

New Jersey Supreme Court

STATE OF NEW JERSEY, BY LEWIS T. BRYANT, COMMISSIONER OF LABOR, <i>Plaintiff,</i> <i>vs.</i> JAMES O. LINDSAY AND FRANK E. DECKER, <i>Defendants.</i>	}	Action-at-law.	10
--	---	----------------	----

NOTICE OF APPEAL.

(Filed Sept. 27, 1920.)

To Messrs. Lindabury, Depue and Faulks, Attorneys 20
for James O. Lindsay and Frank E. Decker, De-
fendants:

Take notice, that the State of New Jersey, by Lewis T. Bryant, Commissioner of Labor, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this case, on the following grounds:

1. Because the Supreme Court erroneously gave judgment for the defendants when said court should have given judgment for the plaintiff. 30

2. Because the Supreme Court erroneously found as a matter of law that the liability sought to be imposed under the act, entitled "An act to amend an act entitled 'An act providing for a payment to the State by an employer operating under section two of an act entitled 'An act prescribing the liability of an employer, to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for

the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of this employment,' approved March fourth, one thousand nine hundred and eighteen," approved April eleventh, one thousand nine hundred and nineteen, could not be supported on the theory of contract between the employer and employee in accordance with (10 the provisions of section two of the Workmen's Compensation Act (so-called), the original act.

3. Because the Supreme Court erroneously found as a matter of law that said act is contrary to the provisions of the Constitution of the United States and the amendments thereof and the Constitution of the State of New Jersey and the amendments thereof in that the effect of said act is to deprive defendants of the equal protection of the laws.

4. Because the Supreme Court erroneously found as (20 a matter of law that said act is contrary to the provisions of the Constitution of the United States and the amendments thereof and the Constitution of the State of New Jersey and the amendments thereof in that the effect of said act is to deprive said defendants of their property without due process of law.

5. Because the Supreme Court erroneously found said act to be unconstitutional, whereas said act is constitutional and valid.

6. Because the said judgment of the said Supreme (30 Court was in divers respects illegal, unjust, oppressive and contrary to law.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff.

Service acknowledged Sept. 24, 1920.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants-Appellant.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, BY LEWIS T.

BRYANT, COMMISSIONER OF LABOR,

*Plaintiff,**vs.*

JAMES O. LINDSAY AND FRANK E.

DECKER,

Defendants.

10

SUMMONS AND COMPLAINT.

(Filed September 30, 1919.)

The State of New Jersey to James O.
 [SEAL.] Lindsay and Frank E. Decker: You are
 summoned to answer the annexed complaint
 of the State of New Jersey, by Lewis T. Bryant, Com-
 missioner of Labor, in an action at law in the Supreme 20
 Court. And take notice that unless you file your answer
 to said complaint with the Clerk of the Supreme Court,
 at Trenton, within twenty days after service upon you
 of this writ and the annexed complaint, the plaintiff
 may proceed in the suit and judgment may be entered
 against you.

Witness, William S. Gummere, Chief Justice of the
 Supreme Court, at Trenton, this nineteenth day of Sep-
 tember, nineteen hundred and nineteen.

ENOCH L. JOHNSON,

30

Clerk.

THOMAS F. MCCRAN,

*Attorney-General of New Jersey,**Attorney for Plaintiff.*

COMPLAINT.

(Filed September 30, 1919.)

The plaintiff, the State of New Jersey, by Lewis T. Bryant, Commissioner of Labor, complains against James O. Lindsay, of Arlington, County of Hudson and State of New Jersey, and Frank E. Decker, of the City of Bristol, and State of Pennsylvania, defendants:

10 1. That on or before the fourth day of July, A. D. nineteen hundred and eighteen, one Joseph Netschert was hired or employed by the defendants in the City of Newark, County of Essex and State of New Jersey, and which contract of hiring or employment was subject to the provisions of section two of an act entitled
20 "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven, and thereafter continued in the employ of said defendants under said contract of hiring or employment subject to the provisions of section two, as aforesaid, until the twenty-sixth day of September, A. D. nineteen hundred and eighteen.

30 2. That on September twenty-sixth, A. D. nineteen hundred and eighteen, while said Joseph Netschert was still in the employ of said defendants, under said contract of hiring or employment, subject to the provisions of section two, as aforesaid, said Joseph Netschert died as a result of an accident arising out of and in the course of his employment.

3. That said Joseph Netschert died leaving no dependents entitled to compensation under the provisions of Chapter 95 of the Session Laws of 1911, and the acts supplemental thereto and amendatory thereof.

4. That said plaintiff, before the commencement of this action advertised by notice in the form prescribed and in the manner provided for under the provisions of section two of Chapter 203 of the Session Laws of 1918, approved March 4, 1918, and effective July 4, 1918, as amended by Chapter 101 of the Session Laws of 1919, approved April 11, 1919, proof of publication whereof is hereto annexed.

5. That said plaintiff at divers times demanded of said defendants that said defendants pay to said plaintiff the sum of \$400.00, in accordance with the provisions of an act entitled "An act providing for a payment to the State by an employer operating under section two of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure thereunder,' approved April fourth, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment," approved March 4, 1918, as amended by act approved April 11, 1919, and said defendants refused and still refuse to pay to said plaintiff the sum aforesaid. 10 20

The plaintiff demands of the defendants the sum of four hundred dollars, together with interest, and costs of suit.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney for Plaintiff. 30

STATE OF NEW JERSEY.

To the dependents of Joseph Netschert:

Take notice that Joseph Netschert died on the twenty-sixth day of September, 1918, as a result of an injury received while employed by James O. Lindsay and Frank E. Decker, Newark, N. J.

This notice is given in order that any dependents of said Joseph Netschert may take advantage of the

provisions of Chapter ninety-five, P. L. one thousand nine hundred and eleven, within the time required by law.

Any person who was a dependent of the one named above should communicate at once with

LEWIS T. BRYANT,
Commissioner of Labor.

(\$6.12)

STATE OF NEW JERSEY, } ss.
10 COUNTY OF ESSEX.

Charles F. Stiasny, of full age, being duly sworn according to law, on his oath saith that he is a clerk in the office of the *Newark Evening News*, and that a notice of which the annexed is a true copy was published on the 11th day of October, A. D. 1918, in the said *Newark Evening News*, a public newspaper, printed and published at Newark, in this State, and continued therein on October 18th, 25th, November 1st, successively thereafter, making four insertions in all.

20 CHARLES F. STIASNY.

Sworn and subscribed this fourth day of August, 1919, before me.

HERMAN P. WOLFF,
Notary Public.

[L. S.]

Service of the within summons and complaint acknowledged September 25, 1919.

LINDABURY, DEPUE & FAULKS,
Attorney of Defendants.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY,

STATE OF NEW JERSEY, BY LEWIS
T. BRYANT, COMMISSIONER OF
LABOR,

Plaintiff,

vs.

JAMES O. LINDSAY AND FRANK
E. DECKER,

Defendants.

Action-at-Law.

10

ANSWER.

(Filed October 3, 1919.)

Defendants, James O. Lindsay, of the Borough of
Arlington, County of Hudson and State of New Jer-
sey, and Frank E. Decker, of the City of Bristol,
County of Bucks and State of Pennsylvania, say that:

20

FIRST DEFENSE.

1. They admit the allegations of paragraphs 1, 2 and
3 of the complaint herein.

2. They admit that a notice of the death of Joseph
Netschert, as a result of an injury received while em-
ployed by defendants, directed to the dependents of
the said Joseph Netschert, was published in the *Newark*
Evening News on the eleventh day of October, 1918, 30
and continued therein on October eighteenth and
twenty-fifth and November first, 1918, successively
thereafter, making four insertions in all. They say
that the statutes referred to in paragraph 4 of the said
complaint are unconstitutional, void and of no effect.

3. They admit that plaintiff at divers times demanded
of them that they pay to the plaintiff the sum of four
hundred dollars (\$400.00) in accordance with the pro-
visions of an alleged act entitled "An act providing for

a payment to the State by an employer, operating under Section II of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder,' approved April 4th, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment,"
10 approved March 4th, 1918, and as amended by an act approved April 11th, 1919. They say that the said alleged act referred to in paragraph 3 of said complaint is unconstitutional, void and of no effect. They admit that they have refused and still do refuse to pay to the said plaintiff the sum aforesaid.

4. They deny that the plaintiff is entitled to the sum of four hundred dollars (\$400.00) with interest and costs as claimed in said complaint or any part thereof.

20 OBJECTIONS TO COMPLAINT IN POINT OF LAW.

Defendants object to the said complaint in point of law as follows:

First Objection: Said complaint does not state a cause of action against these defendants.

Second Objection: The alleged statutes referred to in paragraphs 4 and 5 of the said complaint are unconstitutional, void and of no effect.

Third Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United
30 States and the Amendments thereof and to the Constitution of the State of New Jersey and the Amendments thereof in that the effect of the said alleged statutes is to deprive the defendants of their property without due process of law.

Fourth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the Amendments thereof and to the Constitution of the State of New Jersey and the Amendments

thereof in that the effect of the said alleged statutes is to deny to the said defendants the equal protection of the laws.

Fifth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the Amendments thereof and to the Constitution of the State of New Jersey and the Amendments thereof in that the effect of the said alleged statutes is to take the private property of said defendants for public use without just compensation.

10

Sixth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the Amendments thereof and to the Constitution of the State of New Jersey and the Amendments thereof in that the said alleged statutes attempt to impair the obligation of a contract between the said defendants and the said Joseph Netschert.

Seventh Objection: Said alleged statutes are in other respects contrary to the provisions of the Constitution of the United States and the Amendments thereof and to the Constitution of the State of New Jersey and the Amendments thereof.

20

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendants.

NEW JERSEY SUPREME COURT.
ESSEX COUNTY.

STATE OF NEW JERSEY, BY LEWIS T. BRYANT, COMMISSIONER OF LABOR,	} Plaintiff,	Action-at-Law.
10 JAMES O. LINDSAY AND FRANK E. DECKER,		
	} Defendants.	

AMENDED ANSWER.

(Filed December 19, 1919.)

Defendants, James O. Lindsay, of the Borough of
Arlington, County of Hudson and State of New Jersey,
and Frank E. Decker, of the City of Bristol, County
20 of Bucks and State of Pennsylvania, say that:

FIRST DEFENSE.

1. They admit the allegations of paragraph 1 of said complaint. They allege that the said Joseph Netschert was hired or employed by them prior to the fourth day of March, 1918.
2. They admit the allegations of paragraph 2 of said complaint.
3. They admit the allegations of paragraph 3 of said complaint.
- 08 4. They admit that a notice of the death of Joseph Netschert as a result of an injury received while in defendants' employ, directed to the defendants of the said Joseph Netschert, was published in the *Newark Evening News* on the eleventh day of October, 1918, and continued therein on October eighteenth and twenty-fifth and on November first, 1918, successively thereafter, making four insertions in all. They say that the

alleged statutes referred to in paragraph 4 of the said complaint are unconstitutional, void and of no effect.

5. They admit that the plaintiff at divers times demanded of them that they pay to the plaintiff the sum of four hundred dollars (\$400.00) in accordance with the provisions of an alleged act entitled "An act providing for a payment to the State by an employer, operating under Section II of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder,' approved April 4th, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment," approved March 4th, 1918, and as amended by an act approved April 11th, 1919. They say that the said alleged statutes referred to in paragraph 5 of said complaint are unconstitutional, void and of no effect. They admit that they have refused and still do refuse to pay to the said plaintiff the sum aforesaid.

6. They deny that plaintiff is entitled to the sum of four hundred dollars (\$400.00) with interest and costs as demanded in said complaint or to any part thereof.

OBJECTIONS TO COMPLAINT IN POINT OF LAW.

Defendants object to said complaint in point of law as follows:

First Objection: Said complaint does not state a cause of action against these defendants or *either of them*.

Second Objection: Said alleged statutes are *unreasonable, confiscatory*, unconstitutional, void and of no effect.

Third Objection: Said alleged statutes are contrary to the provisions of the Constitution of the State of New Jersey as amended in that they are unreasonable and confiscatory.

Fourth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the State of New Jersey as amended in that their effect is to deny to the defendants and each of them their natural and unalienable rights of acquiring, possessing and protecting property.

Fifth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the State of New Jersey as amended in that they operate to take the private property of the defendants and each of them for public use without just compensation.

Sixth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the State of New Jersey as amended in that they impair the obligation of a contract between said defendants and the said Joseph Netschert.

Seventh Objection: Said alleged statutes are in other respects contrary to the provisions of the Constitution of the State of New Jersey as amended.

Eighth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the amendments thereof in that they impair the obligation of a contract between said defendants and the said Joseph Netschert.

Ninth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the amendments thereof in that they deprive defendants of their property without due process of law.

Tenth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the amendments thereof in that they operate to take the private property of defendants for public use without just compensation.

Eleventh Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the amendments thereof in that they deny to defendants the privileges or immunities of citizens of the United States.

Twelfth Objection: Said alleged statutes are contrary to the provisions of the Constitution of the United States and the amendments thereof in that they deny to defendants the equal protection of the laws.

Thirteenth Objection: Said alleged statutes are in other respects contrary to the provisions of the Constitution of the United States and the amendments thereof.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants.

10

Consent is hereby given to the filing of the within Amended Answer as in due time.

THOMAS F. MCCRAN,
Attorney of Plaintiff.

REPLY.

(Filed December 23, 1919.)

20

REPLY TO FIRST DEFENSE.

1. Plaintiff joins issue on the amended answer of the defendants except

(a) that plaintiff denies the allegation in paragraph 4 thereof that the alleged statutes referred to in paragraph 4 of the said complaint are unconstitutional, void and of no effect; and

(b) that plaintiff denies the allegation in paragraph 5 thereof that the said alleged statutes referred to in paragraph 5 of said complaint are unconstitutional, void and of no effect. 30

REPLY TO OBJECTIONS TO COMPLAINT IN POINT OF LAW.

1. Plaintiff denies the allegation in the first objection.

2. Plaintiff denies the allegation in the second objection.

3. Plaintiff denies the allegation in the third objection.
4. Plaintiff denies the allegation in the fourth objection.
5. Plaintiff denies the allegation in the fifth objection.
6. Plaintiff denies the allegation in the sixth objection.
7. Plaintiff denies the allegation in the seventh objection.
- 10 8. Plaintiff denies the allegation in the eighth objection.
9. Plaintiff denies the allegation in the ninth objection.
10. Plaintiff denies the allegation in the tenth objection.
11. Plaintiff denies the allegation in the eleventh objection.
12. Plaintiff denies the allegation in the twelfth objection.
- 20 13. Plaintiff denies the allegation in the thirteenth objection.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff.

AGREED STATEMENT OF FACTS.

- 30 The parties to the above stated cause hereby submit the following agreed statement of facts:

1. Prior to March 4, 1918, defendants hired or employed Joseph Netschert who continued in their employ until September 26, 1918.
2. There was not as part of such contract an express statement in writing, either in the contract itself or by written notice from either party to the other, that the provisions of Section II of an act, entitled "An act prescribing the liability of an employer to make compen-

sation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder," approved April fourth, one thousand nine hundred and eleven, and the several acts amendatory thereof and supplemental thereto, were not intended to apply.

3. On September 26, 1918, while the said Joseph Netschert was still in the employ of said defendants under said contract of hiring or employment, said Joseph Netschert died as a result of an accident arising out of and in the course of his employment. 10

4. A notice of the death of said Joseph Netschert as a result of an injury received while in defendant's employ, directed to the dependents of said Joseph Netschert was published in the *Newark Evening News* on the eleventh day of October, 1918, and continued therein on October eighteenth and twenty-first and on November 1st, 1918, successively thereafter, making four insertions in all.

5. No dependents of the said Joseph Netschert have appeared or made any claim for compensation or damages on account of the death of the said Joseph Netschert and so far as any of the parties to the above stated cause are aware the said Joseph Netschert left no dependents. 20

6. Plaintiff at divers times demanded of defendants that defendants pay the plaintiff the sum of \$400.00 in accordance with the provisions of an alleged act, entitled "An act providing for a payment to the State by an employer, operating under Section II of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder,' approved April fourth, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment," approved March 1st. 30

1918, and as amended by an act approved April 11th, 1919.

7. Defendants have refused and still do refuse to pay to the said plaintiff the said sum of \$400.00.

THOMAS F. McCRAN,
Attorney-General,
Attorney of Plaintiff.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendants.

10

NEW JERSEY SUPREME COURT.
No. 33, February Term, 1920.

THE STATE OF NEW JERSEY, BY
LEWIS T. BRYANT, COMMIS-
SIONER OF LABOR,

vs.

20 JAMES O. LINDSAY ET AL.

OPINION.

(Filed June 5, 1920.)

Argued February 18, 1920; decided June 5, 1920.

I. Trial at the bar of the Supreme Court of this State obtains only pursuant to a special rule of Court, and where the amount or value involved is over \$3,000. This limitation is not affected by Section 22 of the Practice Act of 1912.

The Act of 1918, p. 742, as amended by Chapter 101 of the Laws of 1919 (*P. L.*, p. 249), is a taxing act, and as such obnoxious to the 14th Amendment of the Federal Constitution, and therefore invalid.

On facts stipulated pursuant to Section 22 of the Practice Act of 1912.

Before Justices Swayze and Parker.

For the plaintiff, Thomas F. McCran, Attorney-General, and Grover C. Richman, Second Assistant Attorney-General; for the defendant, J. Edward Ashmead.

The opinion of the Court was delivered by
PARKER, J.

This case comes before us on the pleadings and an agreed statement of facts apparently in pursuance of Section 22 of the Practice Act of 1912 (*P. L.*, p. 377). If we are correct in this assumption, the question suggests itself whether the trial is properly brought on at the bar of this court without the parties having obtained a rule for that purpose. Trials at bar appear to have been had mainly, if not entirely, in local actions; *Pat. 393, Elm. 539; Practice Act of 1903, Sec. 201*; and then only when the amount or value involved was three thousand dollars or over, *Ib.* The Court seems to have considered applications for trial at bar in transitory actions where a similar amount was involved, *State Bank v. Evans*, 14 *N. J. L.* 298; but whether the action be local or transitory, the rule seems to be clear that trial must be had at *nisi prius* unless there is a special order of the Court for trial at bar, and that will be made only when the amount involved is at least three thousand dollars, a condition which does not exist in this case. Section 22 of the Practice Act of 1912 does not appear to affect this rule; on the contrary, its provision that the parties may agree upon the judge who shall hear and determine the case would seem to indicate a trial other than at the bar of the court. However, as the case was argued before us without this point being raised by counsel or suggested by the Court, we proceed to a determination of the cause, although not as a precedent for similar cases in the future.

The action is brought under Chapter 203 of the Laws of 1918, *P. L.*, p. 742, as amended by Chapter 101 of the Laws of 1919, *P. L.*, p. 249. This legislation is intended to affect the liability of employers as previously regulated by the Workmen's Compensation Act of 1911,

but is neither an amendment nor a supplement to that act. Its title is "An act providing for a payment to the State by an employer operating under Section 2 of an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, regulating a procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand

10 nine hundred and eleven, upon the death without dependents, of an employee as a result of an injury received in the course of his employment, "and it requires that in cases where an employee dies as a result of an accident arising out of and in the course of his employment and leaving no dependents, entitled to compensation under the provisions of the Workmen's Compensation Act and the dependents, if there had been any, would have been entitled to compensation under the said act, then the employer of such person must pay the

20 Commissioner of Labor the sum of \$400.00, which the Commissioner is to turn over to the State Treasurer; and that all moneys collected under this act shall be used exclusively for the purpose mentioned in another act of 1919, page 429 of the Pamphlet Laws of that year, which is the act relating to what is called the Workmen's Compensation Bureau. There is a provision that the Commissioner of Labor may sue in the name of the State for this payment of \$400.00 wherever the proper conditions exist, calling for its payment, and

30 this action is brought to recover such sum in a case where it is alleged on the part of the plaintiff and admitted by the defendants that the conditions do exist, viz., that a certain employee of defendants was fatally injured in the course of his employment by an accident arising out of the same, and that he left no dependents, and that if he had they would have been entitled to compensation.

It will, therefore, be seen that the legislation in question amounts to this: that whereas, under the Work-

men's Compensation Act, the liability of an employer in the case of an employee leaving no dependents was limited to "expenses of last sickness and burial, the cost of burial, however, not to exceed \$100" (see *P. L.* 1913, p. 306), the amended act now under consideration requires the employer to pay in addition to this the sum of \$400.00, not for any expense connected with the injury, the sickness or the burial of the deceased employee, but to the State Commissioner of Labor as a functionary designated to receive the money and to apply it as part 10 of a fund to pay the expenses of conducting the State Labor Bureau, another State agency. It is true that the State Labor Bureau is an agency expressly devoted to the investigation and settlement of questions arising under the Workmen's Compensation Act, but, for that matter, so is the Court of Common Pleas, at least in part, and the infirmity of this legislation, which is strongly urged upon us by the defendants' counsel, will appear somewhat more plainly if we consider that the act might as well have prescribed that the \$400.00 20 should in each case be turned into the State or county treasury to be used in helping to defray the salaries of the various judges of the Courts of Common Pleas. It seems quite obvious that this is nothing more nor less than a tax imposed for the purpose of supporting the expense of a State agency. The act, as we have said, does not pretend to be either a supplement or an amendment of the Workmen's Compensation Act; it is separate and distinct. Consequently, it cannot be supported upon the theory of a contract between employer and 30 employee conclusively presumed because of the absence of dissent pursuant to the statutory procedure outlined in the compensation act. The real question is whether the State can, in view of the 14th Amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accident. Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when

we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within Section II of the Compensation Act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. *Southern Railway Company v. Green*, 216 U. S. 400. From another standpoint the act seems to be simply a taking of the property of this class of
10 employers without any compensation therefor. They
✓ are, in effect, penalized for employing men or women who are without dependents qualified to claim compensation. If we were permitted to comment upon the question of legislative policy which tends to dissuade an employer conducting a hazardous occupation from receiving into his service a workman, who, if killed in that service, would not leave a widow and infant children destitute of support, it would be opposite to remark that this is the precise opposite of the policy of the
20 United States in the selective service draft. But looking at the matter in its purely legal aspect we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both national and State, and that it cannot be supported on that theory or on any other that has been suggested. The result is that there must be a judgment for the defendant.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY BY LEWIS T. BRYANT, COMMISSIONER OF LABOR, <i>Plaintiff,</i>	} Action at Law.	10
<i>vs.</i>		
JAMES O. LINDSAY AND FRANK E. DECKER, <i>Defendants.</i>		

RULE FOR JUDGMENT.

(Filed June 10, 1920.)

This action was tried before Justices Swayze and Parker at the bar of the New Jersey Supreme Court in Trenton, on February 18, 1920, upon an agreed statement of facts as follows:

1. Prior to March 4, 1918, defendants hired or employed Joseph Netschert, who continued in their employment until September 26, 1918. 20

2. There was not, as part of such contract of employment, an express statement in writing, either in the contract itself or by written notice from either party to the other, that the provisions of Section II of an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder," approved April fourth, one thousand nine hundred and eleven, and the several acts amendatory thereof and supplemental thereto, were not intended to apply. 30

3. On September 26, 1918, while the said Joseph Netschert was still in the employ of said defendants under said contract of hiring or employment, said Joseph Netschert died as a result of an accident arising out of and in the course of his employment.

4. A notice of the death of said Joseph Netschert as a result of an injury received while in defendants' employ, directed to the dependents of said Joseph Netschert, was published in the *Newark Evening News* on the eleventh day of October, 1918, and continued therein on October eighteenth and twenty-first and on November first, 1918, successively thereafter, making four insertions in all.

10 5. No dependents of the said Joseph Netschert have appeared or made any claim for compensation or damages on account of the death of the said Joseph Netschert, and so far as any of the parties to the above stated cause are aware the said Joseph Netschert left no dependents.

20 6. Plaintiff at divers times demanded of defendants that defendants pay the plaintiff the sum of \$400.00 in accordance with the provisions of an alleged act entitled "An act providing for a payment to the state by an employer, operating under Section II of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating the procedure thereunder,' approved April fourth, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment," approved March 4th, 1918, and as amended by an act approved April 11th, 1919.

30 7. Defendants have refused and still do refuse to pay to the said plaintiff the said sum of \$400.00.

Whereupon it is ordered that judgment be entered against the plaintiff and in favor of the defendants.

Rule actually entered this 10th day of June, 1920.

On motion of

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants.

NEW JERSEY Court of Errors and Appeals.

STATE OF NEW JERSEY, BY LEWIS T. BRYANT, COMMISSIONER OF LABOR, <i>Plaintiff-Appellant,</i> <i>vs.</i> JAMES O. LINDSAY AND FRANK E. DECKER, <i>Defendants-Appellees.</i>	}	Action-at-Law.
--	---	----------------

Brief for Plaintiff-Appellant.

This suit is instituted in the name of the State by Lewis T. Bryant, Commissioner of Labor, against the defendants-appellees, under the provisions of Chapter 203, P. L. 1918, p. 742, as amended by Chapter 101, P. L. 1919, p. 249, to recover the sum of four hundred dollars, together with costs of suit.

There is no dispute as to the facts which fully appear in the pleadings and again more concisely in an agreed statement of facts (Case, pp. 14, 15, 16) and need only be referred to as the occasion of this argument requires.

The defendants-appellees stoutly deny any liability under the statute and set up in defense certain constitutional objections thereto, both Federal and State.

The case was argued orally at the February, 1920, term of the Supreme Court and thereafter decided at

the June, 1920, term thereof, the learned opinion of the Court having been delivered by Mr. Justice Parker, wherein the position of the defendants-appellees was sustained and judgment rendered accordingly, which we believe to be erroneous, and hence the occasion for this appeal which now comes on for argument in this Honorable Court.

ARGUMENT.

I.

RESOLUTION AND ACTS, OR PARTS THEREOF, PERTINENT TO THE DISCUSSION OF THE CASE SUBMITTED.

Joint Resolution No. 2, P. L. 1910.

Joint Resolution for the appointment of a commission to inquire into and report legislation upon the subject of an employers' liability act, approved April 9, 1910.

WHEREAS, The Governor in his Second Annual Message recommended that a commission be appointed to consider the provisions of the employers' liability acts of Great Britain, Germany and other foreign countries, and to report to the next session of the Legislature a draft of an act with relation to compensation for accidents to employees; and

WHEREAS, There appears to be a general demand for reasonable statutory regulation as to employees and the modification of certain common law rules applicable to suits between employers and employees; and

WHEREAS, Both the employer and employee, as well as the State, are interested in the determination of these important questions; therefore,

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. The Governor of this State be and he is hereby authorized to appoint two persons who are representative of the labor interests of the State, two persons who are representative of the employers' interest of the State, who, together with one member of the Senate and one member of the House of Assembly, to be named by the President of the Senate and the Speaker of the House of Assembly, respectively, shall constitute a commission authorized to make inquiry into the subject matter recited in the preamble of this resolution, and generally as to the legal relations now existing in this State between the employer and the employee.

Chapter 95, P. L. 1911.

An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911.

Section 12 (as amended by Chapter 93, P. L. 1919, p. 206). In case of death, compensation shall be computed but not distributed on the following basis:

(a) For one dependent, thirty-five per centum of wages.

(b) For two dependents, forty per centum of wages.

(c) For three dependents, forty-five per centum of wages.

(d) For four dependents, fifty per centum of wages.

(e) For five dependents, fifty-five per centum of wages.

(f) For six or more dependents, sixty per centum of wages.

* * * * *

(i) If death results from the accident, whether there be dependents or not, expenses of last sickness, not exceeding two hundred dollars. Also the cost of burial, not to exceed one hundred dollars.

* * * * *

(k) The compensation in case of death shall be subject to a maximum compensation of twelve dollars per week and a minimum of six dollars per week; *provided*, that if at the time of the injury, the employee receives wages of less than six dollars per week, then the compensation shall be the full amount of such wages per week. This compensation shall be paid during three hundred weeks.

Section 20. (As amended by Chapter 174, P. L. 1913, p. 307). "Procedure in case of dispute shall be as follows:

"Either party may present a petition to said judge setting forth the names and residences of the parties and the facts relating to employment at the time of injury, the injury in its extent and character, the amount of wages received at the time of injury, the knowledge of the employer or notice of the occurrence of said injury, and such other facts as may be necessary and proper for the information of the said judge, and shall state the matter or matters in dispute and the contention of the petitioner with reference thereto. This petition shall be verified by the oath or affirmation of the petitioner. Proceedings on behalf of an infant shall be instituted and executed by a guardian, and payment, if any, shall be made to such guardian.

"Upon the presentation of such petition the same shall be filed with the clerk of the Court of Common Pleas, and the judge shall by order fix a time and place for the hearing thereof, not less than three weeks after the date of the filing of said petition. A copy of said petition and order shall be served as summons in a civil action and may be served within six days thereafter upon the adverse party. Within seven days after the service of such notice the adverse party shall file an

answer to said petition, unless the court for good cause shall grant further time, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for a petition. Within thirty days after the final hearing the judge of the Court of Common Pleas shall file his determination.

"At the time fixed for hearing or any adjournment thereof the said judge shall hear such witnesses as may be presented by each party, and in a summary manner decide the merits of the controversy. This determination shall be filed in writing with the clerk of the Common Pleas Court, and judgment shall be entered thereon in the same manner as in causes tried in the Court of Common Pleas, and shall contain a statement of facts as determined by said judge."

* * * * *

Chapter 54, P. L. 1916.

An Act creating a Workmen's Compensation Aid Bureau in the Department of Labor, approved March 15, 1916.

"1. There is hereby created within the Department of Labor a Workmen's Compensation Aid Bureau, of which the Commissioner of Labor shall be head. There shall be such inspectors, clerks, stenographers and other assistants as may be necessary, who shall be appointed by and their compensation fixed by the Commissioner of Labor; which employees shall be appointed under the Civil Service laws now in force in this State.

"2. In addition to the powers and duties specifically devolved by this act, the bureau shall specifically observe

the operation of the act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder,' approved April fourth, one thousand nine hundred and eleven, and the supplements and amendments thereto, and likewise the operation of legislation upon the same subject matter in other States in the United States and in foreign countries, and annually submit to the Legislature a report upon the operation of the said act, together with suggestions for its improvement and the efficient and economic operation thereof.

"3. Upon notice of the happening of an accident involving the injury or death of an employee, the bureau shall immediately endeavor to ascertain the cause of, and facts relating to the accident, and preserve the same for the Court of Common Pleas, wherein such cause may be heard, when required."

(Chapter 178, P. L. 1917.)

An Act concerning the compulsory insurance of compensation payments arising under section two of the act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven, approved March 27, 1917.

"1. This act shall be known as the Workmen's Compensation Insurance Act.

Article I.

"2. Any employer; except the State or a municipality, or county or school district, who by agreement, express or implied, is now or hereafter becomes subject to the provisions of section two of an act entitled 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder,' approved April fourth, one thousand nine hundred and eleven, and the amendments thereof and supplements thereto, hereinafter referred to as the Workmen's Compensation Act, as therein provided, shall forthwith make sufficient provision for the complete payment of any obligation which he may incur to any injured employee or his dependents under the provisions of section two of said Workmen's Compensation Act, by one of the following methods, as hereinafter set forth in sections three and four of this act; and he shall, upon demand, file with the Commissioner of Banking and Insurance proof in such forms as hereinafter set forth."

* * * * *

Chapter 149, P. L. 1918.

A Supplement to an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule for compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred

and eleven, which supplement was approved February 28, 1918.

"1. There is hereby created in the Department of Labor a bureau to be known as the Workmen's Compensation Bureau. Such bureau shall be composed of the Commissioner of Labor, who shall act as chairman thereof; for which service he shall receive the sum of fifteen hundred dollars per year; three deputy commissioners of compensation, one of whom shall be its secretary, and such referees and other employees as may, in the judgment of the Commissioner of Labor, be necessary."

"3. *The Commissioner of Labor, the deputy commissioners and the referees appointed under this act, either sitting individually or together, shall have exclusive original jurisdiction of all claims for compensation arising under the act to which this act is a supplement, and the acts amendatory thereof and supplemental thereto.*"

Chapter 203, P. L. 1918.

An Act providing for a payment to the State by an employer operating under section two of an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven, upon the death, without dependents, of an employee as a result of an injury received in the course of his employment, approved March 4, 1918.

Section 1. (As amended by Chapter 101, P. L. 1919, p. 249.) "The employer of every person who shall

die as a result of an accident arising out of and in the course of his employment, and who shall leave no dependents entitled to compensation under the provisions of chapter ninety-five of the Session Laws of one thousand nine hundred and eleven, shall, in case the dependents of such employee would have been entitled to compensation under said act had such employee left dependents, pay to the Commissioner of Labor the sum of four hundred dollars, which sum shall be paid by the Commissioner of Labor to the State Treasurer. Such sum shall be recoverable by an action at law in the name of the State by the Commissioner of Labor against such employer in any court having jurisdiction of such action. *All moneys collected under the provisions of this act shall be used by the Commissioner of Labor exclusively for the purpose mentioned in an act entitled 'A supplement to an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule for compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, one thousand nine hundred and eleven,' which supplement was approved February twenty-eighth, one thousand nine hundred and eighteen, and such moneys shall be considered to be hereby appropriated for such use only, to be paid by the State Treasurer upon warrants of the State Comptroller and upon requisitions of the Commissioner of Labor.*

"Nothing in this section contained shall apply to any employer who shall not have accepted by agreement, either express or implied, the provisions of section two of chapter ninety-five of the Session Laws of one thousand nine hundred and eleven, as therein provided, and the acceptance of said section two, or the continuance thereunder after the taking effect of this act, shall be deemed an acceptance of all of the provisions of this section.

"Nothing in this section contained shall relieve the employer from any payments which he is required to make under chapter ninety-five of the Session Laws of one thousand nine hundred and eleven, or any act amendatory thereof or supplemental thereto."

II.

PURPOSES OF CHAPTER 203, P. L. 1918, AS AMENDED BY CHAPTER 101, P. L. 1919, DEFINED.

Chapter 203, P. L. 1918, as amended by Chapter 101, P. L. 1919, referred to hereafter for brevity as chapter 203, expressly provides that all moneys collected under the provisions thereof shall be used by the Commissioner of Labor exclusively for the purposes mentioned in Chapter 149, P. L. 1918, and at once it becomes of commanding importance to analyze the purpose of Chapter 149 in order to ascertain if possible the relation of Chapter 203 to the whole scheme of workmen's compensation, as set forth in the statutes of this State.

The scheme of workmen's compensation in this State then has since 1910 been in the process of development and has not perhaps as yet reached its full stage of perfection.

The Legislature, pursuant to the report and recommendations of the Employer's Liability Commission, enacted the original Compensation Act (Chapter 95, 1911) and therein provided in case of dispute claims for compensation under the act should be presented to the Common Pleas Court and thereafter be proceeded with as the statute directed.

This Commission was then continued for the specific purpose of further study of the workmen's compensation problem and particularly to study the administration of Chapter 95, P. L. 1911, with the result that five

years experience under Chapter 95 demonstrated beyond doubt that the procedure therein provided for—before the Common Pleas Court—was entirely too formal and unnecessarily prolonged and it became very evident that a continuation thereof would defeat the very purpose of workmen's compensation.

Consequently the Legislature created the Workmen's Compensation Aid Bureau and charged it with the power and duty to specifically observe the operation of Chapter 95 and likewise the operation of legislation upon the same subject matter in other States in the United States and in foreign countries and annually submit to the Legislature a report upon the operation of Chapter 95, together with suggestions for its improvement and the efficient and economic operation thereof, and also upon notice of the happening of an accident involving the injury or death of an employee to immediately ascertain the cause of, and the facts relating to, the accident and preserve the same for the Court of Common Pleas, wherein such cause may be heard, when required.

However, this plan—Workmen's Compensation Aid Bureau acting in conjunction with the Common Pleas Court—proved to be unsatisfactory and after two years experience therewith it thus became exceedingly apparent that if the scheme of workmen's compensation was to survive, a more effective and still closer control of workmen's compensation claims and settlements must be provided for in the administration of Chapter 95, and therefore the Legislature in the year of 1918 created the Workmen's Compensation Bureau, now composed of the Commissioner of Labor, four deputy commissioners, one referee, three investigators, three associate surgeons and a clerical force of thirteen.

The State, under Chapter 149 (Workmen's Compensation Bureau), is divided into various sections, each under the direction of a deputy commissioner, with offices established in fourteen different centers, and the

Commissioner of Labor, the deputy commissioners and referee either sitting individually or together exercising exclusive original jurisdiction of all claims of compensation arising under the Workmen's Compensation Act.

The procedure under Chapter 149 displaces the procedure before the Common Pleas Court except the appeal and this Bureau's efficiency in the handling of workmen's compensation claims becomes exceptionally demonstrative when we note that during the last fiscal year 4,173 new cases were presented, involving 187 fatal cases, and 4,800 hearings were had, resulting in 2,731 awards. Thus we find the benefits of workmen's compensation through the Workmen's Compensation Bureau brought within easy reach of each injured employee or his dependents, and thereby the successful administration of Chapter 95 is amply assured.

It was then at this juncture in the development of the whole Workmen's Compensation scheme that the Legislature, realizing the necessity therefor, evolved Chapter 203, providing for the raising of a fund to be used exclusively for the purposes of Chapter 149—Workmen's Compensation Bureau—and thereby placed the added burden—payments to this fund—like every other payment under Workmen's Compensation upon industry itself, and this time upon those who in the carrying out of the scheme have the least to pay—upon employers employing employees with no dependents—and the non-dependent fatal cases requiring this payment have during the past seven years averaged 93 annually, or an available fund for the purposes of the Workmen's Compensation Bureau of \$37,200 annually, and the expenses of such Bureau closely approximated are \$55,000 annually.

III.

CHARACTER OF THE DEFENSE RAISED AGAINST
CHAPTER 203.

The defendants-appellees in their Answer (Case, p. 7), and Amended Answer (Case, p. 10), raise thirteen legal objections to the validity of Chapter 203, but in the argument of the case submitted in the Supreme Court confined their attack upon Chapter 203 to three objections, and these objections can perhaps best be stated by using their own language:

"In order to accomplish the declared purpose of the act without violating the Fourteenth Amendment, we submit that the State is obliged to justify its action under either the police or taxing power, or else maintain that it has the right to enforce from employers who may choose to operate under section II of the Compensation Act, an agreement to pay \$400 to the State whenever one of their employees meets with death as a result of an accident arising out of and in the course of his employment, and *leaves no dependents.*"

The Supreme Court in its opinion (Case, p. 16) seems to sustain the position taken by the defendants-appellees, and in the course of its opinion said:

* * * "The real question is whether the State can, in view of the Fourteenth Amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accident. Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their

employ workmen with no dependents entitled to claim, but employers of that character who are within section II of the Compensation Act, we reach a tenuity of classification that seems to use to deprive the class of any logical validity and of all substantial basis. *Southern Railway Company v. Green*, 216 U. S. 400. From another standpoint the act seems to be simply a taking of the property of this class of employers without any compensation therefor. They are, in effect, penalized for employing men or women who are without dependents qualified to claim compensation. If we were permitted to comment upon the question of legislative policy which tends to dissuade an employer conducting a hazardous occupation from receiving into his service a workman who, if killed in that service, would not leave a widow and infant children destitute of support, it would be apposite to remark that this is the precise opposite of the policy of the United States in the selective draft. But looking at the matter in its purely legal aspect we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both National and State, and that it cannot be supported on that theory or on any other than has been suggested. The result is that there must be a judgment for the defendant."

We believe, though, the view expressed by the Supreme Court to be too narrow, and that the Court has failed to give to Chapter 203 the broad and liberal construction to which it is entitled.

IV.

THE LEGISLATURE IS PRESUMED TO PASS A VALID LAW WHICH MUST BE GIVEN EFFECT IF PRACTICABLE.

In *Road Commission v. Harrington Township*, 55 N. J. L. (26 Vr.) 327, the Court of Errors and Appeals, at page 329, says:

"We must presume that the Legislature intended to pass a valid law and adopt an admissible construction which supports it."

In *Village of Passaic v. State, Del., Lack. and W. R. R. Co.*, 37 N. J. L. (8 Vr.) 538, the Court of Errors and Appeals, at page 539, says:

"Courts will sustain legislative action attacked on the ground of unconstitutionality, unless they are fully satisfied of its invalidity, and such a construction will be given to it, if practicable, as will give it effect."

In *Attorney-General v. McGuiness*, 78 N. J. L. (49 Vr.) 346, Mr. Justice Garrison, speaking for the Court of Errors and Appeals, discussed the reasons for the above rule and at page 370 he said:

"As early, however, as 1811, Chief Justice Tilghman, of Pennsylvania, spoke of the doctrine as not only already established, but also as having a well defined limitation. 'For weighty considerations,' he said, 'it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court and every other Court of reputation in the United States that an act of the Legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.'"

Accepting, then, this settled principle of law, we will discuss Chapter 203.

V.

WORKMEN'S COMPENSATION ACTS HAVE GENERALLY BEEN UPHELD.

It is to be noted at the outset that Workmen's Compensation acts have been generally upheld, not only by our State courts but by the United States Supreme Court as well:

State v. Clausen, 65 Wash. 156, 117 Pac. 1101.

Western Indemnity Co. v. Pillsbury, 170 Calif. 686.

Sexton v. Newark Dist. Tel. Co. 84 N. J. L. (55 Vr.) 85, affirmed by the Court of Errors and Appeals, 86 N. J. L. (1 Gum.) 701.

Mountain Timber Co. v. Washington, 243 U. S. 219.

N. Y. Central R. R. Co. v. White, 243 U. S. 188.

Hawkins v. Bleakly, 243 U. S. 210.

Middleton v. Texas Power and Light Co., 249 U. S. 152.

Arizona Employers' Liability Acts, 250 U. S. 400.

Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571.

And such acts have been upheld both as a proper exercise of the police power vested in the States, *Western Indemnity Co. v. Pillsbury*, cited *supra*, and likewise the taxing power, *State v. Clausen*, cited *supra*.

These decisions are based primarily upon the fundamental and broad theory of such legislation, i. e., industry itself should bear the financial losses sustained by workmen engaged therein.

In *State v. Clausen*, cited *supra*, the Court, speaking with reference to the reason for workmen's compensation, at page 1105 said:

"* * *It is founded on the basic principle that certain defined industries called in the act extra-hazardous should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any of such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received."

In *Western Indemnity Co. v. Pillsbury*, cited *supra*, the Court, commenting upon the necessity for workmen's compensation, at page 693 said:

"But, whether elective or compulsory, these statutes, one and all, rest on the underlying notion that the common-law remedy by action, with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of modern industry. These considerations are elaborated in the many reports that have been made under legislative authority, and are outlined in a number of judicial decisions, some of which we shall have occasion to cite. Without undue expansion of the discussion, it may be said, in a few words, that the theory of this legislation is that the risk of injury to workmen in the industries governed by law should be borne by the industries, rather than by the individual workman alone. As the ultimate result, the burden imposed in the first instance upon the employer, will, it is said, be distributed, as part of the cost of production, among the consuming public."

And further, substantially all of the constitutional objections here raised against Chapter 203 were likewise raised against the workmen's compensation acts submitted for consideration in the cases cited, and were effectually disposed of and in doing so the Court practically without exception took carefully into consideration the whole workmen's compensation scheme particularly evolved by the legislature in the case before it.

And moreover, what is essentially true in these cases, as elsewhere, is that our State courts, and especially the United States Supreme Court, have given to the police power and the Fourteenth amendment as well not the narrow view which the defendants-appellees advance but rather a liberal view.

VI.

THE FOURTEENTH AMENDMENT AND THE POLICE POWER GIVEN LIBERAL INTERPRETATION.

In *Atchison, Topeka &c. Railroad v. Matthews*, 174 U. S. 96, Mr. Justice Brewer, commenting upon the Fourteenth Amendment at page 103 said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

In *Holden v. Hardy*, 169 U. S. 366, Mr. Justice Brown, commenting upon the changes in the common law by State statutes, at page 387 said:

"They are mentioned only for the purpose of calling attention to the probability that other

changes of no less importance may be made in the future, and that while the cardinal purposes of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, *should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.*"

In *Western Indemnity Company v. Pillsbury*, cited *supra* the Court in discussing the police power with reference to compensation acts at page 694 said:

"Does a statute giving effect to this theory deprive the employer of liberty or property without due process of law, or deprive him of the equal protection of the laws?"

"If such a law may be given force, the sanction for it must be found in that legislative authority usually termed the police power. The broad and all-pervading scope of this power makes a satisfactory definition of it impossible. Its general nature and extent are declared in a number of decisions of the Supreme Court of the United States. We shall not repeat the oft-quoted and familiar expressions used in these decisions. For the purposes of this discussion, the police power is, we think, adequately and well described by the Supreme Court of Washington in these words: 'By means of it, the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all

rights are subject to this power. Under it, the State may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the State, develop its resources and add to its welfare and prosperity." *In fine, when reduced to its ultimate and final analysis, the police power is the power to govern.'*"

In *McLean v. Arkansas*, 211 U. S. 539, the Fourteenth amendment was invoked to escape the restrictions of State legislation and the Court in commenting upon the right of the State to legislate with respect to its own problems, at page 547:

"The Legislature, being familiar with local conditions is, primarily, the judge of the necessity of such enactments. *The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.*"

In *Gundling v. Chicago*, 177 U. S. 183, Mr. Justice Peckham, speaking with reference to the Fourteenth Amendment, said:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, *and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due*

process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

In *State v. Clausen*, cited *supra*, the Court, in discussing the police power as it affected workmen's compensation, at page 1106 said:

"In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the Constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the State, and is not in violation of any direct and positive mandate of the Constitution. The clause of the Constitution now under consideration was intended to prevent the arbitrary exercise of power of undue, unjust and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. *In other words, the test of a police regulation when measured by this clause of the Constitution is reasonableness as contradistinguished from arbitrary or capricious action.*"

In *Mountain Timber Co. v. Washington*, cited *supra*, Mr. Justice Pitney had before him the same workmen's compensation act as in *State v. Clausen*, cited *supra*, and in discussing the character of such legislation, at page 237, said:

"Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but

so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it."

In *Missouri, Kansas and Texas Ry. v. Cade*, 233 U. S. 642, Mr. Justice Pitney, speaking with reference to classification as applied to the Fourteenth Amendment, at page 650 said:

"As has been said before, the Fourteenth Amendment does not require that State laws shall be perfect; and we cannot judicially denounce this act as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a State Legislature about resorting to classification when establishing regulations for the welfare of those for whom they legislate."

In *Achison, Topcka, &c., Railroad v. Matthews*, cited *supra*, Mr. Justice Brewer, confining himself to classification under the Fourteenth Amendment, at page 104, said:

"* * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Jeffrey Manufacturing Co. v. Blagg*, cited *supra*, Mr. Justice Day had under consideration the Workmen's Compensation Act of the State of Ohio, which act established the State plan that all employers having five or more employees were affected by the act, and in holding that the plan evolved by the Legislature was not arbitrary and discriminatory and therefore in violation of the Fourteenth Amendment, at page 577 said:

"Certainly in the present case there has been no attempt at unjust and discriminatory regula-

tions. *The Legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the State.*

"No employer is obliged to go into this plan. He may stay out of it altogether if he will. Not opening the door of the statute to those employing less than five, still leaving them to the obligations and rules of the common and existing statute law, the Legislature may have believed that, having regard to local conditions, of which they must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it and embraced all the establishments of the State of any size, and that those so small as to employ only four or less might be regarded as a negligible quantity and need not be assessed to make up the guaranty fund or covered by the methods of compensation which are provided by this legislation. This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the

same conditions as those on the other side of it, but if the State has the right to pass police regulations based upon such differences—and this Court has held that it has—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours."

VII.

APPLICATION OF CASES CITED TO CHAPTER 203.

In the light, then, of these decisions we approach Chapter 203.

We can assume, we think without doubt, that the Legislature of this State in formulating its plan or scheme of Workmen's Compensation sought to apply the almost universal theory of such legislation, viz., that industry itself should bear the entire burden thereof.

When Chapter 203 was introduced for enactment these were the accomplishments of the plan or scheme thus far: Chapter 95, P. L. 1911 (the original act); Chapter 178, P. L. 1917 (Compulsory Insurance); Chapter 149, P. L. 1918 (Workmen's Compensation Bureau).

Then, too, under the original act almost all of the burden of workmen's compensation falls upon the employer employing employees with dependents. For example, in the case of death the employer employing employees *with dependents* (under section 2 of Chapter 95, P. L. 1911) paid as a minimum \$6 per week for 300 weeks, computed \$1,581.35, and as a maximum \$12 per week for 300 weeks, computed \$3,162.70, plus expenses of last sickness not exceeding \$200, as well as the cost of burial, not exceeding \$100; whereas the employer under section 2 employing employees *without*

dependents paid only the expense of last sickness and the cost of burial.

The Legislature then, we think it fair to say in the furtherance of its plan or scheme, endeavored to equalize the burden—that is, the entire burden, and in the exercise of its equitable judgment placed the burden of Chapter 203 upon those employers operating under section 2, who had the least to pay—employers employing employees without dependents—and gave to those employers the same freedom as employers employing employees with dependents possessed with respect to payments under the original act—an election, and therefore Chapter 203 is not compulsory but elective. *Sexton v. Newark Dist. Telegraph Co., supra.*

We submit, whether we agree with the plan or scheme or not, or the propriety of such legislation, we cannot, as was said in *McLean v. Arkansas, cited supra*, justify judicial interference unless the act in question is *unmistakably and palpably in excess of legislative power*. The test is reasonableness, *State v. Clausen, supra*, and “the crucial question,” says Mr. Justice Pitney in *Mountain Timber Company v. Washington, supra*, “is whether the exercise of governmental power is fair and reasonable,” and the Legislature has a wide discretion when resorting to classification in establishing regulations for the welfare of those for whom they legislate, *Missouri, Kansas and Texas Ry. v. Cade, supra*. Class legislation is not prohibited by the Fourteenth amendment if within the sphere of its application it affects alike all persons similarly situated. *Atchison, Topeka, &c., Railroad v. Matthews, supra.*

The Legislature, in enacting Chapter 203, we submit was using its legislative judgment and, as Mr. Justice Day says in *Jeffrey Mfg. Co. v. Blagg, supra*, “it is that judgment which fairly and reasonably exercised makes the laws.”

We submit that it is practicable to give Chapter 203 effect and to adopt an admissible construction to support it. The distribution of the burden of workmen's

compensation thereby is fair and reasonable, and if viewed liberally and not technically is a part of the legislative workmen's compensation scheme and as such may be looked upon as a proper exercise of the police power. Certainly if the classification—employers employing five employees, *Jeffrey Mfg. Co. v. Blagg, supra*, is not arbitrary and within the Fourteenth Amendment, so likewise is the classification under Chapter 203—employers employing employees without dependents, for both was the legislative judgment fairly and reasonably exercised and as such made the law. *Jeffrey Mfg. Co. v. Blagg, supra*.

Further, in considering the effect of Chapter 203, we must not overlook this—Chapter 178, P. L. 1917, provides for compulsory insurance and a payment under Chapter 203 in fact is not made by the employer employing employees without dependents, but by the insurance company. The payment under Chapter 203, like the payment under Chapter 95, finds its way into the insurance premium, which is paid alike by employers employing employees with dependents and by employers employing employees without dependents as well. So that the burden of Chapter 203 merges into the entire burden of workmen's compensation and is extended to all employers operating under section two of the Workmen's Compensation Act.

However, the defendants-appellees, as well as the Supreme Court, point out that Chapter 203 is neither an amendment nor a supplement to the Workmen's Compensation Act, and for that reason has no relation to the subject matter whatever. It is a separate and independent act and the State seeks thereby to extract from a limited class of employers a payment which shall be used for the exclusive purposes of a State agency—Workmen's Compensation Bureau—a bureau in which the employer employing employees with no dependents and likewise the deceased employee, receive no benefits, and thereby it becomes a liability imposed upon such employers without fault, and, therefore, the act cannot possibly have any validity.

VIII.

ILLUSTRATIONS OF LIABILITY WITHOUT FAULT AND ITS APPLICATION TO CHAPTER 203.

We submit that many statutes have been upheld by the courts which can be said to create liability without fault and take the property of some to pay the obligations of others. A few important illustrations may be cited.

Statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the States of New York and Illinois. *Exempt Firemen's Fund v. Roome*, 29 Hun. (N. Y.) 391; *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511. And a similar statute relating to agents of foreign fire insurance companies was upheld in *Wisconsin Fire Department v. Helfenstein*, 16 Wis. 136.

In *State v. Cassidy*, 22 Minn. 312, the Court sustained an act to establish a fund for the foundation and maintenance of an asylum for inebriants, requiring thereby all liquor sellers to pay ten dollars per year to the State Treasurer through the county treasurers in addition to the usual license; the fund to be disbursed by a State commission in the erection and operation of the State asylum.

Likewise a South Carolina statute providing for the appointment of railroad commissioners and requiring the expense of the department to be borne by the several railroads according to the gross income proportioned to the number of miles was sustained, the Court holding that the enforced contribution was not a tax within the meaning of the provisions of the State Constitution requiring all taxes to be uniform, but was more in the nature of a license fee.

Columbia and Greenfield Ry Co. v. Wade Hampton Gibbs, as Treasurer of Richland County, 24 S. C. 60.

Charlotte, etc., Ry. Co. v. Gibbs, 27 S. C. 385.

This decision was upheld by the United States Supreme Court in *Charlotte, etc., Ry. Company v. Gibbs*, 142 U. S. 386, and Mr. Justice Field, who delivered the opinion of the Court, at page 390 said:

"This tax is stated to be beyond any which is levied upon other corporations to meet an expenditure for State officers, and, therefore, it is contended, constitutes an unlawful discrimination against railroad corporations imposing an unequal burden upon them in conflict with the constitutional amendment which ordains that no State shall deny to any person the equal protection of the laws."

* * * * *

And again at page 391:

"If the tax were levied to pay for services in no way connected with the railroads, as, for instance, to pay the salary of the executive or judicial officers of the State whilst railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of which is of great importance in the regulation of those instruments of transportation."

* * * * *

And again at page 394:

"In exacting this there is no encroachment upon the Fourteenth Amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered and to whom it is useful is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them.

In *People, &c., Company v. Squire*, 145 U. S. 175, the United States Supreme Court, upon the authority of the *Gibbs* case, cited *supra*, upheld a New York act appointing a subway commission to supervise putting under ground of electric wires and requiring the salaries and expense of the commission to be paid out of the fund to be paid to the State Treasurer by the companies operating electrical conductors underground in proportion to their wire mileage, and Mr. Justice Lamar at page 191 said:

"The contention that the statutes referred to deprive the relator of its property without due process of law is equally without foundation."

Another illustration of such a statute is found in the Oklahoma Depositors' Guarantee Law, which authorizes the assessment and collection of a certain per centum on the daily average deposit of each and every company organized under the laws of the State as a fund to pay the losses caused depositors by failing and insolvent banks. Solvent banks as well as insolvent banks were required to pay this assessment. It was admitted that by this law a portion of the solvent banks' property might be taken without return to pay debts of the failing and insolvent banks and thereby create a liability without fault, but the Supreme Court of Oklahoma, in *Noble State Bank v. Haskell*, 22 Okla. 38, 97 Pac. 590, sustained the act. And afterwards the Supreme Court of the United States, in 219 U. S. 104, upheld the Okla-

homa Supreme Court and Mr. Justice Holmes, in commenting upon this statute, at page 110 said:

"In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. (Citing cases). And in the next, it would seem that there may be other cases beside the every-day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

Many of the States have laws protecting the sheep industry by imposing a tax upon dogs, in order to create a fund for the remuneration of sheep owners for losses suffered through the killing of their sheep by dogs and the tax is imposed upon all dog owners without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the State courts against attacks based on constitutional grounds.

Morey v. Brown, 42 N. H. 373.

Tenney, Chairman, v. Lenz, 16 Wis. 566.

Longyear v. Buck, 83 Mich. 236.

Cole v. Hall, Collector, 103 Ill. 30.

Holst v. Rowe, 39 Ohio State, 340.

The Workmen's Compensation Act of the State of Washington provided for a department to be known as the Industrial Insurance Department, to consist of three commissioners to be appointed by the Governor, with such necessary deputies, and appropriated out of the general funds of the State treasury the sum of one hundred fifty thousand dollars (\$150,000) to be known as the "Administration Fund," out of which the salaries, traveling and office expenses of the Department should be paid, together with all of the expenses of the administration of the accident fund.

The contention against this statute in the Supreme Court of Washington, *State v. Clausen, supra*, and the United States Supreme Court, *Mountain Timber Company v. Washington, supra*, was that the act created a liability without fault and that it took the property of one employer to pay the obligations of another; nevertheless both the Supreme Court of the State and the United States Supreme Court as well upheld the statute.

We submit that these cases apply to Chapter 203. Workmen's Compensation legislation is valid and constitutional. Public welfare demands such legislation. The public therefore is vitally concerned. Every employer or employee coming under Section II. of the original act is benefited either directly or indirectly thereby. We are not concerned in the degree. It is enough if there is a benefit.

The fund provided for under Chapter 203 is not to be used for general governmental purposes but for the exclusive purposes of workmen's compensation and the payments required under Chapter 203 directly relate to workmen's compensation, and nothing else. And even if the payment be a taking of private property for public use, that payment is insignificant and justified when compared with the public advantage to be gained by the success of the whole scheme of Workmen's Compensation. All employers employing employees without dependents under Section II share mutually in the benefits of that scheme and are thereby compensated for the burden they are required to assume, especially when that burden is a contribution to the general good of the scheme and is much less than the burden other employers under Section II are required to assume.

IX.

THE PAYMENT UNDER CHAPTER 203 IS NOT COMPULSORY BUT ELECTIVE.

Actually the payment required under Chapter 203 is not compulsory but elective. That is, the employer may avail himself of the provisions of the original act and thus escape the payment. The defendants-appellees deny the right of the Legislature to impose any burden upon the employer which did not exist at the inception of the contract, and they cited in support thereof the case of *Ball v. Trustees*, 71 N. J. L. 64.

We submit that that case is distinguishable from this situation because there the contract between the parties was unalterable. There was no opportunity for either party to escape when the contract was once made. Here, the contract between the parties is only binding so long as neither party serves notice, as prescribed by the statute, that Section 2 is not to apply, and thus relieves himself of the contract. Indeed, the Legislature might increase the schedule of payments under Section 2 after the contract had been made, as they have heretofore done, and unless the notice prescribed by the statute were given by either party the employer would be bound thereby. *Sexton v. Newark District Telegraph Co.*, 84 N. J. L. 85.

It seems to us, therefore, that the liability imposed by this statute is in the same category as the increase in the schedule of payments under Section 2. Both are burdens imposed after the contract is made, and both are subject to the giving of the notice prescribed in Section 2, and both may be escaped from by refusing to accept the provisions of Section 2 of the Workmen's Compensation Act.

X.

STATUTES SIMILAR TO CHAPTER 203 HAVE BEEN ENACTED IN OTHER STATES.

California.

Chapter 182, Session Laws of 1919, p. 273, provides that every employer employing employees without dependents, in the case of death, shall pay into the Treasury of the State of California the sum of *three hundred and fifty dollars*, which fund may be used for the promotion of vocational re-education and rehabilitation of persons disabled in industry in the State.

Idaho.

Chapter 81, Session Laws of 1917, p. 259, provides in case there are no dependents of the deceased employee the employer shall pay into the State Treasury, to be deposited in the industrial administration fund, the sum of *one thousand dollars*, and further provides:

"All expense incurred by the board (the Industrial Accident Board) * * * including the actual and necessary traveling and other expenses of the members thereof, its officers and employees, incurred while on the business of the board, either within or without the State, shall, unless otherwise provided * * * be paid from the industrial administration fund."

Massachusetts.

Chapter 272, Session Laws of 1919, p. 216, provides that the insurance company insuring the liability of the employer employing employees with no dependents, in case of death, shall pay into the treasury of the commonwealth the sum of *one hundred dollars*, which payments shall constitute a special fund of which the treasurer and

receiver shall be the general custodian, and the payments therefrom shall be made upon the written order of the industrial accident board to employees receiving certain successive injuries in other industries.

Minnesota.

Chapter 358, Session Laws of 1919, p. 382, provides that every employer shall pay to the State Treasurer for every case of injury occurring in his employ and causing death, where there are no persons entitled to compensation, the sum of *one hundred dollars*; the State Treasurer shall be the custodian of this special fund and the court having jurisdiction of the compensation settlement shall direct the distribution thereof.

New York.

Chapter 622, Session Laws of 1916, requires the insurance carrier to pay to the State Treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of *one hundred dollars*; the State Treasurer shall be the custodian of this special fund, which shall be used to provide for total disability cases resulting from successive injuries.

Utah.

Chapter 100, Session Laws of 1917, p. 316, creates a fund to be known as the "State Insurance Fund," and provides that if there be no dependents the employer or insurance carrier shall pay into the State Insurance Fund the sum of *seven hundred and fifty dollars*, unless the employer is insured in the State Insurance Fund, and this fund is disbursed by the industrial commission as provided in the act.

So far as we have been able to learn the above statutes are being complied with in the various States without question, except the California statute, which is now being tested, and also the New York statute, which

was attacked and upheld in *Edsall v. Edsall*, 179 App. Div. (Supreme Ct.) 481.

We therefore submit that for the reasons advanced Chapter 203 should be sustained and upheld.

Respectfully submitted,

GROVER C. RICHMAN,
Second Assistant Attorney-General,
THOMAS F. McCRAN,
Attorney-General.
Counsel for Plaintiff-Appellant.

1891	1892
1893	1894
1895	1896
1897	1898
1899	1900
1901	1902
1903	1904
1905	1906
1907	1908
1909	1910
1911	1912
1913	1914
1915	1916
1917	1918
1919	1920
1921	1922
1923	1924
1925	1926
1927	1928
1929	1930
1931	1932
1933	1934
1935	1936
1937	1938
1939	1940
1941	1942
1943	1944
1945	1946
1947	1948
1949	1950
1951	1952
1953	1954
1955	1956
1957	1958
1959	1960
1961	1962
1963	1964
1965	1966
1967	1968
1969	1970
1971	1972
1973	1974
1975	1976
1977	1978
1979	1980
1981	1982
1983	1984
1985	1986
1987	1988
1989	1990
1991	1992
1993	1994
1995	1996
1997	1998
1999	2000
2001	2002
2003	2004
2005	2006
2007	2008
2009	2010
2011	2012
2013	2014
2015	2016
2017	2018
2019	2020
2021	2022
2023	2024
2025	2026
2027	2028
2029	2030
2031	2032
2033	2034
2035	2036
2037	2038
2039	2040
2041	2042
2043	2044
2045	2046
2047	2048
2049	2050
2051	2052
2053	2054
2055	2056
2057	2058
2059	2060
2061	2062
2063	2064
2065	2066
2067	2068
2069	2070
2071	2072
2073	2074
2075	2076
2077	2078
2079	2080
2081	2082
2083	2084
2085	2086
2087	2088
2089	2090
2091	2092
2093	2094
2095	2096
2097	2098
2099	2100

New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, by
LEWIS T. BRYANT, Commis-
sioner of Labor,
Plaintiff-Appellant,

v.

JAMES O. LINDSAY and FRANK
E. DECKER,
Defendants-Appellees.

Action-at-Law.

BRIEF FOR DEFENDANTS- APPELLEES.

Statement of Facts.

The appeal in this case is from the judgment of the Supreme Court rendered in favor of the defendants-appellees in an action instituted by the plaintiff-appellant to recover \$400. under the provisions of Chapter 203 of the Session Laws of 1918, page 742, which was amended by act approved on April 11, 1919 (P. L., 249). The amendment, however, was passed after the alleged cause of action arose.

The case was brought before the Supreme Court upon an agreed statement of facts, the substance of which, is as follows: Some time prior to March 4, 1918, defendants-appellees employed one Joseph Netschert. There was not as part of the contract of employment, either in the contract itself or by

written notice from either party to the other, an express statement in writing that the provisions of Section II of the Workmen's Compensation Act of 1911 and the amendments and supplements thereto, were not intended to apply. On September 26, 1918, Netschert died as a result of an accident arising out of and in the course of his employment. Notice of his death as a result of an injury received while in the defendants-appellees' employ, directed to his dependents, was published in the *Newark Evening News* on the 11th day of October, 1918, and continued therein on October 18th and 21st, and on November 1, 1918. No dependants of Netschert have appeared or made any claim for compensation or damage on account of his death and so far as any of the parties to this suit are aware he left no dependents.

The defendants-appellees defended the suit in the Supreme Court upon the ground that the above mentioned act is unconstitutional and void and confers upon the plaintiff-appellant no right to collect the sum claimed. The Supreme Court sustained the position taken by defendants-appellees and gave judgment in their favor. Their opinion appears on pages 16-20 of the Case. Defendants-appellees submit that the judgment of the Supreme Court should be affirmed for the following reasons:

I.

The Statute is in violation of the Fourteenth Amendment of the Constitution of the United States.

Undeniably, in a broad sense, the statute in question attempts to take the property of a citizen for a public use. It is, however, obvious that there is no attempt to exercise the right of eminent domain. It is equally obvious that the payment required to be made is not by way of fine or penalty. The law involves no idea of punishment. Its purpose is not in any way to prevent the employment of those who have no dependents, but, as expressed in the act, its sole purpose is to raise money to be used by the Commissioner of Labor exclusively for the purposes and needs of the Workmen's Compensation Bureau created by Chap. 149 of the laws of 1918 (p. 429). The statute in so many words provides "that such moneys shall be considered to be hereby appropriated for such use only".

In order to accomplish the declared purpose of the act without violating the Fourteenth Amendment, we submit that the state is obliged to justify its action under either the police or taxing power, or else maintain that it has the right to enforce from employers who may choose to operate under Section II of the Compensation Act, an agreement to pay \$400 to the state whenever one of their employees meets with death as a result of an accident arising out of and in the course of his employment, and *leaves no dependents*.

It will be observed that the exaction is laid not upon those employers who operate under Section II of the Workmen's Compensation Act; not upon the employers who operate under Section II of the Compensation Act and whose employees are injured as a result of accidents arising out of and in the

course of their employment; not upon those employers who operate under Section II of the Compensation Act and whose employees meet death as a result of an accident arising out of and in the course of their employment, but only upon those employers of the last-mentioned class whose employees leave no dependents. This very restricted class of employers determined by mere chance alone are required to pay to the state a special tax for the maintenance of the Compensation Bureau. No other employer operating under Section II is required to pay one cent for such purpose.

We submit that whether attempted to be justified under the police power, the taxing power or upon the general theory of contract, the characteristics used to designate the objects upon which the burden is cast bear no reasonable relation to the expressed legislative purpose of raising revenue for the maintenance of the Compensation Bureau, and consequently it is but an arbitrary imposition or exaction without any constitutional basis of justification. In both theory and fact the statute denies to those employers from whom the exaction is made the equal protection of the laws; it abridges their immunities and privileges as citizens of the United States; it deprives them of liberty and property without due process of law in violation of the Fourteenth Amendment.

As was said in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, at 559:

“The Fourteenth Amendment, in declaring that no State ‘shall 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 laws’, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoy-

ment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *Barbier v. Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, in which it was also said that 'the equal protection of the laws is a pledge of the protection of equal laws'. In *Hayes v. Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate 'shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed'. * * * 'No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 155, 159, 160, 165."

a. *The statute is not a valid exercise of the police power.*

The police power fundamentally being the power to regulate, it follows, and the authorities uniformly hold that all exactions made by virtue thereof must be incidental to the attempted regulation. It is equally settled that if it be exercised in respect to a limited class, in order not to infringe the inhibition of the Fourteenth Amendment the objects of the class must be distinguishable from others by characteristics which bear a reasonable and just relation to the legislative purpose. The regulation must treat all in the same or similar circumstances alike, both in the privileges conferred and in the limitations or burdens imposed. The present statute does not meet this test.

In the first place it expressly provides that nothing contained therein shall apply to any employer who shall not have accepted by agreement, either express or implied, the provisions of Section II of the Workmen's Compensation Act.

In the second place it provides that the exaction made shall be "exclusively used" for the purposes and needs of the Workmen's Compensation Bureau, and that "such moneys shall be considered to be hereby appropriated for such use only".

The Workmen's Compensation Bureau is composed of the Commissioner of Labor, three deputy commissioners of compensation, and such referees and other employees as may in the judgment of the Commissioner of Labor be necessary. It is given "exclusive original jurisdiction of all claims of injured employees or their dependents for compensation arising under the Workmen's Compensation Act".

It appears, therefore, by reference to the class upon which the possible liability to the exaction is imposed, as well as by reference to the purposes for which the money is to be used, that the class at-

tempted to be regulated (if it can be said that the statute attempts to regulate at all) consists of those employers who choose to operate under Section II of the Workmen's Compensation Act. The exaction, however, is not imposed on all the members of this class, but only on a certain few, determined by the mere circumstance that such of their employees as may be fatally injured may die leaving no dependents. Clearly, this is not treating all of the members of the class to which the regulation applies alike, either in respect to the privileges conferred or the burdens imposed.

If it be said that the statute does treat alike all those employers whose employees are fatally injured and die without dependents, then it may be answered that such employers do not and cannot be said to constitute a class the peculiar characteristics of which bear any reasonable or just relation to the purpose of the law.

As already stated, the function of the Bureau for the maintenance of which the exaction is made is to hear, settle and determine all controversies which may arise between employers and injured employees or their dependents under Section II of the Workmen's Compensation Act. Obviously these controversies are as sure to arise in cases where the injury is not fatal as where it is fatal, and yet no employer whose employee is so injured is required to contribute. Likewise, there is at least equal necessity for the Bureau where the accidents are fatal and the employees leave dependents as in cases where the accident is fatal and the employees leave no dependents, yet none of those employers whose employees meet with accidents that are fatal and leave dependents are required to contribute. In fine, the exaction is not made at all from those whose situation is most likely to cause litigation before the Commissioner and consequent expense on the Bureau, but only upon those the least likely to be brought before it.

The amount bears no relation to the expense to which those on which it is imposed might burden the Bureau. It is an exaction arbitrarily fixed both in respect to the amount and the class selected to bear the burden. Its imposition rests upon mere chance.

In the case of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 151, the court said:

"The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In passing, it also should be observed that the statute under consideration is neither an amendment nor a supplement to the Workmen's Compensation Act. It is a distinct act, the object of which, as indicated by its title, is to provide for the payment to the state of the exaction of a fixed amount for the maintenance of the Compensation Bureau. It neither confers nor attempts to regulate any privilege. It follows, therefore, that as an involuntary contribution by the employer, the exaction cannot be justified as an exercise of the police power but must be sustained, if at all, as a valid exercise of the taxing power.

The Attorney General apparently concedes the necessity for showing a reasonable and just relation between the purposes of the act and the persons upon whom its burden is imposed as is shown by the cases cited in his brief.

Under Point VII of his brief he attempts to

show that such a relationship exists because, as he says, the burden of supporting the Bureau is imposed upon employers who, had their employees left dependents, would have incurred by reason of that fact a greater expense. Assuming this to be the fact, it affords no support for the act.

The purpose of the act is to raise money for the support of the Bureau. The principal work of the Bureau is the determination of controversies between employers and their injured employees or dependents of deceased employees.

Assuming that the general public may be relieved of the support of the Bureau and the burden of such support imposed upon a class, it is plain that this can only be done by placing the burden upon the class which is served by the Bureau.

In *Charlotte, etc., Ry. Co. v. Gibbes*, 142 U. S. 386, cited under Point VIII of the Attorney General's brief, the United States Supreme Court, in sustaining an act of the State of South Carolina, which imposed upon railroad corporations the burden of paying the expense of maintaining the State Railroad Commission, said:

"All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. * * * The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered."

The attempted classification ignores this principle and seeks to place the burden of the support of the Bureau upon the employers who, because of the happening of fortuitous circumstances, have no liability to the dependents of a deceased employee and this in spite of the fact that the very circumstances which subject such employers to the opera-

tion of the act, at the same time decrease the burdens of the Bureau and relieve it of rendering any service to the employer in the matter.

We submit that the amount of the obligation incurred by the employer to others than the state by reason of the death of an employee affords no basis for classification for the purpose of raising a fund to support a state agency, and that this is particularly true in view of the fact that under the attempted classification the expense of the Bureau is imposed upon those who have no need for its services. It would be as logical to impose this expense solely upon employers whose employees have no accidents and who, therefore, incur no expense under the act and have no occasion for the services of the Bureau.

Furthermore, the argument made by the Attorney General is not true in fact for it will be seen from an examination of the latter part of Section 12 of the Workmen's Compensation Act (Supp. to Comp. Stat., p. 1645) that the death of an employee as the result of an accident arising out of and in the course of his employment may or may not impose upon the employer an obligation equal to or in excess of \$400. Whether it does or not is dependent entirely upon the length of time that the dependents survive the deceased employee or continue to be dependents within the statutory definition.

The Attorney General further insists that a payment made under the act in question is not made by the employer but by his insurance carrier. This claim is based upon Chapter 178 P. L. 1917, p. 522, which provides for compulsory insurance of liability under the Workmen's Compensation Act of 1911. The Attorney General, however, ignores the fact that the act above mentioned does not provide for a scheme of insurance which is compulsory in all cases, and that under Section 3 of that act any

employer, upon satisfying the Commissioner of Banking and Insurance of his financial ability, may be exempted from the operation of the act. In the case of an employer so exempted the burden of supporting the Bureau would actually fall upon him and not upon any insurance company. Furthermore, the burden is imposed by the act upon the employer, not upon the insurance carrier, and so far as the validity of the act is concerned, it is entirely immaterial whether the employer is or is not protected by insurance.

The cases cited under Point VIII of the brief of the Attorney General as affording examples of valid statutes creating liability without fault, are not in point. *Exempt Firemen's Fund v. Roome*, 29 Hun (N. Y.), 391; *Firemen's Benevolent Ass'n v. Lounsbury*, 21 Ill. 511, and *Wisconsin Fire Department v. Helfenstein*, 16 Wis. 136, involved only the right of the legislature to impose a license fee, graduated on the amount of business done, on *all* agents of *all* foreign insurance companies doing business within the state.

In *State v. Cassidy*, 22 Minn. 312, the Supreme Court of Minnesota sustained an act which provided for the payment of a license fee of \$10. per year by *all* sellers of intoxicating liquors.

People, etc., Co. v. Squire, 145 U. S. 175, rests upon the same principle as *Charlotte, etc., Ry. Co. v. Gibbes*, above referred to.

In *Noble State Bank v. Haskell*, 219 U. S. 104, the court sustained an act imposing an occupation tax upon *all* state banks and devoting the proceeds of such tax to a specified purpose. The tax imposed by the act was based upon the average daily deposits of each bank. There is nothing in the case which has any application to the question here under consideration.

The Attorney General refers to the fact that legislation similar to the act under consideration has been passed by several other states and cites *Edsall*

v. *Edsall*, 179 App. Div. (Sup. Ct. N. Y.) 481, as sustaining such an act. All that the Supreme Court of New York determined in the case last cited, however, was that the act there under consideration did not violate the peculiar constitutional provision of the State of New York conferring power upon the legislature to adopt Workmen's Compensation Acts. The question as to the effect of the Fourteenth Amendment of the Federal Constitution upon the act was not raised by counsel or considered by the Court. The recent enactment of similar acts in other states is, we believe, of no importance whatever except as illustrating both the dangerous tendency to avoid constitutional restrictions and the necessity for enforcing the Fourteenth Amendment in order that fundamental rights may be preserved.

b. *The statute is not a valid exercise of the taxing power.*

The Supreme Court decided that the act was an attempted exercise of the taxing power and as such violated both the Federal and State Constitutions. Mr. Justice Parker, speaking for the court, said:

"But looking at the matter in its purely legal aspect we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both national and State, and that it cannot be supported on that theory or on any other that has been suggested."

Notwithstanding this the state has made no effort either to show that the act is not a taxing act or to support it as a valid exercise of the taxing power.

It is apparent that the exaction imposed by the statute cannot be considered as a property tax, as no property is involved. It is equally clear that it is not a poll or per capita tax. If a tax at all it

must be in the nature of an occupation or *privilege* tax.

Although the act provides that nothing therein contained "shall apply to any employer who shall not have accepted by agreement, either express or implied, the provisions of Section II of" the Workmen's Compensation Act, it is perfectly obvious that those upon whom the exaction is actually imposed are only those employers who operate under Section II and whose employees receive fatal injury in the course of their employment and die without dependents.

But whether the class be all those who choose to operate under Section II of the Compensation Act, or those who operate under that section and employ servants who may die without dependents, makes no difference, for in either event the exaction considered as a tax is equally invalid. If the class be those who operate under Section II of the Compensation Act, all members of that class are not subjected to the burden. On the other hand, if the class consists of those whose employees shall leave no dependents at the moment of their death as a result of an injury received in the course of their employment, then the class possesses no characteristics sufficiently distinctive to make it a class for separate taxation.

In *Southern Ry. Co. v. Green*, 216 U. S. 400, the court, declaring that arbitrary selection cannot be justified by calling it classification in the absence of real distinction on a substantial basis, expressly held that a classification for taxation dividing corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of equal protection of the laws. The court said:

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based

upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155, 165; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and other for the right to be a corporation. The fact is that both corporations do the same business, in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

Clearly, in the present case there is no peculiar difference between an employer whose employee happens to be without dependents at the moment of death and an employer whose employee may have

dependents at the moment of death, which bears any reasonable relation to the purpose of raising revenues. No sound reason can be assigned for claiming that the one may employ labor under the conditions imposed by Section II of the Compensation Act without any exaction by the State by way of tax, and that the other cannot do so except upon condition that he pays a tax. The tax has no special relation to any privilege conferred by Section II of the act upon the employers particularly affected. It depends absolutely upon the most fortuitous circumstance. It absolutely imposes upon those whose employees have no dependents at the time of death burdens which are not laid upon those engaged in the same business under like circumstances. Such is not classification at all, but mere division of the same class or subject of taxation. It is discrimination pure and simple.

The Supreme Court in its opinion in the case at bar, speaking of this classification said:

"The real question is whether the State can, in view of the 14th Amendment to the Federal Constitution, constitutionally tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accident. Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within Section II of the Compensation Act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. *Southern Railway Company v. Green*, 216 U. S. 400."

c. The statute cannot be sustained upon the theory of contract.

The theory of contract or acceptance by implication of obligations imposed by statute which other-

wise the legislature would have no right to impose is a pleasing one to those legislators who desire to avoid constitutional restrictions. It is, however, one of the most dangerous doctrines possible, and while perfectly sound within proper limitations, unless kept within proper bounds, may be used to invade the most fundamental rights of free men. The statute in question aptly illustrates this danger.

The state here attempts to collect from the defendants-appellees the sum of \$400 which we think we have demonstrated as an involuntary contribution it would have no right to impose. It attempts to justify this demand upon the theory that defendants-appellees have impliedly consented to the exaction and are under a contractual obligation to make the payment. It bases its contention upon that provision of the law which declares that "the acceptance of said Section II (of the Workmen's Compensation Act) or the continuance thereunder after the taking effect of this act shall be deemed an acceptance of all the provisions of this section".

As an authority for the proposition, they rely solely upon the case of *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85; affirmed 86 N. J. L., p. 701, wherein the court held that the legislature had the right to provide that upon the failure of an employer or employee to give a prescribed notice, it should be conclusively presumed that both had agreed to be bound by Section II of the Workmen's Compensation Act and entitled to the benefits and subject to the liabilities imposed thereby.

In that case, however, the State had created and given to the employer and employee the right to make a contract of service different from anything that had theretofore been permitted. The employer was given the opportunity to limit his liability to the extent specified in the act in consideration of his agreement to assume the burdens imposed thereby.

It was provided that only those who accepted it should be entitled to the benefits, and all those who accepted it should be liable to the burdens.

Here, however, the situation is entirely different. The statute in question grants no privilege which the individual employer did not have before its passage. It is neither an amendment nor a supplement to the Workmen's Compensation Law; it is complete in itself; its purpose as expressed in its title, is single and bears no relation to the contractual relations between employer and employee; it neither increases nor decreases the obligation of the employer to the employee, nor the employee to the employer. Its sole function is to impose a tax for the purpose of providing revenue for the state, and, as already shown, exacts that tax only from those members of the class to which it refers whose employees shall have no dependents at the moment of death.

Surely the state could not say that those employers who shall employ white men shall be free to do so without any exaction, but those employers who employ black men shall be held to have agreed to pay \$400 to the state. The state could not do such a thing under the police power or the power of taxation, and we submit that it cannot do it by framing the statute in the terms of contract. The reason is plain. There would be no valid consideration for the contract attempted to be created by implication.

The principle is illustrated by the case of *Ball v. Trustees*, 71 N. J. L. 64. By the act of 1896 (P. L., p. 58) the legislature authorized the creation of a teachers' retirement fund, under the provisions of which, upon contributing to the fund in the manner prescribed by the act, a teacher became entitled to certain benefits upon becoming incapacitated or upon retirement after a limited number of years of service. The act authorized the board of education

of each municipality to reserve monthly and pay over to the state treasurer one per cent. of the salaries paid to teachers who elect to come under the provisions of the act. In 1899 (P. L., p. 475) the legislature made the retirement of a teacher dependent upon the approval of the board of trustees of the fund. It further provided that any teacher "shall be deemed to have accepted the provisions of this act by receiving any sum of money as salary from which there shall have been made a deduction under the provisions of the act of 1896". The court held that no such contract could be enforced by the legislature. In speaking of the section of the statute providing for implied assent to the act of 1899, the court said:

"The difficulty with this provision is that the plaintiff was already bound to submit to the same deduction under the act of 1896, and she must either submit to the deduction or break her contract. She had no other choice, and her continued submitting to the deduction evinced only her determination to perform her contract; the performance of that contract could not, by legislative enactment, be transmuted into an assent to a new and different contract. For such new contract a consideration is lacking."

In other words, from the doing of a thing which the individual has a pre-existing constitutional right to do, the legislature cannot imply an agreement to assume an obligation expressed in a statute which the legislature would have no right to impose except by consent of the person or persons affected.

It may be argued that while the legislature cannot upon the theory of implied consent impose a condition upon my constitutional right to employ black men, I have no constitutional right to employ any one upon the conditions permitted by Section II of the Compensation Act, and consequently in

granting the new right the legislature can impose what conditions it sees fit. The answer to this, however, is equally obvious. While the legislature may, in granting the benefits incident to operating under Section II of the Workmen's Compensation Act, impose such conditions as it may see fit, it cannot say that only those who employ white men shall be entitled to operate under Section II of the act, while no one who employs black men shall be permitted so to do, unless he shall agree to pay \$400 to the state. Such a statute would obviously discriminate against the black men's right to employment and the correlative right of the master to employ black men upon the same terms as white men. In other words, it would make the employment of black men, whom every one has the constitutional right to employ upon the same terms as they employ white men, a consideration for the new obligation to pay the state \$400 which exaction the state would have no right to impose, except upon consent of those affected. In making a grant of new privileges for a consideration the State must make the same offer to all its citizens equally entitled. It cannot as a consideration for the offer demand from some members of the class a liability which it does not exact from all members of the same class unless the peculiar character of those from whom the exaction is made bears some reasonable and just relation to the purposes of the legislation. The difference in color would bear no reasonable relation to the purposes of the act, to wit, the raising of revenue. In no sense could it be said that it is a characteristic sufficiently distinctive to reasonably call for separate legislation in regard to taxation. The discrimination would be arbitrary and unreasonable. Such a statute would be special legislation of the worst sort.

As was said in *Long Branch v. Sloane*, 49 N. J. L. 356, 362:

"For the purposes of this case it is sufficient to say that a determination whether or not a given law is general will proceed from a consideration both of the purpose of the act and the objects on which it is intended to operate. If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class to be general. But if the characteristics used to distinguish the objects to which the legislation applies from others are not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification would be incomplete and faulty, and the legislation not general, but local or special."

So here, the legislature having permitted the employment of men upon the conditions imposed by Section II of the Workmen's Compensation Act, cannot impose upon the master's right to employ men without dependents an agreement to pay \$400 to the state for the reason that the mere accident of dependents at the moment of death is not a distinction which furnishes any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. *Gulf, etc., Co. v. Ellis*, 165 U. S. 151, 155.

In *Truex v. Raich*, 239 U. S. 33, the Supreme

Court in passing upon a statute of Arizona by which it was provided that every employer who employs more than five workmen at any one time, regardless of kind or class of work, or sex of workers, shall employ not less than 80 per cent. qualified electors or native born citizens of the United States, or some subdivision thereof, said:

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

"* * * We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 207; *McLean v. Arkansas*, 211 U. S. 539, 551; *Miller v. Wilson*, 236 U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principle underlying the prohibition of the act is

conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

There is nothing in the opinion in the *Sexton case* on the subject of consent which is contrary to the view above expressed or which lends any support to the act in question. The act under consideration in that case was a valid exercise of the police power of the state without regard to its elective provisions (see cases cited on p. 16 of the Attorney General's brief).

Furthermore, it operated fairly and equally upon all employers. All were given an equal opportunity to accept or reject its provisions upon the same terms. Had the benefits and obligations of the statute there under consideration been applicable only to a class selected without regard to the purpose of the act, it is clear that it would violate the 14th Amendment of the Federal Constitution and would, consequently be void. Such an act, if passed would be a nullity and could not, of course, be validated by the acceptance of its provisions. An invalid act, whether accepted or not, can neither give rise to any rights, nor impose any obligations.

In *Borgnis v. Falk Co.*, 133 N. W. 209, the Supreme Court of Wisconsin, considering an elective compensation act passed by the legislature of that state said:

"If the statute be unconstitutional and void, then it is certain that the plaintiffs have no cause of action, because an election to accept the terms of a void statute could harm no one."

The language of Mr. Justice Kalish, speaking for this court in *Morse v. Metropolitan Steamship Co.*, 88 N. J. Eq. 325, is in point:

“Persons, whether natural or artificial, will be presumed to have entered into a contract with reference to the valid laws of the state. Only the provisions of the contract which are legally enforceable will control the parties thereto. The fact that the defendant incorporated under an act which contained an unconstitutional provision cannot render the provision enforceable, nor can it confer any power on the court to enforce it.”

In this connection it should be seriously noted that if the \$400 exaction can be made upon the basis of consent, then the legislature might impose an exaction equivalent to all the employer had, for admittedly consent in the one case would be as effective as in the other. Such a principle once engrafted into the law would permit discriminations of the most vicious character. By increasing the amount of the exaction, the legislature could actually force any particular class of men out of employment and entirely and successfully defend its invasion of personal liberty upon the subtle theory of consent. If once permitted, it could create distinction between classes of men without difference, and entirely destroy that equality between men which is the basis upon which depends the life and hope of all free governments.

II.**The statute is in violation of the State Constitution.**

For the same reasons the statute is in violation of the State Constitution. It denies to the defendants-appellees and each of them the natural and inalienable rights of acquiring, possessing and protecting property. The imposition is unreasonable and confiscatory. It operates to take the private property of the defendants-appellees and each of them for public use without just compensation. It is a special law granting exclusive privileges and immunities.

For the above reasons we submit that the judgment of the Supreme Court should be affirmed.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendants-Appellees.

JOHN W. BISHOP, JR.,
J. EDWARD ASHMEAD,
Of Counsel.



