437.

APPROVAL, NOTES OF HANOVER RURAL SCHOOL DISTRICT, BUTLER COUNTY, OHIO, $1,685.00.

COLUMBUS, OHIO, April 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

438.

APPROVAL, NOTES OF SOMERVILLE VILLAGE SCHOOL DISTRICT, BUTLER COUNTY, OHIO, $187.00.

COLUMBUS, OHIO, April 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

439.

APPROVAL, NOTES OF ST. JOHN RURAL SCHOOL DISTRICT, MERCER COUNTY, OHIO, $1,845.00.

COLUMBUS, OHIO, April 1, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

440.

OLD AGE PENSION—HOUSE BILL NO. 1 HELD CONSTITUTIONAL—UNEMPLOYMENT INSURANCE—HOUSE BILL NO. 172 HELD CONSTITUTIONAL.

SYLLABUS:

1. *House Bill No.* 1, *relative to aid to aged persons does not provide for the use of public funds for a private purpose, and therefore is not unconstitutional within the principle of* Auditor of Lucas County *vs.* State, 75 *O. S.* 114.

2. *House Bill No.* 172, *if enacted, will not be violative of the Fourteenth Amendment within the principle of* Adkins *vs.* Children's Hospital, 261 *U. S.* 525.

3. *A law which has as its purpose the shifting upon industry of the financial burden of employes caused by unemployment resulting from economic conditions is not so arbitrary, capricious and clearly unreasonable as to violate the Fourteenth Amendment.*

4. *Since the scope of the unemployment insurance bill is by substantive provisions restricted to its avowed purpose, i. e., to provide benefits for persons who become unemployed by reason of economic conditions, the proposed act does not*

so restrict freedom of contract as to deprive persons of property without due process of law.

5. Since the proposed unemployment insurance act is restricted to its proper scope by procedural safeguards, i. e., administration by a commission whose orders are subject to judicial review, it provides the notice, hearing and day in court necessary to due process and due course of law.

COLUMBUS, OHIO, April 3, 1933.

HON. KINGSLEY A. TAFT, *Secretary, Insurance Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date, which reads as follows:

> "The Insurance Committee of the House of Representatives has before it for consideration House Bills Nos. 1 and 172 dealing respectively with Old Age Pensions and Unemployment Insurance.
>
> We are very considerably concerned as to the constitutionality of these two bills.
>
> In the case of the Old Age Pension Law, it has been suggested among other things that payment of money directly to the beneficiaries of the act would clearly be unconstitutional in view of *Lucas County* vs. *State,* 75 O. S. 114. While that case has been modified by later cases it has not apparently been overruled.
>
> As to the Unemployment Insurance bill, it has been suggested that that would be unconstitutional in view of the decision of the United States Supreme Court in the Adkins case holding a minimum wage law for women unconstitutional. It is argued and very plausibly that there is no real analogy between Workmen's Compensation Law and the Unemployment Insurance Act.
>
> We on the Insurance Committee would appreciate an early reply from you on these two questions. Please address that reply to me as secretary of the committee."

You first inquire whether House Bill No. 1, providing for aid to aged persons is unconstitutional, in view of the case of *Auditor of Lucas County* vs. *State,* 75 O. S. 114. Under this bill, no person is entitled to aid unless he is sixty-five years of age or over, has certain residence and citizenship requirements, and is not an inmate of any state penal institution or state hospital. Other requirements are:

> "Section 2. * * *
>
> (g) His income from any and all sources does not exceed $300.00 per year;
>
> (h) Is unable to support himself, and has no husband, wife, child or other person who is able to support him and who is responsible by law for his support;
>
> (i) The net value, less all encumbrances and liens, of all real and personal property of such person does not exceed $3000.00; or, if married, the net value of the combined property of husband and wife does not exceed $4000.00; and
>
> (j) Has not directly or indirectly deprived himself of property or income in order to qualify for aid.

Section 3. The amount of aid payable to any person shall not exceed $25.00 per month, diminished by such an amount that the total income of such person from any and all sources, including such aid, shall not exceed $300.00 per year.

Section 4. If the applicant for or recipient of aid is married, the total amount of aid payable to the husband and wife shall not exceed $50.00 per month, diminished by such an amount that the combined income of both from any and all sources, including the aid payable to either or both, shall not exceed $600.00 per year.

Section 5. In computing the annual income of an applicant for or recipient of aid, or the income of husband and wife together, under the provisions of this act, the annual income of any real or personal property (not including household goods, clothing and other personal effects), which does not produce income or a reasonable income, shall be considered and computed as five per centum of the net value of such property after deducting the amount of all encumbrances and liens thereon.

Section 6. If an applicant for or recipient of aid, or his or her spouse is the owner of any interest in real or personal property, excepting household goods, clothing and other personal effects, it may be required, as a condition precedent to the payment of aid or further aid, that he convey and transfer such property to the Division of Aid for the Aged (hereinafter created), in trust, subject to permission to the recipient of aid and his or her spouse to use or reside upon such property for life; and upon death of either, leaving wife or husband who is entitled to aid, the survivor likewise to be permitted to use or reside upon the said property for life; provided, however, that in all such cases such property shall be deemed to produce income as provided in Section 5 hereof, and the aid granted shall be reduced accordingly, and all taxes and assessments on such property and all necessary expenses of keeping it in good condition and repair shall be paid by the persons using or residing upon it.

All property conveyed to the Division in trust, upon the death of the person or persons entitled to use or reside upon such property as above provided, shall be sold by the Division at public sale, and the proceeds applied in the following order: first, the costs of sale; second, all valid taxes and assessments which are a lien upon said property; third, repay to the Treasurer of State all amounts paid under this act to the person who conveyed or transferred the property to the Division, and all such amounts paid to his or her spouse, with interest at four per centum per annum; fourth, all other valid debts in order according to law; and the balance, if any, to be distributed to the heirs or other persons by law entitled thereto.

Provided, however, that upon request of a recipient of aid, or, after his death, of his surviving spouse, an heir, or other person lawfully entitled thereto, and when reimbursed to the full amount of aid paid and interest as aforesaid, the Division shall reconvey or transfer the property to said person, surviving spouse, or/and heirs or other persons lawfully entitled thereto.

Section 7. Upon the death of a person, the total amount of aid paid to him under this act and to his or her spouse, with interest thereon at four per centum per annum, shall be a debt of the estate of such deceased person; and it shall be the duty of the Division to present claims to the

administrator or executor, if any, to bring suits and to take any other proper action to secure reimbursement from the estate and property of such deceased person.

If upon the death of any person who has received aid under this act, or his or her spouse, it is found that he or she, or both of them, was possessed of property in excess of what is allowed by law in respect to the amount of aid granted, there shall be a penalty or debt, in addition to that above provided for, against the estate of such deceased person in an amount equal to the total amount of aid paid in excess of that to which the recipient was by law entitled; and it shall be the duty of the Division likewise to recover the same from the estate and property so found in excess.

Section 8. The following provisions shall apply in every case where a recipient of aid is being maintained in any charitable, fraternal or benevolent home, hospital or institution, either public or private (but excluding penal and correctional institutions and state hospitals):

(a) The reasonable cost of such maintenance shall be paid out of the aid to which the individual is entitled under this act;

(b) For the purpose of making such payment, installments of the aid, to such extent as necessary, shall be paid to the governing body of the institution, and the balance, if any, to the person entitled to the aid.

Section 9. If any person receiving aid under this act is deemed to be unable to properly care for himself or to disburse the aid payable to him, is convicted of drunkenness or of an offense punishable by imprisonment, or misspends or wastes the aid paid to him, the same may be ordered paid to some suitable person for his benefit, or his certificate of aid may be suspended, modified, or canceled.

Section 10. Upon the death of a recipient of aid any monthly installment then accruing, and not to exceed three additional monthly installments under his certificate of aid, may be ordered paid to a proper person entitled thereto to defray the burial expenses of such deceased person."

This act creates a Division in the State Department of Public Welfare and a board of aid for the aged in each county to administer the act. Section 14 provides:

"Applications for aid under this act shall be made yearly to the county Boards. Each Board shall cause all applications to be investigated. It may grant an application as originally made, or as modified as a result of its investigations, may postpone it for further evidence, or may reject it, as seems right and equitable.

As soon as an application is allowed by a Board it shall execute a 'Certificate of Aid', signed by the chairman and secretary of the Board, stating that the person named is entitled to aid under this act, the monthly amount to which he is entitled, his address, and any other data prescribed by the Division. The Board shall then forward such application or a copy thereof, such certificate, and a report of the findings, or other information as may be required by the Division, to the Division. The Division may approve, modify, or reject the certificate and findings of the board, which action shall be final, unless the Division grant a rehearing or reconsideration. The Division shall certify its action upon each claim to the re-

spective county board, and shall certify also to the Auditor of State every decision allowing, modifying, suspending or canceling aid.

Any person aggrieved by an action of a Board in rejecting, suspending, modifying, or canceling a certificate, or otherwise, may appeal to the Division, in manner and under conditions prescribed by the Division, and its decision thereon shall be final.

No certificate of aid shall be valid for a period longer than one year, a renewal certificate being necessary for each subsequent year. No certificate shall be valid unless duly approved and countersigned by the Division."

The Division is given power to make rules and regulations governing applications for aid and to prescribed records and reports to be made by the county boards. The act further provides:

"Section 17. Aid payable under this act shall be paid monthly by the Treasurer of State upon warrants drawn by the Auditor of State.

Section 18. If at any time the Division or a Board has reason to believe that any certificate of aid has been improperly obtained, it may cause a special inquiry to be made, and may suspend payment of aid pending the inquiry. If on inquiry it appears that the certificate was improperly obtained, it may cancel or notify the same; but if it appears that it was properly obtained, then the aid shall be immediately restored and all the suspended installments shall be due and payable at once.

Section 19. If at any time a recipient of aid under this act, or his or her wife or husband, becomes possessed of property or income in excess of what is allowed by this act in respect to the amount of aid granted to such recipient, the Division or the respective Board shall cancel or reduce the amount of aid accordingly; provided that if such excess of property or income cease, then the aid shall be restored or increased to the proper amount.

Section 20. In every case of suspension, modification or cancellation of a certificate by a Board, it shall forthwith send to the Division a notice thereof and the grounds therefor. The Division shall immediately notify the Auditor of State.

An action of a Board in refusing, suspending, reducing, or canceling a certificate, or the amount of aid payable to a person, shall be effective at once, or at the time designated by the Board, and shall not require approval by the Division; but all orders of Boards allowing, renewing, reinstating, or increasing a certificate or the amount of aid payable, shall not be effective unless and until approved by the Division.

Orders as to payments under Sections 8, 9 and 10 of this act shall be made by the Boards, in accordance with regulations of the Division, and subject to approval by the Division.

Section 21. The Division and the Boards shall not be bound by common law or statutary rules of evidence, or by technical or formal rules or procedure, but shall make investigation in such manner as seems best calculated to conform to substantial justice and the spirit of this act.

Section 22. For the purpose of their investigations, the Division and each Board shall have power to compel the attendance and testimony of witnesses, and the production of books and papers, either before the chief

of the Division, a Board, or a deputy appointed by either; but no person shall be compelled to attend at a place outside the county in which he resides or is found. Every witness shall be examined upon oath, which may be administered by a member of a Board, the chief of the Division, or a deputy of either.

In case of refusal of a witness to attend or testify, or to produce books or papers, as to any matter regarding which he might be lawfully interrogated, the court of common pleas of the county in which the person resides or is found, or a judge thereof, upon application of the Board concerned or the Division, shall compel obedience by proceedings as for contempt as in case of like refusal to obey a similar order of the court.

Section 23. If the Division or a Board finds that any fraudulent misrepresentation has been made by an applicant with the intention of obtaining aid to which he was not by law entitled, or a higher rate of aid than that to which he was entitled, then in addition to any other penalty under this act it may refuse his application or cancel his certificate of aid, and may by order declare that such person shall not be entitled to make a new application for a period not exceeding six months from the date of the order.

Section 24. Any person who, by means of a false statement or representation or by impersonation or any other fraudulent device whatever, obtains or attempts to obtain, for himself or any other person, old age aid to which such person is not entitled or a larger amount of aid than that to which he is entitled, or who knowingly buys, sells or disposes of, or aids or abets in buying, selling, or disposing of property, in order to qualify a person for aid, or who knowingly violates any other provision of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or both.

* * *

Section 26. All rights to aid under this act shall be inalienable whether by way of assignment, charge or otherwise, and exempt from execution, attachment, garnishment or other process."

Section 1 of Article II of the Ohio Constitution vests the legislative power of this State, including the taxing power, in the General Assembly. The taxing power is limited by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution to raising money for public purposes. *Fallbrook Irrigation District* vs. *Bradley,* 164 U. S. 112; *Strickley* vs. *The Mining Co.,* 200 U. S. 527; *Jones* vs. *City of Portland,* 245 U. S. 217. Likewise, the use for private purposes of money raised by taxation is prohibited by Article I, Sections 1, 2 and 19 of the Ohio Constitution. *Auditor of Lucas County* vs. *State,* supra. The following statement appears in 2 Cooley's Constitutional Limitations (8th Ed. at pp. 1026 to 1029):

"In the first place, taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall over-

step the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot-box; and there are other cases where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different. But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen."

In the Lucas County case, supra, it was held, as appears from paragraph 2 of the syllabus:

"The act entitled 'An act to provide relief for worthy blind', passed April 25, 1904 (97 O. L., 392), which provides that all male blind persons over the age of twenty-one years, and all female blind persons over the age of eighteen years, who have been residents of the state for five years and of the county for one year and have no property or means with which to support themselves, shall be entitled to and receive not more than twenty-five dollars per capita quarterly from the county treasury, is unconstitutional for the reason that it requires the expenditure for a private purpose of public funds raised by taxation."

The defects of the statute there before the court, which rendered it unconstitutional, are revealed in the opinion where this language appears:

"No rule sufficiently definite to be susceptible of certain application has been established. But in the leading case, *Loan Assn.* vs. *Topeka,* 20 Wallace, 655, where the constitutionality of an act of the Legislature of Kansas authorizing a municipality to issue and sell its bonds in aid of a manufacturing corporation was raised, Mr. Justice Miller says: 'In deciding whether or not, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects and purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and acquiescence of the people, may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.'

If that rule is applied here, it must be said that the act under consideration is without precedent in this state and that no provision is made in the act to insure the application of the money to the support of the individual, or to prevent him from becoming a public charge, or in any manner to control its use by him. The act does not direct that the pay-

ments shall continue during the lifetime of the beneficiary, nor does it limit the time, nor provide that payments shall cease with the needs of the donee, or provide for any subsequent inquiry. It is an indeterminate gratuitous annuity, a gift pure and simple, and, being so, the Legislature is without authority to make it from the public funds."

In *State ex rel.* vs. *Edmonston,* 89 O. S. 351, a subsequent blind relief statute (99 O. L. 56, repealed 103 O. L. 60), was held to be constitutional. The act created a blind relief commission authorized to conduct investigations to determine those blind persons entitled to relief and to issue an order in such sum as it found necessary, not to exceed $150.00 per annum. It was further provided that "such relief shall be in place of all other relief of a public nature." Only such persons who, because of inability to support themselves, would become charges upon the public or upon those not legally liable to support them, were entitled to relief. The commission was given continuing jurisdiction and authorized to revoke or modify awards at any time recipients of relief should acquire property.

The court in the Edmonston case pointed out these facts and used them as a basis for differentiating that statute from the one considered in the Lucas County case which was "not a statute making provision for public relief to poor persons, but really an act providing for the giving of a bounty to a certain selected class of persons." The court used the language above quoted from the Lucas County case, to the effect that no provision was made in the statute to insure the application of the money to the support of the individual, or to prevent him from becoming a public charge as constituting the basis for the court's decision in the Lucas County case.

After reviewing the provisions of the later blind relief statute, the court in the Edmonston case said:

"It will, therefore, be seen that this statute seems to have been drawn for the purpose of carefully avoiding the defects in the statute of 1904 pointed out by the court in *Lucas County* vs. *State, supra.* The relief provided for in the later statute is limited to those who are, or will become, charges upon the public or upon those not required by law to support them, and is the only public relief that may be given to them. The provision for surgical removal of blindness, where possible, is one to prevent the person from becoming such charge. The entire matter is left to the continuing and imperative supervision of the board of county commissioners. Every safeguard has been adopted to secure the application of the money to the support of the individual and to prevent him from becoming a public charge. It is not an indeterminate annuity, unlimited in time or uncertain in its application.

The express object, and the practical provision, of the enactment is to furnish relief to the blind who are poor and needy, and to avoid the public burden.

It is not questioned that the relief of the poor is a proper public purpose.

Judge Cooley in his work on taxation (3 ed.), page 204, declares that 'the support of paupers and the giving of assistance to those who, by reason of age, infirmity or disability, are likely to become such, is, by the practice and common consent of civilized countries, a public purpose.' The power to tax for a public purpose is part of the inherent sovereignty of

the state. It is a legislative power which by Section 1, Article II of the Constitution is vested in the general assembly. The determination of the public purpose and objects to which it is applicable must rest in the discretion of the general assembly except as limited by the restrictions imposed by the constitution." (Italics the writer's.)

The court then referred to the language in *Loan Assn.* vs. *Topeka,* which appears, supra, in a quotation from the opinion in the Lucas County case. Mr. Justice Miller there stated the test for distinguishing between public and private obligations of taxation to be "the course and usage of the government." The court in the Edmonston case added (p. 358):

> "Outdoor relief of the poor, as distinct from relief in institutions, was fixed as part of the policy and practice of Ohio one hundred years ago."

It is clear from section 3 of House Bill No. 1 that amounts payable under that act are to be paid directly to the recipients of aid as was the case under both of the blind relief statutes discussed. The question here is whether the act provides for a bounty to a selected class or merely provides outdoor relief to needy poor persons. If the latter is its object, the purpose is public and the proposed statute does not fall within the principle laid down by the Lucas County case.

Under the bill granting aid to aged persons, those entitled thereto shall not receive over $300.00 per year. Aid is limited to $25.00 per month, diminished by such an amount that the total yearly income from all sources does not exceed $300.00. Property of beneficiaries that ordinarily would produce income, but which in fact does not, is to be treated as producing 5% net income, and such amount is considered as actual income earned. A recipient of aid may be required to convey his property the division of aid in trust. Such recipient may continue to reside upon or use the property, but it shall be treated as producing income, and the aid granted shall be reduced accordingly. Upon the death of the beneficiary, the Division shall sell the property and repay to the Treasurer of State the sum previously granted as aid. The State's claim is given a priority over claims of unsecured creditors of the decedent. Sums paid as aid shall constitute a debt against any recipient's estate, to which shall be added a penalty in case such recipient owned property in excess of that allowed by the act. If the recipient spends or wastes the aid granted, the sums due him may be paid to a suitable person for his benefit.

Administrative boards are provided to investigate and determine those entitled to aid. Their jurisdiction is continuing. The State Division is given power to review the acts of the county boards. In case property or income is acquired after a certificate of aid has been granted, the board may cancel or reduce the amount of aid accordingly. A form of procedure is provided whereby the administrative bodies can effectively act in furtherance of their prescribed powers and duties.

It is apparent that only those unable to support themselves are to receive aid under this act. Its object is the same as that of the statute before the court in the Edmonston case. The only distinction between the two lies in the scope of operation and the class of persons affected. It seems clear to me that House Bill No. 1 is a measure providing for outdoor relief to the indigent aged and not one providing for a gratuitous bounty.

This position is strengthened by the doubt recently cast upon the validity of the Lucas County case by the Supreme Court of this state in *State ex rel.* vs.

Braden, 125 O. S. 307; 181 N. E. 138, a case involving the poor relief act of April 5, 1932, providing for the issuing of bonds and the levying of an excise tax. In the course of the opinion Judge Jones said (181 N. E. at page 142):

> "In the instant case, under the provisions of the poor relief act adopted by the special session in 1932, the entire matter of providing relief is also left to the continuing supervision of public boards, under safeguards securing the application of the moneys to the individuals who are in need; and the act does not grant to needy individuals indeterminate annuities, unlimited in time. In this aspect of the case the constitutionality of this act can be upheld under the rule announced in the Edmondston Case, supra. Once only during the tenure of the present members of this bench has the Lucas County Case, supra, been cited, and that was in the case of *Miller* vs. *Korns, Aud.,* 1007 Ohio St. 287, 140 N. E. 773, 778, wherein we held that funds raised by taxation for public schools were raised for public, and not for private, purposes. In the course of her opinion Judge Allen said: 'The sovereign people have not considered the giving of education to be a private purpose,' and education is 'a matter of supreme public concern.' And that is true. If it be then a public purpose to afford education to prevent illiteracy, it follows as an obvious corollary that it is also a public purpose when the state assumes the duty of protecting its unfortunate from hunger and want."

Your second question relates to House Bill No. 172, which provides for the creation of a fund by contributions from employers and employes to be administered by a state commission for the benefit of workers who become unemployed through no fault of their own. Your inquiry is whether this measure would be unconstitutional by reason of the decision of the United States Supreme Court in *Adkins* vs. *Children's Hospital,* 261 U. S. 525; 67 Lawyers Edition, 785; 43 Supreme Court Reporter 394, holding invalid an act (40 Stats. at Large, 960) fixing the minimum wages for women and children in the District of Columbia for the avowed purpose that their wages should be adequate to maintain them in health and to protect their morals. This statute was held unconstitutional on the ground that it violated the due process clause of the Fifth Amendment. Since the pending bill will, if enacted, be a state law, the due process clause of the Fourteenth Amendment is involved. The scope of the two provisions is identical.

Under the minimum wage law, contracts between employer and employe were substantially affected because the minimum compensation was fixed. Under the proposed unemployment insurance law, this is not true,— unless the requirement that a small percentage of employers' payrolls and employes' wages be paid into the state funds amounts to fixing wages. The effect of the pending legislation upon freedom of contract is no more direct than in the case of Workmen's Compensation Laws. Thus, there appears to be an important distinction between the proposed statute and the minimum wage law.

Since this important distinction exists, a court in deciding the constitutionality of the proposed act, would not be bound by the decision of *Adkins* vs. *Children's Hospital,* upon the principle of *stares decisis.* Many laws restricting freedom of contract to a greater extent than does the pending bill, have been upheld by the courts. Among these are usury laws, statutes of frauds, laws prohibiting the making of contracts on Sunday, acts regulating insurance rates and prescribing contracts for insurance companies, laws requiring mine operators to

pay for coal by weight before screening, statutes prohibiting payment of employes in orders on a company store, laws limiting hours of labor for women in industry and employers' liability acts.

In the light of the foregoing, I am of the opinion that the proposed enactment is not such a restricting of the freedom of contract as to amount to a deprivation of due process of law. Whether the bill because of its purpose violates the Fourteenth Amendment as being arbitrary, capricious or clearly unreasonable, must be considered.

The distinction between Workmen's Compensation laws and Unemployment Insurance statutes are not legal but social and economic. The federal constitution specifically mentions neither. Legislatures some years ago came to hold the opinion that industry should assume and pass on to consumers of goods the expense of industrial accidents suffered in the production of such goods. Without legislative interference, this expense falls upon the injured workmen. The court of last resort in New York once held such a law unconstitutional (*Ives* vs. *S. Buffalo R. R. Co.* 201 N. Y. 271; 94 N. E. 431), but now laws to accomplish this result are in operation in practically all of the states.

In *Cudahy Packing Co.* vs. *Parramore,* 263 U. S. 418, 423-424, Mr Justice Sutherland, who wrote the majority opinion in the Adkins case, said:

> "Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. * * * Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern * * * to escape condemnation as arbitrary, capricious, or clearly unreasonable."

Workmen's Compensation laws impose liability without fault, contrary to the principle once valued highly by common law lawyers. The imposition of tort liability upon the owner of any inherently dangerous instrumentality and liability imposed by pure food and drug acts, accomplished the breakdown of that principle. The proposed legislation therefore cannot be deemed capricious or unreasonable, merely because it imposes liability without fault.

If the legislature of Ohio passes House Bill No. 172, by such action, the people of this state will know that its representatives are of the opinion that the burden of unemployment, due to the economic system, should be shifted from the individuals upon whom it falls, to the members of a wider group.

Whether or not this "is a matter of sufficient public concern * * * to escape condemnation as arbitrary, capricious, or clearly unreasonable," is a matter of judgment for the legislature, subject to review by the court of last resort, which may pass upon the question—in this case, the Supreme Court of the United States.

In *Mountain Timber Co.* vs. *Washington,* 243 U. S. 219, upholding the Washington Workmen's Compensation Act, Mr. Justice Pitney, speaking for the court, said at page 240:

> "A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is provided as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound and the disabling effect may be the same."

The question presented by you is whether the State, by legislative action, is powerless to compensate workers in those same occupations so necessary to the State's prosperity who are rendered incapable of earning a living by reason of unemployment, due to economic forces beyond their control. One answer to this question may be given by making a slight change in Mr. Justice Pitney's answer to the question which he propounded: An idle machine as well as a bullet may produce a wound and the disabling effect may be the same. With the analogy to the Workmen's Compensation law in mind, I am unable to see that the action of the Ohio legislature in passing this unemployment insurance measure, would be arbitrary or capricious or clearly unreasonable.

Regardless of the wisdom of such legislation, it appears to be a valid exercise of the police power. Courts very often uphold statutes which the judges present upon them believe to be unwise. In his dissenting opinion in the Adkins case, Chief Justice Taft, after referring to the evils of long hours and low wages, said:

> "Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound."

A similar statement might well be made in reference to unemployment insurance.

Having determined that the purpose of this act, to insure against economic unemployment, does not render it invalid, it becomes necessary to determine whether the scope of operation of the act is confined to its proper purpose.

Section 1b defines "employer" as any person, firm or corporation having three or more persons employed in any employment subject to the act, excepting public corporations, farmers and those to whom "the act may not apply by reason of any provision of the Constitution of the United States or any act of congress."

Paragraph c defines "employe" as any persons, employed for hire by an employer in an employment subject to this act, except a person whose employment is not in the usual course of trade, business, profession or occupation of the employer and except further "any person employed at other than manual labor at a rate of remuneration of two thousand dollars a year or more."

Section 1d reads:

"'An employment', except where the context clearly shows otherwise, means an employment in which all or the greater part of the employee's work is performed within the state of Ohio, under any contract of hire, express or implied, oral or written, including all contracts entered into by helpers and assistants of employee, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer; and shall include any trade, occupation, profession or process of manufacture, or any method of carrying on said trade, occupation, profession or method of manufacture in which any person may engage; except that for the purpose of this act it shall not include:

(1) Employment as a farm laborer.

(2) Employment in the personal or domestic service of an employer at his home.

(3) Employment in the service of a common carrier engaged in interstate commerce, subject to the laws of congress and supervision of interstate commerce commission.

(4) Employment by any governmental unit, or municipal or public corporation, or any political subdivision; or in any employment in a private or parochial school or college where the contract of hire is on an annual salary basis.

(5) Employment as a short-time or casual laborer for a period of less than four weeks, provided that where such short-time or casual labor is employed during four successive weeks or more, it shall be deemed an employment within the scope of this act."

Section 1 defines "benefits" and "wages" and further provides:

"g. 'Average weekly wages' means the weekly earnings that an employe subject to this act would average if he were employed full time, i. e., the full number of scheduled or customary working hours per week in the employment or employments in which he is or was engaged prior to applying for benefits under this act. The commission shall make suitable rules for the purpose of calculating the average wages on the basis of which benefits under the act are to be paid, and for this purpose may average full time earnings over a period of three months or more in order to include reasonable proportions of busy and slack weeks, and may adopt such method or methods of calculating the said average weekly wages as may be suitable and reasonable under this act.

h. 'Payroll' means and shall include all wages, salaries and remuneration paid to employees subject to this act.

i. 'Total unemployment,' except where the context clearly shows otherwise, means the condition caused by the inability of an employee, who is capable of and available for employment, to obtain work in his usual employment, or in another employment for which he is reasonably fitted, and whose lack of employment causes total loss of wages.

j. 'Partial unemployment' means part-time employment resulting in loss of wages amounting to forty per cent or more of an employee's average weekly wages."

Section 2 provides for the creation of an unemployment insurance fund to be administered by the State, consisting of premiums paid by employers and employes. The Treasurer of State shall be the custodian of this fund.

Paragraph d prescribes the securities in which the surplus in the fund may be invested.

Section 3 provides that on and after January 1, 1934, the premiums for insurance in the fund shall accrue and become payable by every employer and employe subject to the act. The section further provides:

> "b. Every employer subject to this act shall in the month of January, 1934, and thereafter at such intervals as the commission may determine and require, pay into the fund the amount of premiums fixed by this act, and by the commission as authorized by this act, for the employment or occupation of the employer. Until January 1, 1937, the contributions or premiums regularly payable by every employer into the fund shall be an amount equal to two per cent per annum of his payroll. Thereafter the premium to be paid by each employer shall be determined by the classification, rules and rates made and published by the commission; and every employer shall thereafter pay at regular intervals fixed by the commission such premiums into the fund as may be ascertained to be due from him by applying the rules of the commission; provided that the premium for an employer shall in no case amount to less than one per cent per annum or more than three and one-half per cent per annum of such employer's payroll.
>
> c. For the purpose of establishing the premiums to be paid by employers on and after January 1, 1937, the commission shall investigate, group and classify employments, industries and occupations with respect to the degree of the hazard of unemployment in each, shall determine the risk of unemployment on the basis of the employment record and the fluctuations in the payroll of each employer, and shall fix the rate of premium to be paid by each employer on an actuarial rating at the lowest possible figures consistent with the maintenance of a solvent insurance fund with reasonable reserves and surplus, but within the limitations of maximum and minimum rates of contribution by employers stipulated in section 3b. The commission shall have the power to apply that form of rating system which, in its judgment, is best calculated to merit or individually rate the risk most equitable for each employer, predicated upon the record of employment and the fluctuation in payrolls of such employer, and to encourage the prevention of unemployment; and shall develop fixed and equitable rules controlling the same."

Paragraph d provides for a report by the commission to the legislature upon the advisability of permitting employers to carry their own insurance against unemployment, as in the case of self-insurers under the Workmen's Compensation Act.

Paragraph e provides that every employe subject to the act shall pay into the fund a sum equal to one per cent of all wages received by him in such employment and that the employer shall deduct such amount and pay the same into the fund under such regulations and at such intervals as the commission may determine and require.

Section 4 is important since it provides the conditions under which an employe becomes entitled to benefits. That section reads:

"Every employee who has contributed to the fund the premiums provided for in this act shall be eligible to receive benefits as compensation for loss of wages due to total or partial unemployment, and benefits shall be paid by the commission in the amounts and subject to the conditions stipulated in this act.

a. No employee shall be entitled to any benefits unless he or she (1) has been employed by employers subject to this act and has paid the premiums provided herein for a period of not less than twenty-six weeks within the twelve months preceding the date of the application for benefits, or unless he has been so employed and paid said premiums for a period of forty weeks during the two years preceding date of application;

(2) is capable of and available for employment, and unable to obtain work in his usual employment or any other employment for which he is reasonably fitted including employments not subject to this act, or if suffering loss of wages by reason of partial unemployment amounting to more than forty per cent of his average weekly wages;

(3) has registered at an employment office or other registration place maintained or designated by the commission, or has otherwise notified the commission of his unemployment in accordance with its rules respecting notification.

b. No benefits shall be payable to any unemployed employee who has lost his employment by reason of a strike or lockout in the establishment in which he was employed, as long as such strike or lockout continues; or whose unemployment has been directly caused by an act of God; or who becomes unemployed by reason of commitment to any penal institution; or who fails or refuses to report to the commission or its designated agencies from time to time as required by its rules; or who refuses to accept an offer of employment for which he is reasonably fitted. Provided, however, that no unemployed employee otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept employment if

(1) acceptance of such employment would deny to such employee his right to refrain from joining a labor organization or his right to retain membership in and observe the lawful rules of a labor organization; or

(2) there is a strike or lockout in the establishment in which the employment is offered; or

(3) the employment is at an unreasonable distance from his residence, having regard to the character of the work he has been accustomed to do, and travel to the place of employment involves expense substantially greater than that required for his former employment, unless the expense be provided for; or

(4) The wages, hours and conditions offered are substantially less favorable to the employee than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions.

c. (1) An employee suffering total unemployment shall be eligible for benefits for unemployment occurring subsequent to a waiting period of three weeks and no benefits shall be or become payable during this required waiting period; but no more than three such weeks of waiting period shall be required of any employee in any twelve months in order to establish his eligibility for total unemployment benefits under this act; except that employees who have been discharged for just cause and those

who have voluntarily quit their employment without just cause, and thereafter are unable to secure other employment, shall have a waiting period of six weeks during which no benefits shall be payable.

(2) An employee suffering partial unemployment shall be eligible for benefits for each week of such partial unemployment after a waiting period such that the loss of wages in such partial unemployment is equal to three weeks of total unemployment. No benefits shall be or become payable for this required waiting period, but no more than a total of three weeks in any twelve months shall be required as a waiting period for any such employee.

(3) The waiting period both for total and for partial unemployment shall commence on the day the employee registers as unemployed at an employment office or other place of registration maintained or designated by the commission or on the day that he has otherwise given notice of his unemployment in accordance with the rules of the commission.

d. Benefits shall be payable on account of each week of total unemployment after the specified waiting period at the rate of fifty per cent of the employee's average weekly wages as shown by premiums paid by him, but not to exceed a maximum of fifteen dollars per week. In cases of partial unemployment where by reason of part-time employment there is loss of wages amounting to more than forty per cent of weekly wages, benefits shall be paid as in cases of total unemployment, except that the amount of such benefits shall be as follows:

Where part time employment results in loss of weekly wages in excess of 40% but less than 55%, benefits shall be 10% of average weekly wages; 55% but less than 70%, benefits shall be 20% of average weekly wages; 70% but less than 85%, benefits shall be 30% of average weekly wages; 85% or more, benefits shall be 40% of average weekly wages.

In cases where average weekly wages amount to more than $30 per week, these percentages shall be calculated on the basis of $30.

e. The total benefits to which an employee shall be entitled in any consecutive twelve months whether for partial unemployment or total unemployment, or partial and total unemployment, shall not exceed sixteen times his benefit for one week of total unemployment. In the event of general and extended unemployment such that the reserve of the fund is reduced below a proper actuarial basis, the commission shall have authority to declare an emergency, and thereupon to borrow funds from whatever source obtainable on the security of the resources of the fund, and/or to adjust the benefits; either in their weekly amount or in the length of time for which they should be paid, until such time as the fund is restored to a sound and actuarial basis.

f. When an employee eligible to benefits under this act becomes employed in an employment or by an employer not subject to this act, his right to benefits shall be suspended. If such employee becomes totally unemployed within six months of his employment by his last previous employer subject to this act, his right to benefits shall recommence upon registration and expiration of the waiting period. If an employee undertakes such uninsured employment during the three weeks waiting period it shall not affect the running of such period if such employment continues for two weeks or less.

g. No agreement by an employee to waive his right to benefits

under this act shall be valid; nor shall benefits under this act be assigned, released or commuted, and such benefits shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

h. Whenever in any employment it is customary to operate only during a regularly recurring period or periods of less than one year in length, then the rights to benefits shall apply only to the longest seasonal period or periods which the best practice of such industry or class of employment will reasonably permit. The commission shall ascertain and determine, or redetermine after investigation and due notice, such seasonal period or periods for each such seasonable employment. Until such determination by the commission, no employment shall be deemed seasonal. When the commission has determined such seasonal period or periods, it shall also fix the proportionate number of weeks of employment and payment of premiums required to qualify for benefits in place of the 26 weeks stipulated in section 4a-1, and the proportionate number of weeks for which benefits may be paid.

i. Any employer desirous of employing additional employees for short-time work only, and without liability for premiums and benefits for such employees, may secure permission from the commission for such employment, which shall thereupon be deemed casual employment and exempted from the provisions of this act. The commission shall make and publish rules governing the exemption of such casual employment. But no such employment shall be exempted from the provisions of this act by virtue of this section, unless express permission shall have been granted by the commission, nor in any case if the employment shall continue for a period of more than four weeks."

Section 5e provides:

"Every employee whether totally or partially unemployed, in order to qualify for benefits under this act, must give notice of his unemployment by registering at a public employment office maintained by the commission, or in such other manner and within such times as the rules and regulations of the commission may prescribe. Thereafter he shall give notice of the continuance of his unemployment as frequently and in such manner as the commission may prescribe."

The proposed statute specifically defines those who shall pay into the fund created, specifies the employes entitled to benefits thereunder and lays down the conditions unde which such benefits shall be paid. Only regular employes who are unable to obtain employment elsewhere are entitled to benefits. Causes of unemployment having no relation to economic conditions are enumerated, and cases of unemployment attributable to such causes are excluded from the benefits of the act. A short waiting period is provided before benefits shall be paid. This period does not begin until the employe registers as unemployed at an employment office maintained by the unemployment commission. The rates to be paid employes for total and partial unemployment are specified. The rights to benefits in various seasonal occupations are to be fixed by the commission in accordance with the pertinent provisions of the act. Casual employment of less than four weeks is excluded from the operation of the statute.

These provisions are designed to limit the scope of the act to unemployment from economic causes. Some of these aim at the prevention of fraudulent and spurious claims. The provisions appear reasonably adapted to securing benefits for persons regularly employed in industry who are thrown out of work through no fault of their own at a time when they cannot secure other employment either by their own efforts or through the employment offices to be established under the act. Thus it appears that in its scope of operation, the proposed act is confined to its proper purpose.

The question of procedure remains to be considered. If the operation of the proposed statute is not restricted to its proper purpose by procedural safeguards. the law is invalid as violating what is sometimes termed procedural due process. If proper procedure is not provided, the act will not only violate the Fourteenth Amendment but will also be invalid under Article I, Section 16 of the Ohio Constitution which guarantees "due course of law." Daniel Webster in his argument in the Dartmouth College Case (4 Wheat. 518), declared that by due process of law, was meant "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The provisions of the proposed law are to be carried out through an administrative tribunal called the Unemployment Insurance Commission. Under section 5 of the act, three members appointed by the Governor compose this body. Not more than one of such appointees shall be a person who can be classed as a representative of employers, not more than one as a representative of employes, and not more than two as members of the same political party.

Section 5b empowers the commission:

"* * *

(1) To adopt and enforce reasonable rules and regulations relative to the exercise of its powers and authority, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings; to prescribe the time, place and manner of making claims for benefits under this act, the kind and character of notices required thereunder, the procedure of investigating, hearing and deciding claims, the nature and extent of the proofs and evidence and the method of taking and furnishing the same to establish the right to benefits, and the method and time within which adjudications and awards shall be made; to adopt rules and regulations with respect to the collection, maintenance and disbursements of the unemployment insurance funds; and to amend and modify any of its rules and regulations from time to time in such respects as it may find necessary or desirable;

(2) To employ secretaries, deputies, accountants, superintendents of employment districts and offices, clerks, stenographers, and other assistants as may be required for the administration of the provisions of this act, and to determine their salaries and duties.

(3) To create such employment districts and to establish, maintain and operate such free employment offices and branch offices as may be necessary to provide for the registration of unemployed persons, for placing them in available employments, and for the proper administration of this act;

(4) To appoint advisors or advisory employment committees, by local districts, or by industries or for the whole state, who shall without compensation but with reimbursements of necessary expenses assist the commission in the execution of its duties;

(5) To require all employers, including employers not otherwise subject to the provisions of this act, to furnish to it from time to time information concerning the amount of wages paid, the number of employees employed, the regularity of their employment, the number of employees hired, laid off and discharged from time to time and the reasons therefor, and the numbers that quit voluntarily; and to require such employers to give other and further information respecting any other facts required for the proper administration of this act;

(6) To classify generally industries, businesses, occupations and employers individually, as to the hazard of employment in each business, industry, occupation or employment, and as to the particular hazard of each employer, having special reference to the conditions of regularity and irregularity of the employment provided by such employer and of the fluctuations in payrolls of such employer.

(7) To determine, within the limits provided by this act, the premium rates upon employers subject to this act; and to provide for the levy and collection from all employees and employers subject to this act, of the premiums required for the maintenance of the unemployment insurance fund;

(8) To receive, hear, and decide claims for unemployment benefits, and to provide for the payment of such claims as are allowed;

(9) To promote the regularization of employment and the prevention of unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate and recommend and advise and assist in the establishment and operation, by municipalities, counties, school districts and the state, of prosperity reserves of public works to be prosecuted in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the state in any other way that may be feasible, and to take all appropriate steps within its means to reduce and prevent unemployment; and to these ends to carry on and publish the results of any investigation and research which it deems relevant.

* * *"

Paragraph c of this section provides for publication by the commission of classifications, rates, rules and regulations. The subsequent paragraphs give the commission power to obtain the necessary information from employers.

Section 6a provides:

"Claims for benefits shall be filed with the superintendent of the public employment office for the district in which the claimant is or was last employed, or with a deputy of the commission designated for the purpose. Such claims shall be in such form and shall be filed within such time and in such manner as the rules of the commission shall prescribe; and said rules shall also prescribe the form and manner of allowing or disallowing claims for benefits in the first instance, and the method and manner of serving notice of disputed or contested claims, of hearing and deciding the same, and of appealing and deciding appeals on all claims that are disputed or contested. The commission may provide for the hearing of disputed or contested claims by local boards consisting of one employer or representative of employers, one employee or

representative of employees, and one person who is neither an employer nor an employee nor a representative of either. The members of such boards shall be appointed by the commission, and the commission shall make rules for the proceedings before such boards and for review or rehearing by the commission or by any commissioner or deputy authorized to hear or review claims under rules adopted by the commission as provided in this act."

The first paragraph of section 7 imposes a fine for failure to comply with any lawful order of the commission or decree of any court made in connection with provisions of the act.

Paragraph a reads:

"a (1) If the commission finds that any person, firm, corporation or association is, or has been at any time after January 1, 1934, an employer subject to the provisions of this act, and has failed to comply with the provisions of this act, it shall determine the period during which he or it was such an employer, which finding and determination shall for all purposes of this act be prima facie evidence thereof. The commission shall forthwith give notice of said action to the employer who shall immediately thereafter furnish the commission with a payroll covering the period included in said finding, and shall forthwith pay into the fund the amount of premium determined and fixed by the commission.

(2) If said employer fails, neglects or refuses to furnish such payroll and pay the premium for such period within ten days after receiving such notice, the commission shall then determine the amount of premium due from said employer for the period the commission found him or it to be subject to this act, and shall notify said employer of the amount thereof and shall order the same paid into said fund. *If said amount is not paid within ten days after receiving notice, the commission shall certify the same to the attorney general, who shall forthwith institute a civil action against such employer in the name of the state for the collection of such premium.* In such action it shall be sufficient for the plaintiff to set forth a copy of the finding of the commission relative to such employer as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding of the commission a specified sum which plaintiff claims with interest. A certified copy of such finding relative to such employer shall be attached to the petition and shall constitute prima facie evidence of the truth of the facts therein contained. The answer or demurrer to such petition shall be filed within ten days, the reply or demurrer to the answer within twenty days, and the demurrer to the reply within thirty days after the return day of the summons or service by publication. All motions and demurrers shall be submitted to the court within ten days after the same are filed. As soon as the issues are made up in any such case, it shall be placed at the head of the trial docket and shall be first in order of trial.

(3) Unless said employer shall, within the ten days last aforesaid, execute a bond to the state, in double the amount so found and ordered paid by the commission, with sureties to the approval of the commission, conditioned that he or it shall pay any judgment and cost rendered against him or it for said premium, the court at the time of filing of the petition,

and without notice, shall appoint a receiver for the property and business of such employer, in this state, with all the powers of receivers in other cases, who shall take charge of all said property and assets of the defendant and administer the same under the orders of the court.

(4) *If upon final hearing of said cause it is found and determined that the defendant is subject to the provisions of this act, the court shall render judgment against said defendant for the amount of premium, provided to be paid by such employer for such period under the provisions of this act,* with interest from the date of the determination of said amount by the commission, together with costs, which judgment shall be given the same preference as is now or may hereafter be allowed by law on judgments rendered for claims for taxes.

(5) *If any employer who has complied with this act shall default in any payment required to be made by him or it to the fund, for a period of ten days after notice that such payment is due, the same proceedings may be had as in the case of an employer against whom the commission has made a finding as hereinbefore provided.*

(6) If the defendant is a non-resident of this state or a foreign corporation doing business in this state, service of summons may be made upon any agent, representative or foreman of said defendant, wherever found in the state, or service may be made in any other manner designated by statute." (Italics the writer's.)

Section 5b gives the commission power to make rules and regulations relative to the exercise of its powers and authority. It has the duty to prescribe the time, place and manner of making claims and the kind and character of rules required thereunder and the duty to prescribe the procedure for investigating, hearing and deciding claims. It shall establish the method and time within which awards shall be made. It is also given the power to adopt rules and regulations with respect to the collection, maintenance and disbursement of the unemployment insurance funds.

The duty is placed upon the commission to classify industries, businesses, occupations and employers individually as to the hazard of unemployment. Certain conditions are specified in section 5b(6) which the commission must observe in making this classification. The commission must then determine within the limits of the act the premium rates of employers subject to its provisions. It is the commission's duty to receive, hear and decide claims for unemployment benefits allowable under the act and to provide for the payment of such claims as are allowed.

While the rule-making powers of the commission appear to be broad, and although the commission has wide discretion in classifying employers, fixing rates and determining the right to and the allowance of awards, the act does not appear to be an invalid delegation of legislative power.

It is stated in Cooley's Constitutional Limitations (Eighth Edition) at pages 228-230:

"The maxim that power conferred upon the legislature to make laws cannot be delegated to any other authority does not preclude the legislature from delegating any power not legislative which it may itself rightfully exercise. It may confer an authority in relation to the execution of a law which may involve discretion, but such authority must be exercised under

and in pursuance of the law. The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

The policy of the law is declared in the act. Certain specified conditions must then be taken into account in classifying employers and fixing rates. Conditions necessary for an employe to become entitled to benefits are set forth. Investigation and hearing must precede the allowance of claims. It thus appears that the legislature has formulated the plan and laid down the general principles, leaving to the administrative board only the work of filling in details. Such a law does not provide for an invalid delegation of legislative power. In *Fassig* vs. *State ex rel.,* 95 O. S. 232, 245, the court quoted with approval from the opinion of *Hunter* vs. *Colfax Consol. Coal Co.,* 154 N. W. 1037, 1060 (Iowa), involving a workmen's compensation act, as follows:

"According to Sabre's Case, 86 Vt. 347, 85 Atl. 694, Ann. Cas. 1915 C, 1269, such acts confer the power upon investigation to apply the general provisions of law to particular circumstances and situations, and may validly leave much of detail to the discretion of a commission; that though they may, in a sense, clothe an administrative body with quasi judicial functions in some respects, this is authorized by the police power, and confers power merely to determine facts upon which existing law shall operate, which is a conferring of auxiliary or subordinate legislative powers. The act takes away the cause of action on the one hand, and the ground of defense on the other, and merges both in a statutory indemnity, fixed and certain."

It might be contended that this act infringes the judicial power of the State by conferring upon an administrative board judicial functions. This argument was made as to section 27 of the Workmen's Compensation Act (section 1465-74, General Code) and rejected by the Supreme Court of Ohio in *Fassig* vs. *State ex rel.,* supra. The Court said at pages 243-245:

"From what has been already shown it will be seen that the proceedings before the commission, and its order, are merely administrative, and simply lay the foundation for a suit in a court of competent jurisdiction in which the employer has due process and all rights preserved.

In *State, ex rel. Yaple,* vs. *Creamer, Treas.,* 85 Ohio St., 349, at page 400, the following was said as to the same contention:

'Of course if the board is a court there is an end of the whole matter. The statute would be unconstitutional. For if the board is a court it has not been created in accordance with the manner provided by the constitution.

'We do not consider the board of awards a court, or invested with judicial power within the meaning of the constitution.

'It is created by the act purely as an administrative agency to bring into being and administer the insurance fund, and the fact that it is

empowered to classify persons who come under the law and to ascertain facts as to the application of the fund, does not vest it with judicial power within the constitutional sense.

'Under our system the executive department of the government has many boards to assist in the administration of its affairs.

'In *State, ex rel.,* vs. *Hawkins,* 44 Ohio St., 98, it is said: "What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power." The court then shows that many boards hear and determine questions affecting private as well as public rights, and quotes with approval, from *State, ex rel,* vs. *Harmon,* 31 Ohio St., 250: "The authority to ascertain facts and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary." ' "

The difference between the powers of the Industrial Commission and the Unemployment Insurance Commission appear insufficient to render this language inapplicable to the proposed law.

The commission, such as the one created by this act, according to the statement above quoted from Sabre's Case, exerts "subordinate legislative powers." An administrative body cannot by orders, legislative in character, deprive persons of property without due process of law.

It has been held upon the issue whether rates fixed by a public service commission were confiscatory that "* * * the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment." *Ohio Valley Water Co.* vs. *Ben Avon Borough,* 253 U. S. 287. And, see *Crowell* vs. *Benson,* 285 U. S. 22; 76 L. Ed., 598.

In *Stanton* vs. *The Tax Commission,* 114 O. S. 658, 675, the court said:

> "That parties are entitled to a judicial inquiry into any controversy affecting rights of person or property has been declared by the United States Supreme Court in *Ohio Utilities Co.* vs. *Public Util. Comm. of Ohio,* 267 U. S., 359, 45 S. Ct. 259, 69 L. Ed., 656, and *Ohio Valley Water Co.* vs. *Ben Avon Borough,* 253 U. S., 287, 40 S. Ct., 527, 64 L. Ed., 908."

The proposed act makes provision for the required judicial review of all orders of the administrative body. If an employer who has not complied with the act fails to pay premiums found due by the commission, within ten days after receiving notice, the Attorney General shall institute a civil action in the name of the State for the collection of such premiums. There will be a trial *de novo* of the issues raised and the employer may make any valid defense. The same proceedings are provided in case an employer who has complied with the act defaults in any payment required to be made by him to the fund. Section 7b provides:

> *"The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon in each claim shall be final. Provided, however, that any employer or*

employee aggrieved by an order or decision of the commission may, within fifteen days therefrom, appeal such order or decision to the court of common pleas of the county wherein said appellant is resident or was last employed; and said appeal shall be heard upon a transcript of the proceedings before the commission and said order shall not be modified or reversed unless said court shall find, upon consideration of the record, that it was unlawful or unreasonable. Either party shall have the right to prosecute error from the court of common pleas as in other civil cases." (Italics the writer's.)

It thus appears that the act provides for judicial review of all orders of the commission.

In view of the foregoing, I am of the opinion that:

1. House Bill No. 1, relative to aid to aged persons does not provide for the use of public funds for a private purpose, and therefore is not unconstitutional within the principle of *Auditor of Lucas County* vs. *State,* 75 O. S. 114.

2. House Bill No. 172, if enacted, will not be violative of the Fourteenth Amendment within the principle of *Adkins* vs. *Children's Hospital,* 261 U. S. 525.

3. A law which has as its purpose the shifting upon industry of the financial burden of employes caused by unemployment resulting from economic conditions is not so arbitrary, capricious and clearly unreasonable as to violate the Fourteenth Amendment.

4. Since the scope of the unemployment insurance bill is by substantive provisions restricted to its avowed purpose, i. e., to provide benefits for persons who become unemployed by reason of economic conditions, the proposed act does not so restrict freedom of contract as to deprive persons of property without due process of law.

5. Since the proposed unemployment insurance act is restricted to its proper scope by procedural safeguards, i. e., administration by a commission whose orders are subject to judicial review, it provides the notice, hearing and day in court necessary to due process and due course of law.

Respectfully,
JOHN W. BRICKER,
Attorney General.

441.

PARTITION FENCE—LOCATED IN MUNICIPALITY—COST OF ERECTING SAME NOT CHARGEABLE TO THE LANDOWNERS OF THE TOWNSHIP.

SYLLABUS:

The cost of erecting a partition fence located within the limits of an incorporated village may not be assessed against the land owners, nor is it payable by the township trustees.

COLUMBUS, OHIO, April 4, 1933.

HON. HOWARD S. LUTZ, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion which reads as follows: