavy penalties by way of liquidated damages and provisions for forfeiture and termination of said agreement are provided to be imposed against plaintiffs in the event of failure to prosecute said work according to schedule and for failure to complete the same within the time specified.

VI.

That said defendant The Industrial Commission of Utah is a commission of the State of Utah, designated by statute, and that said defendant William M. Knerr is the chairman of said commission and that said defendants William M. Knerr, O. F. McShane, and Frank A. Jugler are the members thereof; that the defendant E. A. Hodges is the

duly appointed and acting State Metal Mine Inspector and an employee of defendant The Industrial Commission of Utah.

VII.

That in the prosecution of said project there is no shaft constructed or to be constructed in connection therewith, and that it is not the purpose of plaintiffs or of the United States of America, Department of the Interior, Bureau of Reclamation, or of the employees of plaintiffs to explore for or discover mineral values or to develop or operate a mine or smelter in connection with said project, but only to drive a straight tunnel to be used only for the water as herein alleged.

VIII.

That in the prosecution of the work to be performed under said contract, said tunnel is equipped with electric lights and the workmen and laborers therein are provided with fresh air by means of mechanical devices provided by plaintiffs. That there are no stopes, drifts, depressions or elevation where impure air can accumulate, and that through said mechanical devices all gas, smoke and impure air are drawn by suction pumps to the outside and pure air is blown to the headings within said tunnel and distributed throughout the same, and that said defendants have not at any time or at all by general or special order found that said place of employment is unsafe or injurious to the welfare of said employees, nor has any complaint been made by any person to said defendants that said place of employment is unsafe or injurious to the welfare of said or any employee or employees of said plaintiffs.

IX.

That said defendants, and each of them, wrongfully

and unlawfully claim and contend that they have jurisdiction over the operations of plaintiffs under the terms and provisions of said contract by virtue of the provisions of Section 49-3-2, Revised Statutes of Utah, 1933, as amended by Chapter 59 of the Laws of Utah, 1937, with reference to the hours of labor as constituting a days' work as applied to the prosecution of said project.

X.

That heretofore said defendants have notified plaintiffs that it is unlawful for plaintiffs to require or permit their said workmen to work eight hours per day at the place of employment within said tunnel, and that the period of employment of all of the said employees shall be not more than eight hours per day, computed from the time when said employees enter the portal of said tunnel until they return to the entrance thereof, and that it is unlawful for plaintiffs to require or permit their said employees to work more than eight hours each day from the time when said employees enter the portal of said tunnel until they return to the entrance thereof.

XI.

That in the prosecution of said work plaintiffs have required their said employees to work eight hours per day at their place of employment within said tunnel, and to change shifts at the place of employment within said tunnel and not at the portal of said tunnel, and that in computing the said eight-hour period per day the time consumed to going from the portal to the place of employment and returning therefrom to the portal of said tunnel is not computed, all of which is in conformity with the agreement of said plaintiffs with their said employees.

XII.

That said defendants have notified plaintiffs that unless plaintiffs shall cease and desist from requiring or permitting their said employees to work eight hours per day at the place of employment within said tunnel, and unless plaintiffs shall require their said employees to work not to exceed eight hours per day from the time they enter the portal of said tunnel until they return to the entrance thereof, the defendants will institute criminal proceedings against plaintiffs alleging violation by plaintiffs of Section 49-3-2, Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, by requiring plaintiffs' employees to work more than eight hours per day from the time said employees enter the portal of said tunnel until they return to the entrance thereof; that defendants have notified plaintiffs that such criminal proceedings will be instituted and prosecuted covering each of plaintiffs' employees for each day that any of said employees are permitted or required to work more than eight hours from the time said employees enter said tunnel until they return to the entrance thereof.

That defendants wrongfully and unlawfully claim and assert that they have jurisdiction to administer and enforce the provisions of Section 49-3-2, Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, against the plaintiffs, and defendants wrongfully and unlawfully claim and assert that they have jurisdiction by and through the use of such criminal proceedings to compel plaintiffs to comply with the provisions of said Section 49-3-2, Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, by permitting and requiring their said employees to work not more than eight hours

from the time said employees enter said tunnel until they return to the entrance thereof. That the terms and provisions of said section of the statute as amended as aforesaid has no applicability to plaintiffs and/or their employees, and that said defendants are without jurisdiction to enforce or administer the terms or provisions thereof as against plaintiffs and/or their employees, and defendants are without jurisdiction to regulate in any manner the hours of labor on the project hereinbefore described, or to require plaintiffs to demand that their employees work not more than eight hours from the time they enter said tunnel until they return to the entrance thereof.

That in the event said defendants shall carry out their said threats and institute said numerous and vexatious suits and proceedings, said plaintiffs will be caused great expense and annoyance and greatly hampered and impaired in the prosecution of their said project, with the possibility of delay, damage and forfeiture under the terms and provisions thereof.

XIII.

That by reason of the multiplicity of suits threatened to be and which will be instituted against plaintiffs by said defendants in the event they be not prohibited and restrained by this Court, and by reason of the period of time consumed and which will be consumed in the hearing of said numerous actions and the appeals therefrom to the district courts and to this Court, that a remedy by appeal from said actions will be and is inadequate as a remedy for plaintiffs, and plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that an alternative writ of prohibition issue from this Court requiring said defendants, and each of them, immediately to desist and refrain

from instituting any proceedings, criminal or otherwise, against plaintiffs, or either of them, by reason of the hours of employment required or permitted to be served or engaged in by the employees of plaintiffs upon said project, and to immediately cease and desist asserting, claiming, or assuming any jurisdiction whatsoever over plaintiffs and/or their said employees upon said project in the prosecution of said work with respect to the hours of labor permitted or required by plaintiffs from their said employees in connection with said project under the terms and provisions of said statute, to which reference is herein made; and that said defendants, and each of them, be required to show cause before this Honorable Court why said alternative writ should not be made permanent; and that said defendants, and each of them, be required to show cause at a time to be fixed by this Court why they should not be permanently prohibited from proceeding in any way, by criminal proceedings or otherwise, from enforcing the terms and provisions of said Section 49-3-2, Revised Statutes of Utah, 1933, as amended by Chapter 59, Laws of Utah, 1937, as against plaintiffs and their said employees in the prosecution of their contract with the United States of America for the construction of said tunnel, Department of the Interior, Bureau of Reclamation, for the construction of said tunnel; and plaintiffs pray further for such other relief as may seem proper, and for their costs herein incurred.

GEO. W. WORTHEN,

Attorney for Plaintiffs.

STATE OF UTAH, }
 COUNTY OF UTAH. } ss.

GEORGE K. THOMPSON, being first duly sworn on oath, deposes and says:

That he is one of the plaintiffs in the above entitled action; that he has read the above and foregoing Petition for Writ of Prohibition; that he knows and understands the contents thereof and that the statements therein contained are true to his best knowledge, information and belief.

GEORGE K. THOMPSON

Subscribed and sworn to before me this 17th day of January, A. D. 1940.

GEO. W. WORTHEN,

(Seal)

Notary Public

Residing at Provo, Utah.

My commission expires Dec. 8, 1941.

“ EXHIBIT 2 ”

(Title of Court and Cause)

ANSWER

COME NOW the above named defendants and in answer to the Petition for Writ of Prohibition filed herein admit, deny and allege as follows:

I.

These defendants admit the allegations contained in Paragraph 1 of said Petition.

II.

These defendants admit the allegations contained in Paragraph 2 of said Petition.

III.

These defendants admit the allegations contained in Paragraph 3 of said Petition.

IV.

These defendants admit the allegations contained in Paragraph 4 of said Petition.

V.

In answer to Paragraph 5 of said Petition these defendants admit the allegations therein contained, but allege that said allegations are not material to the issues involved in this case.

VI.

These defendants admit the allegations contained in Paragraph 6 of said Petition.

VII.

These defendants admit the allegations contained in Paragraph 7 of said Petition.

VIII.

In answer to Paragraph 8 of said Petition, these defendants admit that the tunnel therein mentioned is equipped with electric lights and that fresh air is forced into the tunnel by means of mechanical devices and admits there are no stopes, drifts or shafts in said tunnel, but denies that by reason of said mechanical devices all gas, smoke and impure air are drawn out of said tunnel. These defendants admit that they have made no general or special order to the effect that the employment of men is unsafe or injurious to the welfare of said employees. These defendants admit that no complaint has been made to these defendants that the place of employment is unsafe or in-

jurious to the welfare of the employees working therein. That in further answer to said Paragraph 8, these defendants allege that the said tunnel is equipped with modern equipment for the purpose of removing the gas, smoke and impure air from said tunnel, but deny that by reason thereof all of such gas, smoke and impure air is removed, although every effort is being made by the plaintiffs to keep the said tunnel as clear of impure air as can reasonably be done.

IX.

In answer to Paragraph 9 of said Petition these defendants admit that they claim to have jurisdiction over the operations of plaintiffs by virtue of the section of the law therein referred to, but deny that they wrongfully make such claim. In further answer to said Paragraph 9 these defendants allege that it is their duty under the law of this State to supervise every employment and place of employment and to enforce the laws for the protection of the life, health, safety and welfare of all employees, and to institute such civil actions as may be necessary to accomplish such purposes and to request the prosecution of criminal actions to enforce such purposes.

X.

In answer to Paragraph 10 of said Petition these defendants admit the allegations therein contained.

XI.

In answer to Paragraph 11, these defendants admit that plaintiffs have required their employees to work eight hours per day at the place of employment in said tunnel and to change shifts at the place of employment within said tunnel and not at the portal thereof, and that

in computing the said eight hour period per day, the time consumed in going from the portal to the place of employment and returning therefrom to the portal is not computed. These defendants, however, have no information relating to the agreements between plaintiffs and their employees with respect to such matters.

XII.

In answer to Paragraph 12 of said Petition these defendants admit that they have notified plaintiffs that unless they cease and desist from requiring said employees to work more than eight hours per day, the said hours to be computed from the time that they go underground until they return to the surface, that they will request that criminal proceedings be taken against plaintiffs, by swearing to complaints, in accordance with the laws of this State relating to such matters, and that such criminal proceedings will be instituted whenever plaintiffs violate the laws of this State, relating to such employment, by requesting criminal complaints, or by otherwise commencing civil actions. These defendants admit that they claim and assert that they have jurisdiction to administer and enforce the provisions of the law referred to in said Paragraph 11, and other provisions of law relating to the employment of labor, and that under the laws of this State relating to the employment of labor in all underground workings, it is the duty of these defendants to see that such laws are complied with, but deny that they make such claims and assertions unlawfully and without authority, and deny that the sections of law referred to in said paragraph did not apply to plaintiffs, but on the contrary, allege that the mining operations carried on by plaintiffs comes within the provisions

of the law of this State relating to underground mining operations.

XIII.

In answer to Paragraph 13 of said Petition these defendants admit that there would be a multiplicity of suits, unless prohibited by this Court, started against plaintiffs, unless they refrain from working their said employees more than eight hours underground. Further answering said Petition and as a further defense thereto, these defendants allege that the tunnel now being driven by plaintiffs is an underground workings built and constructed for the purpose of conveying water. That the methods used in constructing said tunnel are very similar to those used by mining companies in the construction of tunnels and other underground workings. That the rocks are broken by the use of powder, and the muck is removed by the use of men or machinery. That fresh air is forced into the tunnel by use of "blowers," and the bad air is drawn from the tunnel by reversing the "blowers." That like all tunnels in this mountainous country, water is encountered in the tunnel driven by the plaintiffs, and that the air in the said tunnel, like all other underground workings within this mountainous country, is cold and damp, containing at times powder smoke and other gases which cannot be entirely removed from the tunnel even by the use of the most modern methods now in use, and in this connection, these defendants allege that the tunnel being driven by plaintiffs is equipped with the most modern of such methods, in the same way that tunnels being driven in this State for mining purposes are equipped.

WHEREFORE, THESE DEFENDANTS PRAY that

the temporary Writ issued herein be dissolved, and that the Court refuse to make the Writ permanent, and that these defendants be awarded their costs.

JOSEPH CHEZ,

Attorney General of Utah

By S. D. HUFFAKER,

Assistant Attorney General

STATE OF UTAH, }
COUNTY OF UTAH, } ss.

O. F. McShane, being duly sworn, deposes and says that he is one of the defendants above named; that he makes this verification on behalf of himself and the other defendants; that he has read the above Answer and knows the contents thereof, and that the same are true of his own knowledge, except as to matters alleged on information and belief, and as to such matters he believes them to be true.

(SIGNED) O. F. McSHANE

Subscribed and sworn to before me this 1st day of February, 1940.

C. I. SMITH,

Notary Public residing at
Salt Lake City, Utah

My commision expires: