

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 : Reply  
Brief of Plaintiffs

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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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-  
specter,  
Defendants.

No. 6221

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## PLAINTIFFS' REPLY BRIEF

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Received copy of within Brief this.....day of  
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Attorneys for Defendants

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## PLAINTIFFS' REPLY BRIEF

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At Page 6 of defendants' brief counsel observed that:

“Numerous tunnels have been driven in the moun-  
tains for purposes other than mining, and yet the ques-

tion 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 that no such presumption can be indulged. But, assuming, without admitting, that others have complied with this eight hour law, their conduct can have no binding effect upon these plaintiffs or upon this Court.

Counsel next observe that Section 103-1-2 Revised Statutes of Utah, abolishes the common rule of strict construction with respect to penal statutes. We recognize that the Court is concerned only with ascertaining the Legislative intent. But we do submit that penal statutes as stated in plaintiffs' brief will be interpreted as applying only to such classes of employment as come clearly within the terms of the Act.

In Volumes 59 C. J. Section 661, Page 1119-21 the author uses this language:

"In some jurisdictions, the rule of strict construction of penal statutes has been abolished by statute, and in these jurisdictions, they may be liberally construed, according to the fair import of their terms with a view to effect their object and promote justice . . . Nevertheless, the courts in these jurisdictions will not enlarge penal statutes **by implication or intendment** beyond the fair meaning of the language used, nor will they be held to include **other offenses and persons than those which are clearly described and provided for . . .** In order to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute; **and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt will be resolved in favor of accused . . .**"

We believe there is no reasonable basis upon which to

include plaintiffs within the prohibition of the statute in question. Our further position is, that if there is a question as to the statute extending to plaintiffs, any doubt on that point must be resolved in favor of the plaintiffs.

An examination of Compiled Laws of Utah, 1917, Section 7892, discloses that our Section 103-1-2 Revised Statutes of Utah, 1933 was adopted from California Penal Code Section 4 which reads as follows:

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

However, in the case of **Ex parte Twing**, cited in plaintiffs’ brief at Page 13, the California Court held that penal statutes must be construed to reach no further than their words, and that no person can be made subject to them by implication.

The California Court in the case of **Miller v. Salomon**, 281 Pac. 89 cited on Page 1119 of Volume 59 C. J. held that in determining the application of a penal statute it will be given a strict construction. In that case the Court, at Page 89 of the Pacific Report said:

“The statute being a penal statute when under consideration as here, will receive a strict construction.”

Our view is that the rule of liberal construction as to penal statutes does not extend to the point of denying to one charged with the commission of a crime, the benefit of a doubt as to whether or not he comes within the class intended to be charged.

Penal Laws of New York, Section 21 abolished the common law rule of strict construction and provided that

penal statutes must be construed according to the fair import of their terms to promote justice and effect the object of the law.

In **Wallace v. Walsh** (N. Y.) 25 N. E. 1076, 11 L. R. A. 166, the Court said at Page 169 of the L. R. A. Report:

“The Courts have uniformly refused to extend a penal act beyond the strict letter of the Statute in order to bring a case within its meaning which was not clearly embraced in its letter.”

In the case of **City of Rochester v. Rochester Gas and Electric Corporation**, (N. Y.) 134 N. E. 828, it was held that

“Strained and forced construction is not permissible to extend to doubtful situations the prohibition of a penal statute.”

In the case of **People v. Hemleb**, 111 N. Y. Supplement 690, it was held that the rule requiring words of a statute to be construed in connection with the other words thereof is “Especially applicable in the construction of criminal statutes, for such statutes can not be strained in construction to make out a crime.”

The statutes of Oklahoma provide for the same rule of construction as our statute.

It was provided in Compiled Laws of Oklahoma, 1909, Section 2027, as follows:

“The rule of common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.”

In **McDonald v. State**, (Okla.) 15 Pac. 2nd 149, the Court, at Page 150, said:

“It is a fundamental principle of criminal law that there can be no constructive offenses, and **statutes are not to be enlarged by construction** or extended by inference to cover acts not clearly within both the letter and the spirit of a penal statute.”

In **State v. Barnett**, (Okla.) 69 Pac. 2nd 77, the Court said:

“It is a well settled rule that a penal statute must be construed with such strictness as to carefully guard the rights of the accused and at the same time preserve the obvious intention of the Legislature . . . .”

The Oklahoma Court in the last mentioned case quoted approvingly from **Connally v. General Construction Company**, 269 U. S. 385, 46 S. Ct. 126 as follows:

“A statute which either forbids or requires the doing of an act **in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application** violates the first essential of due process of law.”

In the Connally case, the Supreme Court of the United States, at Page 128 of the 46th S. Ct. Report, speaking through Mr. Justice Sutherland said:

“The dividing line between what is lawful and unlawful **can not be left to conjecture**. The citizen can not be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions.”

We submit that the statute in question, even if this Court had never interpreted the words “underground mines or workings” and if the Legislature had not re-enacted the identical words in later statutes and revisions, would be sufficiently uncertain to reasonably admit of different constructions; but in the light of the judicial interpretation and

the Legislative acquiescence therein, we submit that the term "underground mines or workings" restricts the language to underground workings connected with mining.

Respectfully submitted,

GEO. W. WORTHEN