

CASES

DECIDED IN

THE COURT OF CLAIMS

OF THE

STATE OF ILLINOIS

1916 TERM
SPRINGFIELD, ILLINOIS

[Printed by authority of the State of Illinois.]



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PREFACE

The opinions of the Court herein reported, are published by authority of the provisions of section 9 of an Act entitled, "An Act to create the Court of Claims and to prescribe its power and duties," approved June 25, 1917, in force July 1, 1917.

LOUIS L. EMMERSON,
Secretary of State
and ex-officio Secretary Court of Claims.

OFFICERS OF THE COURT

1916 TERM

JUDGES:

MARTIN A. BRENNAN, *Presiding Judge*, Bloomington, Ill.

BENJAMIN P. ALSCHULER, *Judge*, Aurora, Ill.

WILLIAM E. TRAUTMAN, *Judge*, East St. Louis, Ill.

P. J. LUCEY, *Attorney General*.

JAMES J. BRADY, *Auditor of Public Accounts and
ex-officio Clerk*.

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

PLEADINGS.

1. Causes shall be commenced by a verified declaration or statement filed in duplicate with the clerk of the Court on or before the first day of May next preceding a session of the Court. The clerk will note thereon the day of filing and will transmit the duplicate to the Attorney General.

2. Such declaration shall be printed or typewritten and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS.

A. B.

v.

STATE OF ILLINOIS.

3. Such declaration shall state concisely the facts upon which the claim is based, setting forth, time, place, amount claimed, and all other facts necessary to a full understanding upon a contract or other instrument in writing, a copy of such contract or instrument shall be filed with the declaration, together with the name and present address of the officer or agent with whom such contract or instrument was made.

4. The claimant shall state whether or not his claim has been presented to any State department or State officer, or to any person, corporation or tribunal, and if it has been presented he shall further state when, to whom, and what action was taken thereon; and he shall further state whether or not he has received any payment on account of such claim. The claimant shall also state whether or not any other person has any interest in his claim, and if any other person has such interest the claim shall state the name of the person, his interest, and how and when acquired. A bill of particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the declaration.

5. No declaration shall be filed by the clerk unless verified under oath by the claimant, or some other person having knowledge of the facts.

6. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the declaration.

7. Pleadings and practice at common law shall be followed where the same are practicable.

8. All motions shall be in writing and shall specifically state the grounds thereof.

9. The State shall plead within thirty days after the filing of the declaration unless time for pleading be extended: *Provided*, that if the State shall fail to so plead a general traverse of the declaration shall be considered as filed.

10. Counter-claims or set-offs on the part of the State shall be filed with the clerk within the time fixed for pleading by the State. The claimant shall reply to the same within thirty days thereafter, unless time for pleading be extended.

STATUTE OF LIMITATIONS.

11. If it appears on the face of a declaration that the claim is barred by the statute of limitations the same may be dismissed.

EVIDENCE.

12. Upon the filing of a declaration the parties may take evidence as such time and place and before such notary public or other officer as shall be agreed upon between them. If they are unable to agree, either party may, upon notice to the other, submit the matter to any judge of this Court, who shall designate the time and place and the officer before whom the testimony shall be taken, and shall transmit the order to the clerk, who shall thereupon enter the same of record as an order of the Court and shall issue a *dedimus* to such officer.

13. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken, and upon like notice. All evidence for the claimant shall be filed with the clerk on or before the first day of August prior to the session of the Court in October, and all evidence for the defendant shall be filed on or before such sessions of the Court.

14. All costs and expenses of taking evidence on behalf of the claimant shall be paid by the claimant, and the costs and expenses of taking evidence on behalf of the State shall be paid by the State.

15. If the claimant fails to file the evidence in his behalf as required by statute the Court may, in its discretion, fix a further time within which the same shall be filed and if not filed within such further time the cause may be dismissed. Upon motion of the Attorney General the Court may, in its discretion, extend the time within which evidence on behalf of the State shall be filed.

16. In case a demurrer to a declaration is overruled, the claimant shall have twenty days within which to file his evidence, and the State shall have ten days thereafter within which to file its evidence. Thereupon the claimant shall have fifteen days within which to file his abstracts and briefs and the State shall have fifteen days thereafter within which to file its abstracts and briefs.

17. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be pre-

judged by the failure of the State to file evidence in its behalf in apt time, but a hearing shall be had upon the evidence filed by the claimant, unless for good cause shown, additional time to file evidence be granted to the State.

ABSTRACTS AND BRIEFS.

18. Prior to the hearing upon a claim each party shall file with the clerk four printed or typewritten abstracts of the evidence taken on behalf of such party, together with proof of service of a copy on the opposite party.

19. Each party shall file with the clerk four printed or typewritten briefs setting forth the points of law upon which reliance is had, and reference to the authorities sustaining the same, together with proof of service of a copy on the opposite party. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs.

20. Abstracts and briefs shall be filed by the claimant on or before the third Monday of October and by the State fifteen days thereafter. Thereupon the claimant shall have ten days within which to file a reply brief.

21. If a claimant shall fail to file either abstracts or briefs within the time prescribed by the rules the Court may enter a rule upon him to show cause by a day certain why his cause should not be dismissed. Upon the claimant's failure to comply with such rule, the cause may be dismissed, or the Court may, in its discretion, either extend the time for filing abstracts or briefs, or pass or continue the cause for the term, or determine the same upon the evidence before it: *Provided, however,* that the State may within ten days after the filing and service of briefs by the claimant file its abstracts and briefs.

22. If the claimant has filed abstracts and briefs, as herein provided, in apt time, and has otherwise complied with the rules he shall not be prejudiced by the failure of the State to file abstracts or briefs and the cause shall be heard upon the evidence, abstracts and briefs on file, unless the time be extended for the filing of abstracts or briefs by the State.

23. Where by these rules it is provided that the time may be extended for the filing of pleadings, abstracts or briefs, either party, upon notice to the other, may make an application to any judge of this Court, who may make an order thereon, transmitting such order to the clerk, and the clerk thereupon enter the same of record as an order of the Court.

RECORDS AND CALENDAR.

24. The clerk shall record all orders of the Court, including the final disposition of causes. He shall keep a docket in which he shall enter all claims filed, together with their numbers and dates of filing, the names of claimants, of attorneys of record and their ad-

dresses, and he shall, as papers are filed, enter the same upon such docket. At least ten days prior to each session of the Court he shall prepare a calendar of the causes to be disposed of at such session.

ORAL ARGUMENTS.

25. On the hearing of any claim, oral arguments will be heard upon the same, the Court limiting the time thereof in each case, as shall be deemed just.

REFERENCE BY GENERAL ASSEMBLY.

26. Where any claim has been referred to the Court by either House of the General Assembly any person interested therein may file a verified declaration at any time prior to the next annual session of the Court. If no such person files a declaration as aforesaid the Court may determine the cause upon whatever evidence it may have before it, and if there is no evidence the cause may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

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OPINIONS OF THE COURT

TINGLEY DRILLING COMPANY

v.

STATE OF ILLINOIS.

Opinion filed September 17, 1916.

1. LICENSE FEE—no refund of, when. Where a license fee to incorporate under the laws of this State is paid to the Secretary of State and the license issued, no refund of such fee will be made even though no further steps to incorporate be taken.

2. SAME—retention by State. The retention of a license fee by the Secretary of State is in no way conditional upon the commissioners taking further steps.

Q. D. Bailey, for Claimant.

P. J. Lucey, Attorney General, for State.

The statement of claims sets forth that W. G. Tingley, A. D. Bartholomew, W. S. Thompson, Q. D. Bailey and D. B. Carrithers, as commissioners, applied to the Secretary of State for a license to open books and accept subscriptions to the capital stock of a corporation to be known as The Tingley Drilling Company; that the commissioners paid to the Secretary of State a fee of fifty dollars, and that a license was issued to said commissioners, but that no subscriptions were received to said stock.

This claim must be rejected for the reason set forth in the case of *William McKinley, R. W. Hood, and J. R. Ebersole v. State of Illinois*, Vol. 2, Ct. of Cl. Rep. p. 125; the facts being identical with those considered therein.

HERMAN WELLER AND JACOB E. KLICK, TESTAMENTARY TRUSTEES OF
THE ESTATE OF MINA LORENZ

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

1. INHERITANCE TAX—*refund of when.* Section 10 of the inheritance tax law provides that when an inheritance tax has been paid erroneously it shall be lawful to refund the amount so paid.

2. SAME—*claim for refund, made when.* A claim for the refund of inheritance tax erroneously paid must be made within two years from the date of payment, or no refund will be made.

3. STATUTE OF LIMITATIONS—*affects what—is not operative when.* The Statute of Limitations affects only the remedy, and does not commence to run until the parties to be barred have a right to invoke the aid of the court to enforce the remedy.

McCormick and Murphy, for Claimant.

P. J. Lucey, Attorney General, for State.

On January 4, 1898, George Weller conveyed a life estate in certain land in Logan County, Illinois, to Henry Lorenz by deed, with remainder in fee simple to the child or children of Katharine Lorenz, the daughter of grantor and the wife of grantee, the grantor reserving unto himself, however, the possession, use and occupation of the real estate during his own life. This deed was recorded in the Recorder's office of Logan County on January 26, 1898. On March 30, 1910, the said George Weller died testate leaving no children or descendants except Mina Lorenz, the daughter of Katharine Lorenz. The will of said decedent devised a life estate in the same premises previously deeded to the said Mina Lorenz and Lillie Lorenz and claimants were appointed in said will as Trustees of the estate of the said Mina Lorenz and the said Lillie Lorenz. Lillie Lorenz, however, died before the testator, leaving only the said Mina Lorenz as sole devisee.

An inheritance tax appraiser was appointed by the County Judge of Logan County on June 20, 1910, an appraisement was made and it was found that the estate of Mina Lorenz under the aforesaid clause of the will was subject to an inheritance tax of \$593.92, and the County Judge ordered said sum of money paid to the County Treasurer.

The said Mina Lorenz was represented by guardian *ad litem* on the inheritance tax hearing. On September 22, 1910, claimants paid to the County Treasurer of Logan County the sum of \$564.22, the same being the amount assessed less five per cent discount for payment within six months. This money was paid over by the County Treasurer to the State Treasurer.

On June 10, 1912, claimants filed report with the Circuit Court of Logan County, and Mina Lorenz filed objections, claiming that \$188.09 of the tax paid had been erroneously paid, in that it was an assessment against the property taken by her under the terms of the aforesaid deed. She denied that her title was a life estate under the will, and asserted that she had a fee simple estate under the provisions of the deed, and consequently said land was not subject to an inheritance tax. The Circuit Court overruled the objections and approved the report of the Trustees. Mina Lorenz appealed from the judgment of the Circuit Court to the Supreme Court, and at the April term, 1915, the Supreme Court reversed the Circuit Court; and found that \$188.09 of the inheritance tax paid by the testamentary trustees had been erroneously assessed against the estate of Mina Lorenz, and erroneously paid to the County Treasurer. The case in the Supreme Court is reported in Volume 267 at page 230. On May 15, 1915, claimants revised their report in accordance with the order of the Supreme Court, eliminating the charge of \$188.09 against the estate of Mina Lorenz.

Afterward, claimants made application to the State Treasurer for a refund of this amount, but the Treasurer refused payment. It is apparent from the evidence that the claimants were advised that the title to the property in question was taken by the said Mina Lorenz under the will, and not under the deed. The testimony shows that claimant, Herman Weller, was so advised by counsel. Claimant, Klick, knew nothing of the existence of the deed, except that claimant Weller had told him of it and that claimant, Weller, had further taken advice of counsel on the proposition, and following counsel's advice they paid the inheritance tax. There is no question about the good faith of claimants in this matter, and there is no question but that inheritance tax in the amount of \$188.09 was paid in error.

The Attorney General had not filed any pleading in this case, nor has he filed any argument in opposition to the claim.

Section 10 of the inheritance tax law provides that when an inheritance tax shall be paid erroneously, it shall be lawful to refund, provided that application for re-payment be made within two years from the date of payment. Counsel for claimants argue that the statute of limitations has not been pleaded by the State, and that even if pleaded it could not be interposed as a bar to claimants' right of action, for the reason that the statute could not commence to until the date of the final determination of the subject matter of the previous suit by the Supreme Court in 1915.

Rule 11 of the Rules of the Court of Claims, adopted and in effect December 9, 1913, provides: "If it appears on the face of the declaration that the claim is barred by the statute of limitations, the same may be dismissed." It is a rule of statutory construction that a statute of limitations shall be strictly construed, and it has been further said as in *Stanninger v. Taber*, 103 Ill. App. 183, "The statute of limitations affects only the remedy, and does not commence to run until the parties to be barred have a right to invoke the aid of the court to enforce his remedy."

The Supreme Court found in 1915, that this tax was erroneously paid. Previous to that time claimants were of the belief that it had been properly paid, and in this belief they were supported by the advice of their counsel as well as the findings of the Circuit Court. After the entering of the judgment of the Circuit Court, wherein it was found that the tax had been properly paid, claimants certainly could not have asked for a refund and it was not until the Supreme Court in April of 1915 found that the tax had been erroneously paid, that they could possibly have filed this claim.

This Court does not believe that it was the intention of the Legislature to make the limitation clause of the tenth section of the inheritance tax law applicable to a case such as the one before us. While this is not a case that would properly arise in a Court of Equity, it is one which will appeal to a sense of justice, and we believe that claimants are entitled to have refunded to them the amount of their claim.

It is accordingly the judgment of this Court that claimants be awarded the sum of one hundred eighty-eight and 09/100 (\$188.09) dollars.

GEORGE MARSH PULVER

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

1. CONTINGENCY—*happening of may justify refund, when.* If, by the happening of a contingency an interest in an estate is liable to a lesser tax than though the contingency had not happened, then upon the happening of such contingency, a refund should be made, in case the tax has been paid.

2. INTEREST—*when allowed.* Where a tax has been fixed and the same paid and the happening of an event changes the situation of the parties so that a lesser tax would be due, interest will be allowed on the excess paid from date of payment.

Herrick, Allen and Martin, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant was a legatee under the will of Lulu M. Pulver, deceased. The will created a trust estate conveying certain property to Charles L. Allen in trust for the benefit for claimant and Irving Loveridge Pulver until December 8, 1914.

On appraisal for inheritance tax, the value of the interest of claimant was fixed at \$2,396.22 and no tax was assessed, and the value of the estate of the trustee was fixed at \$48,135.34. This valuation was fixed on the hypothesis that one or the other of the claimants would die before the date of distribution and resulted in allowing to the claimant and his brother together an exemption of \$20,000.00, plus the value of the interest as found, \$2,396.22, or \$22,396.22, and the tax was fixed at \$306.35. Claimant and said Irving Loveridge Pulver both lived until December 8, 1914, and under section 25 of the inheritance tax law are entitled to a refund. Each is entitled to a refund of one-half the difference between the effective exemption of \$22,396.22 and \$40,000.00 which would be the exemption that both together would have. This difference amounts to \$17,603.78, and the one-half to which each is entitled is \$8,801.89. The tax at one per cent on the interest of each is \$88.02, and the tax having been paid within the six months, and deducting a five per cent discount equally, the amount that each should have refunded is \$83.62 plus interest from September 30, 1912, the date of payment.

It is accordingly the judgment of this Court that claimant be awarded the sum of \$83.02, together with interest at the rate of 3% from September 30, 1912.

ALICE P. TAPLEY, EXECUTRIX OF THE LAST WILL OF ANNA S. TAPLEY,
DECEASED

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

INHERITANCE TAX—when refund will be awarded. In this claim the tax as fixed by the county court was paid. Later, the order fixing the tax was set aside and a lesser tax assessed. Held, that claimant is entitled to an award.

Harold V. Amberg, for Claimant.

P. J. Lucey, Attorney General, for State.

This is the claim of Alice P. Tapley, executrix of the estate of Anna T. Tapley, deceased, for return of inheritance tax erroneously paid.

Claimant was a legatee of Anna S. Tapley, deceased, late a resident of Boston, Massachusetts.

Decedent died possessed *inter alia* of 164 shares of stock of The Pullman Company, an Illinois corporation, and other stock, which was subject to a tax under the inheritance tax law.

On hearing had before the appraiser appointed by the County Court of Cook County, the cash value of the property subject to tax was fixed at \$29,360.70, and the tax was fixed at \$1,468.04; this appraisal and tax assessment was confirmed by an order of the County Court on July 15, 1913, and notice thereof sent to trustees appointed under the last will and testament. The tax was levied on the theory that the property was willed to the trustees. Claimant paid the amount of the tax, less five per cent, or \$1,394.64 on July 11, 1913.

Claimant had no notice of the basis upon which the tax was assessed until after she had made payment as aforesaid.

On February 15, 1915, the County Court of Cook County entered an order setting aside its prior order, and ordering a new and corrected appraisement; the appraiser appointed in said order fixed the value of the property subject to assessment at \$9,860.70, and fixed the tax at \$93.61. Claimant demanded return of the amount erroneously paid from the County Treasurer of Cook County, and the State Treasurer, but a refund was refused.

In view of the fact that the County Court by its final judgment in this case has fixed the amount of tax at \$93.61, claimant is entitled to a refund. The amount to which claimant is entitled is the difference between the tax paid, \$1,394.64, and the amount of tax as found, less five per cent, of \$88.93, this amount being \$1,305.71.

It is the judgment of this Court that the claimant be awarded the sum of \$1,305.71.

IRVING LOVERIDGE PULVER

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

Pulver v. State ante followed.

Herrick, Allen and Martin, for Claimant.
P. J. Lucey, Attorney General, for State.

The facts in this case are set out in the case of *George Marsh Pulver v. State of Illinois*.

Claimant is entitled to a refund of \$83.62, together with interest from September 13, 1912.

This Court awards the claimant said sum of \$82.62, together with interest from September 30, 1912, at three per cent per annum.

LEWIS L. CLARKE, MARY C. CASE, E STANLEY CLARKE, JULIETTE P. CLARKE, ALICE C. REDFIELD, CORINNE I. AND DUMONT CLARKE, JR.

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

1. **INHERITANCE TAX**—*facts held sufficient to authorize recovery.* In this claim by reason of the interests of claimants having been determined, the trust created having terminated, awards are accordingly made.

2. **INTEREST**—*when allowed.* The right to recover in this case is based upon section 25 of the inheritance tax law, and since claimants are entitled to recover, interest will be allowed.

Gardner, Carton and Thomson, for Claimants.

P. J. Lucey, Attorney General and Arthur R. Roy, Assistant Attorney General, for State.

Claimants are devisees and legatees of Dumont Clarke, deceased, who died testate on December 26, 1909.

By the decedent's will a trust estate was created, claimants being beneficiaries.

An inheritance tax appraiser was appointed to appraise decedent's estate by the County Court of Cook County, and on February 7, 1911, an order fixing the inheritance tax was made by the County Judge. This order determined the value of decedent's estate to be \$132,273.75, and the tax was levied in equal shares among four of the children under the proviso of section 25 of the inheritance tax law.

The tax was figured on the basis that Corinne I. Clark, Alice C. Redfield, Mary C. Case and Lewis L. Clarke, would each take one-fourth of the property or \$33,068.43. After the deduction of the statutory exemption of \$20,000.00 in each case the taxable cash value was ascertained to be \$13,068.43 and on a tax rate of one per cent each was assessed \$130.68, and the total paid, was therefore \$522.72. The tax was paid after six months had elapsed after the death of the testator and interest was paid on the tax, but as claimants admit, this interest was a penalty for which there could be no recovery.

The trust terminated on December 26, 1914, by its own limitations and thereupon the interest of claimants here became fixed.

Claimants now claim a refund under the proviso of section 25 of the inheritance tax law for the difference between the amount paid and the amount which each should pay, their respective interests having been determined.

On this theory Lewis L. Clarke, Mary C. Case, Corinne I. Clarke, Alice C. Redfield and Dumont Clarke should each have paid one-sixth

of the total tax or \$87.12 and E. Stanley Clarke and Juliette F. Clarke should each have paid one-twelfth or \$43.56.

Lewis L. Clarke, Mary C. Case, Corinne I. Clark, Alice C. Redfield and Dumont Clarke each inherited property of the value of \$22,045.62, the values being based upon the values as appraised by the inheritance tax appraiser, deducting from each of these interests the statutory exemption of \$20,000.00, and leaving value of \$2,045.62, the tax upon which at the rate of one per cent would be \$20.45. The interests of Juliette F. Clarke and E. Stanley Clarke are each worth less than \$20,000.00, hence there would be no tax. The tax which all together should have paid would therefore amount to \$102.25. Claimants therefore are entitled to a return of taxes overpaid as follows: To Lewis L. Clarke, Mary C. Case, Corinne I. Clarke, Alice C. Redfield and Dumont Clarke, Jr., to each the sum of \$66.67, and to E. Stanley Clarke and Juliette F. Clarke, to each the sum of \$43.56, or a total of \$420.47. To this should be added three per cent interest from February 7, 1911.

It is accordingly the judgment of this Court that Lewis L. Clarke, Mary C. Case, Corinne I. Clarke, Alice C. Redfield and Dumont Clarke are each awarded the sum of \$66.67, and E. Stanley Clarke and Juliette F. Clarke, the sum of \$43.56, together with interest thereon at the rate of three per cent per annum from February 7, 1911.

TIMOTHY M. COUGHLAN

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1918.

1. **INHERITANCE TAX**—*exemptions should be deducted in fixing rate.* Where the total estate amounts to \$110,549.55, and there is an exemption of \$20,000.00, the rate of the tax should be \$1.00 on the hundred.

2. **COURT OF CLAIMS**—*not a court of review.* The Court of Claims is not vested with authority to review the action of another court in fixing an inheritance tax.

3. **CONTINGENCIES**—*happening of may authorize refund in certain cases.* Claimant paid a tax on \$110,549.55, but by the happening of a contingency he inherited only \$86,560.35. In such case he is entitled to a refund of the difference between the amount paid and the amount he should have paid.

4. **INTEREST**—*when allowed.* Where a tax has been fixed and the same paid, and the happening of an event changes the situation of the parties so that a lesser tax would be due, interest will be allowed on the excess paid from date of payment.

Arthur B. Wells, for Claimant.

P. J. Lucey, Attorney General, for State.

John Coughlan, the father of claimant, died September 29, 1909. Claimant inherited property to the value of \$86,560.35, and this was increased for the purpose of taxation in the sum of \$23,989.20, the value of property which claimant might have inherited had certain contingencies happened. But these contingencies have since become impossible, and it is now apparent that the entire estate inherited by claimant was of the amount as above set forth. Claimant paid a tax of 2% on an assessment of \$110,549.55, less an exemption of \$20,000.00 and further reduced by five per cent for payment within six months. The amount of the tax as assessed was \$1,810.99, and the amount paid after deducting a discount of five per cent was \$1,720.44.

Claimant should only have paid tax at the rate of one per cent instead of two per cent, and he is undoubtedly entitled to a refund of the tax on the value of contingencies which have become impossible. but the case presents the further question as to whether or not he is entitled to a refund of the excess one per cent that he paid on his own inheritance. No appeal was taken by claimant from the order of the County Judge assessing the tax at the rate of two per cent, and we have repeatedly held that in such case, we could not act as a court of review, and are precluded by the final order of the County Court.

But the language of section 25 of the inheritance tax law is to the effect that under such contingencies as exist in this case, claimant

"shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person, corporation or institution should pay under the inheritance tax law, with interest thereon at the rate of three per cent per annum from the time of payment."

Claimant inherited only \$86,560.35, the tax on which, after deducting exemptions of \$20,000.00, would be \$665.60, less the five per cent discount, or \$632.27. Following the language of section 25 of the statute, we think it plain that claimant is entitled to a refund of the difference between the amount paid and \$632.27, the amount he should have paid, and this case may be differentiated from those cases wherein we refused to allow a refund because of the payment on a two per cent basis, because we have here a statute which explicitly says that he is entitled to a refund between the amount paid, and the amount that he should pay, after the failure of the contingency.

The contingent estates which have become vested are each worth less than \$20,000.00, and no tax can be assessed as against them.

Claimant is accordingly entitled to an award of the difference between \$1,720.44, the amount paid, and \$632.27, the amount he should have paid, or \$1,088.17, to which should be added three per cent per annum under the provisions of the statute, from the time of payment of the tax to the time of the payment of refund.

It is accordingly the judgment of this Court that Claimant be awarded the sum of \$1,088.17, with interest from March 25, 1910, at the rate of three per cent per annum.

JOHN SHIELDS

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

1. **GOVERNMENTAL FUNCTION**—*State in conducting hospital exercises.* The State in conducting the Cook County Hospital exercises a governmental function, and is not liable in tort for acts of its agents in that behalf.

2. **RESPONDEAT SUPERIOR**—*doctrine of—does not apply to State.* The doctrine of *respondent superior* does not apply to the State.

Walter T. Stanton, for Claimant.

P. J. Lucey, Attorney General, for State.

The declaration sets up that claimant was employed as an elevator operator in the Cook County Hospital, and was injured as he claims in an accident while he was operating an elevator, through the negligence of a foreman.

The State has demurred and for special cause of demurrer sets up that the doctrine of *respondent superior* is not applicable to the State of Illinois.

This Court has repeatedly held that the State in the exercise of a governmental function is not responsible for injuries to its employees, and in consequence thereof, the demurrer must be sustained.

CLARENCE A. BURLEY, AS EXECUTOR OF TRUSTEE UNDER THE LAST
WILL AND TESTAMENT OF ELIZABETH J. WHITNEY, DECEASED,
LOUISA CHAPIN TELLING, ELIZABETH CHAPIN GREENE,
EDWARD F. CHAPIN, JR., AND MARY W. WHITE

v.

STATE OF ILLINOIS.

Opinion filed October 2, 1916.

1. **INHERITANCE TAX—contingencies the happening of which may authorize refund.** Where an estate is left in trust for a limited period with a provision that, upon the happening of a contingency, the estate should vest and in which case a tax has therefore been fixed as of the date of the death of the testator, which tax has been paid, a refund should be made if by the happening of the contingency the estate be circumstanced such that it would have been liable to a lesser tax.

2. **INTEREST—when allowed.** Where a tax has been fixed and the same paid, and the happening of an event changes the situation of the parties so that a lesser tax would be due, interest will be allowed on the excess paid from the date of payment.

Clarence A. Burley, for Claimants.

P. J. Lucey, Attorney General, for State.

Elizabeth J. Whitney died October 13, 1910, leaving a last will and testament which was probated in the Probate Court of Cook County on October 23, 1910.

The residuary estate was left in trust in equal portions to four grandchildren, Louisa Chapin, now Louisa Chapin Telling, Elizabeth Chapin, now Elizabeth Chapin Greene, Edward Fischer Chapin, Jr., and Mary W. White, the will providing that the trustee should hold the respective portions of each of the beneficiaries until such beneficiary should attain the age of thirty years.

On proceedings to fix the inheritance tax, it was found that the fair market value of the estate was \$63,866.18, and the estate was taxed on the basis that only the eldest grandchild would attain the age of thirty years. Allowing the statutory exemption of \$20,000.00, the tax was fixed at one per cent on \$43,866.18, or \$438.66. This amount less five per cent discount was paid within six months, under protest. Payment was made out of the assets of the estate, by agreement among the legatees.

Louisa Chapin Telling attained the age of thirty years on June 30, 1912, and Elizabeth Chapin Greene attained the age of thirty years in September, 1914.

Because of the fact that more than one of the heirs has now attained the age of thirty years, claim is now made that an additional exemption of \$20,000.00 should have been allowed. Demand for such

return was made on the County Treasurer of Cook County, and the State Treasurer of the State of Illinois, and these demands met with refusal to refund. Claim is now made for a refund of the tax on \$20,000.00, which exemption would have been allowed the second grandchild, had she been thirty years of age at the time of the fixing of the tax, and claimants rely on section 25 of the inheritance tax law.

The tax was levied at the highest rate that would be possible, and it is apparent that a refund should be allowed in this case.

Inasmuch, as the tax was paid within the six months period, and a five per cent discount was allowed, claimants state that \$190.00 was the amount of overpayment to which they should be entitled to an award.

In the opinion of this Court, a refund should be allowed. We, therefore, award the claimants the sum of \$190.00 together with interest at the rate of 3% from March 30, 1911, the date the tax was paid.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

STATE OF ILLINOIS.

Opinton filed December 11, 1916.

DEMURRAGE—railroad companies may charge. In this claim the State concedes the right of claimant to recover demurrage charges. The Court follows the holding in *The Chicago and Alton Railway Company v. State of Illinois*, 2 Court of Claims Reports, 249.

Winston, Payne, Strawn and Shaw, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant filed a claim for two thousand seven hundred ninetyfive and 00/100 (\$2,795.00) dollars, but on a hearing it was agreed between claimant and the attorneys for the State, that the amount due claimant was one thousand five hundred five and 00/100 (\$1,505.00) dollars.

The State admits that claimant is entitled to an award for the latter amount. There is no controversy as to claimant's right to recover in this case; the identical question having been passed upon by this Court in re:

The Chicago and Alton Railway Company v. State of Illinois, 2 Ct. of Cl. R. 249.

It is the judgment of the Court that claimant is entitled to an award amounting to one thousand five hundred five and 00/100 (\$1,505.00) dollars.

EDWIN A. PEASE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF
JOHN H. PEASE, DECEASED

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

INHERITANCE TAX—*exemptions should be deducted in determining the rate of tax.* In this claim the appraiser fixed the value of the property at \$107,087.74. An exemption of \$20,000.00 was allowed and the tax was fixed at the 2% rate, which tax was paid. An appeal was taken to the county court, which court set aside the order of the county judge fixing the tax on the 2% basis and fixed the same on a 1% basis. *Held*, an award should be made.

Kraus, Holden & Lawless, for Claimant.

P. J. Lucey, Attorney General, for State.

John H. Pease who in his life time was a resident of Kane County, Illinois, departed this life testate on the 9th day of May, A. D. 1913, leaving claimant as his only son and heir at law. His will was admitted to probate in said county and the court appointed an appraiser to fix the value of the property for the purpose of levying an inheritance tax. The appraiser appointed by the court found the value of the property devised to claimant to be \$107,087.74, and an order was entered fixing the net tax at \$1,654.67, after allowing the statutory exemption of \$20,000.00, and deducting the 5% which is allowed in cases where the tax is paid within six months after the same is found to be due.

Claimant prayed an appeal from the order of the county judge to the county court of Kane County, and in the meantime paid the amount of taxes levied to the County Treasurer, under protest, that he might save the five per cent discount. Shortly after the appeal to the County Court, the Supreme Court of the State of Illinois, in the case of *The People v. Ullman*, 263 Ill. 258, rendered an opinion to the effect that "Where a child takes from its deceased parents property valued in excess of \$100,000.00 which with lawful exemptions deducted leaves less than \$100,000.00, subject to inheritance tax, the rate of taxation is one (1%) per cent."

The County Court set aside the order of the County Judge and fixed the rate at one per cent in accordance with the above opinion.

Claimant sought to recover from the County Treasurer of Kane County, and from the State Treasurer, the amount erroneously collected from him, but was informed by the State Treasurer that there was no appropriation to take care of his claim.

He did everything the law required to recover the amount due him, and it is the opinion of the Court that he should be reimbursed to the extent of \$827.33, which he was compelled to pay by reason of the erroneous assessment.

Claimant is accordingly awarded \$827.33.

ANDREW HOLMES

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

EXTRACTION—expenses of messenger. The court reviews the evidence and holds that, while it would not be justified in making an award, still it recommends that the Legislature make an appropriation to claimant covering the amount of this claim.

Frank J. Snite, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant a police officer of Chicago, Illinois, was detailed by his superior officer to go to New Haven, Connecticut, to arrest and bring back, one Lillian Smith, alias Lillian Stewart, who was under indictment by the Grand Jury of Cook County, Illinois. A requisition was procured from the Governor of Illinois upon the Governor of Connecticut for the return of the prisoner. Claimant went to New Haven and upon his arrival there found the said Lillian Smith to be in a very bad physical condition and for that reason it was deemed advisable to return her to Chicago at once without waiting for the warrant to come from the Governor.

The prisoner consented to go without the warrant, and the police officer in New Haven informed claimant, that they would forward the Governor's warrant to him at Chicago, as soon as it came to them.

For some reason the warrant from the Governor of Connecticut authorizing the return of the prisoner to Illinois, has never been located, although the files in this case disclose that the requisition from the Governor of Illinois was received and accepted and that a warrant issued in accordance therewith. Not having received the warrant in question, claimant has been unable to secure from the State the money he expended in making this trip, amounting to \$160.12. The warrant is the only authority he had for removing the fugitive to this State, and without it, he is not in a position to establish his claim against the State for expenses incurred by him.

We recognize the necessity of officers complying with the law before they can recover from the State for services rendered. However, we feel that in this case claimant made an honest endeavor to comply with the law and he accomplished as much as if he had secured the warrant. The money expended by him in returning the fugitive was expended for the benefit of the State, and as a matter of equity, claimant should be reimbursed.

While the defense interposed in this case estops us from making an award to claimant, still we are of the opinion that claimant is entitled to the amount paid by him for and on behalf of the State and we recommend that the Legislature make an appropriation to him in the sum of \$160.12.

W. W. LOONEY

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. JURISDICTION—*Court has not of claims under Workmen's Compensation Act.* Where an employee of the State is injured while in the service of the State, this Court does not have jurisdiction of the claim for compensation.

2. SAME—Claims of this class are under the jurisdiction of the Industrial Board.

Silas W. Cook, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant was employed as a guard at the Criminal Insane Asylum, at Chester, Illinois, and on July 27, 1914, while engaged in performing his regular duties as such guard, he was assaulted and beaten over the head and face with a brass bozzle, by an inmate of said hospital. Complainant further states that said State Insane Hospital at the time he received the injury had accepted and was operated under the Workmen's Compensation law for accidental injury or death, passed by the General Assembly of the State of Illinois, and approved June 28, 1913, that said act was in full force and effect at the time he received the injuries; that he had accepted and was working under this act; that he gave notice of said accident and injury so received to the Industrial Board of the State of Illinois; that he complied with said law in every respect, that a hearing of this case was had before the Committee of Arbitration as provided by law; that said Committee of Arbitration found that claimant was entitled to the sum of \$6.35 per week for a period of fifty weeks; that an appeal was prayed and perfected to the Industrial Board; that said Industrial Board heard said appeal and approved and confirmed the findings of the Committee of Arbitration, and that no appeal or further proceedings were had in said cause. A copy of the findings of said Industrial Board is attached to and made a part of claimant's declaration, which shows that the Industrial Board ordered the compensation payments to be made accordingly.

Claimant files his declaration in this Court for the sole purpose of having this Court recommend to the Legislature the payment of the amount found due him by the Industrial Board, and this Court is not to pass upon the merits of the claim; that although section 4 of the Workmen's Compensation Law, defining the term employer includes the State, no provision is made in said law for the payment of the amounts found due by said Industrial Board by the State of Illinois,

and no appropriation has been made by the Legislature for the payment of the amount of such findings.

The Workmen's Compensation Law having been passed by the Legislature subsequent to the act creating this Court, and the Industrial Board having passed upon this claim as provided in said Workmen's Compensation Law, this Court is without further jurisdiction in cases that have been placed directly under the jurisdiction of the Industrial Board by the Legislature, such as claimant claims.

The claim is accordingly dismissed, without prejudice, however to the rights of claimant to present his claim to the Legislature for the payment of the amount allowed by the Industrial Board of the State of Illinois.

DENNIS HULL

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. **GOVERNMENTAL FUNCTION**—*State in conducting charitable institutions exercises.* The State in conducting the Illinois State School for the Deaf at Jacksonville, exercises a governmental function.

2. **SAME**—*State incurs no liability when it exercises.* In this claim, the claimant was injured while employed at the School for the Deaf at Jacksonville, one of the charitable institutions of the State. *Held*, that no recovery could be had.

John C. Snigg, for Claimant.

P. J. Lucey, Attorney General, for State.

In the amended declaration in this case, claimant states that he was an employee of the Illinois State School for the Deaf, at Jacksonville, and was engaged in operating a circular saw in the carpenter shop at the time the accident occurred. Claimant alleged that the saw was dull and was unprotected by proper guards; that the wood being sawed by him was seasoned and tough and that the combination of circumstances caused the board to jump and catch claimant's hand so that the thumb and two fingers of the left hand were cut off. It is apparent from the amended declaration that the place of claimant's employment was operated by the State entirely in its governmental capacity.

It is impossible to ascertain from the amended declaration that what occurred as alleged by claimant was in any way the proximate cause of the injury.

The State has filed a general demurrer. We consider that the statement is bad on demurrer, and for the reason hereinbefore, stated, the demurrer is sustained.

NEILS BUCK FOR THE USE OF BOSTON INSURANCE COMPANY OF BOSTON,
MASSACHUSETTS

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. NEGLIGENCE—*State not liable for—of its agents, etc.* The State is not liable for the negligence of its agents, servants or employees.

Burt A. Crowe, for Claimant.

P. J. Lucey, Attorney General, for State.

The record in this case shows that about six o'clock on the afternoon of December 4th, 1914, Neils Buck, claimant for the use of the Boston Insurance Company of Boston, Massachusetts, was driving his automobile north on a street in the City of Chicago, commonly known and described as Lake Shore Drive, or Sheridan Road, near the intersection of Chestnut street with said Lake Shore Drive, and in the center of the street is what is known as a safety zone, in the center of which zone is a lamp post, which contains a red lamp for the purpose of safety and warning; that said Lake Shore Drive at this particular place is under the control and jurisdiction of the Lincoln Park Commissioners. The evidence shows that Neils Buck, while driving his automobile on Lake Shore Drive, near the intersection of said Drive and Chestnut street, attempted to pass to the left of a line of automobiles towards the center of the street where the lamps were placed in safety zones, and thereby collided with the aforesaid post on which was placed an unlighted lamp. He had passed a number of these lamp posts prior to the collision, and therefore was duly apprised of the fact that these lamp posts were placed at intervals along said Drive. The evidence also shows that while darkness had set in Neils Buck did not have the headlights on his automobile lit. The evidence further shows that, at the time of the accident said Neils Buck owned and there was in full force and effect a policy of automobile collision insurance in a company known as Boston Insurance Company of Boston, Massachusetts, and that said Neils Buck recovered from and has been paid by said Boston Insurance Company of Boston, Massachusetts, the full amount of his damages.

It is hardly necessary in this case to discuss the general facts, for the reason that there is no liability on the State, in view of the well established rule that the State is not liable for the torts of its agents, servants or employees; and even though the lamp in the safety zone was not lit, it is clear from the evidence that the said Neils Buck did not exercise due care and caution for his own safety.

This Court in a long line of decisions has invariably held the same as stated in the foregoing paragraph, and it is needless to quote the decisions. The claim is therefore rejected.

J. F. SCHMIDT BROS. CO.

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

STATE CONTRACTS—facts held sufficient to justify an award. In this claim a dispute arose over the interpretation which should be placed upon the specifications as to painting certain walls of the building—the Court held that the specifications did not call for painting the walls.

Brown, Hay & Creighton, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant, is an Illinois corporation which on October 18, 1912, entered into a written agreement with the Board of Trustees of the Western Illinois State Normal School for the construction of "The Womans' Building," at Macomb.

Plans had been prepared by W. Carby's Zimmerman, the then State Architect, and, prior to the completion of the building he was succeeded by James B. Dibelka as State Architect, who assumed supervision of the job.

Claimant had been paid on contract price the sum of \$63,022.00 and has given credit because of deductions in the amount of \$1,295.50. The original contract price was \$63,940.00. There remains in dispute and unadjusted the following items:

A. \$25.00 on account of an off-set between the living and reception rooms.

B. \$96.00 deduction claimed by trustees on account of sewer not being raised.

C. \$965.00 deductions made by trustees on account of claimant refusing to paint the plastering in the building.

D. Damages claimed by claimant occasioned by alleged delay on the part of the board of trustees in exercising its option on roofing and metal.

On April 15, 1914, Architect Dibelka issued his certificate covering a balance due of \$1,243.80. This was delivered to the claimant and in turn delivered by it to the board of trustees. The board, however, refused to pay.

The \$25.00 claim appears to have been paid. An allowance of \$85.00 was made and paid to the contractor because of a mistake in the drawing of certain "I" beams. The architect made this allowance to cover the extra expense due to this mistake, and it is apparent that the \$25.00 was included in the payment of \$85.00.

The claim for \$96.00 arises out of the following state of facts: The plans and specifications called for a tile sewer under the unexcavated portion of the building. The sewer was installed by the contractor and it was afterwards discovered that the elevation was improper. The contractor made a bid to raise this sewer and this was accepted. The sewer as originally laid by the plumber was of iron pipe, where the plans called for tile. In the sewer as raised, the contractor used tile and the board insisted upon iron, claiming that because the contractor had seen fit to use iron in the first place, it should use it in the relaid sewer. This the contractor was under no obligation to do, inasmuch, as the original specifications called for tile and his bid for raising the sewer was according to the original plans and specifications. The architect in a letter to the contractor dated May 19, 1913, stated that he had given no order for a change in the materials to be used. The State claims that in a certain agreement made September 30, 1913, the contractor withdrew this claim of \$96.00. This agreement appears in the evidence as State's Exhibit "D", and recites by way of preamble that credits have been agreed upon among others, "sewer not raised, ninety-six dollars." It purports to be made for the purpose of removing funds from the hands of the treasurer of the school and placing it in the hands of another, and further states that, "nothing herein contained shall be construed as changing or modifying in any way the terms and conditions of the contract," etc. This agreement would serve only as evidence tending to prove that such an agreement as claimed by the State had been made, but in and of itself is not such an agreement as the State contends it is.

The Court is of the opinion that this claim is just.

The next item of the claim is for the deduction of \$965.00 because the claimant refused to paint the plastering in the building. The specifications for plastering offered in evidence by claimant contained the following language: "The surfaces of all plaster, including walls and ceilings, in all bath and toilet rooms on first and second floors, are to receive on coat boiled oil sizing, and two coats lead and oil paint, as directed. In all bath rooms this paint to be white followed by two coats approved white enamel. Paint plaster backs of all cases, without wood backs, in same manner."

The State on the other hand, offered in evidence a copy of specifications that were exactly the same except that the comma was omitted after the word "ceilings." The State contends that the contractor should have painted all plaster surfaces. On the other hand, claimant contends that the specifications did not call for painting of all plaster surfaces, but were limited to only bath and toilet rooms and plaster backs of cases. Considerable argument is indulged in by counsel of both parties as to the effect of the insertion or omission of the particular comma. If the comma were inserted there would not be much doubt as to the intention.

A peculiar circumstance arises due to the fact that the word, "ceilings," as printed in both copies of specifications as offered, occurs at the very end of the line, and on the copy as offered by the State, there

would be no room for the insertion of a comma after the word, there being no room between the 1st letter of the word and the edge of the sheet upon which is written. In the copy as offered by claimant, there is sufficient room for a comma between the last letter of the word and the edge of the paper and a comma is there. The copy offered by the State is apparently a blue print, made from an original typewritten copy. There is no question but that the blue print offered by the State and the typewritten copy offered by the claimant, are identical. Every peculiarity of the typewriting and of the spacing are the same excepting that the lines on the page in question of the blue print copy begin an inch and a quarter from the left edge of the page, and on the typewritten copy about eleven-sixteenths of an inch from the left hand edge of the page.

We are satisfied that the trouble arises from the fact that the typewritten matter did not occupy exactly the same relative positions on the pages. The copy offered by the claimant contains sufficient space at the end of the line for a comma to appear; that offered by the State, due to the fact that the line begins farther to the right than in the other copy, does not contain space sufficient for a comma to appear.

We are satisfied that the comma appeared in the original specifications. The same paragraph of the specifications also contains the following language: "Paint plaster backs of all cases, without wood backs, in the same manner." It would seem that if it were contemplated that all walls should be painted that this would include the plaster backs of such cases and on the other hand if all walls were not to be painted, then there is reason for this specification, providing for paint in those particular places.

Prior to the making of the contract for this building, the contractor inquired of the architect as to the proper interpretation of this particular paragraph, and on the same day on which the contract was dated, viz., October 18, 1912, the State Architect wrote a letter containing the following language: "You are correct in figuring that only the bath and toilet room walls and ceilings are to be painted, but allow me to call your attention to the fact that these occur on the third floor as well as the remaining floors." We have here an interpretation of the contract prior to the beginning of the work, on the same day that the contract was dated, by the architect who drew the specifications.

There is also testimony in the record to the effect that in the construction of buildings, it is ordinarily not the custom to paint new plaster surfaces, except in bath rooms.

In addition to all this, for form of specifications used by the contractor, was furnished by the architect employed by the State, and the contractor had a right to reply on same in the form as furnished to him. We believe that claimant is entitled to an award on this item.

There remains now for our consideration the claim for damages occasioned by alleged delays on the part of the board in exercising the option in the choice of materials. It is provided in the contract that the contractor should give an alternate proposal for furnishing all metal specified copper, in No. 24 gauge galvanized iron, and that the alternate

bid shall be rejected or accepted within thirty days. This alternate bid was made, but the board did not exercise its option within thirty days. Claimant alleges that because of this fact it was put to greater expense because the price of material used increased \$196.00 between the day on which he made the bid and the day on which he eventually bought the material. As we view this claim, the contractor would have been justified, and he should have purchased the material specified when the board did not exercise its option within the time limited. The material eventually used was the material as originally specified. This, of itself, is immaterial. However, had the contractor followed the clear language of the contract when the board did not exercise this option, this loss would not have occurred. In this view of the case, we do not believe that the claimant should receive any award on this item.

As above stated, we are of the opinion that the claim for \$25.00 should be denied, the claim for \$96.00 should be allowed, the claim for \$965.00 should be allowed, and the claim for \$196.00 for damages should not be allowed.

It is accordingly the judgment of this Court that claimant be awarded the sum of \$1,061.00.

EDWARD W. EATON, ET AL

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. **INHERITANCE TAX—failure of trust ground for refund—when.** Where an estate is left to a person upon a condition, the happening of which may defeat the estate, and an inheritance tax has been paid upon the assumption that the estate will not be defeated, an award will be made.

2. **INTEREST—when allowed.** Where the right to a refund is established under section 25 of the inheritance tax law, interest will be allowed.

Kerr & Kerr, for Claimants.

P. J. Lucey, Attorney General, for State.

The will of Thomas W. Eaton, deceased, probated in the Probate Court of Cook County, created a trust estate making Olive M. Eaton and Edward W. Eaton, trustees to manage same, to make certain payments to beneficiaries named, and on the death of the widow to divide the remainder equally among his son and four daughters.

An inheritance tax was assessed on appraised value of \$41,251.38, with an exemption therefrom of \$20,000.00, at the rate of one per cent, making a tax of \$212.51, to which was added interest of \$32.94, a total of \$245.45, which was paid on December 16, 1912.

The widow, Olive M. Eaton, died on July 23, 1914, and the five children named by the testator survived her and took the remainder of the estate. Claim is now made for refund of the tax paid on the theory that the trust has failed, and that the estates created by the will have now vested.

Under the provisions of section 25 of the inheritance tax law, claimants are entitled to a refund.

It is apparent that the values of the estates inherited by the several claimants are less than \$20,000.00, and that in consequence no tax can be imposed, so that claimants should have refunded to them the entire amount paid, together with interest at three per cent from the date of payment.

It is accordingly the judgment of this Court that the claimants, Edward W. Eaton, Charlotte G. Gardner, Marian A. Wade, Jessie M. Taylor, and Ethel B. Gassneck, be awarded the sum of \$245.45, together with interest thereon at three per cent from September 16, 1912.

SAMUEL ROTHENBERG, ADMINISTRATOR OF THE ESTATE OF ISSAC L.
ROTHENBERG, DECEASED

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondet superior* is not applicable to the State, and the State is not liable for the torts of its officers, agents or employees.

Schnuyler, Ettelson and Weinfeld, for Claimant.
P. J. Lucey, Attorney General, for State.

Claimant seeks to recover for the death of Isaac L. Rothenberg, a child of tender years, who came to his death by drowning in the lagoon in Douglas Park in the City of Chicago, Illinois.

It is set forth in claimant's petition that the ice covering on the lagoon at that time was inviting to children; that the same was unsafe and that there were no guards, police officers or other attendants to warn children and keep them from going on the ice.

The State has filed a general and special demurrer to claimant's petition. One of the causes assigned by the special demurrer is that the doctrine of *respondet superior* is not applicable to the State, and that the State is not liable for the torts of its officers, agents or employees.

This Court has repeatedly held that the doctrine of *respondet superior* is not applicable to cases of this kind. The law is so well settled that it will be unnecessary to cite any authorities.

The demurrer is sustained.

WILLIAM T. STAUTS

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. BAILMENT—*law of, where a horse is bailed.* Where a horse is hired, the bailee is required to pay the expense of caring for it, use it moderately, and as carefully as a person of common discretion would use his own animal, and supply it with suitable food.

2. SAME—*presumption of negligence.* When a horse, in good condition, is placed in the hands of a bailee, and is later returned in damaged condition or not returned at all, an action will lie in favor of the bailor, and the law in such case will presume negligence on the part of the bailee, and will impose on him the burden of showing that he exercised such care as was required by the bailment. *Funkhouser v. Wagner* 62 Ill. 59; *Cummins v. Woods*, 44 Ill. 416; *Bennett v. O'Brien* 37 Ill. 250).

Ralph J. Hefferman, for Claimant.

P. J. Lucey, Attorney General, for State.

This is a claim for damages to a horse rented by Captain Frank Tatman for claimant, for the use of Troop "B", First Cavalry of the Illinois National Guard, during its annual tour of duty in July, 1913.

The evidence shows that the horse in question was in good condition when delivered to Captain Tatman, and was worth about \$175.00, that being the value placed on the horse by the Board of Survey. The tour was made during the hot days of July, 1913, and several of the horses, on one of the journeys, seemed to be overcome by the heat, and would lie down and were almost exhausted on account of the extreme heat and the extra long and hard trip, and when claimant's horse was returned to camp one night it was suffering from exhaustion. The next morning it was stiff and could not move. An assistant veterinary said it had foundered. The Board of Survey ordered the horse shot. The horse was not shot, but placed in a pasture, but it did not recover. Claimant was compelled to go to Chicago and get the horse, and he now claims \$10.00 for expenses for said trip, and \$10.38 for freight charges for shipping said horse and another horse from Chicago to Bloomington. He kept said horse from September, 1913, to the fall of 1914, at a cost of more than \$25.00, and was unable to work him, because said horse never got over his stiffness, and finally was sold for \$25.00.

When a man hires a horse the law is, "He is bound to pay the expense of keeping it, use it moderately, and treat it as carefully as any man of common discretion would treat his own animal, and supply it with suitable food, and if the horse, when placed in the hands of a bailee, is in good condition, and it is returned in a damaged condition

or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter and impose upon him the burden of showing that he exercised such care as was required by the bailment."

Funkhouser v. Wagner, 62 Ill. 59; *Cummins v. Wood*, 44 Ill. 416; *Bennett v. O'Brien*, 37 Ill. 250.

This Court passed on this same question in *Campbell v. State of Illinois*, 2 Ct. of Cl. R. 298.

We hold, that under the law and the evidence in this case, that the claimant is entitled to an award, and it is the judgment of this Court, that the claimant be and is hereby awarded the sum of one hundred ninety-five and 38/100 (\$195.38) dollars.

MICHAEL HEITLER

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

EXTRADITION—expenses of messenger. The court reviews the evidence and makes an award.

Morris Kompel, for Claimant.

P. J. Lucey, Attorney General, for State.

Eugene De Luxe was charged with having committed a felony in Cook County, Illinois, and to secure his release until the day of trial, claimant signed his bail as surety in the sum of five thousand dollars.

De Luxe left the State a short time afterward and was not to be found when his case was called for trial. The Court ordered the bond forfeited, and claimant spent a great deal of time and money in trying to locate the said Eugene De Luxe. He was located in the State of New York, and claimant through the State's Attorney of Cook County, had a requisition for his arrest from the Governor of Illinois upon the Governor of New York, requesting him to deliver to the authorities of the State of Illinois, the said Eugene De Luxe.

When De Luxe was located in New York, it became necessary for a police officer to go from Chicago to New York to bring him back, and this was done; claimant furnishing one hundred forty-five dollars to cover the expenses of the police officer.

Claimant now seeks to recover the amount furnished by him to the police officer for the purpose of returning De Luxe to Illinois.

From the records before us it appears that a proper expense account has been prepared and certified by the police officer who returned De Luxe, and that the same was duly signed by the County Judge of Cook County, and that claimant has in all other respects done what was required to secure a refund of the money so furnished.

In order to have the prisoner returned to answer for the crime committed within the State, it would be necessary for the State to furnish the amount required to bring him back.

The claimant having paid this money, we are of the opinion that it was done for the benefit of the State, and he should be reimbursed.

We therefore award claimant one hundred forty-five dollars.

STATE SAVINGS LOAN AND TRUST COMPANY

v.

STATE OF ILLINOIS.

Opinion Aled December 11, 1916.

1. **INHERITANCE TAX**—claimant to recover under section 10 of the inheritance tax law must appeal. In this claim a tax was fixed by the County Judge, and the same paid; later it was discovered that a mistake had been made in fixing the tax but no appeal was taken. *Held*, that a refund could not be made.

2. **PRACTICE**—claimant not precluded. Since an error was made in fixing the tax, the court holds that claimant may submit this matter to the Legislature.

Herman H. Brown, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant, as administrator of the estate of Mary A. Gardner, deceased, paid to the County Treasurer of Adams County on July 3, 1913, \$756.90, same being the amount of inheritance tax found to be due by the inheritance tax appraiser. It subsequently developed that an error had been made by the inheritance tax appraiser in that he found the value of 131 shares of certain stock to be \$170.00 per share, or \$22,270.00, whereas in his report he set such value down as \$32,270.00, in consequence of which the tax as levied was \$100.00 more than should have been levied. The report of the appraiser was approved by the County Judge. No appeal was taken from this order to the County Court, and in consequence the order of the County Judge remains a final order.

In the case of *Pattison and Harding v. The State*, 2 Ct. of Cl. R. 349, a somewhat similar state of facts was presented, but in that case an appeal had been taken from the order of the County Judge to the County Court, and the County Court found that the previous order was erroneous and entered an order finding that the tax should have been a smaller amount than found by the County Judge. In that case this Court made an award to claimant. But, it will be observed in that case, the executors followed the remedy provided by statute and took an appeal. In the case before us, this was not done, and the administrator is in effect asking of us that we act as a court of review. True, there is no question but that the error in this case may be deemed one of fact, for which, ordinarily, there may be a recovery in a proper forum. But this Court cannot make an award in this case because the administrator has not followed the remedy provided by statute.

While we are satisfied that this error was made, it is not within our power to make an award under the state of facts in this case. Pos-

sibly the administrator may obtain relief by application to the Legislature, and we will not bar any such action in this case by rejecting the claim.

It is the judgment of this Court that this claim be rejected without prejudice so that the administrator, if it cares to, may present same to the Legislature for its consideration.

WILLIAM RUMMLER AND EUGENE RUMMLER, CO-PARTNERS AS RUMMLER
AND RUMMLER

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

STATUTE OF LIMITATIONS—unliquidated claims when filed. Unliquidated claims must be filed within two years from the date the cause of action accrues.

Harry P. Simonton, for Claimant.

P. J. Lucey, Attorney General, for State.

This is a suit in which claimants seek to recover for professional services rendered the Commissioners of Lincoln Park, together with incidental expenditures incident thereto. There is no question about the facts as presented, but the State by its demurrer raises the question as to whether or not this is a proper claim for the consideration of this Court. The itemized statement attached to claimants' declaration, discloses that this claim accrued to claimants on October 30, 1912. The claim was not filed until March 8, 1915, more than two years thereafter.

This is an unliquidated claim and is barred by the Statute of Limitations requiring all such claims to be filed within two years from the date the cause of action accrues. (*The Culver Construction Company v. State*, 2 Ct. of Cl. R. 294.)

This being true, it will be unnecessary to discuss the other grounds set out in the demurrer.

The demurrer is sustained.

EMMA MAYER EXECUTRIX OF THE WILL OF SIMON MAYER, DECEASED
 V.
 STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. INHERITANCE TAX—*claimant to recover under section 10 of the tax law must appeal.* In this claim the tax was fixed by the County Court and the same paid but no appeal was taken. *Held, that no refund could be allowed.*

2. PRACTICE—*Court of Claims not a court of review.* The Court of Claims does not sit as a court of review to pass upon the decisions of other courts.

Simeon Straus and Ira E. Straus, for Claimant.
 P. J. Lucey, Attorney General, for State.

Claimant presents this as executrix of the estate of Simon Mayer, deceased, by appointment of the Probate Court of Cook County, Illinois.

After the death of decedent, his safety deposit box was opened, and claimant was required to deposit \$2,000.00 in the Fort Dearborn National Bank of Chicago to cover possible inheritance tax before being permitted to have access to the contents of said box.

The record shows that on February 14, 1913, the County Court of Cook County entered an order fixing the inheritance tax in said estate at \$1,935.70, fixing the fair market value of the succession to Emma Mayer, the widow, at \$116,784.76, and the taxable value after deducting the statutory exemption of \$20,000.00 at \$96,784.76, and the tax assessed at the rate of 2%. The bank transmitted the amount of the tax payment, less 5% of \$1,838.92, to the County Treasurer.

Claimant's attorney protested to the inheritance tax attorney that the tax should have been assessed at the rate of 1% instead of 2%, and so far as the record shows that is the only protest of any kind that was made.

No documentary evidence has been filed in this case from which we can ascertain just what proceedings were taken in the County Court. The evidence is to the effect that the final order was entered by the County Court and not the County Judge. If the order had been entered by the County Judge and was erroneous, an appeal could have been taken, and so far as record in this case shows, it might have been taken to the County Court. If an erroneous order was there entered, then, of course, an appeal could have been taken to the Supreme Court. There is no doubt but that an erroneous order was entered and so far as the record shows it was entered by the County Court. The tax should have been levied on the basis of 1% instead of 2%. But, instead of appealing to the Supreme Court to have the erroneous order modified, claim-

ant protested only to the inheritance tax attorney, who, of course, was without authority to enter any order, and the judgment of the County Court so far as appears from this record, was a final order.

This Court has repeatedly stated that it is not a court of review, and for us to disturb the order of the County Court would be to assume that authority which we do not have.

In those cases wherein the facts were similar to those in this case, and wherein this Court has found for claimants, orders assessing a 2% tax were either entered by the County Judge and on appeal changed to 1% by the County Court, or fixed at 2% by the County Court, and on appeal changed to 1% by the Supreme Court. On the other hand, we have refused to make an award in those cases where the final judgment of either the County Court or County Judge erroneously assessed the tax at 2%, and claimant failed to appeal from the order and have same assessed at 1%.

Inasmuch as in this case a final judgment of the County Court which had jurisdiction, fixed the rate at 2%, we cannot act as an appellate tribunal and set that judgment aside. This, in effect, is what claimant asks us to do. On the face of the record as presented, claimant has not pursued her remedy provided by law.

In view of this situation, we cannot make an award in this case, and in consequence thereof, it is the judgment of this Court that this claim be not allowed.

CLARA SCHROEDER BY AUGUST SCHROEDER, HER FATHER AND NEXT FRIEND

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

RESPONDEAT SUPERIOR—doctrine of not applicable to the State. The State is not liable for the misfeasance, wrongs or negligence of its officers, agents or servants.

Francis X. Busch, for Claimant.

P. J. Lucey, Attorney General, for State.

The State is not responsible for the misfeasance, wrongs, negligence or omissions of duty of its officers, agents or servants for it does not guarantee to any person the fidelity of the officer or agent whom it employs. *Henke v. State*, 2 Ct. of Cl. R., 11; *Rood v. State*, 2 Ct. of Cl. R. 22. The doctrine of *respondeat superior* does not apply to the State, and the State is not liable for the torts of its officers, agents and employees. *Buszkiewicz v. State* 2 Ct. of Cl. R., 394; *State Bank of Chicago, Admr. v. State*, 1 Ct. of Cl. R., 158.

The declaration in this case discloses that the claimant, Clara Schroeder, a little girl of about fourteen years was injured on June 7, 1914, by falling over a wire gate in Lincoln Park while she and a little companion of about the same age were strolling near the duck pond of the park. She suffered a fracture of two bones between the wrist and elbow of her left arm and while the injury will probably cause her arm to become weakened, the physician in attendance stated that as she grew older the arm would become as strong as ever.

In paragraph 4 of section 3 of the Act of 1903, creating the Court of Claims, it provides among other matters, that the Court of Claims shall hear and determine "All other unadjusted claims of whatsoever nature or character against the State of Illinois."

Counsel for claimant contends that the case at bar comes within this classification.

In the case of the *State Bank of Chicago v. State*, 1 Ct. of Cl. R., page 164, the Court held as follows: "Public or State officers with only certain powers and duties enjoined upon them by the statute do not come within the doctrine of *respondeat superior*. Applying this rule the South Park Commissioners being merely appointive officers with certain statutory powers are mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance but for the purpose of aiding and assisting the sovereign powers of the State in carrying on the functions of the government and they are not liable for the negligence or tortious acts

of its servants." Further the Court said: "It has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How, then, can it now be claimed that the State is liable for the acts of the Board of South Park Commissioners?" This case was cited with approval by the Court in the case of *Busckewicz v. State, supra*, and the doctrine therein announced has been uniformly followed by this Court.

The claimant in that case was seeking an award by reason of the alleged negligence of the Lincoln Park Board, and as in this case insisted that the claim came within that part of section 3 of the Act of 1903 which recites that "it shall be the duty of the said Court to hear and determine * * * all other unadjusted claims of whatsoever nature or character against the State."

The Court in its opinion in the case of *Henke v. State, supra*, on page 13, held as follows: "Prior to 1877 there was no forum or tribunal in this State wherein claims could be filed against the State of Illinois. By the Act of 1877, first creating the Commission of Claims, to be composed of one Judge of the Supreme Court and two Circuit Judges of the State, it was declared to be the duty of the Commission 'to hear and determine all unadjusted claims of all persons against the State of Illinois.' During the existence of the Commission under this Act no claim for personal injuries seems to have been filed against the State. In 1889 the Legislature revised the Commission of Claims Act, changing the manner in which the commission should be constituted, and specially setting forth its jurisdiction. The clause referred to in section three by claimant as to 'all other unadjusted claims' first appeared in this Act. The same year this Act went into force, the commission early passed upon the question here involved, and the opinion then rendered has been an established principle, closely followed by this Court, ever since in the adjudication of similar cases. It was then held (*Schmidt v. State*, 1 Cl. of Cl. R. 76-79) that the law creating this commission does not undertake to create a new liability against the State, but provides a method by which claims against the State may be heard before this commission." And again on page 80, "It is our understanding that * * * this commission has no power to make an award in any case unless the facts show a legal or equitable claim against the State."

In so doing the commission seemed to follow the opinion of the Massachusetts Court filed the same year, in *Murdock Grate Co., v. Commonwealth*, 24 N. E. 854, where the Court in passing upon a similar statute in that State succinctly says: "The Act we are discussing discloses no intention to create against the State a new and heretofore unrecognized class of liabilities, but only an intention to provide a judicial tribunal where well recognized existing liabilities can be adjudicated."

The law is so well settled that the State is not responsible for the misfeasance, wrongs, negligence or omissions of duty of its officers, agents or servants (which includes the Commissioners of the Lincoln Park Board), in the absence of statutory enactment creating liability that it precludes a recovery. It is therefore the judgment of the Court that this claim be denied.

A. T. WILLETT COMPANY, A CORPORATION

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

STATUTE OF LIMITATIONS—unliquidated claims—when filed. Unliquidated claims must be filed within two years from the date the cause of action accrues.

Arthur J. J. Welsh, for Complainant.

P. J. Lucey, Attorney General, for State.

This claim is for horse hire and hauling furnished by claimant to Battery B, Field Artillery Battalion of Chicago, Illinois, from May 21, 1910, to May 30, 1912.

The original bill was for seventeen hundred nine (\$1,709) dollars, upon which was paid twelve hundred ten (\$1,210) dollars, leaving a balance due of four hundred ninety-nine (\$499) dollars.

There is no question concerning the facts in this case, nor is there any question but that claimant's account is correct and that he should be remunerated. However, this is an unliquidated claim coming within the Statute of Limitations requiring said claim to be filed within two years from the time it accrued. This being true, there is nothing further to do than to deny the claim because this court has no power to make an award in such cases.

This has been the uniform holding of the court for many years and the law is so well settled that it will be unnecessary to cite any authorities.

It is the judgment of the Court that the demurrer be sustained.

**KATHARINE S. LECHLEITER, DOING BUSINESS AS THE BUILDERS SUPPLY
COMPANY**

v.

STATE OF ILLINOIS.*Opinion filed December 11, 1916.*

LICENSE FEES—when refund will be awarded. Where a license fee to incorporate has been paid to the Secretary of State, and it is determined by the Secretary that the name of the proposed corporation is not available and the incorporators decline to adopt another name and proceed further, the fee should be refunded.

Michael F. Gallagher, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant in this case had been conducting her business in Chicago, Illinois, under the name of the "Builders Supply Company," and desiring her business incorporated under the above name, on November 10, 1913, sent her check for fifty-five (\$55) dollars to the Secretary of State, with instructions to forward to her the necessary incorporation papers. She was informed by the Secretary of State that the name "Builders Supply Company" was not available, but that she might select some other name. She was also advised that the fifty-five (\$55) dollars was placed to her credit.

Claimant not desiring to use any other name wrote to the Secretary of State informing him to this effect and requested him to return the said fifty-five (\$55) dollars, which she had advanced. She was afterward informed that this amount could not be returned as the same had been paid to the State Treasurer. This claim is filed to recover the fifty-five (\$55) dollars paid to the Secretary of State.

When claimant forwarded the money in question to the Secretary of State with instructions for certain corporate papers she was informed by him that the same could not be issued, and under the circumstances it occurs to us that she is entitled to a refund of the money advanced by her.

This case differs from those cases in which a license has been granted, but where the parties afterward refuse to complete the organization. In this case the State did not comply with her request and there is no good reason why the State should retain the money advanced by claimant.

We are of the opinion that claimant is entitled to relief in this case, and we therefore award her the sum of fifty-five (\$55) dollars.

WILLIAM B. MOAK

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

LICENSE FEES—may not be refunded—when. Where a fee is paid to the Secretary of State for a license to receive subscriptions to the capital stock of a corporation, and the corporation is not completed, no refund of the fee may be made.

William B. Moak, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant in this case on behalf of Irvin A. Rice, et al., paid ninety-five (\$95) dollars to the Secretary of State to secure a license to open books of subscription to the capital stock of D. S. Wilson & Company, a proposed corporation with a capital stock of fifty thousand (\$50,000) dollars.

After the license was issued the parties decided not to proceed further with the corporation, and claimant made a demand for a refund of the license fee advanced by him, which was refused.

This claim is brought in this Court to secure a refund of the amount of the license fee so advanced.

Claimant seems to be under the impression that this case differs from those cases in which the corporation itself advances money for a license fee but fails to proceed with the business of the corporation. The Court is at a loss to see where there is any difference so far as the liability of the State is concerned.

Counsel for claimant argues at some length that an award should be made in this case on equitable grounds and cites the practice with reference to sheriffs and other fee officers in their respective counties. He is inclined to believe that the purpose of the Court of Claims is governed by set rules except those of its own making, and that its sole purpose is to adjust claims against the State.

In *O'Donnell v. State*, 1 Ct. of Cl. R., 255, which has been cited with approval in different cases the Court said: "We can allow claims against the State only in cases where by express statutory provisions the legislature has created a liability on the part of the State for the acts of its agents; or rather waives the exemption of the State from such liability."

In *Schmidt v. State*, 1 Ct. of Cl. R., 76-79, the Court said: "The law creating this commission does not undertake to create a new liability against the State, but provides a method by which claims against the State may be heard before this commission, and the claim rejected

or an award made in favor of the claimant. The statute creating this commission, after reciting the various classes of claims of which the commission might have jurisdiction, among which may be said to be included claim of this petitioner, provides: "And such commission shall hear such claims according to its rules and established practice and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State."

Continuing in the same case on page 80, it discusses the points raised by claimant in his argument in the case at bar: "The point has been pressed in argument by counsel for claimant that the legislature would have the right in a case of this kind, in its discretion, to allow a reasonable sum to persons injured, making an appropriation for its payment, although the claim was strictly speaking, neither a legal or equitable claim, and that the intent of the Act creating this commission was to transfer to the commission the same discretionary power that the legislature would have; or in other words, that the commission would be justified, although believing the claim was neither an equitable or legal claim against the State, in its discretion to make an award against the State and in favor of the claimant. To this proposition we cannot assent. It is our understanding that in the use of the language 'to determine the same according to the principles of equity and justice' is meant and used with a legal signification and that this commission has no power to make an award in any case unless the facts show a legal or equitable claim against the State. We do not believe it was the intention of the legislature to leave it discretionary with the commission to make an award in favor of the claimant regardless of the question as to whether or not he had a legal claim against the State."

It is required by the statute that "preliminary to the filing of any papers in the office of the Secretary of State in order to incorporate under the laws of this State, the proposed incorporators must pay to the Secretary of State the fee prescribed by the statute."

In the case of *Thomas A. Murphy et al., v. State*, which opinion was filed at this term, the Court cited approval *McKinley et al., v. State*, 2 Ct. of Cl. R. page 125, and *Wells-Liddell Co., v. State* 2 Ct. of Cl. R. page 381, wherein we held as follows: "Where a fee has been paid to the Secretary of State in order to obtain a license to incorporate, such fee may not be recovered back even though no subscription to the capital stock is received by the commissioners or no further action is taken to complete the incorporation."

As this claim is governed by the principles set forth in the cases herein above referred to, we are satisfied that the facts set forth in the record before us does not entitle claimant to an award.

It is therefore the judgment of this Court that the demurrer be sustained.

THOMAS A. MURPHY, R. G. SMITH AND FELIX GOGOLINSKI

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1910.

LICENSE FEES—may not be refunded, when. Where a fee is paid in order to obtain a license to open subscriptions to the capital stock of a corporation and the license issues, but no further steps are taken or the corporation is not completed, no refund may be made.

Walter F. Somers, for Claimants.

P. J. Lucey, Attorney General, for State.

This is a case where claimants applied to the Secretary of State for a license to open books of subscription to the capital stock of the Central Plumbing and Heat Supply Company. Their application to the Secretary of State was accompanied by a check for seventy (\$70) dollars, receipt of which was acknowledged by him, February 19, 1914. License was issued in accordance with their application, but later the parties not desiring to complete their organization, requested the Secretary of State to refund the amount of the check which accompanied their application. The Secretary of State informed them he would be unable to comply with their request as the money in question had been paid to the State Treasurer.

Upon claimants' application to the State Treasurer for a refund of the amount in question, they were informed that same could not be paid by him but that they might secure redress before this Court.

The State has filed a general and special demurrer to this claim.

The causes assigned by the special demurrer set up the fact that the license fee was paid by the Secretary of State into the State Treasury, and that by reason thereof the State of Illinois by its officers has performed all the services required of it by law, and that it is entitled to the license fee so paid and upon which this claim is based. Preliminary to the filing of any papers in the office of the Secretary of State in order to incorporate under the laws of this State, the proposed incorporators must pay to the Secretary of State the fee prescribed by statute. Hurd's Stats. 1913, p. 1254, chap. 58, par. 10.

Where a fee has been paid to the Secretary of State in order to obtain a license to incorporate, such fee may not be recovered back, even though no subscriptions to the capital stock are received by the commissioners or no further action is taken to complete the incorporation.

McKinley et al v. State, 2 Ct. of Cl. R. 125; Wells-Liddell Co., v. State, 2 Ct. of Cl. R. 381.

The facts in this case are similar to those in the case of *Wells-Liddell Co., v. State Supra*; the Court in that case held as follows:

"The provision of the Statute in reference to the case at bar involves the same principles as in the case of *Wm. McKinley, R. W. Hood and J. R. Ebersol, v. State*, decided at the October Term of this Court, 1910, wherein this Court decided the provision of the law, chapter 53, Hurd's Revised Statutes 1909, is clear, that payment of the sum of thirty (\$30) dollars, was a requirement which must be complied with before the Secretary of State could issue any papers whatever and that retention of the fee by the Secretary of State is in no way made conditional upon the corporation or individual taking further steps. The law does not make this fee divisible and this Court has no authority to decide this case contrary to the plain provisions of the law."

As this case clearly comes within the law as decided in the case of *Wells-Liddell Co., v. State*, and as the decision in that case has been in accordance with the holding of this Court, we are of the opinion that the demurrer should be sustained. Demurrer sustained.

CHARLES S. BUCKLEY

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. **INHERITANCE TAX**—*when no refund will be made.* Where an inheritance tax is fixed by the county judge, and the same paid, no appeal being taken, an award will be refused.

2. **SAME**—*is a tax upon what.* An inheritance tax is a tax upon the right of succession, and not upon the estate of the decedent.

3. **SAME**—*not affected by agreements among heirs, etc.* Agreements among those who succeed to an estate will not affect the tax.

4. **SAME**—*facts held not sufficient to justify an award.* In this claim the tax was fixed by the county judge and the same paid. Later, in a collateral proceeding in a foreign state a consent decree was entered, whereby, claimant took a greater estate which was liable to a tax as devised but would not be liable to a tax as determined by the decree. *Held*, no refund could be allowed.

5. **JURISDICTION**—*court has equitable jurisdiction of what.* The Court of Claims possesses equitable jurisdiction but in exercising the same it is governed by legal principles.

Oscar F. Zipf, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is a son of Lile Sabin Buckley, deceased, who died on November 28, 1912, in St. Cloud, Kansas, leaving a last will and testament. Said will, after a minor bequest, left the bulk of the estate, amounting to \$22,545.29, to the National American Woman's Suffrage Association.

The will was admitted to probate in the Probate Court of St. Cloud County. It was contested by claimant in the District Court of St. Cloud County, and a decree was entered in that Court by agreement of the parties, which decree finds that the will "is her last will and testament, and that the same should stand as made, subject to the conditions and finding hereinafter set forth." The Court also found that "by agreement between the parties hereto appearing, the real estate belonging to deceased at the time of her death, should be and become the property of the plaintiff." And it was further found that the title to the real estate described in the decree should be quieted in the said Buckley, that the administrator with the will annexed should pay one-half of the estate in cash to the National American Woman's Suffrage Association, figuring the real estate at \$10,500.00, and the remaining one-half to Buckley.

On April 26, 1913, the County Judge of Stephenson County, Illinois, appointed an inheritance tax appraiser, who found an estate with taxable cash value of \$2,000.00, as the property of J. L. Kamrar, a lega-

tee, the tax on which at 3% was \$60.00, and the balance of the estate was valued at \$22,549.29, and was determined to be the property of the National American Woman's Suffrage Association, and the tax fixed at 5%, or \$1,127.26. The total tax recommended was \$1,187.26. This finding of the appraiser was approved by the County Judge. On July 7, 1913, the administrator paid the said tax with interest from November 28, 1912, a total of \$1,230.50.

Claimant now seeks to recover back so much of the tax as applied to that part of the estate which he acquired in the settlement with the National American Woman's Suffrage Association. This amount, which he claims he is entitled to recover, is \$584.34. He contends that the amount of the estate which he obtained in his settlement, being less than \$20,000.00, that no tax should have been levied. He also claims that the amount received by him was a beneficial interest in his mother's estate, and that it is immaterial how he got it, whether directly or indirectly, and asserts that "it was an amicable, equitable settlement, made by the decree of a Court of Record." It will be observed that the tax was paid on July 7, 1913. The order of the Probate Court of St. Cloud County, Kansas, was entered on July 12, 1915, over two years after the tax had been paid. Claimant states that afterwards he "took a survey of the situation and found that although exempt from paying any tax, he had in fact paid the sum herein mentioned." Claimant contends also that he is entitled to recover by virtue of the Court of Claims Act, which provides for the hearing and determination of unadjusted claims by this Court; that he does not seek to recover by virtue of either sections 10 or 25 of the inheritance tax law; that he does not seek to recover under any express provision of the Revenue Act, but bases his claim to recover solely on his legal and equitable right to the money which the State now holds for his use.

The State, on the other hand, contends that the order of the County Judge of Stephenson County is final; that it is a judgment, and no appeal having been taken, that it must be recognized as a final judgment; that the proceeding here is collateral, and that the judgment of the County Judge of Stephenson County cannot be set aside in this proceeding; and that the inheritance tax is fixed as of the date of the death of the person.

Claimant, on the other hand, contends that this proceeding is not one to vacate or attack the judgment of the County Court of Stephenson County, but is an original proceeding of which this Court has jurisdiction, and appeals to the equitable jurisdiction of this Court.

We have heretofore held in many cases that we will not disturb the findings of the County Judge where no appeal has been taken to the County Court, and an order therein entered modifying or setting aside the judgment of the County Judge. But, claimant contends that the case before us is one of a different nature wherein this rule is not applicable. If it be granted that this is true, we must consider the circumstances under which the order of the District Court of St. Cloud County, Kansas, was entered, and the nature of the order. This was an order entered by agreement of the parties, as appears upon its face. It did not set aside the will of decedent. It finds that the parties had

entered into an agreement or a settlement whereby claimant here acquired title to part of the estate devised under the will. Had the case been actually tried in the District Court, and had the will been set aside, we would have an entirely different question confronting us. It is immaterial how claimant acquired the title to the property he had acquired so long as it is apparent that the will of the decedent was found to be her will. The case might have been settled by the giving of a deed or the turning over of money and the taking of a release, as well as in the way that it was settled. What purpose of the parties may have been in effect the settlement, we do not know, nor is it material. The fact remains that claimant's testimony shows that the title to all the property of the decedent, except minor legacies, vested in the devisee under the will. He afterwards received some of the property by agreement with the devisee. If claimant here is entitled to a refund, then it appears to us that an utter stranger to the proceedings who may eventually have acquired some of this property from the devisee would, with like show of reason, be entitled to a refund, if the rate of taxation were smaller, or if such person were entitled to exemptions. The Supreme Court of this State in *In Re Estate of Henry Graves, Deceased*, 242 Ill. at page 216, has said: "The tax is not upon the estate of the decedent, but upon the right of succession, and it accrues at the same time the estate vests,—that is, upon the death of the decedent. Questions may arise as to the persons in whom the title vests, and such questions may affect the amount of the tax and the persons whose estate shall be charged with it; but when those questions are finally determined, their determination relates to the time of the decedent's death. No changes in title, transfers or agreements, of those who succeed to the estate, among themselves, or with strangers, can affect the tax." In that case the Supreme Court pointed out that the contestant did not receive her interest in the estate as an heir. "No beneficial interest passed to her under any statute. The money was paid to her by virtue of a contract with the heirs. Henry Graves died testate. His will disposed of all his estate. The whole of the residuary estate vested at the instant of his death in the residuary legatee. The inheritance tax was then due and payable. The beneficial interest in the property then passed to the legatees and their succession gave rise to the tax. Subsequent events did not affect it." The language of the Supreme Court in that case aptly fits the case at bar. If claimant took as heirs, he was entitled to all of the estate. The District Court found that he took what he did merely by agreement with the devisee. Clearly, he has no claim upon the State of Illinois for a refund, the estate upon which the tax was paid having been legally and properly, so far as any evidence in this case shows, the property of the National American Woman's Suffrage Association. In the case of *People v. Union Trust Company*, 255 Ill. 182, the Supreme Court said: "If, in order to avoid litigation, the legatees, contestants and others in interest under the will compromised their claims, the concessions made, while binding upon the parties, take effect under the agreement, and are not a modification of the will or rights under it or under the inheritance laws of the State."

It is the judgment of this Court that the claim be denied.

THE MERCHANTS LOAN AND TRUST COMPANY, EXECUTORS OF THE LAST
WILL AND TESTAMENT OF ARTHUR W. MASTERS, DECEASED

v.

STATE OF ILLINOIS.

Opinion filed December 11, 1916.

1. **INHERITANCE TAX**—*happening of may justify refund, when.* If by the happening of a contingency an interest in an estate is liable to a lesser tax than though the contingency had not happened then upon the happening of such contingency, a refund should be made, in case the tax has been paid.

2. **INTEREST**—*when allowed.* Where the right to a refund is established under section 25 of the inheritance tax law, interest will be allowed.

McCullough & McCullough, for Claimant.
P. J. Lucey, Attorney General, for State.

Claimant filed its petition here as executor of the last will and testament of Arthur W. Masters, late a resident of Cook County, who died on August 8, 1909.

The will of decedent, probated in the Probate Court of Cook County, created a trust estate to continue until a son should become twenty-one years of age, and a daughter eighteen years of age, and it further provided, that, if each of said children should attain their respective ages that division should be made in equal shares between said children and the widow. It contained further provision for distribution of the estate, in the event that either or both of the children should die before arriving at the ages as set forth in the will.

The inheritance tax appraiser appraised the net taxable value of the estate at \$59,370.31. The inheritance tax was assessed at \$724.45, and on January 22, 1910, the amount of said tax, less five per cent, or \$688.23, was paid to the County Treasurer of Cook County.

Inasmuch, as the contingencies which terminate the trust have occurred, the said children having reached the ages of twenty-one and eighteen respectively, the estate of said decedent became the property of the said widow and children. Before division into thirds, however, it is provided in the will that each of the children should receive, outright, \$5,000.00. If the estate valued at \$59,370.31 be divided into thirds, each of the children and the widow will receive \$15,330.92, and to the share of each of the children should be added \$5,000.00, making the inheritance of each child \$21,330.92. The estate taken by the widow is not subject to tax, being less than \$20,000.00 in value. The deduction of exemptions for each of the children would make the estate of each child subject to tax worth \$1,330.92.

Under section 25 of the inheritance tax law, claimants are entitled to a refund with interest at the rate of three per cent from the date of payment, and in this case, claimants are entitled to the difference between the amount paid \$688.23, and the tax that should have been paid, \$26.60, less five per cent, or \$25.27, same being the aggregate of the tax that should have been paid by the children, less 5% on the theory that same would have been paid within six months as the original tax was paid. This amount is \$662.96.

It is accordingly the judgment of the Court that claimant be awarded the sum of \$662.96, together with interest thereon at 3% from January 22, 1910.

B. A. SMITH

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEEs AND SALARIES—*Dental Board.* Claimant rendered services as a member of the Dental Board and incurred certain expenses in connection therewith for which he has not been paid. *Held*, that an award should be made.

Fred B. Hamill, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant in this case was a member of the Illinois State Board of Dental Examiners, having served on said Board from August 22, 1913, until August 9, 1915. He received as compensation the sum of \$10.00 for each day actually engaged in the duties of the office for all legitimate and necessary expenses incurred in attending the meeting of the said board. The salary and expenses of the different members of the board were paid from the fees, fines, and penalties received and recovered by the board in connection with their work.

It was provided by the Statute creating the Board of Dental Examiners that no part of expense incurred by the said board should be paid out of the State Treasury, but later, upon the advice of W. H. Stead, former Attorney General of the State, it was decided that all moneys collected by the board should be paid into the State Treasury and that warrants covering the salaries and expenses of the different members should be paid by warrants drawn by the Auditor of State, directed to the State Treasurer.

This plan was adopted, and from that time on all moneys received by the board have been turned into the State Treasury.

On July 8, 1916, the Auditor of Public Accounts issued a warrant directed to the State Treasurer, payable to claimant for the sum of \$178.51, which warrant was duly countersigned by the State Treasurer, and delivered to claimant by the Auditor in payment of claimant's salary and expenses. The warrant in question was issued on account of a deficiency and payment was refused by reason of a certain injunction proceedings instituted in the Circuit Court of Sangamon County, Illinois. Later, on September 27, 1916, claimant received from the Auditor a second warrant for \$340.00, which was duly signed by the State Treasurer.

The latter warrant was drawn against a regular appropriation which was included in the Omnibus Bill approved June 29, 1916, in

force July 1, 1915. This bill so far as it attempted to appropriate moneys for the payment of salaries of officers of the State Government, was afterward declared unconstitutional by the Supreme Court of this State in the case of *J. B. Fergus et al v. Andrew Russell et al*, 270 Ill. 304, and by the final decree in that case the State Treasurer was enjoined from paying any warrants that were declared to be unconstitutional and void.

No claim is made that claimant failed to perform his duties in accordance with the statute authorizing his appointment nor is there any question regarding the correctness and justice of his claim.

Having performed his duties we believe that he should be compensated, and we accordingly make an award in favor of the claimant for \$518.51.

T. A. BROADBENT
v.
STATE OF ILLINOIS.

Opinion Aled December 22, 1916.

FEEs AND SALARIES—*B. A. Smith v. State ante followed. This claim is governed by the decision of the Court in B. A. Smith v. State, supra.*

Brown, Hay & Creighton, for Claimant.
P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of claimant for \$124.10.

C. P. PRUYN

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

Brown, Hay & Creighton, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant in this case is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$170.40.

W. F. WHALEN

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

Brown, Hay & Creighton, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant in this case is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$279.35.

E. F. HAZELL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

Brown, Hay & Creighton, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant in this case is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$304.70.

HENRY L. WHIPPLE

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

Brown, Hay & Creighton, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of claimant for \$312.72.

Dr. N. W. Cox

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

Alexander Wilson, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$552.73.

O. H. SEIFERT

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

E. I. Frankhauser, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$119.20.

GIDEON M. DEMPSEY

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1910.

FEES AND SALARIES—B: A. Smith v. State ante followed. This claim is governed by the decision of the Court in B. A. Smith v. State, supra.

E. I. Frankhauser, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of claimant for \$187.77.

MARIE D. GAINES

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEEs AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra*.

E. I. Frankhauser, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of claimant for \$51.35.

C. F. O'CONNOR
v.
STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*B. A. Smith v. State ante followed.* This claim is governed by the decision of the Court in *B. A. Smith v. State, supra.*

E. I. Frankhauser, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant is seeking an award for services performed in connection with the Illinois State Board of Dental Examiners. The facts are practically the same as those in the case of *B. A. Smith v. State of Illinois*, in which case an opinion was filed at this term.

Our conclusions are the same and we therefore make an award in favor of the claimant for \$111.95.

MARY A. CUMMINGS

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

INHERITANCE TAX—*facts held sufficient to authorize an award.* In this claim debts were proven up after the tax had been fixed and paid which debts were not reckoned in fixing the tax. *Held*, that an award should be made.

Palissard & Benjamin, for Complainant.

P. J. Lucey, Attorney General, for State.

Claimant is the widow of and executrix of the will of Robert F. Cummings, late of Iroquois County, Illinois, who died on December 31, 1914, and on April 12, 1915, an inheritance tax appraiser was appointed. On June 30, 1915, he made his report to the County Court of Iroquois County, fixing the value of the estate subject to tax at \$341,084.48, from which amount exemptions of the widow amounting to \$20,000.00 were deducted, and the tax fixed at \$6,421.69. The report of the appraiser was approved, and claimant paid into the County Treasury \$6,100.61, being the amount of the tax less 5%, and this tax was in turn paid to the State Treasurer.

There had been pending the claim of Lamson Brothers and Company against the estate in the amount of \$167,280.01, and no deduction was made on account of said claim. On January 4, 1916, said claim was allowed in the amount of \$73,475.79. In making his appraisal the inheritance tax appraiser allowed \$10,250.00 as costs of administration. This was subsequently ascertained to be \$16,587.60. By these two items the share of the widow as legatee and devisee was lessened in the amount of \$70,818.39. On the other hand, credits in the amount of \$4,654.98 had not been taken into consideration by the appraiser, and no tax had been levied thereon. A recapitulation of these figures demonstrated that tax has been paid on \$75,158.41, which amount the widow as legatee and devisee and who is also claimant herein, has not received. The tax on this amount, less the 5% allowed for payment within six months, amounts to \$1,428.02, which is the amount of this claim.

Chapter 120 section 373 of the Revised Statutes states as follows: "Whenever debts shall be proved against the estate of the decedent after distribution of legacies from which the inheritance tax has been deducted in compliance with this Act, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the State or county treasury, or by the County Treasurer if it has been so paid." Section 375 of the same chapter provides:

"When any amount of said tax shall have been paid erroneously to the State Treasurer, it shall be lawful for him on satisfactory proof rendered to him by said County Treasurer of said erroneous payment to refund any pay to the executor, administrator or trustee, person or persons who have paid any such tax in error the amount of such tax so paid, provided that all applications for the repayment of said tax shall be made within two years from the date of said payment."

It is apparent that claimant is entitled to a refund, and it is accordingly the judgment of this Court that claimant be awarded the sum of \$1,428.02.

EARL G. HOWARTH

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

MILITARY SERVICE—when award will be made for injuries received in. A member of the Illinois Naval Reserve who is injured in the service of the State under orders from the Commander-in-Chief, is entitled to an award in the Court of Claims.

Cecil Page, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant in this case was a young man at the time of the accident and was regularly enlisted as a seaman in the Third Division of the Illinois Naval Reserve, a part of the organized military force of the State, and was under the rules and regulations covering military bodies. He was required to render obedience to all orders of his superior officers, and a part of the duties of the Naval Reserve consisted in taking cruises on Lake Michigan and the other Great Lakes.

On or about August 1, 1914, he was ordered by Captain Edward A. Evers, Commanding Officer of the Naval Reserve, which he was enlisted with the Third Division as a seaman, to go on a cruise on the United States Steamship "Dubuque," and claimant was ordered to and did serve as a seaman on board said ship from that date until on or about September 7, 1914. His particular duty on board the ship during the cruise was that of captain of the stow-hole, to stow below deck various equipment, and bring same forth when needed. The store-room or stow-hole below deck was raised by means of an opening through the deck called a hatchhole, which was bordered with a ledge extending upwards from the deck approximately one-half inch. Over the hatch hole was constructed an iron cover operating on hinges, with a ledge on the underside extending downward approximately one-half inch and fitting over the ledge on the deck so as to prevent water from entering the stow-hole. The cover weighing approximately one hundred pounds. On or about August 18, 1914, at the hour of 4 A. M., while the sea was somewhat rough causing the ship to rock, claimant, after having stowed away a quantity of equipment, and using due care for his own safety, sought to close the cover over the ledge when he lost control of it, the cover falling on the index finger of his right hand and practically severed it; although the finger was not amputated, it is now stiff and he has no use of same.

At the time of his injury he was earning \$14.00 per week; he was prevented from following his business for four weeks and thereafter

earned \$30.00 per month for two years in service of the Illinois Naval Reserve.

The State admits all the facts alleged in claimant's declaration, and admits that claimant under the law of the State of Illinois as cited in the brief, is entitled to a recovery, but contends that claimant should not be awarded a large amount or the amount he claims, to-wit: \$2,000.00.

Considering the injury, that it was the index finger of his right hand, and the manner in which same was sustained, that he received about half pay for two years, we are of the opinion that claimant is entitled to an award.

An award is therefore made to claimant in the sum of \$800.00.

H. L. C. SMITH

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

MILITARY SERVICE—when aboard will be made for injuries received in. A member of the Illinois Naval Reserve who is injured in the service of the State under orders from the Commander-in-Chief is entitled to an award in the Court of Claims.

Cecil Page, for Claimant.

P. J. Lucey, Attorney General, for Claimant.

The claimant in this case was a young man at the time of the accident, and was regularly enlisted as a seaman in the Third Division of the Illinois Naval Reserve, a part of the organized military force of the State, and was under the rules and regulations covering military bodies. He was required to render obedience to all orders of his superior officers, and a part of the duties of the Naval Reserve consisted in taking cruises on Lake Michigan, and the other Great Lakes.

On or about June 28, 1914, he was ordered by Captain Edward A. Evers, Commanding Officer of the Naval Reserve, which he was enlisted with, in the Third Division as a seaman, to go on a cruise on the United States Steamship "Dubuque," and claimant was ordered to and did serve as a seaman on board said ship from June 28, 1914, until on or about September 10, 1914. His particular duty on board said ship during the cruise, was working on what is called an ash hoist, being a shaft extending from the floor of the fire-room, through the deck of the ship, by which was hoisted ashes from the fire room to the deck of the ship, by means of a rope operated over a pulley. The pulley was located in the hoist about twenty-six feet above the fire room floor and about six feet above the deck. On the end of the rope in the fire room was fastened a sack used as an ash carrier. The other end was extended upward passing over a pulley in the hoist and then about twenty feet aft to a drum, looped around the drum and there held and pulled by a seaman. The drum was operated by an electric motor which revolved the drum during the hoisting, while the sack was being emptied and while the sack and rope were being returned to the fire room for the purpose of repeating the operation. On or about July 3, 1914, claimant was stationed on the deck at the hoist for the purpose of receiving and disposing of the ashes when lifted as aforesaid from the fire room to the deck and returning the sack and rope to the fire room as aforesaid. When a sack reached the deck, the seaman holding the

end of the rope, after passing around the drum, would release the tension and thereby permit the drum to continue to revolve without gripping the rope and raising the sack of ashes higher. After the ashes were disposed of by claimant, during one of these operations on the last named date, July 3, 1914, claimant using due care for his own safety, dropped the empty sack to the fire room and was in the act of pulling down the rope for the purpose of repeating the operation, when suddenly the rope became tightened on the revolving drum, and jerked the fingers and hand of claimant into the pulley, destroying the first joint of the second finger, breaking open joint in the second finger of the left hand, pulled the second joint out of the socket and otherwise injured the hand, resulting in the loss of the use of the first two joints of the finger.

At the time of, or just prior to his injury, he was earning \$14.00 per week. He was injured on July 3, 1914, and continued in the service of the Illinois Naval Reserve until some time about September 10, 1914, during all of which time he received about \$56.00 from the State, as payment for cruising, resulting in a loss to the claimant of salary during that time in the amount of \$84.00.

The State admits all the facts alleged in claimant's declaration, and admits that claimant under the law of the State of Illinois, as cited in the brief, is entitled to a recovery, but contends that claimant should not be awarded a large amount or the amount he claims, to-wit: \$2,000.00.

Considering the injury, that is, was the second finger of the left hand, and the manner in which it was sustained, we are of the opinion that claimant is entitled to an award. An award is therefore made to the claimant in the sum of \$400.00.

CHARLES W. O'NEILL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

CONTRACTS—when recovery may be had on. The court reviews the evidence and makes an award in favor of claimant.

McRoberts, Morgan & Zimmerman, for Claimant.

P. J. Lucey, Attorney General, for State.

On July 18, 1910, the Board of Administration of the State of Illinois, entered into a contract with Earl D. Stout for the erection of a hospital building at the Peoria State Hospital at South Bartonville, Illinois. Claimant became a subcontractor under the said Earl D. Stout in connection with the erection of said building and agreed to install the plumbing and heat for said building.

He did his work in a satisfactory manner, but was unable to secure the money due him for his work from the general contractor and accordingly filed a claim for the amount due him, with the Board of Administration. The Board of Administration advised claimant they could not deal with him except through the principal contractor, Earl D. Stout. Claimant then secured a statement from the said contractor, Stout, authorizing and requesting the Board of Administration to pay the sum of \$236.00 to claimant, that being the amount due the said Stout from the said Board.

As the money appropriated to take care of this contract was not paid within a certain time, it was turned back to the State Treasury with other unexpended appropriations, and the Board of Administration was unable to pay claimant, notwithstanding they were requested to do so by the general contractor.

Under the circumstances it appears to us that claimant is entitled to receive from the State the sum of \$236.00, which is being withheld on the general contract and we therefore make an award to claimant for that amount.

Claimant is awarded \$236.00, this payment to claimant releases the State of Illinois from all obligations to the general contractor, Earl D. Stout, for and on account of the money so paid to claimant.

CHARLES W. O'NEILL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1918.

CONTRACTS—when recovery may be had on. The court reviews the evidence, and makes an award in favor of claimant.

McRoberts, Morgan & Zimmerman, for Claimant.
P. J. Lucey, Attorney General, for State.

Claimant, a contractor of Peoria, Illinois, entered into a contract with the Board of Administration of the State of Illinois, whereby he was to provide material and do certain work in connection with some of the cottages at the Peoria State Hospital, South Bartonville, Illinois. He employed I. L. Hartman a sub-contractor to do a part of the work but the work of Hartman was not satisfactory to the Board of Administration, and they declined to accept it. Claimant afterwards contracted with the Peoria Stone & Marble Co., to finish the work which he had sublet to Hartman; the said Peoria Stone & Marble Co., finished same and it was accepted as satisfactory by the Board of Administration. The said Hartman filed a claim with the Board of Administration for \$303.59, on account of the work done under claimant's contract, and the Board has withheld that amount insisting they would not pay it until claimant and Hartman had settled their differences.

Later, Hartman entered suit against claimant in the County Court of Peoria County, Illinois, for money alleged to be due him on account of the work done by him in connection with claimant's contract with the State. Claimant filed notice of set off and upon a hearing the Court entered a judgment for claimant in the sum of \$50.00.

The appropriation under which the Board of Administration had power to make the contract with the claimant was made by the Forty-eighth General Assembly at the regular biennial session held from January 8, 1913, to June 30, 1913, and this appropriation, together with all other unexpended appropriations lapsed into the State Treasury, as provided by the constitution on the 30th day of September, 1915, and there is no appropriation out of which the amount due claimant on his contract can be paid by the Board of Administration.

Claimant having done the work in a manner satisfactory to the Board of Administration and having adjusted his claim with Hartman, the sub-contractor, in the Civil Courts, we are of the opinion that he should be reimbursed by the State for the money due him.

We therefore make an award to claimant in the sum of \$303.59.

DAVID RUTTER AND COMPANY, A CORPORATION

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

CONTRACTS—facts which will justify recovery on. In this claim, the specifications recited that delivery of coal could be made by rail, when such was not the case, the State representative was aware of the fact, but the claimant was not. *Held*, that claimant was not bound by price fixed in contract, but could recover a reasonable price.

Thomas D. Nash, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant entered into a contract with the State Board of Administration for supplying coal to the Peoria State Hospital at Bartonville for the year ending July 1, 1915.

Claimant, previous to the making of the contract, had secured a copy of the specifications for bidders, as prepared and furnished by the Board of Administration, and in these specifications it was recited that the Peoria State Hospital was accessible by the Peoria & Pekin Union Railway, and it was provided that coal should be delivered in car load lots, f. o. b. on the siding at the hospital. The specifications were not applicable alone to the hospital, but to all institutions under the control of the Board of Administration. Certain of the institutions it appeared from the specifications had no side tracks, and it was provided that at such institutions delivery should be by wagon.

It appears that there was a track to the Bartonville institution, but this track, while constructed by the railroad company mentioned, was on the property of another, and prior to the making of this contract, the railroad company had been enjoined by the Circuit Court of Peoria County from transporting cars of coal over said tracks except such cars as contained coal from the mines of the owners of the land. This fact was known by the Board of Administration, but was unknown to the claimant.

About August 1, 1914, claimant tendered coal to the railroad company for delivery to the hospital, but the railroad company refused to receive same, because of the existence of the injunction. Thereupon the president of the claimant company advised the Board of Administration of the fact, stating that it would be impossible for him to perform his contract. The necessities of the hospital were urgent, and claimant was advised to make deliveries as best it could. Thereupon, claimant made arrangements for delivery by wagon. This, however, necessitated the expenditure of 75c per ton for delivery from the nearest point on the

railroad to the hospital. To make deliveries in this manner, claimant expended \$12,873.59, and it now seeks to recover this amount from the State, claiming that it was impossible to perform the contract, that in making its bid it had acted upon the representation that the hospital was accessible to the railroad, while in fact it was not, and that the direction to it by the Board of Administration to make deliveries as best it could, as it was apparent that it was impossible to perform the contract, amounted in effect to a new contract. As we view this case, either no contract in fact existed, due to the fact that the minds of the parties had not met, or if it existed, then a new contract was made when the claimant, after refusing to deliver under the contract as executed, was instructed to make deliveries. It is unnecessary for the the purposes of this case to determine which was the actual state of affairs. Certainly, delivery on the side track at the hospital was an essential ingredient of the contract. Accordingly, we do not believe that claimant is barred from recovery by article IV section 19 of the constitution.

The State concedes that there is some equity in claimant's claim.

We are of the opinion that, due to the fact that claimant has innocently sustained this loss, due entirely to the facts as above stated, that it is entitled to recover, and it is accordingly the judgment of this Court that claimant be awarded the sum of \$12,873.59.

WESTERN UNITED GAS AND ELECTRIC COMPANY, A CORPORATION

v.
STATE OF ILLINOIS.

Opinion filed December 22, 1916.

LICENSE FEES—*when refund will be awarded.* Claimant paid a fee to Utilities Commission of this State upon the basis of an issuance of \$800,000 worth of stock when late the amount was reduced to \$80,000. *Held*, that a refund should be made.

R. C. Putnam, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant company is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its principal office at Aurora, Illinois. It is a public utility corporation which furnishes gas, electricity and steam heat in several of the cities of the State.

On petition of claimant the State Public Utilities Commission of Illinois on December 16, 1915, entered an order authorizing the issuance of \$800,000 worth of bonds of the Western United Gas and Electric Company, which said order contained a provision for the payment by claimant of an authorization fee of \$800.00.

The sum of \$800.00 was paid by claimant to the State Public Utilities Commission in accordance with its order. Later, it was determined that the order of the State Public Utilities Commission authorizing the issuance of bonds to the amount of \$800,000.00 was far in excess of what was required and upon petition of claimant said order was modified to the extent that said claimant company would be authorized to issue \$80,000 worth of bonds.

After the amended order was entered by the commission reducing the amount of bonds issued from \$800,000 to \$80,000, claimant sought to recover from the State Public Utilities Commission and from the State Treasurer the sum of \$720.00 which represents the difference between the amount paid by it, upon the entering of the first order, and the amount that it would have been required to pay under the amended order.

Claimant was informed that the money so paid by it was turned into the State Treasury, and that as there was no appropriation covering refunds of this kind he was unable to pay back the money.

Having paid the sum of \$800.00 in good faith in accordance with the order of the State Public Utilities Commission, and not having received the benefit as was intended by the order of the commission, we are of the opinion that claimant is entitled to a refund of \$720.00.

We accordingly make an award in favor of the claimant in the sum of \$720.00.

Judge Alschuler took no part in the consideration of this case.

THOMAS MCGUIRE, DOING BUSINESS AS THE MCGUIRE AND WHITE
DETECTIVE AGENCY.

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

CONTRACTS—when law will imply promise on part of State to pay. Where a duty is imposed by law upon an officer and moneys are not provided with which to perform the duty, he may perform the duty and the necessary expenses are a proper charge against the State.

Benson Landon, for State.

P. J. Lucey, Attorney General, for State.

Thomas McGuire, the claimant, is carrying on a general detective business in the City of Chicago, under the name of McGuire & White Detective Agency.

On June 12, 1914, the Auditor of Public Accounts employed Mr. McGuire to furnish men to protect the property of the La Salle Street Trust and Savings Bank, the State Bank of Calumet, and the Ashland Twelfth Bank, which banks were under investigation by the Auditor's office. Mr. McGuire furnished men and rendered service for the period of time beginning June 12, 1914, and ending September 27, 1914. The statement for services and expenses of operatives rendered shows a charge against the LaSalle Street Bank of \$210.85, against the Ashland Twelfth Street Bank of \$1,909.20, and against the State Bank of Calumet of \$1,903.15, a total of \$4,023.20.

The testimony of the witnesses shows that the contract was made by the Auditor, that the services were rendered, and that the charges are the usual and reasonable charges for such service.

The State was represented at the taking of testimony by the Attorney General, but he has not filed any brief or argument contesting the claim.

On the authority of the case of *Anyon, et al v. State*, decided in the October Term, 1914, by this Court, this claim will be allowed, and it is the judgment of the Court that claimant be awarded the sum of \$4,023.20.

AUGUSTUS ALBERT CARPENTER, EXECUTOR OF THE LAST WILL OF
AUGUSTUS A. CARPENTER, DECEASED.

v.
STATE OF ILLINOIS.

Opinion filed December 22, 1918.

INHERITANCE TAX—when refund will be made. In this claim the tax as fixed by the County Judge was paid under protest, after which an appeal was taken to the County Court which court confirmed the order of the County Judge, and thereupon an appeal was taken to the Supreme Court, which court held that a portion of the estate was not liable to a tax under the act of 1909. (*People v. Carpenter*, 264 Ill. 400). Later, a tax was fixed by the County Judge under the act of 1895, and an appeal taken to the County Court which approved the action of the County Judge in fixing the tax and thereupon an appeal was prayed to the Supreme Court which court held that the estate was not liable to a tax under the act of 1895. (*People v. Carpenter*, 274 Ill. 103.) *Held*, that claimant is entitled to an award.

Scott, Bancroft, Nartin & Stephens, for Claimant.

P. J. Lucy, Attorney General, for State.

The claimant in this case seeks an award for \$2,020.47, which he claims is due by reason of the erroneous inheritance tax assessment in the estate of Augustus Albert Carpenter, deceased.

The appraiser appointed by the County Court to fix the tax on decedent's estate found that the total tax assessed against the estate to be \$28,997.04. Claimant to secure his statutory discount paid to the County Treasurer, \$27,547.19, which was the amount originally taxed, less than five per cent discount.

The County Judge entered an order fixing the tax rate in accordance with the appraiser's report and upon an appeal to the County Court from the order of the County Judge, the order was affirmed. An appeal was taken to the Supreme Court of the State of Illinois, and it found that the tax was excessive and erroneous. A new order fixing the tax rate was again entered by the County Court and this second order was appealed from to the Supreme Court and was found upon hearing to be excessive.

A final order was made by the County Court in accordance with the directions of the Supreme Court which fixed the total tax at \$26,870.83. Claimant contends that he is entitled to five per cent discount on the amount of this final order, by reason of his having paid the original tax assessed against the estate, within six months from the death of decedent.

The State insists that claimant is not entitled to an allowance of five per cent discount on the amount of this final order, although they

concede that there is a basis for claimant's contention upon equitable grounds.

In the case of *Bartholomae v. State*, 2Ct. of Cl. R. 306, where the same question arose this court held as follows: "It would seem that, inasmuch, as this erroneous tax was paid within the period whereby the five per cent discount was secured, that a like discount should be allowed upon the correct tax as fixed by the County Court, this being included in the money already paid, * * *"

As heretofore stated, claimant paid \$27,547.19, which was the original assessment, less the five per cent discount. If the correct assessment of \$26,870.23 had been made in the first instance, claimant after deducting his five per cent discount would have paid \$25,526.72. The difference in what he paid under the erroneous order and what he would have paid under corrected final order amounts to \$2,020.47, and we believe that claimant is entitled to a refund of this amount.

We therefore make an award in favor of claimant for \$2,020.47.

WESTERN GRAIN PRODUCTS COMPANY

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

License Fees—when refunded. Where a fee is paid under protest, in a case where no fee is required, a refund will be allowed.

P. J. Lucey, Attorney General, for State.

Claimant is engaged in the manufacture of stock food at West Hammond, Illinois. On December 27, 1913, it paid license fees amounting to \$50.00 into the State Treasury for two of its products, and again paid such fees on January 5, 1915. It objected to the payment of these fees to the State Food Commission, stating that the particular products covered by said licenses were not sold within the State of Illinois. Nevertheless, upon the insistence of the Food Commission, it did pay the fees. Subsequently, for the year 1916, the Food Commission being satisfied that the foods were not sold in Illinois, did not require license for the same brands.

It is clearly apparent from the record that these foods were not sold in Illinois, and that under the law claimant should not have been required to pay license fee. There is some question as to whether or not the fees were paid under protest by claimant, but we are inclined to resolve the doubt, on consideration of the evidence in the record, in favor of the claimant, and it is accordingly awarded the sum of \$100.00.

FRANK N. HILL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

NON-LIABILITY OF STATE—*State not liable to officers who volunteer services. Where an officer volunteers his services in assisting and arresting an escaped convict, and in consequence thereof receives injuries, the State is not liable.*

Louis Warner and Lauderback Brothers, for Claimant.
P. J. Lucey, Attorney General, for State.

The claimant in this case a resident of the City of Chenoa, Illinois, was on July 20th and 21st, 1915, and prior and subsequent to said dates, the regularly appointed and acting marshal of said city, and by agreement with said city, his hours of duty were between 6 P. M. and 12 o'clock midnight.

On the evening of July 20th, 1915, claimant received a telephone communication from the State Reformatory, at Pontiac, Illinois, to be on the lookout for two escaped criminals from said institution. Complying with said request, he at once began the search and continued from the time the first train, the "Hummer" a Chicago and Alton train from Pontiac, reached Chenoa at about 9 o'clock P. M. until the time he sustained a broken leg, which was about 1 o'clock in the morning of July 21, 1915, and at least an hour after his duties to the city of Chenoa as city marshal for that day and night. His official hours ended at midnight, but by special request of the officer of the State Reformatory he continued the search until about one o'clock A. M., at which time while walking along the Chicago and Alton railroad track to search some empty box cars located near the canning factory, he accidentally fell across the rail in such a way as to break his left leg between the knee and ankle. By reason of this accident he was put to considerable expense, unable to perform any work for a long period of time, and suffered great bodily pain.

The evidence shows that claimant received one dollar per day from the city of Chenoa as city marshal, and that during all the time he was unable to work the city continued to pay him one dollar per day. His doctor bill amounted to \$25.00. The evidence shows that at no time was claimant either an officer or servant of the State of Illinois. If claimant had been in the service of the State as one of its servants, he would have been required to submit his claim to the Industrial Board. Claimant is seeking to recover damages for his injury in the sum of \$1,000.00. It is the judgment of the Court that the claim be denied.

W. T. Joos

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

STATUTE OF LIMITATIONS—antiquated claims—when filed. Unliquidated claims must be filed within two years from the date the cause of action accrues.

Weil & Bartley, for Claimant.

P. J. Lucey, Attorney General, for State.

This is a claim presented by W. T. Joos against the State of Illinois for damages caused by a continuous nuisance.

Claimant, according to the statement filed herein, is the lessee of a farm in Peoria County, which adjoins certain lands leased by the owner thereof to the State of Illinois and used as a part of the State Rifle Range and known as "Camp Grant"; that shortly after claimant took possession under the lease above referred to, the State began the operation of the Rifle Range, and on July 7, 1910, various State troops and companies of the Illinois National Guard were engaged in rifle practice upon the lands leased by the State and adjoining claimant's property. That rifle practice began on September 18, 1909, and continued until the 28th day of November of that year, during all of which time neither the claimant nor his assistants were able to work in the fields, since they were within range of the bullets being fired by the troops and companies above referred to, while practicing target shooting; that the crops were not harvested at all nor utilized; that his corn fodder and second crop of clover were left a waste in the fields owing to the heavy snows falling shortly after the ends of the rifle practice. That rifle practice began on July 7, 1910, and continued until about October 30th, of that year, and during the following season commenced on or about July 2, 1911, and continued until October 30th following. That the claimant, being unable to operate his farm on that account, complained to the officers in charge of the Illinois National Guard, including the Adjutant General thereof, but without result, and in order to redress the wrongs, instituted in the Circuit Court of Peoria County, Illinois, a suit in chancery, praying that the officers of said Illinois National Guard, and the members thereof be restrained from so using said rifle range, but that no temporary injunction was issued by the Circuit Court; that after a protracted hearing in said court an injunction was issued, in accordance with the prayer of the bill, from which injunction order the State thereafter appealed to the Supreme Court. The Supreme Court on the

17th day of December, 1912, entered an order affirming the decree of the Circuit Court and making such injunction permanent. (W. T. Joos, Appellee v. The State National Guard, et al, 257 Ill. 138.)

The total claim as shown by the declaration, including attorney's fees, court costs, etc., incurred in and about the trial of said case and \$750.00 alleged to be due through loss of crops, etc. amounts to \$1,587.10.

To this claim the State has interposed a demurrer, urging that if the claimant has a valid claim that the statute of limitations interposes a bar to recovery.

That this rifle range constitutes a nuisance, for which the State is liable, there can be no question, both on principle and adjudication. *Crawford v. State*, 1 Ct. of Cl. R. 91; *Joos v. Ill. Nat. Guard, et al*, 257 Ill. 138; *Scanlan v. State*, 1 Ct. of Cl. R. 128; *Green v. State*, 1 Ct. of Cl. R. 178; *Hickox v. State*, 1 Ct. of Cl. R. 81; *Chicago Ball Club v. State*, 1 Ct. of Cl. R. 291. Court of Claims Act 1903.

The damaging of property by bullets during target practice carried on by the State Militia is not an act in which the servant could exercise his choice or make use of his judgment. It is the militia acting in strict subordination to the civil power. We believe that as conducted the rifle range at Camp Grant constituted a permanent nuisance of a kind already considered by this Court; but that the nuisance discontinued when the rifle practice ceased on October 30, 1911, and the declaration in this court was not filed with the Auditor of Public Accounts, who is ex-officio Clerk of this Court until April 26, 1914, more than two years after the nuisance abated, and is therefore barred by the Statute of Limitations. No legal liability rests upon the State to pay claimant's amounts paid out by him as costs and attorneys' fees in prosecuting the case in Peoria County and Supreme Court of this State. The demurrer is sustained and the petition dismissed.

ROBERT L. VIANDS

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

1. **QUARANTINE**—*State not liable for acts of officers in enforcing.* Where the State exercises its police power in enforcing a quarantine to prevent the spread of a contagious disease, the State is not liable for the acts of its officers or agents in the enforcement of such quarantine.

2. **SAME**—*State not liable for property destroyed.* Where in the enforcement of a quarantine the property of an individual or corporation is destroyed, the State in the absence of a statute is not liable therefor.

Kirby, Wilson and Brockhouse, for Claimant.
P. J. Lucey, Attorney General, for State.

The claimant in this case was a tenant farmer residing three miles north of Ashland, Cass County, Illinois. On November 9, 1914, the farm occupied by him was placed under strict quarantine by order of the State Board of Live Stock Commissioners, because the live stock belonging to said claimant on said farm had become afflicted with a dangerous and contagious disease, known as the foot and mouth disease. On November 11, 1914, the farm was still being under quarantine, the dwelling house occupied by claimant was destroyed by fire, and part of his household goods and other personal property situated in said dwelling was also destroyed, for which he now presents his claim for \$242.85.

Counsel for claimant argue that had it not been for the strict quarantine on said farm prohibiting claimant's neighbors from going to the house, they would have been able to save the balance of claimant's personal property, and therefore the State should reimburse him for the loss that he sustained.

The State in placing the quarantine on claimant's farm was acting solely in a governmental capacity for the benefit of its citizens. This work must necessarily be handled through its officers, employees or servants, and if the State in the exercise of its police powers had destroyed the property in question no recovery could be had against the State, there being no statute provided therefor.

The judgment of this Court is that the claim be rejected.

R. C. ENGLISH AND E. C. ENGLISH, CO-PARTNERS DOING BUSINESS AS
ENGLISH BROTHERS

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

MISTAKE OF FACTS—contractor making mistake in estimate. Where a contractor in making an estimate upon work to be performed by him honestly makes a mistake in such estimate, he may have his contract rescinded.

Henry L. Jones, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimants who are contractors at Champaign, Illinois, are asking for an award in the sum of \$4,500.00 on account of their having forfeited to the State said amount when they refused to comply with a bid submitted by them for the erection of an auditorium for the Southern State Normal University at Carbondale, Illinois.

It appears from the records before the Court that a clerical mistake was made by claimant in preparing their estimates in connection with the structural and ornamental iron used in the erection of the proposed building.

At the time claimants were preparing their estimates for the erection of the auditorium at Carbondale, they were also engaged in preparing estimates for the erection of a State building at Normal, Illinois. The Gage Structural Steel Co., of Chicago, Illinois, furnished claimants proposals for the structural steel in connection with the building to be erected at Normal, Illinois, but did not furnish them proposals for the steel to be used in the building at Carbondale.

By Mistake, claimants used the proposal furnished them for the Normal building, believed it to be the proposal for the erection of the Carbondale building and this mistake caused their estimates to be from \$12,000 to \$14,000 less than they should have been.

When the bids were opened it was found that claimants were considerably lower than the other bidders and accordingly the contract was awarded to them. Claimants on finding their mistake above referred to, notified the State Architect and the Board of Trustees of the Southern Illinois State Normal University that they would be unable to go ahead with the work on account of the mistake in their bid and asked that their certified check for \$4,500 be returned.

At the request of the State Architect a meeting was held at Carbondale, Illinois, at which claimants, the State Architect and the Board

LOZZA v. STATE OF ILLINOIS.

CORA DARIN LOZZA

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

DAMAGES—*Johnson v. State, ante followed.* This case is governed by the facts in the case of *Frank O. Johnson v. State of Illinois*, 2 Ct. of Cl. R. p. 227.

Lagger & Blatt and Brown, Hay & Creighton, for Claimant.
P. J. Lucey, Attorney General, for State.

The facts in this case are almost identical with the facts in the case of *Frank O. Johnson v. State of Illinois*, decided May 22, 1914, in the Court of Claims, and reported in Volume 2, Ct. of Cl. R., at page 227.

On the authority of that case, claimant is entitled to an award, and the only question for this Court to decide is as to the proper amount that should be awarded.

From a consideration of the evidence as offered by claimant and the State, it is the opinion of this Court that claimant shall be awarded \$500.00.

It is accordingly the judgment of this Court that she be awarded said amount.

COUNTY OF WILL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND COSTS—meaning of in section 39 of act relating to Joliet Penitentiary. The Legislature in enacting section 39 of the act in relation to the Joliet Penitentiary meant that the term "fees and costs" was intended to include not only what might be included in the strict definition of that term, but also other actual and necessary expenses incurred in the prosecution of a case.

Robert W. Martin, State's Attorney, for Claimant.
P. J. Lucey, Attorney General, for State.

Statutes must be interpreted according to their intent and meaning and not always according to the letter; a thing within the statute, though not within the letter, and a thing within the letter is not within the statute, unless within the intention.

Perry v. Johnson County, 94 Ill. 214, 220;

Anderson v. Chicago, Burlington & Quincy R. R. Co.,
117 Ill. 26, 28;

People ex rel v. Gaultier, 149 Ill. 39, 47;

People ex rel v. City of Chicago, 152 Ill. 546, 551.

In construing a statute, the courts are not confined to the literal meaning of the words of the statute, but the intention is to be gathered from the necessity, object or reason of the enactment and the meaning of its words enlarged or restricted according to the true intent.

Castner v. Walrod, 83 Ill. 171, 178;

Cruse v. Aden, 127 Ill. 231, 239;

People ex rel v. City of Chicago, 152 Ill. 546, 552;

People ex rel v. Harrison, 191 Ill. 257, 267;

Dissenting opinion, *People v. Russel*, 245 Ill. 268, 282.

When the literal enforcement of the statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the Legislature could not have contemplated, the Courts are bound to presume that such consequences were not intended and adopt a construction which will protect the ends of justice and avoid the absurdity.

People ex rel v. Gaultier, 149 Ill. 39, 47;

Crane v. Chicago & Western Indiana R. R. Co., 233 Ill.
250, 263;

Sturges v. City of Chicago, 237 Ill. 46, 51;

People ex rel v. City of Chicago, 152 Ill. 522, 546.

In construing said statute, its object must be borne in mind and language susceptible of more than one construction should receive that construction which will effect the purpose and object of the statute, rather than defeat it.

People ex rel v. Hinrichsen, 161 Ill. 223, 226;

People v. Price, 257 Ill. 587, 593;

City of Decatur v. Schlick, 269 Ill. 181, 185;

A prosecution is the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them until terminated in the final judgment of the Court, to-wit: the sentence.

Territory v. Nelson, 2 Wyoming, 346.

Neither the people of the county in a criminal case can be held for costs.

Galpin v. City of Chicago, 249 Ill. 554, 566.

Section 39 of the act in relation to the Joliet Penitentiary provides with reference to the payment by the State of the costs of prosecuting convicts in the penitentiary who may commit a crime while in such penitentiary as follows:

"* * * that all fees and costs arising from the prosecution of convicts for crimes committed in the penitentiary which the county is now required to pay in like cases, shall be paid by the State." Hurd's Revised Statutes, 1916, chap. 108, par 39, p. 1968.

Fees—Costs—Defined.

The term "Fees" is used to designate the sums prescribed by law as charges for services rendered by public officers.

City of St. Louis v. McInts, 107 Mo. 611;

Com. v. Balley, 3 Ky. Law Rep. 110-114.

Any charge for services not enumerated in the statute is not nor is there any pretense for calling it costs.

Chase v. De Wolf, 69 Ill. 47, 49.

Costs are awarded by each court in the proceedings before it. They are certain legal fees allowed by law computable from the record.

State v. Graham, 68 W. Va. 1, 7.

Costs are creatures of the statute and where the statute does not provide for costs, none may be taxed.

Galpin v. City of Chicago, 249 Ill. 554, 566.

At common law no costs were allowed by the Court or jury who were authorized to amerce the unsuccessful party a certain amount in addition to the amount sought to be recovered in the action, and here grew up the practice of allowing costs.

Galpin v. City of Chicago, *supra*, p. 566.

There is a distinction between fees and costs as indicated by the following citations:

In *Alexander v. Harrison*, 8 Ind. App. 47, 48, the court distinguished the terms "Costs" and "Fees" as follows:

"The terms 'fees' and 'costs' are often used interchangeably as having the same application, but accurately speaking the term 'fees'

is applicable to the items chargeable by law as between the officer or witness and the party whom he serves; while the term 'costs' has reference to the expenses of the litigation as between litigants. *Musser v. Good*, 11 Serg. & R. Pa. 247. This distinction has little, if any practical value."

The same distinction was made in the case of *Bechart v. Anderson*, 24 Okla. 82, 84. In *Columb v. Webster Manufacturing Company*, 76 Fed. 198, 200, the court said:

"'Costs' means taxable costs to be recovered by the adverse party. * * *. 'Fees' means for the cost at bar, the fees of the clerk in the strict sense of the word."

In the case of *In Re Terry*, 153 N. Y. Supp., 258, on pages 260, 261, the Court said:

"But fees do not properly come within the definition of the word 'costs' * * *. Costs are defined to be the expenses incurred by the parties in the prosecution or defense of a suit at law. They are distinguished from fees in being an allowance to a party for expense incurred in conducting his suit, whereas, fees are compensation to an officer for services rendered in the progress of the cause."

In *City of Cartersville v. Cardwell*, 152 Mo. App. 32, 37, the court defined "costs" and "fees" as follows:

"As between a party to a suit and the officer or witness, the charges allowed are usually denominated fees; but as between the parties to the suit, these charges are usually called costs. The word "costs" when used in relation to the expense of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill."

This is a claim amounting to \$2,903.74, filed by claimant against the State for expenses incurred in the prosecution of Frank Repetto and Jasper S. Perry, both of whom were tried and convicted of the charge of murder in the County of Will, Illinois; said offenses having been committed by them while confined as prisoners in the Illinois State Penitentiary at Joliet, Illinois.

The jury in the *Repetto case* on October 17, 1914, returned a verdict finding him guilty of murder and fixing his punishment at death. Three reprieves were issued to the defendant, the last one extending to July 16, 1915, on which day he was executed pursuant to the judgment and sentence of the Circuit Court of Will County, Illinois.

Jasper S. Perry was also tried in the Circuit Court of Will County, Illinois, and the jury returned a verdict finding him guilty and fixing his punishment at death, but the Court granted a motion for a new trial on the ground that the punishment was too severe. Later, he entered a plea of guilty of the charge of murder and was sentenced to life imprisonment in the Illinois State Penitentiary.

Neither of these men were citizens or residents of Will County, Illinois, but on the contrary were sent to the penitentiary from Cook County, Illinois. This claim is prosecuted by virtue of the provisions of section 39, chapter 108, Hurd's Revised Statutes, which statute provides:

"The several courts of Will County, Illinois, having criminal jurisdiction, shall take cognizance of all crimes committed within said penitentiary by the convicts therein confined, and said courts shall try and punish all such convicts charged with such crimes in the same manner and subject to the same rules and limitations as are now established by law in relation to other persons charged with crimes in said county; * * * *Provided, further, that all fees and costs arising from the prosecution of convicts for crimes committed in the penitentiary, which the county is now required to pay in like cases shall be paid by the State.*

A bill of particulars filed by claimant in this case enumerated different amounts expended which in substance are as follows:

For guards	\$1,342.33
For jurors' meals.....	186.99
For jurors' fees.....	728.00
For sheriff's fees for court attendance.....	34.30
For interpreter at trial.....	3.00
For dieting prisoners.....	161.00
Sheriff's fee allowed by statute for execution of prisoner.....	100.00
For board of men employed to erect scaffold.....	2.50
Incidental expense to sheriff in connection with execution of Repetto	345.02

In the last item of incidental expense to sheriff, there is included an item of \$25.00 paid to W. T. Davis, Jailer of Cook County, Illinois for services rendered in connection with the execution of Repetto, which includes railroad fare and other incidental expenses.

The State admits liability in the sum of \$765.30, which amount includes jurors' fees in the amount of \$728.00; sheriff's fees in the amount of \$34.30, and interpreter's fee in the amount of \$3.00, but it denies that claimant is entitled to recover for any other items set forth in its claim.

The principal question in this case is what construction should be placed upon the statute herein above referred to. Did the Legislature intend to limit claimant to what might technically be termed 'fees' and 'costs,' or did it mean to allow claimant what might be deemed fees, costs and other actual expenses incurred in the prosecution of cases similar to the one before us.

We realize that while there are several authorities defining what is meant by fees and costs, still this particular question has not been decided by any court in Illinois so far as we are able to determine. From a careful examination of the authorities presented by both sides, we are forced to the conclusion that the Legislature when it passed the statute in question, intended to reimburse claimant, not only for the fees and costs as they might be construed under a strict construction of that term, but it also intended to include in that term reimbursement for other actual and necessary expenses incurred in the prosecution of these cases.

The item of \$25.00 paid to W. T. Davis, Jailer of Cook County, Illinois, for services rendered in and about the execution of the said

Repetto does not in our opinion constitute a valid claim against the State because there was no necessity for the sheriff of Will County, to hire the said Davis. If he desired to have the said Davis assist him in this work he should pay him from the allowance he received for services of this kind.

Claimant having paid every other item enumerated in their claim, and there being no question but that it was necessary for it to lay out the different amounts in pursuance of duties imposed upon it, we feel that it should be entitled to an award in this case for the money so expended.

Claimant is accordingly awarded \$2,878.74.

THE NORTHERN TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF
SAMUEL LOCKWOOD BROWN, DECEASED

v.
STATE OF ILLINOIS.

Opinion filed December 22, 1916.

INHERITANCE TAX—*when award will be made.* In this claim the tax was fixed by the County Judge and paid, after which an appeal was prayed to the County Court, and the tax reduced. *Held*, that an award should be made.

William S. Miller and F. H. Bengel, for Claimant.
P. J. Lucey, Attorney General, for State.

The claim in this case is for a refund of \$65.81 inheritance tax claimed to have been erroneously paid to the County Treasurer of Cook County on the 22nd day of January, 1914, and is made under the provisions of an Act to tax gifts, legacies, inheritances, etc., approved June 14, 1909.

Samuel Lockwood Brown died testate on the 13th day of December, 1912, a resident of the City of Chicago, State of Illinois. Claimant was duly designated as trustee under the will of deceased, and was also nominated and appointed executor under said will, and that said The Northern Trust Company was duly appointed and qualified as such executor by the Probate Court of Cook County, Illinois, on the 4th day of November, 1913, and that it has also qualified and is now acting as such trustee. An inheritance tax proceeding was had under the direction of the County Judge of Cook County. The appraiser filed his report with the County Judge, who entered an order on the 21st of January, 1914, fixing the total inheritance tax due the State of Illinois at \$261.12. On January 22, 1914, more than six months after the death of said testator, the claimant paid the tax as fixed by said order together with interest thereon at six per cent from the date of death, to-wit: December 13, 1912, amounting to \$17.49, making the total amount paid to the County Treasurer of Cook County \$278.61, and which amount was transmitted by him to the State Treasurer of the State of Illinois. Afterward, claimant petitioned the County Court for an appeal which was approved and allowed to the County Court. The Court after having heard all the evidence found that the valuation placed by the appraiser upon the property of deceased was incorrect; the Court therefore entered an order on July 23, 1914, finding that the tax was erroneously fixed by the County Judge, and finding the correct amount of the tax to be \$200.00 instead of \$261.12. This amount as corrected should also be charged with interest at six per cent from the

date of death, to-wit: December 13, 1912, to the date of payment to the County Treasurer on January 22, 1914, amounting to \$13.30, so that there should have been paid to the said County Treasurer the total sum of \$213.30 on January 22, 1914, on account of said tax, instead of \$278.61, making a difference of \$65.31.

We find that the claimant has paid to the State of Illinois an erroneous and excessive tax and that it in all respects complied with the law to secure the refund and that it is entitled to have returned by the State, the sum of \$65.31.

We therefore, accordingly award to claimant the sum of \$65.31.

THE NORTHERN TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF
JOHN M. WHITMAN, DECEASED

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

INHERITANCE TAX—when award will be made. In this claim the tax was fixed by the County Judge and paid after which an appeal was prayed to the County Court, and the tax reduced. *Held*, that an award should be made.

Wm. S. Miller and F. H. Bengel, for Claimant.
P. J. Lucey, Attorney General, for State.

The claim in this case is for a refund of \$1,445.16 inheritance tax claimed to have been erroneously paid to the County Treasurer of Cook County on the 22nd day of April, 1913, and is made under the provisions of an Act to tax gifts, legacies, inheritances, etc., approved June 14, 1909.

John M. Whitman died testate on the 29th day of October, 1912, a resident of the City of Chicago, State of Illinois, and claimant was duly designated as trustee under the will of John M. Whitman, and was also nominated and appointed executor under said will. The said The Northern Trust Company was duly appointed and qualified as such executor by the Probate Court of Cook County, Illinois, on the 9th day of November, 1912, and is still acting as such, and it has also qualified and is now acting as such trustee. An inheritance tax proceeding was had under the direction of the County Judge of Cook County; the appraiser filed his report with the County Judge, who entered an order on April 2, 1913, fixing the total inheritance tax due the State of Illinois at \$30,459.39. On April 22, 1913, less than six months after the death of the testator, the claimant paid the tax as fixed, and thereby secured a discount of five per cent, amounting to \$1,522.95, thus making the amount paid to the County Treasurer of Cook County \$28,936.44, which amount was transmitted to the Treasurer of the State of Illinois. Afterwards, claimant petitioned the County Court for an appeal which was approved and allowed to the County Court. The Court after having heard all the evidence, entered an order on April 12, 1914, finding that the tax was erroneously fixed by the County Judge, and finding the correct amount of the tax to be \$28,040.30, instead of \$30,459.39. The amount as corrected is also entitled to a discount of five per cent, it having been paid within six months after the death of the testator, which discount would amount to \$1,447.02, so that there should have been paid to the County Treasurer on April 22, 1913, on account of said tax, the sum of \$27,493.28, instead of \$28,936.44, making a difference of \$1,443.16.

We therefore accordingly award claimant the sum of \$1,443.16.

LONEY NEITH, BY GUS NEITH, HER NEXT FRIEND

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

RESPONDEAT SUPERIOR—doctrine of not applicable to State. The doctrine of *respondet superior* does not apply to the State, and the State is not liable for the torts of its agents.

Michael W. Kaveney, for Claimant.
P. J. Lucey, Attorney General, for State.

Claimant, a girl of fourteen years of age, was struck by a swing in the playground at Lincoln Park, Chicago, on June 25, 1916. She sustained a fracture above the right knee and certain other injuries. The declaration as filed contained no allegation of any negligence on the part of the State or any of its employees, but testimony has been taken, and the case tried on the theory that there is some allegation of such nature. From the evidence, it is apparent that the injured claimant was on a path; that the swings projected over the path, and that she was caught by one of the swings as she was attempting to fix her hat, and dragged, and sustained the injury complained of. There were no attendants in charge at the time, they being in another part of the park.

Claimant was confined to a hospital for five weeks, and did not return to work for three months; she had been working and was earning \$5.00 per week.

We have before us many suggestions both by claimant's attorney, and the family pastor, that the family is in very poor circumstances, and the case as presented would seem to be more an appeal for a charitable contribution by this Court than for relief as provided by law.

There is no claim that the injured was not of sufficient age or mentality to exercise care for her own safety, and there is actually nothing in the evidence that could substantiate a finding for claimant. We have so repeatedly held that the State is not liable for the torts of its agents where it is exercising a governmental function, that further discussion along this line would be needless.

The claim is rejected.

HUGH CAIN

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

NEGLIGENCE—*State not liable for the torts of its officers, agents, and employees. The State is not liable for the torts of its officers, agents and employees.*

Enochs & Kerker, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant was employed at the University of Illinois as an electrician's helper. On April 10, 1916, he and two others attempted to move a heavy box into a building at the University. He was directed by his superior to assist in the work. In doing the work he walked over some gas pipe which rolled when he stepped upon them.

The negligence alleged that three men were not enough to carry the box, and that he should not have been required to walk over the gas pipes in carrying it. Due to one or the other or both of the causes as stated, claimant sustained an inguinal hernia for which he underwent an operation. As a result of this, he was unable to work until September 7th, and has lost wages and has been put to considerable expense. It is argued by claimant's attorneys, "He followed blindly the orders and commands of his superiors." To us it would seem he was obligated to use some degree of care for his own safety, but there is no evidence in the record which would support even such a presumption. It has been held by this Court in cases which have arisen at the University of Illinois, that the State is not liable for the torts of its officers, agents and employees, and we see no reason why we should change our former holdings in this particular.

In our view of this case, claimant would not be entitled to recover even if we did not hold as above stated, and it is consequently the judgment of this Court that this claim be rejected.

ISAAC N. ADRIAN

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

1. **GOVERNMENTAL FUNCTIONS**—*State exercises in operating Jacksonville State Hospital.* The State in the operation of the Jacksonville State Hospital, exercises a governmental function.

2. **RESPONDEAT SUPERIOR**—*doctrine of does not apply to State.* The doctrine of *respondet superior* does not apply to the State and where the State exercises a governmental function it is not liable in tort.

R. S. Egan, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant held the position of property and economy officer of the State Board of Administration of the charitable and other kindred institutions of the State since 1913. It was his duty to visit the different institutions under the control of the State Board of Administration once each month to inspect and inventory property, to advise with farmers in control of lands, check up the institutions and make reports. His salary was \$1,500.00 per annum.

On August 14, 1914, while in the discharge of his duties he went to the State Hospital at Jacksonville. He was being driven around the premises in a wagon to which was attached a team of horses driven by one Peterson, a farmer at the institution, instead of the regular coachman who was away on a vacation. The team had been idle for several days; the harness on the team was in a very bad state of repair. The horses took fright at a canvas which had been played upon a picket fence to dry by Peterson, and started to run away. Peterson, in pulling on the lines, broke three straps, due to the defective condition of the harness. The wagon was partially tipped over and claimant was thrown out on the ground. His left ankle bones were broken and he was unable to rise from the ground. He sustained a "Potts Fracture," a fracture of the lower part of the fibula, and he was in a hospital at Jacksonville for about two weeks, and then removed to the State Hospital at Jacksonville, where he remained until October 29, 1914. He was then removed to his home at West Chicago, where he was confined until about December 1st following. He then attempted to enter upon his duties, but was unable to do any work.

He was retained on the State pay roll until April 1, 1915.

He is a man sixty-three years of age, and in addition to the physical injuries has become broken down in health, having lost considerable weight, and was at the time of the taking of the testimony in this case

still under the physician's care and the prognosis is that he will always be lame as the result of the injury.

The declaration charges the State with negligence, in that the driver of the team was incompetent, that the act of the State employee in placing the canvas upon the picket fence scared the horses, and that the harness was unsafe and in a rotten condition.

The State sets up as a defense that it is operating the Jacksoncille State Hospital in its governmental capacity, and that the doctrine of *respondent superior* is not applicable.

We have so repeatedly held that the State in the exercise of its governmental function cannot be held to respond in damages for the negligence of its employees, that citation of authority would be unnecessary. There can be no award made by this Court in this case.

But it has been the principal of this Court, in a case otherwise meritorious, that is, in a case where an injury is sustained through no fault on the part of the injured person and entirely through the fault of the employees of the State, not to preclude a claimant from securing an appropriation from the Legislature by rejecting the claim.

This case appears to us to be one falling within that class. If, under the law, we had it within our power to make an award, we would award the claimant here the sum of \$3,000.00, but, inasmuch as we cannot do this, this claim will be rejected without prejudice, however, to the right of the claimant to present his claim to the Legislature to secure an appropriation.

MARY SUTTER

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

DAMAGES—*Johnson v. State, ante followed.* This claim is governed by the decision in the case of *Frank O. Johnson v. State of Illinois*, 2 Ct. of Cl. R. 227.

Laggar & Blatt, Brown, Hay & Creighton, for Claimant.
P. J. Lucey, Attorney General, for State.

The facts in this case are almost identical with the facts in the case of *Frank O. Johnson v. State of Illinois*, decided May 22, 1914, in the Court of Claims, and reported in Volume 2 Ct. of Cl. R., at page 227.

On the authority of that case, claimant is entitled to an award, and the only question for this Court to decide is as to the proper amount that should be awarded.

From a consideration of the evidence as offered by claimant, and the State, it is the opinion of this Court that claimant shall be awarded \$750.00.

It is accordingly the judgment of this Court that she be awarded the sum of seven hundred fifty and 00/100 (\$750.00) dollars.

FRED H. GILLETT

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The rule of *respondent superior* is not applicable to the State.

CLAIMS—*rejection of without prejudice.* The court reviews the evidence and rejects the claim without prejudice to the claimant to present it to the Legislature.

John H. Savage and John W. Downey, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimant while employed as a guard at the Illinois State Penitentiary at Joliet, Illinois, was assaulted and injured by one of the convicts under his charge on the night of January 24, 1915. He was struck on the head by a brick thrown by the convict, causing a compound fracture of the skull, and as a result of the injuries sustained, claimant has been left in a weakened condition, and is unable to perform his usual occupation or do other manual labor requiring much exertion.

The assault was wilful and malicious on the part of the convict in question, and claimant at the time of receiving the injury, was in the performance of his duties and was free from any negligence.

In the case of *Schmidt v. State*, 1 Ct. of Cl. R. at page 76, which is case similar to the one before us, this Court held that the State was not liable to an employee of the Southern Illinois Penitentiary at Menard, who had been assaulted and injured by one of the convicts in that institution.

In *Taylor v. State*, 2 Ct. of Cl. R., page 243, in which an employee of the Illinois State Penitentiary sought an award for injuries suffered by reason of the negligence of another employee of the State, it was held that the rule of *respondent superior* does not apply to the State, and the claim was denied.

While the rule as announced in the above cases precludes our giving an award to the claimant, still recognizing the seriousness of claimant's injuries, together with all the other attending circumstances in the case, we do not wish to prevent him from presenting his claim to the Legislature, and this claim is therefore rejected without prejudice.

JAMES A. DONNELLY

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

• **SERVICES**—*when State not liable for.* Where a person voluntarily performs services by which the State is benefited, without direct authority, no liability attached for the payment of such services.

ATTORNEY GENERAL—*legal representative of the State.* The Attorney General is the legal representative of the State in all matters.

James A. Donnelly, for Claimant.

P. J. Lucey, Attorney General, for State.

Sarah J. Lace of Cook County, Illinois, was committed to the Kankakee State Hospital as an insane patient in 1895, and remained there until the time of her death, which occurred on or about December 24, 1914. At the time of her commitment, she did not possess any property except a small homestead that was afterward lost through foreclosure of a mortgage.

In 1908, James M. Braschler, conservator of the estate of Sarah J. Lace, collected about Three Thousand and 00/100 (\$3,000.00) dollars, for the estate, due to the fact that his ward was an heir of a Mr. Jones, who departed this life in the southern part of Illinois. Shortly after the death of Mrs. Lace, Braschler was appointed administrator of the estate of Mrs. Lace, but he did not act long in that capacity, as he was removed by an order of the County Court, and a son of the deceased was appointed as his successor.

It appears that claimant had been acting as attorney for the conservator, Braschler, but his services came to an end when Braschler was succeeded by Lace as administrator as hereinabove noted.

Claimant realizing that the estate of Sarah J. Lace was indebted to the Kankakee State Hospital, wrote a letter to that institution requesting that he be advised if such a claim existed. The institution forwarded a statement of claim to the claimant, who filed the same against the estate of Sarah J. Lace, deceased, and upon a trial a judgment for \$473.00 was entered against the estate.

The attorneys representing the estate, mailed a check for the amount of the judgment, direct to the State Board of Administration.

Claimant presented his bill for \$75.00 to the Board of Administration for services rendered in connection with the collection of this claim. Payment was refused, and he was advised that the Board of Administration had not authorized him to act for it, and it further

advised him that the Attorney General of the State represented it in matters of this kind.

Claimant not having received any compensation for his services, filed his claim in this Court to secure an award.

Is the State liable under the facts presented by the record? This is the only question for the Court's consideration.

There is nothing in the record which shows that claimant was employed by any one having authority to bind the State, but on the contrary, it appears that his services were volunteered. This being true, the State is not liable and the claim is accordingly rejected.

EMMA METZGER

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

INHERITANCE TAX—facts held sufficient to authorize recovery. In this claim by reason of the interest of claimant having been determined, the trust created having terminated, award is made accordingly.

SAME—requirement of appeal from order of County Judge does not apply, when. The requirement that an appeal from the order of the County Judge fixing the inheritance tax is necessary to secure a refund, does not apply when the happening of events determine the interest of the party occur after the limit within which such appeal may be taken.

SAME—refund of. The decision of a superior court holding that a party cannot take property on which tax has been paid is held sufficient to justify award for refund.

Holden & Buzzell, for claimant.

P. J. Lucey, Attorney General, for State.

This claim is filed by Emma Metzger to secure a refund of an inheritance tax which she claims was wrongfully assessed against her in connection with certain estates devised by her father, William Metzger, deceased.

At the death of claimant's father, six children were surviving, and by his last will which was probated in Cook County, Illinois, he devised to each of said children, one-sixth of his estate. It was provided that the one-sixth interest devised to his daughter, Marie Mueller, should be held in trust for her, the trustees appointed in said will be empowered to handle the income of same as they deemed advisable during her life time.

The will further provided that if the said Marie Mueller should die after the testator, leaving child or children or descendants of any deceased child her surviving, then and in that case the surviving child or children, and the descendants of any deceased child should receive the estate held by said trustees. It was also further provided in said will that if the said Marie Mueller should die after the testator, leaving no child or children or descendants of any deceased child her surviving, then the trustees should convey and transfer said trust estate to such of the testator's children and the descendants of any deceased child of his that may then be living; the said children and the descendants of any such deceased child to take per stirpes and not per capita.

Claimant was taxed for one-sixth of the estate devised and bequeathed to her in her own right, and in addition thereto, was taxed

for the value of the reversion in the trust estate devised to Marie Mueller, on the theory that said reversion would eventually become the property of claimant.

The one-sixth interest devised to claimant together with the amount she received as a child's award are as follows:

Child's award	\$ 3,000.00
One-sixth interest of estate.....	67,893.75

This amount less the exemption of \$20,000.00 is \$50,893.76. One per cent tax on the latter amount would be \$508.94, and taking the five per cent discount, amounting to \$25.44, the amount that could be taxed to her would be \$483.50.

In addition to being taxed on the total valuation of \$70,893.76 as hereinabove set forth, claimant was also taxed for \$31,827.50, which was the valuation placed on the reversionary interest in the Trust Estate.

By charging claimant as aforesaid, she was compelled to pay a two per cent rate on an estate valued at \$102,721.31, less the exemption of \$20,000.00. The tax fixed on this amount was \$1,654.43; and after deducting five per cent she paid \$1,571.71 under protest.

The order of the County Judge fixing this tax was entered on December 11, 1912; claimant did not prosecute an appeal from said order, but later, on July 2, 1913, a bill in equity was filed by Marie Mueller against claimant and others in the Circuit Court of Cook County, asking that the will of William Metzger, deceased, be set aside, and declared null and void. An issue of fact was made up and submitted to a jury as to whether or not the instrument purporting to be the last will of William Metzger, deceased, was in fact his last will. The verdict of the jury was that the instrument in question was not the last will of William Metzger, deceased, and upon this verdict, a decree was entered setting aside said last will. All of the adult defendants including claimant consented to this decree.

As a result of said decree, the estate of William Metzger, deceased, descended to his children according to the Laws of Descent of this State, instead of passing to them under his will, and the trustees who were nominated by the decedent to take charge of the Trust Estate devised to Marie Mueller, turned the said estate over to her as her own absolute property.

Claimant contends that since the will has been set aside, which had the effect of vesting the absolute title of the said Trust Estate in Marie Mueller, she should have a refund for all the tax she was compelled to pay on account of said Trust Estate. Out of the surplus she asks that all money due against the estate of Marie Mueller be deducted, and that the remaining \$785.86 be returned to her with interest thereon at three per cent per annum from January 3, 1911.

It is contended by the State that claimant is not entitled to recover for the following reasons:

First—Claimant did not prosecute an appeal from the decision of the Judge of the County Court of Cook County, to the County Court of Cook County, as required by statute.

Second—Claimant has not pursued the remedy available to her to entitle her to an award.

Third—The decree of the Circuit Court of Cook County setting aside the said will does not have the effect of nullifying the order of the County Judge of Cook County.

It is urged by claimant that the decree setting aside the will of William Metzger, deceased, had the effect of definitely determining the rights of the parties to the different estates left by the decedent, and that it is unjust and inequitable for her to be taxed for an estate in which she has no interest.

We appreciate the fact that claimant was compelled to pay a tax on an estate in which it is now clearly settled that she has no interest, but the proposition we have to consider deals with the authority vested in this Court to grant redress in a claim of this character.

The law is well settled in the State as to a claimant's right to recover a tax that has been unlawfully collected, and it is also well settled as to what is required to be done in order to secure a refund of same.

The only way the action of the County Judge in fixing the tax may be reviewed is by an appeal to the County Court. Par. 378, chap. 120 Hurl's Rev. Stat. 1913, p. 2099.

"The County Court has jurisdiction to hear and determine all questions in relation to the tax arising under the Inheritance Tax Law, (Par. 379, Chap. 120 Supra) and the County Judge, by order entered, upon a hearing, fixes the tax, and appeals from the decision of such County Judge may be taken to the County Court. Para. 378, Chap. 120, *Supra*."

Several claims have been presented to this Court, asking for a refund of a tax claimed to have been wrongfully assessed, but unless claimant proceeded in accordance with the statute governing cases of this kind, their claims for awards have been denied.

This case presents a somewhat different statement of facts, in that, the question as to the rights of the respective heirs of William Metzger, deceased, was definitely determined when a decree was entered setting aside the will of William Metzger, deceased.

While the statute is clear as to what is required of one seeking a refund of a tax erroneously assessed by the County Judge, yet in this case it is our judgment that the method prescribed by the statute was not intended for cases similar to the one before us; in fact, claimant could not follow said method because the order of the County Judge fixing the tax was entered on December 11, 1912, and the bill in equity of Marie Mueller against claimant and others to set aside and have declared null and void the will of William Metzger, deceased, was not filed in the Circuit Court of Cook County, Illinois, until July 2, 1913, which was more than six months after the entering of the order of the County Judge of Cook County, Illinois, fixing said tax and the time of appeal from said order had expired and the will was not set aside until at least six months after the bill in equity was filed, and it was not filed by claimant.

It is evident that by the decision of the Circuit Court declaring the last will and testament of the decedent void, claimant cannot possibly take the property, that is, the reversionary interest in that originally willed to Marie Mueller as a trust fund. This being the case, it would be a hardship to compel her to lay out the amount of money erroneously assessed against her which she was compelled to pay without any fault on her part.

After allowing the State the amount of tax due it from claimant, and Marie Mueller, we find the excess paid to the State by claimant to amount to \$785.86.

We therefore make an award in favor of the claimant for seven hundred eighty-five and 86/100 (\$785.86) dollars, with interest thereon at the rate of three per cent per annum from January 3, 1911.

WILLIAM B. HALE, ET AL

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

INHERITANCE TAX—refund of. An appeal from the order of the County Judge to the County Court where a final order is entered reducing the amount of tax due from an estate, is sufficient authority to entitle claimant to a refund of the amount overpaid.

Kales, Kelly & Hale, for Claimant.

P. J. Lucey, Attorney General, for State.

Claimants are the executors and trustees of the estate of George W. Hale, deceased, who in his lifetime was a resident of Cook County, Illinois. On April 16, 1915, the County Judge of Cook County, Illinois, entered an order fixing the tax on the decedent's estate at \$46,258.88.

On the same day, claimants paid the County Treasurer of Cook County, Illinois, under protest, the sum of \$44,945.94, being the amount assessed less the five per cent discount.

An appeal was taken from the order of the County Judge to the County Court, and later, on the 7th day of August, 1915, that Court entered an order finding the correct amount of tax to be \$84,702.15.

A demand was made upon the County Treasurer of Cook County and upon the State Treasurer for the difference which was \$10,978.89, but neither of them refunded any part of this amount to claimants.

It is contended by the State that the claimants are entitled to a refund of \$9,243.79, and that to allow them more would be charging the State interest.

We fail to appreciate the force of the State's contention that any part of this refund represents an allowance of interest. On the authority of *Bartholomae v. State*, 2 Ct. of Cl. R. 306, and *Carpenter v. State*, opinion filed this day, claimants by the final order of the County Court are entitled to a refund from the State amounting to ten thousand nine hundred seventy-eight and 89/100 (\$10,978.89) dollars, and we therefore make an award in their favor for this amount.

JULIUS C. SKOOG

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*payment of to persons is classified civil service. A person in the classified State Civil Service, discharged without authority, and later reinstated, is entitled to payment of his salary for the period of his discharge.*

T. J. Sullivan, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant in this case, Julius C. Skoog, held the position of clerk in the Insurance Department of the State of Illinois for some years prior to July 1, 1911, and until on or about the 6th day of March, A. D. 1915; he continued to hold his above position, and was a member of the classified State Civil Service of the State of Illinois, by virtue of an Act of the Legislature approved June 10, 1911, and in force July 1, 1911.

The evidence in this case shows that claimant was discharged on the 6th day of March, 1915, from the said position by the State Civil Service Commission without any charges having been preferred against him, and without any hearing having been given him, except that he was required to take an efficiency test and that he failed to receive the necessary grade. The evidence further shows that on the 1st day of April, 1915, he was reinstated by the said State Civil Service Commission to said position above mentioned, and that while employed he received and was paid by the State of Illinois the sum of \$125.00 per month.

He now presents his claim to this Court for the sum of \$97.20, being the balance of his salary during the month of March 1915, on the ground that he was unlawfully discharged by the State Civil Service Commission.

The State does not contend that claimant is not entitled to the balance of his salary, as stated in his claim, on the ground that he was unlawfully discharged.

We therefore make an award to claimant in the sum of ninety-seven and 20/100 (\$97.20) dollars.

FRED C. WEIS

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

FEES AND SALARIES—*payment of to persons in classified civil service.* A person in the classified State Civil Service, discharged without authority, and later reinstated, is entitled to payment of his salary for the period of his discharge.

T. J. Sullivan, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant in this case, Fred C. Weis, held the position of clerk of the State Mining Board of the State of Illinois, for some time prior to July 1, 1911, up to, on or about the 24th day of January A. D. 1915, and was a member of the classified State Civil Service of the State of Illinois, by virtue of an Act of the Legislature approved June 10, 1911, and in force July 1, 1911.

The evidence in this case shows that during the term of service above mentioned, the claimant received and was paid by the State of Illinois, the sum of \$125.00 per month. That on the 24th day of January, 1915, claimant was discharged from said position by the State Civil Service Commission without any charges having been preferred against him, and without any hearing having been given him before the said State Civil Service Commission, except that he was required to take an efficient test, and failed to receive the necessary passing grade. The evidence further shows that afterwards, on the first day of February, 1916, claimant was reinstated by the said State Civil Service Commission to the position formerly held by him, as above mentioned, and at the salary of \$125.00 per month, as above stated.

Claimant now presents his claim to this Court for the full amount of the salary due him from the 24th day of January, 1915, to the first day of February, 1916, amounting to \$1,538.42, on the ground that he had been unlawfully discharged by the State Civil Service Commission.

The State does not contend that claimant is not entitled to said amount of salary, because he was unlawfully discharged.

We therefore make an award in favor of the claimant for one thousand five hundred thirty-eight and 42/100 (\$1,538.42) dollars.

THOMAS L. ATKINSON

v.

STATE OF ILLINOIS:

Opinion filed December 22, 1916.

FEEES AND SALARIES—unlawful discharge of civil service employees. A person in the classified State Civil Service who is unlawfully discharged from his position, and later reinstated is entitled to payment of his salary during the period of such discharge.

T. J. Sullivan, for Claimant.

P. J. Lucey, Attorney General, for State.

The claimant in this case, Thomas L. Atkinson, states that on the second day of November, 1912, he was certified by the State Civil Service Commission of the State of Illinois, as general bookkeeper to the Board of Administration of the State of Illinois, and that on and after said date he continued to be a member of the classified State Civil Service of the State of Illinois.

The evidence in this case shows that on the 13th day of February, A. D. 1915, claimant was discharged from said position by the State Civil Service Commission without any charges having been preferred against him, and without any hearing having been given him before the State Civil Service Commission, except that he was required to take an examination for an efficiency test, and that he failed to receive the necessary passing grade. The evidence further shows that afterwards, on the 1st day of February, A. D. 1916, this claimant was reinstated by the State Civil Service Commission to the position formerly held by him, as above mentioned, and at the salary of \$150.00 per month, the salary he also received prior to his discharge.

The claimant now presents his claim to this Court for his unpaid salary from the 13th day of February, 1915, to the 1st day of February, 1916, amounting to the sum of \$1,730.35, on the ground that he was unlawfully discharged.

The State does not contend that claimant is not entitled to this salary, as he was unlawfully discharged.

We therefore make an award to claimant in the sum of one thousand seven hundred thirty and 85/100 (\$1,730.35) dollars.

LOZZA v. STATE OF ILLINOIS.

CORA DARIN LOZZA

v.

STATE OF ILLINOIS.

Opinion filed December 22, 1916.

DAMAGES—*Johnson v. State, ante followed.* This case is governed by the facts in the case of *Frank O. Johnson v. State of Illinois*, 2 Ct. of Cl. R. p. 227.

Lagger & Blatt and Brown, Hay & Creighton, for Claimant.
P. J. Lucey, Attorney General, for State.

The facts in this case are almost identical with the facts in the case of *Frank O. Johnson v. State of Illinois*, decided May 22, 1914, in the Court of Claims, and reported in Volume 2, Ct. of Cl. R., at page 227.

On the authority of that case, claimant is entitled to an award, and the only question for this Court to decide is as to the proper amount that should be awarded.

From a consideration of the evidence as offered by claimant and the State, it is the opinion of this Court that claimant shall be awarded \$500.00.

It is accordingly the judgment of this Court that she be awarded said amount.

JOHN DUNLOP

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

ATTORNEY FEES—*State not liable for.* The State is not liable for fees paid to an attorney for defending a public officer charged with malfeasance in office, unless expressly authorized by the special order of the Attorney General.

ATTORNEY GENERAL—*is legal representative of the State.* The Attorney General is the legal representative of the State, and no officer, board, commission or department can legally authorize the employment of an attorney.

Weil & Bartley, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant was a State Mining Inspector working under the direction of the State Mining Board in Peoria County. In 1913, an explosion occurred in the Crescent Coal Company mine in Peoria County, and claimant made an investigation of the disaster. He caused the arrest of a miner under the provisions of the mining laws, and in doing this incurred the enmity of certain persons, as a result of which claimant was indicted by the Grand Jury of Peoria County charging him with malfeasance in office, in that he failed to post certain notices as required by law, and failed to see that a certain entry had been sprinkled.

The President of the State Mining Board employed attorneys to defend the claimant, and after a trial, claimant was acquitted.

The Mining Board approved a bill for the services of the attorneys in defending claimant, and issued a voucher which was approved by the Department and Institution Auditor, but the State Auditor refused payment.

Afterwards claimant paid the attorneys and now asks the State to reimburse him. Claimant contends that he should be reimbursed because he was a public officer acting in behalf of the State and because of the fact that he was performing his duty, and thereby incurred the ill-feeling of others, in consequence of which he was put to the expense of defending himself on the criminal charges.

It would indeed seem to be an injustice not to reimburse this man for this expense, but at the same time, it may be argued that this was one of the risks he undertook in the performance of the duties of his position.

Under the opinion of the Supreme Court in *Fergus v. Russell*, 270 Ill. 325, we must hold that the President of the Mining Board had no

authority to employ attorneys to defend claimant. It is argued that it would create a somewhat anomalous situation for the Attorney General to defend claimant in a suit where the State's Attorney of Peoria County was prosecuting. This is undoubtedly true, and yet under similar circumstances the State has made provisions for just such a situation. In chapter 129 of the Revised Statutes, the State Military and Naval Code in section 8 of article 22, it is provided that the expense of defending a member of the militia who is prosecuted criminally for any act committed while in the performance of military duty shall be paid by the State, providing that the Attorney General should be first consulted in regard to the selection of the attorney for the defense. Unfortunately, however, for claimant, there is no such statute applicable to his case. The Attorney General is the law officer of the State, and the State can incur no expense for attorney's fees without his special order. Under the circumstances we must reject the claim. Inasmuch as there is much equity and justice in the claim, we would reject it without prejudice were it not for the further fact that from the opinion in the Fergus case, above cited, it is apparent that the Legislature would have no authority to appropriate any funds to claimant under the facts in this case.

The claim is accordingly rejected.

W. M. WILKINSON

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

FEES AND SALARIES—*payment of to civil service employee unlawfully discharged.* An employee in the Classified State Civil Service, is entitled to payment of salary for the period of his discharge, when such discharge is unlawfully made.

H. J. Slagle, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant was chief engineer at the Jacksonville State Hospital on April 30, 1915, and for several years prior thereto, and was a member of the classified service under the so-called Civil Service Law.

He had been required to submit to a so-called Efficiency Examination, and failing to receive the grade required by the Civil Service Commission was dismissed from service on April 15, 1915. At that time he was receiving a salary of \$121.00 per month. He was reinstated on February 1, 1916. Had he been continuously employed, his salary beginning September 1, 1915, would have been \$162.00 per month under a general order adopted by the Board of Administration, and approved by the Civil Service Commission. During the time he was absent from duty, he worked for the City of Jacksonville and earned \$600.00. He now seeks to recover the amount he would have earned, had he been continuously on duty, \$1,294.00, less the amount received from the City of Jacksonville, \$600.00, or a total of \$694.00.

Claimant contends that he was unlawfully discharged, in consequence of which he should be entitled to pay while off duty. No written charges had been preferred against him. In the case of *Baird v. Stevenson*, 270 Ill. 569, it was held that employees in the classified service could not be required to take examination as a test of their efficiency, and following the rendition of that opinion, the Civil Service Commission passed a resolution reinstating claimant to his position. The State, by the Attorney General, does not take issue with claimant on the merits of his claim.

Inasmuch as claimant was unlawfully discharged, it is the opinion of this Court that he should be paid for the time lost. Taking into consideration the amount of money earned during his absence from duty, it is the opinion of this Court that claimant be awarded the sum of six hundred ninety-four and 00/100 (\$694.00) dollars.

CARL P. DENNETT AND GEORGE F. GRIFFIN, EXECUTORS OF THE
ESTATE OF THOMAS A. GRIFFIN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

INHERITANCE TAX—refund of. Where an inheritance tax has been erroneously assessed, and paid into the State treasury, a refund of the excess so paid will be made.

Scott, Bancroft, Martin & Stephens, and Zimmerman, Garrett & Randall, for Claimant.

Edward J. Brundage, Attorney General, for State.

Thomas A. Griffin, a resident of Boston, Massachusetts, died on August 12, 1914, leaving a will which was duly admitted to probate in the County of Suffolk, Massachusetts, wherein claimants were appointed executors.

Decedent owned certain real and personal property in Illinois, and was also the owner of 60,511 shares of common stock and 16,586 shares of the preferred stock of the Griffin Wheel Company, a Massachusetts corporation, which was doing business in Illinois, and owned property in Illinois. He was also the owner of 1,000 shares of the preferred stock of the United States Steel Corporation, a New Jersey corporation, doing business in Illinois.

Ancillary probate proceedings were had in the estate of the decedent in the Probate Court of Cook County, Illinois, and an appraiser was appointed by the County Judge of Cook County to determine the fair market value of the estate for the purpose of fixing the inheritance tax in the estate, on October 13, 1914. The appraiser's report was filed with the County Judge on December 28, 1914, and was approved by the order of the County Judge, entered on December 28, 1914. On February 26, 1915, an appeal was taken from the order of the County Judge to the County Court of Cook County, and a final order was entered on April 19, 1916, and from that order an appeal was taken to the Supreme Court of Illinois on December 21, 1916. The Supreme Court of Illinois, in the case of *People v. Dennett*, reported in 216 Illinois Reports at page 48, reversed the order of the County Court in part and remanded the cause. Subsequently the case was redocketed in the County Court of Cook County, and an order entered in accordance with the opinion of the Supreme Court. On the order of the County Judge, the Executors paid to the County Treasurer of Cook County, an inheritance tax of \$51,933.70 on January 19, 1915, being the total amount assessed, \$54,667.05 less five per cent for pay-

ment within six months after the death of the testator. This tax was assessed on the theory that the shares of stock of the Griffin Wheel Company were taxable under the Illinois inheritance tax law, because thirty-six per cent of the tangible property and assets of that corporation was located in Illinois, and that thirty-six per cent of the value of the shares were taxable in Illinois, and a like tax was fixed on fourteen per cent of the value of the stock in the United States Steel Corporation, on the theory that fourteen per cent of that corporation's tangible assets were located in Illinois. The tax so assessed was approved by the County Judge, and this part of the order was appealed from the County Court, and it was modified to the extent that that court found that the tax should have been levied on fifty per cent of the value of the stock in the Griffin Wheel Company, and that the shares of stock in the United States Steel Corporation were not appraisable and taxable under the Illinois inheritance tax law.

The question in the Supreme Court was as to whether or not the shares of stock in the Griffin Wheel Company were taxable under the laws of Illinois, and that court held that this stock was not assessable, and the final order of the County Court of Cook County on January 13, 1917, made in conformity with the finding of the Supreme Court, found accordingly, and also found that the tax properly assessable against the estate of the decedent was \$10,598.29.

As this Court has repeatedly held, that claimants having paid the tax within the six months period, which entitled them to a five per cent discount in the amount of payment, had the proper tax been assessed in the first instance, claimants would have paid \$10,598.29, less 5%, or \$10,068.38.

Claimants have done everything that should have been done to entitle them to a refund of the excess tax paid. Appeals were taken and perfected within proper times, and claimants are entitled to a refund of the difference between the amount actually paid, and the amount that should have been paid, taking into consideration the fact that 5% was deducted from the amount paid, for payment within six months, and that 5% would have been deducted if the proper amount had been paid within six months.

The State, by the Attorney General, in its statement filed admits the validity of the claim and the regularity of all proceedings necessary to secure the refund.

It is consequently the judgment of this Court that claimants be awarded the difference between \$51,933.70 and \$10,068.38, or forty-one thousand eight hundred sixty-five and 32/100 (\$41,865.32) dollars.

FRED SMITH, EXECUTOR OF THE ESTATE OF THOMAS P. SMITH,
DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

INHERITANCE TAX—refund of. A final order by the County Court reversing the finding of the County Judge, and reducing the amount of inheritance tax due on an estate, entitled the claimant to a refund of the excess amount paid.

George D. Smith, Judah, Willard, Wolf & Reichmann, and Zimmerman, Garrett & Rundall, for Claimant.

Edward J. Brundage, Attorney General, for State.

The facts in this case as stipulated between claimant and the State are as follows:

Thomas P. Smith, a resident of Cook County, died October 16, 1914, leaving a will which was admitted to probate in the Probate Court of Cook County, and Letters Testamentary were issued to Fred W. Smith as Executor. In 1901, decedent executed a certain trust deed, in and by which he conveyed certain property to a trustee.

On April 12, 1915, the inheritance tax appraiser, previously appointed by the County Judge of Cook County, found the value of the decedent's estate subject to inheritance tax to be \$506,969.82, including in his estimate the value of certain estates created by the trust instrument executed by decedent in 1901.

The County Judge of Cook County duly entered an order approving the appraiser's report. On April 14, 1915, claimant paid to the County Treasurer of Cook County, \$8,872.43, which was the amount of the tax, \$9,339.40, reduced by 5%, because of payment within six months of the death of decedent.

On June 5, 1915, an appeal was taken from the order of the County Judge to the County Court, and on April 27, 1917, the County Court entered an order reversing in part the finding of the County Judge, and fixing the inheritance tax at \$4,336.13, on the theory that certain of the trust estate created by the aforesaid trust instrument was not assessable under the inheritance tax law.

This claim was filed in this Court on April 30, 1917, and appearance entered by the Attorney General.

There can be no question as to the correctness of the claim. Claimant has done all things required of him to be done to secure a refund, and is entitled to the difference between \$8,872.43, and \$4,119.32, which is the aforesaid sum of \$4,336.13, reduced by 5%.

Claimant is accordingly awarded the difference between these two items, the sum of four thousand seven hundred fifty-three and 11/100 (\$4,753.11) dollars.

ARTHUR J. KNIGHT

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

MILITARY AND NAVAL—transportation for enlisted men—State not liable for. An enlisted member of the military or naval force of the State of Illinois, leaving the confines of the State on his own business, and not on authority of the State, is not entitled to a refund for transportation to point of mobilization.

Arthur J. Knight, Pro se.

Edward J. Brundage, Attorney General, for State.

Claimant, a resident of the City of Rockford, was mustered as a private in Battery D, Illinois Field Artillery, in Chicago, on September 3, 1915. On June 19, 1916, this organization was called by the President of the United States for service on the Mexican border. On that day he was in Hanover, New Hampshire, and on June 20th, he received a telegram from the Captain of his organization, commanding him to report at the Armory at Chicago at once. He immediately went to Chicago by way of Springfield, Massachusetts, and New York City, and was put to the expense of \$34.43 in paying his railroad fare.

By way of argument, claimant states that transportation of enlisted men under military regulations should be paid to the point of mobilization, because transportation is paid from the place of discharge to the point of enlistment, and claimant also cites the Military and Naval Code, section 149, which provides that transportation and subsistence for all officers and men on duty under sections 3, 4, and 5 of article 16, shall be furnished by the State. Section 3 provides for the pay of officers when in actual service of the State. Section 4 for the pay of enlisted men when in active service. Section 5, for pay of enlisted men in actual service at encampments. It is fair to presume that claimant voluntarily enlisted in this militia organization.

When he went outside of the State, he did so of his own volition, and with full knowledge of the fact that he might be called upon to report for the duty and service which he undertook to perform when he joined the organization. He was not outside the State because the State required him to be. When he took it upon himself to go to Hanover, New Hampshire, it was on his own private business and he could return at his own expense and of his own volition at any time, or having undertaken the obligations of a member of Battery D, he could be called upon to return when the State required his services.

In our view of the case, claimant was not on duty until he reported for duty at the appointed rendezvous, and there is nothing in the law which provides for the payment of expenses before actual performance of duty.

There is nothing in the law that we can find, nor is there anything in the military regulations that we have been informed of that would warrant the making of an award in this case, but on the other hand it is within the province of the Legislature to appropriate in this case, if it may so see fit. The claim appeals to one's sense of justice, and we do not feel inclined to preclude claimant by rejecting the claim. This claim is consequently rejected without prejudice, to the right of claimant to prevent his claim to the Legislature.

BARNARD AND MILLER

v.

STATE OF ILLINOIS.

Opinion filed May 7, 1917.

SERVICES—*when payment will be made for.* Services rendered under express authority of law, will be paid by the State.

Miller, Starr, Brown, Packard & Peckham, for Claimants,
Edward J. Brundage, Attorney General, for State.

Claimants are engaged in the business of printing in Chicago, and printed certain briefs for the State in the case of *People of the State of Illinois, ex rel Charles S. Denson, Governor, and William H. Stead, Attorney General, plaintiff in error, v. Economy Light & Power Company, defendant in error*, in the Supreme Court of the United States. The statement of accounts for this work was \$1,157.20 and claimant received thereon \$900.87, leaving due to them a balance of \$256.92. The 49th General Assembly appropriated money to the Governor sufficient to pay this bill, and it was audited by the Department and Institution Auditor and found correct, but the particular item of appropriation was held invalid in the suit of *Fergus v. Russell*, 270 Ill. 304.

There is no question but that the bill is correct and the services were performed under express authority of law, and it is the opinion of this Court that an award should be made.

We accordingly award to claimant the sum of two hundred fifty-six and 92/100 (\$256.92) dollars.

JOHN HUENNIG

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

SERVICES—payment for will be made—when. Services rendered by a person duly appointed to perform certain duties will be paid by the State, even though the Act embracing the appropriation for that purpose is held unconstitutional.

T. J. Condon, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant was appointed a member of the State Board of Examiners of Horseshoers for the State of Illinois, on February 8, 1915, and in pursuance of his appointment entered upon his duties and performed the services required of him until the first day of March, A. D. 1917.

The Supreme Court of the State of Illinois in the suit entitled *Fergus v. Russell, et al*, decided that the appropriation for the payment of salaries and fees of the Board of Examiners of Horseshoers, was, among other appropriations, unconstitutional.

Claimant continued to perform his services and on February, 1917, there was due him the sum of \$280.00, which he has been unable to collect by reason of the decision in the Fergus case aforesaid.

It would be inequitable for the State to refuse to pay claimant for the services performed by him in this connection, and we are therefore of the opinion that he is entitled to the amount of his claim.

Claimant is accordingly awarded the sum of two hundred eighty and 00/100 (\$280.00) dollars.

ANTHONY KOECHLEY

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1918.

SERVICES—*Huennig v. State, ante followed.* The facts in this case are governed by the facts in the case of *John Huennig v. State of Illinois, supra.*

T. J. Condon, for Claimant.

Edward J. Brundage, Attorney General, for State.

This case is similar to the case of John W. Huennig in which case an opinion has been filed this date. For the reasons assigned in that case, we make an award to claimant in this case of two hundred eighty and 00/100 (\$280.00) dollars.

AMERICAN MISSIONARY ASSOCIATION

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

INHERITANCE TAX—refund of made, when. Inheritance tax erroneously collected and paid into the State treasury will be refunded.

Miller, Starr, Brown, Packard & Peckham, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant is a charitable corporation existing under the laws of the State of New York, and as a beneficiary under the will of Henry W. Hubbard, deceased, makes claim for the refund of a portion of the amount paid by it as an inheritance tax in the matter of the estate of the decedent. The will of the decedent was probated on May 29, 1913, in the Surrogate's Court of the County of New York, and State of New York, and later on November 19, 1913, upon the report of the appraisers appointed by the County Judge of Cook County, Illinois, an order was entered by the said County Judge of Cook County, fixing the value of the estate devised to claimant at \$60,723.16.

The order further provided that claimant was not entitled to any exemptions that the tax rate was 6% and that the total tax was \$3,643.39.

Claimant in order to procure the 5% discount as provided by law in cases where tax is paid within six months after the death of decedent, paid the amount assessed against it less 5%, amounting to \$3,461.23. This amount was paid under protest.

In August, 1916, an appeal was taken from the order of the County Judge to the County Court, and upon a hearing the County Court modified the tax as assessed by the County Judge, determining the value of the interest passing to claimant at \$57,910.66, and the tax thereon at \$3,474.64.

Claimant appealed from the order of the County Court to the Supreme Court of Illinois, and upon a hearing in the latter court, it was determined that the value of claimant's interest was \$37,008.22, and that the property transferred to it was taxable at the rate of 5%, amounting to \$1,850.41, and that the amount of tax was legally payable on November 19, 1913, the time when claimant made payment of the tax as assessed and fixed by the County Judge was \$1,757.89, being the amount of gross tax assessed, less the 5% discount.

From the above it is evident by the erroneous order entered by the County Judge in this matter, claimant was compelled to pay the sum of \$1,703.34 in excess of what should have been paid, had the assessment been correct in the first instance.

This being the case, claimant is entitled to an award of \$1,703.34. We accordingly make an award in favor of the claimant in the sum of one thousand seven hundred three and 34/100 (\$1,703.34) dollars.

MICHAEL CHAMBERS

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

DAMAGES—*payment of.* Private property taken or damaged for public use will be paid for by the State.

Rosenthal, Kurz & Houlihan, for Claimant.

P. J. Lucey, Attorney General, for State.

During the year 1914, and for some years prior thereto, claimant owned a lot fronting on West Madison Street, Chicago, Illinois, upon which he had erected five one-story brick buildings.

Adjoining his lot to the west was a tract of land owned by the State, but there was a vacant strip of land about eleven feet in width, belonging to claimant extending from the west wall of claimant's most westerly building to the east line of the land owned by the State.

The State let a contract for the erection of an Armory on its land and the contractor in charge of the work, assuming that the State owned all of the vacant property west of claimant's buildings, made excavation thereon although claimant had informed him that he owned the strip of land, extending eleven feet west from the west wall of his building.

The contractor made excavations on claimant's property within a few feet of the west wall of his building and as a result greatly damaged the same. The walls cracked, the building sagged and fixtures within the building owned by claimant were partially destroyed. A concrete walk running along claimant's building to the west, was practically destroyed by reason of the excavation.

After repeated complaints by the claimant, the contractor placed his building on jacks where it remained for about fifteen months, and as a result, the building was in such shape that the business of claimant was practically destroyed.

One of the claimant's other buildings was also damaged to such extent that the tenant who had been paying a monthly rental of \$25.00 per month, was compelled to abandon the premises.

From the record before us there is no question but that the claimant is entitled to recover for the damages he has sustained, and in arriving at the amount we are forced to the conclusion that he suffered damages far in excess of the amount testified to by the contractor who testified on behalf of the State.

While it is somewhat difficult to arrive at an amount that would definitely determine the amount of damages sustained, we are of the opinion that claimant is entitled to recover two thousand five hundred and 00/100 (\$2,500.00) dollars.

MICHIGAN BOULEVARD BUILDING COMPANY

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

LIABILITY—of State. Any act required to be performed under express authority of law creates a liability against the State for the expenses incurred by the officer or person required to perform such act.

SAME—when appropriation insufficient. An appropriation made for a specific purpose, the expenditure of which is under express authority of law, if insufficient for such purpose, does not relieve the State of the liability for the excess expense of performance.

Allen G. Mills, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant, a corporation organized and existing under and by virtue of the laws of the State of Illinois, is the owner of a certain building known as the Michigan Boulevard Building, Chicago, Illinois, having purchased the same on October 19, 1916, from Jarvis Hunt, et al, Trustees.

At the time claimant purchased the building in question, the Judges of the Appellate Court for the First District of the State of Illinois, were occupying rooms Nos. 1224 to 1229, both inclusive, in said building under two certain leases.

The leases in question were authorized by an act of the General Assembly of the State of Illinois, approved June 2, 1877, whereby the Judges of the said Appellate Court of the First District of Illinois, were authorized to rent suitable rooms in the City of Chicago for holding said Court, and for use of the officers thereof.

According to the terms of the leases, the rent for the period of April, May and June 1917, amounting to \$4,803.75 is due and payable to claimant, but it appears that the amount appropriated for this purpose was not sufficient and there is no money on hand at the present time to pay the rent, which is acknowledged by the State to be due.

Claimant as owner of the building is entitled to receive said rent, in accordance with the terms of the leases entered into on behalf of the State by the Judges of the Appellate Court for the First District of Illinois, and this being true, we accordingly award claimant the sum of four thousand eight hundred three and 75/100 (\$4,803.75) dollars.

RICHARD M. HOE, TRACY DOWS, THATCHER T. P. LUQUER, JAMES L. MITCHELL, UNITED STATES TRUST COMPANY OF NEW YORK, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALEXANDER ECTOR ORR, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

INHERITANCE TAX—refund of—when. Where a final order is entered on an appeal from the order of the County Judge fixing the amount of inheritance tax due from an estate, reducing the amount of tax found due, a refund of the excess amount so paid will be refunded.

Short, Davis & Rust, for Claimants.

Edward J. Brundage, Attorney General, for State.

Claimants are the executors of the last will and testament of Alexander Ector Orr, deceased, who departed this life June 3, 1914, a resident of Brooklyn, Kings County, New York.

The decedent at the time of his death owned certain property within the State of Illinois that was liable for inheritance tax assessment by the State.

On or about December 16, 1914, claimants applied for a transfer of the various stock owned by the decedent, but before consent was given by the Attorney General of the State of Illinois, it was agreed that claimants should deposit with the Peoples Trust & Savings Bank of Chicago, the sum of four thousand two hundred fifty and 00/100 (\$4,250.00) dollars, to guarantee the payment of such inheritance tax as might be levied.

On December 11, 1914, the County Judge entered an order fixing the amount of the tax to be assessed against the estate at \$3,395.34.

The Peoples Trust and Savings Bank at the request of the Attorney General, mailed a check to the County Treasurer of Cook County for \$3,514.18, being the amount of said inheritance tax as levied, together with interest thereon from June 3, 1914, the date of decedent's death.

Claimant appealed from the order of the County Judge to the County Court and upon a hearing the County Court entered its final judgment in said cause, fixing the amount of inheritance tax required to be paid at \$2,096.59. This amount with interest thereon from June 3, 1914, to June 4, 1915, the date when the first tax assessed was paid to the County Treasurer, amounts to \$2,170.34.

The difference between \$3,514.18, the amount paid by claimants and \$2,170.34, the amount they should have paid in accordance with the final order of the County Court is \$1,343.84.

Claimants have pursued the necessary steps required by law to secure a refund of the amount due them in this matter, and it is therefore the judgment of this Court that they be awarded one thousand three hundred forty-three and 84/100 (\$1,343.84) dollars.

JOHN J. COFFEY

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

SERVICES—when payment for will be made. Services rendered by a person regularly elected or appointed will be paid for by the State even though the Legislature fails to make a regular appropriation therefor.

Brown, Hay & Creighton, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant was duly elected Secretary of State Board of Equalization on August 1, 1913, and has performed the duties of that office from the date of his appointment until the present time.

He was to receive \$5.00 per day for each and every day he acted as such officer and was paid on that basis from the date of his election up to and including the 31st day of December, A. D. 1914.

From January 1, 1915, to and including June 30, 1915, a period of one hundred fifty-five days, he performed the duties of his office but did not receive pay therefor by reason of a decree in a chancery suit filed in the Circuit Court of Sangamon County, Illinois, by one Fergus in which it was held that the appropriation under which claimant was to receive his pay was invalid.

It is admitted that claimant performed the services as required by him under the law, and it would be inequitable to require him to serve the State in this capacity without compensation.

Claimant having performed the duties of this office for one hundred fifty-five days, he is entitled to receive pay therefor at the rate of \$5.00 per day, and we therefore award him the sum of seven hundred seventy-five and 00/100 (\$775.00) dollars.

THOMAS DEWITT CUYLER, EXECUTOR OF THE LAST WILL OF MARIE DEWITT JESSUP, DECEASED

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

INHERITANCE TAX—refund of. Inheritance tax erroneously collected and paid into the State treasury will be refunded.

Rosenthal, Hamil & Wormser, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant is the executor of the last will and testament of Marie DeWitt Jessup, who died on the 17th day of June, A. D. 1914, a resident of the State of New York.

On June 14, 1915, the County Judge of Cook County, Illinois, entered an order approving the inheritance appraiser's tax report, which fixed the tax on decedent's property at \$22,628.46.

On May 17, 1915, which was prior to the date of the entry of the order aforesaid, claimant for the purpose of securing the payment of tax which might be assessed against the estate, deposited with the Peoples Trust and Savings Bank of Chicago, to the credit of the inheritance tax officials in said proceedings, the sum of \$30,000.00 and they in turn paid to the County Treasurer of Cook County, under protest, out of said deposit, the sum of \$23,986.17, being the amount of tax assessed by the order of the County Judge, with interest thereon at the rate of six per cent per annum from June 17, 1914, the date of the decedent's death.

On August 15, 1915, an appeal was taken to the County Court from the order of the County Judge, fixing the tax aforesaid, and the County Court after making some deductions reduced the tax to \$18,829.50.

A further appeal was taken to the Supreme Court of the State of Illinois, from the final order and judgment of the County Court of Cook County, which resulted in a reversal of the final order and judgment of said County Court, *People v. Cuyler, et al* 276 Ill. 72.

Later a final order was entered in the County Court of Cook County in accordance with the judgment and mandate of the Supreme Court. This final order provided that the total tax should be \$14,907.87 which represents the amount of the final order and judgment of the \$14,060.80 with interest thereon at the rate of 6% from June 17, 1914, the date of decedent's death to June 14, 1915, the date of said payment.

Claimant having paid the sum of \$23,986.17 in accordance with the erroneous order of the County Judge, instead of \$14,907.87 the amount he should have paid, he is therefore entitled to a refund of the difference, amounting to \$9,078.30.

We therefore make an award to claimant of nine thousand seventy-eight and 30/100 (\$9,078.30) dollars.

MERRITT STARR

v.

STATE OF ILLINOIS.

Opinion filed May 12, 1917.

REFUNDS—when made. Funds paid out in the performance of employment regularly made, for which the State receives the benefit will be refunded.

Miller, Starr, Brown, Packard & Peckham, for Complainant.
Edward J. Brundage, Attorney General, for State.

Claimant by special appointment of the Governor of Illinois was appointed and served the State as attorney in a certain case in the Supreme Court of the United States, known therein as *People of the State of Illinois on the relation of Charles S. Deneen, Governor, and William H. Stead, Attorney General, plaintiffs in error v. The Economy Light and Power Company, Defendants in error.*

That while acting as attorney aforesaid, claimant paid out for and on behalf of the State, the sum of \$10.84, in connection with the prosecution of said case, and the State has never reimbursed him for this amount.

For the reasons set forth in the case of *Bernard & Miller v. State*, which opinion was filed at this term, we award to claimant the sum of ten and 84/100 (\$10.84) dollars.

MATILDA JENCA, A MINOR BY FRANK JENCA, HER NEXT FRIEND
v.
STATE OF ILLINOIS.

Opinion filed May 12, 1917.

RESPONDEAT SUPERIOR—*doctrine of not applicable to the State.* The rule of respondeat superior is not applicable to the State.

J. W. D'Arcy, for Claimant.

Edward J. Brundage, Attorney General, for State.

Matilda Jenca, aged about seven years while crossing one of the busy streets at Joliet, Illinois, on the morning of October 15, 1916, was injured by being struck by an automobile operated by Miss Mabel Zimmer, whose father was at that time Warden of the Illinois State Penitentiary.

The petition of claimant states that the machine in question was owned by the State of Illinois, and was used by the Warden and his family for business and pleasure, and that the injury sustained by claimant was occasioned by the negligent manner in which the young lady operated the machine.

The State filed a demurrer setting forth, First: That the Doctrine of *respondeat superior* is not applicable to the State. Second: That it does not appear that the person driving the automobile mentioned in the petition was in the employ of the State at the time of the operation of the automobile in question. Third: That the State of Illinois is not liable for the torts of third persons committed against one of its citizens.

This Court has repeatedly held that the doctrine of *respondeat superior* is not applicable to the State, and even though the party in charge of the automobile was an employee of the State, the State would not be responsible for her acts. This being true, it is unnecessary to consider this case further. The demurrer is sustained.

CLARENCE A. BURLEY, AS EXECUTOR OF AND TRUSTEE UNDER THE LAST
WILL AND TESTAMENT OF ELIZABETH J. WHITNEY, LOUISA
CHAPIN TELLING, ELIZABETH GREENE, EDWARD F.
CHAPIN, JR., AND MARY W. WHITE

v.

STATE OF ILLINOIS.

Opinion filed May 16, 1917.

INHERITANCE TAX—*Burley et al, v. State ante followed. This case is governed by the facts in the case of Burley, et al v. State, supra.*

Clarence A. Burley, for Claimants.

Edward J. Brundage, Attorney General, for State.

Elizabeth J. Whitney, deceased, left the bulk of her estate in trust to be given to her four grandchildren. They were not to receive their respective shares until they attained the age of thirty. At the time of her death, none of said children had reached the age of thirty years, and the inheritance tax appraiser, assumed that only the eldest grandchild would reach that age, and accordingly fixed the tax on that basis, allowing but one exemption of \$20,000.00.

The inheritance tax was paid on that basis within six months after the death of the decedent, which amounted to \$414.82, after allowing the five per cent discount as provided by law.

It was agreed between the beneficiaries that the tax should be paid out of the general fund of the estate in order to protect the eldest grandchild, and it was further agreed that upon recovery of any part of the tax, the same should be divided equally between them.

On June 30, 1912, Louisa Chapin Telling, the oldest of the grandchildren reached the age of thirty years, and received her one-fourth share of the estate. Having been allowed her exemption no claim arose as to her share of the tax as assessed.

Later, on September 5, 1914, Elizabeth Chapin Greene, the second oldest of the grandchildren reached the age of thirty years, and received her share of the estate. She accordingly filed a claim in this Court for the tax upon her exemption of \$20,000.00, which would be \$200.00 less the five per cent discount, amounting to \$10.00, leaving a total of \$190.00, with interest at the rate of 3% from the time of payment. Her claim was allowed by this Court in an opinion filed October 2, 1916.

On May 13, 1916, Edward F. Chapin, Jr., attained the age of thirty years, and received his share of the estate. Having reached the age of thirty years, there is another exemption of \$20,000.00, which should be allowed, upon which the tax would be \$200.00, less the five per cent

discount, amounting to \$10.00, leaving a balance of \$190.00 which should be refunded to claimants with interest thereon from March 30, 1911, being the date when the tax was paid.

For the reasons assigned in our former opinion in this case herein referred to, claimants are awarded one hundred ninety and 00/100 (\$190.00) dollars, with interest thereon at three per cent from March 30, 1911.

WALSH CONSTRUCTION COMPANY

v.

STATE OF ILLINOIS.

Opinion filed May 18, 1917.

CONTRACTS—construction of. The court reviews the evidence as to the construction of the contract, and makes an award accordingly.

Vause, Hughes & Kiger, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant here seeks to recover for certain work done on the levees at Cairo. It entered into contract on December 31, 1913, with the Rivers and Lakes Commission for the doing of this work.

The claim is divisible into three parts. Under the first part, it was estimated in the contract that the amount of excavation would be 29,400 cubic yards. Claimant excavated 19,308.1 cubic yards, and the Rivers and Lakes Commission allowed for the excavation of 10,997.5 cubic yards. The difference between claimant and the Rivers and Lakes Commission arose over the question as to whether or not the excavation should have had vertical or sloping sides. It is evident from the evidence that it was necessary to excavate with sloping sides. This is not an extra, and under the contract claimant is entitled to pay for the actual amount of the execution. The State does not contest the claim in this particular, and the claimant on this part should receive \$5,657.96.

Another part of the claim for the difference in the cost due to the use of stone and sand instead of gravel, has been dismissed out of the case, and there remains now for consideration the claim for the maintenance of track connections. It appears that over a part of the work, the Illinois Central Railroad had certain tracks which had to be removed and replaced from time to time; removed so that the work could proceed, and replaced so that the railroad could switch its cars. For this part, claimant alleges that there is due it the sum of \$2,726.84. In the specifications, claimant points out that it was the duty of the Rivers and Lakes Commission to provide the necessary right of way upon which the work is to be done. On the other hand, the State points out that the specifications provide that the plans are a part of the specifications, and that the work is to be made complete, and to the satisfaction of the Commission, and that claims for extra labor or material must be reported to the Rivers and Lakes Commission in writing at the time same is furnished, and must also be presented in writing at the end of the month, that nothing shall be paid for as extra labor that can be classified under any of the heads upon which unit prices are fixed, that the written notices required on the part of the contractor

are conditions precedent to any recovery on its part for extra work, that whenever work is required to be done which was not contemplated, the Commission shall fix the prices, and the contractor shall abide by the same. It is also provided that in all questions regarding the value of extras, variations, allowances or deductions, or the violation of the contract, the decision of the Commission shall be final.

The Rivers and Lakes Commission decided adversely to the claims of claimant, based on this state of facts.

As we view this part of the claim it is for extras, upon which to entitle claimant to recover, the conditions precedent in the contract must have been complied with. The reports required of claimant were not made, so far as the record shows, and the Rivers and Lakes Commission, whose decision claimant agreed should be final decided adversely to claimant.

There remains nothing for us to do but reject this part of the claim, and it is accordingly the decision of this Court that claimant be awarded the amount of the first item, five thousand six hundred fifty-seven and 95/100 (\$5,657.95) dollars.

CITY OF CHARLESTON

v.

STATE OF ILLINOIS.

Opinion filed May 16, 1917.

LIABILITY—of State. The opinion of the Supreme Court governs the action of the Court of Claims, and an award is made accordingly.

John T. Kincaid, for Claimant.

Edward J. Brundage, Attorney General, for State.

The City of Charleston has furnished water to the Eastern Illinois State Normal School since July, 1913, and claims payment for water furnished until April 1, 1917.

When the Normal School was located at Charleston, the City Council passed a resolution offering to give all the water required for fifty years for the consideration of \$5.00, provided the school be located at Charleston.

In July, 1913, an ordinance was passed providing for the installation of water meters, and a regular rate was charged to the school. This bill was not paid and the City threatened to disconnect the water. Following this, the school filed a Bill of Complaint in the Circuit Court of Coles County, praying specific performance and injunction to restrain the City from cutting off the water supply. A temporary injunction was ordered and the defendant demurred. The demurrer was sustained by the Circuit Court and in turn by the Appellate Court for the Third District, and the Supreme Court.

The Supreme Court in its opinion in the case, appearing in 271 Ill. at page 602, held that the City was without authority to make the agreement to furnish water.

Following the decision of the Supreme Court above cited to its logical conclusion, we must hold that the City of Charleston is entitled to recover the amount of its claim, and it is consequently the judgment of this Court that the claimant be awarded the sum of four thousand two hundred and 00/100 (\$4,200.00) dollars.

AMOS SAWYER

v.

STATE OF ILLINOIS.

Opinion filed May 16, 1917.

COMPENSATION—to public officers. Statutes prohibiting extra pay to public officers, have no application to two distinct offices, positions or employments.

PUBLIC OFFICERS—may hold position or employment. An officer, in addition to the duties of his office, unless expressly prohibited by law, may hold an employment or position, when each has its own duties and compensations.

E. A. Hardt, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant was Chief Clerk of the State Board of Health for several years prior to March 30, 1913, and subsequent thereto. On March 30, 1913, the then Secretary of the Board died, and the next day the Governor directed the petitioner to assume the duties of the office of Secretary and appointed him "Acting Secretary." He immediately entered upon the performance of the duties of that office and continued to act as both Secretary and Chief Clerk of the Board until April 14, 1914.

He had applied to the Civil Service Commission to be relieved of his duties as Chief Clerk, but his application was refused. It is apparent from the record that he devoted a great deal of time to the performance of his duties, it requiring many hours of extra work.

The statute provides that the Secretary of the Board of Health shall be elected by the Board. There was no formal election, though the members of the Board severally told him to act.

In the interim between meetings of the Board, the Secretary performed all of its duties and exercised all of its powers, and among other things he granted licenses to practice medicine. In law, an acting secretary is a Secretary. We are not prepared to hold that claimant was not in fact the Secretary of the Board, to hold otherwise might indeed lead to serious consequences.

The position of Chief Clerk of the Board is not a statutory office, that of Secretary is.

Claimant having been Secretary of the Board, as we view it, the only question remaining for us is to decide as to whether or not he is entitled to a salary, having received his salary as Chief Clerk.

In the case of the *United States v. Saunders*, 126 U. S. 130, the Supreme Court of the United States has held that statutes prohibiting the allowance of extra pay or compensation to public officers have no

application to two distinct offices, positions or employments, each of which has its own duties and compensations, and which offices may both be held by one person at the same time.

We do not question the right of claimant to have held both offices, positions or employment at the same time; as we view it, he held an employment and an office. Neither is this right questioned by the State.

Under the authority above cited, we believe claimant is entitled to recovery, and is entitled to receive compensation from March 31, 1913, to April 14, 1914. The 48th General Assembly had appropriated \$3,600.00 a year for the salary, and in addition to this the Board paid \$150.00 a month. In our view of the case, the salary as fixed by law was \$300.00 per month, and claimant is accordingly entitled to recover \$3,750.00, the salary for twelve and one-half months.

We accordingly award claimant the sum of three thousand seven hundred fifty and 00/100 (\$3,750.00) dollars.

EUGENE WARFEL

v.

STATE OF ILLINOIS.

Opinion filed June 1, 1917.

MILITARY SERVICE—Injuries received in. Where a member of the Illinois National Guard is injured in the performance of duties under orders of his commanding officer, he is entitled to compensation as damages for such injuries.

James E. Davis, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant who is a resident of the City of Galesburg, Illinois, was a regularly enlisted soldier in Company "C" 6th Regiment of Infantry, Illinois National Guard.

On the 16th day of August, 1916, while acting under the orders of his superior officer, he was assisting other members of his company in moving the arms and stores of said company from the old armory building to the new armory building.

There were birds nests located in and about the roof and rafters of the armory and under instructions from the officer in charge, claimant was endeavoring to remove the same. While so doing, he slipped and fell from the roof of the building to the floor striking projections in the way of heat radiators and other obstructions and as a result of the fall his left leg was fractured between the knee and the hip; his left forearm dislocated and fractured between the elbow and wrist; his left jaw fractured and all the teeth broken off, and he was otherwise greatly bruised and injured.

Claimant was taken to a hospital at Galesburg where he remained for some months and later was removed to a hospital at Chicago where he received treatment under a specialist in that city.

His injuries are such that they failed to respond to treatment to any appreciable extent. It was necessary to rebreak and reset the leg and it is now about one inch shorter than normal. This, together with the other injuries has caused claimant to be permanently disabled, and from the evidence of the physicians who treated him, it is certain that he will never be able to follow his usual occupation.

His right to recover which is not disputed by the State is based on section 11 of article 16 of the State Military and Naval code, paragraph 154, chapter 129 Hurd's Revised Statutes, 1913, which is as follows:

"In every case where an officer or enlisted man of a National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of

orders from the commander-in-chief, said officer or enlisted man, or his heirs or dependents shall have a claim against the State for financial help and assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. * * *"

The record discloses that claimant was a young man of about twenty-three years of age: that prior to the injury he was in good health and had an earning capacity of \$20.00 per week.

Taking into consideration the injuries sustained by claimant, and money expended by him for medical services and hospital bills, we are of the opinion that he should be awarded the sum of six thousand five hundred and 00/100 (\$6,500.00) dollars.

MYER J. STEIN

v.

STATE OF ILLINOIS.

Opinion filed June 1, 1917.

LEGAL SERVICES—payment for will not be made, when. Payment for legal services rendered on behalf of the State, will not be made when the employment or appointment of the person rendering such services is, by the authority of any other than the Attorney General.

George B. Gillespie, for Claimant.

Edward J. Brundage, Attorney General, for State

A resolution was passed by the Senate of the State of Illinois, on or about June 19, 1915, authorizing and empowering one of its committees to investigate the educational system of the City of Chicago. The committee in question was authorized to employ an attorney and the necessary assistants required to make the investigation and in accordance therewith said committee on July 2, 1915, retained claimant to act as its attorney.

Claimant performed the work required of him by the committee from the date of his employment up to and including October 14, 1915; during which time he met with the committee at its various meetings and conducted by the investigation by examining witnesses and taking testimony in the City of Chicago and elsewhere.

The claim in this case is for the legal services rendered the committee amounting to \$2,600.00, and for moneys paid out in its behalf, amounting to \$1,100.00, making a total of \$3,700.00.

A demurrer was filed by the State to claimant's position setting forth in substance: 1st, That the committee appointed by the 49th General Assembly to sit during the recess of such assembly had no legal existence after the sine die adjournment on June 30, 1915. 2nd, That said committee had no authority to employ an attorney as the Attorney General, alone, is the legal advisor of the General Assembly and its committees.

In view of the recent decision handed down by the Supreme Court of this State, *Fergus v. Russel*, 270 Ill. 344, we must hold that the committee in this case had no authority to employ claimant as its attorney.

The demurrer is sustained.

PATRICK H. GIBLIN

v.

STATE OF ILLINOIS.

Opinion filed June 1, 1917.

MILITARY SERVICE—*Warfel v. State, ante followed.* This case is governed by the facts in the case of *Warfel v. State, supra.*

T. J. Sullivan, for Claimant.

Edward J. Brundage, Attorney General, for State.

Claimant is a resident of Springfield, Illinois. On the 13th day of August, 1915, he was injured while employed as a clerk in connection with the Adjutant General's department of the State. At the time of his injury he was acting under the orders of his superior officer in storing provisions in boxes and cases at Camp Lincoln, which is located northwest of Springfield, Illinois.

He was compelled to stand upon a platform about ten feet in height in order to handle the different boxes and cases and while so working the platform collapsed and claimant was thrown to the ground and as a result of his fall, his left arm and shoulder were broken and fractured.

Prior to claimant's injury he was capable of earning at the rate of \$21.00 per week, and as a result of the injury in question he was precluded from doing any work for a period of twenty weeks. He was also compelled to lay out the sum of \$160.80 for hospital bills and surgeons' fees, in endeavoring to be cured.

In this case the State is not making any defense, and it is similar to the case of *Warfel v. State*, in which an opinion was filed at this term.

For the reasons given in the *Warfel* case, we are of the opinion that claimant is entitled to an award of \$580.80, which includes the loss of services by claimant while he was incapacitated from work on account of his injury, together with the money expended by him for hospital bills and surgeon fees.

Claimant is accordingly awarded five hundred eighty and 80/100 (\$580.80) dollars.