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Workmen's Compensation in Michigan

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WORKMEN'S COMPENSATION IN MICHIGAN.

THE Michigan Commission appointed by Governor Osborn[1] to report upon Employers' Liability and Workmen's Compensation, and to present a law that would embody its conclusions, has formulated its report and laid the same before the Governor. The report deals with the subject from an economic standpoint in so far as it was found possible to divorce it from the legal problems that are so important to a practical and constitutional solution. Though the Commission has in its report made no particular reference to its views upon the legal questions involved, it is evident that it must have arrived at a clearly defined conclusion thereon before it could undertake the task of making a draft of a proposed law.

This article is not an attempt to discuss these legal problems from the standpoint of one who holds a brief in the controversy that is now being waged over the question of the practicability of the workmen's compensation and the constitutionality of the various forms of compensation acts that have been proposed. Nor is it an attempt to give more than a cursory review of the law upon the subject as the courts have interpreted it. But the record of the development of the compensation principle in the United States, and of the action of the courts thereon to the present date, should be of some value in the further discussion of the subject, especially to those who either as legislators or as employers and employees may be called upon to sit in judgment over the feasibility and the legality of the bill proposed by the Commission.

The history of the workmen's compensation movement in England and upon the Continent and in the British Colonies has been detailed many times. The movement in the United States, however, covers but a brief period. It, nevertheless, has moved so rapidly that the several States seem about to overtake and perhaps to pass their European sisters in this effort to ameliorate the condition of the workmen and at the same time to do greater justice to the employer.

The first State to undertake a systematic investigation of the subject was the State of New York, whose Commission was organized on the 22nd day of June, 1909, and proceeded to make as thorough a study as possible of the subject as presented in that State. As a

[1] The Michigan Commission to investigate and report as to Employers' Liability and Workmen's Compensation was appointed in June, 1911, and concluded its labors and presented its report to Governor Osborn in December. Its members were. Hal. H. Smith, of Detroit, Chairman; Charles R. Sligh, of Grand Rapids, Vice Chairman; W. P. Belden, of Ishpeming; M. P. McCuen, of Grand Rapids; and O. A. Reeves, of Jackson.

result of their investigations two laws were recommended. The first was a compulsory bill applicable to workmen engaged in manual or mechanical labor in eight employments, each of which was deemed by the Commission to be notoriously dangerous to the workmen. The Commission also proposed certain amendments to the employers' liability act then in effect in the State of New York, coupled with an elective plan of compensation applicable to industries not covered by the compulsory act. The modifications of the employers' liability act, which defined the employers' liability for injuries, were all favorable to the employee. The Commission further proposed to give to the workman who would voluntarily consent to be bound by the provisions of this act, a compensation for all injuries that he might suffer in his employment. In this respect the optional act differed from the compulsory act, which gave compensation only where the injury arose out of and in course of the employment, and was caused in whole or in part by the necessary risk or danger of the employment or the failure of the employer or any of his officers, agents or employees to exercise due care or to comply with any law affecting such employment. The optional act provided for an election on the part of the workman, after the accident, as to whether he would bring his action at common law or would accept the benefits of the compensation act as modified. These proposed laws were reported to the legislature and speedily became a part of the law of the State of New York. The optional act, or as it has generally been described, the elective compensation law of New York, § 205, *et seq.* of Chapter 252 of the LAWS OF 1910, is a dead letter. It has been stated that no employers or employees have elected to be bound by its provisions. The workmen of the State appear to have been satisfied with the provisions of the Phillips law, Chap. 352, § 1, which, as has been before stated, increased the burdens of the employers as they had already been defined by the Employers' Liability Act of 1902.

The Wainwright law, Chap. 674 of the LAWS OF 1910, as the compulsory act is called, was speedily presented to the courts of New York for their opinion as to its constitutionality. The question was considered in the case of *Ives* v. *South Buffalo Ry. Co.*,[2] which was an action brought by an employee to recover compensation under the compulsory act. The Appellate Division affirmed a final judgment for the plaintiff entered on a decision at Special Term sustaining a demurrer to defenses pleaded in the answer. The answer pleaded the unconstitutionality of the law. The Court of Appeals,

[2] 201 N. Y. 271, 94 N. E. 431; see 9 Mich. L. Rev 704.

after an exhaustive examination of the authorities, held that the law was unconstitutional. The court was of the opinion that the legislature had power to modify or abolish the fellow servant rule and the rule of contributory negligence, and, to a limited extent, to regulate the application of the doctrine of assumed risk. It sustained the classification of employments under the act, but held the law unconstitutional as depriving an employer of his property without due process of law, and declared that the law, imposing, as it did, an absolute liability upon employers in certain occupations for injuries sustained by employees, though solely through the fault of the latter (except when such fault showed serious and wilful conduct) and without any fault of the employer though engaged in a business lawful *per se,* was not sustainable as a proper exercise of the State's police power. The court, however, clearly indicated its full sympathy with the purpose of the act, and its desire "to present no purely technical or hypercritical obstacles to any plan for the beneficient reformation of a branch of our jurisprudence in which it may be conceded reform is a consummation devoutly to be wished."

The court suggested that corporations formed after the passage of the act could be made subject to its provisions by appropriate legislation, but made no further concession in their view of constitutional principles to the demand "of that which for want of a better name we call public opinion."

This decision was rendered upon the 24th of March, 1911, and immediately a storm of protest arose from a great majority of those who had espoused the cause of workmen's compensation. At a meeting of the American Academy of Political Science held in the City of Philadelphia in April, 1911, many prominent publicists, representatives of both the workmen and the employer, made earnest protest against the decision. The court was called a Bourbon court, and dignified economists suggested that if the Constitution was in the way of the accomplishment of the desires of the people in this respect the Constitution should stand aside or be amended. It was earnestly argued that the New York Court in the *Ives* case had laid down a doctrine contrary to the opinion of the United States Supreme Court in the case of *Noble State Bank* v. *Haskell,*[3] a case that received extended examination in the opinion of the New York tribunal. On almost the very day that these protests were finding voice throughout the country, the opinion of Mr. Justice HOLMES of the United States Supreme Court, rendered some time before, on

[3] 219 U. S. 104, 31 Sup. Ct. 186.

a motion for leave to file a petition for a re-hearing in the *Noble State Bank* case was printed in the Supreme Court Reporter.[4] It was evident that the court had been warned that its first decision would be made the basis for a extension of the police power, for Mr. Justice HOLMES in delivering the last opinion of the court said:

> "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the State."

It was not possible for the adherents of the cause of workmen's compensation to derive much comfort either from the well considered opinion of the New York court or from this language, which seemed to modify the strength of the opinion in the *Noble State Bank* case in so far as it had been thought that it could be interpreted as a basis for an extension of the police power, and attention was therefore directed to efforts to avoid rather than to meet the doctrine laid down in the *Ives* case.

The New Jersey legislature had been considering the question and within two weeks from the date of the opinion in the *Ives* case the New Jersey act was approved. This created an elective system of compensation, not by an election as was possible under the New York optional law after the accident, but by an election as between the employer and the employee before the accident. This law has not as yet been tested by the courts.

The Senate of the State of Massachusetts, however, soon thereafter had under consideration House Bill No. 2154, which provided for an elective system of compensation not different in principle from that embraced in the New Jersey law. This law, however, was unique in one respect, in that it provided in the same act for the incorporation of mutual associations of employers to insure the payment of the compensation elsewhere provided in the act. This was a frank effort to establish in Massachusetts a system based upon the German system of Trade Associations. This act was on July 18th, 1911, considered by the Senate and by them presented to the Justices of the Supreme Judicial Court of Massachusetts for their opinion as to whether or not it was in conformity with the provisions of the

[4] 219 U. S. 575, 31 Sup. Ct. 299

Constitution of Massachusetts which required "that property shall not be taken from a citizen without due process of law," and whether it was in conformity with the Fourteenth Amendment to the Federal Constitution. The opinion of the Justices[5] was rendered on the 24th day of July, 1911. It was to the effect that the bill as presented was constitutional. The opinions of the Justices of the Massachusetts Supreme Judicial Court, rendered under the constitutional provision of that State requiring the court to advise the legislature when so requested, have not the binding effect of decisions rendered in the due course of judicial proceedings and the court has definitely said that any doctrine expressed in any such opinion would not bind the court.[6]

The vital question which seems to be presented in this case was as to whether or not the act, while in terms optional, was in reality compulsory. The court said:

> "There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly, so far as the employer is concerned, from the New York statute above referred to. * * * An employer who does not subscribe to the association will no longer have the right, in an action by his employee against him at common law, to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow-servant. In the case of an employee who does not accept the compensation provided for by the act and whose employer had become a subscriber to the association, an action no longer can be maintained for death under the employers' liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. * * * Taking into account the non-compulsory character of the proposed act, we see nothing in any of its provisions which is not in conformity with the 14th amendment to the Federal Constitution, or which infringes upon any provision of our own constitution in regard to the taking of property without due process of law."

In the meantime the States of Illinois, New Hampshire and Ohio had passed compensation acts. In Illinois the law applies especially to dangerous employments, including construction work, transportation and allied employments, mining, and employments in which ex-

[5] 96 N. E. 308.

[6] Adams v. Bucklin, 7 Pick. 121, 126; Opinion of Justices, 5 Metc. 596, 597; Opinion of Justices, 9 Cush. 604, 605.

plosive materials are used, or regarding which statutory regulations are imposed for the placing and using of machinery. Any employer covered by the act might elect to be bound by it. If he did not so elect, the defenses of assumed risk and the fellow-servant rule are denied to him, and contributory negligence is to be considered by the jury only to the extent of reducing damages. A schedule of compensation was provided, somewhat higher than that established in the New York or Massachusetts laws. The act is to take effect May 1st, 1912.

In New Hampshire an elective law was also passed, limited to certain dangerous employments, while the rate of compensation is fixed in some respects on a lower scale than that adopted in Massachusetts.

The State of Ohio, by an act which took effect June 15th, 1911, established a State Liability Board of Awards to administer State insurance funds raised from premiums paid jointly by employers and employees, ninety per cent. of which should be paid by the employer and ten per cent. by the employees. Employers failing to pay the premiums are deprived of the defenses of the fellow-servant rule, assumption of risk and contributory negligence. In case of wilful negligence on the part of the employer the workman has the option of accepting the award of the Board or of bringing an action at law. The schedule of compensation is based upon two-thirds of the loss of earning power. Neither the Illinois, the New Hampshire, nor the Ohio act has yet been the subject of judicial decision of the courts of those respective States, though the Ohio act is now under consideration.

While this activity in the case of workmen's compensation was going on in the East and Middle West, the States of the West and the Pacific Slope were dealing with the question. Kansas accepted the elective plan upon a schedule of compensation similar to that of Illinois, and made the law applicable to railways, factories, mines, and employments in which the risk to life and limb of the workmen is inherent, necessary or substantially unavoidable. The act is open to employers who employ fifteen or more workmen.

In Nevada an act was passed, effective July 1st, 1911, which applies to workmen engaged in certain specified extraordinarily hazardous occupations. In these employments the employer is bound to pay compensation for injuries or death, according to the schedule set forth in the act; although the workmen may proceed in their remedy at law and disregard the provisions of the act. The act embodies also the doctrine of comparative negligence. The schedule of compensation is on a basis of sixty per cent. of the average weekly earnings.

In California an elective plan was selected, although the plan is compulsory as to the employees of the State and its political divisions. The common law defenses are abolished or modified. The comparative negligence theory is recognized. A schedule of compensation substantially in advance of that in the Massachusetts and New York laws is prescribed.

The State of Washington presented, however, the most interesting experiment of any. Its law is compulsory as to extra hazardous work, although employers and employees engaged in other work may jointly elect to accept its provisions. The extra hazardous employments enumerated in the law include factories, mills, work shops, and plants where machinery is used, foundries, mines, logging, lumbering, shipbuilding and railroading. The employer is required to contribute to an accident fund a sum equal to a certain specified percentage of his total pay roll, according to a schedule of rates set forth in the law, which varies according to the hazard of the industry. This fund is in the hands of the State Treasurer. Each class of employers is liable for the injuries occurring in that class and that class alone. The amounts payable into the accident fund are computed on the current cost plan, that is, they are intended to be no more nor less than sufficient to meet the current liabilities. If an employer defaults in payment to the fund, the amount due is collected by an action at law in the name of the State. The administration of the act is imposed upon an Industrial Insurance Department, under whose authority the amounts to be paid out of the accident fund are ascertained and disbursed.

This interesting experiment in State insurance was immediately brought to the attention of the Supreme Court of the State of Washington. On June 17, 1911, an application was made for a writ of mandamus to compel the State Auditor to issue a warrant on the State Treasurer in payment of a simple contract obligation incurred by the Industrial Department. The opinion of the court[7] was handed down on September 27, 1911, and contains an elaborate statement of the act, and an extensive discussion of all the authorities. The decision, unlike that in the *Ives* case or that of the Massachusetts tribunal, considers *in extenso* the economic phases of the question. That this may not be improper is evident from the well remembered words of Justice FULLER in the case of *Mueller* v. *Oregon*[8] in which case an effective argument was built up upon reports of investigating commissions, committees of philanthropic bodies, *et cetera*. The Court, arguing from many of the same cases

[7] State of Washington v. Clausen, 117 Pac. 1101.

[8] 208 U. S. 412.

which were examined by the New York court, is clearly of the opinion that this law, which directly compels the payment of premiums to the insurance fund for the payment of injuries where there was no fault of the employer, is constitutional. They concede that the *Ives* case is direct authority against the position taken in their opinion, but add, "the court there" [that is, in the *Ives* case], "had in review a case which is dissimilar in many respects to the act before us and is perhaps less easily defended on economic grounds."

What justifies this assertion is not easily understood, unless it be the fact that the Wainwright law, considered in the *Ives* case, might not have been considered by the New York case except as a part of the legislative program which imposes on the employer, under the so-called Phillips law, Chap. 352, § 1, above referred to, very heavy burdens of employers' liability. The defense of assumed risk had practically been destroyed. The fellow-servant doctrine had been modified by increasing the number of employees who were to be regarded as direct representatives of the employer, and the injured workman was materially assisted by the putting upon the employer the duty of pleading and proving the defense of contributory negligence. These modifications of the common law doctrines were held by the court in the *Ives* case to be within the power of the legislature. It has, therefore, been argued, and this argument seems to be the only justification of the remarks of the Washington court, that the Wainwright law, which imposed on all employers in certain industries a new and unprecedented duty to pay compensation in the very few remaining cases where there was not even a statutory fault, was an act which under the circumstances any competent court would be inclined to consider very strictly. However this may be, it cannot be denied, as the Washington court has said, that the opinion in the *Clausen* case is directly opposed in principle and in reasoning to the opinion in the *Ives* case. How radically the two courts disagree can be seen from the fact that while the New York court expressly disavowed the *Noble State Bank* case as authority for the constitutionality of the act before them, the Washington Court makes the *Noble State Bank* case one of the main props of its opinion. The court in the *Clausen* case, in discussing the question as to whether the act is unconstitutional in that it interferes with the right of trial by jury, concedes "that there is no direct authority supporting the contention that the right of trial by jury may be thus taken away." The court argues from the case of *Holden* v. *Hardy,* and *State* v. *Buchanan,*[10] as follows:

[9] 169 U. S. 366.
[10] 29 Wash. 602.

> "In these cases it is held that the legislature may limit the number of hours a workman shall be permitted to labor in certain classes of employments, on the principle that to do so is to protect the health of the individual workman and thus contribute to the public welfare. If it be within the rule of the police powers of the State to interfere with the workman's personal freedom in this regard, it would seem to be no greater stretch of power to go one step farther and provide that if he be injured while so laboring, he shall receive a sure award in a limited sum as compensation for his injury, and in lieu thereof shall forego his common law action in damages therefor."

No argument to bridge the hiatus between these two propositions is offered except the confessed desirability, so far as economics and philanthropy is concerned, of substituting the new method of procedure for the common law trial by jury. The court then proceeds to suggest an ingenious argument in this wise:

> "The right of trial by jury accorded by the constitution as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action on the one hand, and the ground of defense on the other; and merges both in a statutory indemnity, fixed and certain. If the power to do away with a cause of action in any case exists at all, in the exercise of the police power of the State, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate."

That this question as to whether or not the legislature of the State of Washington could take away a right of action or abolish the right of trial by jury is of great doubt is apparent from the concurring decision of Judge CHADWICK, who, while avowing his hope that the law can be held constitutional, expressly reserved his opinion on the question as to the trial by jury, and declared that the opinion of the court upon that proposition is not settled, and this decision should not be so regarded. In the course of his concurring opinion, however, he insists that there was no party in interest before the court, "whose interest it is to challenge the act of the legislature. This is a moot case, pure and simple, and the right of the relator to recover is in no way affected by the constitutional questions raised by the parties and discussed by the court."

The Washington act, therefore, can hardly be said as yet to have been endorsed as valid and constitutional in a decision that can stand

as a precedent, either for the courts of Washington or for those of any other State.

Among the States which have, through their commissions, investigated this subject, none has devoted to it more earnest thought or careful investigation than the State of Wisconsin. From this State came some of the earliest and most earnest supporters of the doctrine of workmen's compensation. The investigation of the Wisconsin Commission was undertaken at about the same time as was the work of the New York Commission, and, assisted by the co-operation of an active and intelligent labor department, it has been enabled to throw considerable light upon the question from the experience of the employers and workmen in the Middle West. This Commission finally presented to the legislature of that State a bill which was enacted as Chap. 50 of the SESSION LAWS OF 1911. It became effective September 1, 1911. This act abolished the common law defenses of assumption of risk and the fellow-servant rule. It was compulsory as to the State and its subdivisions, but elective as to all other employers having four or more employees. The compensation is fixed on a scale having a maximum of $3,000, but is based upon 65 per cent. of the average weekly earnings. The election of the employer is made by filing a statement with the Industrial Accident Board, and when he has accepted the compensation act his employees are presumed to have also accepted it unless contrary notice is given. The constitutionality of this act was presented to the Supreme Court of the State of Wisconsin in the case of *Borgnis, et al., respondents* v. *Falk Co., appellant*,[11] and in an opinion filed Nov. 14th, 1911, the constitutionality of the act was sustained. The question was presented to the court upon a bill for an injunction against the defendant, the Falk Company, praying that it be enjoined from filing an election under the Workmen's Compensation act, alleging that such election would work irreparable injury to the plaintiffs, who were employed under contracts by the Falk Company. The injunction was issued and the Falk Company appealed. The court admits that the action "might very well be disposed of without considering the question of the validity of the act in question," but asserts that the subject of the act is of general interest, that there is so great a public sentiment therefor that many employers have accepted the terms of the act, and concludes "that it is their duty to decide the questions that are involved though they may not be absolutely essential to the result." The opinion therefore must stand as a moot case, and is no more valuable than the Washington or the Massachusetts decisions. The court seem to have had some doubt

[11] 133 N. W. 209.

in their minds as to whether the law could be sustained if the constitutional provisions of Wisconsin were to be strictly construed, since at the outset of the opinion they consider at length the necessity for a reform of the employers' liability law, and the desirability of interpreting the constitutional provisions in the light of the reforms that modern progress and public opinion seem to demand. They say:

> "When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch upon a veritable bed of Procrustes."

The point of view and mental attitude of the Wisconsin court can be best appreciated by contrasting this paragraph with the opinion in the *Ives* case. Even enthusiastic supporters of workmen's compensation might be tempted to suggest that constitutional principles that have stood for two centuries ought to be regarded as expressing doctrines of such fundamental right that it might be best to preserve those principles intact, even though we lose an opportunity to satisfy the public demand for any certain reform.

Upon the main question of whether or not the act, though in form elective, is in fact compulsory, the reasoning of the court is not much more convincing. They say:

> "As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law the employee will feel compelled to accept also through fear of discharge if he do not accept.
>
> "Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical workings of the law. * * * These matters are, however, purely speculative and conjectural; none can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee."

Whatever value this reasoning may have had in the determination of the *Borgnis* case, it certainly leaves this question open for a further consideration when, after the law has been in practical opera-

tion, employers or employees shall present themselves to the court, insisting that they have been compelled to elect one way or another under the act.

The demand for workmen's compensation has extended to the Federal Congress, and that body, through its commission, has prepared and is to submit to Congress an act governing employees of the Federal Government and those laboring in Interstate Commerce Extensive hearings have been had and elaborate briefs have been submitted in support of several forms of compensation law, the elective, the supplemental—of which the New York act was a type—the compulsory, and that which involves State insurance.

Whatever may be said as to the effect as precedents of the opinions of the Massachusetts, Washington, and Wisconsin courts, it can, we think, be safely predicted that the activity of the legislatures of the several States and of Congress, urged on by the tremendous public sentiment that appears to be behind the movement for workmen's compensation, will ultimately result in some plan which will not run counter to constitutional provisions, and can receive the final approval from the courts of the land. That such a plan, at least for the present, must be based upon the elective system seems for the present both advisable and necessary. It has been earnestly argued that the elective plan is a make-shift; that it is but a statutory change of the rule of public policy which invalidates agreements for releases made in advance of the happening of an accident, and that there is no middle course between the just theory of a pure compulsory compensation on the one hand, and a modified system of employers' liability, such as now exists, on the other hand. That the elective system involves some difficulties of administration not inherent in the compulsory plan must be admitted. But the elective system does recognize the fundamental principle upon which all workmen's compensation rests, of payment for accidents that occur without the fault of the injured. The recognition of that principle in the law, coupled with any provision for a sure payment of a limited compensation, is a distinct advance upon the present system of employers' liability, and perhaps all the advance that should be attempted until the principle of workmen's compensation can be tested by practical operation in American industries.

The Michigan Workmen's Compensation Commission, having arrived at this general conclusion, prepared a compensation act, compulsory as to the State and its subdivisions, but elective or optional as to all other employers of workmen, except in the cases of the agricultural industry and of household domestic servants. The cardinal principles of the act proposed can be briefly stated: First,

reasonable compensation at minimum cost for all accidents except the result of wilful fault. Second, a compensation certain in amount. Third, a compensation the payment of which is certain. Fourth, compensation the payment of which can be enforced with a minimum of litigation. Fifth, a scheme of compensation which should encourage the prevention of accidents.

In the development of these principles in the details of the legislation, a number of important and interesting problems have arisen. The interpretation of the phraseology of the British and various Canadian acts by their courts furnishes a guide to a solution in many instances, but the conditions in American industry are so different from those in England and her colonies, that the law of Workmen's Compensation in the United States is as yet to a great extent a closed book.

In proposing an optional or elective law, the Michigan Commission offers an opportunity for practical trial of the compensation principle. It is devoutly to be hoped that the courts will be able to permit the experiment, not by yielding constitutional principles to a needed reform, but by developing that reform within constitutional limits.

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