STATE WORKMEN'S COMPENSATION ACTS AND THE POLICE POWER.

State laws based on the theory that modern industrial conditions require remedies for the protection of employees different from those developed at common law and by statutes in modification thereof, have been increasing in number during the last five years. It is urged by the supporters of this legislation that on broad economic and social grounds the loss of earning power caused by injuries to workmen should be figured as part of the cost of production to the employer. On behalf of the employers it is contended that no man should be made to pay for damage suffered through no fault of his, and in spite of his best effort to prevent it.

Under our system of written constitutions these enactments have been subject to attack as violative of the "due-process" clause found in one form or another in all the constitutions, and have been defended as representing a proper exercise of the police power of the legislatures. If the value of this legislation be admitted the question remains as to how the taking of property required by it can be justified in the face of the "due-process" clauses. In the Ives case (201 N. Y. 271) the arguments against a definition of the police power which would restrict the operation of the "due-process" clause and justify the taking contemplated in the statute are very clearly set forth.

The Ives case was an action by an employee against his employer under article 14a of the Labor Law of New York.[1] This addition to the law of the state was modeled upon the English Workmen's Compensation Act of 1897, and provided that every employer engaged in any of the industries classified by the act (and thereby determined to be especially dangerous), should be directly liable for any injury to employees resulting from a "necessary risk or danger of the employment or one inherent in the nature thereof."[2]

By the act the liability of the employer for failure to exercise due care or to comply with any law was retained, the only exceptions in his favor being in cases where the injury was caused by the

[1]Laws 1910, Ch. 674.
[2]No. 217a.

intoxication or serious and willful misconduct of the workman.[3] The determination of amounts payable in certain cases was fixed[4] and the employee given his option of suit under the act or under the laws of the state previous to the act.[5]

The court held the statute void under the state constitution on the ground that the liability sought to be imposed on the employers classified by the act amounted to a taking of property without due process of law. They said that the act could not be sustained as a valid exercise of the police power because it was not a law of regulation,—it did nothing to conserve health, safety or morals of the employees and imposed no new or affirmative duties on the employer in the conduct of his business, its sole purpose being to make him liable for injuries which might be sustained wholly without his fault. The decisions in the then recent cases of Noble State Bank v. Haskell[6] and Assaria State Bank v. Dolley[7] were urged upon the court as indicating an apparent extension of the limits of the police power[8] sufficient to include the legislation before them, but Judge Werner refused to recognize the cases as controlling in construing the state constitution.[9]

Because of the pioneer character of the act under consideration and the interest of various labor organizations in its passage, the decision in the Ives case was subject to considerable criticism. In 1913 an amendment[10] to the New York constitution was adopted which provided that nothing in that instrument should be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees, or for payment by employers of compensation, and the following year a new compensation act (Consol. Laws, c. 67; Laws 1914, c. 41) was passed, differing from the former law in that instead of imposing a direct liability on the employer it gave the election of insuring in the state fund, with any proper company, or of giving proof of his own financial

---

[3]No. 217b.
[4]No. 219a.
[5]No. 218.
[6]219 U. S. 104, 32 L. R. A. (N. S.) 1062.
[7]219 U. S. 121.
[8]219 U. S., p. 111, "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518 It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."
[9]Werner, J., thought the act invalid under the Federal Constitution as well as under that of the State. 201 N. Y., at p. 298.
[10]See Laws 1914, Vol. 3, p. 2372 (N. Y. Cons., Sec. 19, Art. I).

ability to pay.[11] By insuring as described or by paying the prescribed compensation in each case, the employer was relieved from all further liability.[12] The employee might not claim damages under the rule in negligence cases, the compensation being based solely on the loss of earning power.

Before this new act had become law, however, the highest courts of several states had passed on the validity of statutes similar in effect to that declared void in the Ives case. The Justices of the Supreme Court of Massachusetts delivered a favorable advance opinion[13] on the validity of the state law; in a Washington case (State ex rel. Davis-Smith Co. v. Clausen),[14] the Supreme Court of that state, while recognizing the force of the Ives case as a precedent, expressly refused to follow it. Although the act under consideration in Cunningham v. Northwestern Improv. Co.[15] was held invalid by the Montana court in that the employer, having paid his insurance premium, might, notwithstanding, be held for damages,—there being no provision made for his reimbursement from the state

[11]No. 50, entitled: "Security for payment of Compensation," describes three modes in which the employer may secure compensation to his employees: (1) by subscribing to the state fund, (2) by filing a copy of contract or policy of insurance with the commission, or (3) by furnishing satisfactory proof to the commission of his financial ability to pay. The penalty for failure to comply with these provisions is fixed at one dollar per day per man employed; the employer also loses certain defenses by No. 11.

[12]No. 53: "* * * relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer."

[13]The text may be found in 209 Mass. 607 (July 24th, 1911). The act is similar to the New York act of 1914, *supra*.

[14]65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; decided Sept. 27th, 1911. The Ives case was decided in March of the same year. The opinion in the principal case contains much matter dealing with the question as to whether an act imposing tort liability on one who is not negligent is a violation of any fundamental right. The argument is the familiar one that the law of negligence is not such a fundamental principle of our law as to be rendered inviolate by the due process clause of our constitutions. See note in 32 L. R. A. (N. S.) 162, and 10 Columbia Law Review, p. 753. The decision does not go on this ground, however, but on the broader basis that such enactments are within the police power of the legislature. Opinion of Fullerton, J., at p. 195: "If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault, or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy public rights."

[15]44 Mont. 180, 117 Pac. 554 (Nov., 1911), quoting with approval the Washington case, *supra*.

fund, yet this court adopted the language of State Bank v. Haskell in defining the police power and sustained the declared power of the legislature to pass a compulsory insurance law. The Wisconsin statute is of the elective type; that is, the employer may defend his suit in court deprived of the defenses embodied in the fellow-servant rule and the doctrine of assumption of risk, contract provisions notwithstanding. While this act provides that election and recovery under its provisions bars the employee from further remedy, and so is not open to the objection raised in the Montana case, supra, the court in declaring the act valid[16] took the opportunity to express their views on the validity of the legislation under the state constitution. While in the above cases the decisions rested on the theory that the acts under consideration were actually within the police power of the legislatures as shown by analogous decisions, the Wisconsin court dealt with the question as one of the methods to be pursued in construing a written constitution. "Where there is no express command or prohibition," said the court, "but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of the problems of construction and interpretation."[17] This expression is in contrast to the suggestion made by Judge Werner in the Ives case to the effect that if the people of the state desired the law in question they should amend the constitution.[18] What is perhaps the strongest statement of the doctrine that public policy determines constitutionality under the due-process clauses is found in the Washington case, supra, where the court declared that in order to be fatally defective the legislation must be shown to be "so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy public rights."[19]

It would seem that the real point of departure between the decision in the Ives case and the decisions in the courts of the other states on the compensation legislation lies in the method of construc-

[16]Borgnis v. Falk, 147 Wis. 327.

[17]Id., p. 349. See opinion of Barnes, J.: "If the opinion of the court is intended to mean that it is a doubtful question whether our constitution should be preserved or thrown in the 'scrap heap,' I do not agree with it."

[18]Page 201, N. Y. 271, at p. 305.

[19]See note 14, *supra*.

tion adopted in testing the validity of new legislation under a written constitution. The recent decision[20] of the New York Court of Appeals holding valid the compensation act of 1914 seems to support this view. In the opinion, Miller, J., says: "Much reliance is placed on the decision of this court in Ives v. South Buffalo Ry. Co. In that case Judge Werner, referring to the appeal on economic and sociological grounds and speaking for the court, said:

'We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts.' That decision was made in March, 1911. Following that suggestion the Legislature provided in the orderly way prescribed by the Constitution for the submission to the people of a proposed constitutional amendment, and in due time that amendment was adopted on November 4, 1913, and became section 19, article I, of our state constitution. It is unnecessary to set that amendment forth in extenso, but it suffices to say that so far as the due-process clause or any other provision of our state constitution is concerned the amendment amply sustains the act."

[20]Jensen v. Southern Pac. Co., 109 N. E. 600, at p. 602. The opinion ends with this sentence: "The decisions of the United States Supreme Court, notably in the Noble State Bank case, make it reasonably certain that it (the law) will be found by that court not to be violative of the Constitution of the United States," p. 604.