969.

WORKMEN'S COMPENSATION—POWERS GRANTED BY SECTION 35 OF ARTICLE II AMENDED IN 1923 NOT SELF-EXECUTING—NEW PROVISIONS WILL NOT APPLY TO CASES IN WHICH INJURY OCCURRED PRIOR TO TAKING EFFECT OF AMENDMENT.

*SYLLABUS:*

1. *The general powers granted by section 35 of article II as amended in 1923 are not self-executing. However, existing laws exercising such powers in so far as they are consistent with the amended sections, are in force.*

2. *The second and fifth sentences of said constitutional amendment abrogating the statutory and common law rule for damages, and providing additional compensation upon the condition therein mentioned, in industrial employments, is self-executing when the general powers of the section are exercised. Therefore, said provision will be effective on and after January 1, 1924.*

3. *The provision in the fourth sentence of said section requiring the setting aside of a fund for investigation purposes is mandatory and self-executing in so far as setting aside the fund is concerned. However, the provisions therein providing for an expenditure, are not self-executing,and said fund cannot be expended until laws are passed authorizing the same.*

4. *In the administration of said constitutional amendment, the new provisions will not apply to cases in which the injury occurred prior to the taking effect of the amendment.*

5. *The amended section provides no means for appointment of employes other than is now provided by statute, and confers no power upon the Industrial Commission in this respect*

COLUMBUS, OHIO, December 6, 1923.

HON. H. R. WITTER, *Director, Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication requesting my opinion as follows:

> "For the guidance of the Industrial Commission, we respectfully request that you give us an opinion as to whether the constitutional amendment relating to the subject of workmen's compensation is self-acting, or whether legislation is required to put into effect the amendment, or any portion of it.
>
> The points which we feel it necessary to have cleared are as follows:
>
> 1. Shall the Industrial Commission, without further legislation, accept applications for additional awards and make such awards as provided in said amendment on and subsequent to January 1, 1924? And is the assumption correct that subsequent to January 1, 1924, injured workers or the dependents of workers killed in the course of employment have no option of lawsuit and are limited to the remedy provided in the workmen's compensation law and the constitutional amendment referred to above.
>
> 2. Has the Industrial Commission the authority, without farther legislation, to set aside such portion of the premium paid into the State Insurance Fund as the members of said Commission might deem necessary and prudent, to be used for purposes incident to the investigation and prevention of industrial accidents and diseases, subject to the limit fixed in the amendment as to the amount.

3. After it is made clear as to whether or not the Industrial Commission has authority to set aside such portion of the premium paid into the fund, as provided in the constitutional amendment, has said Commission authority to appoint employes whose services will be used in furthering the investigation and prevention of industrial accidents and diseases?

Your opinion is asked on this particular point because of the fact that at the present time the Industrial Commission is without authority to make an appointment of any employe. As the constitutional amendment specifically provides, however, that this portion of the premium that is authorized to be set aside as a fund to be used for the investigation and prevention of industrial accidents and diseases is to be expended by the Industrial Commission, we feel that it should be made clear as to whether or not this constitutional amendment is limited or qualified by pre-existing legislative enactments or executive orders.

4. We would also appreciate it if it were made clear whether or not the appointment of employes under authority of this constitutional amendment, to be paid from the fund which the Industrial Commission is authorized to set aside for the purpose above mentioned, shall be limited by the provisions of the Civil Service Law and the rules of the Civil Service Commission, and whether the laws now existing in regard to fixing of salaries, defining of appropriations, etc., should also govern in such appointments.

In consideration of these matters, your attention is directed particularly to sections 154-45, 871-22, 1465-55 and 1465-56, General Code of Ohio."

Section 35 of article II as adopted by the poeple in the last election provides:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death because of the failure of the employer to comply with any specific requirement for the protection of the lives, health, and safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; * * * * and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than

fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution."

The schedule accompanying said enactment provides that if the electors approve the amendment the same shall take effect on the first day of January, 1924, and said original section 35 of article II shall thereupon be repealed.

A perusal of the amended section above quoted will at once disclose that the general powers granted therein are not self-executing. The first sentence, which remains the same as the original section, provides that 'Laws may be passed" for the purpose of establishing a state fund for the workmen's compensation, etc.; again, in the third sentence, which remains the same as the original, it is provided that "laws may be passed establishing a board * * * to collect, administer and distribute such fund, "etc.

In view of the foregoing, it is evident that the general powers authorizing such compensation and providing for the board to administer the same, are the same in the amendment as they were in the original section, and as heretofore indicated, are not self-executing, nor are such provisions mandatory. The amendment supplements the general powers granted in the original section and only provides detailed procedure and incidental powers which will be referred to later herein.

It would seem pertinent to discuss at this time the status of existing statutes relating to the administration of the compensation law, in view of the amendment which will become operative on and after January 1, 1924.

It is a general rule that when a new constitution is adopted that the existing laws not inconsistent therewith remain in force without an express provision to that effect (6 Ruling Case Law, p. 34, Sec. 27). This rule was annunciated in the case of Cass v. Dillon, 2 O. S., 607, and clearly recognized as applicable to amendments in State ex rel. v. Lynch, 88 O. S., 71.

Therefore it is concluded that the existing statutes in so far as they are applicable and consistent with the amendment under consideration will remain in force on and after January 1, 1924.

At this point consideration will be given to the second sentence of said amendment which differs from the language of the original, and for the purpose of convenience will be repeated herein. Said sentence provides:

"Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

The purpose to be accomplished by this provision will be apparent upon the reading of the original section and the decision of the Supreme Court of Ohio rendered upon the re-hearing of the case of The Ohio Automatic Sprinkler Co., v. Fender, 108 O. S., 149. This case overruled 96 O. S., 305, 105 O. S., 1 and 105 O. S., 161. The effect of this decision was to deprive the employer of his defense after having paid his premium, in certain instances wherein he had been protected under the former interpretations as to the meaning of "lawful requirement" as provided in the original constitutional provision. The holding in the Fender case was in part:

> "A lawful requirement within the meaning of section 35, article II, of the Ohio Constitution, and section 29 of the Workmen's Compensation Act (Section 1465-76, General Code, 103 O. L., 84), includes statutes and ordinances, lawful orders of duly authorized officers, specific and definite requirements constituted by law, and laws embodying in general terms duties and obligations of care and caution; and further includes requirements relating to safety of the place of employment and to the furnishings and use of devices, safeguards, methods, and processes designed for the reasonable protection of the life, health, safety and welfare of employes."

It will be observed that the effect of the amended section is to completely eliminate all controversy in reference to the question of liability of the employer. The wisdom of this provision wil commend itself, for if the employer had little or no protection under the original section, after having contributed to the fund for such purpose, the validity of the entire section might have been questioned in view of other provisions of the State and Federal Constitutions

While the new language of said amendment now being considered mentioned "Laws passed in accordance herewith", which expression could easily give rise to the argument that it is not self-executing, and laws must be passed before this particular provision becomes operative, I do not concur in such view. The same rules of construction are applicable to constitutional amendments as are applicable to statutes. (State v. Creamer, 83 O. S., 412) With this rule before us, attention is directed to the fact that it has frequently been held by the courts of this state that:

> "Where a section is amended the amended section must be construed with the rest of the original act as if it had been enacted at the same time with it."

McKibben v. Lester, 9 O. S., 628.

This principle has been re-announced and amplified in a number of other Ohio cases. See

State v. Vause, 84 O. S., 207;
State v. Spiegel, 91 O. S., 13;
State v. Fulton, 99 O. S., 168

Applying the above principle to the clause of section 35 of article II immediately before us, the conclusion must be that the expression "Laws passed in accordance herewith" can and does properly have reference to the existing laws which were passed under authority of the original section, or any future enactments upon the same subject. In view of this conclusion it is obvious that the reference to the passing of laws in itself is not determinative of whether this particular clause is self-executing or otherwise. In further considering the question as to whether said clause which requires a new duty upon the administering authority and affects the rights of employer and employe as contradistinguished from the original provision and the latest expression of the Supreme Court upon the subject, is self-executing, it, of course, will be observed that as yet no law has been passed by the legislature specifically covering the particular object of the amendment in this respect. While it is a general rule that a provision is not self-executing unless there is some expression to that effect in the amendment itself, it has been held that when a constitutional provision is clear and explicit that no legislation is necessary. In the case of State ex rel. v. Lynch, supra, it was held that the sections of the 1912 amendments relating to the adoption of char-

ters by municipalities were self-executing and no express provisions in such sections to that effect, have been found.

What has been said in reference to the second sentence will also apply to the fifth sentence which provides for the allowing of additional compensation in those cases wherein the board finds that specific requirements have been violated. The language here is explicit, and no details necessarily need to be provided by additional legislation in order to make said clause workable from a practical standpoint.

It therefore must be concluded that the provisions relating to liability of the employer and remedial provision embraced in the second and fifth sentence of said amendment are mandatory and self-executing, when the general powers of the act are exercised. It follows that after Janauary 1, 1924, when said section goes into effect that when compensation is fixed by the Industrial Commission, under the laws as they now exist, such compensation shall be in lieu of all other compensation as provided in said section and applications for additional compensation may be received at that time. In other words, when compensation is fixed under existing laws such action must conform to the provisions in the amended constitution, in so far as such provisions are explicit and applicable.

At this point it would seem pertinent to consider, from a practical standpoint, at least, whether the Industrial Commission in its operation after January 1, 1924, should in its fixing of compensation take into consideration the new constitutional amendment in all cases in which such compensation is fixed, or whether the new rule is applicable only to cases in which the injury occurred after the taking effect of such amendment. That is to say, the question presents itself as to whether the application of the new provision to cases arising before January 1, 1924, is the meaning of the section, and further, whether such an administration of the law would operate as to make such law retrospective, thereby impairing the obligations of contracts, in view of the Federal Constitution.

Section 28 of article II of the Ohio Constitution provides:

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

While this section is directed to the legislature and must yield to later amendments to the fundamental law, it can properly be considered as showing the established policy of the people of this state in protecting existing rights at the time of changing a law. It is believed that a logical argument may be made in support of the contention that the people in the adoption of the amendment to section 35 of article II did not necessarily intend it to be so construed as to be in conflict with the fundamental principle long established by section 28 of article II. It is believed it will be helpful in determining the intent of the electorate in the present enactment (Section 35) with reference to the inhibitions in section 28 to consider some of the decisions of the courts in construing the latter section. In Rairden v. Holden, 15 O. S., 207, it was held:

> "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

And, in Miller v. Hixson, 64 O. S., 39, it was held, in substance, that a statute which imposes a new duty, obligation, liability or additional burden as to past transactions is retroactive. The latter case was cited and the above rule recognized in the case of State ex rel. v Zangerle, 101 O. S., 238.

However, in the application of the above rule much difficulty has arisen. Many laws of a remedial nature have been held not to violate said constitutional provision.

In analyzing the amendment under consideration, attention is directed to the case of State ex rel. v. Creamer, 83 O. S., 349. In that case the original voluntary compensation law was under consideration. It was urged that the law violated the provisions of section 28, article II of the Ohio Constitution and section 10 of article 1 of the Constitution of the United States. The reason urged was that any employer accepting the act in effect compelled the employe to accept the same, with the result that a new contract was substituted for existing contracts between the employer and employe, thus withdrawing certain rights which previously existed. The court held that these were not violated, for the reason that under the act the employe waived his right of action for negligence. It is believed that from reading this entire case the conclusion will be drawn that it was the opinion of the court that the statutes and common law existing at the time a contract is entered into between an employer and employe, will by implication become a part of such contract. If my interpretation of this is correct, it follows that in instances wherein injuries occur prior to January 1st, the existing law relative to compensation will enter into the question. Therefore, it is apparent that if the Industrial Commission in fixing compensation under the new law applies it to cases arising prior to January 1st, such administration will be in conflict with the principle proclaimed in section 28 of article II. As heretofore indicated, the same rule of construction applicable to statutes are applicable to constitutions, and under this rule every effort will be made to harmonize two provisions rather than to find that one is repealed by implication.

Section 10 of article I of the Federal Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

It has been held that implied contracts come within the inhibitions of the above section (116 U. S. 131).

A state constitution or an amendment thereto has been construed as a "law" within the meaning of the above provision (12 C. J. 988).

Without an extended discussion, it may be stated that the rule of interpretation heretofore set forth in reference to section 28 of Article II of the Ohio Constitution is substantially the same with respect to Section 10 of Article I of the Federal Constitution in so far as the retrospective operation of laws so as to impair the obligations of contracts are concerned. It must therefore be concluded that Section 35 of Article II, as amended, if applied to injuries growing out of employment contracts occurring prior to its adoption is in violation of Section 10 of Article I, unless there is some exception under the decision of the courts. Of course, the act in question is a police regulation. (See State v. Creamer, supra.) The compulsory provisions of such compensation laws have frequently been upheld upon this doctrine. The police power, as the courts have frequently held, is measured only by the needs of the public welfare, and the inhibitions in reference to the impairment of the olbigation of contracts must yield to such power unless the exercise thereof in a given case constitutes an abuse of such power.

In a case decided by the Supreme Court of Washington, State, etc., v. City of Seattle, 132 Pacific, 45, involving the construction of a workmen's compensation act, it was squarely held that it was a police regulation and within the power of the legislature to enact even though it made less valuable contracts entered into prior to its taking effect and abrogated other such contracts. Thus it will be seen that the question as to what injuries come under the amended act is not free from doubt.

However, notwithstanding the Washington case cited, I am not convinced that the people of Ohio intended in this enactment to abrogate the rule in Section 28 of Article II. Neither am I convinced that the public exigencies are such as to demand that in the application of the amendment it be given a retrospective operation. In this connection it may be mentioned that it is a well recognized rule that in case of doubt, a prospective interpretation will be given rather than retrospective construction. Therefore, the conclusion is that the amendment should apply to those cases which arise or in which the injury occurs after the taking effect of the law.

This will bring us to a consideration of the provisions embodied in the fourth sentence of the amendment to Section 35 of Article II, which provides:

> "Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases."

It will be observed that the language in said sentence is explicit in that the Commission shall set aside the fund therein provided for.

In view of the foregoing discussion, it is believed the conclusion should be reached that this is a self-executing and mandatory provision in so far as the setting aside of the fund is concerned, and the Commission should be governed accordingly after the taking effect of the act.

However, the language is equally explicit in providing that such funds are "to be expended by such board in such manner as may be provided by law." It is believed to be apparent that as yet there are no laws passed authorizing the Industrial Commission to make such an expenditure. The only law in existence authorizing an expenditure by the industrial Commission is the provision for the payment of compensation claims from the fund now provided for such purpose. The conclusion is irresistible that the part of said sentence authorizing the expenditure of the fund provided for is not self-executing and must await the necessary legislation.

This will bring us to the question presented of the appointment of employes for the purpose of furthering the investigation, etc., mentioned in the constitutional amendment.

In view of the foregoing holding in reference to the provision relative to the expenditure of the fund not being self-executing, it would seem unnecessary to prolong the discussion as to the appointment of employes for such purpose. In other words, there is no provision in the constitution to appoint any employes in the Department of Industrial Relations, excepting in the manner as is now provided by law. Undoubtedly the employes now performing the same or similar services for which the fund is provided, can continue to function in this respect, but payment must now be made from the sources provided by appropriation.

In view of the foregoing citations and discussions, it is my opinion that:

(1) The general powers granted by Section 35 of Article II as amended in 1923 are not self-executing. However, existing laws exercising such powers in so far as they are consistent with the amended sections, are in force.

(2) The second and fifth sentences of said constitutional amendment abrogating the statutory and common law rule for damages, and providing additional compensation upon the conditions therein mentioned, in industrial employments, is self-executing when the general powers of the section are exercised Therefore, said provision will be effective on and after January 1, 1924.

(3) The provision in the fourth sentence of said section requiring the setting aside of a fund for investigation purposes is mandatory and self-executing in so far as setting aside the fund is concerned. However, the provisions therein providing for an expenditure, are not self-executing, and said fund cannot be expended until laws are passed authorizing the same.

(4) In the administration of said constitutional amendment, the new provisions will not apply to cases in which the injury occurred prior to the taking effect of the amendment.

(5) The amended section provides no means for appointment of employes other than is now provided by statute, and confers no power upon the Industrial Commission in this respect.

In view of the above, it is assumed that a specific reply to your various questions will be unnecessary.

Respectfully,
C. C. CRABBE,
*Attorney-General.*

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970.

APPROVAL, BONDS OF SHAWNEE VILLAGE SCHOOL DISTRICT, PERRY COUNTY, $5,259.68, TO FUND CERTAIN INDEBTEDNESS.

COLUMBUS, OHIO, December 6, 1923.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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971.

DISAPPROVAL, BONDS OF VILLAGE OF WILLARD, HURON COUNTY, $38,430.00.

COLUMBUS, OHIO, December 7, 1923.

RE:—Bonds of Village of Willard, Huron County, $38,430.00.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—I have examined the three transcripts furnished this department in connection with the above issue of assessment bonds for street improvements.

Each of the transcripts recites that the amount of the issue as provided by the bond ordinance shall be "less the amount of cash assessments paid in by owners of property assessed."