

1917

## Do Compulsory Workmen's Compensation Laws Violate the 14th Amendment of the Federal Constitution?

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### Recommended Citation

Robert Walston Chubb, *Do Compulsory Workmen's Compensation Laws Violate the 14th Amendment of the Federal Constitution?*, 2 ST. LOUIS L. REV. 029 (1917).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol2/iss1/3](https://openscholarship.wustl.edu/law_lawreview/vol2/iss1/3)

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# ST. LOUIS LAW REVIEW

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Published Quarterly During the University Year by the  
Undergraduates of Washington University Law School.

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## NOTES

### DO COMPULSORY WORKMEN'S COMPENSATION LAWS VIOLATE THE FOURTEENTH AMEND- MENT OF THE FEDERAL CONSTITUTION?

It seems certain that the Missouri legislature will tardily follow the lead of thirty-one states, the Federal Government and most of the territories, by passing a workmen's compensation law at its next session. Although these statutes are beginning to attract the attention of Missouri lawyers, the burden of investigation of such legislation in this state seems to have fallen on the able shoulders of Mr. Alroy S. Phillips of the St. Louis Bar. In a recent pamphlet issued by the Missouri Workmen's Compensation Conference he has thoroughly discussed the policy and principles involved in the meas-

ure proposed for Missouri, with some attention to the legal problems offered by such an act.

All of the law connected with workmen's compensation in this country is in a very undeveloped and amorphous state. No two of the statutes are alike. Judicial interpretation also varies from state to state. At best, the legal problems are difficult, impinging as they do upon the law of Master and Servant, Proximate Causation, Insurance Law, Conflict of Laws, and Constitutional Law. Most of the books on the subject, like those of Boyd and Bradbury, are based upon experience under the British Act, and are in other respects out of date, and even the careful summary in *Lawyers' Reports Annotated*,<sup>1</sup> cannot keep pace with rapid judicial and legislative departments.

Among the doubtful questions connected with these laws is that of the constitutionality of provisions making payment by insurance of the claims of injured workmen compulsory upon employers. Seven states out of the thirty-one have passed compulsory laws,<sup>2</sup> and without going into the merits and policy of the matter, it appears to be the opinion of those who have had experience in administration that the compulsory form is more desirable than the so-called "elective" laws which abrogate the common law defenses (assumption of risk, contributory negligence, and the fellow-servant rule) and leave to the employer the option of coming under the law or facing possible litigation without these important defenses.<sup>3</sup> For in spite of the "club" in the elective laws it has been found that large numbers of employers take the risk and stay outside the operation of the statute.

A general opinion seems to prevail, which is expressed by Mr. Phillips in his treatment of the subject, that compulsory laws, with the usual provisions requiring insurance, are contrary to the guarantees of the state and Federal constitution, more particularly to those articles which prohibit taking of property without due process

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<sup>1</sup> L. R. A. (N. S.) 1916 D.

<sup>2</sup> Ohio, California, Arizona, Washington, New York, Oklahoma, Wyoming.

<sup>3</sup> Massachusetts Accident Board. Annual Report 1913.

"It has become evident that as a matter of justice and public welfare, compensation acts, should be uniform and compulsory, and apply to all employees and occupations alike." See also Report of the New Jersey Employers' Liability Commission in 1915. Trenton, 1916. Their first recommendation is "the passage of a compulsory compensation law" in place of the present elective law. Also Conference of Commissioners on Uniform State Laws. Report of Committee on Compensation for Industrial Accidents, 1914. "Best results can be obtained only through a compulsory law."

of law, and which guarantee trial by jury. The latter objection, based on the fact that most laws are administered by commission, seems to have occupied but little attention, since under all of the laws there is appeal or other recourse to the courts on matters of law, and has been summarily disposed of where it has come up.<sup>4</sup> So that the question narrows itself down to a consideration of those guarantees which are found in all state constitutions, as to due process of law, and in the Fourteenth Amendment of the Federal Constitution.<sup>5</sup>

The issue is stated by Mr. Phillips as follows: "The trend of the decisions of the Supreme Court of the United States is that while there is no other objection to a compulsory law as far as the employer is concerned, it may be a violation of the due process clause of the constitution to make him liable irrespective of negligence, unless the law is passed in a valid exercise of the police power of the state, which is generally understood to mean that its application must be limited to enumerated extra-hazardous employments." Now it is impossible to be dogmatic on a subject that has not been passed upon by the Supreme Court, but it is certain that the decisions of that court on the police power, and recent state decisions directly in point, greatly discredit the belief that the laws are unconstitutional. In the first place, there are no decisions of the Supreme Court on the subject. There seems to be no basis whatever for the "general understanding" that compulsory laws must be limited as suggested, for as a matter of fact two of the compulsory laws are not so limited, and decisions repudiate the distinction. Finally, very recent state decisions point most decidedly to the constitutionality of the laws.

#### I.

It is impossible to define the limits of the police power in any precise way. But the following well-known dicta of the United States Supreme Court show that the interpretations are increasingly liberal, and are the only guide to the nature and extent of the power.

"We premise that the clause of the Fourteenth Amendment referred to (that relative to the equal protection of the laws) was undoubtedly intended to prohibit an arbitrary deprivation of life or liberty, or an arbitrary spoliation of property. But it does not limit

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<sup>4</sup>The only case in which this objection has been raised is *State v. Clausen, infra*, in which the court decides that the law does not offend in this respect.

<sup>5</sup>See Constitution of the State of Missouri, Article II, Secs. 20 and 30.

nor was intended to limit, the subject upon which the police power of the states may be lawfully exerted."<sup>6</sup>

"The police power is not subject to any definite limitation, but is co-extensive with the necessities of the case and the safeguards of the public interests."<sup>7</sup>

"This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some states, methods of procedure which, at the time that the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals had proved detrimental to their interests; while upon the other hand certain other classes of persons, particularly those engaged in dangerous or unhealthful occupations, have been found to be in need of additional protection."<sup>8</sup>

"We hold that the police power of the state embraces regulations designed to promote the public convenience or general prosperity as well as regulations designed to promote the public morals, or the public safety."<sup>9</sup>

It may be seen that the last definitions are considerably broader than the first. But of all the decisions and the dicta upon which the state courts have relied in their decisions on workmen's compensation the most important and controlling is the following from Mr. Justice Holmes' opinion in *Noble State Bank v. Haskell*.<sup>10</sup>

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. U. S.*, 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."

## II.

As to the necessity of limiting the application of the law to classified extra-hazardous employments for the purpose of bringing it under the police power, the fictitious nature of such classification has been repeatedly recognized by the courts:

"It is frankly admitted by the appellant that it is within the

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<sup>6</sup> Mr. Justice White in *Jones v. Brim*, 165 U. S. 182.

<sup>7</sup> Mr. Justice Brown in *Canfield v. U. S.*, 167 U. S. 518.

<sup>8</sup> Mr. Justice Brown in *Holden v. Hardy*, 169 U. S. 385.

<sup>9</sup> *C., B. & Q. Ry. v. Illinois*, 200 U. S. 341. Mr. Justice Harlan.

<sup>10</sup> 219 U. S. 104.

legislative power to make this change with regard to hazardous trades, but not with regard to what are called the non-hazardous trades. But why not? . . . We see absolutely no ground for the contention that these defenses may be lawfully abrogated as to the more hazardous industries, but must be forever held sacred to the less hazardous industries. There may be a less persuasive reason for the change in the latter class of industries, but this does not deprive the legislature of the power to make it."<sup>11</sup>

"There is no reason of necessity or propriety—there is no reason whatever that occurs to us—why a common carrier should be subjected to liability to his bookkeeper or to his clerk in his general offices . . . or to any other of his servants who is not actually engaged in some such hazardous occupation as operating engines or trains, . . . while the merchant, the manufacturer, and all other persons, are exempt from such liability to their servants engaged in the performance of the same work under the same circumstances."<sup>12</sup>

"The legislative power to impose the liability upon an employer who is without fault does not, in view of the courts which have dealt with the subject, rest upon the consideration that the particular employer is conducting an industry in which injury is more likely to result than in some other."<sup>13</sup>

Apparently it has never occurred to those who raise this objection to examine at first hand what is meant by "extra-hazardous" industries. In the New York compulsory statute, the hazardous employments are divided into 43 classes of from six to twenty-five employments, and embracing as a matter of expert testimony, all occupations except strictly mercantile pursuits. The Washington statute is even more liberal in its definition. The other compulsory laws are admittedly modeled on these two where they mention the words "hazardous" at all. Two compulsory laws, Ohio and California, include all industrial occupations, making no distinction whatever. And the California law, as will be explained below, has been pronounced constitutional.

Therefore it seems hardly possible that the Supreme Court of the United States will base its decision of the constitutionality of these laws on any academic distinction of the sort.

<sup>11</sup> *Borgins v. Falk*, 147 Wis. 327.

<sup>12</sup> *Railway v. Westby*, 178 Fed. 619.

<sup>13</sup> *Western Indemnity Co. v. Pillsbury*, 170 Cal. 682.

## III.

Coming now to direct decisions on the constitutionality of compulsory accident insurance laws, there are four cases directly in point decided by state courts of last resort. These cases are summarized and discussed at length in the able annotation on Workmen's Compensation in Lawyers' Reports Annotated.<sup>14</sup>

The source of the general skepticism on the constitutionality of these laws is the case of *Ives v. South Buffalo Ry.*,<sup>15</sup> decided in 1911. The purport of the decision was that the law took property without due process of law, by imposing liability without fault. The ground of the decision is clear. The court simply says: "It is taking the property of A and giving it to B," or again "It does nothing to conserve the health, safety and morals of the employee." Liability without fault is unconstitutional. The reasoning of the court is exactly opposed to that of subsequent decisions, one of which was handed down by the same court. But this is notable, that the statute under consideration differed from the latter statutes, so that although the dicta are opposed, the decisions may be distinguished. The first New York law<sup>16</sup> provided no means whatever of distributing the burden imposed upon the employer; it was not an insurance law at all. The case caused much popular criticism of the New York Court, not to speak of expert legal condemnation.

Directly contra to the *Ives* case, and in terms overruling it is the recent decision (July, 1915) of the same court in *Jensen v. Southern Pacific Ry.*,<sup>17</sup> upholding the constitutionality of the present compulsory New York law, which was passed subsequent to amendment of the state constitution, but which nevertheless declares that the law is valid under the same Fourteenth Amendment under which the other was declared unconstitutional. The court distinguishes the two acts: "That act made no attempt to distribute the burden. This act does in effect as well as in theory distribute the burden equally over the industries affected. The two acts are therefore, so plainly dissimilar that the decision in the *Ives* case is not controlling in this." But it does not attempt to reconcile the divergent theories upon which the two cases were decided. For instance, in the latter case, the court found *Noble State Bank v. Haskell*, *supra*, controlling on the

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<sup>14</sup> L. R. A. (N. S.) 1916 D., p. 409.

<sup>15</sup> 201 N. Y. 271.

<sup>16</sup> C. 674, Laws of 1910.

<sup>17</sup> 215 N. Y. 519.

police power question ("the decision in *Noble State Bank v. Haskell* is decisive"), while the court in the *Ives* case vehemently refused to follow the U. S. Supreme Court, saying of the case and another similar to it, "we cannot regard them as controlling."

The case of *State ex rel. Davis Smith Co. v. Clausen*,<sup>18</sup> (1915) pronounced the present Washington law constitutional as to due process, equal protection, and trial by jury. The opinion gives examples of liability without fault to discredit the *Ives* decision, and relies on *Holden v. Hardy* and *Bank v. Haskell* for its definition of the police power. The court lays much stress on the point that the law is a reasonable exercise of the police power, and not such a capricious and arbitrary exercise as would violate the Fourteenth Amendment. The court frankly refused to follow the *Ives* decision.

The case of *Western Indemnity Co. v. Pillsbury*<sup>19</sup> (August, 1915), pronounced the present California law valid. The case is significant for two reasons. In the first place, California did not pass an amendment to her state constitution to permit the law, as the other states have done. Second, the California law is inclusive of all industrial employments, regardless of hazard. The case was brought up on a certiorari to the Industrial Accident Commission. (Note that the Washington case above came up on a writ of mandamus to the state auditor.) The California court quotes the *Clausen* case extensively and distinguishes the *Ives* case; it also makes reference to the *Jansen* case. Holding that "liability without fault is not new to the law" it declares that the state statute "merely changes the existing rules governing the liability of masters . . . to their servants," and "does not affect past transactions of previously acquired rights of person or property."

As far as the general development of the law is concerned, all of these cases are significant as showing the present inclination of courts (which will probably appear in the Supreme Court with recent changes in its personnel) to regard policy and the need of new laws to meet modern industrial conditions. The Washington court quotes "the enlightened opinion of mankind" in the same breath with legal precedents. The New York court evidences the new spirit in the following: "This subject should be viewed in the light of modern conditions, not those under which the common law doctrines were developed. With the change in industrial conditions an opinion has

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<sup>18</sup> 65 Wash. 156.

<sup>19</sup> 170 Cal. 686.



gradually grown up which almost universally favors a more just and economical system of providing for accidental injuries to employees, as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both." The California court also recognizes that the old damage suit system, "involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, . . . and is unsuited to the conditions of modern industry." "The theory of this legislation is that the risk of injury to workmen . . . should be borne by the industries, rather than by the individual workman alone."

It appears then, that by the weight of authority compulsory compensation laws, including the insurance scheme, are established on a constitutional basis. The only effect of the opinion in the historic Ives case is in the words of the L. R. A. annotator that "it is probable that in future workmen's compensation acts will provide for insurance rather than direct liability."

Since there is nothing in the Missouri Constitution to alter the situation, and since judicial opinion upholds the constitutionality of such laws, there is no reason why Missouri should not have the most efficient, inclusive and far-reaching compensation law in the country.

WALSTON CHUBB, '18.