REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 8

Containing cases in which Opinions were filed between July 1, 1933
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PREFACE

The opinions of the Court of Claims 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 powers and duties," approved June 25, 1917, in force July 1, 1917.

EDWARD J. HUGHES,
Secretary of State
and Ex-officio Secretary Court of Claims.

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JUSTICES OF THE COURT OF CLAIMS

C. N. HOLLERICH, *Chief Justice,*

C. H. LINSCOTT, *Judge,*

A. L. YANTIS, *Judge.*

OTTO KERNER, *Attorney General.*

EDWARD J. HUGHES, *Secretary of State and Ex-officio Secretary of the Court.*

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT.

RULE 1. (a) The Court of Claims shall hold a regular session of the Court at the Capital of the State on the second Tuesday of January, March, May, September and November of each year, and such special sessions as it deems necessary or proper to expedite the business of the Court.

(b) No cause will be heard at any session unless the pleadings have been settled and the evidence, abstracts, briefs and arguments of both parties have all been filed with the Clerk on or before the first day of said session.

COMPLAINT.

RULE 2. (a) Causes shall be commenced by a verified complaint which, together with four copies thereof, shall be filed with the Clerk of the Court. A party filing a claim shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The original complaint and all copies thereof shall be provided with a suitable cover or back having printed or plainly written thereon the title of the Court and cause, together with the name and address of all attorneys representing the claimant. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) No person who is not a licensed attorney and an attorney of record in said cause will be permitted to appear for or on behalf of any claimant, but a claimant even though not a licensed attorney, may prosecute his own claim in person.

RULE 3. Such complaint shall be printed or typewritten and shall be captioned substantially as follows:

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS.

A. B., Claimant
vs.
STATE OF ILLINOIS, Respondent } No.

RULE 4. (a) Such complaint shall state concisely the facts upon which the claim is based and shall set forth the address of the claimant, the time, place, amount claimed, the State department or agency in which

the cause of action originated and all averments of fact necessary to state a cause of action at law or in equity.

(b) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

RULE 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall 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 and, if so, the amount so received.

(b) The claimant shall also state whether or not any third person or corporation has any interest in his claim, and if any such person or corporation has an interest therein the claimant shall state the name and address of the person or corporation having such interest, the nature thereof, and how and when the same was acquired.

RULE 6. (a) A bill of particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the complaint in all cases.

(b) Where the claim is based upon the Workmen's Compensation Act the claimant shall set forth in the complaint all payments, both of compensation and salary, which have been received by him or by others on his behalf since the date of said injury; and shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

RULE 7. No complaint shall be filed by the Clerk unless verified under oath by the claimant, or by some other person having personal knowledge of the facts contained therein.

RULE 8. If the claimant be an executor, administrator, guardian of other representative appointed by a judicial tribunal, a duly authenticated copy of the record of appointment must be filed with the complaint.

RULE 9. If the claimant die pending the suit his death may be suggested on the record, and his legal representative on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

RULE 10. Where any claim has been referred to the Court by the Governor or either House of the General Assembly any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a complaint, aforesaid, the Court may determine the cause upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the cause may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

RULE 11. If it appears on the face of the complaint that the claim is barred by a statute of limitations, the same shall be dismissed.

PLEADINGS.

RULE 12. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as herein otherwise provided.

RULE 13. The original and four copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause, together with a proper designation of the peading printed or plainly written thereon.

RULE 14. A claimant desiring to amend his complaint or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

RULE 15. The respondent shall answer within sixty days after the filing of the complaint, and the claimant shall reply within thirty days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail to so answer a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

EVIDENCE.

RULE 16. After the cause is at issue the parties shall present evidence either by a stipulation of facts duly entered or by a transcript of evidence taken at such time and place as is mutually agreeable and convenient to the parties concerned. All witnesses before testifying shall be duly sworn on oath by a notary public or other officer authorized to administer oaths. If the parties are unable to agree upon a time and/or place of such hearing, application may be made to any Judge of the Court, who shall thereupon fix a *time and place of such hearing.*

RULE 17. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the next succeeding regular session of the Court.

RULE 18. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

RULE 19. If the claimant fails to file the evidence in his behalf as herein required, 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 respondent shall be filed.

RULE 20. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be prejudiced by the failure of the respondent to file evidence in its behalf in apt time, but a hearing by the Court may be had upon the evidence

filed by the claimant, unless for good cause shown, additional time to file evidence be granted to the respondent.

RULE 21. All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or cause pending before the Court shall be *prima facie* evidence of the facts set forth therein; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS.

RULE 22. The claimant, in all cases where the transcript of evidence exceeds fifteen pages in number, shall furnish a complete typewritten or printed abstract of the evidence, referring to the pages of the transcript by numerals on the margin of the abstract. The evidence shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

RULE 23. When the transcript of evidence does not exceed fifteen pages in number the claimant may file the original and four copies of such transcript in lieu of typewritten or printed abstracts of the evidence, otherwise the original and four copies of an abstract of the evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly *written thereon.*

RULE 24. Each party may file with the Clerk the original and four copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a written notice in duplicate to that effect.

RULE 25. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days prior to the first day of the session to which the cause shall stand for hearing, unless the time for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later than the first day of said session, unless the time for filing the brief of claimant has been extended, in which case the respondent shall have a similar extension of time within which to file its brief. Upon good cause shown further time to file abstract, brief and argument or a reply brief of either party may be granted by the Court or by any Judge thereof.

RULE 26. 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 claim 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.

RULE 27. 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 respondent to file abstracts or briefs on time, unless the time for the filing of abstracts or briefs by the respondent be extended.

EXTENSION OF TIME.

RULE 28. Where by these rules it is provided the time may be extended for the filing of pleadings, abstracts or briefs, either party, upon notice to the other, may make application for an extension of time to any Judge of this Court, who may enter an order thereon, transmitting such order to the Clerk, and the Clerk shall thereupon place the same of record as an order of the Court.

MOTIONS.

RULE 29. Each party shall file with the Clerk the original and four copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 30. Motions shall be filed with the Clerk at least five days before they are presented to the Court. All motions will be presented by the Clerk immediately after the daily announcement of the Court but at no other time during the day, unless in case of necessity, or in relation to a cause when called in course. All motions and suggestions in support thereof shall be in writing, and when the motion is based on matter that does not appear of record, it shall be supported by affidavit.

RULE 31. In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty days thereafter within which to amend his complaint; and, if he decline or fail to so amend, final judgment will be entered dismissing the claim.

ORAL ARGUMENTS.

RULE 32. Either party desiring to make oral arguments shall file a notice of his intention to do so with the Clerk at least ten days before the session of the Court at which he wishes to make such argument.

REHEARINGS.

RULE 33. A party desiring a rehearing in any cause shall, within thirty days after the filing of the opinion, file with the Clerk the original and four copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court with proper reference to the particular portion of the original brief relied upon and with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

RULE 34. When a rehearing is granted the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

RECORDS AND CALENDAR.

RULE 35. 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 number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs as filed; such mailing shall constitute due notice and service thereof. Within ten days prior to the first day of each session of the Court the Clerk shall prepare a calendar of the causes to be disposed of at such session and deliver a copy thereof to each of the Judges and to the Attorney General.

RULE 36. Whenever on peremptory call of the docket any claim or claims appear in which no positive action has been taken and no attempt made in good faith to obtain a decision or hearing of the same within two years, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such claim or claims should not be dismissed for want of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the next regular session after the entry of such order, such claim or claims may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper showing made by the claimant the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued or leave given to amend or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of this rule. And the Court may, during the second day of any regular session, call its docket for the purpose of disposing of cases under this rule.

ORDER OF THE COURT.

It is hereby ordered that the above and foregoing rules be and the same are hereby adopted as the rules of the Court of Claims of the State of Illinois. It is further ordered that such rules shall be in full force and effect from and after the first day of January, A. D. 1934, and that the same shall be in lieu of all rules theretofore in force.

Entered this 22nd day of November, A. D. 1933.

C. N. HOLLERICH, *Chief Justice.*
C. H. LINSCOTT, *Judge.*
AUBREY L. YANTIS, *Judge.*

COURT OF CLAIMS LAW

An Act to create the Court of Claims and to prescribe its powers and duties. (Approved June 25, 1917. L. 1917, p. 325.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* The Court of Claims is hereby created. It shall consist of a chief justice and two judges, appointed by the Governor by and with the advice and consent of the Senate. In any case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor is appointed and qualified. If the Senate is not in session at the time this Act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

§ 2. The term of office of the chief justice and of each judge shall be from the time of his appointment until the second Monday in January next succeeding the election of a Governor, and until his successor is appointed and qualified. This provision in reference to the term of office of the chief justice and of each judge shall apply to the current terms of said offices and the respective terms of the present incumbents shall be deemed to have begun upon the appointment of said incumbents. (As amended by Act approved and in force May 11, 1927. L. 1927, p. 393.)

EMERGENCY.] § 3. WHEREAS, in order that the full salary of said chief justice and of said judges as provided for by an Act of the Fifty-fourth General Assembly may be paid out of an appropriation made and now available therefor; therefore an emergency exists and this Act shall take effect and be in force and effect from and after its passage and approval. (Act approved May 11, 1927. L. 1927, p. 393.)

§ 3. Before entering upon the duties of the office the chief justice and each judge shall take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of State.

§ 4. The chief justice and each justice shall each receive a salary of three thousand two hundred dollars per annum, payable in equal monthly installments. (As amended by Act approved July 8, 1933. L. 1933, p. 452.)

§ 5. The Secretary of State shall be *ex-officio* secretary of the Court of Claims. He shall provide the court with a suitable place in the capitol building in which to transact its business.

§ 6. The Court of Claims shall have power:

(1) To make rules and orders, not inconsistent with law, for carrying out the duties imposed upon it by law;

(2) To make rules governing the practice and procedure before the court, which shall be as simple, expeditious and inexpensive as reasonably may be;

(3) To compel the attendance of witnesses before it, or before any notary public or any commissioner appointed by it, and the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it;

(4) To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay;

(5) To hear and give its opinion on any controverted questions of claims or demand referred to it by any officer, department, institution, board, arm or agency of the State government and to report its findings and conclusions to the authority by which it was transmitted for its guidance and action;

(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto.

§ 7. In case any person refuses to comply with any subpoena issued in the name of the chief justice, attested by the Secretary of State, with the seal of the State attached, and served upon the person named therein as a summons at common law is served, the Circuit Court of the proper county, on application of the Secretary of the Court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such Court on a refusal to testify therein.

§ 8. The concurrence of two members of the Court shall be necessary to the decision of any case.

§ 9. The Court shall file a brief written statement of the reasons for its determination in each case. In case the Court shall allow a claim, or any part thereof, which it has the power to hear and determine, it shall make and file an award in favor of the claimant finding the amount due from the State of Illinois. Annually the Secretary of the Court shall compile and publish the opinions of the Court.

§ 10. Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed.

§ 11. The Attorney General shall appear for and represent the interests of the State in all matters before the Court.

§ 12. All claims now pending in the Court of Claims created under "An Act to create the Court of Claims and prescribe its powers and duties," approved May 16, 1903, in force July 1, 1903, shall be heard and determined by the Court of Claims created by this Act in accordance with the provisions hereof.

§ 13. The jurisdiction conferred upon the Court of Claims by this Act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claim or demand, over which the Court of Claims is herein given jurisdiction, unless an award therefor shall have been made by the Court of Claims.

§ 14. Repeal.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 2023—Claim denied.)

WILLIAM G. GETTINGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.
Rehearing denied January 9, 1934.

PARKER AND EAGLETON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—limitations—motion to dismiss—when sustained.* Where it appears from face of record that no claim for compensation was made nor any application for same filed within time required by Act, Court is without jurisdiction and motion to dismiss claim will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his declaration herein on December 2, 1932, alleging that he, on the 5th day of November, 1931, was in the employ of the State of Illinois as a State Highway Maintenance Policeman in District No. 12 and while riding a motorcycle near Wheeler, Illinois, an automobile was suddenly driven in front of him and in order to prevent a collision he fell from his motorcycle and was injured. He had been an employee of the State since May 1, 1930.

It was stipulated that the accident occurred November 9, 1931. His doctor and hospital bills were paid by the State and John Weishaar, the man who was driving the automobile which drove upon the highway in front of claimant paid claimant $12.00 on the hospital bill. It appears that claimant remained in the employ of the State and on January 15, 1932 returned to his work and was paid his regular compensation up to the time he severed connections with the State, which was February 20, 1933. He was acting under the order of Sergt. Arch LaBaw, who also has a similar claim pending in

this court. Claimant is seeking to recover the sum of $2,500.00.

The Attorney General has filed a motion to dismiss and this case is heard upon that motion. The motion to dismiss is based upon the proposition that claimant has not complied with the terms and provisions of Section 24 of the Compensation Act of 1911 as subsequently amended, because no claim or demand appears to have been made upon the respondent by the claimant for compensation within six months after the date of the accident on November 9, 1931. We think that a compliance with the statute is jurisdictional. The Supreme Court in the case of *City of Rochelle* vs. *Ind. Co.*, 332 Ill. 386, and in other cases, held that no proceeding for compensation shall be maintained unless claim for compensation has been made within six months after the accident. The making of such claim is jurisdictional and unless there is proof of the claim being made there is no jurisdiction. The motion, therefore, to dismiss will be allowed. Case dismissed.

(No. 2031—Claim denied.)

ARCH LEBAW, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.
Rehearing denied January 9, 1934.

PARKER AND EAGLETON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

The same question involved herein was discussed and decided in the case of Quillman vs. State, No. 2008, post, and the decision is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On April 12, 1933 claimant filed his declaration in this court averring that he had received personal injuries while in the performance of his duties as a State Highway Patrolman. It appears that on the 17th day of August, 1929, while in the performance of his duties in the neighborhood of Salem, Illinois, while riding his motorcycle in a southerly direction a person or persons driving in the opposite direction suddenly turned to the west and ran into the claimant, throwing him

to the ground injuring his left arm, left leg and foot. Claimant alleges damages in the sum of $2,500.00.

The Attorney General has made a motion to dismiss because it does not appear that claimant complied with the terms and provisions of Section 24 of the Workmen's Compensation Act of 1911, as subsequently amended. The statute provides that a claimant for compensation must make a demand within six months after the date of the accident, which in this case was on August 17, 1931. There was no action taken in this case until April 12, 1933. Claimant returned to his work January 20, 1930, in the meantime having been appointed to the position of Sergeant.

The motion to dismiss is based upon the proposition that claimant has not complied with the terms and provisions of Section 24 of the Compensation Act of 1911 as subsequently amended, because no claim or demand appears to have been made upon the respondent by the claimant for compensation within six months after the date of the accident on August 17, 1931. We think that a compliance with the statute is jurisdictional. The Supreme Court in the case of *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386, and in other cases, held that no proceeding for compensation shall be maintained unless claim for compensation has been made within six months after the accident. The making of such claim is jurisdictional and unless there is proof of the claim being made there is no jurisdiction. The motion, therefore, to dismiss will be allowed. Case dismissed.

(No. 1931—Claim denied.)

HERBERT E. SHAPIRO, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 23, 1933.
Rehearing denied October 17, 1933.

ALTHEIMER, MAYER, WOODS & SMITH, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award denied.* In order for a member of the Illinois National Guard to recover compensation for personal injury under the Military and Naval Code, it must be proven that such injury was sustained, not only while he was on duty but while performing his duty in pursuance to orders, and if the evidence shows

that such injury was sustained while doing an act in disobedience of the orders of his military superior an award will be denied.

SAME—*same—when award for would be against public policy and Statute.* To make an award for personal injury sustained by member of Illinois National Guard while acting in disobedience of the orders of his military superior would be contrary to the Statute and against public policy.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Plaintiff filed his declaration in this court on June 21, 1932.

He alleges that he was born on the 22nd day of December, 1915, and on the 29th day of May, 1931, he enlisted in the Illinois National Guard and became a member of the 122nd Field Artillery; that on August 1, 1931, under orders of his commanding officer, with the other members of his regiment, entrained for Camp McCoy, near Sparta, Wisconsin.

The declaration further alleges that he was directed by the proper officers on August 13, to clean up the grounds adjacent to the targets, and while in the performance of his duties he picked up an unexploded shell and accidently dropped the same, and that the shell exploded, and as a result thereof, he was seriously wounded, and lost the thumb, first and second fingers of the right hand. He was removed to St. Mary's Hospital at Sparta, Wisconsin, and remained there for eleven days. He was then removed to St. Joseph's Hospital in the city of Chicago, and it was necessary to perform a skin grafting operation.

Prior to the time of the accident he was a student in one of the technical schools in the city of Chicago, studying to be a draftsman, and by reason of his injuries had been unable to follow out his profession when he became proficient. He seeks to recover compensation under the Military and Naval Code of Illinois for these injuries.

It appears in the record that on August 13, 1931, he was on duty with his company which was firing French 75 mm. guns on the south target range. He had been detailed to take care of horses for the company's officers and had been specifically directed prior to the accident along with another private of the Battery to hold five horses which had been ridden by officers to a part of the range. After the officers left to perform their duties, the plaintiff and the other private arranged between themselves that one should hold the horses so the

other might go where his fancy dictated. The plaintiff went out in surrounding territory in disobedience of his orders and began to collect souvenirs.

The findings of the Board of Inquiry are before us. This report is made a part of the record by the stipulation of the counsel representing both sides of this case. The records of the office of the Adjutant General show that the injured soldier was injured while on duty with the National Guard, but the injury did not occur in line of duty.

It appears from this record that on the day in question, Private Shapiro with two other enlisted men, accompanied by Captain Nessler, the Battery commander, were engaged in a problem which was carried out on the south range, at Camp McCoy. All of the party were mounted. At a certain point, the party dismounted and Private Shapiro with several other soldiers acting as horse-holders, was given two horses and sent about 200 feet to the rear by the Battery Commander.

Shortly thereafter, Private Shapiro turned his horse over to another soldier and left the vicinity. He had been gone but a short time when he returned with some loose shrapnel and a nose from an expended 155mm. shrapnel shell. He had found an unexploded 37 mm. projectile and had placed it in his shirt pocket. He saw another one on the ground and reached down to pick it up with his right hand and in so doing, the projectile in his pocket fell to the ground and struck the second projectile, causing an explosion, which resulted in his injury.

It also appears that during the period of training, this soldier, as well as all other members of the Battery, were constantly warned by the Battery Commander, and other officers, and non-commissioned officers, of the danger of handling unexploded projectiles or "duds", whether on the range or elsewhere.

It also appears that on the line of march to each of the ranges, there are large sign boards warning soldiers of the danger of handling unexploded shells. The signs are placed in such position that they are directly in the path of approaching troops,

It is urged, on behalf of the plaintiff, that the accident happened while in the performance of his duties under the direction of his commanding officer, but there is nothing in

the evidence to support that contention. The facts conclusively show that the claimant was entirely outside of his duties in picking up unexploded shells, and was also at that time acting in direct disobedience of orders of his military officers, and general orders of the camp.

The findings of the military board are set forth largely in the report of the Adjutant General. Section 11 of the Military and Naval Code provides: "Sec. 11. In every case where an officer or enlisted man of the National Guard * * * shall be injured, wounded or killed while performing his duty * * * in pursuance of orders * * * said officer or enlisted man * * * shall have a claim against the State. * * *"

It does not appear from the evidence that this soldier had been assigned to clearing the target range of unexploded shells or other debris. The record specifically shows that he had been assigned to the duty of holding some horses, and in disobedience of those orders, he received the injury.

It also appears from the record that this soldier had been warned by his officers not to pick up shells while on the range, as some of them might be unexploded and therefore dangerous.

It further appears that signs were posted near the range warning soldiers against such action, as caused the injury in this case.

We cannot agree with counsel that this injury arose while in the performance of claimant's duties. Stress is put upon the fact that he was only about 15½ years of age at the time of his enlistment and accident, but if that were true, he was probably allowed to join the National Guard upon his representation that he was at least 18 years of age at the time of his enlistment, and he should not now be permitted to take advantage of his own misrepresentation.

As we view the facts in this case, this claimant did not receive an injury while in the performance of his duties, pursuant to orders, but on the contrary, received his injury while in disobedience of his orders. It would not only be contrary to the statute for this court to assume jurisdiction of this case, but it would be positively against public policy to make an award in this case.

The claim is, therefore, dismissed.

(No. 2008—Claim denied.)

JOHN QUILLMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.
Rehearing denied November 21, 1933.

WILLIAM O. EDWARDS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—limitations—plea to jurisdiction—when sustained.* Where it appears from face of record that no claim for compensation under Workmen's Compensation Act was made, nor any application for same filed within the time required by Act, the court is without jurisdiction to hear cause and plea to jurisdiction will be sustained and claim dismissed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim for compensation. Claimant alleges that on the 4th day of July, 1929, he was employed as a watchman on a hard surfaced road on Route No. 13, three miles west of Pinckneyville, Perry County, Illinois. The claim arises out of a severe injury which he received when about three or four o'clock in the morning, a car driven by one James Carman approached a point where the claimant was standing, endeavoring to warn the driver of the automobile of the existence of a barrier protecting a strip of new concrete that had been put in to repair a bad place in the road. Carman, driving apparently in a reckless manner, struck this barrier and the barrier struck the claimant, severely injuring him.

The claim was filed October 31, 1932. This case comes before us on a motion to dismiss by the Attorney General for want of jurisdiction, for the reason that it does not appear from the records that claimant complied with the terms and provisions of Section 24 of the Workmen's Compensation Act of 1911, as subsequently amended, in this:

(a) No claim or demand appears to have been made upon the respondent by the claimant for compensation within six months after the date of the accident on July 4, 1929.

(b) Application for compensation or declaration of claim herein was not filed within one year after the date of the injury or within one year after the date of the last payment made by the respondent to the claimant of any temporary total compensation payable under the Act.

It appears from the petition filed by claimant that he is seventy-two (72) years of age; that he did not anticipate nor understand that his injury was as serious as it was and would result in a seventy-five per cent (75%) permanent disability; that he did receive Two Hundred Dollars ($200.00) from Carman, the man who injured him.

Claimant objects to the motion to dismiss and sets up seven (7) reasons, and cites former opinions of this court, and urges that the State has waived Section 24 of the Compensation Act, citing authorities.

This court has held that Section 24 of the Compensation Act is jurisdictional and was not waived by the State and is not equivalent to a demurrer at common law.

The facts appear from the evidence taken in the case, and we will consider it the same as a motion made at the close of all the evidence in a suit at law to direct a verdict, for the reason that this court has no jurisdiction, and the petition will be dismissed.

(No. 1717—Claim denied.)

PERCY WOLFF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1933.

RES ADJUDICATA—*when motion to re-instate claim will be denied.* Where it clearly appears that claim was fully heard and fairly decided and an award made by the court, such adjudication is final and claim will not again be considered and motion to reinstate will be denied.

Per Curiam:

This matter coming on to be heard before the court on a motion to reinstate the claim.

From the files it appears that on May 14, 1931, an opinion was rendered by this court wherein an award in the sum of $2,416.94 for the payment of hospital bills, doctor bills, and nurses bills, was allowed.

Prior to that time claimant had received $1,472.85 in addition for such purposes, making a total of $3,889.79.

The rule of res adjudicata will apply. This is not a harsh rule, particularly in this case, because it appears from the records of the Division of Highways, Department of Public Works and Buildings, that the claimant actually received $175.00 per month from December 1, 1928, the date of his

injuries, to February 13, 1933, and then continued on the State payroll at a salary of $100.00 per month from then until April 17, 1933.

The motion for leave to reinstate, will, therefore, be denied.

(No. 1982—Claim denied.)

ROSA PETERSEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 17, 1933.
Rehearing denied January 9, 1934.

SAMUEL G. RAUTBORD, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*governmental function.* It is well settled that in organizing training and military camps, the State is exercising a governmental function and acting in its sovereign capacity.

SAME—*personal injury caused by act of member—when State not liable for.* Where claimant was injured by being struck by bullet fired by member of Illinois National Guard engaged in rifle practice in military training camp, and in performance of his duties as such member, the State is not liable to respond in damages.

SAME—*same—respondeat superior.* The doctrine of respondeat superior has no application to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Rosa Petersen, filed her declaration on September 9, 1932, stating that on July 24, 1932, the State of Illinois was conducting a military camp and training quarters, known as Camp Logan, situated on the shore of Lake Michigan, at or near Zion, in Lake County, Illinois, and at the time a detachment of the one hundred thirty-second (132nd) Illinois infantry was being quartered and stationed there, and it became and was the duty of the State to post and maintain look-outs in the vicinity of Camp Logan, to warn boats or water crafts rightfully on the waters of Lake Michigan of the danger of coming within the rifle range; that at the time in question, target practice was being held, firing in the direction of the Lake, and there were no guards, signs or buoys to inform any person or persons happening to be on the Lake of impending danger, and not regarding its duty in this behalf, the State so carelessly and negligently and with-

out regard for the safety of the plaintiff, conducted said target practice; that at the time and place, the claimant was riding in a boat on Lake Michigan, opposite to Camp Logan, at a distance of approximately one and one-half miles from shore, and was then and there in the exercise of due care and caution for her own safety.

The declaration also charges that the State, which is called the defendant in the declaration, did make an assault upon the plaintiff, and shot off certain fire arms then and there loaded with gun powder and leaden bullets, at and against her, and did shoot and wound her, and she became incapable of following and transacting her affairs and business, and necessarily laid out divers sums of money, and asks the sum of Ten Thousand Dollars ($10,000) as damages.

A statement of her actual expenses is attached to the declaration, totalling Six Hundred Eleven Dollars and Fifty Cents ($611.50), and the balance of the damages asked is for pain, suffering and mental anguish; the whole sum totalling Ten Thousand Dollars ($10,000).

It appears from the evidence that on the morning of July 24, 1932, at about 9:00 or 9:30 A. M., the claimant, Rosa Petersen, a resident of Evanston, Illinois, and employed as a stenographer, was a member of a Hiking Club, which club was on its way to Winthrop Harbor. There were twenty of them in the boat, and there were six other members of the party who went by auto. The boat was being operated by its owner, one Wellington Quirk, and was known as the Coast Guard type. It is thirty-six feet long and about six feet high from the water line. They left Waukegan about 9:30 going north. Camp Logan is north of Waukegan. There is a difference in the evidence as to how far from shore they travelled, but the evidence fairly shows that they were at least a mile or more from shore. When opposite Camp Logan bullets commenced to fall around them, and claimant was shot. The boat was brought around from the right and headed back towards Waukegan. The siren of the boat was sounded for from five to ten minutes. It was an electric siren. It took them something over an hour to get back to Waukegan. The claimant was placed in an automobile and taken to a hospital. Quirk, the owner of the boat, had been a member of the Yacht Club for a couple of years and had been an owner of boats for twenty years and navigated them himself. He was familiar

with Camp Logan and surrounding waters. It also appears from the evidence that Quirk knew of the existence of the Hydrographic system in Chicago, and knew of their reports which are issued daily during the summer months.

Just prior to the accident, Miss Petersen noticed bullets drop in the water quite a distance away, but just how far does not appear from her testimony. She was quite an outdoor person and familiar with boats. Some comment was had about their being rifle practice at Camp Logan. The claimant heard the owner of the boat state that they were having target practice at Camp Logan. The boat was then turned to the right or east and claimant stated that it seemed as if their boat had been made a target, because bullets were flying all around them, and claimant testified that none of them expected any danger at that time.

Claimant was struck in both legs; through the calf of her right leg and the left foot. She did not discover the wound in her right leg until afterwards. It appears that she was sitting in the back of the boat with her feet drawn under her when she was shot. The bullet entered the top of the foot over a metatarsal bone, took a course towards the sole of the foot and became turned completely around in its direction probably through glancing contact with the bone, according to the medical testimony. There were scars on her foot that may or may not be painful.

At the time of the accident, Edwin S. Hoops, a retired captain of the United States Army and assigned to the 131st Infantry of the Illinois National Guard for training purposes, was on duty. Camp Logan is a rifle range for troops of the State of Illinois and Wisconsin, mostly Illinois troops. The Illinois Guard used this range the whole season. In 1932 this range was used extensively from June 19th to October 15th. There are two firing points there, one in the south range and one in the north range. For this opinion, it is unnecessary to go into the details of these ranges. It is sufficient to state that the firing is made towards the Lake. The ranges are about 600 yards apart and parallel. About 10:30 all the targets were suddenly withdrawn and they received word from the man down in the pits that there was a boat approaching. The targets were supported on butts. When the targets were withdrawn the firing ceased. The firing on that date was at a range of 200 yards. The targets were back some 600 yards

from the Lake on the south range and about 200 yards back on the north range. After the bullets had passed through the targets there would be a danger zone at the lake caused by bullets ricocheting, from about five hundred to seven hundred yards. It appears from the evidence that the bullet that struck the complainant was fired from the south range. It appears from the evidence that the Hydrographic Bureau in Chicago, several weeks prior to the time of the injury, had given notice to the various Chambers of Commerce and the various Yacht Clubs that firing would be conducted at Camp Logan, and it is fair to presume that the owner of the boat either knew, or by the exercise of due care and caution should have known of the firing at Camp Logan.

There is some controversy whether bullets fired from a Springfield rifle would have reached the claimant were the boat a mile and one-half from shore, but nevertheless, the facts are that she was shot, and all indications point that she was shot from a bullet fired from a rifle used by the State troops.

Under the view that we take of the case, it will not be necessary to consider whether the claimant was in the exercise of due care and caution for her own safety at the time of the accident. There can be no question about the facts in this case, or the claimant's injury. That the State of Illinois has the unquestioned right to train and maintain a National Guard for the public welfare, none will deny.

It is well-settled that in organizing training and military camps, the State is exercising a governmental function and acting in its sovereign capacity. The State cannot be sued or made a party defendant in Courts of Record. (*Art. IV, Constitution of 1870; Moore* vs. *School Trustees of Town Three*, 19 Ill. 83.)

We do not find that the Supreme Court of this State has ever passed upon the question of whether or not the State is liable for the acts of its officers or agents. However, with reference to public involuntary *quasi* corporations, such as counties and townships, carrying out governmental functions designated to them by the State, the rule is well recognized and quite analogous to the liability of the State.

Hedges vs. *Madison County*, 6 Ill. 567.
Hollenbeck vs. *Winnebago County*, 95 Ill. 148.
City of Chicago vs. *Williams*, 182 Ill. 135.

This court has quoted the last mentioned case, in the case of *Morrissey* vs. *State*, 2 C. C. R. 354, as follows:

"Where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred. It must be conceded in this case, that all lawful acts done by, or omissions of the Canal Commissioners, or their agents, are the acts and omissions of public officers, acting in their public capacities for which there can be no recovery in tort, and for wrongful acts of such officers there can certainly be no recovery because the doctrine of *respondeat superior* does not apply to the State, and it is not liable for malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. *Ross* v. *State*, 1 C. of C. R. 175, and many other cases decided by this court, holding to the same rule.

"It is not contended by claimant that such statute exists, and this court has repeatedly held that the statute which creates this court does not increase or enlarge the liability of the State but provides only the forum, wherein claims may be adjudicated according to the principles of equity and justice, except as otherwise provided by law."

It is a well-established rule that the doctrine of *respondeat superior* does not apply to a State in the exercise of purely governmental functions. In the case of *Seymour* vs. *VanSlyck*, 8 Wend. 403; 422; *United States* vs. *Kirkpatrick*, 9 Wheat. 720, 723 and *Story on Agency*, 9th Ed. Sec. 319, p. 390, this doctrine is stated:

"The government itself is not responsible for the misfeasance, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive to the public interests; and, indeed, laches are never imputable to the government."

So far as we are able to ascertain, from 1877 when the Commission of Claims was established, down through the creation of the Court of Claims, to the present time, this forum for the adjudication of legal and equitable claims against the State of Illinois has consistently adhered to the general rule, that the doctrine of *respondeat superior* has no application to the State.

In *Hinchcliff* vs. *State*, 2 C. C. R. 159, it was held:

"It is . . . a well established rule in this and all other courts that the State is not liable for the negligence, torts, misfeasances or omissions of duty of its officers, agents or servants, for it does not guarantee the fidelity of the agents or officers it employs to carry on its governmental functions."

Many times since then this court has followed this rule. (See *Dannewitz* vs. *State*, 6 C. C. R. 142.)

Because of the constitutional provisions against suing the State, this court was established, but the statutes defining the jurisdiction of the Court of Claims does not increase or enlarge the liability of the State. No doubt the intention of the legislature in establishing the Court of Claims was only to provide a forum where claims could be adjudicated according to well recognized principles of law and equity, except as otherwise provided by Statute. (See *Morrissey* vs. *State*, 2 C. C. R. 254.)

This court said in *Ryan* vs. *State*, 4 C. C. R. 57 that Section four (4) of the Act generally defining the court's jurisdiction to hear claims against the State, does not increase or extend liability on the part of the State so as to permit an award not based upon well recognized principles of law or equity in the absence of a statute to the contrary, "however much such cases might appeal to the sympathies of the court."

As we view it, the infantry was performing a duty, at the time of this deplorable accident, imposed by the law for the public benefit and for the promotion and preservation of the public welfare, and their acts and omissions are the acts and omissions of public officers, acting in their public capacities, and for such acts there can be no recovery, because the doctrine of *respondeat superior* does not apply to the State, and the State is not liable for malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability.

The claim of the claimant, Rosa Petersen, therefore will be denied and case dismissed.

(No. 1865—Claimants awarded $170.00.)

RAYMOND G. SCOTT, M. D. AND RALPH W. CARPENTER, M. D., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 17, 1933.

RAYMOND G. SCOTT, M. D., AND RALPH W. CARPENTER, M. D., pro se.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*When award made for.* Where it appears that claimants rendered medical services to inmates of State institution in the course of regular employment, and at the request of State department, the charge for same being just and reasonable, an award for same may be made upon recommendation of the proper State department.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimants, Raymond G. Scott, M. D., and Ralph W. Carpenter, M. D., filed their claim in this court on December 10, 1931 for medical services in the total amount of One Hundred and Seventy Dollars ($170.00); claimants being practicing physicians and surgeons of Geneva, Illinois. It appears from the evidence that for several years this firm of physicians had been regularly employed by the Department of Public Welfare of the State of Illinois to care for the inmates at the St. Charles School for Boys, a State institution located near Geneva. A demurrer was filed to the complaint but has since been withdrawn.

Rodney H. Brandon, then Director of the Department of Public Welfare, on December 18, 1931, submitted a statement for the record stating "that it (the claim) is entirely just and should be paid along with current bills. Doctors Scott and Carpenter * * * are paid monthly for their services. This bill, somehow or other, was lost in the shuffle, and has never been paid. It is a valid claim against the funds of this department." The claim as originally submitted was for One Hundred Seventy Dollars ($170.00) for twenty-seven calls to inmates during the month of June, 1931. Subsequently on October 5, 1933, a further and amended claim was filed, supported by affidavit, for the said sum of One Hundred Seventy Dollars, and for a further item of "services rendered Mr. Otto A. Elliott, Superintendent of St. Charles School for Boys in May and June, 1931 in the sum of Forty-one and 50/100 Dollars ($41.50) for a leg fracture sustained by him." Inasmuch as Mr. Elliott has a personal claim pending in this court under No. 1867 for this same bill, no award is made for same, and no further consideration given thereto in connection with this cause.

The claim for One Hundred Seventy Dollars ($170.00) is admitted by Dr. J. J. McShane, a State physician of the Department of Public Health as reasonable and proper for approval.

In view, therefore, of the circumstances, and upon the recommendation of the State Department, the claim of One Hundred Seventy Dollars ($170.00) is allowed and we recommend that same be paid.

(No. 2215—Claim denied.)

CHARLES THOMAS ALFORD, BY HENRY ALFORD, his next friend, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 21, 1933.

THOMAS P. MOORE AND JULIUS RAZOVSKY, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*pleading—when demurrer sustained.* Where declaration shows that injury for which award is sought was the result of the negligence of a servant of the State demurrer will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant, Charles Thomas Alford, an infant, by his father and next friend, submits by his claim, that while walking upon and along a certain public thoroughfare in the city of St. Louis and while in the exercise of due care for his own safety, was struck by an automobile truck owned by the State of Illinois, then and there carelessly and negligently operated by a servant of the State, thereby breaking his right collar bone and causing other physical injuries set out in his complaint, all to the damage of claimant in the sum of Two Thousand Dollars ($2,000.00).

The State of Illinois, the respondent, has filed its demurrer to this complaint upon the grounds that claimant is barred from maintaining an alleged action for the reason that the doctrine or rule of *respondeat superior* has no legal application to the Sovereign State in the exercise of its governmental function. There is nothing in the complaint by which it is disclosed to what branch of the State government the truck in question belonged, nor in what manner or for what purpose or by whom it was being used, but regardless of that, the State of Illinois is not liable for the torts of its

agents, employees or servants under the rule of *respondeat superior*. This rule has been almost uniformly followed by this court, and where a demurrer is filed to a claim based upon this rule, the court is in duty bound to recognize the same, unless some reason for an exception can be shown. In the present case, such demurrer is filed and in support thereof the following citations are made.

"The government itself is not responsible for the misfeasances, or wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties and losses which would be subversive to the public interests; and indeed, laches are never imputable to the government. *Seymour* vs. *VanSlyck*, 8 Wend. 403; 422; *United States* vs. *Kirkpatrick*, 9 Wheat. 720, 723."

Story on Agency 9th Ed. Sec. 319, p. 390.

This rule has been applied and followed by the Court of Claims in many instances where claims have arisen as the result of alleged negligence of officers or servants of the State of Illinois. In each instance such claims have been denied for the reason the State cannot be held liable for the misfeasance, malfeasance or nonfeasance of its officers or agents.

State Bank of Chicago, Admr. vs. *State*, 1 C. C. R. 158.
Belt vs. *State*, 1 C. C. R. 266.
Morrissey vs. *State*, 2 C. C. R .254.
Schroeder vs. *State*, 3 C. C .R. 36.
Ogan vs. *State*, 4 C. C. R. 347.
Dunning vs. *State*, 5 C. C. R. 244.
Janeczko vs. *State*, 5 C. C. R. 244.
Pelka, Admx. vs. *State*, 6 C. C. R. 390.

The intention of the legislature in establishing the Court of Claims was only to provide a forum where claims could be adjudicated according to well recognized principles of law and equity, except as otherwise provided by statute.

Henke vs. *State*, 2 C. C. R. 11.
Morrissy vs. *State*, 2 C. C. R. 254.

The demurrer of respondent is sustained; leave granted to file amended declaration by first day of January term.

(Nos. 1965, 1966 and 1967, Consolidated—Claimants awarded $104.50.)

E. R. CHAMNESS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 21, 1933.

E. N. NEVINS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MEDICAL SERVICES RENDERED TO STATE EMPLOYEES—*when award may be made for.* Where claimant rendered medical services to State employees injured while in performance of their duties, at request of their superiors, charge for same being fair and reasonable, an award may be made therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

This cause comes before the court upon three separate claims filed by Dr. E. R. Chamness of Carlinville, Illinois, and by stipulation of counsel, cases No. 1965 and No. 1966 have been consolidated with case No. 1967. The claimant in this case is the same Dr. E. R. Chamness who testified as a witness in the case of Henry Z. Cox, Court of Claims No. 1820. It appears from the record herein that Dr. Chamness is a practicing physician and surgeon and is the owner of the Macoupin Hospital at Carlinville, Illinois. On June 25, 1931 Henry Z. Cox was an employee of the State of Illinois, working under the Highway Department, and while engaged in such employment, sustained an injury to his right hand. He was sent to Dr. Chamness for treatment, and the amount of the latter's bill for such service is Twenty Dollars ($20.00). Harlan Shaw was also an employee of the State and was injured at the Reader State Plant in Macoupin County on October 23, 1930 in the course of his duties, necessitating x-ray examinations, sutures, dressing of wounds, etc., including facial and scalp wounds. He, too, was referred by a superior in the department to Dr. Chamness for treatment, and the latter's bill for such services is Sixty-five Dollars ($65.00). Mr. Donald Kairns was employed by the State of Illinois on State Aid Route 108 and on June 27, 1931 sustained an injury to his right hand and received medical attention from Dr. Chamness, for which the latter has filed his claim in the sum of Nineteen and 50/100 Dollars ($19.50).

These bills all seem to be recognized by the Highway Department as fair and reasonable for the services rendered,

but for some reason the bills were not presented to the State in regular course until after the appropriation from which they could have been paid had lapsed.

The claims appearing to be legal and proper and the allowance of same being within the jurisdiction of this court, same are found to be just and proper claims, and the consolidated claim in the sum of One Hundred Four and 50/100 *Dollars ($104.50) is allowed in favor* of the claimant and in settlement of these three claims.

(No. 1911—Claimant awarded $490.70.)

LOUIS M. JETTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 21, 1933.

GERALD G. GINNAVEN, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ AND JOHN KASSERMAN, Assistant Attorneys General, for respondent.

PERSONAL INJURY—*expense incurred as result of—when award may be made for.* Where State employee engaged in extra hazardous occupation was injured while in the performance of his duties, as a result of which he suffered loss of vision of his right eye and incurred expense for medical and hospital care, an award may be made for reimbursement for such expenses and for the said loss of vision.

MR. JUSTICE YANTIS delivered the opinion of the court:

Louis M. Jetter, claimant herein, as shown by the record, was an employee of the State at the State Power Plant in Springfield on September 11, 1931. While repairing a pump, a gasket was blown out, a stream of hot water blown against the right side of the face and body of claimant. He was taken to the hospital and certain expenses were incurred by him as follows:

Springfield Hospital	$73.70
Dr. M. J. Jelliffe	57.00
Marian Dye, nurse hire	30.00
Asbuties Peters, nurse hire	30.00
Total	$190.70

Claim is made for reimbursement of this expense and for the further sum of Three Hundred Dollars ($300.00) for

loss of vision in the right eye, said sum of Three Hundred Dollars being the amount for which claimant states he might obtain an operation to remove a cataract from his right eye; such cataract being claimed by claimant to be the result of said accident. Although there is some question when considering all the record whether the steam to which claimant was exposed would cause the cataract, the court is of the opinion that the cataract in question was the result of the accident.

The testimony of Dr. Jones, a State physician, is that the claimant has traumatic cataract, and that the pressure of water at one hundred fifty pounds (150 lbs.) could cause such cataract. Claimant testified that the pressure of water at the time of the accident, striking his eye and face, was, in his judgment, one hundred and fifty pounds, and the temperature of same from one hundred eighty to two hundred (180-200) degrees. Dr. Jones further testified that claimant has a total loss of vision of his right eye, with light perception and light projection remaining, same due to the traumatic cataract that was caused by the injury in question. It is further stipulated by claimant that an award of Three Hundred Dollars ($300.00) would be accepted in full satisfaction for the loss of vision of said eye in view of a possible relief to be expected from an operation that might be performed thereon.

Claimant was an employee of the State, and engaged in the performance of his duties at the time of the accident. The court is of the opinion that the case is one in which an award may properly be made; that the sum of Four Hundred Ninety Dollars and seventy cents ($490.70) is a reasonable and proper award in the premises, and such amount is allowed in full settlement of all claim against the State for injuries or loss, and expense resulting from the said accident.

(No. 1818—Claim dismissed.)

LESTER KRAMER, ADMINISTRATOR OF THE ESTATE OF JOHN KRAMER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 21, 1933.

PLEADING—*when face of shows claim is barred.* **Where declaration on its face shows that claim is barred by Statute of Limitations, motion to dismiss will be sustained and claim dismissed.**

Per Curiam:

Upon motion of the Attorney General, leave is given to withdraw the Respondent's plea of the Statute of Limitations and substitute therefor a motion to dismiss the claim;—which said motion is based upon the contention that the declaration on the face thereof shows that the claim is barred by the Statute of Limitations.

And such motion now coming on to be heard by the court, and both parties being present by their respective counsel, and the court having duly considered said motion, and having heard the arguments of counsel and being fully advised in the premises, doth find that the declaration on the face thereof shows that the claim is barred by the Statute of Limitations.

It is therefore ordered that said motion of the Attorney General to dismiss be and the same is hereby allowed and the claim is dismissed without award.

(No. 2250—Claim denied.)

HAROLD RAGAINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 23, 1933.

HAROLD RAGAINS, pro se.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

LIMITATIONS—*plea of—when sustained.* Where it appears from face of claim that same is barred by Statute of Limitations, plea of same will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

This case comes before the court upon a claim filed by Harold Ragains of South Haven, Michigan, for money claimed by him to be due for wages while working as an attendant at the Jacksonville State Hospital, Jacksonville, Illinois from September 27, 1919 to October 7, 1919 in the total sum of Twelve and 57/100 Dollars ($12.57). Said claim was filed with the Clerk of this court on October 2, 1933.

A plea of the Statute of Limitations has been filed by respondent, and it appearing from the claim and recitals therein that such claim is barred by the Statute of Limitations, the plea filed by respondent is found to be properly

averred and under Section Ten of the Act to create the Court of Claims etc., approved June 25, 1917, said claim is hereby denied and the case dismissed on the ground that the said claim is barred by the Statute of Limitations.

(No. 1938—Claim denied.)

CHICAGO FOUNDATION COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

ARNOLD L. LUND, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

FRANCHISE TAX—*voluntarily paid cannot be recovered.* Where the evidence shows that franchise tax was voluntarily paid and without any compulsion or duress it cannot be recovered.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant asks to be reimbursed in the amount of One Hundred Seventy Dollars ($170.00) on account of over payments of franchise taxes made by it to the State of Illinois for the years 1928, 1929, and 1931. It appears that prior to 1928 the capital stock of the company was Forty Thousand Dollars ($40,000.00), and that on March 19th, 1928 the authorized capital stock was increased from Forty Thousand Dollars ($40,000.00) to Two Hundred Thousand Dollars ($200,000.00).

In connection with such increase the corporation indicated that it proposed to issue at once One Hundred Twenty Thousand Dollars ($120,000.00) of additional stock for cash, and Forty Thousand Dollars ($40,000.00) as a stock dividend; which, together with the Forty Thousand Dollars ($40,000.00) previously issued, made a total issued capital stock of Two Hundred Thousand Dollars ($200,000.00), upon which fees were assessed and paid. As a matter of fact, only One Hundred Ten Thousand Dollars ($110,000.00) of the authorized capital stock was actually issued, and claimant contends that the franchise tax should have been based upon that amount,

instead of Two Hundred Thousand Dollars ($200,000.00), upon which amount the tax was actually assessed.

There is no claim made in the declaration and no testimony in the record to show that the tax was paid under protest, and apparently the same was paid voluntarily. It is the well settled law in this State that a tax voluntarily paid cannot be recovered back in the absence of a statute providing for such recovery. *Oppenheimer and Co.* vs. *State*, 6 C. C. R. 465; *Board of Education* vs. *Toennigs*, 297 Ill. 469; *Illinois Merchants Trust Co.* vs. *Harvey*, 335 Ill. 284; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122; *Standard Oil Co.* vs. *Bollinger*, 337 Ill. 353.

The taxes in question having been paid voluntarily and without any compulsion or duress cannot be recovered in this proceeding.

Award is therefore denied. Case dismissed.

(No. 2159—Claim denied.)

CHARLES M. DAHLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

HARDY, HARDY & HARDY, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*failure to make claim for compensation within time provided—court without jurisdiction to hear.* Where no compensation has been paid for injury complained of, and no claim for same has been filed within one year thereafter the court is without jurisdiction to proceed with hearing.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On April 26th, 1933 the claimant, Charles M. Dahler, filed his complaint in this court to recover compensation for injuries which were sustained by him on the 25th day of February, A. D. 1928. It appears from the complaint that claimant was a State Highway Policeman and was injured on February 25th, 1928 on Route No. 41, two miles north of Avon, Illinois; that there had been an automobile wreck at that point, and claimant was flagging an approaching automobile in order to send word to the next town for a wrecker

to remove the damaged cars from the scene of the accident. The driver of the car which he was attempting to flag suspected a holdup and discovered his mistake too late to stop, and as a result thereof the automobile struck the claimant and knocked him down, breaking his leg at the ankle joint.

The complaint does not allege that any claim for compensation was made within six months after the accident. No compensation was paid, and the complaint on the face thereof shows that it was not filed within one year after the date of the injury.

The Attorney General has filed a motion to dismiss for the reason that no claim for compensation was made within six months after the accident, and no application was filed within one year after the date of the injury, as required by Section 24 of the Workmen's Compensation Act.

The jurisdiction of the Court of Claims in cases of this kind is derived from paragraph six (6) of Section six (6) of the Act commonly known as the Court of Claims Act (Cahill's Revised Statutes, 1933, Chapter 37, paragraphs 462-475) which provides that the Court of Claims shall have power "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employe of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called "The Workmen's Compensation Act", the Industrial Commission being hereby relieved of any duty relative thereto."

This court recently held in the case of *Crabtree* vs. *State of Illinois*, 7 C. C. R. 207, that the effect of the aforementioned Section of the Court of Claims Act is to incorporate into such Court of Claims Act, the terms and provisions of the Workmen's Compensation Act, so far as the same are applicable. Such being the case, it is incumbent upon the claimant to bring himself within the requirements of Section 24 of the Workmen's Compensation Act, with reference to making claim for compensation and filing application therefor.

The Supreme Court in numerous cases has held that the making of claim for compensation, and the filing of application for compensation within the time required by the statute, are conditions precedent to the right of the claimant to recover. *Inland Rubber Co.* vs. *Ind. Com.* 309 Ill. 43; *City of Rochelle* vs. *Ind. Com.*, 322 Ill. 386; *Duquoin School District* vs. *Ind. Com.*, 529 Ill. 543.

The claimant having failed to comply with the aforementioned requirements of Section 24 of the Workmen's Compensation Act, this court is without jurisdiction to proceed with the hearing. *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43.

The motion of the Attorney General is therefore sustained and the case dismissed.

(No. 1761—Claim denied.)

S. J. GROVES & SONS COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.
Supplemental opinion on petition for rehearing filed May 8, 1934.

NOAH GULLETT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*where specifications part of—decrease in amount of work contracted for, under authority of specifications—when award for damages on account of denied.* Where specifications form part of contract and provide that State department has right to alter quantities of work thereunder, provided the total price of such deductions does not exceed tweny-five per cent of original price, no award will be made for damages on account of such decreased amount of work, if same does not exceed said twenty-five per cent.

SAME—*construction of hard road—what is not material alteration of original plans for.* Changing shoulder of road, under authority of specifications, from ten feet to four feet is not a material alteration of the plans to construct road.

SAME—*extra compensation for—Constitutional prohibition against.* Where specifications forming part of contract permit decrease in amount of work claimed on account of such decrease award for damages would be extra compensation and is forbidden under Section 19 of Article 4 of the Constitution of the State of Illinois which is mandatory and binding.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed April 30, 1931, seeking to recover damages in the sum of $2,495.70, alleged to have been sustained by reason of a change in plans in a contract for widening a highway and known as Section 11-y, State Bond Issue Route 18 in Kane and DuPage counties. The contract price was $159,986.52. In the declaration claims for damages are alleged for two items, one for a reduction of 15,807 cubic yards, Class "A" excavation which at the unit price of 32c

amounted to $5,058.24; and the other for a deduction of 46,258 square yards of shoulders, which at the unit price of 5c amounted to $2,312.90.

In a stipulation filed in said cause, it is agreed that if the claimant is found to be entitled to recover, the amount of the award should be Twenty-three Hundred Twelve and 90 100 Dollars ($2,312.90). When the contract was made, the specifications contemplated the construction of earth shoulders ten (10) feet wide, and from the evidence it appears that because additional right-of-way could not be obtained, it was found impracticable to construct ten feet shoulders and the latter were actually constructed of a width of four (4) feet. Claimant contends that while there was less excavation handled, their loss and damage was not only the decreased payment for excavation, but that the excavation and construction of a four foot shoulder involved greater labor and of a more expensive character than if they could have constructed ten foot shoulders as contemplated in the contract.

Under the proposal submitted to the State preliminary to the contract in question, it is provided in Section Eight that if the engineer decides to extend or shorten the improvement, or otherwise alter it by extras or deductions, including the elimination of any one or more of the items by an amount not to exceed twenty-five per cent of the total money value of the original contract price, or contract price corrected as provided in the specifications, the contractor will perform the work as altered, increased or decreased at the contract unit price.

The standard specification for road and bridge construction relied upon by claimant and respondent respectively are as follows:

"4.3. INCREASED OR DECREASED QUANTITIES OF WORK.] The Department reserves the right to alter the quantities of work to be performed or to extend or shorten the improvement, provided the total price for all such alterations, extensions or deductions does not exceed twenty-five (25) per cent of the original contract price, or contract price corrected as provided in Article 2.2. Should any of the changes provided herein be made, the contractor shall perform the work as altered, increased, or decreased at the contract price. No allowance will be made for any change in anticipated profits nor shall such changes be considered as waiving or invalidating any condition or provision of the contract."

"4.4. ALTERATIONS IN PLANS AND SPECIFICATIONS.] The Department reserves the right to make such changes in the plans and in the character of

the work as may be necessary or desirable to insure completion in the most satisfactory manner, provided such changes do not materially alter the original plans and specifications. Such changes shall not be considered as waiving or invalidating any condition or provision of the contract."

There is no dispute by the claimant and respondent as to the provisions of the contract or the construction work actually done. Claimant knew, at the time he filed his proposal, of Section 8 above stated, and when claimant signed the contract for the work in question, he knew of the foregoing provisions relative to a decrease in the quantity of work. Claimant contends that the change from a ten foot to a four foot shoulder was a material alteration in the original plans and specifications. The court is of the opinion that the construction of the hard road or slab was the principal or major factor in the contract, with such necessary earth shoulder as was essential to a completion of the project in chief; further that any alteration or deduction in the width or character of the earth shoulders or other matters incidental to the construction of said pavement proper are matters intended to be included and contemplated under Section 4.3 of the standard specifications for road and bridge construction. As the total contract price was One Hundred Fifty Thousand Dollars ($150,000.00), and the alterations or deduction for the two items of increased cost and decreased excavation amounted to only Seventy-three Hundred Seventy-one and 14/100 Dollars ($7,371.14), or less than five per cent, with a declared loss of Twenty-three Hundred Twelve and 90/100 Dollars ($2,312.90), the total price for such alteration or deduction is therefore within the twenty-five per cent provision in Section 4.3 of the standard specifications and the claimant is entitled to no award. Any award that might be made would have to be as extra compensation, contrary to provisions of Section 4.3 above set forth. Under Section 19, Article 4 of the Constitution, as cited by the Attorney General, such grant of extra compensation can not legally be allowed by this court herein. Claim is denied and case dismissed.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

The original opinion was filed herein denying claim on January 9th, 1934. The claimant, on February 14th, 1934, filed its petition with the clerk of this court for a rehearing.

The petition not having been filed within the time limits prescribed by Rule 33 of the court, the petition is not properly before the court.

In addition thereto, the petition fails to show any matter or thing which, if shown or proven on a rehearing, might invite a different opinion than the one heretofore rendered.

The court finds that there is no cause shown for a rehearing, and the petition for a rehearing is denied.

(No. 1976—Claim denied.)

ELMER HALLAM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

CHARLES W. CREIGHTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time provided in Act a condition precedent to jurisdiction—when motion to dismiss for want of jurisdiction will be sustained.* Where no claim for compensation is filed within 6 months after injury or application for award filed within one year after injury the court is without jurisdiction to proceed with hearing and motion to dismiss will be sustained.

MR. JUTICE YANTIS delivered the opinion of the court:

The claimant seeks to recover in this case from the State of Illinois the sum of Seventeen Dollars ($17.00) paid to Dr. John D. Boggs of Fairfield for medical attention received by claimant when melted tar was splashed over the latter's arms and hands. The accident in question occurred on June 22, 1931, while claimant was in the employ of the State of Illinois, Department of Public Works and Buildings, Division of Highways, working on Section No. 724, State Route No. 15, the cause of the injury being alleged to have been a defective lid, on a kettle of melted tar, falling into the kettle and splashing the hot tar on claimant.

The claim was filed September 1, 1932. The injury, as above stated, occurred June 22, 1931. The Attorney General has filed a motion to dismiss for want of jurisdiction, for the reason that claim for compensation was not made within six (6) months after the accident, or an application

for an award filed within one year as prescribed by the Workmen's Compensation Act of Illinois. The motion is sustained and allowed, and claim dismissed.

(No. 2165—Claim denied.)

EDWARD J. KELLEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

GEORGE R. FITZMAURICE, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—what must be shown.* In order to recover compensation it is necessary that the injury complained of be accidental, that it arise out of and in the course of the employment, and that claimant be engaged in employment which is extra hazardous in fact or declared to be under the Act.

ILLINOIS EMERGENCY RELIEF COMMISSION—*a State charitable agency—State not liable for negligence of servants and agents of.* Where employee of Illinois Emergency Relief Commission, a State charitable agency suffered loss of limb, alleged to have been caused by negligence of employee of infirmary conducted under its supervision, in administering a chemical, an award will be denied as the State is not liable for the careless or negligent acts of its servants and agents in the performance of governmental functions.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on May 1, 1933 and alleged therein that on the 6th day of July, 1932, he was employed by the Illinois Emergency Relief Commission; that such Commission was created by the Governor and the legislative branch of the State government for the purpose of administering relief; that while so employed by the Illinois Emergency Relief Commission at one of its relief stations, said claimant in the course of his employment became troubled with varicose veins and was sent to the infirmary conducted under the supervision of such Illinois Emergency Relief Commission; that an incompetent employe without any medical training was placed in charge of said infirmary by a Dr. Louis D. Joseph, Medical Supervisor of such Illinois Emergency Relief Commission; that said employe acting under the direction and authority of said Dr. Louis D. Joseph attempted to administer a chemical into the vein of the

claimant, but being unskilled as aforesaid, the chemical was injected into the tissue, and an infection resulted, whereby it became and was necessary to amputate the left leg of the claimant above the knee.

The complaint further alleges that application for adjustment of claim is now pending before the Illinois Industrial Commission, and claimant seeks to recover compensation for sixty-four (64) weeks' temporary total disability, and 190 weeks specific loss, on account of the loss of the use of the left leg, as provided by the Compensation Act.

The Attorney General has filed a general demurrer to the complaint, and the matter now comes before the court on the question as to the sufficiency of such complaint.

Claimant apparently bases his claim upon the provisions of the Workmen's Compensation Act of this State. In order to recover under such Act, it is necessary that the injury in question be an accidental injury; that it arise out of and in the course of his employment; and that he be engaged in some department of a business or enterprise which is declared to be extra-hazardous by Section Three (3) of the Compensation Act.

The complaint alleges that the claimant "in the course of his employment became troubled with varicose veins", but fails to set forth any facts showing an accidental injury or showing that the injury in question arose out of his employment, or that the business or enterprise in which he was engaged was one which is classed as extra-hazardous by Section three (3) of the Compensation Act. It follows, therefore, that the complaint does not state a right of action under the Workmen's Compensation Act.

Furthermore, the Illinois Emergency Relief Commission *is a State charitable agency*, created by an Act of the General Assembly approved and in force February 6, 1932, Cahill's Revised Statutes, 1933, Chapter 23, Sections 463-467, for the purpose of providing "relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances".

In operating and maintaining charitable institutions, the State is exercising a governmental function, and there is no liability on the part of the State for the careless or negligent acts of its servants and agents in the performance of governmental functions. (*Hinchscliff* vs. *State of Illinois*, 2 C. C. R.

159; *Derby* vs. *State of Illinois*, 7 C. C. R. 145; *Hollenbeck, Admx.* vs. *Winnebago County*, 95 Ill. 148; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; 25 R. C. L., p. 407, sec. 43.)

IT IS THEREFORE ORDERED that the demurrer to the complaint be sustained, and for the reasons last above stated, the case is dismissed.

(No. 1893—Claim denied.)

HARRY S. KRAMER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

PARKER & BAUER, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence—respondeat superior.* State is not liable for personal injuries suffered by member of State Civil Service Commission caused by tripping over piece of linoleum in the State House which had become broken and was projecting from floor as the State is not liable for the negligence of its officers, servants and agents in the performance of governmental functions.

SAME—*claim for on grounds of equity and good conscience—when denied.* An award as a matter of social justice and equity cannot be allowed where the State would not be liable at law or in equity if it were suable.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On December 8, 1931 one Harry S. Kramer who was then one of the members of the Civil Service Commission of this State, sustained injuries in the office of the Civil Service Commission in the State House, by tripping over a piece of heavy linoleum which had become worn and broken and was projecting upwards from the floor. The injuries consisted of a fracture of the right hip, and Mr. Kramer was confined to the hospital for about three months, and thereafter was required to use crutches or a cane for a further period of approximately six months, and incurred hospital, doctor and nursing bills to the extent of Eighteen Hundred Fifty-three Dollars and Fifteen Cents ($1,853.15).

In addition to his office as Civil Service Commissioner, Mr. Kramer was manager of the real estate department of the Illinois Trust Company, affiliated with the First National

Bank of East St. Louis, and as a result of the accident in question, was prevented from attending to his duties as such manager from December 8, 1931 to April 13, 1932, although he received his full salary as Civil Service Commissioner during that time.

Claim was filed to recover for the injuries sustained and the expenses incurred as aforesaid. After the testimony on both sides was taken, Mr. Kramer died, and upon the suggestion of his death, Elizabeth Kramer, as executor of his estate, was substituted as claimant.

The right to recover is based upon the theory that it was the duty of the State to maintain and keep the floor in question in proper and safe condition; and upon the theory also that even though the State is not liable for the negligence of its servants and agents, nevertheless an award should be made as an act of social justice and equity.

On account of the very serious injuries sustained by Mr. Kramer and the amount of expenses incurred as the result thereof, this claim appeals very strongly to the sympathies of the court, but, nevertheless, we find it impossible to allow an award for two reasons:

First: It is a well established principle of law, supported by numerous decisions of this court, as well as the other courts of this State and other States, that the State is not liable for the negligence of its officers, servants or agents in the performance of governmental functions. A few of the many authorities supporting this proposition are the following:

Hinchscliff vs. *State of Illinois*, 2 C. C. R. 159.
Derby vs. *State of Illinois*, 7 C. C. R. 145.
Hollenbeck, Admx. vs. *Winnebago County*, 95 Ill. 148.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
25 R. C. L. p. 407, Sec. 43.
8 R. C. L. Supp., p. 5580, Sec. 43.

Secondly: This court cannot allow an award as a matter of social justice and equity in any case where the State would not be liable at law or in equity if the State were suable. The latter proposition was exhaustively considered in the case of *Crabtree* vs. *State of Illinois*, 7 C. C. R. 207 (decided in May, 1933), in which case the previous decisions of this court on that question, from the time the court was created down to that date, were analyzed and considered, to-

gether with the decisions of the courts of this and other States and it was there held, that the legislative enactment creating the Court of Claims and prescribing its powers and duties, merely defined the jurisdiction of the court, and did not create any new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

Award is therefore denied and the case is hereby dismissed.

(No. 1718—Claim denied.)

MOSE LAY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

DURFEE & HOLMES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—limitations.* **Where no compensation has been paid, making claim and filing application for same within time fixed by Act is a condition precedent, without which the court is without jurisdiction to proceed with hearing. *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207, adhered to.**

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On February 14, 1931, the claimant, Mose Lay, filed his complaint herein, in which he alleges that prior to and on the 17th day of June, A. D. 1928 he was employed as a guard at the Southern Illinois Penitentiary at Menard, and further alleges that on said 17th day of June, 1928 he sustained a hernia as the result of an accident which arose out of and in

the course of his employment. It is not claimed that any compensation was received by the claimant, nor that any claim for compensation was made within six months after the accident.

The Attorney General has made a motion to dismiss on account of the fact that claim for compensation was not made within six months after the accident, and application for compensation was not made within one year after the date of the injury.

The same question was raised in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, and was carefully considered in that case.

The jurisdiction of the Court of Claims in cases of this character is derived from Paragraph Six (6) of Section Six (6) of "An Act to Create the Court of Claims and to Prescribe its Powers and Duties", (Cahill's Revised Statutes, 1933, Chapter 37, Paragraphs 462-475) which provides that the Court of Claims shall have power "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employe of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called 'The Workmen's Compensation Act', the Industrial Commission being hereby relieved of any duty relative thereto."

This court held in the Crabtree case that the effect of the foregoing provision of Section 6 of the Court of Claims Act was to incorporate into the Court of Claims Act the terms and provisions of the Workmen's Compensation Act, so far as they may be applicable, and further held that it was necessary for every claimant who based his right to recover upon the provisions of the Workmen's Compensation Act, to allege and prove a compliance with the requirements of Section 24 of the Workmen's Compensation Act relative to making claim for compensation within six months after the accident, and filing application for compensation within one year after the accident or after the last payment of compensation; also that the aforementioned requirements of Section 24 of the Compensation Act are conditions precedent to the right to recover, and unless the claimant shows a compliance therewith, this court has no jurisdiction to proceed with the hearing.

The decision in the Crabtree case has been followed by this court in numerous cases decided since that time, and applies with equal force to this case, and an award must therefore be denied.

IT IS THEREFORE ORDERED that the motion to dismiss be sustained and the case dismissed.

(No. 1873—Claim denied.)

LEWIS A. LUSH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

LEWIS A. LUSH, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*limitations.* Making claim for compensation and filing application for same within time fixed by Workmen's Compensation Act is a condition precedent, and if employee is injured on December 18, 1930, and files application for compensation on January 22, 1932, no compensation having in the meantime been paid on account of injury, the court is without jurisdiction to proceed with hearing and claim will be dismissed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On the 18th day of December, 1930, claimant was employed by the Division of Highways, Department of Public Works and Buildings, as its District Construction Engineer for the Sixth District, with headquarters in Springfield. On that date he was struck by an automobile while in the performance of his duties and sustained accidental injuries which arose out of and in the course of his employment. He incurred hospital and doctor bills to the extent of Sixty Dollars ($60.00) as the result of such injuries, and asks to be reimbursed for that amount.

Claimant's sole right of recovery is under paragraph Six (6) of Section Six (6) of an Act entitled "An Act to Create the Court of Claims and to Prescribe its Powers and Duties", which provides that the Court of Claims shall have power "To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employe of the State, such determination

to be made in accordance with the rules prescribed in the Act commonly called 'The Workmen's Compensation Act', the Industrial Commission being hereby relieved of any duty relative thereto."

The effect of this enactment was considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, and this court there held that as the result of such enactment, the terms and provisions of the Workmen's Compensation Act, so far as they may be applicable, must be considered by this court the same as though they were incorporated bodily into the Court of Claims Act.

Under the provisions of Section 24 of the Workmen's Compensation Act, the application for compensation must be made within one year after the date of the injury or the last payment of compensation. This requirement has been held in numerous cases to be a condition precedent to the right to recover. (*Crabtree* vs. *State of Illinois*, 7 C. C. R. 207; *DuQuoin School District* vs. *Ind. Com.*, 329 Ill. 543; *Chicago Board of Underwriters* vs. *Ind. Com.*, 332 Ill. 611.)

The injury in this case was sustained on the 18th day of December, 1930, and the application for compensation was filed herein on the 22d day of January, A. D. 1932. No compensation was ever paid and award must therefore be denied.

IT IS THEREFORE ORDERED that the claim be disallowed and the case dismissed.

(No. 2172—Claim denied.)

THE MODERN LAUNDRY CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

H. CLAY CALHOUN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MOTOR LICENSE FEES—*excess amount voluntarily paid—award for denied.* **Where claimant paid an amount for motor license fees in excess of that lawfully due, without any compulsion or duress, payment is voluntary and cannot be recovered.**

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant paid motor license fees for the year 1932 in excess of the amount which it was legally required to pay, and asks for a refund of the amount which was paid in excess of the legal tax.

There is nothing in the complaint or in the proof which shows that the license fees in question were paid under protest, nor is it even suggested that the same were paid under duress or compulsion.

It is the well settled law of this State that a tax which is paid voluntarily and not under duress or compulsion cannot be recovered back. (*S. Oppenheimer & Co.* vs. *State*, 6 C. C. R. 465; *Board of Education* vs. *Toennigs*, 297 Ill. 469; *Standard Oil Co.* vs. *Bollinger*, 337 Ill. 353.)

IT IS THEREFORE ORDERED that the claim be disallowed and the case dismissed.

(No. 1538—Claim denied.)

MOHAWK CARPET MILLS, INC., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.
Rehearing denied May 8, 1934.

NOAH GULLETT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*when payment deemed voluntary and not under protest.* Advising Secretary of State at the time of payment of franchise tax that payer protested payment thereof does not constitute in law a payment under protest but will be considered a voluntary payment.

SAME—*paid under law subsequently declared unconstitutional.* The fact that law imposing tax is unconstitutional, and tax for that reason is illegal is not of itself sufficient to authorize action to recover amount paid thereof.

SAME—*compulsion—duress.* Payment of tax will not be deemed compulsory or under duress, as a matter of law, when made to avoid penalties or threatened legal action by State officers.

PROTEST—*moneys paid under—remedy in court of jurisdiction—failure to pursue.* A party paying money to public officer under protest has under statute thirty days within which to file bill chancery restraining deposit of such money in State treasury and having validity of law under which paid determined, and if he does not avail himself of such remedy he will not be entitled to an award in the Court of Claims.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On May 15, 1929 the claimant was assessed a franchise tax of One Thousand Dollars ($1,000.00). Such tax was paid to the Secretary of State on June 15, 1929, and was held by him until July 17, 1929, at which time it was turned over to the State Treasurer.

Claimant filed its complaint herein on September 18, 1929, and claims that it really should have been assessed the sum of Forty-six Dollars and Twenty Cents ($46.20) instead of One Thousand Dollars ($1,000.00), and asks for the return of Nine Hundred Fifty-three Dollars and Eighty Cents ($953.80), which it claims to have paid in excess of the amount actually due from it.

On account of the conclusion at which we have arrived in this matter, it is unnecessary to enter into a discussion of the question as to the correct amount of the tax which should have been paid by the claimant:

Claimant alleges that it protested against the payment of such tax, and advised the Secretary of State of its contention that such tax, and the sections of the Corporation Act providing for the assessment thereof, were unconstitutional, null and void; and alleges also that the Secretary of State advised the claimant of his contention to the contrary, and insisted that the tax be paid, and that the Secretary of State advised the claimant that if the same were not paid, a penalty would be added thereto as required by the provisions of the then Corporation Act of this State, and, further, that he, the Secretary of State, would request the Attorney General to sue the claimant for the tax in an action of debt, in accordance with the then provisions of such Corporation Act, and that he would also request the Attorney General to file an information in equity against the claimant and thereby enjoin it from further transacting business in this State.

Claimant avers that in order to avoid the accumulation of said penalty, and in order to be able to continue to transact its business in this State, it paid said franchise tax under protest to said Secretary of State on the 15th day of June, A. D. 1929.

The Attorney General has filed a general demurrer to the complaint and takes the position that the payment of the

franchise tax by the claimant under the facts set forth in the complaint does not amount in law to a payment under protest, although the claimant at the time of payment stated to the Secretary of State that it protested the payment of the tax.

It is the well settled law in this State that a tax voluntarily paid cannot be recovered back in the absence of a statute providing for such recovery. In the case of *S. Oppenheimer & Co.* vs. *State*, 6 C. C. R. 465, the facts were very much the same as in this case, and this court there held that a demurrer to the declaration should be sustained.

In the case of *People* vs. *Bandy*, 239 Ill. App. 273, the court, in discussing the right to recover back a fine which had been paid upon a judgment of conviction which was thereafter held to be erroneous, on page 277 said:

"Of course, in one sense the payment of a fine is always involuntary since it would not be made if a criminal prosecution were neither instituted or threatened, but where a fine has been paid under the advice of counsel in order to settle the case or to avoid penalties for other offenses, or the trouble and expense of an appeal, the payment is said to be a voluntary one."

In the case of *Yates* vs. *Royal Ins. Co.*, 200 Ill. 202, the Supreme Court of this State held that the mere fact that the statute imposing a tax is unconstitutional, and the tax for that reason is illegal, is not sufficient to authorize an action to recover back the amount paid. In that case the court also said, page 207:

"If an illegal tax is, however, paid under duress or compulsion it may be recovered back. The appellee company contends that the statute under which the payment was made declared that the payment of the amount demanded thereunder as for taxes should be a condition precedent to its right to transact its business in the State; that it had established 290 agencies in the State and was engaged in transacting a large and profitable business, and that the payment sought to be recovered was exacted under threats on the part of the insurance superintendent that it would be denied the right to continue its business in the State unless the payment was made, and that it made the payment under the pressure of the situation, not voluntarily but under duress. It clearly appeared the superintendent of insurance believed the Act under which the payment was made was a valid law. Therefore the element of fraud, which might be involved if an illegal tax was collected with full knowledge that the law imposing the tax was invalid, does not enter into consideration. The question is then presented whether it appeared from the proofs the payment was made voluntarily, or under such circumstances as would constitute duress or compulsion";—

and the court, after an examination of the testimony, concluded that there was no duress or compulsion as a matter of law, and that the tax was voluntarily paid and therefore could not be recovered back. The same conclusion was reached in the case of *Board of Education* vs. *Toennigs,* 279 Ill. 469; also in the case of *Illinois Merchants Trust Co.* vs. *Harvey,* 335 Ill. 284; *Richardson Lubricating Co.* vs. *Kinney,* 337 Ill. 122; and *Standard Oil Co.* vs. *Bollinger,* 337 Ill. 353.

Furthermore, under the provisions of Paragraph Thirty-five (35), Chapter 127b of Cahill's Revised Statutes of 1929, the Secretary of State, in case of monies paid to him under protest, is required to hold the same for thirty days, and on the expiration of such period to deposit the same with the State Treasurer, unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the court.

The claimant therefore had its remedy by a bill in equity but failed to use the same.

Under the facts set forth in the complaint, and the settled law of this State, the payment to the Secretary of State by the claimant was not under duress or compulsion, but constituted a voluntary payment under the law, and the same cannot be recovered back.

The demurrer will therefore be sustained, and the case dismissed.

(No. 2233—Claim denied.)

JOHANNA MORRISEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.
Rehearing denied September 13, 1934.

GEORGE F. DOYLE, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of agent of State—when award for damages on grounds of equity and good conscience will be denied.* Where declaration clearly shows that injury for which damages are sought were sustained as the result of the negligence of an agent of the State, no award can be made on the grounds of legal liability on the part of the State as the rule of *re-*

spondeat superior is not applicable to it, nor will an award on the grounds of equity and good conscience be justified as one must point to some law giving him the right to an award and cannot invoke the principle of equity to secure one. *Brawner* vs. *State*, 5 Court of Claims Reports, page 194, not followed.

MR. JUSTICE YANTIS delivered the opinion of the court:

In the declaration filed in this cause, claimant alleges damages arising from an automobile accident on February 25, 1933 on a public thoroughfare in the City of Chicago. Claimant alleges that while walking on the street, she was struck by an automobile driven by one James Duckham, an oil inspector of the Department of Finance of the State of Illinois. Claim is made for resultant injuries in the sum of Ten Thousand Dollars ($10,000.00), which the claimant later moves to reduce to an ad damnum of Two Thousand Dollars ($2,000.00). The declaration further recites that claimant has received the sum of One Hundred Fifty Dollars ($150.00) from the said James Duckham by reason of said injuries.

Respondent, by its counsel, moves the court to dismiss the claim on the grounds that the declaration is substantially insufficient in Law and fails to state a proper legal cause of action against the respondent for the reason that the State is not liable for the misfeasance, malfeasance or nonfeasance of its officers or agents; it being contended by the respondent that claimant should be barred from maintaining her said action for the reason that the doctrine or rule of *respondeat superior* has no legal application to a sovereign state in the exercise of a governmental function. Claimant, in her objection to the motion, rests her right to an award upon the theory that regardless of any legal right, this court should grant an award upon the theory of equity and good conscience, and for the reason, as alleged, that a failure to make an award to this claimant under the facts alleged, would be doing a social injustice. In support of her contentions, claimant quotes from and relies principally upon the case of *Brawner* vs. *the State*, 5 C. C. R. 194. The ruling in the Brawner case has not, as insisted by claimant, been consistently followed, and the court is of the opinion that it should not be. It is true there appears in the reports of this court a number of cases (some of which are cited by counsel for claimant), which hold:

"There is no question that as a matter of law, no recovery could be had upon this claim, and therefore the consideration of this claim must be directed upon the proposition of equity and good conscience."

Hasson vs. *State*, 5 C. C. R. 224.

But, notwithstanding these decisions, the Law is correctly stated in the case of *Tuttle* vs. *State*, 5 C. C. R. 3, wherein it is said:

"It is, however, urged by the claimant that the doctrine of equity and good conscience should be applied. It is the opinion of this court that this rule should not be invoked in this particular case because in the first instance it does not appear to the court that the Legislature intended to have it so construed. As a matter of fact, if the Legislature intended that this court should be the medium through which the State becomes liable for this class of cases, then the Legislature should so specifically state. It is the opinion of the court that it is without the province of this court to indulge in presumptions."

In the case of *Watkins* vs. *the State*, 6 C. C. R. 172, it is stated:

"Claimants seem to recognize the fact their claims are not legal, for they say 'they know whatever is allowed them will be allowed out of equity and good conscience.' The statute creating the Court of Claims gives it powers to hear and determine all claims and demands, legal and equitable, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay. It is plain, from the language of this statute, that no claim against the State can be allowed by this court unless there is either a legal or equitable obligation of the State to pay it. Before a claimant can have an award against the State, he must show he comes within the provisions of some law making the State liable to him for the amount claimed. If he can not point to any law giving him the right to an award, he cannot invoke the principle of equity to secure such an award. Where there is no legal liability, equity can not create one.

(10 R. C. L. Sec. 132.)

Equity is not the court's sense of moral right. It is not the power of the court to decide a case according to a high standard of abstract right, regardless of the law."

As stated by the Supreme Court of Massachusetts in construing a similar Statute in that 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."

The Watkins case just quoted was decided in 1929, subsequent to the amendment of the Court of Claims Act of 1917, and applies to the Act as now existing. The motion of

the Attorney General to dismiss is allowed and cause dismissed.

(No. 2158—Claim denied.)

FAY V. SHUMWAY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

HOGAN & COALE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage—negligence of members of Illinois National Guard—State not liable for.* The State is not liable to respond in damages for personal injuries or damage to property occasioned by the negligence of members of the Illinois National Guard.

SAME—*same—same—claim on grounds of equity and good conscience.* An award for damages for personal injury and damage to property alleged to have been sustained by reason of negligence of member of Illinois National Guard while operating truck on highway is not justified on the grounds of equity and good conscience.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On April 19, 1933, about 6:30 o'clock P. M., claimant was driving west on Cook Street, a through street (Route 24) in the City of Springfield, Illinois. Traffic on Cook Street has the right-of-way over traffic from the north and south. As claimant was driving along Cook Street, at the intersection thereof with Eighth Street, a truck was driven south on Eighth Street and, without stopping, passed onto the intersection and struck the car in which the claimant was riding, to wit: a Buick sedan, causing damage to the sedan in the amount of Two Hundred Thirteen Dollars and Ten Cents ($213.10), and personal injuries to the plaintiff on account of which she was required to pay Eighty Dollars ($80.00) for doctor and hospital expenses.

The truck at the time in question was being operated by members of the Illinois National Guard at Springfield, and the claimant apparently contends that the State is liable for the damages sustained on account of the fact that the truck was being driven by a member or members of the Illinois National Guard; and also claims that she is entitled to recover as a matter of equity and good conscience.

As to the first contention, it appears that the driver of the truck at the time of the accident was driving it without permission, and in violation of existing orders, but even if the driver was acting pursuant to orders and in the course of his employment, there would still be no liability on the part of the State, as it is a well-settled rule of law that the State is not liable for the acts of its servants and agents in the performance of governmental functions. (*Hinchcliff* vs. *State of Illinois*, 2 C. C. R. 159; *Derby* vs. *State of Illinois*, 7 C. C. R. 145; *Hollenbeck, Admx.* vs. *Winnebago County*, 95 Ill. 148; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; 25 R. C. L. p. 407, sec. 43.)

The right to recover as a matter of equity and good conscience is based upon Section 4 of Paragraph 6 of the Court of Claims Act which provides that the court shall have power "to hear and determine all claims and demands legal and equitable, liquidated and unliquidated, *ex-contractu* and *ex-delicto*, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay."

In the case of *Crabtree* vs. *State of Illinois*, 7 C. C. R. 207, this court, after a careful consideration of the question, and a review of the authorities since the time of the original creation of the Commission of Claims in 1877, held that the foregoing provision of the Court of Claims Act merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability. This court further held in that case that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State, whether at law or in equity, if the State were suable; and this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; and that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

Claimant having failed to bring herself within the provisions of a law giving her the right to an award, IT IS THEREFORE ORDERED that the demurrer of the State be sustained. Case dismissed.

(No. 1773—Claimant awarded $406.06.)

LEVI P. SONS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

VIRGIL W. MILLS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where it is undisputed that claimant received accidental injuries arising out of and in course of employment while engaged in extra-hazardous occupation, an award for compensation therefor will be made under provisions of Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed May 13, 1931, for an injury to one of claimant's great toes.

The facts are not in dispute. Claimant, while an employee of the State of Illinois on February 13, 1930, was working on the Illinois Waterway at Lockport. He was at that time fifty-nine years of age, and while putting gas in a Caterpillar Tractor Shovel, the operater of the Caterpillar pulled up the load and the machine moved forward about one foot or more over claimant's right foot, injuring the great toe on the right foot. A portion of the first phalange was amputated by the State Physician and claimant was off duty fifty-three days. It was later found that not all of the first phalange had been amputated, and that the portion remaining had a loose uneven edge, causing pain and lameness. After an x-ray by Dr. J. T. Blakeley of Fairfield, Illinois, a further operation was performed by such doctor, removing the remainder of the first phalange. It is agreed between claimant and representatives for the State that the Workmen's Compensation Act is applicable, and there is no dispute as to the facts. Average weekly earnings were Forty-four Dollars.

The temporary total disability having continued for fifty-three days, being seven and four-sevenths weeks at Fifteen Dollars per week would equal One Hundred Thirteen and 56/100 Dollars ($113.56). For permanent disability under sub-paragraph eight of Paragraph E of Section Eight W. C. A., the Act provides for fifty per centum of the average

weekly wage for thirty-five weeks, but sub-section H of Section Eight provides further for a maximum of Fifteen Dollars ($15.00) per week, which would make a total of Five Hundred Twenty-five Dollars ($525.00). Sub-paragraph Ten of Paragraph E of said section reduces that amount one-half in the case of the loss of one phalange; thus making an allowance in this case of Two Hundred Sixty-two and 50 100 Dollars ($262.50). The bill of Dr. J. T. Blakeley for amputating one phalange of the great toe was Thirty Dollars ($30.00). An award is therefore made:

For temporary total disability	$113.56
For loss of one phalange of toe	262.50
For medical account, Dr. J. T. Blakeley	30.00
	$406.06

(No. 2142—Claimant awarded $244.00.)

H. O. TAYLOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

D. B. REID, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FEES—*Coroner—inquest, death of inmate of State charitable institution—when award may be made for.* Where coroner of proper county conducted inquests as provided by law on bodies of deceased inmates of State institution, and there is no evidence that lawful fees therefor could be collected out of the estates of said inmates, an award for said fees may be made under provisions of the statutes of the State of Illinois.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Dr. H. O. Taylor, was, on the 1st day of June, A. D. 1932, and since that time has been the coroner of Union County. On April 5, 1933 he filed his complaint herein asking for the payment to him of a total of Two Hundred Forty-four Dollars ($244.00) for his fees for holding inquests on the bodies of sixteen different patients, each of which patients at the time of death, was an inmate of the Anna State Hospital, and each of which patients died suddenly or mysteriously.

Section 27 of Chapter 85, Cahill's Revised Statutes of 1931 provides as follows:

"In the event of a sudden or mysterious death of any inmate of any public or private hospital or asylum for the insane, a coroner's inquest shall be held, as provided by law in other cases. Notice of the death of a patient and the cause thereof shall, in all cases, be given to the judge of the court having jurisdiction over such patient, and the fact of his death, with the time, place and alleged cause shall be entered upon the docket.

"In cases where the deceased patient was an inmate of any State charitable or penal institution, and the fees for holding such inquest cannot be collected out of the estate of such deceased inmate, such fees shall be paid by the Department of Public Welfare out of the State treasury."

It is not contended that the fees for holding any of such inquests could be collected out of the estate of any of the deceased inmates, and under the statute the claimant is entitled to recover the amount of his fees as set forth in the declaration.

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant for the sum of Two Hundred Forty-four Dollars ($244.00).

(No. 1682—Claimant awarded $20.00.)

WAUKEGAN CLINIC, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

WAUKEGAN CLINIC, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*claim for expenses of medical attention—when award may be made.* Where medical services were rendered to employee of State at the request of his superiors for injuries sustained in the course of his duty, an award for the reasonable value of same may be made where Attorney General recommends payment.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim is for medical attention given by claimant to Elzie Barnfield, an employee of the Division of Highways, State of Illinois, for an injury received May 1, 1929. No disagreement of facts appear. The services in question were apparently accorded by claimant to the injured employee in the regular course of duty and at the request of superiors

in the Highway Department. An allowance of the claim has been recommended by the Division of Highways. A statement of the latter in the record states: "The bill was not paid previously, inasmuch as the accident occurred shortly before the expiration of the previous appropriation, and before the bill could be passed on, the time limit for bills incurred under that appropriation had expired". Allowance of the claim is recommended by the Attorney General's Office.

It is apparent that the claim would have been paid if it could have cleared the department in time for the appropriation then expiring.

The claim is therefore allowed and payment recommended in the sum of Twenty Dollars ($20.00).

(No. 1908—Claim denied.)

JAMES S. WHITEHEAD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1934.

JAMES S. WHITEHEAD, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when motion to dismiss claim under will be dismissed.* Making demand for compensation and filing application for same within the time provided by Act is a condition precedent, without which the court is without jurisdiction to proceed with hearing and motion to dismiss will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a claim filed by petitioner under representation that he was employed as an attendant at the Alton State Hospital, Alton, Illinois on the 12th day of April, 1931; that while so employed, at said date, he was injured by one of the inmates who attacked claimant with a knife, inflicting various wounds. Claimant was confined for six and one-half days at the Alton State Hospital, and was given medical attention during that time by the State. He continued in the employ of the State and was still so employed at the filing of his petition on June 6, 1932.

The claim as now filed is for extreme suffering incurred during the attack and while claimant was recuperating there-

from, and because of the disfigurement of claimant's face, all in the amount of Fifteen Hundred Dollars ($1,500.00).

Motion was filed by the Attorney General to dismiss the claim for want of jurisdiction of this court, the grounds of such motion being that the declaration fails to show any demand having been made for compensation within six months after the date of injury, and that the application for compensation was not filed within one year from the date thereof. The claim, if any, under the facts stated, would be under the Workmen's Compensation Act, and the motion of the Attorney General to the jurisdiction under said Act being well pleaded, such motion is allowed and the claim denied. Case dismissed.

(No. 1875—Claimant awarded $25.74.)

T. S. CRAIG, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

T. S. CRAIG, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

EXPENSES—*when award for reimbursement may be made.* Where claimant, a State employee, attended meeting at University of Illinois at request of State Farm, Garden and Dairy consultant and with approval of his superior and incurs expenses thereby which said superior certifies are just and reasonable, an award may be made for same where Attorney General makes no objection thereto.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For a long time prior to January 11, 1931, the claimant was head farmer at East Moline State Hospital, East Moline, Illinois, and just prior to the last mentioned date he was requested by Mr. A. C. Everingham, State Farm, Garden and Dairy consultant, with the approval of Dr. C. H. Anderson, Managing Officer of the East Moline State Hospital, to attend a meeting for all head farmers at the University of Illinois.

He attended such meeting from January 11 to January 16, 1931, inclusive, and in connection therewith incurred ex-

penses in the amount of Twenty-five Dollars and Seventy-four Cents ($25.74). He neglected to present his bill for payment until after the appropriation under which the indebtedness was incurred had lapsed, and was therefore required to file his claim in this court.

Dr. C. H. Anderson, Managing Officer of the East Moline State Hospital, states that the claim is just and remains unpaid, and the Attorney General advises that there is no objection to an award in favor of the claimant in the amount claimed.

IT IS THEREFORE ORDERED that an award be entered in favor of the claimant in the amount of Twenty-five Dollars and Seventy-four Cents ($25.74).

(No. 1826—Claimant awarded $262.50.)

ELIZABETH ISHAM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

HILL & MCBRIAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SALARY—*when award may be made for.* Where it appears that claimant was engaged at salary of $200.00 per month, but was only paid at the rate of $125.00 per month and no complaint was made as to manner in which she performed her duties, an award will be made for the difference, where appropriation is sufficient to pay same.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Shortly prior to July 1, 1929, claimant was employed by Clyde I. Backus, then Assistant Director of the Department of Registration and Education, as office manager of the Chicago office of the Department and as secretary to the Assistant Director. At the time she was employed it was agreed that her salary was to be $200.00 per month, being the amount which had been paid to her predecessor. Claimant worked from July 1 to October 16, 1929, at which time she left the employ voluntarily for the reason that she had been paid only $125.00 per month instead of $200.00 as agreed, and now seeks to recover the balance which she

claims to be due her, to wit: $75.00 per month from July 1st to October 16th.

No complaint was made as to the manner in which she performed her duties and she was assured by the Assistant Director on several occasions that she would be paid her salary at the rate of $200.00 per month as agreed. It has been stipulated herein that the State of Illinois appropriated the sum of Two Thousand Four Hundred Dollars ($2,400.00) for manager of the Chicago office of the Division of Registration;—and no reason appears why the claim should not be paid.

Claimant is entitled to receive the sum of Seventy-five Dollars ($75.00) per month for three and one-half months, in payment of the amount due her, and IT IS THEREFORE ORDERED that an award be entered in favor of the claimant for the sum of Two Hundred Sixty-two Dollars and Fifty Cents ($262.50).

(No. 2184—Claim denied.)

CLARENCE KABAT, A MINOR, BY ANNA KABAT, HIS NEXT FRIEND, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

HORTSMAN, LINDER, PELNAR & BERNARD, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*State not liable for personal injury sustained by student of public school maintained by a local board of education.* There is no liability on the part of the State upon any theory of law or equity for damages for personal injuries sustained by student of public school maintained by local board of education, a municipal corporation.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Clarence Kabat, by Anna Kabat, his mother and next friend, filed his complaint herein and seeks to recover damages for personal injuries sustained by said Clarence Kabat while a student in attendance at J. Sterling Morton High School at Cicero, Illinois.

The complaint alleges that on September 1, 1930, said Clarence Kabat, who was then seventeen (17) years of age,

was a sophomore at J. Sterling Morton High School, and in the course of his studies was required to melt some aluminum in a furnace maintained by the school, and thereafter carry the same to his work bench; that in carrying such melted and liquid aluminum to his work bench, he tripped and fell over a piece of tin which was laid upon the floor with the edges turned up, and as a result thereof, the melted aluminum was spilled, and Kabat's left arm from his elbow to his hand, was severely burned. The complaint further alleges that the respondent was negligent in failing to provide a safe and secure place for the students to work, and in permitting such tin to lie loosely on the floor in such workroom.

The complaint also alleges that on November 12th, 1930 a policy of insurance was issued by the Fidelity and Casualty Company of New York to the Trustees of Schools of the School District in which the J. Sterling Morton High School is located, whereby such Trustees of Schools were indemnified against loss from the liability imposed by law upon such Assured for damages on account of bodily injuries or death suffered by any person not employed by the Assured while within the school premises; that such policy was in force at the time of such accident; that claim was filed with said Fidelity and Casualty Company of New York; that such Company denied liability on the ground that the Assured was engaged in a governmental function; that said policy is a contract of indemnity and by the terms thereof indemnified against loss from the liability imposed by law upon the Assured; that no liability is imposed on such Assured in this case, either under the common law or by statute, for the reason that the Assured is engaged in a governmental function; that the Fidelity and Casualty Company of New York indemnifies the Assured against claims which cannot be maintained against it either by common law or by statute; that said contract of insurance is beneficial only to said insurance company and that the premium paid therefor is in the form of a gift from public funds of the State; that suit cannot be maintained directly against said Fidelity and Casualty Company of New York under said policy, and that no liability is imposed by law on Assured.

The complaint further alleges that said Fidelity and Casualty Company of New York should have notice of this

proceeding, and that if judgment is rendered against the State, the said Fidelity and Casualty Insurance Company of New York should be required to show cause why it should not in equity and good conscience pay the same.

Claimant admits that the school authorities are not liable under the law on account of the fact that the maintaining of said school is a governmental function, but takes the position that the State should respond in damages because there is no legal liability on behalf of the school authorities.

The J. Sterling Morton High School is not maintained by the State, but is maintained by the local Board of Education, which is a municipal corporation having authority under the statute to sue and be sued.

The principle involved in this case is identical with that involved in the case of *Raffaele Trombello, et al. Admrs.* vs. *State of Illinois*, No. 2237, decided at the present term of this court. In that case it was held that this court had no jurisdiction over a suit for damages arising on account of the death of a small child who was drowned while playing in the Douglas Park lagoon which was under the jurisdiction of the West Chicago Park Commissioners. The rule announced in that case applies with full force to the present case, and is supported by numerous decisions set forth in the opinion rendered in the Trombello case. This court, therefore, has no jurisdiction in this case.

The fact that the Trustees of Schools obtained a policy of insurance which does not protect the claimant in this case, and which really affords no protection to anyone whatsoever, is not a matter concerning which this court can grant any relief.

It follows from the foregoing that this court can have no jurisdiction in this case, and the same is therefore dismissed.

(No. 1946—Claim denied.)

W. H. LOGES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

W. H. LOGES, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*caused by fire started by Highway Maintenance Policeman burning grass along highway—State not liable for.* The precise question involved herein was decided by this court in *Unverfehrt* vs. *State*, No. 1945, *post*, and the opinion in said case is controlling herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant has filed his claim herein for the recovery of damages in the amount of Seventy-three Dollars and Fifty Cents ($73.50) for crops destroyed by fire. It appears that the State Highway Patrolman on S. B. I. Route Four (4), Section Five (5), Macoupin County, was burning the grass and weeds on the right-of-way, and claimant avers that such patrolman lost control of the fire and permitted it to spread into claimant's field adjoining the highway, causing the damage complained of.

This court has uniformly held that the maintenance by the State of its State Bond Issue routes is a governmental function, and has also held in numerous cases that the State is not liable for the negligence of its servants or agents in the performance of governmental functions. *Hinchcliff* vs. *State of Illinois*, 2 C. C. R. 159; *Derby* vs. *State of Illinois*, 7 C. C. R. 145; *Hollenbeck, Admx.* vs. *Winnebago County*, 95 Ill. 148; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; 25 R. C. L. p. 407, sec. 43.

Consequently there is no liability on the part of the State for the damages sustained by claimant.

If the highway patrolman was guilty of negligence which resulted in injury and damage to the claimant, he is personally responsible therefor, but there is no liability on the part of the State.

IT IS THEREFORE ORDERED that an award be denied and the claim dismissed.

(No. 2202—Claimant awarded $400.14.)

C. L. OGLESBY AND J. F. MAMMEN, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

C. L. OGLESBY AND J. F. MAMMEN, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

LABOR AND MATERIALS—*when award made for.* Where it appears that claimants furnished labor and materials to State at its request, and that bill therefor, which is unquestioned and approved, was not presented for payment before lapse of appropriation out of which it could be made, an award will be made for amount due.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimants who were engaged in the plumbing, heating and electrical business at Vandalia, Illinois, seek to recover the sum of Four Hundred Dollars and Fourteen Cents ($400.14) for labor and materials furnished between February 3d and June 27, 1931 in connection with certain improvements and repairs made at the State Farm at Vandalia. Such labor and materials were furnished at the instance and request of the then superintendent of such State Farm, and the reasonableness of the claim is not questioned.

The claims were presented in the first instance to the then superintendent of the Farm, but were not paid on account of the fact that the appropriations for such purposes had lapsed or were exhausted. No reason is presented why the claim should not be paid. Mr. Frank D. Whipp, Superintendent of Prisons, states that he has had the claims checked and suggests approval.

IT IS THEREFORE ORDERED that an award be entered in favor of the claimants for the amount of the claim, to wit: Four Hundred Dollars and Fourteen Cents ($400.14).

(No. 1940—Claimant awarded $90.00.)

CHARLES A. RODENWALD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.

J. FRED GILSTER AND WILLIAM G. JUERGENS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* If State employee sustains accidental injuries arising out of and in the course of his employment while engaged in extra-hazardous enterprise an award for compensation will be made in accordance with the provisions of the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant was employed as a carpenter in connection with the erection of a new cellhouse at the Southern Illinois Penitentiary at Menard, Illinois. While engaged in such work, on January 21, 1932, he ran a splinter of wood into the index finger of his left hand, causing a wound which became infected and as a result thereof, claimant was temporarily totally disabled for the period of six weeks and asks compensation for that time at the rate of Fifteen Dollars ($15.00) per week, pursuant to the provisions of the Workmen's Compensation Act of this State.

There is some testimony in the record as to specific loss sustained by the claimant, but no claim is made on that account.

The injury in question arose out of and in the course of claimant's employment, under circumstances which make the State liable therefor under the terms of the Workmen's Compensation Act. Claimant's wages at the time of the accident were Forty-four Dollars ($44.00) per week and he is therefore entitled to compensation in the amount claimed, to-wit: six (6) weeks at Fifteen Dollars ($15.00) per week.

Award is therefore entered in favor of the claimant for the sum of Ninety Dollars ($90.00).

(No. 2237—Claim denied.)

RAFFAELE TROMBELLO, ET AL., ADMRS., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.
Rehearing denied April 25, 1934.

JAY J. MCCARTHY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of employees of West Chicago Park Commissioners, a municipal corporation—State not liable for.* Because the West Chicago Park Commissioners, a municipal corporation, are not liable for damages for death of minor by reason of falling from raft in park under jurisdiction of said municipal corporation, alleged to have been caused by its negligence in failing to protect and guard children of tender age, does not render the State responsible and there is no liability on its part.

WEST CHICAGO PARK COMMISSIONERS—*appointment of officers by Governor does not impose liability on State for damages.* The fact that officers of the West Chicago Park Commissioners are appointed by the Governor and not

elected by the people in the district in which it lies and that it is under the control of the State and not the inhabitants of its district does not render the State liable to respond in damages for the negligence of its employees or agents.

PLEADING—*failure to state cause of action.* Where declaration fails to allege any legal liability on the part of the State motion to dismiss will be sustained.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On August 29, 1932 Sam Trombello, then a minor of the age of six (6) years, was visiting in Douglas Park in the city of Chicago, which park was under the jurisdiction of the West Chicago Park Commissioners.

The complaint alleges that such child was playing in and around the park lagoon in which there was a signboard consisting of wooden planks, which the employees of the West Park Board permitted to be used as a raft or plaything; that such raft constituted an attractive nuisance and a menace to the lives of children of tender years who played about the same and floated into deep water thereon; that such facts were known to the defendant or could have been known to it in the exercise of reasonable diligence; and that the defendant failed to guard and protect children of tender years in going upon and playing on said raft.

While plaintiff's intestate was playing on such raft, it got into deep water, and as the result of his moving around on the raft, it tipped and he fell therefrom and was drowned.

The Attorney General has filed a motion to dismiss on the ground that the complaint fails to state a cause of action against the State.

Claimant takes the position that the courts of this State have decided in numerous cases that there is no liability on the part of the West Chicago Park Commissioners in cases of this kind, and cites the following cases, to-wit: *Stein vs. West Park Commissioners*, 247 Ill. App. 479; *Hendrix, Admx. vs. Urbana Park District*, 265 Ill. App. 102; and contends that because there is no liability on the part of the West Chicago Park Commissioners, the State must be liable.

It is true that the courts of this State have repeatedly held that the West Chicago Park Commissioners, and the commissioners of other park districts, are not liable in cases of this kind, for the reason that in the maintenance of public

parks, the park commissioners are engaged in a governmental function, and are not liable on the ground of respondeat superior for the negligence of their servants and agents in connection with such functions. It does not follow, however, that the State is liable in this case simply because there is no liability on the part of the park commissioners.

We are aware of the fact that the Appellate Court in the Stein case (247 Ill. App. 479), in speaking of the West Chicago Park Commissioners, said:

"Its officers are appointed by the Governor and not elected by the people in the district in which it lies, and it is therefore under the control of the State, and not the inhabitants of its district."

Such language, however, was used in considering the question as to whether the park commissioners were acting in a private or a governmental capacity, and whether such park district was created for the benefit and advantage only of those living within the district or for the public generally, and had no reference to the liability of the State to respond in damages.

In the case of *West Chicago Park Commissioners* vs. *Chicago*, 152 Ill. 392, the Supreme Court held that the West Chicago Park Commissioners is a municipal corporation.

In the case of *Perkins, et al.* vs. *State of Illinois*, 4 C. C. R. 197, the claimant sought to recover for labor and services performed at the instance and request of the commissioners of Lincoln Park. After a full consideration of the matter, the court there said:

"The Court of Claims has no jurisdiction over suits against municipal corporations and it therefore follows from the opinion above expressed that it can have no jurisdiction in this case. The claim is accordingly dismissed."

The conclusion there reached has been adhered to by this court in numerous cases decided since the Perkins case. *Otto Stein, Admr.* vs. *State of Illinois*, 6 C. C. R. 329; *Blanche Kaufman* vs. *State*, 6 C. C. R. 355; *Ella Kirkpatrick* vs. *State*, 6 C. C. R. 480; *James Hickey, Jr.*, vs. *State*, 7 C. C. R. 60; *Grace Bartel* vs. *State*, 7 C. C. R. 85.

Even if this court had jurisdiction of the case, there would be no liability on the part of the State, as the rule relative to liability for the negligence of its servants and agents in the performance of governmental functions applies to the State, the same as to the park district.

The case of *Otto Stein, Admr.* vs. *West Chicago Park Commissioners*, 247 Ill. App. 479, cited by the claimant, was a case in which the facts were somewhat similar to the present case, plaintiff's intestate having been drowned while skating on the ice at the Douglas Park lagoon. As previously stated, in that case the court held that there was no liability on the part of the West Chicago Park Commissioners. After the decision of that case by the Appellate Court, the administrator filed his claim in this court, and this court held that there was no liability on the part of the State. See *Stein, Admr.* vs. *State of Illinois*, 6 C. C. R. 329.

The declaration does not allege any legal liability on the part of the State, and this court has no jurisdiction to make an award.

The motion to dismiss is therefore sustained and the case is dismissed.

(No. 1874—Claim denied.)

JOHN MARSH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 7, 1934.
Supplemental opinion on petition for rehearing filed March 13, 1934.

HAROLD JAMES SITRON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be denied—injury for which award sought must arise out and in the course of employment.* Where claimant, who was a foreman in furniture department in Joliet State Prison, left his work, went to the paint department in another building with the knowledge of his immediate superior to help fix a paint machine, and after having fixed same began operating it and suffered an accidental injury, same will not be deemed to have arisen out of and in the course of his employment and an award will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

This case comes before the court upon the claim filed by John Marsh to obtain compensation for an accidental injury claimed to have been received while in the course of his employment as foreman in the Furniture Department at the State Prison at Joliet, Illinois. His duty was to act as foreman in the Furniture Department over twenty-four to thirty-two men. While so employed, a foreman in the Paint Depart-

ment had trouble with his paint machines, and claimant, learning of the trouble, requested permission of his immediate superior, Mr. Bowen, if he might go over to the new cell block house to fix it. Mr. Bowen told him he could go when he had some spare time, when he was through with work in his own department. Two or three days afterwards, claimant took one of the prisoners, Ferguson, with him, and went to the new cell block house, took the paint machine apart, and after repairing the machine began to use the same in spraying. He testified that they were short of hose on the machine and that he asked one of the men to bring the machine over to him so that he could handle it more easily; that as the machine was moved, he stepped off of a platform about two feet high, stepped on a three edged stick lying loose on the floor and bumped his right knee on one of the cell doors; that he finished the job, with the help of his man Ferguson, went to the foreman and explained to him about the machinery and then went back to his own department about one-half block distant from where he had suffered his accident.

It is clear from the record that the accident in question did not arise out of and while the claimant was engaged in the course of his duties and occupation, and so far as the record shows, his activities at the time of the accident were merely those of a volunteer, performed at a time when he was off duty, and can in no wise come within an allowance under the terms of the Workmen's Compensation Law.

Upon a consideration of the entire record, the court is of the opinion that the injury was not incurred within the purview of the Workmen's Compensation Act, and it is

THEREFORE ORDERED BY THE COURT that the claim be, and the same is hereby denied. Case dismissed.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

The original opinion herein, denying claim, was filed February 6, 1934. On February 19, 1934, claimant filed herein his petition for rehearing. The petition is to a large extent but a re-argument of the case; a further citation of authorities and the conclusion that,

"If the facts at bar are interpreted by the law in the cases cited * * * the State is responsible to claimant for compensation."

Claimant's duties were those of a foreman in the Furniture Department at the Joliet State Prison. During his leisure hours, at the request of the foreman in the Paint Department, and with the knowledge of his own immediate superior, he went to the Paint Department in another building "to help fix the paint machine". After having fixed the machine, he began operating it, and while so doing was hurt.

He was not working in any phase of the employment for which he was hired by the State.

Counsel cite *Sunnyside Coal* vs. *Industrial Commission*, 291 Ill. 523.

"When an employee is injured in an employment different from that which he was originally hired to perform, in order to find whether the employer is liable it is necessary to determine whether or not the element of knowledge or acquiescence or a known custom on the part of the employer exists. If the employer does not know the practice or custom, the employee is held to be a volunteer acting outside the scope of his authority, and if the employer does know and acquiesces, the employee is held to be acting within the scope of his authority."

The rule of *respondeat superior* does not apply to the State, and even if the Superintendent (Bowen) consented, claimant was still a volunteer so far as the State is concerned.

Counsel also quotes from *Dixon* vs. *Chiquola Manf. Co.*, 26 Cyc. 1090.

"The scope of a servant's duties is to be defined by what he was employed to perform, and by what, with the knowledge and approval of his master, he actually did perform," and an employee who was performing the same services he was in the habit of performing when he was injured is not to be considered a mere volunteer. (*Dixon* vs. *Chiquola Manf. Co.*, 86 S. C. 435; 26 Cyc. 1090; 1 Bradbury on Workmen's Comp.—2d ed-467.)

The State hired claimant as a furniture-shop foreman. The evidence shows that was the only trade he knew. There is no proof that he had ever tried to operate a paint machine before in his life, and certainly "he was not in the habit of performing such work" as referred to in the opinions just quoted. The inference from those cases is that, if claimant *was not* in the habit of performing these extrinsic duties or if the employer had not acquiesced in same, the employer would not be liable.

Counsel for claimant cite another case, which under the facts, is directly against an allowance of this claim, i. e., *Henry* vs. *Industrial Commission*, 293 Ill. 493.

"If knowledge of the foreman that the claimant was working at another machine would have made the employer liable for an accident happening at such other machine, that rule cannot apply to an injury happening at a third machine, where the claimant, without his employer's knowledge, was engaged in other work than that which he had been told to do and was exposed to risks not incidental to such work."

The State, and not even the Superintendent, Mr. Bowen, had any knowledge that Marsh intended to or was *operating* the paint machine. The most that can be said is that Superintendent Bowen was informed by Marsh that the latter intended to help *repair* it. If he had quit then, he would not have suffered the accident in question.

No new matters or questions are raised in the petition for re-hearing. However, we have again examined the record in the case and find no reason for granting a rehearing and the petition is therefore denied.

(No. 1977—Claim denied.)

ADDIE PORTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1934.

MILLER & MILLER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*sustained in State Park—State not liable for.* In maintaining and conducting "Old Salem" Park, the State is exercising a governmental function and neither the State nor any of its agents are liable to respond in damages for injuries suffered therein as the result of the negligent acts of any of its servants in the conduct thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed September 1, 1932 for Five Hundred Dollars ($500.00) and alleges that while claimant was visiting "Old Salem" Park on August 28, 1931, she was injured by falling down an open concrete stairway at the Museum Building maintained by the State on the park grounds. Claimant alleges that such fall and the injury sustained by her therefrom was due to the failure of the State to provide a suitable

door, gate or bar to protect the entrance to such stairway; that as a result of the fall, she suffered a fracture and other severe injuries and bruises to her body and has expended for medical service and other attention in connection therewith the sum of Five Hundred Dollars, for which she asks an award.

In maintaining and conducting the park in question, the State is exercising a governmental function, and neither the State nor any of its agents are liable to respond in damages for the negiligent acts of any of its servants. The park and the building in question are maintained solely for the benefit of the public, and there is no legal liability upon the part of the State, and the doctrine of *respondeat superior* does not apply.

Pelka vs. *State*, 6 C. C. R. 390.
White vs. *County of Bond*, 58 Ill. 297.

The distinction between cases involving private corporations or cities and the State is pointed out in the case of *City of Chicago* vs. *Seben*, 165 Ill. 371, wherein the court states:

"A distinction is taken in the text books and in many of the cases, between the liability of purely municipal corporations, such as cities and chartered towns and villages, and the non-liability of counties and towns as political divisions of the State, such towns and counties being held to be exempt from liability while chartered cities and villages are held to be subject to such liability. (1 Beach on Public Corp. Sec. 757; Tiedeman on Mun. Corp. Sec. 339.) This distinction was recognized by this court in the recent case of *Nagle* vs. *Wakey*, 161 Ill. 387, where it was said (p. 392): 'The courts draw a distinction between the town and the municipal corporation proper, on the question of liability in favor of the town.' The distinction is furthermore referred to and recognized in the following cases: *Browning* vs. *City of Springfield*, *supra*; *Town of Waltham* vs. *Kemper*, *supra*; *White* vs. *County of Bond*, 58 Ill. 297; *Symonds* vs. *Clay County*, 71 Id. 355.) The reason for the distinction, as given by this court in the cases above referred to is, that cities and chartered towns and villages act under charters, by which valuable privileges are conferred upon them at their request, these privileges being held to be a consideration for the duties imposed upon them; and for the performance of these duties, like individuals, they must be responsible in an action. (*White* vs. *County of Bond*, *supra*.)"

For the reasons stated, no award can be made and the claim is therefore dismissed.

(No. 2081—Claim denied.)

W. C. REYNOLDS, DOING BUSINESS UNDER THE NAME AND STYLE OF REYNOLDS OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1931.

HARRY TYPER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

GAS TAX—*voluntarily paid cannot be recovered.* Where gas tax is voluntarily paid it cannot be recovered.

SAME—*paying on demand of State official or to avoid penalties not duress or compulsion.* Payment of tax on demand of proper State official or to avoid penalties is not compulsion or duress.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover a refund of One Hundred Twenty-seven and 50 100 Dollars ($127.50) gas tax paid on 4,250 gallons, reported over a period of nine months as sold, but which it is now claimed was lost by a leaky tank.

Respondent, by the Attorney General, files its motion to dismiss the claim as being supported by no legal rights.

The tax was apparently voluntarily paid. A discount and deduction for a certain loss of 1,942 gallons by leakage, was made during the period now complained of.

It is well settled in this State that a tax voluntarily paid cannot be recovered back in the absence of a statute providing for such a recovery. It is also well settled that the fact that the statute under which the tax was levied and collected was unconstitutional will not authorize an action for its recovery by the party paying it. (*Oppenheimer & Co.* vs. *State*, 6 Ct. Cl. 465; *Board of Education* vs. *Toennigs*, 297 Ill. 469.) The fact that the State had no legal right to demand the tax and claimant was under no legal obligation to pay it is of no consequence unless the payment was compulsory in the sense of depriving claimant of its free will. (*Ill. Glass Co.* vs. *Chicago Tel. Co.* 234 Ill. 535; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Western Electric Co.* vs. *State*, 6 Ct. Cl. 414.)

Wm. Wrigley Jr. Co. vs. *State*, 7 C. C. R. 153.

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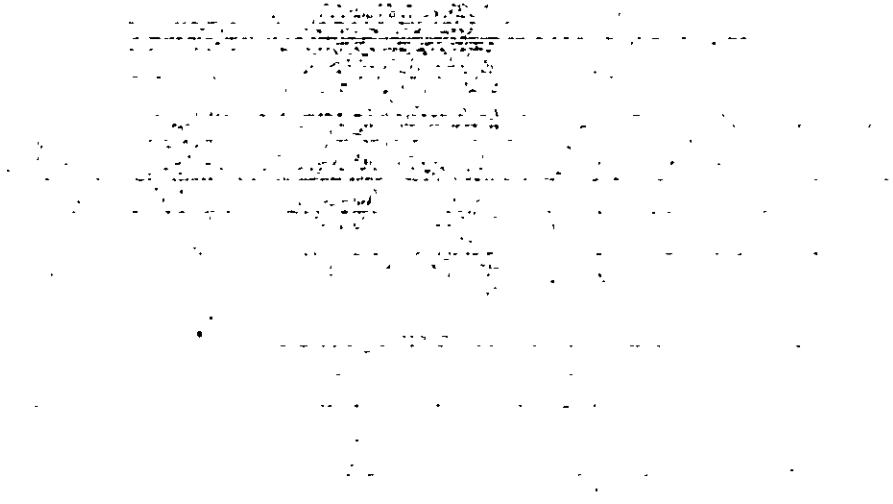

the instrument. The paragraph in question is not clearly worded, but upon a careful consideration thereof, we are of the opinion that the construction placed upon said Paragraph Two (2) by the claimant and by the Attorney General is correct, and that such paragraph will not bear the interpretation placed thereon by the department. We conclude, therefore, that the State did not have the right to forfeit the deposit check upon the ground that the claimant failed to give notice within twenty (20) days after the opening of the bids, of its desire to withdraw. Whether the State was justified in forfeiting the check on any other grounds, still remains to be considered.

Paragraph Two (2) provides that the proceeds of the check shall become the property of the State, in either of two contingencies, to-wit:

1. If, for any reason, the bidder, after the opening of the bids, withdraws.

2. If on notification within twenty (20) days from the date of the opening, the bidder refuses to execute the contract and bond.

There is nothing in the record to indicate that the claimant at any time withdrew its bid, and consequently it is unnecessary to further consider the first contingency above stated. Furthermore, there is no question but what the claimant refused to execute the contract and bond. Claimant justifies its refusal upon the fact that it was not notified of the award within twenty (20) days after the opening of the bids.

The Attorney General contends that the claimant received a "notification" within twenty (20) days after the opening of the bids, and therefore impliedly admits that if claimant was not notified of the award within twenty (20) days after the opening of the bids, it was justified in refusing to execute the contract and bond.

We now come to the consideration of the question as to whether the letter of the Department of November 17, 1931 constituted a "notification" within the meaning of said Paragraph Two (2), as contended by the Attorney General. If such letter constituted a "notification" within the meaning of Paragraph Two (2), then the State was justified in retaining the deposit check. If, on the other hand, the letter

of November 17th did not constitute such "notification", then the claimant was within its rights in refusing to execute the contract and bond, and is entitled to the return of its deposit check.

It will be noted that the letter of November 17th merely advises the claimant that it was "the apparent low bidder", and further, that "preliminary to award of contract is now required that a bond properly executed be on file in this office". There is nothing in such letter which would justify the claimant in proceeding with the work under the contract.

On December 3, 1931, to-wit, thirty (30) days after the opening of the bids, claimant notified the department that it had received no notice of the contract having been awarded and asked for the return of the check. The department made reply to such letter on December 9th. If the department took the position that the letter of November 17th constituted a "notification", such letter of December 9th should have so stated. However, the department in its said letter of December 9th said nothing whatsoever about its letter of November 17th, but on the contrary, then notified claimant "of the acceptance of your following proposals, opened on Tuesday, November 3, 1931", etc.; and notified claimant that a formal contract would follow and that pending receipt of such contract, said letter of December 9th be taken as authority to proceed with the work. This letter of December 9th constituted the first authority given to claimant to proceed with the work. The letter of the Division of Architecture and Engineering of December 14th stated that December 2nd was the date the Division received authorization to enter into this contract.

From a careful consideration of all of the correspondence in the matter, the court feels that the letter of the department dated December 9, 1931 was the first notification which was given to claimant in accordance with the provisions of Paragraph Two (2), and that the letter of the department dated November 17, 1931 was not intended to be and was not in fact the notification required by said Paragraph Two (2). The department was not in position to award a contract until a bond had been filed by the successful bidder, and no request to file such bond was made prior to said letter of November 17th. Inasmuch as no contract could be

awarded until a bond was filed, surely no notification could be given prior to the award.

There can be no question as to the right of the State in a proper case to forfeit a deposit if the bidder neglects or refuses to enter into a contract within the time required by the proposal. However, forfeitures are not favored in the law, and before the State can justify a forfeiture, it must bring itself within the terms of the contract authorizing the same. In this case, under the terms of the proposal which was prepared by the State itself, the State was entitled to declare a forfeiture for failure to execute the contract, provided "notification" was given to the bidder within twenty (20) days after the opening of the bids. The word "notification" as used in said Paragraph Two (2) can mean nothing other than a "notification" of the fact that the contract was awarded to the bidder. The letter of November 17, 1931 was not such a notification.

The first notification given to claimant of the award of the contract to it was the letter of the department dated December 9th, which was more than twenty (20) days after the opening of the bids. In this connection it is also to be noted that the claimant on December 3rd, to-wit, thirty (30) days after the opening of the bids, requested the return of its deposit check.

It is also to be noted that the department on December 23rd, referring to the request made by claimant that it be privileged to decline the award of the contract, advised the claimant as follows:

"Kindly refer to your letters of December 10th and December 15th wherein you request that you be privileged to decline the award of above contract, and be advised that the same is hereby granted and the award is being made to the next lowest bidder."

Nothing whatsoever was said regarding the forfeiture of the deposit check, and there is nothing in the evidence to show that the State lost anything on account of the acceptance of the next lowest bid. On the record before us, we feel that the State was not justified in forfeiting the deposit bid and that the claimant is therefore entitled to a return of the amount of its deposit check.

Award is therefore entered in favor of the claimant for the sum of Three Thousand Dollars ($3,000.00).

(No. 1913—Claim denied.)

GORDON L. WETHERHOLT, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 26, 1934.

KERR & PHILLIPS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee causing—respondeat superior not applicable to State.* The State is not liable for damages to property caused by the negligent and careless operation of one of its trucks by its employee, the doctrine of respondeat superior not being applicable to the State.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

During the month of March, 1932, claimant was conducting a garage known as The Ideal Service Station and Garage at Pontiac, Illinois, in which garage the State stored a number of its trucks. On March 21, 1932 the driver of one of the State trucks carelessly and negligently operated such truck in driving the same into the garage, whereby the building was damaged to the extent of One Hundred Thirty-six Dollars and Ninety-eight Cents ($136.98), and claimant has filed herein his claim for such amount. The Attorney General has filed a motion to dismiss for the reason that under the facts set forth in the complaint there is no liability on the part of the State. Claimant bases his right to recover upon the negligence of the servant and agent of the State in the operation of said State truck.

It is well settled by the decisions of this court that in the maintenance of its hard-surfaced roads the State is acting in a governmental capacity. (*Chumbler* vs. *State*, 6 C. C. R. 138; *Stoddard et al.* vs. *State*, 6 C. C. R. 27; *Bucholz et al.* vs. *State*, 7 C. C. R. 241.)

It is also the well-settled law of this State that the State is not liable for the negligence of its servants and agents while in the exercise of its governmental functions. (*Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Morrissey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs. *State*, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77.)

If the claimant has sustained injuries as the result of the negligence of the servant of the State, the right of action is against the servant individually and not against the State.

Claim denied.

Case dismissed.

(No. 1878—Claimant awarded $66.65.)

THE YELTON-WEAVER SUPPLY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 26, 1935.

THE YELTON-WEAVER SUPPLY COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*unauthorized deduction of discount—when award made.* Where State in violation of provisions in contract for sale of goods to it deducts discount an award for the amount so deducted will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is a wholesaler of plumbing and heating supplies, engaged in business at Springfield, Illinois. On May 26, 1931, claimant shipped to the St. Charles School for Boys, St. Charles, Illinois, certain radiation for that institution, of the value of Thirteen Hundred Thirty-two Dollars and Ninety-eight Cents ($1,332.98). The terms of sale were five per cent (5%) discount for payment within fifteen (15) days from the date of shipment, or thirty (30) days net. One section was broken in transit and on June 9, 1931, the manager of the St. Charles School advised claimant thereof and asked for a credit memorandum on account thereof, and stated that he wished to take advantage of the five per cent (5%) discount. On June 10, 1931, claimant acknowledged receipt of the letter of June 9th and asked for further information in order that it might ship a replacing section. The necessary information was forwarded on June 15, 1931, and a replacing section was shipped by the claimant on June 19, 1931. On July 13, 1931, the St. Charles School for Boys issued its voucher authorizing payment to claimant of the sum of Twelve Hundred Sixty-six Dollars and Thirty-three Cents ($1,266.33), being the amount

of the invoice in question, less five per cent (5%) discount. A warrant was issued by the State on such voucher on August 7, same was mailed to claimant on August 8, and received by it on August 10, 1931.

Claimant now asks for the sum of Sixty-six Dollars and Sixty-five Cents ($66.65), being the amount of discount deducted by the State upon the ground that payment was not made within fifteen (15) days after the date of shipment, and that consequently the State was not entitled to deduct the amount of such discount.

There is no dispute as to the facts and inasmuch as payment was not made by the State within the time required by the contract, we are of the opinion that the State was not authorized to make a deduction of five per cent (5%) discount, and that the claimant is entitled to the amount deducted by the State on that account.

IT IS THEREFORE ORDERED that an award be entered in favor of the claimant for the sum of Sixty-six Dollars and Sixty-five Cents ($66.65).

(No. 1868—Claim denied.)

NELLIE M. BUTLER, ADMINISTRATRIX OF THE ESTATE OF MICHAEL P. BUTLER, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1934.

HUNTER, KAVANAGH & MCLAUGHLIN; DOYLE, SAMPSON & GIFFIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY CAUSING DEATH—*inmate of State charitable institution—when State not liable for.* Where inmate of Peoria State Hospital, a State charitable institution, suffered injuries resulting in death through the falling of an elevator, the cause of which is not definitely shown by the evidence, the State is not liable for damages and an award will be denied.

SAME—*conduct of State charitable institution a governmental function—State not liable for negligence of employees or inmates thereof.* In the conduct of a charitable institution the State exercises a governmental function and is not liable to respond in damages for the negligence of its officers or servants there employed, or for the negligence or wrongful acts of the inmates in their relation with each other.

SAME—*equity and good conscience—when award on grounds of will be denied.* This phase of the claim herein has been fully considered and decided

in *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207, and the ruling therein is adhered to.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is an action by the Administratrix of the Estate of Michael P. Butler, deceased, under a claim filed December 31, 1931, alleging damages in the sum of Ten Thousand Dollars ($10,000.00) for the death of the said Michael P. Butler. The latter was an inmate of the Peoria State Hospital under a commitment on December 2, 1930. On December 30, 1930, he was engaged, with other inmates, in removing dry goods from the basement of the building known as the store-house to the third floor thereof. The elevator in use was also being operated by one of the inmates. On one trip, after one box had been unloaded from the elevator, and while Butler and another inmate were still in the elevator, for some unknown reason the elevator fell a distance of several feet and one of the large boxes fell back into the elevator from the landing, crushing Butler and the other inmate so that death resulted. Deceased Butler left a widow and four children under sixteen years of age. The elevator was under the supervision of one Ira Broyhill and the elevator was operated by means of cables and ropes. Decedent died January 1, 1931, as a result of the injuries sustained. The Peoria State Hospital is one of the State charitable institutions and in maintaining it the State is exercising a part of its governmental functions. In the conduct of its charitable and penal institutions, neither the State nor any of its agencies are liable for damages caused by the negligence of those in charge of or employed in such institutions. The institution is maintained solely for the benefit of the public, and there exists no legal liability upon the part of the State nor the institution for the negligence of its officers or servants there employed, nor can the State legally or as a matter of public policy be held to respond in damages for the negligence or wrongful acts of the inmates in their relation with each other. It is contended that the accident in question was wholly the result of a faulty elevator and the evidence discloses that the elevator had been frequently repaired and that in May, 1931, it was replaced by a modern elevator, but whether this was the immediate cause or whether some act upon the part of the other inmate Mike Bell, who was operating the elevator, cannot be definitely known from the evidence. At any rate this court has uniformly held that in such cases an award can-

not be justified upon any legal ground. *Hemmerling* vs. *State*, 2 C. C. R. 316. *Pelka* vs. *State*, 6 C. C. R. 390. *Sturrock etc.* vs. *State*, 7 C. C. R. 157. *McInturff* vs. *State*, 5 C. C. R. 314.

It is true that in occasional instances this court has in past years departed from the rule, but the court is not in accord with the interpretation of the extent of the court's power under equity and good conscience, as given in those cases.

In the case at bar, counsel for claimant in his reply brief indicates that he relies entirely upon a broad interpretation of an allowance under equity and good conscience. As stated by this court in *Crabtree* vs. *State*, 7 C. C. R. 207,

"We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: 'The Court of Claims shall have power: 'to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay;' merely defined the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

The claimant having failed to bring himself within the provisions of the law entitling him to an award, there is nothing this court can do but deny the claim."

The court believes that the ruling in the Crabtree case should be adhered to in this case, and an award is therefore denied and the claim dismissed.

(No. 1811—Claim denied.)

CARRIE N. LAFONT, EXECUTRIX. ESTATE OF ALBERT W. LAFONT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1934.

CLARENCE B. DAVIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*not applied to all employees of State.* The Workmen's Compensation Act does not automatically apply to all employees of the State, but only when they are engaged as such in an employment in a department of the State which is engaged in extra hazardous enterprises named in the Act.

SAME—*employment not extra hazardous.* Janitor employed in office of Secretary of State is not engaged in extra hazardous employment and if injured while so employed, no award for compensation under Act will be made.

SAME—*pleading.* Where complaint alleges no facts upon which award could be justified claim will be dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed by plaintiff as the personal representative of the Estate of Albert W. LaFont, deceased, on August 11, 1931, for an award for doctor's bill and hospital bill in the respective sums of One Hundred Fifty Dollars ($150.00) and One Hundred Fifty-eight and 15/100 Dollars ($158.15), or a total of Three Hundred Eight and 15/100 Dollars ($308.15). Mr. LaFont was a cripple, having one artificial limb. He was employed by the Secretary of State for janitor duties about the State House, and at the time of the injury complained of, was assigned to remove the covers from discarded books. The record discloses that he took some of the books and placed one on top of another to make a seat, and while sitting on these books became over-balanced and in falling struck one of his hands against some scales. Several days later he reported the hand as getting along all right, but later suffered an infection in said hand. He died from other causes, as shown by the record, on April 23, 1931.

The duties of Albert W. LaFont could not in any sense be considered extra hazardous, and to justify an award to him, it would be necessary to hold that the State was engaged in the business of maintaining the building wherein he was then employed. The court is of the opinion that the maintenance of said Capitol building does not engage a major portion of the attention or time of the officers of the State, so as to bring it within the rule where the Workmen's Compensation Act would apply. As stated in the Therien case,

"A janitor in a building not maintained as a 'business' by the employee is not within the Workmen's Compensation Act."

Therien vs. *Industrial Commission,* 351 Ill. 160.

The complaint alleges no facts upon which an award is justified.

An award is denied and claim dismissed.

(No. 1886—Claimant awarded $25.00.)

MOORMAN MANUFACTURING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1934.

WILSON & SCHMIEDESKAMP, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MISTAKE OF FACT—*money paid under may be recovered.* A payment made under a mistake of fact, and which the payor was under no legal obligation to make may be recovered.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On May 11, 1931, claimant made application to the Division of Foods and Dairies for registration of its Gro-Strong Block Minerals, and enclosed with its application its check for Twenty-five Dollars ($25.00) in payment of the registration fee. On June 3, 1931, claimant ascertained that said minerals were not required to be registered in this State and immediately advised the Division of Foods and Dairies to that effect, and asked for a return of the registration fee theretofore paid by it. The Superintendent of the Division on June 5, 1931, advised claimant that the money had been paid to the State Treasurer, and therefore could only be recovered through the Court of Claims, but offered to accept claimant's next registration in lieu of the one it then had, and asked the return of said certificate with claimant's next application for registration.

At the time of its next application, to-wit, on February 3, 1932, claimant asked for credit for said sum of Twenty-five Dollars ($25.00) in accordance with the previous offer of the Superintendent of the Division. Thereupon the Superintendent of the Division advised claimant that all registrations for 1931 and all correspondence relating thereto had been filed away, and that the Division could not cancel a 1931 registration and replace it with a 1932 registration.

Claimant then filed its claim in this court for the return of the Twenty-five Dollars ($25.00) so paid by it as aforesaid.

The facts in the case are undisputed and there is no ques-

tion but what the payment of the registration fee in question was made by the claimant under a mistake of fact. The rule covering such payments is set forth in 48 Corpus Juris, page 759, as follows:

"As a general rule, a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, even though made during the pendency of a suit on the demand. The right of recovery under such circumstances is known to the civil and Roman law, as well as to the common law, and is bottomed upon the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to repay. The rule applies to payments made to or by public and governmental agencies as well as private persons;" also on page 765 as follows: "Where one by mistake of fact pays more than is due upon a debt or obligation, he may recover the overpayment."

The rule is also announced in 21 R. C. L., page 164, as follows:

"Where money is paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, and the money would not have been paid if it had been known to the payor that the fact was otherwise, it may be recovered. The ground on which the rule rests is that money, paid through misapprehension of facts, in equity and good conscience belongs to the person who paid it. Municipal corporations as well as individuals are subject to this rule. An error of fact is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. It has sometimes been attempted to draw a distinction between ignorance of fact and error of fact. In practical effect, however, they are substantially one and the same thing and, considered as a motive of actions, ignorance differs but little from error. In practice the terms are frequently used as of interchangeable significance."

The law as above set forth has been recognized by this court in numerous cases. *Bates Valve Bag Corporation* vs. *State*, 7 C. C. R. 64; *Black Star Coal Co.* vs. *State*, 6 C. C. R. 379; *The Importers, Etc. Insurance Co.* vs. *State*, 5 C. C. R. 1; *Big Four Wilmington Coal Co.* vs. *State*, 4 C. C. R. 279; *Fireman's Insurance Co.* vs. *State*, 2 C. C. R. 220.

Under the law claimant is clearly entitled to a return of the registration fee paid by it.

Award is therefore entered in favor of the claimant for the sum of Twenty-five Dollars ($25.00).

(No. 1670—Claim denied.)

TRANSPORTATION BUILDING CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1934.

OSCAR WYCLIF HARMAN and CHARLES OSCAR SWARTZ, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RES ADJUDICATA—*when claim will not again be heard.* Where it appears claim has been fully considered and an award denied it will not again be heard.

REHEARING—*when will be denied.* Unless it is shown that the court overlooked or misapplied the law petition for rehearing will be denied.

RENT—*claim for use and occupation.* State is not liable for payment of rent, except on written lease entered into by proper State authority and owner or authorized agent of property and such lease shall not extend beyond June 30th of the second year following adjournment of the General Assembly making appropriation for rent thereunder.

SAME—*same—under doctrine of equity and good conscience—when denied.* Where statute prohibits recovery of rental unless on valid written lease between owner or authorized agent of property and proper State authority and within amount appropriated therefor, claim for use and occupation on grounds of equity and good conscience will be denied. Where the statute prohibits the doing of an act equity can afford no relief.

CONTRACTS—*appropriation for—when State not liable for contract made by State officer or commission.* Under Section 30 of the Act in relation to State finance, no officer has the right to contract any indebtedness on behalf of the State in excess of the amount of money appropriated, unless expressly authorized by law.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover rental in the sum of Eighteen Hundred Dollars for quarters occupied by the State Athletic Commission and for electrical service during the time covered by such rental, for the further sum of Thirty-five and 19/100 Dollars. A previous claim for a portion of said amount was filed and heard by this court entitled "Transportation Building Corporation, Claimant, vs. State of Illinois, No. 1545," in which an opinion was filed September 10, 1930, denying said claim; case reported in Volume 6 C. C. R. 423. The present claim was filed November 5, 1930.

Under a stipulation agreed upon by the complainant and respondent, it appears that the Illinois State Athletic Com-

mission occupied certain office premises in the city of Chicago owned by claimant during the months of November and December, 1926, January, February, March and April of 1927, and in May and June of 1929; that the Director of the Department of Finance of Illinois and the Chairman of the Illinois State Athletic Commission entered into a written lease on April 30, 1927, with the claimant for the office rooms occupied by the Commission for the period from May 1, 1927, to June 30, 1929, being a total of twenty-six months, at an agreed rental of Three Hundred Seventy-five Dollars per month; that rent was paid through the Department of Finance to the claimant for such quarters from May 1, 1927, to April 30, 1929, but no rent has been paid for the two remaining months of said lease, namely May 1, 1929, to June 30, 1929; that Three Hundred Seventy-five Dollars per month was the reasonable and usual charge for such office rooms in the city of Chicago during the period occupied; further that the electric light bills set out in the declaration and bill of particulars, amounting to a total sum of Thirty-six and 19/100 Dollars, were ordered from time to time by the State Athletic Commission through its Chairman, in its usual course of business, and that the prices charged for such were the usual and customary prices.

Further that no lease was ever made or entered into for the premises occupied during the months of November, 1926, to April, 1927, either by the Director of Finance or the State Athletic Commission, but that the Chairman of said Commission orally agreed to pay a monthly rental of One Hundred Seventy-five Dollars for said period, and that such charge was a reasonable and usual charge for such office rooms in the city of Chicago during said period.

Further that the Fifty-fourth General Assembly appropriated the sum of Twelve Thousand Dollars for general office expenses of the Illinois State Athletic Commission for use during the 1925-1927 biennium, all of which was expended and no part of which lapsed into the general treasury on September 30, 1927. Further that the Fifty-fifth General Assembly appropriated the sum of Three Thousand Seven Hundred Sixty-two and 50/100 Dollars as an emergency appropriation for office expenses for the Commission for the 1925-1927 biennium, of which an unexpended balance of One Hundred Eighty-four and 49/100 Dollars lapsed into the general fund on September

30, 1927. Further that the Fifty-fifth General Assembly appropriated the sum of Fifteen Thousand Eight Hundred Dollars for general office expenses of said Athletic Commission for the biennium of 1927-1929, all of which was fully expended before September 30, 1929, and no part of which lapsed into the general fund; that no part of the claim of Eighteen Hundred Forty-six and 83/100 Dollars (correct total as per stipulation being $1,836.19), has been paid. Further that claimant on October 28, 1929, filed its declaration against respondent, being case No. 1545, seeking a recovery of rentals under the terms of the written lease for the period of May 1, 1929, to June 30, 1929; that the court had jurisdiction of the parties hereto, in that claim, and found that such contract or lease was void, and on September 10, 1930, denied said claim, and that said judgment still remains in full force and effect; that within the time prescribed by law, the claimant filed its notice of intention to file a petition for rehearing; that such petition was not filed for the reason that claimant herein discussed the matter with the Attorney General, stating its desire to sue for use and occupancy not only for the two months period covered by said lease, but also for an additional period from November, 1926, to April 30, 1927, both inclusive, and it was because of this fact that the Attorney General suggested that claimant file a new claim, basing its right of action on use and occupation instead of presenting the matter on rehearing; that as a result of said discussion, claimant filed its declaration in the case at bar.

As above noted, the stipulation states that while the petition for rehearing was pending, claimant filed the case at bar and abandoned its petition for rehearing on the suggestion of the Attorney General. While the Attorney General may have suggested such a course, the decision to do so was made by the claimant. The Attorney General cannot, nor can any other officer of the State, by stipulation or otherwise admit away the interests and rights of the State in any suit. Such procedure is contrary to public policy. Claimant's bill of $750.00 rent for the months of May and June, 1929, and for $35.04 electric light furnished the Athletic Commission were fully presented, adjudicated and determined in the case of *Transportation Building Corporation* vs. *The State of Illinois*, No. 1545 (6 C. C. R. 423), and to attempt to again obtain

a hearing of that claim by merging same with other items is barred by the rules of *res adjudicata*.

"A judgment in favor of the plaintiff for installments of rent * * * which established the validity of the lease under which the installments accrued is conclusive in a suit between the same parties for subsequent installments, as to all questions concerning the validity of the lease which were raised and determined under the issues in the former suit."

Louisville N. A. & C. R. Co. vs. *Carson*, 169 Ill. 247.

"The fact that this relief is claimed under two bills does not preclude a fact decided in the former suit being conclusive in the later suit where the allegations in each bill are substantially alike and all the relief claimed under the later bill could as well have been granted under the former."

Tilley vs. *Bridges*, 105 Ill. 336.

"A decree on the merits refusing to enjoin a collection of a certain tax for certain years against a railroad company bars a bill by the same complainant against the collectors of the same counties seeking the same relief, though other references and grounds are alleged for granting the relief."

Ruegger vs. *Indianapolis & St. L. Railroad Company*, 103 Ill. 449.

With the foregoing in mind, the court has given consideration to that portion of the present claim which seeks a recovery of the amount involved in the former claim in the light of a petition for rehearing. On a petition for rehearing, unless it is shown that the court overlooked or misapplied the law, then the petition for rehearing should be denied. We have carefully considered the decision in the former case, No. 1545, and the records submitted in the case at bar. Nothing appears in this record to show that the court overlooked or misapplied the law when it announced its decision in No. 1545. The written lease was therein held to be invalid. In the case at bar it is sought to recover upon the entire account without any lease, on the theory that the State, like an individual, is liable for any benefit received, regardless of any valid contract to pay. Claimant, in his reply brief, says that no attempt is made to dispute the findings in the various cases cited by claimant in his original brief. In the original brief, the following cases are cited: *C. I. P. S.* vs. *State*, 5 C. C. R. 21; *Jefferson Printing Co.* vs. *State*, 5 C. C. R. 380; *Rathbun* vs. *State*, 4 C. C. R. 118; *Wilson & Co.* vs. *State*, 4 C. C. R. 140;

Austin Mfg. Co. vs. State, 4 C. C. R. 106; *Meyers* vs. *State*, 4 C. C. R. 278; *Central Coal Co. vs. Illinois*, 4 C. C. R. 312; *City of Chicago* vs. *State*, 4 C. C. R. 345.

In none of the foregoing cases was any objection interposed by the Attorney General's office on behalf of the respondent and the question of legality of an award was not raised in either of the cases. In the case at bar, the claim as to $750.00 rental and $35.04 electric light bill has not only been heard and denied by this court in the former hearing, but counsel for the respondent files herein its plea denying liability under the Constitution of Illinois.

As stated in *Lewson* vs. *The State*:

"The State Legislature biennially makes appropriations for ordinary and contingent expenses, etc., for the operation, maintenance and administration of the several offices, departments, institutions, boards, commissions and agencies of the State government. The elective State officers and the various State institutions know the amount or amounts appropriated for them respectively. The statute of Illinois provides that no officer, institution, department, board or commission shall contract any indebtedness on behalf of the State; nor assume to bind the State in any amount in excess of the money appropriated, unless expressly authorized by law to do so. * * * To allow this claim would be to establish a most dangerous precedent. It would open up the avenues for all State officers and State departments to ignore the limitation of the appropriation for their respective offices or departments if they saw fit so to do and to rely on the Court of Claims to take care of all claims made in excess of such appropriations."

Lewson vs. *State*, 5 C. C. R. 80.

"Each General Assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two-thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the State treasury, from funds belonging to the State, shall end with such fiscal quarter."

Section 18, Article IV, Illinois Constitution.

"No officer, institution, department, board or commission shall contract any indebtedness on behalf of the State, nor assume to bind the State in an amount in excess of the money appropriated, unless expressly authorized by law."

Section 30, Chapter 127b, State Finance.

"No disbursements from appropriations shall be made for rental of office or other space, buildings or land except in pursuance of a written

lease entered into by the proper State authority and the owner or authorized agent of the property. Such lease shall in no event extend beyond June 30th of the second year following the adjournment of the General Assembly making such appropriation except that the lease may contain a renewal clause subject to acceptance by the State after that date. A copy of such lease or leases shall be filed in the office of the Secretary of State within thirty days after execution."

Item 2, Section 9, Chap. 127b, State Finance.

"Two members of said (Illinois State Athletic) Commission shall constitute a quorum for the transaction of business, and the concurrence of at least two commissioners shall be necessary to render a determination or decision by the Commission."

Section 6, Chapter 10b, Illinois Athletic Commission.

As the record shows that the Athletic Commission had exhausted the appropriation made by the General Assembly for its office expense, leaving no funds out of which this claim could be paid, and as Section 3 of the Act in relation to State finances provides that

"No officer * * * or commission shall contract any indebtedness * * * in an amount in excess of the money appropriated, unless expressly authorized by law,"

the Athletic Commission had no power to contract an indebtedness for rent or for any other purpose in excess of the appropriation made for it. Claimant claims that equity should aid him in his predicament. Where the Statute prohibits the doing of a thing, equity will afford no relief. It is a vital part of the duty of the Legislature to carefully ascertain what amount of money should be expended by the various departments of the State during the succeeding two years. To allow this claim under a theory of use and occupation, when not only a legal right therefor does not exist, but does in fact prohibit the claim, would be for this court to exercise rights and discretion with which it does not believe the Legislature intended to vest it. Claim is denied.

(No. 1820—Claimant awarded $222.75.)

HENRY COX, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 19, 1934.

E. N. NEVINS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*notice of injury and claim for compensation.* Where employee sustains accidental injuries arising out of and in the course of employment while engaged in extra hazardous occupation and notifies his superior of same and is afterward paid compensation a demand for same will be deemed waived, and an award may be made under the provisions of the Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant by his counsel, filed his petition with the clerk of this court on October 22, 1931 alleging that on the 25th day of June, 1931, he was in the employ of the Department of Public Works and Buildings, Division of Highways, State of Illinois, and was with others, engaged in the construction of a certain hard road near the Village of Chesterfield, County of Macoupin, and State of Illinois, and at the time of his injury was operating a trip mixer on a truck in dumping a mixture of concrete and his hand was caught between the body of the truck and the frame while engaged in that occupation; that at the hearing it was stipulated that the claimant was in the employ of the State at the time of the accident; both he and the State were under the Compensation Act and that the injury arose out of and in the course of the employment. The only questions in dispute are notice of the injury and demand; the nature and extent of the injury or disability and the amount of compensation due.

Claimant was sixty-one years of age, and was receiving thirty-five cents per hour. He had no children under sixteen years of age and had only been in the employ of the Highway Department for a week or two before the date of the injury. He was employed by Harvey Smith the foreman of the job and both Mr. Smith and one Lawrence Brooks, the General Superintendent received notice a short time after the injury. It was stipulated that compensation should be paid at the rate of Ten Dollars and Fifty Cents ($10.50) per week. Claimant did receive as compensation, the sum of Ten Dollars and Fifty Cents ($10.50) on August 3rd, the further sum of Twenty-one Dollars on August 11th, and the further sum of Twenty-one Dollars ($21.00) on August 19th, or a total of Fifty-two Dollars and Fifty Cents ($52.50), all in the same year of the accident.

Immediately after the injury, claimant walked around the mixer and informed Harvey Smith that he had his hand

mashed, and Smith directed him to be sent to Chesterfield. Mr. Brooks the superintendent was out there. Claimant visited Dr. Knoop who rendered first aid and claimant requested that he be transferred to a doctor at Carlinville, and was accordingly sent to Dr. Chamness who treated him from thence on, and now has a claim pending for the services rendered. X-ray pictures were taken which showed an injury to the bony structure of his fingers. Claimant had a compound fracture of the distal phalanx of the second finger of the right hand and a contusion of the third finger on the right hand. There is some flattening of the finger because there is an excess of callous there, and a part of the distal phalanx worked out.

He was last treated by his physician on August 5, 1931, and three weeks thereafter was the time fixed by the physician when he could return to work.

It is apparent that this injury arose out of and in the course of his employment and the State did receive notice and had waived demand by paying compensation as above set forth and no question arises as to whether or not this accident arose out of and in the course of his employment.

We, therefore, hold that the third finger of the right hand fully recovered; that the second finger was severely injured and that he has a fifty per cent. loss of the permanent and complete use thereof. Claimant has been paid Fifty-two Dollars and Fifty Cents ($52.50) for a temporary total disability, but nothing has been paid for the specific loss of the finger nor the full amount of his temporary total compensation. The evidence shows that from the time his temporary disability ceased on the 26th day of August, 1931, sixty-one (61) days or eight and five-sevenths (8 5/7) weeks elapsed, which was the period of the total temporary disability. It was stipulated that the amount he was entitled to is Ten Dollars and Fifty Cents ($10.50) per week as compensation; having received five (5) weeks compensation for this injury, he is further entitled to Ten Dollars and Fifty Cents ($10.50) per week for three and five-sevenths (3 5/7) weeks, or Thirty-nine Dollars ($39.00). The Compensation Act provides for thirty-five (35) weeks for loss of the second finger, and as he has sustained an approximate 50% complete loss of the use of the second finger, he is entitled to receive therefor the sum of Ten Dollars and Fifty Cents ($10.50)

per week, for a period of seventeen and one-half (17½) weeks, or the total sum of One Hundred Eighty-three Dollars and Seventy-five Cents ($183.75). Adding to this, the said further sum of Thirty-nine Dollars ($39.00), makes a total of Two Hundred Twenty-two Dollars and Seventy-five Cents ($222.75). We recommend an award in that sum.

(No. 1595—Claimant awarded $90.43.)

NELLE A. DEAL, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 19, 1934.

HEYL & HEYL, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where a State employee sustains accidental injuries arising out of and in the course of employment while engaged in extra hazardous occupation an award will be made for compensation under provisions of Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant, Nelle A. Deal, age 65 years on the 4th day of December, 1931, and a resident of Peoria, Illinois, filed her declaration in this court on May 28, 1930 alleging that on September 12, 1929, she was in the employ of the State of Illinois, stationed at the Peoria State Hospital, and had been directed by her superior to go to the City of Bloomington, also in the State of Illinois, in an automobile belonging to the State and driven by a chauffeur and while enroute from Peoria to Bloomington, the chauffeur, who was likewise an employee of the State, carelessly, negligently, and recklessly drove the automobile and by reason thereof, the automobile was overturned, and the claimant was seriously and permanently injured, and she asks damages in the sum of $10,000.00 for personal injury, doctor's bill and hospital bills.

She was employed as a social worker for three years and seven months. On October 14, 1929 she reported for work and she was told that her services were no longer needed. She had been laid up three and one-half weeks. She was paid $90.00 per month salary and had an allowance of

$18.00 per month as maintenance. It would seem that she had connections with the Peoria State Hospital at Bartonville, Illinois, and it was a part of her duty to go out and visit former patients and get histories, etc. It appears from the evidence that this hospital is equipped with its own heating plant, kitchen, their buildings, their elevators are in the buildings and that it also has its own electric light plant, all of which are operated in connection with the hospital.

We are of the opinion that for this reason the claimant came under the Compensation Act, provided, however, that she had given the proper notice. On the day in question it seems as though the plaintiff had gone to Bloomington for the Jacksonville State Hospital. She was accompanied on the trip by her daughter. She had a doctor bill amounting to the sum of $23.00 which she had paid herself. The declaration does not aver that any notice was given within the period provided by Section 24 of the Compensation Act, but when claimant was asked the question whether any notice had been given to Dr. George A. Zeller, the Assistant Attorney General, Eagleton said: "No notice necessary; we will admit that."

If claimant is entitled to recover at all, it is under the Compensation Act of this State and not under the common law. She was receiving a compensation of $90.00 per month and $18.00 per month maintenance, or a total compensation of $108.00 per month. It does not appear that she had any children under sixteen years of age. She was compensated at the rate of $29.50 per week, and she was entitled to 50% of her earnings but not more than $15.00 per week. Her incapacity having existed for thirty-two days, or four weeks and four days, she is entitled to compensation for the full period of time or four and four-sevenths weeks, at $14.75 per week, or the sum of $67.43. It appears from the evidence that she has paid the physician; having done so she is entitled to be compensated for his bill.

An award in the sum of Sixty-seven Dollars and Forty-three Cents ($67.43) plus $23.00 medical bill, is therefore recommended, or a total sum of Ninety Dollars and Forty-three Cents ($90.43).

(No. 1677—Claim denied.)

CHARLES J. KRAFT, Claimant vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 19, 1934.
Rehearing denied, March 12, 1935.

BECKMAN, OLSON, HOUGH & WOODS, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*when claim of officer for money advanced for use of will be denied.* Where officer of Illinois National Guard made necessary and permanent improvements on, and furnished supplies for Illinois National Guard Armory without lawful authority therefor and without any appropriation being made for same, his claim for such moneys advanced will be denied.

SAME—*liability of State for repair and maintenance of Armory—necessity of appropriation for.* The State is liable for cost of repair and maintenance of Illinois National Guard Armory, only when there is an appropriation made therefore by the legislature and no State officer has any power to make such appropriation.

SAME—*claim of officer of for reimbursement for moneys advanced on grounds of equity and good conscience—when denied.* The advancement of money by Officer of Illinois National Guard for repairs and maintenance of Armory without lawful authority and there being no appropriation therefor will not justify an award for reimbursement on the grounds of equity and good conscience.

PLEADING—*jurisdiction.* Where complaint and evidence in support thereof show that an award would be contrary to the Statute and the provisions of the Constitution, the court is without jurisdiction to grant relief and an award will be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The petitioner filed his claim with the clerk of the court on November 12, 1930, alleging that the State of Illinois is indebted to him in the sum of Ten Thousand Nine Hundred Thirty-five Dollars and Seventy-nine Cents ($10,935.79) for money paid and expended by him for the use of the State of Illinois. He avers that during the years of 1923 to 1928 inclusive, he was a Colonel of the 202nd Coast Artillery of the Illinois National Guard, commanding the Regiment, and that as such officer he found it necessary, in order to protect the properties of the State of Illinois and to carry on the work of the regiment, to purchase from time to time, certain goods, wares, merchandise, supplies and equipment for the enlisted men of the regiment and for a certain Armory

belonging to the State of Illinois, located at the southeast corner of Thorndale Avenue and Broadway in the City of Chicago and known as the Broadway Armory. He also avers that the above mentioned sum of money was paid by him from his own funds and/or funds to which he was lawfully entitled in making the purchases, and that all of said purchases were for Armory supplies and equipment with the exception of Three Hundred Fourteen Dollars and Sixty Cents ($314.60) which was expended for supplies for the enlisted men in the regiment.

The petitioner also avers that it was absolutely impossible to carry on efficiently the work of said regiment and/or to protect the properties and interests of the State of Illinois without purchasing said goods, etc.; that the said State of Illinois has accepted and enjoyed the benefit of such purchases, and is, therefore, liable for the reimbursement to your petitioner; and the bill of particulars is attached to the complaint.

On December 20, 1930, an amended petition or declaration was filed, substantially the same as the first one, but the bill of particulars attached thereto is for the sum of Ten Thousand Nine Hundred Sixty-one Dollars and Forty-nine Cents ($10,961.49). There is one, however, noticeable exception. It is averred in this amended petition that the sums of money claimed by the petitioner had all been paid by him from his own funds, and/or funds to which he was lawfully entitled, and that all of the purchases were for the said Armory with the exception of Nine Hundred Eleven Dollars and Sixty-four Cents ($911.64) which was expended for supplies for the enlisted men in said regiment. The bill of particulars contains numerous items and supplies of one kind or another, and we are at a loss to know just what this means, and because of such uncertainty, we cannot consider it, and we do not find that there is anything in the evidence to throw light upon this proposition.

On January 30, 1934, by leave of court, an amendment was filed to the amended petition. This fixes the damages at the sum of Fifteen Thousand Three Hundred Thirty-four Dollars and Eighty-six Cents ($15,334.86), which was arrived at by figuring five (5) per cent. interest for each calendar year for the sum mentioned in the amended declaration.

which amounted to Four Thousand Three Hundred Seventy-three Dollars and Thirty-seven Cents ($4,373.37).

To support these contentions, the claimant filed his deposition which was taken January 27, 1931, and thereafter introduced oral argument. It appears from the evidence that claimant had been a resident of the City of Chicago for quite a period of years and was on that date, 49 years old. His military experience consisted of a few months over thirty-one years of continuous service, that is, in the Federal and State service. During that period he had received a Certificate of Merit which was a recognition similar to a War Cross, issued during the late war. He had served in various insurrections in Central America; in Nicaragua, and the Panama Revolution in 1911; went to the border in 1916 and to France in 1917, and stayed there until sometime during the year 1919. He was discharged from the World War with the rank of captain; had been wounded during his military service, seven times, twice in the World War. When he returned from the World War, he helped organize the American Legion for about two years. He testified that he organized about thirty-eight posts that are still existing in Cook County and in 1921 started organizing the present 202nd Coast Artillery, and was made Colonel of that regiment in 1923, it being a regiment of National Guard Troops.

The following appears on page 5 of his deposition:

"Q. And you resigned when?

A. Resigned March 24, 1930.

Q. That was following the Board of Inquiry, or Efficiency Board?

A. Yes."

Just what this had to do with the questions involved here, has been left unexplained. Later on he was asked:

"Q. During your time with the Marine Corps or in the Federal service during the World War were you ever charged with any withholding of funds or anything of that kind?

A. No, never reprimanded in my life by a superior officer.

Q. You were honorably discharged, and other than this Board of Inquiry your service has been without any question, is that right?

A. Always has."

Just what the Board of Inquiry had to do with the resignation of the claimant is still a matter of doubt and conjecture.

It appears from his evidence that he received a salary of $175.00 per month from the State, up and until January 1, 1927 when he resigned as custodian of the Armory. Proof is submitted that he applied this monthly salary to the Armory in making improvements therein and bettering the conditions. It is also shown that there were four different funds from which money was drawn for the military service, either by way of improvement to the armory or pay to the men. One was the Armory Rental Fund, which is derived from the armory sub-rentals to civilian organizations; two: the State fund, appropriated by the State to the Adjutant General's Department; three: the National Guard Commission Fund, made up of donations from patriotic citizens; four: the Federal appropriation to the National Guard.

This court has not been supplied with an itemized statement of these funds, but it appears that the claimant also bought a number of circus seats for the armory and received rentals therefrom; that the Armory was rented for $100.00 per night for wrestling matches and $50.00 per night for basketball games, and there were other miscellaneous charges for rental.

It appears from the evidence that the claimant did expend large sums of money for the use and benefit of his regiment, particularly the Armory, but the court is at a loss to know why he resigned in the face of what we are led to believe was to be a military investigation of his activities. Nothing further appears from the record except that which would glorify an honorable patriotic record. That this claimant was led to believe that he would be reimbursed for these expenditures, appears from his testimony and an affidavit of Colonel Inglesh. An affidavit was filed with this court on June 18, 1934 from one Jules F. Cornelius to the effect that in 1925, a committee of business men was organized for the purpose of appearing at Springfield to set forth the merits and desirability of the Broadway Armory, and that he, Jules F. Cornelius, was chairman of that committee, which consisted of approximately twenty-five business men, and during that time was frequently in contact with Colonel Kraft; that in 1925, he and Colonel Kraft appeared at Springfield and

went before the then Governor and Colonel Inglesh and before the Chairman of the Appropriation Committee of each the Senate and the House and before the Committees Proper, and presented at that time the desirability of the purchase of the Armory, for the option that the state then had was expiring shortly. He recalls definite statements that this would be the only appropriation for military purposes during that session of the legislature. He also states in his affidavit that the matter of improvements was discussed and that assurances were given to Colonel Kraft that the improvements would be provided for at a later date, and that in all respects it would be made into an Armory reasonably well equipped and habitable. Affiant further stated that he was acquainted with the Armory and that the same was badly in need of repairs and did not have facilities for the proper housing and maintaining of the supplies and men of the regiment. The terms of the affidavit are in general language. It is, however, definite that assurances were given to the claimant that improvements would be provided for at a later date, but it does not state what improvements and we gather from the affidavit that the claimant well knew that the appropriation did not include anything for improvements.

It also appears from the evidence that the claimant well knew the manner in which the improvements for the Armory should be made and that neither the then Governor nor Colonel Inglesh had the power to make appropriations. During claimant's long term of military service, his familiarity with military manuals and his constant contact with high officials of the Illinois National Guard and National Army officers, he must have known that the law provided a way to make the necessary improvements and that neither he, himself, or any other officer of the National Guard could make such improvements upon their own volition without first getting the necessary appropriation, unless he wanted to take a chance with a legislature, many of its members probably not then even elected.

It appears from the amended petition that during the years 1923, 1924, 1925, 1926, 1927 and 1928, claimant expended for lumber, office supplies, athletic supplies, pianos, electrical supplies and garage equipment, etc., the sum of Ten Thousand Nine Hundred Sixty-one Dollars and Forty-nine Cents ($10,961.49).

The Attorney General, Otto Kerner, on March 7, 1934, filed a motion to dismiss for the following reasons:

1. That both the original and amended complaint filed herein are substantially insufficient in law and fail to state a proper legal cause of action against the respondent.

2. That since the original claim was filed herein on September 12, 1930, this court is without jurisdiction to consider expenditure items listed for the years 1923, 1924 and 1925, for the reason same are outlawed by Section 10 of the Court of Claims Act of 1917, as amended, and said Statute of Limitation has run against this portion of the claim.

3. That it affirmatively appears from the record the claimant has not legal right, title or interest in said Special Fund of the 202nd Coast Artillery Regiment of the Illinois National Guard, but acted only as a disbursing agent for the Chicago National Guard Commission which collected funds by subscription and donation and apportioned same among the various National Guard units in the City of Chicago for the sole benefit and use of the personnel of the National Guard.

4. That it affirmatively appears from the record claimant improperly commingled funds derived from rental of the Broadway Armory with funds secured from the National Guard Commission contrary to the provisions of Section 3½ of Article XVIII of the Military and Naval Code of Illinois, and that he made expenditures of funds derived from armory rentals without requisition and approval by the Adjutant General.

5. That under the facts shown by the record no legal claim can arise for refund to the claimant of those sums of money which he personally received as custodian of the Broadway Armory and voluntarily deposited in the Special Fund account for the reason claimant was under no duty or obligation to make such deposit and these funds, therefore, must necessarily be considered merely a gift made by claimant for the welfare and benefit of his organization or regiment. Nothing appears in the record and no proof has been offered which tends to show an agreement actual or implied by which the respondent became liable to make refund of this money to the claimant.

6. That except as to money actually derived from armory rental the respondent had no right, title or interest

in and to the Special Fund of the 202nd Coast Artillery Regiment and at no time exercised any supervision or control of the expenditure of said fund.

In claimant's brief it is argued that Colonel Kraft was in command of the 202nd Coast Artillery of the Illinois National Guard, during the years 1923 to 1928, inclusive, and during a large part of this time, he was also custodian of the Broadway Armory located at the corner of Thorndale and Broadway, Chicago, Illinois. The quarters of the 202nd Coast Artillery were in this building; that as Colonel of this regiment, the claimant was personally responsible for the equipment; that he had made various attempts to get the State to furnish a great amount of things as time went along, but the delays made it absolutely impossible to function unless he "took the bull by the horns" and did some of the things himself, and his actions were not only looked upon with satisfaction by the various parties having charge of the affairs, but were in general approved, for certain it was, that all of the things furnished were needed and were kept upon the premises, and still remain there, and are now in use by the State, and that all but a small part of the items listed in the Bill of Particulars were for improvements permanent in nature.

It is argued in the brief that sub-paragraph 4 of Section 6 of the Court of Claims Act gives the court jurisdiction to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay.

The case of *Highway Commissioners* vs. *City of Bloomington*, 253 Ill. 164 is also quoted, along with *Harty Bros.* vs. *Polakow*, 237 Ill. 559, and a quotation from page 565 is set forth in the brief.

There is a vast difference between the authorities cited and the facts in the instant case, and we hold these authorities are not in point. It will be remembered that all of the expenditures claimed by the claimant were made deliberately by him with full knowledge of the possibilities of reimbursement, and at a time when there was no possible public danger, and we are impressed by the fact that no officers of the Illinois National Guard, including the Adjutant General, or

his assistants have appeared in behalf of the claimant; not his successors nor any of the captains, lieutenants or enlisted men that served in the 202nd Coast Artillery at the Armory in question during claimant's colonelcy, many of whom undoubtedly formed a friendship and affection with the claimant in the face of great mutual danger and years of acquaintanceship.

The statute referring to the Court of Claims is perhaps misleading or unfortunately worded. This court has in the case of *Crabtree* vs. *State of Illinois*, 7 Illinois Court of Claims, page 207 held that the language referred to defines the jurisdiction of the court, and that it does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

Without extending this opinion to an undue length, we hold that because funds were not provided in a manner pointed out by Statute and the Constitution for the purpose for which Colonel Kraft spent the funds, we are without jurisdiction to grant him relief. To hold otherwise would be to nullify the Statute setting up all of the rules and regulations of the military manuals of this State insofar as these or similar questions are involved, and to render void the practices of the Adjutant General's Department, which are the result of many years of experience, and these things we refuse to do.

OPINION ON PETITION FOR REHEARING.

Per Curiam:

Claimant Charles J. Kraft, through his counsel, having filed a petition for re-hearing in the above entitled cause and ten different grounds for re-hearing having been set forth and counsel having asked for re-hearing for the purpose of putting in new testimony, and it being admitted that claimant did not follow the statutes and regulations provided for such work, the petition for re-hearing must be denied.

It has never been the policy of this court to grant re-

hearings for the purpose of introducing new testimony and we hold that request for appropriations for such purposes as claimant requests in this case must be first submitted to the legislature, and if, in their discretion, they are inclined to make the appropriation, then such appropriation will come squarely within the constitution.

The Act creating the Court of Claims was designed to lessen the work of the State Legislature and not in any way to take away or lessen their powers, neither can we put our approval upon matters done contrary to law, and when an officer of the State or the State Militia presumes upon the authority granted the legislature, we must leave him where he has placed himself.

The petition for a re-hearing will, therefore, be denied.

(No. 1785—Claimant awarded $186.25.)

JOHN H. LAIRD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 19, 1934.

PAUL G. WEISENHORN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MASTER AND SERVANT—*what constitutes relation.* An inmate of a State institution, who is also regularly employed at a fixed salary and subject to the order and direction of those in charge of particular department of institution is an employee and the relation of master and servant exists.

WORKMEN'S COMPENSATION ACT—*injury in course of employment—when award may be made for.* Where one is employed to operate electrically driven food chopper, cleaning same is in the course of employment and if injured while so doing an award may be made under Act.

SAME—*injury while doing act in violation of order—when award may be made.* If an employee violates a rule or order of employer, but in so doing does not put himself out of the sphere of his employment, he is only guilty of negligence in violating such order or rule and an award for compensation may be made if injured.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his declaration with the Secretary of State on July 3, 1931 alleging that on the 6th day of September, 1930, John H. Laird, because of illness and his service record was admitted to the Illinois Soldiers' and Sailors' Home,

where he underwent treatment for such illness and was there for observation. On the 8th day of September, 1930, he was assigned to work in the kitchen as a relief helper, and received One Dollar ($1.00) per day, his duties consisting of general work in the kitchen, the preparation of foods and the cleaning of the equipment,—in general, all work which he was ordered to do by the cooks on duty; that in obedience to the orders of his superiors, he was operating a food-chopping machine, when the fourth finger on his right hand was caught in the machine and injured so badly that amputation was later necessary. He also claims that he had been permanently disfigured and disabled.

It appears from the evidence that he was an inmate of the Soldiers' and Sailors' Home at Quincy, Illinois, but was also working for a dollar a day in and about the kitchen. He was a veteran of the World War, having been admitted to the hospital for treatment of ulcers of the stomach and for physical observation. The dietitian at the home gave him the job in the kitchen at Thirty Dollars ($30.00) per month. He worked in the kitchen from 5:00 A. M. to 1:00 P. M., six days a week. It was a part of his duties to use a vegetable chopper and to clean the appliance after using it. He testified that sharp circular knife was a part of this appliance and that he put his hand in where it was and his little finger was cut off. He has never married. He had only been employed in this capacity twelve days and received a check from the State of Illinois, for the sum of Twelve Dollars ($12.00).

There is much testimony in the record in regard to this plaintiff's ability to earn money as a pipe-fitter. As far as the record is concerned, he is still at the charitable institution. He has not worked steadily at his trade since 1925.

According to the testimony of Dr. C. E. Ehle, who attended claimant, the doctor amputated the finger below the second distal joint. Claimant's third finger was also lacerated and the doctor sewed up the laceration. Claimant was discharged, according to the testimony, on October 25, 1930.

It appears from the evidence that this food-chopper was electrically driven, with a round bowl and a guard over the top of the knife. In order for one to get his finger into the bowl it would be necessary to place the finger on the inside under the protecting shield.

It appears from the testimony of the manager, H. H. Fletcher, that it had been the practice to take inmates from the institution and work them in the kitchen, and give them a chance to make a little extra money for a few days and then let someone else take the job, and that he did not consider Laird as an employee but rather as an inmate of the institution.

The Attorney General argues that the claimant was an inmate of the institution, but admits that the claimant was employed in the institution, and argues that the claimant had disobeyed orders in cleaning the machine and for this reason he is not entitled to recover. Attorney General also argues that the State is not liable to respond in damages for the negligence of its officers, agents or employees, and that where it appears that the injuries sustained were sustained without any negligence or fault on the part of the agents of the State an award will be denied, and cites authorities to that effect.

We cannot agree with the Attorney General in this connection. It appears to us that the relationship of master and servant existed at the time of this injury. The fact that he is also an inmate is not controlling because it is clear that claimant was also an employee, and subject to the direction of the cook, dietitian and others around the institution. All of claimant's medical bills and hospital bills were apparently paid.

Claimant bases his measure of damages upon the earnings that the claimant made while in the employ of others as a pipe-fitter. In this he is in error. He can only recover, if at all, under the Illinois Compensation Act, and the amount that he can recover is fixed by that Act. Under the wages paid to claimant he was only entitled to be paid at the rate of Seven Dollars and Fifty Cents ($7.50) per week for a period of four and five-sixths weeks for temporary total disability, and twenty weeks for loss of his fourth finger at Seven Dollars and Fifty Cents ($7.50) per week, or a total sum of One Hundred Eighty-six Dollars and Twenty-five Cents ($186.25).

The fact, if it be a fact, that claimant was directed not to place his hand in the machine and injured as the result of his own negligence does not under the Compensation Act bar his recovery. The act of cleaning the food-chopper was in the course of his employment; it was a part of his duties.

Would the violation of the order of the employer not to use his hand in cleaning the vegetable chopper, take the employee entirely out of the sphere of his employment, and deprive him of the Act?

In *Republic Iron Co.* vs. *Industrial Commission*, 302 Ill., 401, on page 406 it was said: "Where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such a case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred."

We, therefore, hold that the claimant is entitled to recover and we recommend an appropriation in the sum of One Hundred Eighty-six Dollars and Twenty-five Cents ($186.25).

(No. 1816—Claimant awarded $1,241.00).

ROY PERRY, ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED OF THE ESTATE OF DUDLEY E. PERRY, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 19, 1934.

SUMNER & LEWIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*Military and Naval Code—award for disability under establishes liability.* Where member of Illinois National Guard files claim for disability incurred while in the performance of his duties, under provisions of Military and Naval Code, and an award for such disability is made thereunder to date of award, liability is established and if such disability continues an award may be made for such further period thereof under said Code.

SAME—*same—payments due under assets of estate of member.* Payments due to member of Illinois National Guard for disability under provisions of Military and Naval Code, are upon his death, assets of his estate and payable to his personal representative, and the right thereto is not de-

pendent upon whether his heirs are direct or collateral or dependent upon him for support.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On August 12, 1928, Dudley E. Perry was a corporal in "Company L," 130th Infantry, Illinois National Guard, in active service at Camp Grant, and while in camp there, contracted pulmonary tuberculosis in the line of his duty.

Subsequent to the August, 1928, encampment of the Illinois National Guard, Perry entered the Good Samaritan Hospital at Vincennes, Indiana, and remained there until August 30, 1929. On that date he was admitted to the Illinois Soldiers' and Sailors' Home at Quincy as a guest of the State, and remained there until his death which occurred on February 5, 1931.

On April 21, 1930, Perry filed his claim (No. 1586) in this court for service pay under the terms and provisions of the Military and Naval Code of this State. A hearing was had and an award entered allowing him $2.12½ per day for 323 days, being one-half of his service pay from August 12, 1928, to June 30, 1929; and payment of such amount was thereafter made to Dr. C. E. Ehle who had theretofore been appointed executor of the last will and testament of said Dudley E. Perry, whose death occurred while his case was pending in this court.

On October 10, 1931, said Dr. C. E. Ehle, executor as aforesaid, filed his claim in this court, seeking to recover service pay of said decedent from July 1, 1929, to the date of his death, to-wit, February 5, 1931.

Thereafter said Dr. C. E. Ehle was discharged as such executor and Roy Perry was duly appointed administrator *de bonis non* with the will annexed of the estate of said decedent.

Under section four (4) of Article sixteen (16) of the Military and Naval Code of this State, corporals in the National Guard received $4.25 per day for active service pay. Under Section ten (10) of the same article, any officer or enlisted man of the National Guard who may be disabled in any way, while on duty, so as to prevent his working at the occupation from which he gains his living, is entitled to medical treatment and to draw one-half of his active service pay,

for not to exceed thirty (30) days, on the certificate of the attending medical officer; if still disabled at the end of thirty days he is entitled to draw pay at the same rate, for such period as a board of three medical officers, convened by the order of the Commander in Chief, may determine to be right and just, but not to exceed six (6) months, unless approved by the Court of Claims.

The Attorney General asks that the claim be dismissed because of the amount heretofore paid, and because there are no dependents, deceased having left only collateral heirs.

It seems to us, however, that the liability of the respondent to the decedent was admitted by the order entered in the previous case; and the liability in this case follows as a necessary consequence. As we view it, the claim for decedent's service pay from July 1, 1929, to the date of his death, constitutes an asset of his estate, and the right thereto is not dependent upon the question as to whether his heirs were direct or collateral, or whether any of such heirs were dependent upon him for support.

Claimant is entitled to an award for one-half of decedent's service pay, to-wit, $2.12½ per day, from July 1, 1929, to the date of his death, February 5, 1931, to-wit, 584 days.

Award is therefore entered in favor of the claimant, Roy Perry, administrator *de bonis non* with the will annexed of the estate of Dudley E. Perry, deceased, for the sum of Twelve Hundred Forty-one Dollars ($1,241.00).

(No. 1929—Claim denied.)

CARL CARLSON, Claimant vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

ARNOLD L. LUND, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*sustained on public highway—negligence of employee of State Highway Department—when State not liable for.* The precise question involved herein was decided by this court in the case of *Markham* vs. *State*, No. 1934, *post* and the opinion in said cause is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claim herein filed on July 7, 1932, represents that claimant, on the 11th day of October, 1931, about 10:00 P. M., was driving on the public highway known as 127th Street in the town of Worth, Illinois; that there existed on said highway an excavation about eight feet square and several feet deep, made by employees of the State Highway Department; that it then and there became "the duty of the defendant, the said Highway Department, to exercise due care and caution in protecting the property or persons of others then and there lawfully present, etc." That claimant was riding at approximately twenty-five miles an hour in his automobile, and was exercising due care and caution for his own safety and for that of others then present, but that the defendant, not regarding its duty in that behalf, carelessly, negligently, wilfully and improperly neglected to place and keep a lighted lamp, light or flare or to take other precautions to warn other approaching vehicles or to place any other protection around the excavation in question, and by reason of such negligence the automobile of claimant was overturned and plaintiff was injured and was forced to lay out certain sums of money, all as shown by his Bill of Particulars, amounting to the total of $132.75.

The Attorney General has filed his motion to dismiss the complaint by reason of the fact that such claim is predicated upon the charge of negligence upon the part of employees and agents of the State of Illinois in the State Highway Department, and that under the law, the rule of *respondeat superior* does not apply and that there can be no liability upon the part of the State for which an award could legally be made by this court.

As cited by respondent in its brief.

"The State acts in its sovereign capacity, and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents, and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself, unless such liability is expressly provided by the Statute creating such agency."

Kinnare vs. *City of Chicago*, 171 Ill. 332-335.

"In the construction and maintenance of its roads, the State acts in the governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, mis-

feasance or negligence of its officers or agents in the absence of a Statute creating such liability. Such has been the settled decision of this court for many years."

Bucholz, Admx. vs. *State*, 7 C. C. R. 241.
Peterson vs. *State*, 6 C. C. R. 77.
Braun vs. *State*, 6 C. C. R. 104.

There is no averment in the complaint that the highway in question was under the control of the State of Illinois, but under the contentions of the Attorney General and the matters above set forth, such fact would be immaterial.

The motion to dismiss is allowed and claim dismissed.

(No. 2004—Claim denied.)

BERTHA HILDERBRANDT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

JOHN P. PALLISSARD, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PLEADING—*complaint failing to set forth cause of action—will be dismissed.* Where complaint fails to set forth facts showing liability of the State motion to dismiss will be allowed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On October 17, 1932, claimant was driving her automobile on S. B. I. Route No. 25, between Chebanse and Kankakee. The highway there consists of a macadam roadway and the employees of the State were then oiling same. The complaint avers that no notice was given to the claimant of the condition of the roadway, and that on account of the slippery condition thereof, her automobile skidded off the highway and collided with a culvert, whereby the said automobile was damaged.

The Attorney General has entered a motion to dismiss the case for the reason that there is no liability on the part of the State under the facts set forth in the complaint.

Claimant's right to recover is based upon the negligence of the servants and agents of the State in the maintenance of said State Route No. 25.

It is well settled by the decisions of this court that in the maintenance of its hard-surfaced roads the State is acting in a governmental capacity. *Chumbler* vs. *State*, 6 C. C. R. 138; *Stoddard et al* vs. *State*, 6 C. C. R. 27; *Bucholz et al* vs. *State*, 7 C. C. R. 241.

It is also the well-settled law of this State that the State is not liable for the negligence of its servants and agents while in the exercise of any of its governmental functions. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Morrissey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs. *State*, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77.

Under the well settled law of this State the motion to dismiss will have to be sustained.

Motion sustained.

(No. 1900—Claim denied.)

JOHN MILLER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

JOHN MILLER, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time provided in is jurisdictional.* Making claim for compensation under Workmen's Compensation Act within time required by the Statute is jurisdictional and a condition precedent to right to maintain proceeding under Act.

SAME—*pleading.* Where complaint is insufficient under the law a motion to dismiss will be sustained.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On September 23, 1931, claimant was in the employ of the State in connection with the maintenance of its S. B. I. Route No. 116 in Iroquois County. On that date, while in the performance of his duties, he claims to have sustained a hernia while pulling on a post.

The complaint contains no averment as to notice of the accident or claim for compensation, and the Attorney Gen-

eral has entered a motion to dismiss the case for the reason that notice was not given to the employer within fifteen (15) days after the accident and claim for compensation was not made within six (6) months after the accident, as required by the terms and provisions of Section twenty-four (24) of the Workmen's Compensation Act.

Our Supreme Court has frequently held that the making of claim for compensation within the time required by the Statute is jurisdictional, and is a condition precedent to the right to maintain a proceeding under the Compensation Act. *Haiselden* vs. *Industrial Board*, 275 Ill. 114; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262; *Inland Rubber Co.* vs. *Ind. Com.* 309 Ill. 43; *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386; *Beverly Country Club* vs. *Massachusetts Bonding Co.*, 268 Ill. App. 380.

The complaint therefore is insufficient under the law, and the motion to dismiss must be sustained.

Motion allowed.

(No. 2075—Claimant awarded $4,020.20.)

ELIZABETH A. MORROW, EXECUTRIX OF THE ESTATE OF JOSEPH A. MORROW, Deceased, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

SCHAFFER & DOLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*University of Illinois—maintaining and operating heating and power plant of, extra-hazardous—claim for compensation for death of employee having supervision of care of—when award made.* The University of Illinois, in the operation and maintenance of its heating and power plant, containing machinery, dynamos and generators of a kind that the laws of the State of Illinois and the ordinances of the city where located required to be surrounded by guards or rails to protect employees from injury, is engaged in an extra-hazardous enterprise, and if an employee having supervision of the care of said plant sustains accidental injuries, arising out of and in the course of such employment an award will be made under the provisions of the Workmen's Compensation Act.

SAME—*accident arising out of and in the course of employment.* Where employee of the University of Illinois, in the performance of his duties, as supervisor of the care of the physical plant of said University, was required to leave its grounds, for the purpose of purchasing coal for its use, and while

traveling on the highway for such purpose sustains an accidental injury, such injury arises out of and in the course of his employment.

SAME. *Compensation due widow, payable to her individually and not as executrix.* When award is made to widow for compensation for death of her husband, same is required to be paid to her individually and not as executrix.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Elizabeth A. Morrow as executrix of the estate of Joseph A. Morrow, deceased, has filed herein her complaint against the State for the recovery of compensation for the death of her husband, Joseph A. Morrow under the terms and provisions of the Workmen's Compensation Act.

Said Joseph A. Morrow, for about forty-five years immediately preceding his death was an employee of the University of Illinois, and for over fifteen years prior to his death was Superintendent of Buildings at the University, pursuant to appointment by the Board of Trustees upon the recommendation of the President and Supervising Architect. Mr. Morrow maintained an office on the campus at 110 Power Plant from which office he exercised direct supervision over the physical plant of the University, including operations of the buildings and control of the janitors and employees of the power plant. It was part of his duties to see that the buildings should be properly taken care of, maintained and operated.

In the performance of his duties he was subject only to the Board of Trustees, the President of the University, and the Supervising Architect thereof.

Among other duties, Mr. Morrow had charge of the purchase of coal for the University heating and power plant, which consumed approximately forty-five thousand (45,000) tons per annum. With the approval of the Board of Trustees and the Supervising Architect, Mr. Morrow had been accustomed for a number of years to purchase coal from the mines in southern Illinois. The method employed by the Trustees involved the making of trips to the coal mines by Mr. Morrow for the purpose of ascertaining if coal was available and the approximate tonnage thereof. After obtaining such information, Morrow would return to the University and the purchase would then be completed by telephone. This had proven to be the most economical way to purchase coal for the use of the University.

On August 22, 1932, while enroute to southern Illinois to purchase coal for the University he sustained accidental injuries as the result of a collision between the automobile in which he was riding and another automobile, which injuries resulted in his death within an hour after the accident.

It was stipulated between the claimant and the respondent, among other things, as follows:

"The care of the physical plant of said University which was under the personal supervision and control of the said Joseph A. Morrow as such Superintendent of Buildings, required the services of about 250 employees, all under said Morrow. There are about 125 buildings in said physical plant, of which about 75 are located on a campus area of about 500 acres; the other (principally agricultural buildings) being located some distance from the campus proper.

"That the power and heating plant, the electrical plant, the water plant, garages, storage buildings, telephone system, auto and truck equipment, and police force and fire department, were all under the personal and direct supervision of said Morrow as such Superintendent of Buildings.

"One of the duties of said Joseph A. Morrow in the operation of the heating plant of said University was the purchase of coal for the plant. The said Morrow was engaged in this specific duty, going to the coal mines in southern Illinois to buy coal for said heating plant at the time of the accident in which he was killed, about 11:00 o'clock A. M., Monday, August 22, 1932.

"Said accident was the result of an automobile collision which occurred at the intersection of Illinois State Routes 25 and 121 at Tuscola, in Douglas County, Illinois, and the said Joseph A. Morrow died within an hour after the accident, without regaining consciousness. The said Morrow was not guilty of any contributory negligence, but was in the exercise of due care and caution for his own safety at the time of the accident.

"At said time and place, said Morrow was riding in a Chevrolet sedan owned by the University of Illinois, and driven by S. E. Griffith, another employee of said University, for the special purpose of taking said Morrow to southern Illinois to purchase coal for the University, as above stated. Said Morrow was riding in the front seat of said auto with said Griffith, and they were not talking as they approached the said intersection.

"The plaintiff paid out the items of $10.00 to Dr. John O. Cletcher for medical services, and $10.20 to Enos H. Renner for ambulance services, as set forth in the plaintiff's Bill of Particulars, marked 'Claimant's Exhibit B,' and attached to her Declaration of Claim filed in this cause."

Although in the service of the University, Mr. Morrow was paid by the Auditor of Public Accounts of the State and under repeated decisions of the Supreme Court of this State, was an employee of the State. *People* vs. *Board of Trustees*, 283 Ill. 494-501; *Thomas* vs. *University of Illinois*, 71 Ill. 310.

The State therefore was an employer and Morrow was an employee within the meaning of those words as used in

the Compensation Act. Under the evidence there is no question but what Morrow was in the performance of his duties at the time of the accident in question.

The Attorney General contends that the accident in question did not arise out of and in the course of the employment of Mr. Morrow. The evidence shows conclusively that his duties necessarily took him away from the University for the purpose of purchasing coal, and that he was in the performance of his duties at the time of the accident. Being engaged in the performance of his duties at the time of the accident, there can be no question but what the accident arose out of and in the course of his employment. *Mueller Construction Co.* vs. *Ind. Bd.*, 283 Ill. 148; *Irwin Niesler & Com.*, 346 Ill. 89; *Swift and Co.* vs. *Ind. Com.*, 350 Ill. 413; *Kennedy Van Saun Mfg. Co.* vs. *Ind. Com.*, decided by the Supreme Court at the February term, 1934, thereof, but not yet reported.

The real question in the case is as to whether under the circumstances, the State was engaged in a business or enterprise which is extra-hazardous within the meaning of Section three (3) of the Act.

In a general opinion heretofore rendered to the University of Illinois, this court held to the view that the University is engaged in an "enterprise" within the meaning of the Compensation Act, and also held to the view that although the University was chartered primarily to furnish instruction to students in various branches of learning, yet it consists of a number of different departments or schools which are practically complete in themselves; and therefore it is in the same position as an individual or corporation which is engaged in several different businesses or enterprises, some of which may be extra-hazardous and some not; that each department or school must therefore be considered a separate business or enterprise, and the liability of the University in each case depends upon whether that particular school or department comes within any of the provisions of Section three (3) of the Act, or is a business or enterprise which is extra-hazardous in fact.

Under the evidence and the stipulations in the record, it satisfactorily appears that the heating and power plant is an independent department of the University; that the heat-

ing plant contains eight (8) large stokers, eight (8) furnaces, and eight (8) boilers, having a capacity of about seven thousand (7,000) horsepower; that there are about Fifty-five Hundred (5,500) feet of large covered tunnels for heating pipes; that there are about Twenty-eight Hundred (2,800) feet of open lines in basements of buildings and about Sixteen Thousand Five Hundred (16,500) feet of conduit tunnels for insulated steam lines and electric lines connecting the more distant buildings; that the power plant is a part of the heating plant, and connected with it; that the power room contains Three (3) generators aggregating about Seventeen Thousand Five Hundred (17,500) kilowatt power with dynamos and other machinery in proportion, which would be sufficient to furnish power and light for a city of Five Thousand (5,000) people; that the machinery is such that the laws of Illinois and the ordinances of the cities of Champaign and Urbana require it to be surrounded by guards and rails to protect the employees and the public from injury; that such guards and rails have for years been maintained around such machinery.

It appears, therefore, that in the operation and maintenance of its heating and power plant the University comes within the provisions of Paragraph eight (8) of Section three (3) of the Act and possibly several other paragraphs of said Section three (3), and, further, that the business or enterprise of maintaining and operating the heating and power plant is extra-hazardous in fact, and that the claimant is therefore entitled to an award under the provisions of the Act.

The deceased left him surviving Elizabeth A. Morrow, his widow, and Charles E. Morrow and Thomas W. Morrow, his adult sons, as his only heirs at law. Elizabeth A. Morrow was dependent on said Joseph A. Morrow for her support at the time of his death. Neither Charles E. Morrow nor Thomas W. Morrow were so dependent. The wages of said Joseph A. Morrow were $416.66 per month, and the claimant is therefore entitled to an award of Four Thousand Dollars ($4,000.00), and in addition thereto the sum of Twenty Dollars and Twenty Cents ($20.20) for medical services, etc., rendered at the time of the accident, making a total of Four Thousand Twenty Dollars and Twenty Cents ($4,020.20). The compensation, however, is required to be

paid to the widow individually and not as executrix. *Keller* vs. *Ind. Com.*, 291 Ill. 314; *Peabody Coal Co.* vs. *Ind. Com.*, 299 Ill. 142.

Award is therefore entered in favor of the claimant for the sum of Four Thousand Twenty Dollars and Twenty Cents ($4,020.20), payable as hereinbefore set forth.

(No. 1973—Claim denied.)

GENEVIEVE SULLIVAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

L. FRED O'BRIEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.* In the maintenance of a public highway the State is acting in a governmental capacity and is not liable for the negligence of its servants and agents in connection therewith.

SAME—*pleading.* Where complaint on its face shows that claim is based on negligence of employees of State engaged in maintaining public highway motion to dismiss will be sustained.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On November 1, 1931, claimant, with several others, was riding as a guest in an automobile then being driven by Claude L. Cashman in an easterly direction on S. B. I. Route No. 90 between Camp Grove and Sparland.

The complaint avers that the north and south crossroad near the Charley Ruth Corner had been newly graveled and that the servants and agents of the State had negligently left large quantities of gravel in long piles across said Route 90; that when the automobile in which claimant was riding struck the gravel, it was thrown out of the control of the driver and rolled over an embankment onto a wire fence, whereby the claimant was seriously injured.

The Attorney General has entered a motion to dismiss the case for the reason that there is no liability on the part of the State under the facts set forth in the complaint. The

facts in the case are very much disputed, but for the purpose of the motion the allegations of the complaint will be taken as true.

Claimant's right to recover is based upon the negligence of the servants and agents of the State in the maintenance of said State Route No. 90.

It is well settled by the decisions of this court that in the maintenance of its hard-surfaced roads the State is acting in a governmental capacity. *Chumbler* vs. *State*, 6 C. C. R. 138; *Stoddard et al.* vs. *State*, 6 C. C. R. 27; *Bucholz et al.* vs. *State*, 7 C. C. R. 241.

It is also the well-settled law of this State that the State is not liable for the negligence of its servants and agents while in the exercise of any of its governmental functions. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Morrisey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs. *State*, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77.

Under the settled law of this State the motion to dismiss will have to be sustained.

Motion sustained.

(No. 1949—Claim denied.)

PETER TROMPETER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

JONES & HEFLIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee—State not liable for.* While individuals and private corporations are liable for damages caused by the negligence of their employees and agents, the rule does not apply to the State nor to sub-divisions of it created for governmental purposes, the rule of *respondeat superior* not being applicable to them.

SAME—*same—remedy for.* Where one suffers damages as the result of the negligence of an employee of the State he has his remedy against said employee in courts of general jurisdiction.

SAME—*claim for on grounds of equity and good conscience.* If a claimant cannot point to any law giving him the right to an award he cannot invoke the principle of equity to secure one.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed July 15, 1932, and is supported by a Bill of Particulars, setting forth damages to the automobile of plaintiff in the sum of Twenty-six Hundred Sixty-five Dollars ($2,665.00). The declaration alleges that claimant was the owner of a Cadillac twelve cylinder sedan, and on the 10th day of December, 1931, was driving in a westerly direction on State Bond Issue Route No. 69 near the intersection of State Bond Issue Route No. 23 in LaSalle County; that an employee of the State of Illinois, then in the scope of his employment, was operating and driving an automobile truck in a northerly direction along Route No. 23 and that the latter drove in and upon Route No. 69 without regard to a stop sign, and while claimant was in the exercise of ordinary care for his own safety, that through the carelessness and negligence of the driver of said truck, the claimant and his automobile were forced off the highway and damaged in the amount of $2,665.00. The declaration consists of seven counts, all alleging the careless and negligent action of respondent through its agent; special negligence being alleged in the failure to observe the stop sign at the entrance to Route No. 69, driving to the right of the center of Route No. 69 and across the pathway of the automobile of claimant and driving without lighted lamps in accordance with the Statutes in such cases made and provided. A motion to amend the declaration, together with the proposed amendment, was filed April 27, 1934, whereby the claimant asked leave to make the "Firemen's Insurance Company, a corporation," an additional party claimant, and inserting in said declaration the fact that under the insurance carried by claimant, Peter Trompeter, with the Firemen's Insurance Company, the latter had paid to said Peter Trompeter the sum of Twenty-six Hundred Sixty-five Dollars ($2,665.00), for damages incurred by him in said accident, and asking that in case of an award that such award, if any, made by this court would be decreed to be paid to the Firemen's Insurance Company up to the amount of the said sum of $2,665.00, and praying further that this court would determine and fix whatever just compensation and damage claimants are entitled to as a result of the alleged negligent and careless driving of the automobile truck in question by the agent of respondent.

Following the filing of the record and abstract of evidence, the Attorney General filed his motion to dismiss the claim, for the reason that no legal liability is shown to exist upon the part of respondent for the negligent and careless action of its employee. Citations contained in claimant's brief correctly set forth the rule pertaining to the liability of private individuals in cases of this character, but the Attorney General, in objecting to the allowance of such claim, relies upon the rule that the State is not liable for damages caused by the negligence of its employees and agents. The claimants in the citation of additional authorities, indicate that they believe an award should be made regardless of the rule of *respondeat superior.*

While individuals and private corporations are liable for damages caused by the negligence of their employees and agents, the rule does not apply to the State nor to sub-divisions of the State created for governmental purposes. The State does not undertake to guarantee to anyone that its employees will be competent or careful or free from negligence in the performance of their duties, as that would involve the State in endless difficulties and losses which would be subversive to the public interests.

Minear vs. *State Board of Agriculture,* 259 Ill. 549.
Hollenbeck vs. *County of Winnebago,* 95 Ill. 148.

The claimants in their original statement, brief and argument base their contention and claim purely upon legal rights and upon the negligence of the employee of the State. Additional authorities cited by claimants indicate that they would base their right upon the so-called Doctrine of Equity and Social Justice. This court recently held, in the case of *Crabtree* vs. *State,* 7 C. C. R. 207,

"that when the Legislature created this court and clothed it with power to hear claims against the State, we do not think it thereby intended to waive the right of the State to interpose any legal or equitable defense it might have to the demands of claimant."

The case of *Murdock Grate Co.* vs. *Commonwealth,* a Massachusetts case, was referred to in the Crabtree case, wherein the court said,

"The Act * * * 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."

Further,

"Before a claimant can have an award against the State, he must show he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award, he cannot invoke the principle of equity to secure the award."

In passing upon the motion of respondent to dismiss, the court recognizes the meritorious nature of the claim presented, but being limited to a consideration of the rights involved from the standpoint of the legal liability of the State, this court is of the opinion that the motion to dismiss should be allowed.

It appears that the original claimant, Peter Trompeter, has been reimbursed by the company with which he carried insurance, for the major part of the value of the car at the time of the accident. Claimants are not without a remedy. If, as they allege, their injuries were caused by the negligence of the State employee, Mr. Oeft, while claimant Trompeter was in the exercise of due care (upon which questions we express no opinion), claimant can bring proper actions against him in a court of general jurisdiction and have their damages determined. The claim is denied and case dismissed.

(No. 1882—Claim denied.)

ALMER WOLF ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 21, 1934.

JOHN M. STAGER, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*overflow of water causing—when State not liable for.* Where claim is for damages to stock and grain from overflow of water alleged to have been caused by failure of State in constructing hard road, to provide culverts to admit passage of flood waters thereunder, an award will be denied as the State in building and maintaining of public highways exercises a public function and is not liable for damages caused by a defect in the construction thereof.

SAME—*pleading—evidence.* The cause of action set out in the declaration must be supported by proof.

BRIDGES AND CULVERTS—*ordinary care in constructing.* Where State exercises ordinary care in the construction of bridges and culverts over water courses on private land and is not otherwise guilty of negligence there is no

liability for damages occasioned an adjacent proprietor by extraordinary and unforeseen floods choking or washing out the channel of the stream.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein asks an award of $875.00 for damages claimed to have been occasioned by flood waters, resulting in loss and damage to stock and grain on the farm owned by the Henry Wolf estate on which claimant was a tenant. The Declaration filed herein avers that the loss occurred on October 11, 1931, and was due to the fact that when the embankment for laying the slab on Route 40 in the North West Quarter of Section 4, Township 21, N. R. 7 East of the 4th P. M. in Whiteside County, Illinois, was built, that same was constructed without culverts to admit the passage of flood waters under said highway; that a pond or lake was thereby created, resulting in the damages stated.

The Attorney General's office has filed a motion on behalf of respondent to dismiss the claim.

There is no sufficient averment in the Declaration to legally justify an award, and the motion to dismiss should be allowed. While the damage is charged to be the result of flood waters, there is no charge in the Declaration of any legal neglect or negligence on the part of the State that could warrant a claim against it.

However, as the evidence has all been taken, the case can be disposed of on its merits, under the evidence as submitted.

An examination of the evidence and the record discloses that when Route 40 was built, the embankment on which the slab was laid was built to the west of the former roadway and was built to a grade which was considered high enough to prevent flood waters from rising above the surface of the highway, and was built two feet higher than the maximum high water mark of which any record could be obtained; that on the night of October 11, 1931, a cloudburst occurred and the water in the Elkhorn bottoms where the Wolf land laid rose higher than at any previous time; that even on the downstream side of the highway, it was approximately a foot higher than ever before, and that the latter could not have been affected in any way by the building of the road in question.

The record further discloses that the old bridge over Elkhorn Creek that existed before the construction work, had a

span of 77 feet and that the new bridge has three 60-foot spans; that Elkhorn Creek is a winding, twisting stream through the Wolf land and that the engineers in charge of the preliminary construction plans for the State, made additional offers and submitted plans to Henry Wolf, the then owner of the land, to avoid the future possibility of the flood waters of Elkhorn Creek piling up on the land back of the Wolf buildings. The record further discloses that approximately eight inches of rain fell in the area in question on the night of October 11, 1931, that the maximum high water record before the construction work was 158.0 which was considerably higher than the old highway, and which would be sufficient to make the entire Elkhorn bottom impassable in case of flood. The new pavement was built at elevation of 160, and the elevation of water on the upstream side on the night of the cloudburst, was approximately 161.2.

The court finds from the record that there is no proof that S. B. I. Route 40 was constructed in a negligent or improper manner in the section complained of; that the evidence conclusively shows proper construction throughout with sufficient and adequate drainage under conditions which might be ordinarily and reasonably expected; that the charge made in the complaint "That the embankment was built without culverts, etc.", is not supported by the evidence, but that the record discloses affirmatively that concrete culverts were constructed and that the new bridge offered a flow-opening almost two and one-half times greater than the former bridge.

Where it appears that the respondent has exercised ordinary care in the construction of bridges and culverts over water-courses on private land and is not otherwise guilty of negligence there is no liability for damages occasioned an adjacent proprietor by extraordinary and unforeseen floods choking or washing out the channel of the stream. *Peoria & P. U. R. Co.* vs. *Barton*, 38 Ill. App. 469; *Illinois Cent. R. R. Co.* vs. *Bethel*, 11 Ill. App. 17.

This court in many instances has held that respondent in building and maintaining a system of improved hard-surfaced highways acts in its sovereign capacity in carrying out a governmental function and cannot be held liable for the negligence of its officers or agents. *Morrissey* vs. *State*, 2 C. C. R. 254; *Dunning* vs. *State*, 5 C. C. R. 232; *Highland* vs. *State*, 6 C. C. R. 384; *Bucholz, Admr.* vs. *State*, 7 C. C. R. 241.

While the flood in question, no doubt, resulted in grave hardship and misfortune to claimant, there is no legal or equitable grounds upon which the State could be held to respond in damages, and the claim is therefore denied and case dismissed.

(No. 2082—Claimant awarded $1,234.60.)

JOE WHITE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 14, 1934.

ELDON L. MCLAUGHLIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*burden of proof in claims under.* The general rule of law that the burden is upon the plaintiff to prove his case by a preponderance or greater weight of the evidence, is applicable to claims under the Workmen's Compensation Act.

SAME—*what must be proven in claim under.* It is not sufficient for claimant to prove that he did not work, it must be shown that he was not able to work, as result of injury.

SAME—*claim for medical services rendered after hearing—award denied.* No award will be made for medical services rendered after hearing of claim for compensation.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his claim in the nature of a common law action on March 7, 1933 claiming One Thousand Three Hundred Twelve Dollars and Forty Cents ($1,312.40) by reason of an accident that occurred on November 17, 1932, while the claimant was engaged in the operation of a snow plow on State Aid Route No. 7, near Sidell, Illinois. The plow had proceeded over two railroad tracks and had crossed a bridge at the north edge of Sidell. About two blocks farther on and north of the C. & E. I. tracks, the plow caught a man-hole and threw claimant off.

It abundantly appears from the record that the claimant did receive an injury arising out of and in the course of his employment and that his superior officer had notice on the same day of the accident.

Dr. M. L. Hole, at Danville, Illinois, was called and testified that claimant had a contusion of the scalp, an abrasion across the left popliteal space; a strain of the posterior liga-

ments of the left knee; that the doctor had treated the claimant for those injuries continuously from that time, and was the only physician on that case. He further testified that claimant was still having trouble with the knee, and that there was some swelling with a loss of motion, and the doctor gave as his opinion that the posterior ligaments of the knee were pulled. X-ray pictures would be of little or no help in determining the extent of the injury. The doctor was asked, if in his opinion there would be a permanent disability, and he answered to the effect that there would be; that the disability would be to the left knee. He was then asked: "How much about, in your opinion would be the permanent loss of use of the left knee as a result of this injury?" There was an objection, and he answered: "I would say about fifty per cent of the use of his knee." We are forced to sustain this objection. It is for the court to determine the extent of an injury after being fully advised of all the facts and circumstances, and under the decisions, this kind of testimony is incompetent.

Outside of the testimony of the doctor, there is practically no evidence to aid the court in ascertaining the extent of this injury, and the amount of temporary total disability. It is, however, virtually conceded by the Attorney General that the claimant is entitled to Ten Dollars and Eighty Cents ($10.80) per week for eight weeks during temporary total disability, or the sum of Eighty-six Dollars and Forty Cents ($86.40); also the further sum of Ten Dollars and Eighty Cents ($10.80) per week for ninety-five weeks, or the sum of One Thousand Twenty-six Dollars ($1,026.00) for fifty per cent loss of the use of claimant's left leg.

Claimant was fifty-seven years of age at the time of the accident; married, but no children.

It appears from a letter dated March 31, 1933, written by Fred Tarrant, State Highway Engineer of Maintenance, that the claimant in this case did receive an injury arising out of and in the course of his employment; that he was carried on the payroll for one-half time from November 17 to January 7, and was paid a total amount of Seventy-nine Dollars and Eighty Cents ($79.80), but no doctor bills were paid.

Claimant was not taken to a hospital, and is not claiming any hospital bill or nurses bill. He did receive a severe injury.

The Attorney General probably reaches the figure eight weeks temporary total disability from the cross-examination of Mr. White, the claimant. He was asked: "How long after the accident was it before you could get around?" and he answered to the effect that it was in the neighborhood of about seven weeks.

It is the general rule of law, applicable to cases of this kind, as well as others, that the burden is upon the applicant to prove by the greater weight of the evidence, the injury complained of.

In the case of *Mt. Olive and Staunton Coal Co. vs. Industrial Commission*, 301 Ill. 521, it was held that it is not enough for the defendant in error to show that he did not work. It must also appear that he was not able to work.

The period of temporary total disability has been defined by our Supreme Court as the period of the healing process. Temporary, as distinguished from permanent disability is a condition that exists until an injured workman is as far restored as the permanent character of the injuries will permit. It has also been said that the period of temporary total incapacity is that period immediately after the accident during which the injured employee is totally incapacitated for work by the reason of illness attending the injury. It might be described as the period of healing process.

The claimant having the burden to prove the extent of the temporary disability and having failed to do so, we must accept the Attorney General's conclusions, that this disability only covered a period of eight weeks.

Under the Compensation Act, the employer is liable for medical, surgical and hospital services to the employee, and under the provisions of Paragraph (a) of Section 8 there is no limitation of time or amount of the medical, surgical and hospital services which the employer is required to furnish and they are limited only to that which is reasonably required to cure or relieve from the effects of the injury.

Dr. Hole testified that his services were reasonably worth the sum of Two Hundred Two Dollars ($202.00), and he filed an itemized statement which was introduced in evidence as claimant's exhibit 1. It consisted of one item of Five Dollars ($5.00) for first aid. He made eight calls upon the claimant in November, 1932, eleven calls in December, and two calls in the following January, making a total of

twenty-one calls. It is not contended that any bones were broken or any serious lacerations. The doctor also filed a claim for ten physiotherapy treatments in January; eleven in February; fourteen in March; thirteen in April; twelve in May and seven in June at Two Dollars ($2.00) apiece. Considering the nature of the injury, the slow process that nature requires to heal such an injury; further considering all that might be done by human agencies in cases of this kind, the testimony of the doctor is conclusive to the effect that the claimant received ample surgical attention. After the testimony was taken in this case, the doctor filed an affidavit increasing his bill to the sum of Two Hundred Sixty-eight Dollars ($268.00). It appears that at the time the testimony was taken, Dr. Hole had done all that he could for claimant. We, therefore, cannot allow the extra claim for medical services rendered after the hearing, and upon which the Attorney General had no opportunity to cross examine Dr. Hole.

We, therefore, recommend to the legislature that an appropriation be made in this case to the claimant for eight weeks temporary total disability at Ten Dollars and Eighty Cents ($10.80) per week, less the sum of Seventy-nine Dollars and Eighty Cents ($79.80) paid to the claimant, and in addition to that, the sum of One Thousand Twenty-six Dollars ($1,026.00) for fifty per cent (50%) loss of the use of the left leg, the same being for ninety-five (95) weeks at Ten Dollars and Eighty Cents ($10.80) per week, and the further sum of Two Hundred Two Dollars ($202.00) for medical care and attention, or a total sum of One Thousand Two Hundred Thirty-four Dollars and Sixty Cents ($1,234.60).

(No. 2339—Claimant awarded $18,076.80.)

FRED GRASSLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 5, 1934.

NOTE—The claimant and the Department of Public Works and Buildings were unable to agree upon the amount of damages to which claimant is entitled, and stipulated that the claim be submitted to this court for determination and that the award made by this court, if any, shall be paid by the Department of Public Works and Buildings and not by way of appropriation made by the Legislature, as in cases where awards are made under the Court of Claims Act.

PROPERTY DAMAGE—*construction of Illinois Waterway—measure of.* Where property of an abutting owner is not taken for public use, but is damaged by reason of construction of public improvement, he is entitled to compensation for the depreciation in the market value of the property as the result of the construction of said improvement, under the Constitution of Illinois of 1870, and the true measure of such damage is the difference between the fair cash market value of the property unaffected by said improvement and its fair cash market value as affected by it and benefits to land not taken may be set off against damages to lands not taken.

SAME—*same—loss of revenue not proper element.* Inconvenience or loss of business suffered by owners of abutting property during the progress of the work in the construction of a public improvement do not constitute damage to property not taken, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, without which such improvements can seldom be made, and therefore give no cause of action against the State.

SAME—*same—remodeling, etc., made necessary by—proper element of.* Where remodeling, repairing and altering of improvements on property not taken for public use are made necessary on account of a change in grade of street, due to construction of public improvement, same are proper elements in determining amount of damages to such property.

Per Curiam:

The claimant, Fred Grassle, who owns certain property in the city of Joliet, which immediately adjoins The Illinois Waterway, and who claims that such property has been damaged by the construction of such Waterway and the Cass Street Bridge over the same, filed his claim for damages with the Department of Public Works and Buildings, pursuant to the Statute of this State commonly known as The Illinois Waterway Act. The claimant and the Department of Public Works and Buildings were unable to agree upon the amount of damages to which claimant is entitled, and stipulated that the claim be submitted to this court for determination. It is stipulated and agreed that the award made by this court, if any, shall be paid by the Department of Public Works and Buildings and not by way of appropriation made by the legislature, as in cases where awards are made by this court under the Court of Claims Act.

The lot owned by the claimant is situated at the Northeast corner of the intersection of Western Avenue (called Cass Street east of the Waterway) and Bluff Street in the city of Joliet immediately west of the Waterway, which said lot has a frontage on Western Avenue of Eighty-five and two-tenths (85.2) feet and a frontage on Bluff Street of One hundred (100) feet. It is improved with a three-story brick

building and basement, erected in 1912. The basement is of concrete construction, and has a cement floor and built-in bakery oven which was used for the operation of a bakery until the latter part of 1929; the first floor contains four storerooms, all of which face on Western Avenue and are of approximately the same dimensions; the second and third floors each contain four five-room apartments.

Prior to the construction of The Illinois Waterway, the street grade on Western Avenue in front of the property in question was approximately level and the sidewalk and entrances to the stores on the first floor were approximately even with the then existing grade.

In the course of the construction of The Illinois Waterway through Joliet, the old bridge over the Illinois and Michigan Canal was removed and a new bridge over the Illinois Waterway was constructed, the west approach to which is on a seven per cent (7%) grade. Such grade commences at a point variously stated to be from seventeen (17) to twenty (20) feet east of the west property line, and the approach, as now constructed, is about five feet above the former sidewalk level at claimant's east property line.

Claimant relies upon the provisions of the Illinois Waterways Act and seeks to recover damages which he claims have resulted and will result to his property by reason of the construction and maintenance of The Illinois Waterway, including the Cass Street bridge over the same, and the work done in connection therewith. Claimant maintains that he is entitled to recover for the following elements of damage:

1. The loss of revenue from the time it was announced that the present grade was to be the permanent grade for the approach to the bridge, to-wit, from the summer of 1930, to date.

2. The difference in market value of the property before and after the completion of the Illinois Waterway Improvement.

3. The cost of remodeling and reconstructing the building on the property so as to conform to the new street grade.

It is not questioned that the claimant has sustained damages, and consequently the only question for this court to determine is the question as to the amount of damages to which the claimant is entitled.

The true measure of damages in cases of this kind, that is, for property damages by a public improvement, but not taken for public use, is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it. Benefits to land not taken may be set off against damages to lands not taken. Damages must be direct and proximate and not such as are merely speculative and remotely contingent. *Department of Public Works* vs. *McBride*, 338 Ill. 347, 352; *Department of Public Works* vs. *Caldwell*, 301 Ill. 232, 247.

The several elements of damage claimed, as above, will be considered in the order above set forth.

I.

Loss of Revenue From Summer of 1930 to Date.

With reference to this item, it has been repeatedly held by our Supreme Court that inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement, do not constitute damage to property not taken, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made and therefore give no cause of action against a municipality therefor. *Osgood* vs. *City of Chicago*, 154 Ill. 194; *Lefkovitz* vs. *City of Chicago*, 238 Ill. 23; *Chicago Flour Co.* vs. *City of Chicago*, 243 Ill. 218; *Peck* vs. *Chicago Railway Co.*, 270 Ill. 35, 40.

If such rule applies to a municipality, it must apply with equal force and effect to the State, and we therefore award no damages against the State as to the item claimed for loss of revenue.

II.

Depreciation in Market Value.

On the question as to the difference in the market value of the property prior to and subsequent to the construction of the Waterway, four witnesses testified on behalf of the claimant, one being the son-in-law of the claimant and the others being men who had had considerable experience in real estate values and appraisals in the City of Joliet.

As in most cases where similar questions are involved, there is a wide divergence in the views of the several witnesses. The witnesses for the claimant differed greatly from each other in their opinions as to value, and there was a wide difference between the average of the witnesses for the claimant and the average of the witnesses for the respondent.

After a careful consideration of all of the evidence, the court is of the opinion that the fair cash market value of the property just prior to the construction of The Illinois Waterway was $65,400.00; and that the fair cash value of such property after the construction of the improvement, and assuming that certain alterations which had been recommended by the architects for the respondent had been made, was $34,700.00.

The record shows that during the period of time in question, there was a decrease in rentals in the City of Joliet, of approximately forty per cent (40%), and during the same period a decrease in market value of real estate of approximately twenty-five (25) to thirty per cent (30%), which was attributable solely to economic conditions. Assuming that the value of the property prior to the making of the improvement was $65,400.00, and that there was a decrease in the market value of thirty per cent (30%) as the result of economic conditions, the value of the property at the present time, entirely disregarding the Waterway Improvement, would be $45,780.00. Assuming the present value of the property, after the making of the improvements suggested by the State architect, is $34,700.00, as above set forth, there is a loss in the amount of $11,080.00, which, in our opinion, represents the depreciation in the market value of the property as the result of the construction of the Illinois Waterway. The present valuation of $34,700.00 was based, however, upon the assumption that the alterations and repairs necessitated by construction of the Waterway had been made, and the cost of such alterations and repairs constitutes the third item of damages claimed.

III.

Cost of Remodeling and Reconstructing Building.

Mr. J. E. Coll, an architect, who testified on behalf of the claimant, estimated the total cost of making the alterations

and repairs necessitated by the change in grade of Western Avenue, in accordance with the drawing prepared by the State architect, as well as the cost of redecorating the interior of the entire building, and including also a ten per cent charge for overhead and supervision, and a ten per cent profit—at the sum of $9,610.34, and submitted a detailed and itemized statement of the several items thereof.

We feel, however, that the evidence does not justify a charge for redecorating the second and third floors of the building, and must therefore exclude from the estimate of Mr. Coll the item of $2,160.00 charged by him for decorating the second and third floors, and must also make the necessary adjustments on that account for overhead and supervision as well as profit. After making such deduction and making the necessary adjustments as aforesaid, we have the sum of $6,996.80 as the net cost of remodeling, repairing and decorating the building to the extent made necessary by the construction of the Waterway and the bridge over the same.

With reference to the claim now made to cover the cost of waterproofing the basement and tearing down and reconstructing the bakery, we further find that the evidence does not justify the charging of that expense to the State. No claim therefor is made in the complaint and the itemized statement prepared by the architect, J. E. Coll, who testified on behalf of claimant, which purports to cover all of the items of expense connected with the remodeling, altering and repairing of the building, contains no item whatsoever relating either to the waterproofing of the walls or the tearing down and reconstruction of the bakery. The bakery has been vacant since the Fall of 1929 and consequently it cannot be said that such vacancy resulted from the construction of the Waterway. Prior to the construction of the Waterway, there was no entrance direct from the bakery to either Western Avenue or Bluff Street, and consequently there is no interference with ingress to or egress from said basement from either of said streets as the result of the change of grade. The evidence discloses no reason aside from economic conditions, why such basement should not produce as much revenue at this time as it did prior to the construction of the Illinois Waterway, and consequently we award no damages for that item.

From the foregoing, therefore, we conclude that the claimant is entitled to recover the following items of damage to his property on account of the construction of the Illinois Waterway and the bridge over the same, to-wit:

1.	Depreciation in market value of the property, as above set forth	$11,080.00
2.	Cost of remodeling, altering, repairing and redecorating, as above set forth	6,996.80
	Total	$18,076.80

Award is therefore hereby made in favor of the claimant, Fred Grassle, and against the State of Illinois, for the sum of Eighteen Thousand Seventy-six Dollars and Eighty Cents ($18,076.80), payment to be made by the Department of Public Works and Buildings of the State of Illinois within fifteen (15) days from the entry of this order, in accordance with the stipulation heretofore filed herein.

(No. 2352—Claimant awarded $30.10.)

THE ALTON RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

WILLIAM L. PATTON AND SILAS H. STRAWN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FREIGHT CHARGES—*when award will be made for.* Where facts are undisputed that claimant rendered services to State in carrying freight on order of State Department, but that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks payment in the sum of Thirty and 10 100 Dollars ($30.10) for freight shipments furnished the respondent through the Division of Highways, during the month of May, 1933. For some reason the bills were not presented to the Department until December 22, 1933 and payment therefor was then refused because of the lapsing of appropriations of said Highway Department on Septem-

ber 30, 1933. There is no question raised between the parties as to the law or the facts and as it clearly appears that the service was rendered and that a legal obligation exists upon the part of the State for the payment of same, it is hereby ordered that an award be made in favor of claimant herein for the sum of Thirty and 10/100 Dollars ($30.10).

(No. 1890—Claimant awarded $5.00.)

W. G. ANDERSEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 18, 1934.

W. G. ANDERSEN, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MISTAKE OF FACT—*money paid under—award will be made.* Where the facts are undisputed that money for which claim is made was paid to State as the result of mutual mistake of fact award for refund will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein asks for an award in the sum of Five Dollars as a refund for over-payment through a mutual mistake of fact in connection with his application for a Broker's Certificate of Authority under date of February 29, 1932. From the statement made by the then Superintendent of Insurance of Illinois, it appears that due to the rush in the issuance of certificates, the fact that claimant was already licensed as a real estate broker was not noted. Payment was made in the sum of $10.00 for the Broker's Certificate of Authority in question, whereas $5.00 was the correct fee. The 1931 Act was amended in 1933 and the license would now be $10.00, but from the statement appearing in the record and the undisputed facts that the over-payment of $5.00 was made through a mutual mistake of fact, an award should, and will be made for such over-payment.

Commercial Nat'l. Bank & Trust Co., vs. *State*, 7 C. C. R. 122;
Bates Valve Bag Corp. vs. *State*, 7 C. C. R. 64;
Cairo Water Company vs. *State*, 7 C. C. R. 6.

Claim allowed and an award made in the sum of Five Dollars ($5.00).

(No. 1828—Claimant awarded $209.15.)

CHICAGO AND NORTHWESTERN RAILWAY COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

SAMUEL H. CADY AND NYE F. MOREHOUSE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

REIMBURSEMENT—*when award will be made for.* Where claimant in good faith, upon agreement with State Department and in compliance with order of Commerce Commission removed obstructions at grade crossing in connection with construction of State road, location of which was changed under court decision preventing State department from expending moneys in connection with location as originally planned, an award will be made for the amount expended in so doing.

MR. JUSTICE YANTIS delivered the opinion of the court:

There is no dispute of facts as to this claim. It appears that during June and July of 1927 complainant, in compliance with an order of the Illinois Commerce Commission, made at the instance of the Division of Highways, expended $209.15 in removing obstructions at a grade crossing in connection with S. B. I. Route No. 18. The location of the route was changed under a decision of the Supreme Court, and the Department of Public Works and Buildings was thereafter unable to expend any money in connection with the location as originally planned, and for that reason the said claim of $209.15 has remained unpaid. It appears from the record that the claim is correct and that the claimant was acting in good faith when the claim arose, and the work was done; that same is in pursuance of a legal agreement between the parties, and the claim should be paid.

Claim is allowed, and an award recommended in the sum of Two Hundred Nine and 15/100 Dollars ($209.15).

(No. 2089—Claim denied.)

SAM COSTELLO ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

ROBERT A. MEIER, JR., for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee—State not liable for.* The State is not liable for the negligence of its employees, the rule of *respondeat superior* not being applicable to it.

PLEADING—*rules of court—when claim will be dismissed under.* Where motion of respondent to dismiss claim is sustained and claimant fails to file amended complaint within time provided in rule 31 of this court final judgment will be entered dismissing the claim.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed March 15, 1933 and asks an award for damages in the sum of Fifty-seven and 03/100 Dollars ($57.03) by reason of a collision by a certain truck, belonging to the State of Illinois, and then and there operated by employees of the State in the Department of Public Works and Buildings, Division of Highways, with a truck then owned and operated by the claimant. The declaration alleges that on November 15, 1932, while claimant's servants were driving the said truck of claimant on State Bond Issue Route No. 7 near the City of Morris, Illinois, the said truck of respondent was so negligently and carelessly operated by the State employee in question that a collision occurred, resulting in damages and necessary repairs in the sum of $57.03.

The Attorney General has filed a motion to dismiss the claim for the reason that it is sought to recover damages caused by the alleged negligence of an employee of the State, i. e., the driver of the State truck; that there is no legal ground for liability against the State for damages so caused, and that the rule of *respondeat superior* does not apply.

From the files it appears that the State truck in question was equipped with a snow plow and was engaged, at the time, in plowing snow on S. B. I. Route No. 7; that the plow struck some slight obstruction and the truck skidded against the pavement and in so doing hit the truck of claimant. The courts have had occasion many times to consider the question of liability for damages in connection with the maintenance of its hard road system. Cases cited by the Attorney General are in point, and as is there stated:

"In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. Such has been the settled decision of this court for many years."

Bucholz, Admr. vs. *State*, 7 C. C. R. 241, 243.
Sapp vs. *State*, 7 C. C. R. 89.
Morrissey vs. *State*, 2 C. C. R. 454.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.

The rule of *respondeat superior* does not apply, and the court is of the opinion that the motion to dismiss should be allowed.

Motion to dismiss allowed.

(No. 1898—Claimant awarded $15.00.)

FOWLER MFG. CO., LTD., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

FOWLER MFG. CO., LTD., pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*payment of under mistake of fact—when award for made.* Where tax is paid under mutual mistake of fact award will be made for refund.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claim was filed pro se May 2, 1932 for $15.00, under an averment by claimant that it received a bill from the Secretary of State on May 15, 1930 for $15.00 franchise tax, which sum it paid on May 27, 1930, but at the same time notified the Secretary of State that it was surrendering its authority to transact business in Illinois; that the Secretary of State thereupon forwarded a blank form with instructions that if same was returned with One Dollar by June 25th, a refund of the $15.00 tax would be made. The claimant executed and returned the form on June 11, 1930, but that no refund has ever been made of the said sum of $15.00.

It is apparent that the payment of the franchise tax has been wrongfully retained by the State, as the Certificate of Withdrawal was filed prior to the time which such franchise tax would apply. Where payment of a franchise tax is made under a mutual mistake of fact, a refund will be made.

Commercial Nat'l. Bank & Trust Co. vs. *State*, 7 C. C. R. 122.

It is apparent from the record that the refund should have been made prior to July 1, 1930 and that claimant is

entitled to an award and such an award is therefore made in the sum of Fifteen Dollars ($15.00).

(No. 2240—Claimant awarded $111.40.)

A. C. McCLURG & COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

MUSGRAVE, OPPENHEIM, PRICE & EWINS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*overpayment—reduction of capitalization.* Where franchise tax is paid for taxable year on one capitalization and before such year begins, capitalization is reduced by amendment to charter, award may be made for difference between amount paid and amount which would have been due under capitalization as reduced by said amendment.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claim is herein made for the sum of $111.40 for erroneous payment of franchise tax. No disagreement of facts appear in the record. Claimant is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and under the provisions of the General Corporation Act filed its return in connection with the franchise tax to be paid to the State of Illinois for the year 1933 and received from the Secretary of State a statement in connection therewith showing that a franchise tax had been assessed against it upon a capitalization of $854,800.00, and that the tax assessed upon such valuation was $427.40. Claimant on the 22nd day of June, 1933 paid the Secretary of State the latter sum, but prior to said date, i. e., on June 21, 1933, the Secretary of State issued to claimant a corrected statement showing the franchise tax assessed against it for 1933 upon a capitalization of $632,000.00, with a tax assessed thereon in the sum of $316.00; that claimant's check of $427.40 was sent to the Secretary of State prior to the time claimant received the corrected statement issued by the Secretary of State; that the payment so made was deposited by the Secretary of State before receipt of notice from the claimant and before the latter could stop payment upon said

check. It further appears that the claimant, on June 30, 1933, requested a refund, but that due to the fact that the check had been already credited to the Secretary of State's office, no refund has been made by same. The Secretary of State's office has approved a stipulation in accordance with the above facts and for a refund of $111.40. It therefore appears that an over-payment of $111.40 has been made. Under the holdings that where a franchise tax has been paid for a taxable year on one capitalization and before such year begins the capitalization has been reduced by an amendment of its charter, an award may be made for the difference between the amount paid and the amount which would have been due under the amended charter, and an order for a refund of said amount should be made.

An award is therefore allowed in favor of claimant in the sum of One Hundred Eleven and 40/100 Dollars ($111.40).

(No. 2354—Claimant awarded $73.08.)

MOULDING-BROWNELL CORPORATION, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

ARTHUR J. HUGHES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for cost of.* Where facts are undisputed that State received and used supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, and proper department recommends payment, an award for amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claim is herein made for $73.08 for one car load of gravel furnished and delivered to the Illinois State Highway Department on June 19, 1931, as set forth in the Bill of Particulars. The bill was presented to the Department of Public Works and Buildings and claimant was thereupon advised that the appropriation under which same was purchased had lapsed. There seems to be no conflict of law or facts involved and the claim seems to have remained unpaid because

of the legislative appropriation out of which same might have been payable having lapsed.

The supplies having been sold, delivered and used by the State and the claim appearing legal, and an award having been recommended by the department to which such gravel was furnished, an award is therefore made in the sum of Seventy-three and 08/100 Dollars ($73.08).

(No. 2258—Claim denied.)

JAMES REID, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.
Rehearing denied February 13, 1935.

DAVID KRUEGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee—State not liable for.* The doctrine of *respondeat superior* is not applicable to the State and it is not liable to respond in damages for the negligence or carelessness of its employees or agents.

PLEADING—*proof.* The allegations of the complaint must be supported by competent evidence.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant alleges in his declaration that on August 4, 1933 his Pontiac sedan was parked along the curb on Fifteenth Avenue in Rockford, Illinois; that about 1:15 A. M. one James W. Taylor, as agent of respondent, was operating a National Guard military truck along said avenue. Claimant alleges that respondent, through its agent, was operating said motor vehicle in a negligent and reckless manner, wholly disregarding the safety of other people, and in the course thereof struck and collided with the motor vehicle of claimant while the latter was in the exercise of ordinary care for the safety of himself and his property, resulting in property damage to said car in the amount of $187.40. A stipulation has been entered into between the parties, agreeing upon the foregoing facts except as to the question of reckless and negligent driving upon the part of the military truck. A report from the Adjutant General's office, appearing in the files, discloses that the military truck was proceeding west-

ward on Fifteenth Avenue at the time in question, at a speed not to exceed twenty-eight miles per hour, and with proper lights; that a car approached from the west, swerving from one side of the street to the other, and that in attempting to avoid a crash with that car, Corporal Taylor, who was driving the military truck, swerved quickly to the right and in so doing ran into the back of plaintiff's car which was parked parallel to the curbing. A Military Board found that the responsibility for the accident laid with the reckless driver of the unknown car and that there was no evidence that the military truck was operated in a negligent or reckless manner or in disregard of the safety or property of others. Neither is there any evidence of any negligence or blame upon the part of claimant.

The claim herein is made upon the averment and presumption of negligence upon the part of the State through its employee. The proof does not support such averment.

Claimant assumes that the State is liable for all damages caused directly or indirectly by an employee of the State. Under the rule of respondeat superior, the State would not be legally liable in the case at bar, even had the driver of the military truck in question been guilty of carelessness and negligence, but in some instances this court, in cases of gross negligence upon the part of the State employee and an entire lack of contributory negligence upon the part of claimant, has made an award under the theory of equitable relief. We do not believe that such awards were properly allowed under the existing Statutes, but regardless of same there is no theory upon which this court could legally justify the making of an award to claimant in the case at bar.

Derby vs. *State*, 7 C. C. R. 145.

We recognize, however, that claimant was entirely without fault and has suffered damages in an amount about which there is no disagreement, and in denying an award herein we do so without prejudice to any other rights which claimant may see fit to pursue. Claim denied without prejudice.

(No. 2328—Claimant awarded $201.19.)

ROCK ISLAND SAND AND GRAVEL CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

HUBER & REIDY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made.* Where the facts are undisputed that the State received supplies, as ordered by it, and that bill therefor, which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award will be made, where claimant presents bill within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant represents that it is engaged in the business of procuring and selling sand, gravel and other building materials and that it furnished to the State of Illinois, through the Department of Purchases and Construction, certain building supplies duly itemized in the bill of particulars attached to said claim in various amounts totalling $201.19. The facts are admitted and from same it appears that the supplies in question were sold and delivered to the State but for some reason the bills therefor were not presented until after the appropriation, from which they might have been paid, had lapsed.

Where the facts are undisputed that the State has received supplies as ordered by it and that such supplies were legally bought by the State and that a bill therefor was not presented before the lapse of the appropriation out of which such payment could be made, and further that claimant has not permitted an unreasonable length of time to elapse in so failing to present the bill, an award for the amount due will be made by the Court of Claims.

Shell Petroleum Corp. vs. *State*, 7 C. C. R. 224.

The claim appearing to be legal and just, an award is therefore made for the payment of same in the sum of Two Hundred One and 19/100 Dollars ($201.19).

(No. 2236—Claimant awarded $67.36.)

SHELL PETROLEUM CORPORATION, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

CYRUS S. GENTRY AND W. W. YEAGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award made for.* Where it appears that supplies were ordered by State and received by it and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award will be made for amount due.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant asks an award for merchandise and supplies furnished to the State of Illinois during the period of April 8, 1931 to June 29, 1931 in the sum of $112.52. The bill was presented to the Anna State Hospital, to which the supplies were delivered, but was not paid because presented subsequent to the 30th day of September, 1931, when the appropriation, from which payment might have been made, had expired. It appears from the files that a credit of Forty-five and 16/100 Dollars ($45.16) should be made upon the invoices included in the account filed, and the State, through the Attorney General's Office, has stipulated that the sum of Sixty-seven and 36/100 Dollars ($67.36) is due and payable to claimant.

An award is therefore made in the sum of Sixty-seven and 36/100 Dollars ($67.36).

(No. 2182—Claim denied.)

JOHN SIGLER, ETC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

J. S. COOK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*pleading—when motion to dismiss for insufficiency of complaint will be sustained.* Where complaint for allowance of compensation under Workmen's Compensation Act fails to allege that the

employee was engaged in any of the occupations which come within any of the ten subdivisions of Section 3 of said Act or that the work in which said employee was engaged at the time of such injury was in fact extra-hazardous, motion to dismiss claim will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant, John Sigler, seeks to recover under the Workmen's Compensation Act for the death of a brother of claimant, i. e., one Robert Sigler, alleged to have occurred as the result of injuries sustained by the said Robert Sigler on the 27th day of January, A. D. 1933, while said employee was engaged in the discharge of his duties as an employee of the State of Illinois, to-wit: as a "Towpath Walker" in the maintenance of the Illinois and Michigan Canal. The complaint avers that on the day in question, while Robert Sigler was in and about his duties as a "Towpath Walker", and engaged in his duties as such, and while in the course of his employment was struck by a truck; that the towpath upon which he was walking at the time he was run over ran *between the cities of Seneca and Marseilles, Illinois;* that he died as a result of the accidental injuries sustained and that claimant was totally dependent upon the earnings of said Robert Sigler for his own maintenance and support. An award is asked for medical and hospital indebtedness incurred in the sum of Two Hundred and Fifty Dollars ($250.00) and Thirty-seven Hundred Fifty Dollars ($3,750.00) compensation.

The Attorney General has filed a motion to dismiss for the reason that the records (of the State of Illinois) show the alleged injury occurred elsewhere than on the property of respondent; that there is no allegation in the complaint as to what the deceased was in fact doing at the time of the alleged injury; that there is no averment in the declaration as to where the accident occurred and that the declaration contains no averment that the duties or occupation of the deceased were extra-hazardous or that same were in fact within the Workmen's Compensation Act. The claimant has filed a brief and argument in opposition to the motion to dismiss. In same he departs from the averments of his declaration, wherein it is stated "that the towpath upon which the said Robert Sigler was walking at the time he was run over and injured by said truck was the towpath running

between the cities of Seneca and Marseilles, Illinois", and in such reply brief state that "if injured at a time when he was about one hundred feet from the canal and walking from the interurban station to the towpath to start on his regular trip along the towpath" that he would still be entitled to compensation and that claimant herein would be entitled to an award under the theory that this case is one of the exceptions to the general rule that a person's employment does not begin until he reaches the place where he is to work.

In view of the fact that the declaration does not contain any allegation that would show that the employee was engaged in any of the occupations which would come within either of the ten sub-divisions of Section 3 of the Workmen's Compensation Act, and no averment that the work in which said employee was engaged was in fact extra-hazardous, the motion of the Attorney General will be sustained, and the other objections which are primarily matters of proof will not be considered in determining the motion.

Contrary to the contention of counsel for claimant under point III of his reply brief, the court is of the opinion that in order to bring an employee within the purview of the Workmen's Compensation Act, so that an award could be recommended (if otherwise justified under the pleadings and proof), the State in its employment of such employee must have been engaged in one of the enterprises or businesses enumerated in one of the ten sub-sections of said Section 3 of the Compensation Act or such business or enterprise must have been in fact extra-hazardous.

The motion to dismiss the complaint is allowed and under the rules claimant will have thirty (30) days within which to file such amendment as he may desire.

(No. 2340—Claimant awarded $199.46.)

THE TEXAS COMPANY, A DELAWARE CORP., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

JAMES T. NIELSON AND DOYLE, SAMPSON & GIFFIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where fact is undisputed that State received supplies, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claim is herein made for One Hundred Ninety-nine and 46/100 Dollars ($199.46) for merchandise set forth in the bill of particulars claimed to have been sold and delivered to the State of Illinois from January 1, 1933 to June 30, 1933, for which a bill was presented to the Department of Public Works and Buildings November 18, 1933. There seems to be no conflict of law or facts involved and the claim seems to have remained unpaid because of the legislative appropriation out of which same might have been payable lapsed on October 1, 1933.

The supplies having been sold, delivered and used by the State and the claim seeming to be legal in every respect and an award having been recommended by the department to which such supplies were furnished, an award is therefore made in the sum of One Hundred Ninety-nine and 46/100 Dollars ($199.46).

(No. 1632—Claimant awarded $6,877.76.)

UNION CENTRAL LIFE INSURANCE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1934.

BROWN, HAY & STEPHENS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FOREIGN CORPORATION—*privilege tax—overpayment made under mistake of fact may be recovered.* Where a privilege tax has been erroneously calculated by the taxing officer, amount overpaid as a result of such miscalculation will be considered as having been paid under mistake of fact and an award for same may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed August 6, 1930 and is for a refund of certain privilege taxes paid by claimant and including $2,739.26 for the year 1925, $4,009.81 for the year 1926, $6,003.21 for the year 1927 and $9,298.34 for the year 1928, a total of $22,050.62 alleged to have been paid as a tax on insurance premiums on policies written by claimant and re-insured by it, plaintiff claiming that such additional tax so charged on re-insurance premiums in excess of the maximum amount chargeable under the Ohio basis for the four years in question, amounted to $22,050.62; that in addition thereto was an item of $6,877.76 alleged to be due claimant as a refund of one-half of one per cent on $1,375,552.00, the amount of premiums collected in Illinois from January 1, 1927 to May 24, 1927, the complaint being that the Insurance Division of Illinois computed the amount of tax for said period at the rate of three per cent, instead of two and one-half per cent, which was a mistake of fact as to the foreign law.

Claimant was incorporated under the laws of the State of Ohio, and was licensed to do business in the State of Illinois. Under the provisions of Section 2 of the Act in relation to the taxation of non-resident corporations, it is provided that if the laws of another state require of insurance companies license fees on a rate which will produce amounts greater than would be produced under the regular provisions of Section 1 of said Act, etc., then such insurance companies shall be required to pay a tax in Illinois on the same basis as is imposed by the laws of that State upon similar insurance companies organized under the laws of Illinois. Immediately prior to May 24, 1927, the laws of Ohio required a payment of two and one-half per cent (2½%) of the balance of the gross amount after deducting return premiums, etc. On the above date, the Ohio law was amended to provide for a rate of three per cent (3%). The claim of plaintiff for a refund of $6,877.76 is made for the reason that the Insurance Division of the Department of Trade and Commerce of Illinois computed the amount of tax for the period from January 1, 1927 to May 24, 1927 at the rate of 3% under the theory that the amendment of May 24, 1927 was retroactive. Plaintiff avers that such construction or view by the said department was a mistake of fact as to the foreign

law and that it is entitled to a refund of one-half per cent on $1,375,552.00, being the amount of premiums collected in Illinois from January 1, 1927 to May 24th of that year.

As to the first portion of plaintiff's claim, i. e., the claim for refund of $22,050.62 for additional tax charged on reinsuring premiums, the court holds that the objection by the Attorney General is well founded. The Illinois Supreme Court, in the case of *Union Central Life Insurance Company* vs. *Lowe, Director, etc.*, 349 Ill. 464, refused to sustain this contention when raised by the Company in litigation relative to the tax for the years 1930 and 1931. This decision, as conceded by plaintiff, disposes of plaintiff's contentions as to the items contained in its claim of $22,050.62, and this portion of plaintiff's claim is therefore denied.

In regard to the remaining item of plaintiff's claim, i. e., that of $6,877.76 it appears that the tax was fixed by the Superintendent of Insurance of Illinois for the year from January 1, 1927 to December 31, 1927 under the provisions of Section 2 of the Act in question (Cahill Ill. Rev. Statutes, 1933, Chapter 73, Paragraph 80), using the Ohio rate because it was higher than the Illinois rate and making his calculation at 3% for the entire year under the belief that the Ohio Law, which became effective on May 24, 1927, was retroactive. Claimant paid the taxes assessed, which amounted to $104,599.26. Subsequently thereto, the Supreme Court of Ohio held that the amendment of May 24, 1927, changing the Ohio rate from 2½% to 3% was not retroactive and that 3% rate did not become effective until May 24, 1927. (*Safford* vs. *Met. Life Ins. Co.*, 119 Ohio State 332.) If the claimant had been taxed at 2½% from January 1, 1927 until May 24, 1927 and at 3% for the balance of the calendar year of 1927, its tax would have been $97,721.50, or a difference of $6,877.76, being the amount now claimed by plaintiff.

"When a franchise or privilege tax has been erroneously calculated by the taxing officer, recovery will be allowed for the amount illegally collected."

Holland Butter Co. vs. *State*, 6 C. C. R. 512.
Cairo Water Co. vs. *State*, 7 C. C. R. 6.
Liquid Carbonic Co. vs. *State*, 5 C. C. R. 390.

"The determination as to what is the foreign law is a question of fact and not of law."

Dearlove vs. *Edwards*, 166 Ill. 619.
Marshall vs. *Coleman*, 187 Ill. 556.

The court is not unmindful of the views expressed in the case of the *Ohio Casualty Ins. Co.* vs. *State*, 6 C. C. R. 504, and of other cases wherein a more strict view has been taken of the rights to an award and a recovery of franchise and privilege taxes, but regarding the facts herein as showing that the payment made was in truth made under a mistake of fact upon the part of the Insurance Department of the State, plaintiff seems to be entitled to a recovery. The court is aware of no theory upon which the allowance of interest could be made, and an award will therefore be allowed the plaintiff for the sum of $6,877.76.

(No. 2320—Claimant awarded $200.00.)

EDWARD M. ARMSTRONG, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

EDWARD M. ARMSTRONG, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where claimant sustains accidental injuries arising out of and in the course of his employment, while engaged in employment found to be extra-hazardous, an award for compensation will be made under provisions of the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 20th day of December, A. D. 1933, the claimant was employed by the respondent as a carpenter in the State Capitol Building. On that date he was working with a wood-working machine in a shop in the basement of the Capitol Building, and his hand came in contact with a rip saw and as a result thereof, he sustained injuries resulting in the permanent loss of seventy-five per cent (75%) of the use of the second finger of the left hand and the permanent loss of fifty per cent (50%) of the use of the third finger of the left hand. He also expended the sum of Seventy Dollars and Fifty Cents ($70.50) for physicians'

and hospital bills, and presents his claim in the amount of Two Hundred Dollars ($200.00) for compensation for the loss so sustained as well as for money advanced for physician's and hospital bills.

It appears that at the time of the accident in question, the claimant and respondent were operating under the terms and provisions of the Workmen's Compensation Act, and the claimant is therefore entitled to compensation under the terms and provisions of such Act, for the specific loss sustained by him, as well as for the money paid and advanced by him for physicians' and hospital bills. The amount so due him under the terms and provisions of the Compensation Act is in excess of the amount of his claim, and an award is therefore hereby entered in favor of the claimant for the amount claimed, to-wit, Two Hundred Dollars ($200.00).

(No. 2065—Claimant awarded $18.79.)

J. W. BUTLER PAPER COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

H. W. REIHER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award made for.* **Where facts are undisputed that State received supplies as ordered by it and that claim therefor was not filed before lapse of appropriation out of which it could be paid, an award will be made for amount due.**

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On February 1, 1933 claimant filed its complaint herein and seeks to recover the sum of Eighteen Dollars and Seventy-nine Cents ($18.79) for stationery and supplies furnished to the respondent under date of January 19, 1931. There was an ample balance in the proper appropriation when the stationery and supplies were ordered, but the appropriation had lapsed by the time this claim was filed, and consequently payment was refused by the department.

There is no question but what the merchandise in question was ordered by the respondent and delivered to it; nor is it contended that the prices charged are excessive. Award is therefore entered in favor of the claimant for the sum of Eighteen Dollars and Seventy-nine Cents ($18.79).

(No. 2362—Claimant awarded $8.33.)

L. C. HILL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

JOHN M. SULLIVAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MISTAKE OF FACT—*license fee paid under—may be recovered.* Where overpayment of license fee is made under mistake of fact, an award for amount so overpaid as result of such mistake will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of Eight Dollars and Thirty-three Cents ($8.33) on account of excess license fees which he claims to have paid to the respondent. It appears that on November 7, 1933 claimant sent a draft to the respondent in the amount of $33.33 as license fee for malt and vinous beverage license for the period ending June 30, 1934, under the impression that said date was the end of the license year. The license year, however, ended on April 30, 1934, and although the respondent retained the draft for $33.33, it sent claimant a receipt in the amount of $25.00 to cover his license fee for that period.

After receiving his license for the period ending April 30, 1934, and the receipt of the respondent in the amount of $25.00, claimant took the matter up with the Department of Finance, and asked for a refund of the overpayment. He was advised that it was impossible for such department to make such refund, as the Malt and Vinous Beverage Act did not provide any way for the making of refunds of this character, and was further advised to file a claim against the State with the Court of Claims.

The money having been paid to the respondent as the result of a mistake of fact, claimant is clearly entitled to the

return thereof. *Blomstrom* vs. *Dux*, 175 Ill. 435-439; *Firemen's Insurance Co.* vs. *State*, 2 C. C. R. 220; *Moorman Mfg. Co.* vs. *State*, No. 1886 (decided May, 1934).

Award is therefore hereby entered in favor of the claimant for the amount claimed, to-wit, Eight Dollars and Thirty-three Cents ($8.33).

(No. 2054—Claim denied.)

HAROLD HOULIHAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.
Rehearing denied November 13, 1934.

BARR & BARR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

The issues involved herein were discussed and decided in the case of *Kump* vs. *State*, No. 1881, *post*, and that decision controls herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed in this court January 19, 1933. Plaintiff alleges that on the 13th day of January, A. D. 1930 he was employed as a steam-fitter's helper by the State of Illinois, acting by and through the Division of Waterways of the Department of Purchases and Construction, and employed in connection with the construction of the Illinois deep waterway; that on the date in question, i. e., January 13, 1930, while engaged in construction work on said project, he fell into a hole about two feet deep and three feet in diameter, and was seriously injured by striking timbers which projected upward in said hole; that as a result of said injuries he suffered permanent disability, for which damages in the sum of Five Thousand Dollars ($5,000.00) are requested of the State; said employment being alleged to be a hazardous one within the meaning of the Workmen's Compensation Act.

Respondent, by the Attorney General, has filed a motion to dismiss the claim because the injury is alleged to have occurred January 13, 1930, and the claim was not filed until January 19, 1933, and that under Section 24 of the Workmen's Compensation Act a recovery is barred. The claim would be barred by said section and the holdings of this court,

as stated in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, unless the fact that the claimant was employed on the Illinois Waterway exempts him from the limitations set forth in Section 24 of the Workmen's Compensation Act.

Counsel for plaintiff have contended in their briefs in other cases of this character that the claim is filed under Section 25 of the Waterway Act, approved June 17, 1919 (Cahill's Revised Statutes, Chapter 19), and that none of the provisions of the Workmen's Compensation Act apply except those which prescribe the amount of compensation in the respective cases.

The court cannot concur in the further contention of plaintiff that the limitations of Section 24 of the Workmen's Compensation Act do not apply to this claim by reason of the fact that claimant was employed in the construction of the Illinois Waterway system and that by the terms of the later Act (Section 25, Paragraph 115, Chap. 19, Cahill's Illinois Revised Statutes, 1933), the Workmen's Compensation Act shall be referred to by the Court of Claims *only* for the purpose of ascertaining the amount of the award.

The Illinois Waterway Act was passed, and approved June 17, 1919. Prior to the time of its passage the legislature had already provided for the hearing of all claims by this court against the State of Illinois. By Section 23 of the Waterway Act, the liability of the State for damages to real estate or personal property by reason of the construction, maintenance or operation of the Illinois Waterway and its appurtenances was made specific. By Section 24 all claims for damages to property or persons other than employees of the State were made determinable by the Department of Public Works and Buildings. It was apparently the desire of the legislature to make clear its intention that claims for damages by employees engaged in the waterway project should be left in the forum of this court for determination. It is provided in said Section 25, that

"The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder."

There is nothing contained in the wording of said section or anywhere in the Waterway Act which indicates that the court in exercising such jurisdiction should give to employees of the Illinois Waterway any different consideration in regard to the requirements of notice and filing claim and

other provisions of the Workmen's Compensation Act than those applied to all other employees.

There is no conflict between the Court of Claims Act, the Workmen's Compensation Act and the Waterway Act, and the only question is as to whether there is any wording contained in said Section 25 of the Waterway Act which would indicate that a different rule should be applied by the Court of Claims in passing upon claims for compensation made thereunder than is applied to other claims.

The legislative act by which this court exists, provides that

"The Court of Claims shall hear and determine the liability of the State for accidental injuries or death * * * by *any* employee; further that such determination shall be made in accordance with the rules * * * of the Workmen's Compensation Act."

(Section 6 Court of Claims Act)

There is nothing in Section 25 of the Waterway Act that repeals, adds to or modifies this enactment. It is provided in Section 25 that,

"The amount of such liability shall be ascertained by the Court of Claims by reference to the provisions of * * * the Workmen's Compensation Act."

but one cannot read into that language any intent to repeal or modify the existing law under which the Court of Claims hears compensation cases.

It appears from the record herein that no claim for compensation was made within six months after the accident and that no application for compensation was filed in this court within one year after such accident. Under the provisions of the Waterway Act, this court is to find the amount due the claimant. The court finds that there is no amount due, because of a failure of the injured employee to bring himself within the classification for the allowance of an award, by reason of his failure to comply with the provisions of Section 24 of the Workmen's Compensation Act.

Motion to dismiss claim allowed.

JUSTICE HOLLERICH, dissenting:

I dissent for the reasons set forth in the case of *Joseph Kump* vs. *State of Illinois*, No. 1881.

C. N. HOLLERICH, Chief Justice.

(No. 2095—Claim denied.)

WILLIAM HUFF, ADMINISTRATOR OF THE ESTATE OF JANIE HUFF, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

A. L. WILLIAMS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MUNICIPAL CORPORATIONS—*police officers of—not agents of State.* Police officers of the City of Chicago are not agents of the State.

PERSONAL INJURY—*death—State not liable for when caused by negligence of policemen.* The State is not liable for the negligence of its servants and agents, nor for the negligence of employees of Municipal corporations.

SAME—*same—claim for on grounds of equity and good conscience denied.* An award on the grounds of equity and good conscience is not justified where claimant's intestate was killed by policemen employed by the City of Chicago while pursuing a criminal.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

William Huff, as administrator of the estate of Janie Huff, deceased, filed his complaint herein on March 25, 1933, seeking to recover damages for the pecuniary loss sustained by the husband and next of kin of said decedent by reason of her death, which occurred on September 25, 1931. On that date claimant's intestate was engaged in the performance of her domestic duties in the yard at the rear of her home in Chicago, when she was struck by a bullet fired by certain police officers of said city who, in the performance of their duties, were in pursuit of a thief in that vicinity.

Claimant alleges in substance that such police officers were then and there in the employ of the City of Chicago, a municipal corporation; that said City of Chicago was an agent of the State, whose duty it was to preserve the peace and tranquillity thereof; that by virtue of their offices and the laws of this State, such police officers were conservators of the peace; that they were in the performance of their duties when claimant's intestate was killed, and that her death was the result of the carelessness and negligence of such police officers; and claims that by reason of such facts the respondent is liable in this case for the pecuniary loss which the husband and next of kin of said decedent have sustained by reason of her death.

The Attorney General moves to dismiss the case for the following reasons:

1. Such police officers were in the employ of the City of Chicago, a municipal corporation capable of suing and being sued, and the State therefore is not liable for their acts.

2. The death of claimant's decedent occurred on September 25, 1931, and claim was not filed in this court until March 25, 1933, whereby the claim was barred by the provisions of Section two (2) of the Injuries Act of this State.

It is admitted that the police officers were appointed by and were agents of the City of Chicago. The State had no right to appoint them, had no control over their actions, and no right to discharge them. They were paid by the City of Chicago, and were in no sense agents of the State so as to bind the State by their acts in the performance of their duties, notwithstanding the fact that by virtue of their office, they were conservators of the peace of the State. There is no theory upon which the State can be held liable for their acts.

It has long been the rule in this State that a municipal corporation is not liable for the acts of its police officers in the performance of their duties. *Culver* vs. *City of Streator*, 130 Ill. 238; *Craig* vs. *City of Charleston*, 180 Ill. 154; *City of Chicago* vs. *Williams*, 182 Ill. 135-137.

In the cases cited, as well as numerous other cases in this State, our courts have uniformly held that a municipal corporation, in the exercise of its police powers, is not liable for the acts of its officers, even though in violation of the laws of the State and in excess of the legal powers of the city. The ground for such decision is that in the enforcement of its police regulations and in the promotion and preservation of the public and general welfare, a municipal corporation is exercising a governmental function, and in the exercise of such functions is not liable under the doctrine of *respondeat superior*.

The same rule applies with equal force to State officers. In this case there is no liability on the part of the State, because the police officers in question were the agents of the City of Chicago and not the agents of the State. However, even if they were agents of the State, the State would not be liable for their negligent acts which constitute the basis of this claim, for the reason that the State is not liable under the doc-

trine of *respondeat superior* for the negligence of its servants and agents.

It is suggested by the claimant that an award should be made on the ground of equity and good conscience.

The right of this court to make an award in any case on the ground of equity and good conscience was fully considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, as well as in the case of *Morrissey* vs. *State*, No. 2235, decided at the January term, 1934, of this court. In those cases, we held in substance that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

The same conclusion was reached by this court in numerous previous cases. See *Schmidt* vs. *State*, 1 C. C. R. 76; *Jorgenson* vs. *State*, 2 C. C. R. 134; *Ryan* vs. *State*, 4 C. C. R. 57; *Watkins* vs. *State*, 6 C. C. R. 172; *Mercer* vs. *State*, 6 C. C. R. 20; *Peterson* vs. *State*, 6 C. C. R. 77; *Perry* vs. *State*, 6 C. C. R. 81.

The claimant has not established a case wherein he would be entitled to redress against the State if it were suable, and consequently we have no authority to make an award. It therefore becomes unnecessary to consider the second point raised by the Attorney General.

IT IS THEREFORE ORDERED that an award be denied and the case dismissed.

(No. 1881—Claim denied.)

JOSEPH KUMP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.
Rehearing denied, November 13, 1934.

JAMES E. BURKE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS WATERWAY—*provisions of Workmen's Compensation Act applicable to employees of.* There is no conflict between Section 25 of the Waterway Act and the Workmen's Compensation Act or between the said Section 25 and the Court of Claims Act and no different rule will be applied in passing upon claims for compensation for accidental injuries made by employees of the Illinois Waterway and claims for compensation by other State employees.

CLAIM FOR COMPENSATION FOR ACCIDENTAL INJURIES BY EMPLOYEE OF ILLINOIS WATERWAY—*limitations.* Employees of the Illinois Waterway are not exempted from the limitations set out in Section 24 of the Workmen's Compensation Act and if such employee suffers injury arising out of and in the course of his employment and fails to make claim for compensation and file application for same within time provided in said section, court is without jurisdiction to make award.

WATERWAY ACT—*construction of Section 25 of.* The wording of Section 25 of the Waterway Act is not a grant or limitation pf a specific power to the exclusion of general powers, and the words, "the amount of such liability to be ascertained by reference to the provisions of the Act commonly called the Workmen's Compensation Act" as used therein, are a direction to the Court of Claims to refer to all of the provisions of Workmen's Compensation Act, determining what, if any amount is due in each particular case.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff filed his declaration with the Clerk of the Court of Claims on February 25, 1932, for injuries received on the 8th day of June, A. D. 1929, while employed by the State of Illinois as a carpenter in the Division of Waterways. The complaint avers that while so employed, he fell from a scaffold, breaking his right wrist in two places and that as a proximate result thereof he suffered total temporary incapacity from June 8, 1929, to August 12, 1929, and suffered a serious and permanent disfigurement to his right hand in this, that the right wrist of plaintiff is greatly enlarged and will remain so permanently. A Bill of Particulars attached to said claim asks "for one week of temporary total incapacity from work at $66.00 per week as provided in Act entitled 'Workmen's Compensation Act,' $20.00. For ninety per cent loss of right hand, $3,060.00." Claimant was married and had five children under the age of sixteen years. He was drawing wages of $12.00 per day on a five and one-half day week basis, making $66.00 per week. Under the Statutes in force at the time of the accident, the claimant, if compensation was awarded, would be allowed a maximum of $19.00 per week. The proof shows that claimant was employed under the Illinois Waterway Act and was injured in the course of his duties. Further

that he was paid $168.00 for the period from June 8, 1929, until August 12, 1929.

In his complaint, claimant asks relief because of "the serious and permanent disfigurement to his right hand," but the Bill of Particulars filed by him asks relief for "90% loss of use of right hand."

The Attorney General has filed a motion to dismiss the claim by reason of the fact that the complaint shows the injury to have occurred on June 8, 1929, and the declaration was not filed until February 25, 1932, and that under Section 24 of the Workmen's Compensation Act a recovery is therefore barred. Claimant in his reply brief contends that the fact that he was employed under the Illinois Waterway Act exempts him from the limitations set out in Section 24 of the Workmen's Compensation Act. Claimant cites Section 25 of the Waterway Act, which provides,

> "The State shall be liable for accidental injuries or death suffered by any employee arising out of and in the course of his employment, the amount of such liability to be ascertained by reference to the provisions of the Act commonly called 'The Workmen's Compensation Act'. The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder, and shall make and file its finding and determination in such case."

Claimant contends that by the wording of this section the Court of Claims should give consideration to and be guided by the Workmen's Compensation Act *only* in determining the amount of liability of the State, and that application of all other provisions of the Compensation Act are excluded from consideration by this court by reason of the fact that in said Section 25 of the Waterway Act the express charge is given to the Court of Claims to find "the amount of such liability".

Counsel for claimant contend "that the inclusion in a Statute of specific powers amounts to an exclusion of all other powers" and extend their brief upon that proposition. The court is of the opinion that the wording in Section 25 of the Waterway Act is not a grant or limitation of a specific power to the exclusion of general powers, and is of the further opinion that the words there used, to-wit: "The amount of such liability to be ascertained by reference to the provisions of the Act commonly called the Workmen's Compensation Act" are a direction to this court to refer to all of the provisions of the

Workmen's Compensation Act determining what, if any amount is due in each particular case.

The Illinois Waterway Act was passed and approved June 17, 1919. Prior to the time of its passage, the Legislature had already provided for the hearing of all claims by this court against the State of Illinois. By Section 24 of the Waterway Act, the liability of the State for damages to real estate and personal property incident to the operation of the Illinois Waterway and its appurtenances was placed within the forum of and made determinable by the Department of Public Works and Buildings. It was apparently the desire of the Legislature to make clear its intention that claims for damages by employees engaged in the waterway project should be left within the jurisdiction of the Court of Claims for determination. As stated in Section 25 of the Waterway Act,

"The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder."

There is nothing contained in the wording of said section or elsewhere in the Waterway Act which indicates that the Court of Claims, in exercising its jurisdiction, should give to employees of the Illinois Waterway any different consideration in regard to the requirements as to notice and filing of claim and other provisions of the Workmen's Compensation Act than those applied to all other employees of the State.

There is no conflict between Section 25 of the Waterway Act and the Workmen's Compensation Act or between the said Section 25 and the Court of Claims Act, and the court is of the opinion that no different rule should be applied by the Court of Claims in passing upon claims for compensation made by employees under the Waterway Act and claims for compensation by other State employees.

The legislative Act by which the Court of Claims exists provides that,

"The Court of Claims shall hear and determine the liability of the State for accidental injuries or death * * * by *any* employee: Further that such determination shall be made in accordance with the rules * * * of the Workmen's Compensation Act."

Section 6, Court of Claims Act.

There is nothing in Section 25 of the Waterway Act that repeals, adds to or modifies this enactment. Section 25 merely provides that,

"The amount of such liability shall be ascertained by the Court of Claims by reference to the *provisions* of * * * the Workmen's Compensation Act."

But one cannot read into that language any intent to repeal or modify the existing law under which the Court of Claims hears compensation cases, nor does the court feel justified in reading into the wording of said Act the word "*only*" as counsel for claimant insists should be done when he says that said Section 25 provides "that *only* the amount of such liability shall be ascertained by the court, etc".

As suggested by counsel for claimant, this court did hold in the Crabtree case (7 C. C. R. 207) that the particular enactment of the Compensation Act making specific limitations as to time for notice and filing of claims operated as against the general enactment of the Court of Claims Act in regard to five year limitations on general claims, but the court does not believe that the wording of Section 25 of the Waterway Act can be construed as in conflict with the Compensation Act or in conflict with the general powers of the Court of Claims in workmen's compensation cases. Under the theory advanced by counsel for claimant, no limitations of time of any kind would exist within which an employee engaged in Illinois Waterway construction work would be compelled to file his claim. Even the five year limitation prescribed by the Court of Claims Act would not apply and the claimant could file his claim irrespective of how many years had passed since the purported accident had occurred. The Court does not believe that such was the intention of the Legislature.

It appears from the record herein that no claim for compensation was made within six months after the accident and no application for compensation was filed within one year after such accident. Under the provisions of the Waterway Act, this court is to find the amount due the claimant by reference to the provisions of the Workmen's Compensation Act. The court finds that there is no amount due, by reason of the failure of claimant to comply with the provisions of Section 24 of the Workmen's Compensation Act in regard to filing his claim for compensation within one year after the accident in question. Claim dismissed.

CHIEF JUSTICE HOLLEMEN, dissenting:

I am not in accord with the majority opinion.

Section 23 of the Illinois Waterway Act provides as follows:

"The State *shall* * * * * * * *be liable* for all damages to *persons* caused by the construction, maintenance or operation of the "Illinois Waterway" and its appurtenances, such damages to persons who are employees to be ascertained, determined and fixed as provided in this Act."

Section 24 of such Act provides as follows:

"All claims for damages to persons (except to employees) and all claims for damages to property, real or personal, shall be ascertained, determined and fixed by the Department of Public Works and Buildings, and paid out of any moneys which shall from time to time be provided for the payment of such claims"; etc. etc.

Section 25 of such Act provides as follows:

"In case the Department of Public Works and Buildings shall construct such waterway or its appurtenances, or any part or parts thereof, by the direct employment of services, labor, materials and equipment, *the State shall be liable* for accidental injuries or death suffered by any employee arising out of and in the course of his employment, the *amount* of such liability to be ascertained by reference to the provisions of the Act commonly called the "Workmen's Compensation Act." The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder and shall make and file its findings and determination in each case."

Paragraph 6 of Section 6 of the Court of Claims Law provides that the Court of Claims shall have power "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment *by any employee* of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto."

The first question to be determined, therefore, is the question as to the manner in which these several statutory provisions shall be construed.

The aforementioned provision of the Court of Claims Law is a general provision relative to injuries sustained "by any employee of the State" and is a part of the Court of Claims Law in force July 1, 1917. The aforementioned provisions of the Waterways Act are special provisions which apply only to such State employees as come within the provisions of *such* Act, which was approved June 17, 1919. The rule of construction in such cases as laid down by our Supreme Court, is as follows:

"The rule is that where there is to be found in a statute a particular enactment, it is to be held operative as against the general provisions on the same subject either in the same Act or in the general laws relating thereto"; *Robbins vs. Lincoln Park Commrs.*, 332 Ill. 571.

In the case of *Handloffski vs. Chicago Traction Co.*, 274 Ill. 282, the Supreme Court (p. 286) said:

"It is a rule in the construction of statutes that 'where there is in the same Statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' Endlich on Interpretation of Statutes, Sec. 399; *Chicago and Northwestern Railway Co. vs. City of Chicago*, 148 Ill. 141."

The rule is also stated in 59 Corpus Juris, p. 1056, as follows:

"Where there is one Statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special Statute, or the one dealing with the common subject matter in a minute way, will prevail over the general Statute, unless it appears that the legislature intended to make the general Act controlling."

A similar question was considered by this court in the case of *Crabtree vs. State*, 7 C. C. R. 207. The question there involved was as to whether the 5-year Statute of Limitations provided by Section 10 of the Court of Claims should prevail over Section 24 of the Workmen's Compensation Act in a case under such Act. We there held that Section 10 of the Court of Claims Act was a general provision which by its terms applied to every claim against the State cognizable by the Court of Claims, whereas Section 24 of the Compensation Act applied only to claims against the State for accidental injuries or death suffered in the course of employment by an employee of the State; that Section 24 of the Compensation Act was a particular provision, which should prevail over the general provision contained in Section 10 of the Court of Claims Act. I feel that the same conclusion must be reached in this case, to-wit: that the provisions of the Waterways Act are special provisions, and so far as they are inconsistent with the general provisions of the Court of Claims

Act, including the Workmen's Compensation Act which by reference is included in the Court of Claims Act and made a part thereof, such special provisions must prevail.

Applying the law as above set forth to the case before us, leads to the following conclusions:

Paragraph 6 of Section 6 of the Court of Claims Act gives this court the power to "*hear and determine the liability* of the State for accidental injuries or death suffered * * * by any employee of the State", and further provides that such determination shall be made in accordance with the rules prescribed by the Workmen's Compensation Act. In cases which arise under the provisions of Paragraph 6, Section 6 of the Court of Claims Law, this court, in the first instance, must consider and determine the question as to whether there is a *liability* on the part of the State, and in the consideration and determination of such question this court must be governed by the provisions of the Workmen's Compensation Act; hence the previous decisions of this court in cases arising under Section 6 aforesaid, to the effect that unless there is a compliance with the requirements of Section 24 of the Workmen's Compensation Act, there is no liability on the part of the State.

Cases which arise under the Illinois Waterway Act, however, are governed by the special provisions of that Act, and stand upon an entirely different basis. Section 23 of such Act provides that "The State shall also be *liable* for all damages to persons caused by the construction, maintenance or operation of the Illinois Waterway," etc., and Section 25 of such Act provides that in case the Department of Public Works and Buildings shall construct such Waterway by the direct employment of labor, etc., "the State *shall be liable* for accidental injuries or death suffered by any employee arising out of and in the course of his employment," and further, "the *amount* of such liability to be ascertained by reference to the provisions of the Act commonly called the Workmen's Compensation Act."

In cases arising under the Illinois Waterway Act, where the Department of Public Works and Buildings is constructing the Waterway, by the direct employment of labor, as in this case, the State assumes liability for all accidental in-

juries or death suffered by any employee arising out of and in the course of his employment. In such cases the jurisdiction of the Court of Claims is limited to a determination of the question as to whether the injuries arose out of and in the course of the employment of the employee; if so, the State assumes liability therefor, and the court must then determine the amount of such liability under the provisions of the Workmen's Compensation Act.

In short, there is a material difference between the general employees of the State who come under the provisions of the Workmen's Compensation Act, and those employees of the State who come under the provisions of the Illinois Waterway Act.

In the case of the general employees of the State who claim to have sustained accidental injuries arising out of and in the course of their employment, the court must determine first whether there is a liability on the part of the State, and such determination must be made under the terms and provisions of the Workmen's Compensation Act. If there is such liability, then the court determines the amount thereof under the terms and provisions of such Act.

In the case of employees of the State who come under the Waterway Act, and who claim to have sustained accidental injuries arising out of and in the course of their employment, it is not necessary for this court to consider the question of the liability of the State, as such liability has been specifically assumed by Sections 23 and 25 of the Waterway Act. The only question to be determined in such cases is whether the injuries arose out of and in the course of the employment of the employee. If so, the State has assumed liability therefor, and the *amount* of such liability is then to be determined by the court under the terms and provisions of the Workmen's Compensation Act.

The majority of the court takes the position that no different rule should be applied in passing upon claims for compensation made by employees under the Waterways Act, and claims for compensation made by other State employees. It seems to me, however, that the Legislature recognized the dangerous character of the work to be done pursuant to the Waterways Act, and on account of the dangerous character of such work, decided that the State should assume liability

for all accidents occurring to any of the workmen where the Department of Public Works and Buildings is constructing the Waterway, provided the injury arose out of and in the course of the employment. The wisdom of making such a distinction may be questionable, but that matter is for the Legislature and not for this court. The Legislature having provided that the State shall be liable for accidental injuries or death suffered by any employee arising out of and in the course of his employment, I feel that this court is bound by such provision at law.

The majority opinion also takes the position that unless the provisions of Section 24 of the Compensation Act shall control, there is no limitation of time whatever within which an employee engaged under the Waterways Act would be compelled to file his claim, and that the 5-year Statute of Limitations prescribed by the Court of Claims Act would not apply. I cannot agree with that conclusion. Section 10 of the Court of Claims Act provides that "Every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues," etc. This provision, I maintain, applies to every case cognizable by the Court of Claims, unless and until the Legislature provides otherwise. We have heretofore held that the Legislature has provided otherwise as to Workmen's Compensation cases (*Crabtree* vs. *State*), and I contend that as to all cases other than Workmen's Compensation cases, the general terms of Section 10 will continue to apply unless and until otherwise provided by legislative enactment.

In this case there is no question but what the claimant sustained accidental injuries arising out of and in the course of his employment in connection with the construction of the Illinois Waterway by the Department of Public Works and Buildings, and I am therefore of the opinion that he is entitled to be compensated therefor under the terms and provisions of the Workmen's Compensation Act.

The majority having decided, however, that the case must be dismissed, it would be useless to make a computation of the amount which, in my judgment, the claimant is entitled to receive.

(No. 2381—Claimant awarded $44.62.)

LAKE STREET MEMORIAL PARK, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

McQUEEN, CHURCHILL & GROMER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FEES—*excess, paid under mistake of fact—may be recovered.* Where fees are paid in excess of amount lawfully due, under mistake of fact, an award for such excess will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of Forty-four Dollars and Sixty-two Cents ($44.62) on account of excess fees paid to the respondent under the terms and provisions of the Securities Law of this State.

It appears that on November 24, 1933, the claimant submitted a statement under the Illinois Securities Law to qualify 1,600 shares of its preferred stock of the par value of One Hundred Dollars ($100.00) per share, and 1,600 shares of its common stock of the par value of Five Dollars ($5.00) per share for sale at those prices as Class D securities. The statutory fee for such amount of securities, to-wit, $168,000.00, was $84.00, which amount was paid by the claimant in the State treasury as required by Section twenty-six (26) of the Securities Act. Thereafter an appraiser was selected to appraise the properties of the corporation as provided by the Securities Law, and he appraised the same at a lower valuation than had been given by the claimant. The claimant thereupon submitted an amended statement which sought to qualify 750 shares of preferred stock of the par value of $100.00 per share and 750 shares of common stock of the par value of $5.00 per share. The statutory fee for such amount of securities, to-wit, $78,750.00, was Thirty-nine Dollars and Eighty-three Cents ($39.83).

Claimant having paid Eighty-four Dollars ($84.00) under its original statement, whereas, under its amended statement

it was only required to pay Thirty-nine Dollars and Eighty-three Cents ($39.83), it is clearly entitled to a return of the excess fees paid, to-wit, Forty-four Dollars and Sixty-two Cents ($44.62), same having been paid under a mistake of fact. 48 Corpus Juris 759; 21 R. C. L. 164; *Firemen's Insurance Co.* vs. *State*, 2 C. C. R. 220; *Moorman Mfg. Co.* vs. *State*, No. 1886 (decided May, 1934).

Award is therefore hereby entered in favor of the claimant for the sum of Forty-four Dollars and Sixty-two Cents ($44.62).

(No. 2030—Claim denied.)

EMIL LANGER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.
Rehearing denied November 13, 1934.

BARR & BARR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

The issues involved herein were discussed and decided in the case of *Kump* vs. *State*, No. 1881, *ante*, and the decision is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff, on December 19, 1932, filed his claim for injuries received while employed as an engineer on September 11, 1929. The declaration alleges that claimant was working in the Division of Waterways in the construction of the Illinois deep waterway at the lock and dam at Brandon Road, near Joliet, Illinois; that while operating a motor or engine which drove a conveyor, it was necessary for claimant to walk back and forth on an elevated platform; that the platform fell, causing claimant to drop a distance of approximately twelve feet, whereby he was injured; that said employment was a hazardous one within the meaning of the Workmen's Compensation Act and that the injury sustained by him constituted a permanent, partial disability within the meaning of the Compensation Act and *arose out of* and in the *course* of his employment as an engineer employed by the State in the Division of Waterways of the Department of Purchases and Construction; for which injuries claimant asks an award of Ten Thousand Dollars ($10,000.00) from the State.

A motion to dismiss the claim has been filed by the Attorney General, because the declaration shows that the injury occurred September 11, 1929, and the claim was not filed until December 19, 1932, and because such claim is therefore barred under the provisions of Section 24 of the Workmen's Compensation Act and the holdings of this court, as expressed in *Crabtree* vs. *State*, 7 C. C. R., 207. Claimant, in his reply brief, contends that the fact that the claimant was employed on the Illinois Waterway exempts him from the limitations expressed in said Section 24. Counsel for claimant, in their reply brief, quote Section 23 of the Waterway Act, wherein it is said that,

"Such damages to persons who are employees to be ascertained, determined and fixed *as provided in this Act*."

But Section 25 of the Waterway Act provides that,

"The State shall be liable for accidental injuries or death suffered by any employee arising out of and in the course of his employment, the amount of such liability to be ascertained by reference to the provisions of the Act commonly called 'The Workmen's Compensation Act'. The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder and shall make and file its finding and determination in each case."

While the Waterway Act, in Section 23, states that the damages are to be ascertained, determined and fixed as provided in such Act, no provisions are made by which such ascertainment or determination is to be arrived at, except by the reference to the Workmen's Compensation Act and the Court of Claims Act as found in Section 25 of the Waterway Act.

The court cannot concur in the further contention of plaintiff that the limitations of Section 24 of the Workmen's Compensation Act do not apply to this claim by reason of the fact that claimant was employed in the construction of the Illinois Waterway system and that by the terms of the later Act (Section 25, Paragraph 115, Chap. 19, Cahill's Illinois Revised Statutes, 1933), that the Workmen's Compensation Act shall be referred to by the Court of Claims *only* for the purpose of ascertaining the amount of the award.

The Illinois Waterway Act was passed, and approved June 17, 1919. Prior to the time of its passage the Legislature had already provided for the hearing of all claims by this

court against the State of Illinois. By Section 23 of the Waterway Act, the liability of the State for damages to real estate or personal property by reason of the construction, maintenance or operation of the Illinois Waterway and its appurtenances was made specific. By Section 24 all claims for damages to property or persons other than employees of the State were made determinable by the Department of Public Works and Buildings. It was apparently the desire of the Legislature to make clear its intention that claims for damages by employees engaged in the waterway project should be left in the forum of this court for determination. As above stated, it is provided in said Section 25, that

"The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder."

There is nothing contained in the wording of said section or anywhere in the Waterway Act which indicates that the court in exercising such jurisdiction should give to employees of the Illinois Waterway any different consideration in regard to the requirements of notice and filing claim and other provisions of the Workmen's Compensation Act than those applied to all other employees.

There is no conflict between the Court of Claims Act, the Workmen's Compensation Act and the Waterway Act, and the only question is as to whether there is any wording contained in said Section 25 of the Waterway Act which would indicate that a different rule should be applied by the Court of Claims in passing upon claims for compensation made thereunder than is applied to other claims for compensation by other injured State employees.

The legislative Act by which this court exists, provides that

"The Court of Claims shall hear and determine the liability of the State for accidental injuries or death * * * by *any* employee; further that such determination shall be made in accordance with the rules * * * of the Workmen's Compensation Act."

Section 6 Court of Claims Act.

There is nothing in Section 25 of the Waterway Act that repeals, adds to or modifies this enactment. It is provided in Section 25 that,

"The amount of such liability shall be ascertained by the Court of Claims by reference to the provisions of * * * the Workmen's Compensation Act."

but one cannot read into that language any intent to repeal or modify the existing law under which the Court of Claims hears compensation cases.

As there are no limitations provided for in the Waterway Act, except by reference to the Workmen's Compensation Act and the Court of Claims Act, there would be, under the theory advanced by counsel for claimant, no limitations of time of any kind within which an employee engaged in the Illinois Waterway construction work should be filed. Even the five year limitation prescribed by the Court of Claims rules would not apply and such claimant could file his claim irrespective of how many years had passed since the purported accident occurred. The court cannot approve such a construction of the several Acts.

It appears from the record herein that no claim for compensation was made within six months after the accident and that no application for compensation was filed in this court within one year after such accident. Under the provisions of the Waterway Act, this court is to find the amount due the claimant. The court finds that there is no amount due, because of a failure of the injured employee to bring himself within the classification for the allowance of an award, by reason of his failure to comply with the provisions of Section 24 of the Workmen's Compensation Act.

Motion to dismiss allowed.

JUSTICE HOLLERICH, dissenting:

I dissent for the reasons set forth in *Kump* vs. *State*, No. 1881, *ante*.

C. N. HOLLERICH, Chief Justice.

(No. 2053—Claim denied.)

ROY PAGE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.
Rehearing denied November 13, 1934.

BARR & BARR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

The issues involved herein were discussed and decided in the cases of *Langer* vs. *State*, No. 2030, *ante* and *Vail* vs. *State*, No. 2033, *post*, and those decisions are controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed on January 19, 1933, and alleges that on the 10th day of November, A. D. 1928, the claimant was employed as a carpenter by the State of Illinois, acting by and through the Division of Waterways of the Department of Purchases and Construction in connection with the construction of the Illinois deep waterway; that on said date of November 10, 1928, while engaged in the course of his occupation and employment, he struck his left knee upon one or more iron braces used in the form building of said construction work; that as a result of said injury, he suffered loss of earnings; that said employment was a hazardous one within the meaning of the Workmen's Compensation Act; that said injury arose out of and in the course of his employment in the Division of Waterways, and for which injuries he asks an award in the sum of Two Thousand Dollars ($2,000.00).

The Attorney General has filed his motion to dismiss the claim for want of jurisdiction and for the reason that it does not appear from the records that claimant has complied with the terms of Section 24 of the Workmen's Compensation Act, in that no claim or demand appears to have been made upon respondent by claimant within six months after the date of the accident and that no application for compensation was filed herein within one year after the date of said injury or within one year after the date of the last payment made by respondent to claimant on account of such injury.

Under the pleadings herein and the proof contained in the record, it is apparent that the objections raised by the Attorney General are well founded. The court is of the opinion that the determination of the claim is governed by the provisions of the Workmen's Compensation Act, and that the Waterway Act is not in conflict therewith and does not remove any of the requirements incident to claims by employees of the State. This claim is analogous to that of *Vail* vs. *the State*, C. C. R. No. 2033 and *Langer* vs. *the State*, C. C. R. No. 2030. For further expression by the court, reference to those cases is hereby made. The motion of the At-

torney General to dismiss is granted and the case is dismissed.

I dissent for the reason set forth in the case of *Joseph Kump vs. State of Illinois*, No. 1881.

C. N. HOLLERICH, Chief Justice.

(No. 2076—Claim denied.)

MARY PALUMBO, ADMINISTRATRIX OF THE ESTATE OF CARMINE CAMPAGNIE, ALSO KNOWN AS CARMELO CAMPAGNIE, Deceased, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

DAWSON, DAWSON & SCHNEBERGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RESEARCH AND EDUCATIONAL HOSPITAL—*conduct of governmental function—negligence of employee causing death of patient—State not liable for.* The Research and Educational Hospital is a charitable institution and in the conduct thereof the State exercises a governmental function and is not liable for the death of a patient, who it is alleged died as the result of a surgical operation performed therein by agents of the State, and claimed to have been unnecessary and for the purpose of increasing their knowledge and without regard for welfare of patient. *Jones vs. State*, No. 1787, *ante*, followed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Mary Palumbo, as administratrix of the estate of Carmine Campagnie, also known as Carmelo Campagna, deceased, filed her complaint herein on February 23, 1933, seeking to recover damages for the pecuniary loss sustained by the widow and next of kin of said decedent, by reason of his death, which, it is alleged, resulted from the negligent and wrongful acts of certain officers and agents of the respondent.

The complaint alleges in substance that on February 16, 1932, claimant's decedent became a patient at the Illinois Research and Educational Hospital at 1819 West Polk Street, Chicago; that on March 4, 1932, the respondent, through its physicians and employees at said hospital, performed a surgical operation upon said decedent; that said operation was unnecessary and was performed by such physicians and em-

ployees "through their desire to increase their own knowledge of kidney diseases rather than from a just and proper regard for the welfare and rights of said patient;" that said operation was performed without securing the consent of said patient, or of his wife or children; that said patient died as the immediate effect of the operation, and that his widow and minor children have sustained a pecuniary loss on account of his death in the amount of Ten Thousand Dollars ($10,000.00).

The Attorney General has moved to dismiss the case, for the reason that the State in the conduct and operation of institutions such as the Research and Educational Hospital is engaged in the exercise of a governmental function, and therefore is not liable for the negligence of any of its employees or agents in connection therewith.

A similar question was presented in the case of *Lillie Bell Jones* vs. *State*, No. 1787, recently decided by this court. In that case the claimant alleged that she had sustained serious and permanent injuries as the result of a tonsillectomy performed on her at a time when she was a patient at the Illinois Eye and Ear Infirmary, a State charitable institution located at Chicago. She claimed that the operation was performed by an interne, that it was performed negligently, and unskilfully, and that as the result thereof she sustained serious and permanent injuries. The authorities on the question were carefully considered and the court there held that in the conduct and operation of such institution the State was engaged in the exercise of a governmental function, and therefore was not liable for the negligence of its servants and agents in connection therewith.

The case was carefully considered and numerous authorities were cited in support of the conclusion there reached, among which were the following: *Tollefson* vs. *City of Ottawa*, 228 Ill. 134; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; 13 R. C. L. 944, Section 8.

In that case it was also pointed out that even if the institution had been operated by a private corporation, under the law as laid down in the cases of *Parks* vs. *Northwestern University*, 218 Ill. 381; *Hogan* vs. *Chicago Lying-in Hospital*, 335 Ill. 42; and *Simon* vs. *Pelouse*, 263 Ill. App. 177; there would be no liability on the part of the corporation for the negligent acts of its servants and agents.

From the allegations contained in the complaint, it appears that the Research and Educational Hospital belongs to the same general class of institutions as the Illinois Eye and Ear Infirmary, and what we said in the Lillie Bell Jones case applies with equal force to this case.

This being a case in which there would be no legal liability on the part of the State if the State were suable, we have no authority to enter an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January Term, 1934, of this court.

The motion of the Attorney General must therefore be sustained and the case dismissed.

(No. 2348—Claimant awarded $159.95.)

PHILLIPS PETROLEUM COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

CECIL HUNT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where it appears that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

SAME—*interest—when claim for denied.* Where failure to receive payment for supplies sold State is due to negligence of claimant in failing to present bill before lapse of appropriation out of which it could be paid, no liability exists on the part of the State for interest.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of One Hundred Fifty-nine Dollars and Ninety-five Cents ($159.95), together with interest thereon from October 1, 1933, at the rate of six per cent (6%) per annum, for gasoline and oil sold and delivered by it to the respondent during the period from July 6, 1932, to July 1, 1933, pursuant to the terms of a contract in writing dated the 6th day of July, A. D. 1932.

The claim was presented for payment to the Division of Highways on October 1, 1933, but payment was refused on

account of the fact that the appropriation had lapsed on September 30, 1933.

It appears from the report of Mr. Ernest Lieberman, Chief Highway Engineer, that the invoices upon which the claim is based are outstanding and unpaid. The claim should therefore be allowed, except as to the item of interest, which is disallowed. Had claimant presented its claim at any time between July 1, 1933, and September 30, 1933, payment would have been made upon presentation. The failure to receive payment was due to the negligence of the claimant and under the facts there is no liability on the part of the State so far as the item of interest is concerned.

Award is therefore entered in favor of the claimant for the sum of One Hundred Fifty-nine Dollars and Ninety-five Cents ($159.95).

(No. 2387—Claimant awarded $167.28.)

PHOENIX METAL CAP CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

WEST & ECKHART, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RETAILERS' OCCUPATION TAX—*when award for refund will be made.* Where claimant paid retailers occupation tax under protest, and subsequently thereto is advised that it was not liable for the tax and credit memorandum is issued therefore by Department of Finance, an award for refund of such amount will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks to recover on a credit memorandum issued by the Department of Finance, but not paid from appropriation, the sum of One Hundred Sixty-seven and 28/100 Dollars ($167.28) paid as Retailers Occupation Tax to the Department of Finance of the State of Illinois.

There seems to be no disagreement of facts. Under report from the Department of Finance, it appears that claimant was engaged in producing and selling metal caps, which are affixed to the tops of glass containers in which fruits, vegetables and other tangible personal property are contained and ultimately sold to users or consumers: Under

the rulings of the Department of Finance, such sales constitute sales for re-sale under Special Rule No. 1 of the Rules and Regulations issued by the Department of Finance in relation to the Retailers Occupation Tax Act.

On August 22, 1933, claimant paid the sum of $167.28 to the Department, under protest. On September 13th, the Department of Finance advised claimant that the sales in question were within the exception of Special Rule No. 1, and the claimant was not liable for such tax. Claimant thereafter, in October, filed its claim for credit for the amount paid under protest, i. e., $167.28. The Department, being legally unable to make a refund, issued a credit memorandum, evidencing claimant's right to said amount, and referred claimant to the Court of Claims for adjustment. The claim was filed herein on March 22, 1934. It appearing from the undisputed facts that the Department of Finance recognizes the legality of said claim, and that a refund should be made, it is therefore ordered that an award be entered for claimant in the sum of $167.28. Further that upon payment thereof, the original credit memorandum, No. 783, Registered No. 86095, issued April 14, 1934, to the Phoenix Metal Cap Company, Inc., by the Department of Finance, be surrendered to said Department for cancellation.

(No. 2175—Claimant awarded $12.00.)

JOHN H. READ, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

GEORGE E. MARTIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—award will be made for.* Where motor vehicle license fee is paid under mistake of fact an award for refund will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant asks for the return of Twenty-four Dollars ($24.00) on account of motor vehicle license fees which he claims to have paid to the Secretary of State in excess of the amount which he was legally required to pay. It appears that in February, 1926, he acquired a Buick sedan and in his application for a motor vehicle license erroneously listed such automobile as 29.9 horsepower, whereas, in fact, the horsepower was but 23.4. A similar error was made in his application for the years 1927 to 1932 inclusive. As the result of such mistake, claimant paid a license fee of Twelve Dollars ($12.00) in each of such years, whereas the correct fee should have been Eight Dollars ($8.00) for each year. In 1933 he discovered the error and made application to the Secretary of State for a refund of the amount overpaid, to-wit, Twenty-eight Dollars ($28.00), and was refunded Four Dollars ($4.00) for the year 1932, but was informed that the fees previously paid by him had long since been paid to the State Treasurer by the Secretary of State and that it was therefore impossible for the Secretary of State to make a refund on account thereof to the claimant. He now seeks to recover the sum of Twenty-four Dollars ($24.00), being the amount of the excess so paid by him as aforesaid.

Each of the excess payments made by claimant was the result of a mistake in fact and under the law as set forth in the case of *Moorman Manufacturing Company* vs. *State*, No. 1886, decided at the present term of this court, claimant is entitled to the return of the amount so paid by him by mistake.

However, claimant's complaint was filed herein on May 10, 1933, and under Section ten (10) of the Court of Claims Act his right to recover is limited to the period of five (5) years immediately preceding the filing of the claim.

There is nothing in the record to show that the fee paid for 1928, was paid subsequent to May 10th of that year, and consequently recovery is limited to the excess amounts paid for the years 1929, 1930 and 1931, to-wit, Four Dollars ($4.00) for each of such years.

Award is therefore hereby entered in favor of the claimant for the sum of Twelve Dollars ($12.00).

(No. 2219—Claim denied.)

HERMAN REINHARDT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

SPENSLEY & FRITZ, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of employee of State—equity and good conscience.* An award for damages to property alleged to have been caused by negligence of employee of State cannot be made on the grounds of equity and good conscience.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On June 10, 1933 claimant was the owner of and operating a certain Pontiac coach in an easterly direction upon a certain public highway in the State of Indiana known as U. S. Interstate Highway No. 12, at or near the City of Baileytown. At the same time one Robert Phillips, an employee of the Department of Trade and Commerce, Division of Oil Inspection of the State of Illinois, was operating a certain Ford automobile owned by the respondent, in the same direction, on said highway.

Claimant alleges that the respondent, by its said agent, so carelessly and negligently operated said Ford automobile, that it ran into and collided with the automobile of the claimant, whereby the said automobile of the claimant was damaged and destroyed.

The facts are not in dispute, and the Attorney General contends that, admitting the allegations of the complaint, still there is no liability on the part of the State, for the reason that the doctrine of respondeat superior does not apply to the State, and that therefore the Respondent is not liable in this case.

The claimant admits that there is no liability under the doctrine of respondeat superior, but claims the right to an award on the ground of equity and good conscience.

The right of this court to make an award in any case on the ground of equity and good conscience was fully considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, as well as in the case of *Morrissey* vs. *State*, No. 2233, decided at

the January Term, 1934, of this court. In those cases we held in substance that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

The same conclusion was reached by this court in numerous previous cases. See *Schmidt* vs. *State*, 1 C. C. R. 76; *Jorgenson* vs. *State*, 2 C. C. R. 134; *Ryan* vs. *State*, 4 C. C. R. 57; *Watkins* vs. *State*, 6 C. C. R. 172; *Mercer* vs. *State*, 6 C. C. R. 20; *Peterson* vs. *State*, 6 C. C. R. 77; *Perry* vs. *State*, 6 C. C. R. 81.

We appreciate that the rule above announced has not always been adhered to by this court, but we are convinced that it is the correct rule of law, and feel that we have no right to depart from the same.

The claimant has not established a case in which he would be entitled to redress against the State if it were suable, and therefore we have no authority to allow an award.

IT IS THEREFORE ORDERED that an award be denied and that the case be dismissed.

(No. 1540—Claimant awarded $1,216.89.)

ROSSIA INSURANCE COMPANY OF AMERICA, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

GILLESPIE, BURKE & GILLESPIE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS—*foreign—privilege tax paid under mistake of fact—may be recovered.* Where overpayment of tax has been made as the result of mistake of fact and not mistake of law, claimant is entitled to a refund of the amount so overpaid.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is a non-resident corporation licensed to do business in this State, and seeks to recover the sum of One Thousand Eighty-one Dollars and Sixty-eight Cents ($1,081.68) which it claims to have erroneously paid on account of privilege tax for the year 1927, as well as the sum of One Hundred Thirty-five Dollars and Twenty-one Cents ($135.21) which it claims to have erroneously paid on account of fire marshal tax for said year.

The facts are not in dispute, and from the stipulation on file it appears that claimant reported in its privilege tax return for the year 1927 that it had received reinsurance premiums from the Firemen's Fund Insurance Company in the amount of Ninety-four Thousand Three Hundred Eighty-four Dollars and Fifteen Cents ($94,384.15), whereas, in fact it actually received reinsurance premiums from said Firemen's Fund Insurance Company in the amount of Forty Thousand Two Hundred Ninety-nine Dollars and Eighty-nine Cents ($40,299.89), a difference of Fifty-four Thousand Eighty-four Dollars and Twenty-six Cents ($54,024.26), upon which last amount claimant paid a privilege tax of two per cent, to-wit, $1,081.68, and a fire marshal tax of one-fourth of one per cent, to-wit, One Hundred Thirty-five Dollars and Twenty-one Cents ($135.21); and which said amounts it now asks be refunded to it.

It also appears that the Firemen's Fund Insurance Co. reported in its privilege tax return for the year 1927 that it had paid to the claimant on account of reinsurance premiums the sum of Forty Thousand Two Hundred Ninety-nine Dollars and Eighty-nine Cents ($40,299.89), which return verifies the claim of the claimant herein as to the amount of reinsurance premiums received by it.

It is stipulated that the amount reported by the claimant in its privilege tax return as aforesaid, was in error, and that an overpayment of tax was made by it on its erroneous return, in the amount claimed.

The overpayment having been made as the result of a mistake of fact, and not a mistake of law, claimant is entitled to a refund of the amount so overpaid. *Blomstrom* vs. *Dux*, 175 Ill. 435-439; *West Frankfort Bank and Trust Co.*

vs. *Barretti*, 206 Ill. App. 261; 48 Corpus Juris 759; 21 R. C. L. 164; *Firemen's Insurance Co.* vs. *State*, 2 C. C. R. 220; *Importers' & Exporters' Insurance Co.* vs. *State*, 5 C. C. R. 1; *Hoorman Mfg. Co.* vs. *State*, No. 1886 (decided May, 1934).

An award is therefore hereby entered in favor of the claimant for the sum of Twelve Hundred Sixteen Dollars and Eighty-nine Cents ($1,216.89).

(Nos. 2294, 2308—Consolidated—Claimants awarded $152.00.)

DR. W. C. RUNYON, No. 2294, ST. ELIZABETH'S HOSPITAL, No. 2308, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

DR. W. C. RUNYON, pro se; St. Elizabeth's Hospital, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*surgical and hospital services furnished to employee under—when award may be made for.* Where State employee suffers accidental injuries arising out of and in the cause of his employment, while engaged in extra-hazardous employment, an award may be made for the fair value of surgical and hospital services furnished said employee, where reasonably required to cure or relieve from the effects of such injuries.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Both of the above cases arise out of the same transaction and therefore, by agreement of counsel for claimants and the Attorney General, the cases are consolidated for the purpose of consideration.

On July 29, 1930 one Lewis M. Amick was employed by the respondent as a carpenter at the Southern Illinois Penitentiary, and while working on building form work and removing a 4 x 4 timber from a wall form, he strained himself and sustained a strangulated hernia.

The Superintendent of Construction sent him to the claimant, St. Elizabeth's Hospital, where he was operated by the claimant, Dr. W. C. Runyon. The doctor thereafter filed a claim for One Hundred Dollars ($100.00) for the services rendered by him, and the hospital filed a claim for Fifty-

two Dollars ($52.00) for hospital services while said Amick remained at said hospital.

The Department of Public Welfare in a report regarding the matter, states that in its judgment the claims are fair and reasonable and that favorable action should be taken thereon. It appears from the evidence that at the time of the accident in question, the claimant and the respondent were operating under the terms and provisions of the Workmen's Compensation Act of this State, and pursuant to the provisions of Section 8a of said Act, the Employer is required to provide the necessary first aid medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited only to that which is reasonably required to cure or relieve from the effects of the injury. There is nothing to indicate that either the medical, surgical or hospital services were not reasonably required to cure or relieve from the effects of the injury, and the claims should therefore be allowed.

An award is therefore hereby entered in favor of the claimant, Dr. W. C. Runyon, for the sum of One Hundred Dollars ($100.00); and

An award is also hereby entered in favor of the claimant, St. Elizabeth's Hospital, for the sum of Fifty-two Dollars ($52.00).

(No. 1876—Claim denied.)

SARAH RUTLEDGE, ADMINISTRATRIX OF THE ESTATE OF WILLIS WELLS, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

MANUEL E. WISEMAN AND LEIGH M. KAGY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, CAUSING DEATH—*inmate of State Charitable Institution—when State not liable for damages.* **The issue herein is identical with that in the case of *Butler, Admx.* vs. *State*, No. 1868, *ante* and the opinion therein is controlling herein.**

SAME—*equity and good conscience—when award on grounds of will be denied.* **This phase of the claim herein has been fully considered and decided in *Crabtree* vs. *State*, 7 Court of Claims Reports, Page 207 and the ruling therein is adhered to.**

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On December 5, 1930, Willis Wells, claimant's intestate, was committed to the Alton State Hospital at Alton, Illinois, and was classified on the records as "General paralysis, of the insane cerebral type, commonly called 'paresis'." Wells was assigned to different work around the institution and on February 9, 1931, in company with about twelve others, was assigned to the work of cleaning down the walls and large iron beams on the second floor of the power house. Wells was a large man, about six feet, four inches tall, and weighed about Two Hundred Eighty (280) pounds. In the course of his work he fell through a piece of defective flooring, and sustained injuries from which he died shortly thereafter. He left him surviving no widow and no child or children, and no descendant or descendants of any deceased child or children, but left him surviving the claimant, Sarah Rutledge, and Katie Wells Martin, his sisters, and James Wells, his brother, as his sole and only heirs at law and next of kin.

Sarah Rutledge was thereafter duly appointed Administratrix of the estate of said decedent by the County Court of Madison County, and qualified as such.

Claimant avers that at and prior to his death, Willis Wells was contributing to the support of Sarah Rutledge, his widowed sister, and her family consisting of her son James, aged 17, and her daughter Lovey Rutledge Fleming, aged 20, and seeks to recover damages for the pecuniary loss sustained by the next of kin of said decedent, as the result of his death.

Decedent left no lineal heirs, and there is nothing in the record to show that he was contributing anything whatsoever to the support of any of his heirs at or just prior to the time of his death. He had contributed to the support of his sister, Sarah Rutledge, prior to the time he was committed to the Illinois State Hospital, which was on December 5, 1930, and there is nothing in the record to show a contribution to any of his heirs since that date, nor does the record show that he owned any property whatsoever out of which he could have made a contribution had he desired to do so, nor does the evidence show that there was any reasonable probability that he would ever again be in condition to be released from

the institution and earn any money out of which he could contribute to the support of his relatives in the future.

Furthermore, under the well-established law of this State, the State is not legally or equitably liable to the claimant in this case. In the conduct of its charitable institutions the State exercises a governmental function and is not liable for the neglect of its official agents or employees in connection therewith, for the reason that the doctrine of *respondeat superior* does not apply to the State in the exercise of its governmental functions. This is admitted by counsel for claimant in their reply brief, but they ask that an award be made on the ground of equity and good conscience.

The authority of this court to allow an award in any case solely on the ground of equity and good conscience was thoroughly considered by this court in a number of recent cases. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term of this court.

In the Crabtree case the authorities on the question, from the time of the establishment of the court down to the time of the decision, were carefully considered and reviewed, and after such review, the court reached the following conclusion:

"We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: 'The Court of Claims shall have power: "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay"; merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

What we said in the Crabtree case applies with equal force in this case. The claimant herein having failed to bring herself within the provisions of some law entitling her to an award, there is nothing this court can do but deny the claim.

IT IS THEREFOR ORDERED that the claim be disallowed and the case dismissed.

(No. 2100—Claimant awarded $178.66.)

ST. LOUIS COTTON COMPRESS COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

LEWIS, RICE, TUCKER, ALLEN & CHUBB, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid under mistake of fact—award will be made for.* Where an amount in excess of that lawfully due for franchise tax is made as the result of a mistake of fact, an award for the refund of such excess will be allowed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of One Hundred Seventy-eight Dollars and Sixty-six Cents ($178.66) which it claims to have paid to the State of Illinois as initial fees on increases of capital stock, in excess of the amount it was legally required to pay.

Claimant is a foreign corporation, and upon obtaining authority to do business in Illinois, to-wit, on February 24, 1925, designated the sum of Three Hundred Fifty-five Thousand Eight Hundred Fifteen Dollars ($355,815.00) of its capital stock as estimated to be employed in Illinois. Thereafter claimant increased its capital employed in this State as follows:

$58,020.00 on June 5, 1929; $299,310.00 on May 29, 1930; and $241,290.00 on June 13, 1932.

Claimant was assessed and paid the initial franchise tax on the increase dated June 5, 1929, in the correct amount, to-wit, Twenty-nine Dollars and One Cent ($29.01).

In computing the initial franchise tax on the increase dated May 9, 1930, the respondent erroneously included an initial franchise tax on the increase of June 5, 1929, in the amount of Twenty-nine Dollars and One Cent ($29.01), which amount was paid by claimant.

In computing the initial franchise tax on the increase dated June 13, 1932, the respondent erroneously included an initial franchise tax on the increase made on June 5, 1929, as

well as that made on May 29, 1930, to-wit, the total amount of One Hundred Forty-nine Dollars and Sixty-three Cents ($149.63), which amount was paid by claimant.

The total amount erroneously assessed by the respondent as aforesaid, and paid by the claimant, is One Hundred Seventy-eight Dollars and Sixty-six Cents ($178.66).

There is no dispute as to the facts, and no question but what the claimant was compelled to pay $178.66 in excess of what it was legally required to pay, nor is there any question but what the over-assessments in question resulted from errors on the part of the respondent.

The excess payments made by the claimant having been made as the result of a mistake of fact, the claimant is entitled to an award for the amount of the excess so paid by it. *Blomstrom* vs. *Dux*, 175 Ill. 435-439; *West Frankfort Bank and Trust Co.* vs. *Barretti*, 206 Ill. App. 261; 48 Corpus Juris 759; 21 R. C. L. 164; *Firemen's Insurance Co.* vs. *State*, 2 C. C. R. 220; *Importers' & Exporters' Insurance Co.* vs. *State*, 5 C. C. R. 1; *Moorman Mfg.* vs. *State*, No. 1886 (decided May, 1934).

An award is therefore hereby entered in favor of the claimant for the sum of One Hundred Seventy-eight Dollars and Sixty-six Cents ($178.66).

(No. 2290—Claimant awarded $58.30.)

SHELL PETROLEUM CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

CYRUS S. GENTRY AND WILLIAM W. YEAGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award made.* Where it clearly appears that supplies as ordered by State were delivered to and received by it in good order and no question is made as to charge therefor, an award will be made for price thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of Fifty-eight Dollars and Thirty Cents ($58.30) for oil sold to the respondent and delivered at the Vandalia State Farm on January 14, 1933.

The superintendent of the institution admits that the oil was received in good condition, and states that the invoices were never vouchered. It is stipulated that the amount due is Fifty-eight Dollars and Thirty Cents ($58.30), and an award is therefore entered in favor of the claimant for that amount.

(No. 2392—Claimant awarded $300.00.)

ORILLA LORRAINE THOMAS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

ORILLA LORRAINE THOMAS, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SOLDIERS' BONUS—*when award may be made for amount of.* Where claim for Soldiers' Bonus was filed and approved and warrant issued for same, but soldier died before receiving it, an award for payment of same to one lawfully entitled thereto will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant as next kin of Earl Forrest Thomas, filed her claim herein on June 6, 1934, and seeks to recover the sum of Three Hundred Dollars ($300.00), under the provisions of the Bonus Act of this State, approved May 3, 1921, and an Act to Provide Payment to Beneficiaries, approved June 19, 1925.

It appears that Earl Forrest Thomas was a World War veteran; that he made application for his bonus under the Illinois Bonus Law; that his application was approved and a warrant in the amount of Three Hundred Dollars ($300.00) issued to him; that such veteran died before he received or endorsed such warrant; that such warrant was never returned and is shown on the records in the office of the Adjutant General as "outstanding"; that on January 6, 1933, the claimant herein filed a supplementary claim as next of kin of the deceased veteran, which claim was approved by the Adjutant General on September 25, 1933; that on such date there was no fund from which the State Treasurer could lawfully pay the claim, as the appropriation previously made for the payment of such claims lapsed on September 30, 1929.

Under the facts in the record, there is no question as to the right of the claimant to recover the amount claimed, and an award is therefore entered in favor of the claimant for the sum of Three Hundred Dollars ($300.00).

(No. 2193—Claim denied.)

STEVEN URECH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.

WALTER J. FRIED, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*claim for damages caused by delay of another contractor—provision in contract precluding—when award denied.* Where contract for construction of bridge contains provision that acceptance of last payment for work done thereunder shall operate as and be released from all claims or liabilities under contract for anything done or relating to work under same, or for any act or neglect of the department of State relating to or connected with contract, such provision is binding and if said last payment is made and accepted, an award for damages claimed to have been sustained as result of delay of another contractor in completing his work will be denied.

SAME—*claim for extra compensation—Constitution prohibits.* Where party is paid amount provided in contract and it is provided therein that acceptance of payment shall release State from any and all claims and liabilities thereunder, an allowance for an additional amount claimed as damages would constitute extra compensation and is prohibited by the Constitution of the State of Illinois.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On June 10, 1931, claimant was awarded a contract for the construction of a three-span girder bridge on S. B. I. Route No. 51, for the sum of Twenty-five Thousand Seven Hundred Sixty-nine Dollars and Eighty-three Cents ($25,769.83). The improvement was officially known as Federal Aid Project No. 140, Section No. 511 V-B, Cook County, and was to be completed by August 15, 1931. The contract provided, among other things, that the "Standard Specifications for Road and Bridge Construction" adopted by the Department of Public Works and Buildings on February 1, 1930,

should be an essential document of such contract, and a part thereof.

Claimant asked for and received an extension of time to January 1, 1932, for the completion of his contract. The work was completed within the time limit as so extended, and final payment was received by claimant on January 1, 1932.

Claimant contends that he was delayed in starting work on account of the fact that one Dan Longo, who had the contract for the grading work, did not get out of his way until August 18th, three days after the time originally set for the completion of the work; also that he was delayed two weeks on account of a change in the plans made by the State Engineer relative to the footings of the west embankment; and further contends that on account of the fact that he was unable to commence work until August 18th, whereas he should have had the contract completed by August 15th, he was compelled to work during colder weather than he anticipated when he entered into the contract, and was thereby required to pay out and expend the sum of Three Hundred Sixty-one Dollars and Twenty-six Cents ($361.26), for labor, insurance, hot water, coke, salamanders, straw, etc., which he would not have been required to pay, had he not been delayed as aforesaid, and asks to be reimbursed in that amount.

The Attorney General contends that the claimant is not entitled to an award, and relies on the terms and provisions of the contract, as well as Section nineteen (19) of Article four (4) of the Constitution.

The Standard Specifications for Road and Bridge Construction which are a part of the contract provide (in part) as follows:

"The acceptance by the contractor of the last payment as aforesaid shall operate as and shall be a release to the department from all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act or neglect of said department relating to or connected with this contract."

Section nineteen (19) of Article four (4) of the Constitution provides as follows:

"The General Assembly shall *never grant or authorize* extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such

unauthorized agreements or contracts shall be null and void; *Provided*, the General Assembly may make appropriations for expenditures * * * *."

There is nothing in the contract between the claimant and the respondent which makes any reference to the work being done by the grading contractor, Dan Longo, nor is there anything in such contract which gives the claimant herein any rights superior to those of said Longo.

The evidence shows that at the time the contract between the claimant and respondent was signed, to-wit, June 27, 1931, Longo was still working on his contract, and claimant had knowledge of that fact. If claimant wished to protect himself against delays on the part of the grading contractor, he should have insisted on a provision in the contract giving such protection; having failed to do so, he cannot at this time recover extra compensation under the contract. Furthermore, under the aforementioned provisions of the contract, the acceptance of the final payment by the claimant constituted a release of the respondent from all claims under the contract.

Considering the terms and provisions of the contract in question, and the constitutional provision above referred to, we would not be justified in allowing an award upon the record *before us.*

Award is therefore denied and the case dismissed.

(No. 2033—Claim denied.)

ALVA E. VAIL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1934.
Rehearing denied November 13, 1934.

BARR & BARR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

The issues involved herein were discussed and decided in the cases of *Kump* vs. *State*, No. 1881, *ante* and *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207 and the decisions are controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed in this court on December 23, 1932. Plaintiff alleges that on September 19, 1929, he was injured while employed as a carpenter by the State of Illinois in the

Division of Waterways of the Department of Purchases and Construction, in connection with the construction of a dam near Joliet. That such injury occurred while he was cutting down a wooden form that had been constructed for the pouring of concrete, by falling a distance of about twelve feet, striking his right heel on a V-bolt and thereby sustaining a fracture of the heel bone. It is admitted that the injury sustained arose out of and in the course of his employment.

Plaintiff claims relief by virtue of the provisions of the Illinois Waterway Act, Cahill's Illinois Revised Statutes, 1933, Chap. 19, and by the provisions of the Workmen's Compensation Act, in the amount of Five Thousand Dollars ($5,000.00).

The Attorney General has filed his motion to dismiss the claim for the reason that no claim for compensation is shown to have been made within six months after the accident in question, and for the further reason that the application for compensation was not filed within one year of the date of the injury or after the last payment of compensation, as required by Section 24 of the Workmen's Compensation Act. The plaintiff in his reply brief contends that the claim is filed for compensation under Section 25 of "An Act in relation to the constructing, operation and maintenance of a deep waterway from the power plant of the Sanitary District of the City of Chicago at or near Lockport, to a point in the Illinois River at or near Utica, and for the development and utilization of the water power thereof," approved June 17, 1919, Laws of 1919, page 977; further that sub-section 6 of Section 6 of the Act creating the Court of Claims, which is as follows:

> "To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act', the Industrial Commission being hereby relieved of any duty relative thereto".

does not adopt the provisions of the Workmen's Compensation Act and that Section 10 of the Court of Claims Act providing a limitation period of five years within which to file claims applies to compensation claims by employees, notwithstanding the limitations contained in Section 24 of the Workmen's Compensation Act.

The plaintiff further contends that regardless of whether the above contention is maintainable, that the limitations of

Section 24 of the Workmen's Compensation Act should not be held applicable to this claim, inasmuch as such claim arises out of and is filed under the provisions of Section 25 of the Illinois Waterway Act, which section provides as follows:

"In case the Department of Public Works and Buildings shall construct such waterway or its appurtenances, or any part or parts thereof by the direct employment of services, labor, materials and equipment, the State shall be liable for accidental injuries or death suffered by any employee arising out of and in the course of his employment, the amount of such liability to be ascertained by reference to the provisions of the Act commonly called the 'Workmen's Compensation Act'. The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder, and shall make and file its finding and determination in each case."

Plaintiff contends that the Legislature has seen fit, by the foregoing, to provide that the Workmen's Compensation Act shall be referred to by the Court of Claims only for the purpose of ascertaining the amount of the award.

Claimant further contends that regardless of the construction of these sections, an award should be made in this case under the rule of equity and good conscience. This contention and the first contention (that the limitation requirements in Section 24 of the Workmen's Compensation Act do not apply to claims made by employees of the State, as determined in this court), are fully dealt with in the case of *Crabtree* vs. *State of Illinois*, 7 C. C. R. 207, wherein it is held that the requirements of Section 24 of the Workmen's Compensation Act relative to claims for compensation by employees of the State, and the time within which notices must be given and application must be filed, are conditions precedent to the right of recovery under that Act. Further,

"The Act 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; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either in law or in equity, if the State were suable; that unless the claimant can bring himself within the provisions of a law, giving him the right to an award, he can not invoke the principle of equity and good conscience to secure such an award."

We reaffirm the ruling announced in the Crabtree case, as applicable to this case.

The court cannot concur in the further contention of plaintiff that the limitations of Section 24 of the Workmen's

Compensation Act do not apply to this claim by reason of the fact that claimant was employed in the construction of the Illinois Waterway system and that by the terms of the later Act (Section 25, Paragraph 115, Chap. 19, Cahill's Illinois Revised Statutes, 1933), that the Workmen's Compensation Act shall be referred to by the Court of Claims *only* for the purpose of ascertaining the amount of the award.

The Illinois Waterway Act was passed, and approved June 17, 1919. Prior to the time of its passage the Legislature had already provided for the hearing of all claims by this court against the State of Illinois. By Section 23 of the Waterway Act, the liability of the State for damages to real estate or personal property by reason of the construction, maintenance or operation of the Illinois Waterway and its appurtenances was made specific. By Section 24 all claims for damages to property or persons other than employees of the State were made determinable by the Department of Public Works and Buildings. It was apparently the desire of the Legislature to make clear its intention that claims for damages by employees engaged in the waterway project should be left in the forum of this court for determination. It is provided in said Section 25, that

"The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder."

There is nothing contained in the wording of said section or any where in the Waterway Act which indicates that the court in exercising such jurisdiction should give to employees of the Illinois Waterway any different consideration in regard to the requirements of notice and filing claim and other provisions of the Workmen's Compensation Act than those applied to all other employees.

There is no conflict between the Court of Claims Act, the Workmen's Compensation Act and the Waterway Act, and the only question is as to whether there is any wording contained in said Section 25 of the Waterway Act which would indicate that a different rule should be applied by the Court of Claims in passing upon claims for compensation made thereunder than is applied to other claims.

The legislative Act by which this court exists, provides that

"The Court of Claims shall hear and determine the liability of the State for accidental injuries or death * * * by *any* employee; further that such determination shall be made in accordance with the rules * * * of the Workmen's Compensation Act."

Section 6 Court of Claims Act.

There is nothing in Section 25 of the Waterway Act that repeals, adds to or modifies this enactment. It is provided in Section 25 that,

"The amount of such liability shall be ascertained by the Court of Claims by reference to the provisions of * * * the Workmen's Compensation Act."

but one cannot read into that language any intent to repeal or modify the existing law under which the Court of Claims hears compensation cases.

It appears from the record herein that no claim for compensation was made within six months after the accident and that no application for compensation was filed in this court within one year after such accident. Under the provisions of the Waterway Act, this court is to find the amount due the claimant. The court finds that there is no amount due, because of a failure of the injured employee to bring himself within the classification for the allowance of an award, by reason of his failure to comply with the provisions of Section 24 of the Workmen's Compensation Act.

Claim dismissed.

I dissent for the reasons set forth in the case of *Kump* vs. *State of Illinois*, No. 1881, *(ante)*.

C. N. HOLLERICH, Chief Justice.

(No. 2351—Claim denied.)

C. J. ALLERTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

FREDERICK R. NYBERG, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State Highway Employees—State not liable for.* The doctrine of respondeat superior not being applicable to the State it is not liable for damages to property resulting from the negligence of its employees or agents.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On the 12th day of February, A. D. 1933, certain employees of the respondent were operating a snow plow in a southerly direction on S. B. I. Route No. 1 at a point about ten (10) miles north of Danville, Illinois. At the same time, the claimant was driving his Studebaker automobile in the same direction. Claimant avers in his complaint that the snow plow stopped suddenly and without warning to him, at a time when he was close thereto, and that as the result thereof, and by reason of the negligence of the employees of the State in the operation of said snow plow, his automobile collided with said snow plow and was damaged in the amount of $51.75.

The Attorney General has entered a motion to dismiss the case for the reason that there is no legal liability on the part of the State under the facts set forth in the complaint.

The motion of the Attorney General is based upon the rule that the State is not liable under the doctrine of *respondeat superior* for the negligence of its servants and agents. That rule has been stated so often in the decisions of this court, as well as in the decision of other courts of this State, that citations seem superfluous.

There being no legal liability on the part of the State if the State were suable, this court is without jurisdiction to enter an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term, 1934 of this court.

The motion of the Attorney General must therefore be sustained and the case dismissed. Case dismissed.

(No. 2401—Claimant awarded $12.40.)

ANNA STATE HOSPITAL COMMISSARY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

ANNA STATE HOSPITAL COMMISSARY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RETAILERS' OCCUPATION TAX—*paid under mistake of fact—may be recovered.* Where payment of Retailers' Occupation Tax is made under mutual mistake of fact an award for refund of same may be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant paid the sum of Twelve Dollars and Forty Cents ($12.40) for retailers' occupational tax for the months of August and September, 1933, and has filed its claim herein to recover the amount so paid, and alleges that it is not subject to such tax, and that the same was paid by mistake.

It appears that the sales of merchandise were made by the Commissary of Anna State Hospital; that the capital employed is Inmate Trust Fund moneys; and that the profit derived from the sales is used exclusively for the amusement of the patients at the Institution.

The Department of Finance admits that the claimant was not subject to the tax when the same was collected. The tax having been paid under a mutual mistake of fact, the amount paid will be refunded.

Award is therefore entered in favor of the claimant for the sum of Twelve Dollars and Forty Cents ($12.40).

(No. 1807—Claim denied.)

ELSIE BAUMGART, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

SCOTT W. LUCAS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*State not liable for damages sustained by reason of defect in State Highway.* In the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition for travel.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover damages for injuries which she sustained on July 12, 1930, near Delavan Junction in Tazewell County. Just prior to the time of the accident in ques-

tion, claimant was riding in an automobile in a northerly direction on S. B. I. Route No. 24. The automobile in which she was riding struck a hole in the pavement and was overturned, whereby the claimant avers that she sustained serious and permanent injuries, and her automobile was seriously damaged.

Claimant avers that it was the duty of the respondent to maintain said highway in good condition and repair, but that the respondent disregarded its duty in that behalf; that the respondent had notice or knowledge of such hole in the pavement, and that the claimant and the driver of the car in which she was riding were in the exercise of due care and caution at the time of the accident.

Claimant's right to an award is based upon the negligence of the respondent in maintaining said highway in a good and safe condition. Such negligence, however, does not give claimant the right to an award. This court has held in numerous cases that in the maintenance of its hard-surfaced roads, the State is exercising a governmental function. *Chumbler* vs. *State*, 6 C. C. R. 138; *Stoddard et al* vs. *State*, 6 C. C. R. 27; *Bucholz et al.* vs. *State*, 7 C. C. R. 241.

The law is well established that in the exercise of its governmental functions there is no liability on the part of the State for the negligence of its servants or agents. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Morrissey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs. *State*, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77.

There being no liability on the part of the State if it were suable, this court has no jurisdiction to allow an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term, 1934, of this court.

Award must therefore be denied and the case dismissed.

(No. 2209—Claimant awarded $280.00.)

CARL BENDER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

HAROLD C. SEWELL AND ALEXANDER J. STROM, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made.* Where claimant is an employee of the State, was accidentally injured while engaged in and in the course of his employment, and such employment is within the purview of the Workmen's Compensation Act an award for such injuries will be made in accordance with the provisions of said Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation filed in this cause, it appears that on or about August 28, 1932, claimant was employed by the State of Illinois as a repair and maintenance man on State Highway No. 5, at a point about five miles west of Belvidere, and that he was receiving compensation at the rate of Thirty Dollars ($30.00) per week; that while wheeling a wheelbarrow full of cement from the cement mixer to the road, he struck a projection, causing him to fall, twisting his left leg and knee and being struck by the handle of the wheelbarrow, resulting in laceration of the ligaments of the knee; that immediately after the injury, the knee was placed in a cast; that claimant was compelled to use crutches and unable to do any work and temporarily and totally disabled for a period of approximately five months; further, that claimant was employed only a part of the working days in the year (about 50%), and the compensation would be determined under Section 10 E of the Compensation Act; that claimant is the father of and supporting four children, all under the age of sixteen years; that claimant, under Paragraph 145, Section J, would receive $14.00 per week by virtue of having four children at the age stated, for a period of twenty (20) weeks, or a total of Two Hundred Eighty Dollars ($280.00).

Under this stipulation, no disagreement as to facts exists. Claimant was an employee of the State; was injured while engaged in and in the course of his employment, and such employment was within the purview of the Workmen's Compensation Act. The only question, therefore, is a determination of the amount of an award that should be allowed.

Under the stipulation of facts and the statutory provisions applying in such case, an award on a basis of $14.00 per week for a period of twenty (20) weeks, or a total of Two Hundred Eighty Dollars ($280.00), is hereby allowed.

(No. 1980—Claim denied.)

SAMUEL M. CHILDRESS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

WILLIAM G. THON, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*owning automobile causing, creates no liability for.* There is no legal liability upon the part of the State from the mere fact that it owned the car, which was being driven by one of its employees and caused a personal injury.

SAME—*caused by negligence of State employee—State not liable for.* The State is not liable for injuries complained of by reason of the malfeasance, misfeasance or negligence of its officers or agents in the exercise of its governmental functions.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claim in question was filed September 7, 1932. Claimant seeks to recover damages and personal injuries received about 10 o'clock p. m., on July 4, 1931, in a collision occurring approximately two miles from Rantoul, Illinois, on State Bond Issue Route No. 25, between an automobile owned and driven by the son of claimant, in which claimant was a passenger, and an automobile owned by the State of Illinois and then and there driven by one Sergeant Roth of the State Highway Police, Division of Highways, Department of Public Works and Buildings of the State of Illinois. The undisputed proof shows that the two cars were travelling in opposite directions, and that Sergeant Roth had been drinking and was to some degree intoxicated at the time; that the claimant was injured and suffered damages both in medical treatment and loss of time during his recovery. The only evidence other than claimant's testimony and that of his son, John Childress, in regard to Sergeant Roth's condition or responsibility for the accident in question is the statement contained in his report to Walter L. Moody, Superintendent of State Police, under date of September 22, 1932, as found in the files of the Division of Highways of the State, wherein Sergeant Roth states, "I do not feel that I was responsible for the accident any more than the driver of their car was. * * * To the best of my belief, I was driving my car between forty-five and fifty miles per hour."

Neither the pleadings nor the facts in evidence, however, show any legal liability on the part of the State in this case. If the driver of the State owned car, Sergeant Roth, was guilty of negligence and such negligence was the proximate cause of the accident and the injury complained of, without contributory negligence upon the part of the driver of the Childress car, claimant has a cause of action against the one whose negligence caused the injury, but there is no legal liability upon the part of the State from the mere fact that the State owned the car which was being driven by the State employee. There is no evidence in the record that the driver of the State owned car was engaged in the performance of his duty as an employee of the State at the time the injury occurred, and the burden of making such proof was upon the claimant. But even if such proof had been made, the State would not be liable, for it has long been the settled law of this State, as declared by our Supreme Court and by repeated decisions of this court, that the State is not liable for injuries complained of by reason of the malfeasance, misfeasance or negligence of its officers or agents in the exercise of its governmental functions, in the absence of a Statute creating such liability. *Minear* vs. *State Board of Agriculture*, 259 Ill. 549. *Morrissey* vs. *State of Illinois*, 2 C. of C. R. 254. *Johnson* vs. *State of Illinois*, 2 C. of C. R. 165.

In the absence of a Statute making the State liable for damages caused by the negligence of the police officers in the performance of their duties, this court has no power or authority to legally make an award for such damages. The claim is denied and cause dismissed.

(No. 2325—Claim denied.)

H. CLAY DUKE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

GARIEPY & GARIEPY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time provided in, jurisdictional.* Where there is nothing in the record to show that claim for compensation was made, or application filed for same

within time provided in Section 24 of the Act the court is without jurisdiction to proceed with the hearing and motion to dismiss must be sustained.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on February 14, 1934, and seeks to recover compensation for injuries which he claims to have sustained on October 17, 1932, while in the employ of the respondent,—as the result of which said injuries he lost the hearing of his right ear.

The Attorney General has entered a motion to dismiss the case for the reason that claim for compensation was not made within six months after the accident, and application for compensation was not filed within one year after the date of the injury, or within one year after the last payment of compensation, as required by Section Twenty-four (24) of the Compensation Act.

The question here involved was considered by this court in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, and we there held that the jurisdiction of this court with reference to claims for compensation for accidental injuries or death suffered in the course of employment by any employee of the State, is the same as that possessed by the Industrial Commission in claims of other persons whose rights must be determined by the Compensation Act; and, further, that the provisions of Section twenty-four (24) of the Compensation Act apply with equal force to the State and to other employers named in the Act, and also apply with equal force to the employees of the State and to other employees named in the Act.

The Supreme Court has held in numerous cases that the making of claim for compensation and the filing of application for compensation within the time required by the Statute, are jurisdictional, and are conditions precedent to the right to maintain a proceeding under the Compensation Act. *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386; *Chicago Board of Underwriters* vs. *Ind. Com.*, 332 Ill. 511; *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262.

There is nothing in the record to show that claim for compensation was made, or application for compensation was filed, within the time required by Section twenty-four (24) of

the Compensation Act, and this court is therefore without jurisdiction to proceed with the hearing.

The motion of the Attorney General must therefore be sustained and the case dismissed. Case dismissed.

(No. 2042—Claim denied.)

FRASER-SMITH COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

FRASER-SMITH COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employee of State—State not liable for.* The State is not liable for damages caused by the negligence of its agents or employees.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks to recover for the account of the Farmers Co-op. Elevator Company of Luther, Iowa, for alleged negligence on the part of a grain inspector at Chicago, for delay in delivering an inspection report on a car of corn. The complaint alleges that the car was bought from the Farmers Co-op. Elevator Company July 27, 1931, at 57c delivered to Chicago with inspection at latter point to be by July 31st; that the car arrived in Chicago and was inspected on July 31st before 11:00 a. m., in time to have been handled in the Board of Trade before the close of the session and before the expiration of July contracts, but that through error, the sample, taken by the inspector in the Division of Grain Inspection, Department of Trade and Commerce, was delivered to the Grain Stabilization Corporation and was not discovered until after the close of the Board of Trade; that due to the fact that delivery by the railroad of the car in question was made before July 31st, the railroad cannot be held responsible for the delay; that claimant's agent was compelled to buy a car to fill July contracts at the cash market for No. 2 yellow corn, which was 71¼c Chicago, making a loss to the shipper of 14½c per bushel; that the delayed car was sold on the open market on August 1st at 62c net; that the actual loss was 9½c per bushel, or $125.12.

Respondent has filed a motion to dismiss the claim on the ground that the declaration not only fails to show that the Grain Inspector in question had ever been notified prior to the inspection, by claimant or anyone else, to whom the report of inspection should have been delivered, and further for the reason that the respondent could not in any event be liable for any purported negligence upon the part of such employee.

The complaint alleges that the Beach-Wickham Company was the consignee of the car in question, but there is nothing in the complaint disclosing any instructions or notice to the Inspector or the Grain Department in regard to the car in question. Regardless of this, however, the objection by the Attorney General that respondent could not be liable for any purported error or negligence upon the part of the employee is correct.

This court is committed to the rule that the State is not liable for the negligence of its agents or employees unless there is a Statute making it liable. There is no Statute making the State liable in a claim of this character, and unless the claimant can show the existence of a Statute creating such liability, the State, under the rule of *respondeat superior* would not be liable, and this court is without proper authority to make an award.

Derby vs. *State*, 7 C. C. R. 145.

Mercer vs. *State*, 6 C. C. R. 20.

The motion of the Attorney General to dismiss the claim is allowed. Case dismissed.

(No. 1835—Claim denied.)

ERNST H. HELMLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 15, 1934.

ERNST H. HELMLE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PLEADING—*when motion to dismiss complaint for insufficiency will be sustained.* Where complaint fails to set forth any facts showing claimant is entitled to award, motion to dismiss will be sustained and case will be dismissed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant alleges in his complaint that during the month of June, 1931, he was in the employ of the Department of Public Welfare as a reimbursing inspector, and for that month had been assigned to the Lincoln State School and Colony; that his headquarters were at Springfield and in the regular course of his duties he returned to Springfield each week-end and left for Lincoln again on the next Monday morning; that he was required to purchase railroad tickets, expend money for taxi fare and also occasionally for meals when the trains were late and it was impossible to obtain his meals at the institution; that he so paid for railroad transportation $6.80; meals, $1.85; taxi and street-car fare, $2.65; making a total of $11.60, which he asks be refunded to him.

The complaint further states that claimant failed to present his expense account through the proper channel of the Department of Public Welfare until the month of October, 1931, at which time the appropriation had lapsed and payment could not be made.

The Attorney General has entered a motion to dismiss for the reason that there is nothing in the complaint to show that the claimant was entitled to have his expenses paid by the State. The complaint contains no allegations with reference to the salary or compensation of the claimant, and fails to set forth any facts showing that he is entitled to his expenses in addition to his salary; in short, it contains no averments whatsoever showing his right to have his expenses paid by the State.

Under the present state of the record, the motion of the Attorney General must be sustained and the case dismissed.

Case dismissed.

(No. 1909—Claim denied.)

MARY AGNES JEFFERSON, ADMINISTRATRIX OF THE ESTATE OF BESSIE BANKS, ALIAS JESSE BANKS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

ADAMS & BAKER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, DEATH—*inmate of charitable institution—negligence of employees of—respondeat superior.* In the conduct of a charitable institution the State exercises a governmental function and is not liable to respond in damages for injuries to, or death of inmates occasioned by the negligence of its officers, agents or employees as the doctrine of respondeat superior is not applicable to the State.

SAME—*pleading.* Complaint seeking damages for causing death is defective where it fails to show that action is brought for the benefit of those for whom such remedy could be legally sought.

SAME—*limitations.* Unless a suit for damages for wrongfully causing death is brought within one year after said death, plea of Statute of Limitations will be a bar.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks to recover for the death of Jesse Banks, a feeble minded person, while an inmate of the Chicago State Hospital, alleged to be operated by respondent. Claimant avers that said Jesse Banks was properly and duly committed to said institution and had been treated for a long time therein as a mental defective, and that it was the duty of the State to furnish reasonable and proper guards to prevent the escape of any inmate and to furnish skillful physicians, surgeons and medical attendants for same; that on the 7th day of June, 1930, said Jesse Banks was not mentally capable of caring for himself and was in the care and custody of the employees of respondent, that he was negligently permitted to walk out of the institution onto the public streets and highways; that in so doing, he approached a citizen upon the streets and was mistaken for a person with criminal intent and was shot and killed by some person on the streets; that plaintiff was put to a large amount of funeral expenses and has been deprived of the company, association and friendship of said inmate, for all of which she seeks an award in the sum of $10,000.00.

The Attorney General has filed a motion to dismiss the claim for the reason (1) that the Statute giving a right of action for wrongful death requires that suit be brought within one year thereafter and that in this case the death occurred June 7, 1930, and the claim was not filed until June 7, 1932; (2) that the Statute gives a right of action only for the benefit of the widow and next of kin and the declaration herein makes no mention of any widow or next of kin or basis of legal right existing in claimant; (3) that the claim is incomplete in that it does not conform to rule eight of the Court of Claims,

which requests an Administrator to file with his claim an authenticated copy of the record of his appointment as Administrator.

The objections raised by the Attorney General are well founded.

In the absence of a Statute, the State is not liable for injuries claimed to have been sustained as the result of negligence of its employees.

Minear vs. *State Board, etc.*, 259 Ill. 549.

In the conduct of a charitable institution, the State exercises a governmental function, and is not liable to respondent in damages for the negligence of its officers, agents or employees, and the doctrine of *respondeat superior* does not apply.

Sturrock, Admrs. vs. *State*, 7 C. C. R. 157.

The further objection by the Attorney General that the claim has not been filed within one year after the death of Jesse Banks raises a further bar to the allowance of any claim.

Sections 1 and 2, Chapter 70, Cahill's Illinois Revised Statutes, 1933.

The complaint is further objectionable in that it fails to show that said action is brought for the benefit of those for whom such remedies could be legally sought.

The motion to dismiss is allowed.

Claim dismissed.

(No. 1910 Claim denied.)

CHARLES L. MARKHAM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

R. D. ROBINSON AND BURRELL BARASH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage—sustained on public highway—when State not liable for.* The State is not liable for personal injury or property damage sustained on public highway in course of repair, alleged to have been caused by negligence of its employees in failing to place a light or signal at barricade into which claimant drove, for the reason that in the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages caused by either a defect in construction or failure to maintain them in a safe condition for travel.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant asks to recover for personal injuries and property damages arising by reason of a collision of claimant's automobile with a barricade erected on State highway between the City of Galesburg and the City of Wataga, such barricade having been erected by State Highway employees in connection with repair work on such highway, on or about the 5th day of October, A. D. 1927. Claimant charges that the State, through its agents and servants, failed to place a light or signal at the barricade to warn the users of the highway of such obstruction, and that through such wrongful and negligent failure of such State employees, the highway was left, during the night-time, in bad and unsafe condition, and that claimant unavoidably ran into such barricade, although exercising due care and diligence, and was thereby seriously injured, being compelled to expend $50.00 in being cured of his injuries, and his automobile was damaged, necessitating the expenditure of $50.00 for repairs. Claimant has attached a Bill of Particulars, in which he states his claim as follows:

Loss of time, five months at $120.00 per month	$ 600.00
Damage to automobile	27.90
Doctor's bill	20.50
Injury to arm and pain and suffering	2,000.00
Total	$2,648.40

Respondent has filed a motion to dismiss, basing same upon the averment that the claim is within the rule that the State, in the construction and maintenance of its highways, is not liable for injuries occurring through the error, fault or negligence of its employees. From the files it is indicated that there would be complicating proof as to the charge that no lighted lanterns had been placed at the barricades on the night in question, but regardless of this fact, the motion of the Attorney General is properly pleaded, and as has been stated in *Morrissey* vs. *State*, 2 C. C. R., 454; *Minear* vs. *State Board* etc., 259 Ill. 549, and *Bucholz* vs. *State*, 7 C. C. R., 241:

"In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise thereof it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its offices or agents in the absence of a Statute creating such liability."

The Legislature of Illinois has not seen fit to pass any legislation creating liability upon the part of the State in such cases, and the court is of the opinion that no basis exists for an award by it upon the claim stated.

The motion by the Attorney General to dismiss the claim is therefore allowed. Claim dismissed.

(No. 2312—Claimant awarded $153.82.)

CARL E. NELSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

POUST, FISK & MOUDRY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

LABOR AND MATERIALS—*when award made for.* Where it appears that claimant furnished labor and materials to State at its request, and that bill therefor which is not questioned, was not presented before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is engaged in the plumbing and heating business at DeKalb, Illinois, and is duly licensed under the laws of this State. Between January 3, 1933, and June 27, 1933, at the request of the officials in charge of the Northern Illinois State Teachers' College at DeKalb, claimant furnished certain labor and materials for the purpose of repairing or improving the plumbing in the buildings of such College.

A statement of the amount due him was presented to the proper authorities of said College, but was not presented in time to be paid before the appropriation lapsed, and claimant has therefore filed his claim in this court.

It is admitted that the labor and services in question were furnished by the claimant at the request of the proper officers of the Northern Illinois State Teachers' College, and no question is raised as to the reasonableness of the several items of the bill. The only reason the bill was not paid was because it was not presented before the appropriation lapsed. The Presi-

dent of the College states that the bill presented is correct and in accordance with his records.

The Attorney General makes no objection to the allowance of the claim and we can see no reason why it should not be paid.

Award is therefore entered in favor of the claimant for the sum of One Hundred Fifty-three Dollars and Eighty-two Cents ($153.82).

(No. 2347—Claim denied.)

GERTRUDE SHAPIRO, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

ROBERT E. CHERRY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of Municipal corporation—State not liable for.* The State is not liable for damages for personal injuries alleged to have been sustained in Lincoln Park, Chicago, Illinois, a park under control and supervision of Board of Park Commissioners, a Municipal Corporation as result of negligence in failing to maintain sidewalks therein in a safe condition, on any theory of law or equity.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed her complaint herein on March 20, 1934, and alleged therein that "on the 6th day of January, A. D. 1934, the defendant, by and through 'The Commissioners of Lincoln Park,' a duly authorized and existing department or agency of the defendant, with powers and duties conferred upon it by the laws of the State of Illinois, in pursuance of its powers as aforesaid, was possessed of certain sidewalks and pathways for the convenience and safety of pedestrians in the area or district known as Lincoln Park," etc.; and further alleged therein that it was the duty of the defendant to keep and maintain its said sidewalks in good condition and repair and free of obstructions; that notwithstanding its duty in that behalf, the defendant permitted an obstruction dangerous to the safety of pedestrians to be and remain upon said sidewalk, and that the claimant, while in the exercise of all due care and caution for her own safety, tripped and stumbled upon

and against said obstruction, and was thrown with great force to the ground, and thereby sustained serious and permanent injuries.

The Attorney General has moved to dismiss the case for the reason that the Commissioners of Lincoln Park are a municipal corporation, capable of suing and being sued, and that this court is without jurisdiction to entertain this claim.

The same question was raised in the case of *Benjamin Price* vs. *State*, No. 2085, decided at the March term, 1934, of this court; also in the case of *Raffaele Trombello, et al. Admrs. etc.* vs. *State*, No. 2237, decided at the January term, 1934, of this court; and we there held that inasmuch as Lincoln Park is under the direct control and supervision of the Board of Park Commissioners and is a municipal corporation having authority to sue and be sued, an action could not be maintained against the State, for injuries received as the result of an accident occurring in such park.

It has frequently been held by the courts of this State that the Board of Park Commissioners is not liable for injuries occurring in parks. *Stein* vs. *West Park Commissioners*, 247 Ill. App. 479; *Hendricks, Admx.* vs. *Urbana Park District*, 265 Ill. App. 102; *Love* vs. *Glencoe Park District*, 270 Ill. App. 117. There being no liability on the part of the park district, no reason can be perceived why the State should be held liable.

It is also suggested that the State is liable under the doctrine of equity and good conscience. The question of the liability of the State in any case solely on the grounds of equity and good conscience was raised in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, and we there held that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principle of equity and good conscience to secure such an award. The same conclusion was reached in the case of *Johanna Morrissey* vs. *State*, No. 2233, decided at the January term, 1934, of this court.

Claimant having failed to bring herself within the provisions of a law entitling her to an award, the motion of the Attorney General must be sustained and the case dismissed. Case dismissed.

(No. 2366—Claimant awarded $1,128.23.)

FRED J. SHELL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

FRED J. SHELL, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SALARY—*court reporter—earned after death of judge appointing—when award may be made for.* Where claimant was duly appointed official court reporter, by duly elected judge of Circuit Court, under authority of the Statutes, and continued to act as such after the death of the judge appointing him, for and at the request of his successor and the presiding judge of the Judicial Circuit, no appointment of any other court reporter having been made, an award for salary earned after such death may be made where the services performed are certified as being necessary and satisfactory by the proper judge of the Judicial Circuit.

COURT REPORTER—*term of office—when death of judge appointing does not terminate.* Where court reporter is appointed by judge of Circuit Court, under provisions of Statute limiting term of office to length of term of judge appointing, death of said judge does not of itself terminate term of office of appointee, and he will hold such office until his successor is appointed and qualifies.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For many years prior to June 17, 1933, claimant was the official court reporter of the Circuit Judge residing in Macon County, in the Sixth Judicial Circuit of this State. On the last mentioned date he was appointed by Hon. Horace W. McDavid of Decatur, one of the judges of said Judicial Circuit, as his official court reporter, and the original order of appointment was duly filed in the office of the Auditor of Public Accounts of the State. On September 11, 1933, Judge McDavid died, and thereafter the judicial work of said Sixth Circuit was carried on by the two remaining judges of said district, to-wit, Hon. John H. Armstrong of Champaign, and Hon. Joseph L. McLaughlin of Sullivan.

After the death of Judge McDavid, the claimant was requested by Judge McLaughlin, then the presiding judge of the Circuit Court of Macon County, to continue with his work and duties as official court reporter of such court, and thereafter continued in the performance of such duties.

On January 29, 1934, a special election was held to fill the vacancy caused by the death of Judge McDavid and Hon. Charles Y. Miller was elected to fill such vacancy. On February 6, 1934, claimant was reappointed as official court reporter in and for the Circuit Court of Macon County, by said Judge Miller, and has thereafter continued to act as such.

Claimant received his regular salary of $270.00 per month from the time of his appointment by Judge McDavid to and including the month of September, 1933. During October, 1933, he received a notice from the State Auditor to the effect that on account of the death of Judge McDavid, claimant would not receive any further compensation from the State of Illinois until such time as a new appointment of official court reporter might be made by the successor to Judge McDavid.

Although claimant performed all of the duties of court reporter from the time of the death of Judge McDavid, to-wit, September 11, 1933, until the 6th day of February, A. D. 1934, he has not been paid for his services during the months of October, November and December, 1933, nor for the month of January, or the first five days of the month of February, in 1934. He has therefore filed his complaint in this court asking an award for the amount of the salary due him for the time above mentioned at the rate of $270.00 per month, to-wit, the sum of $1,128.23.

It appears from the certificate of Judge McLaughlin that he held all of the Circuit Court in Macon County after the death of Judge McDavid; that it was practically impossible to perform the work in that court unless the services of a competent and skillful reporter could be procured; that he requested claimant to continue as official court reporter of said court, and that claimant did so, and handled all matters that came before the court, so far as his duties required, in a competent and skillful manner, and that he also did a large amount of other work in and about the work of said court at the request of said Judge McLaughlin during all of the time which elapsed from the date of the death of Judge McDavid to the date on which Judge Miller took his oath of office,

to-wit on February 6, 1934; that in his opinion the services rendered by claimant during all of such period were necessary for the orderly procedure of said court, and that such services were well performed.

The right of the claimant to an award depends upon the question as to whether his term of office expired at the time of the death of Judge McDavid, or whether he continued after the death of Judge McDavid until the time of the appointment of a new court reporter by the successor to Judge McDavid.

Claimant was appointed by Judge McDavid pursuant to the provisions of an Act of the General Assembly of the State of Illinois entitled "An Act to authorize the judges of Circuit, Superior and City Courts to appoint shorthand reporters for the taking and preservation of evidence, and to provide for their compensation," in force July 1, 1929, as amended.

Section one (1) of said Act provides in part as follows:

"That each of the several judges of the Circuit, Superior and City Courts in this State be, and they are hereby authorized to appoint one Official Shorthand Reporter * * * * * *. Such appointment shall be in writing and shall be filed in the office of the Auditor of Public Accounts and continue in force until revoked by the judge making said appointment. The Reporter so appointed shall hold his position during the pleasure of the judge so appointing him, not, however, to extend beyond the time the judge making such appointment shall be elected for."

Said Act also provides that such reporter, before entering upon the duties of his office, shall take and subscribe the official oath of office. Consequently, under the provisions of that Act, as well as the provisions of Sections twenty-four (24) and twenty-five (25) of Article five (5) of the Constitution, the claimant was an officer and not an employee.

A similar question was presented in the case of *The People ex rel Kelley*, 134 Ill. App. 642. In that case leave was given to file an information in the nature of a *quo warranto* seeking to oust Mrs. Kelley from her position as official court reporter for the Circuit Court of Cook County, which she then held by virtue of her appointment made by Judge Murray F. Tuley, deceased. The appointment was made by an order of record July 8, 1903, "for a term ending the first day of June, 1909, to hold her office during the pleasure of the judge appointing her, as provided by said Statute." The Statute involved in that case was not identical with the Statute in force at the time claimant in this case was appointed, but seems to

be substantially the same so far as the questions involved in this case are concerned. It was contended in that case that the authority of Mrs. Kelley to hold the office ceased upon the death of Judge Tuley. In that case the court said:

"The only question is whether the appointment is still in force, Judge Tuley, by whom or at whose instance it was made, having since died. The obvious meaning of the statutory provision above quoted is that the term of the reporters so appointed while terminable at any time by the judges appointing them shall in no event extend beyond the term of office of such judges. It does not follow, however, that the reporter's appointment terminates with the death before the expiration of his official term of the judge by whose order he was appointed, merely because the judge so appointing can no longer exercise at his pleasure the power of removal. The continued employment of the reporter by other judges of the same court after such death, may be considered in the nature of a recognition and affirmation of such appointment by such judges." * * * * * * "Respondent has continued to perform services for the judges of the Circuit Court by whom her bills have been duly certified, and we are of the opinion her appointment is still in force."

It would seem, therefore, as though the claimant's term of office did not expire upon the death of Judge McDavid, but that he continued in his office until the time of the appointment of another court reporter by the successor to Judge McDavid.

However, even if his term had expired with the death of Judge McDavid, we feel that he would hold over until the time of the appointment and qualification of his successor under the law of this State.

In the case of *The People* vs. *Schweitzer*, 280 Ill. 437, the court, on page 451, said:

"In legal contemplation, an office that has once been created is necessary, and it is never vacant and is presumed to be continuously filled until it is abolished."

In 46 Corpus Juris, page 971, Section 117, the law is laid down as follows:

"While the word 'vacancy' as applied to an office is one which has no technical meaning, an office is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event. On the other hand, an office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it. The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by Statute, a con-

dition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions."

The wording of the Act of the General Assembly authorizing the appointment of court reporters does not, in itself, indicate that the death of the judge making the appointment should create a vacancy in the office of reporter. Had it been so intended, the Legislature would certainly have incorporated words to that effect therein, instead of providing that the reporter should hold his position "during the pleasure of the judge so appointing him, not, however, to extend beyond the time the judge making the appointment shall be elected for." We cannot assume that the Legislature intended to have a vacancy in the office of the court reporter between the time of the death of the judge making the appointment and the time of the election of his successor.

We conclude, therefore, that the claimant rightfully held the office of court reporter until the appointment of his successor by Judge Miller, and having performed all of the duties of such office in a competent and skillful manner, is entitled to the salary claimed by him.

Award is therefore entered in favor of the claimant for the amount claimed, to-wit, the sum of Eleven Hundred Twenty-eight Dollars and Twenty-three cents ($1,128.23).

(No. 2195—Claimant awarded $2,089.25.)

BRUCE C. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

ROYAL W. IRWIN AND EWART HARRIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—aggravating pre-existing disease of.* Where a member of Illinois National Guard, while afflicted with disease or ailment sustains a personal injury, while engaged in the performance of his duties, which aggravates such pre-existing disease or ailment, resulting in partial loss of use of arm, an award may be made under the provisions of the Military and Naval Code.

MR. JUSTICE YANTIS delivered the opinion of the court:

Bruce C. Smith was a private in the 108th Observation Squadron of the 33rd Division, Aviation, I. N. G., and in his complaint asks compensation for personal injury alleged to have been incurred on August 14, 1931, while in Summer camp at Camp Grant, Rockford, Illinois. In his declaration, he makes claim under Sections 10, 11, 13 and 14, Article XVI, Chapter 129, Smith-Hurd Illinois Revised Statutes, 1931:

One-half active service pay under Section 4 of said Article, to-wit: $7.00 per week from August 15, 1931 to June 23, 1933	$ 644.00
Necessary hospital charges	646.45
Medical and Surgical care	1,372.00
Medicines and appliances	82.10
Impairment and disablement of left arm and shoulder	5,000.00
Total Claim	$7,744.55

The record discloses that during the second week claimant was in camp in August, 1931, a boil appeared on his right arm, for which he received some attention by the Medical Department. Later another appeared on the same arm. On the day his squadron broke camp, claimant was assigned to pull up tent stakes. He was unable to use his right arm at the time because of pain, and was pulling with his left arm. In doing so, he felt a sprain or strain in his left shoulder. He left camp the next morning and thereafter saw Captain Fenwick of the Medical Corps on August 24th. He testified that the left shoulder had been paining him during the week after leaving camp, and the boils on his right arm were continuing to require medical attention. At that time there was no outside infection apparent on the left shoulder, but he could not lift the left arm. Claimant was sent to St. Luke's hospital August 29, 1931, and was operated on by Dr. Pontius for pus in the left shoulder joint, same coming from an opening in the bond at the deltoid tuberosity. Later this pus formation increased in the right chest cavity and the blood stream was found to be infected. On the 28th of September abscesses in the middle of the right leg were discovered from the blood stream, and on October 6th an abscess on the left leg was opened. The shoulder continued to drain and the doctor's testimony is that the patient had osteomyelitis or infection of the bone; that he was returned to the hospital on November 15th and the bone was drilled, x-rays taken and he was discharged again

November 30, 1931. On February 6, 1932, another operation was performed and he was treated for the infected area around the bone until discharged March 4, 1932. The joint was again put in a cast in April and he was discharged permanently from the hospital May 14, 1932. The doctor's testimony was further that the infection healed in August, 1932, resulting in a stiff shoulder joint. The doctor testified further that the condition he found in the left shoulder might, with reasonable medical certainty, have been caused by the sprain; that there was an infection existing in the body at the time and that the effect of the sprain was to localize the infection at the point where the sprain occurred, and that the sprain having occurred, the later symptoms would follow. He further testified, "I would say the infected blood was the result of the boil, and the trauma (injury) was the cause of the localization. He would not have had osteomyelitis if the blood stream was not infected. There was a previous condition, and a sprain, 'It has to have the two,' one must precede the other. The blood condition must be present when the sprain is received."

Dr. Samuel Plummer, another witness called by claimant, when asked to what he ascribed the inflammation of the bone in the upper part of the left arm, stated, "Taking into consideration the history of the case as here given, the presence of boils at the time, a comparatively slight injury which was felt in the region of the upper part of the arm bone near the shoulder; that injury had been the cause of localizing the infection which was in the blood from the boils." And in answer to the further question, "The injury you refer to occurred through spraining the shoulder pulling stakes?", "Yes."

The contention is made that under the provisions of Section 10 of Article 16 of the Military Code there must first be a hearing by Medical Board upon a claim by an injured member of the National Guard before the Court of Claims can properly consider such claim. That section provides as follows:

"Any officer or enlisted man of the National Guard or Naval Reserve who may be wounded or disabled in any way, while on duty and lawfully performing the same, so as to prevent his working at his profession, trade or other occupation from which he gains his living, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in Sections

3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief may determine to be right and just, but not to exceed six months, unless approved by the State Court of *Claims*."

Sec. 10, *Article* XVI, *Military Code.*

There has been no consideration of the matter by Medical Board and the Attorney General's report, found in the record, shows a report by Captain Fenwick of the Medical Corps that the treatment given at the camp during the service of the soldier was for boils not incurred "in line of duty." No further treatment was rendered by anyone in the Medical Corps to Private Smith after leaving Camp Grant, and apparently no claim based upon the sprain to the left shoulder was ever put in line for consideration by any Medical Board. There is nothing in the record to indicate that any application for pay or medical treatment based upon the sprain or injury to claimant's left shoulder has ever been made by claimant through the Military Department. The court is of the opinion that it was the intention of the Legislature that Section 10 should apply to all claims except those resulting from injury or death in active duty under direct commands pursuant to orders from the Commander-in-Chief, but there is some doubt as to the intent of Section 11, and in justice to claimant, we resolve the doubt in his favor. Section 11 provides as follows:

"In every case where an officer or enlisted man of the 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 or assistance and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the Medical department."

Sec. 11, *Art.* XVI, *Military Code.*

Under Section 10, a board of three medical officers should consider and pass upon claims of this character, and if their findings indicate that compensation in excess of six months should be paid, the State Court of Claims should then review

the matter for approval or disapproval of such additional time over the said six months period.

Under the provisions of Section 11, Article XVI of the Military Code, the Court of Claims is given authority to adjust claims arising thereunder as the merits of each case may demand.

The real underlying cause of claimant's condition was not any injury incurred in line of duty. Claimant had an infected condition of blood from which boils resulted before and after the sprain. Much of the hospital and medical care he received was for these boils in the arms and legs and would have been required regardless of the sprain. According to the doctor's testimony, the sprain localized the infection in the bone of the left shoulder, resulting in osteomyelitis. In compensation cases, when a workman has a pre-existing disease which is aggravated by an accident sustained in the course of his employment, he is entitled to compensation to the extent, and in the proportion in which the pre-existing disease is increased or aggravated.

It is difficult to ascertain here to what extent the pre-existing disease of the blood was increased or aggravated by the sprain, and as to how much of the expense incurred by claimant for hospitalization and medical and surgical care can be attributed to the injury to the shoulder and how much of it was necessarily obtained for the patient's care in obtaining relief from the boils and general infection under which he continued to suffer for many months. Dr. Pontius' bill shows that there were four chest operations; also that there were four operations for abscesses of the legs. These two items totalled $80.00, and formed a part of his general bill of $1,372.00. There was also a charge of $250.00 for emergency service on August 29th, at which time the claimant states his legs were also operated upon or treated (Record page 10). How many of the 147 hospital visits at $3.00 each were necessarily made because of the shoulder condition and what part of same should be chargeable to his general physical disability does not appear. The same is true in regard to 23 home visits made by Dr. Pontius at $4.00 per call. Likewise, the 82 office calls at $2.00 each. The testimony of the plaintiff is also disputed by Dr. Pontius as to the last hospitalization date; claimant alleging that it was in May, 1933, while Dr. Pontius testified,

"The plaintiff is wrong, the last hospitalization was in August, 1932."

As above stated, the court is in grave doubt as to claimant being entitled to consideration of his claim by the Court of Claims at this time, but giving consideration to his rights under Sections 10 and 11 of Article XVI of the Military Code, and, in an endeavor to grant to him such award as the merits of his case seem to demand, an award is recommended upon the following basis:

½ active service pay under Sec. 10 of Article XVI Military Code, to-wit: $7.00 per week from August 15, 1931 to August 15, 1932	$ 364.00
½ Hospital charges incurred during said period, being proportionate part allowed in treatment of shoulder	323.25
½ medical and surgical care during said period, being proportionate part allowed in treatment of shoulder	686.00
½ Medicines and appliances	41.00
30% loss of use of arm	675.00
	$2,089.25

An award is therefore made in the sum of Twenty Hundred Eighty-nine and 25/100 Dollars ($2,089.25).

(No. 1745—Claimant awarded $8,357.71.)

TOWN OF STERLING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

SHELDON & BROWN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

REIMBURSEMENT—*highway constructed by town—taken over by State.* Where it appears that State took over strip of brick and cement pavement, constructed by claimant, as part of State system of Highways, an award may be made for cost of same, based on its condition and average life.

MR. JUSTICE YANTIS delivered the opinion of the court:

The Town of Sterling, situated in Whiteside County, Illinois, has filed its claim as a *quasi* public corporation, a political subdivision of the State of Illinois, and bases its claim of $16,715.43 against the State on the fact that the State, through its Department of Public Works and Build-

ings, accepted and took over, on or about the 12th day of November, 1927, and is now using a strip of brick and cement pavement that was constructed by claimant and paid for by it, and that the State in accepting said section of highway incorporated same in and made it a part of Route No. 40 between the City of Sterling and the Village of Milledgeville, Illinois. The complaint does not allege whether Route No. 40 was constructed under the terms and appropriations of the Sixty Million Dollar Bond Issue Act or under the One Hundred Million Dollar Bond Issue Act, but a stipulation was entered into between the parties hereto that the strip of pavement for which reimbursement is asked was laid over a township highway, which was later included as a part of the County State-Aid-System of highways; that the County of Whiteside later abandoned said route as a State-Aid Route on March 12, 1927, at which time it was incorporated in and became a part of the State Bond Issue Route No. 40 and was then and there taken over for maintenance by the State Division of Highways; further that payments on the contract for the construction of that portion of State Bond Issue No. 40 that lies between Sterling and Mt. Carroll were made as follows: $2,375.36 from the General Road Fund appropriation of the Division of Highways, and $6,675.00 from the One Hundred Million Dollar Bond Issue Fund.

The question of whether an award in reimbursement of the Town of Sterling can be made *is largely based* upon whether the section in question comes within the Sixty Million Dollar Bond Issue Act or of the One Hundred Million Dollar Bond Issue Act. No provision is made under the former for reimbursement to townships for existing roads utilized by the hard road system. Section 10 (Cahill, Chapter 121, Section 192), applies to construction work previously made by a county and the State jointly, or by a county alone. Under the One Hundred Million Dollar Bond Act, (Cahill, Chapter 121, Section 198), provision is made that,

"If the Department of Public Works and Buildings utilizes and makes such paved road (constructed by the county and State jointly or by such county alone or into a township, under township organization or a road district in a county not under township organization over a paved road constructed by the county with township or road district funds) shall be determined in the manner hereinafter provided for and an amount of money equivalent to the cost or share of cost paid by said county, township or road

district shall be set apart and allotted by said department to such county, township or road district."

As to whether this section of road can be construed to be one of the roads provided for under the One Hundred Million Dollar Bond Act depends upon the construction of Section 198 (9), Chapter 121, which reads:

"The general location of the routes upon and along which said proposed roads are to be constructed shall be substantially as described in this section * * *.

"ROUTES 1 TO 46 INCLUSIVE

"Said road to be constructed along and upon those routes or those parts of routes described in Section 9 of an Act * * * approved June 22, 1917 *upon which no durable hard-surfaced road shall have been constructed.*"

From the foregoing, it appears that only those routes or those parts of routes of 1 to 46 inclusive, upon which no hard-surfaced road had been constructed at the time of the passage of the One Hundred Million Dollar Bond Act on June 29, 1923, were to be included under the terms of the latter Act. Unless that portion of State Bond Route No. 40 between Sterling and Mt. Carroll was constructed as a part of and under the One Hundred Million Dollar Bond Issue, there is no legal provision for a refund for the section of township road here involved. From the stipulation it appears that the balance of this strip or portion of Route No. 40 between Sterling and Mt. Carroll was paid for as follows: $2,375.36 from General Road Fund of Division of Highways and $6,675.00 from the One Hundred Million Dollar Bond Issue. The cost of the brick pavement constructed by the Town by Sterling and taken over by the Department as a part of Route No. 40 was $16,715.43. The proof indicates and claimant in its reply argument concedes, that one-half of this amount is all that claimant would equitably be entitled to because of the age and life of such road although claimant further contends that interest to the amount of $2,611.88 ought also in equity be allowed to claimant. It appears that some construction work was done on this portion of Route No. 40 during 1917, before the passage of the One Hundred Million Dollar Act; that the section designated as Section 4, from Mt. Carroll to Chadwick was placed under contract May 23, 1924. There is grave doubt in the minds of the court whether this section of road can be considered under the reimburse-

ment section above quoted, due to the apparent intent of the Legislature to include only such routes or portions of routes between 1 and 46 upon which *no durable hard-surfaced road shall have been constructed,* but resolving the doubts in favor of claimant, and under the evidence appearing in the record, the court deems it proper to recommend an award. There is no provision under which interest can be properly allowed, and an award will therefore be made in the sum of $8,357.71.

(No. 2369—Claimant $513.38.)

UNITED STATES OF AMERICA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

PAUL F. JONES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

INHERITANCE TAX—*property passing to charitable institution under Section 28 of Act, not subject to—when claim for refund allowed.* Where property of intestate passed to charitable institution located in the State of Illinois, same is exempt from inheritance tax under Section 28 of Act, and, if tax is paid thereon an award for refund of same may be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to June 3, 1929, William Crowley, a Civil War veteran, was a member of the National Home for Disabled Volunteer Soldiers at Danville, Illinois. He died intestate at such institution on said date, leaving no known heirs. Crowley in his lifetime entered into an agreement with said National Soldiers' Home whereby his entire estate, at his death, would vest in the Post Fund of said National Home, provided he died leaving no heirs at law or next of kin.

On June 6, 1929 letters of administration on the estate of said William Crowley were issued by the Probate Court of Vermilion County to S. E. Brittingham, Public Administrator of said County, and upon demand therefor, the estate of the pensioner was turned over to said Public Administrator by said National Home.

Said Administrator thereafter made an inheritance tax return and subsequently paid the sum of Five Hundred Thir-

teen Dollars and Thirty-eight Cents ($513.38) to the County Treasurer of Vermillion County as inheritance tax, which said sum was thereafter paid by said County Treasurer to the State Treasurer of this State.

Claimant contends that under the provisions of the Act of Congress of June 25, 1910, the estate of said William Crowley, under the facts hereinabove set forth, vested in the Board of Managers of said National Home; that said estate was not subject to an inheritance tax and that therefore the amount so paid for inheritance tax as aforesaid should be refunded to the claimant.

The Attorney General admits that said National Home is a charitable institution under Section 28 of the Inheritance Tax Act, and that property passing to such Home is exempt from inheritance tax, and makes no objection to the allowance of the claim.

Award is therefore entered in favor of the claimant for the sum of Five Hundred Thirteen Dollars and Thirty-eight Cents ($513.38).

(No. 2324—Claim denied.)

JEANETTE VANDERLAAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

LIGTENBERG & CURRY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*patient State Charitable Institution—State not liable for.* In the conduct of the Dental Clinic at the University of Illinois College of Dentistry, the State exercises a governmental function and is not liable for damages for personal injuries sustained by patient thereof alleged to have been sustained by negligence in failing to maintain stairway therein in safe condition.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed her complaint herein on February 7, 1934, in which she avers that on the 14th day of December, 1931, she was a patient at the Dental Clinic then being held by the respondent at the University of Illinois College of Dentistry

in the City of Chicago; that in connection therewith it became necessary for her to descend a certain stairway in one of the buildings of said college; that it was the duty of the defendant to keep and maintain such stairway in a good and safe condition for the use of the claimant and others lawfully on said premises; that respondent disregarded its duty in that behalf, allowed said stairway to become uneven, failed to provide proper railings, and failed to light said stairway properly, and so maintained the same as to render it unsafe for persons using the same; that by reason thereof she tripped and fell part way down the stairs and thereby sustained serious and permanent injuries for which she claims damages.

The Attorney General has entered a motion to dismiss the case for the following reasons:

1. There is no liability on the part of the respondent under the facts set up in the complaint.

2. Claimant's right of action is barred because the claim was not filed within two years from the date the injuries were received.

Inasmuch as the motion must be sustained on account of the reason first urged by the Attorney General, it is unnecessary to consider the second reason urged by him.

In the maintenance of its educational and charitable institutions the State exercises a governmental function. It is the well established law of this State and other states, that in the exercise of its governmental functions, the State is not liable for the negligence of its servants or agents. *Hollenbeck, Admx.* vs. *Winnebago County,* 95 Ill. 148; *Minear* vs. *State Board of Agriculture,* 259 Ill. 549; 25 R. C. L. p. 407, Section 43; 8 R. C. L. Supp. p. 5580, Section 43.

This court has no authority to allow an award in any case unless there would be legal liability on the part of the State if the State were suable. *Crabtree* vs. *State,* 7 C. C. R. 207; *Morrissey* vs. *State,* No. 2233, decided at the January term, 1934, of this court.

The complaint fails to set forth facts showing any liability on the part of the State and we therefore have no authority to enter an award.

The motion of the Attorney General must therefore be sustained and the case dismissed. Case dismissed.

(No. 2431—Claimant awarded $210.40.)

WILLIAM A. WORTHINGTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1934.

WILLIAM A. WORTHINGTON, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*medical and hospital services—when award made for.* Where an electrician, employed by Secretary of State, sustains accidental injuries, arising out of and in the course of his employment, an award will be made for amount expended for necessary medical and hospital services incurred as a result of such accident.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 2d day of March, A. D. 1934, claimant was working as an electrician in the employ of the Secretary of State, and on the last mentioned date was assigned to install an electrical service connection in the vault of the Corporation Department in the Capitol Building. In the course of this work it became necessary to cut a channel in the east wall of the vault at a height that required the use of an elevated support on which the claimant could stand. In the course of the work this support gave way and claimant fell to the floor of the vault in such a manner as to break his right ankle.

He was off duty on account of the injury from March 2nd to May 28, 1934, and expended the sum of Two Hundred Ten Dollars and Forty Cents ($210.40) for doctor and hospital bills in being cured of his injuries. Claimant was paid his salary during the time he was off duty and makes no claim for permanent disability, but makes claim only for the sum of Two Hundred Ten Dollars and Forty Cents ($210.40) for the money expended by him for medical and hospital treatment as aforesaid.

It appears that at the time of the accident in question the claimant and respondent were both operating under the terms and provisions of the Workmen's Compensation Act, and that the accident arose out of and in the course of the claimant's employment.

Under the provisions of the Workmen's Compensation Act, respondent was required to furnish "the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services thereafter," etc.

Respondent having failed to furnish such medical and hospital services, and the claimant having been required to obtain the same at his own expense, is entitled to be recompensed for the amount so paid or incurred by him therefor.

Award is therefore entered in favor of the claimant for the sum of Two Hundred Ten Dollars and Forty Cents ($210.40).

(Nos. 2373, 2374, 2375, 2377, 2378, 2379, Consolidated—No. 2377, Claimant awarded, $3,000.00, No. 2378, Claimant awarded, $700.00.)

SAMUEL STEIN AND SADIE STEIN, Nos. 2373, 2374, NILES BURKE ET AL., No. 2375, FREDERICK A. RUB, No. 2377, ALBERT ST. JULIEN ET AL., No. 2378, HELEN ST. JULIEN, No. 2379. Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 30, 1934.

BARR & BARR, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

Note: The claimants and the Department of Public Works and Buildings were unable to agree upon the amount of damages, if any, to which claimants might be entitled and stipulated that the claims be submitted to this court for determination, and that the award, if any, made by this court, shall be paid by said department and not by way of appropriation made by the legislature, as in cases where awards are made under the Court of Claims Act.

ILLINOIS WATERWAY ACT—*construction of words "all damages" in Section 23 thereof.* Under Section 23 of the Illinois Waterway Act, providing that the State shall be liable for all damages to real or personal property which shall be overflowed or otherwise damaged by reason of the construction, maintenance, or operation of the waterway and its appurtenances, the words, "all damages" cannot be considered alone, but must be considered in connection with all the other words of the section and the Act.

SAME—*same—Section 7 of Act—Eminent Domain.* Where Section 7 of the Illinois Waterway Act authorizes the Department of Public Works and Buildings to acquire by condemnation under the Eminent Domain laws of the State of Illinois all property necessary to be taken or damaged for the construction, maintenance, operation or repair of such Waterway and its appurtenances, the words "all damages" as used in Section 23 of said Act

means all damages legally recoverable and measured as in cases under Eminent Domain Act.

PROPERTY DAMAGE—*construction of Illinois Waterway—measure of.* Where property of an abutting owner is not taken for public use, but is damaged by reason of construction of public improvement, the true measure of such damage is the difference between the fair cash market value of the property unaffected by said improvement and its fair cash market value as affected by it.

SAME—*same—loss of or inconvenience to business—not damage to property—not proper element of damage.* Inconvenience to or loss of business suffered by owners of abutting property during the progress of work in the construction of a public improvement, do not constitute damage to property, within the meaning of the Constitution, but constitute a burden incidentally imposed upon private property adjacent to public work and no cause of action therefore arises against the State.

SAME—*same—duty to minimize.* One claiming damage to private property by reason of construction of public improvement must make all reasonable efforts to render the loss as small as possible, and will not be permitted to recover for any increase of loss consequent upon a failure to perform that duty.

Per Curiam:

All of the above claims arise by reason of the construction of the Illinois Waterway through the City of Joliet. The several claimants own property which they claim has been damaged either by the construction of the Cass Street Bridge or the Jefferson Street Bridge over the Illinois Waterway in said City of Joliet, and seek to be recompensed for the damages which they claim to have sustained by reason of the construction of such bridges.

Inasmuch as the same questions are involved in each of the several cases, and inasmuch as the same counsel represent all of the claimants, the several claims have been consolidated for the purpose of this hearing.

The several claimants filed their respective claims with the Department of Public Works and Buildings, in accordance with the provisions of the Statute of this State commonly known as the Illinois Waterway Act. The claimants and the said Department were not able to reach an agreement as to the amount of damages sustained, if any, nor were they able to agree on arbitration in accordance with the provisions of the Waterway Act. In consequence thereof, and by stipulation between the several claimants and the Department of Public Works and Buildings, the several claims were submitted to this court for determination.

It is stipulated and agreed that the several awards made by this court, if any, shall be paid by the Department of Public Works and Buildings, and not by way of appropriation made by the Legislature, as in cases where awards are made by this court under the Court of Claims Act.

The facts, so far as they apply to each of the several cases, are substantially as follows:

Sometime prior to the year 1932, the respondent commenced the construction of the Illinois Waterway through the City of Joliet, and was engaged in such construction work during all of the year 1932, and for sometime thereafter. Said Waterway, in passing through the City of Joliet, runs in a northerly and southerly direction, and in general follows the bed of the DesPlaines River and the Illinois and Michigan Canal, and occupies the space theretofore occupied by said river and said canal. Both Jefferson Street and Cass Street (which is known as Western Avenue west of the river) in said City of Joliet extend in an easterly and westerly direction and intersect the Illinois Waterway at right angles. Prior to the time of the construction of the Illinois Waterway, said DesPlaines River and said Illinois and Michigan Canal were crossed by public bridges approximately level, and at grade on both Jefferson and Cass Streets.

Respondent commenced the work of demolishing the then existing bridge across said river and canal on Jefferson Street about the 25th day of April, A. D. 1932, and commenced the work of demolishing the then existing bridge on Cass Street about May 1, 1932; and commenced the construction of a new bridge on each of said streets, to take the place of the old bridges as soon after said dates as the nature of the work permitted.

The construction of the Jefferson Street Bridge, together with the approaches thereto, was completed on or about the 25th day of November, A. D. 1932, and the Cass Street Bridge and approaches, on or about the 1st day of January, 1933. Both new bridges were so constructed as to provide a clearance thereunder of 16½ feet, thereby making the floors of both bridges approximately 18 feet higher at the crown than the floors of the old bridges. As a result thereof it was necessary to construct approaches to said bridges from both the east and the west, the east approach on Jefferson Street com-

mencing at a point 197 feet east of said bridge, and the west approach on Western Avenue commencing at a point 96½ feet west of said bridge. Such approaches, both east and west, were constructed on a grade of approximately 7%.

The claimant, Frederick A. Rub, owns property adjoining the west approach to the Cass Street (Western Avenue) bridge; the claimants, Niles Burke, et al., then owned a sign located on the south side of Western Avenue, near the bridge; the claimant, Helen St. Julien, owns property adjoining the east approach on Jefferson Street; and the claimant, Samuel Stein and Sadie Stein, own property about 30 feet east of the east end of such approach.

So far as the question of damages is concerned, certain facts in each case are different, and each case will therefore be considered separately on the question of damages.

No. 2373.
SAMUEL STEIN.
Damage to Real Estate.

No. 2374.
SAMUEL STEIN AND SADIE STEIN.
Damage account of Loss of Business.

Claimants, Samuel Stein and Sadie Stein, filed their original claim with the Department of Public Works and Buildings on December 31, 1931. They are, and were at that time and prior thereto, the owners of a lot located on the south side of Jefferson Street known as 110 East Jefferson Street, having a frontage on that street of twenty-five and one-half (25½) feet and a depth of One Hundred Thirty-two (132) feet. Such lot is improved by a two-story brick building twenty-five and one-half by ninety feet, which is occupied as a wholesale and retail fish market on the first floor, and as a flat on the second floor. Claimant contend that during the time the Jefferson Street Bridge and the approaches thereto were in the course of construction, to-wit, from April 25th to November 26, 1932, the street in front of their property was constantly barricaded, and that as the result thereof they suffered a loss of business, and also contend that the real estate owned by them as aforesaid has depreciated in value as the result of the construction of the

Jefferson Street Bridge and the approaches thereto, and therefore claim damages for both of said items.

As to the item of damages for loss of business on account of the blockade of the street, this court held in the recent case of *Grassle* vs. *State*, No. 2339, that this item does not constitute a proper element of damage within the meaning of the Waterway Act, and in that case we denied an award therefor.

The decision in the Grassle case finds support in the following decisions of our Supreme Court, to-wit:

Osgood vs. *City of Chicago*, 154 Ill. 194.
Lefkovitz vs. *City of Chicago*, 238 Ill. 223.
Chicago Flour Co. vs. *City of Chicago*, 243 Ill. 218.
Peck vs. *Chicago Railways Co.*, 270 Ill. 34.
City of Winchester vs. *Ring*, 312 Ill. 552.

Claimants insist, however, that this item is a proper element of damage under the wording of Section twenty-three (23) of the Waterway Act which reads as follows:

"The State shall be liable for all damages to real estate or personal property within or without the radius or zone of the 'Illinois Waterway' which shall be overflowed or otherwise damaged by reason of the construction, maintenance or operation of the "Illinois Waterway" and its appurtenances. It shall also be liable for all damages to persons caused by the construction, maintenance or operation of the 'Illinois Waterway' and its appurtenances, such damages to persons who are employees to be ascertained, determined and fixed as provided in this Act."

Cahill's Revised Statutes, 1933, Chap. 19, P. 113.

Claimants in their brief say:

"The provision providing for payment of all damages, means just what it says. It includes all damages whether within the constitutional provision as to liability or not, and includes also damages to business."

The question of the liability of the respondent for this item of damages therefore depends upon the proper construction of the words "all damages" as used in the Act. In determining the meaning of such words, we must ascertain the intention of the Legislature, and in ascertaining such intention we must consider all of the terms and provisions of the Act, as well as the purpose thereof. The words "all damages" cannot be considered alone but must be considered in connection with all of the other words of the section and the

Act. *People* vs. *Goldberg*, 332 Ill. 346; *City of Genesco* vs. *Shearer*, 326 Ill. 82.

Section seven (7) of the Act enumerates the powers of the Department of Public Works and Buildings, and Paragraph eight (8) of said section authorizes the Department "to acquire by condemnation under the eminent domain laws of this State, all property necessary to be taken or damaged for the construction, maintenance, operation or repair of such Waterway and its appurtenances."

Section eight (8) of the Act provides that before the Department shall enter upon, take or damage private or public property for the construction, maintenance, enlargement or extension of the Waterway or its appurtenances, it shall make just compensation therefor, and if such just compensation cannot be agreed upon, it shall be ascertained, determined and found in the manner provided by the eminent domain laws of this State.

Section sixteen (16) provides for the rebuilding or reconstruction of any existing drainage or sewer systems constructed by any city or village which are destroyed or materially interfered with in the construction, maintenance, use and operation of the Waterway.

Section twenty (20) provides for the repair or reconstruction of present bridges and approaches thereto, which are or may be damaged or materially impaired in the construction of the Waterway.

Section twenty-three (23) provides that the State shall be liable for all damages to real or personal property which shall be overflowed or otherwise damaged by reason of the construction, maintenance, or operation of the Waterway and its appurtenances, and that the State shall also be liable for all damages to persons caused by the construction, maintenance or operation of the Waterway and its appurtenances.

There is nothing in any of the provisions of the Act which we have been able to discover, which indicates an intention on the part of the Legislature to establish any other or greater liability on the part of the State than now exists in eminent domain cases. The Department is specifically given the right to acquire all property necessary to be taken or damaged for the construction, maintenance or operation of the Waterway "by condemnation under the eminent do-

main laws of this State," and it is nowhere specifically provided that the measure of damages shall be different from that in condemnation cases under the eminent domain laws, or that any items or elements of damage shall be considered, other than those items or elements which have been recognized by our courts in eminent domain cases, since the adoption of the Constitution of 1870.

The only authorities cited by the claimants in their brief are the following, to-wit:

Opinions of Attorney General, 1931, p. 443-461;
St. L. V. & T. H. R. R. Co. vs. *Capps,* 67 Ill. 607.

So far as the opinion of the Attorney General is concerned, it is sufficient to say that the present Attorney General is not in accord with such opinion, but on the other hand, contends that the claimants are not entitled to any damages whatsoever on account of loss of business, and has filed his brief and argument herein, in support of such proposition.

The case of *St. L. V. & T. H. R. R. Co.* vs. *Capps,* 67 Ill. 607, cited by counsel for the claimants, arose out of an ordinance adopted by the Board of Trustees of the Town of Vandalia in 1868. Such ordinance granted the railroad company a right-of-way over, across and along the streets and alleys of said town, upon the agreement, among other things, that the railroad company would pay "all damages that may accrue to the property owners on said Main Street, by reason of the construction of said railroad."

Capps was the owner of several lots fronting on Main Street on which he had erected buildings, and among them a store in which he had prosecuted his business as a merchant for more than twenty years, doing a large business. The railroad company excavated said Main Street fifteen (15) or more feet deep and forty (40) or more feet wide, and constructed its railroad thereon, and Capps contended that he was entitled to be compensated for the damage done to his business by reason thereof. In that case the court held that under the ordinance in question, he was entitled not only to damages for the depreciation in value of his real estate, but was also entitled to damages for interruption to his business during such time as would have been necessarily employed in accommodating himself to another place of business equally eligible, and his removal thereto.

That case, however, is clearly distinguishable from the case at bar. The Capps case arose in 1868, and the law in force at that time (prior to the adoption of the Constitution of 1870) did not authorize the payment of damages to owners of property damaged but not taken, and the decision must therefore be read in the light of the law as it existed at that time.

In the case of *Chicago Flour Co.* vs. *City of Chicago*, 243 Ill. 268, the plaintiff sued the City of Chicago to recover damages which it sustained as the result of being deprived of the use of a certain switch track, during the time the same was being elevated pursuant to the requirements of a track elevation ordinance of said City of Chicago.

The track elevation ordinance contained a provision to the effect that nothing therein contained should be so construed as to require the railway company to pay any direct, incidental or consequential damages to adjacent property or business caused by the elevation of the tracks, and the City of Chicago therein agreed "that all such damages, if any there be, shall be adjusted and paid by the City of Chicago."

The plaintiff in that case contended, as the claimants here contend, that under the wording of the ordinance, the City of Chicago was required to pay "all damages," and that such words included damages resulting from its being deprived of the use of the switch track, and relied upon the Capps case to sustain its contention. In disposing of such contention and in considering the decision in the Capps case, the Supreme Court there said:

"The only invasion of their rights complained of, is the temporary interference with the ordinary means of access to and egress from their property during the progress of the work. It is well settled that inconvenience, expense or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the constitution. *Lefkovitz* vs. *City of Chicago*, 238 Ill. 23; *Osgood* vs. *City of Chicago*, 154 id. 194; *Northern Transportation Co.* vs. *City of Chicago*, 99 U. S. 635.

"It is insisted, however, in behalf of the appellants, that the paragraph of the ordinance quoted above constituted a contract on the part of the city to pay all damages of the character here involved and that a recovery may be had therefor under the ordinance. That provision of the ordinance was not intended to impose upon either party a liability which did not

before exist, but was intended to determine, as between the parties to the agreement, which should pay the damages for which it might be reasonably anticipated one or both would become liable in the prosecution of the work. It is true that the word "damages", as used in the ordinance, is capable of the meaning insisted upon by the appellants, and we are referred to the case of *St. Louis, Vandalia and Terre Haute Railroad Co.* vs. *Capps*, 67 Ill. 607, and *Same* vs. *Same*, 72 id. 188, where an ordinance granted to a railroad company the right-of-way over, across and along the streets and alleys of a town upon condition that the railroad company should be held bound to pay all damages that might accrue to the property owners on Main Street by reason of the construction of said railroad, and it was held that the damages there included damages for the interruption of a property owner's business during such time as would be necessarily employed in securing another place of business equally eligible and in removing thereto. This case arose prior to the adoption of the constitution of 1870, and at a time when, in the absence of the ordinance, neither the town nor the railroad company would have been liable for damages by reason of the construction of the railroad in the street. *Moses* vs. *Pittsburg, Ft. Wayne and Chicago Railroad Co.*, 21 Ill. 515; *Murphy* vs. *City of Chicago*, 29 id. 279.

"*The object of the construction of contracts is to arrive at the intention of the parties.* The subject matter of the contract, the nature of the instrument, the intention and purpose of the parties and the object they had in view will be taken into consideration and the intention carried into effect, so far as the rules of language and the rules of law will permit. (2 *Parsons on Contracts*, *499). In the Capps case there was no liability on the part of either the town or the railroad company for any damages whatever. The object of the town in inserting the provisions concerning damages was manifestly to secure the property owners on Main Street against damages of every character, the meaning of the word never having been adjudicated in a similar case. In the present case, the city, and perhaps the railroad company, would be liable for certain damages, the meaning of the word having been defined by many adjudications, and the manifest object of the parties was, not to protect property owners and to secure them their damages, but to determine, as between the city and the railroad company, who should pay them if any were to be paid and to relieve the railroad company from their payment. The property owners were protected by the law which gave them a right to recover damages, which did not exist in the Capps case. The damages which could be recovered were defined by law. We think it apparent that only such damages were contemplated in the ordinance and that the object of the provision was to afford indemnity to the railroad companies, and, as between them and the city, to impose upon the latter the liability for all damages legally recoverable against either or both on account of the work mentioned in the ordinance."

The rule laid down in the case of *Chicago Flour Co.* vs. *City of Chicago* has been approved in numerous cases since that time. *Catholic Bishop of Chicago* vs. *City of Chicago*, 177 Ill. App. 187; *Foley Mfg. Co.* vs. *City of Chicago*, 194 Ill. App. 532; *Otis Elevator Co.* vs. *City of Chicago*, 263 Ill. 419;

Peck vs. *Chicago Railways Co.*, 270 Ill. 34; *Lord* vs. *City of Chicago*, 274 Ill. 313.

In the various provisions of the Waterway Act hereinbefore referred to, the legislature apparently sought to provide compensation to all of the different persons, and for all the different properties, public and private, which might be damaged by reason of the construction, maintenance or operation of the waterway, but in none of such provisions is there any evidence of an intention on the part of the legislature to enlarge the liability of the State, or provide for any other or different compensation from that provided by the Eminent Domain Law.

As we view it, the words "all damages" as used in Section 23 of the Waterway Act mean "all damages legally recoverable".

We are of the opinion that the rule laid down in the Grassle case is the correct rule of law, and are not disposed to depart from the same, and consequently cannot allow an award as to the item of damages for loss of business.

As to the item of damage to real estate, it is admitted that there was no change in the grade of the street in front of claimants' property; that the grade commenced about thirty (30) feet west of claimants' property and extended westward, and that claimants remodeled their building after the construction of the Jefferson Street Bridge and the approaches thereto.

Two real estate experts testified on behalf of the claimants and two on behalf of the respondents. The experts for claimants estimated the damage as of the date of the closing of the Jefferson Street Bridge, at Sixteen Hundred Dollars ($1,600.00), but admitted that such depreciation was more or less an arbitrary figure.

Two experts for the respondent testified that in their opinion the property of the claimants had sustained no damage by reason of the construction of the Bridge. The court viewed the property (pursuant to authority given in the stipulation on file), and after a careful consideration of the evidence, is forced to the conclusion that claimants have failed to show any damage to their real property by reason of the construction of the Jefferson Street Bridge or the approaches thereto.

Award is therefore denied in cases No. 2373 and 2374 and the cases dismissed.

No. 2375.
NILES BURKE AND JOHN MARSO.

Prior to and at the time of the construction of the Cass Street Bridge and the approaches thereto, claimants were engaged in the outdoor advertising business under the name of B. & M. Advertising Service. They had located an electric display sign twenty-five (25) feet long and fourteen (14) feet high on the south side of Cass Street, near the west end of the Canal Bridge, under a lease from year to year with Frederick A. Rub, by the terms of which lease they paid him twenty-five Dollars ($25.00) per year, and which said lease expired in November, 1932.

Lessees leased the space on this sign to Joliet Warehouse and Transfer Co. at a rental of Twenty-five Dollars ($25.00) per month.

In the Spring of 1932, Cass Street was closed to traffic on account of the work being done thereon, and the value of the sign for advertising purposes was thereby destroyed, and the lessees thereof refused to pay any rent therefor after May 1, 1932.

Thereafter and in the course of the work of tearing out the old Cass Street Bridge and constructing the new bridge and the approaches thereto, the sign was torn down without notice to claimants. The value of the sign at the time of the destruction thereof was Three Hundred Dollars ($300.00), and claimants have filed their claim to recover that amount, and in addition thereto the sum of One Hundred Fifty Dollars ($150.00) for loss of rent from May, 1932 to November, 1932, at Twenty-five Dollars ($25.00) per month.

Claimants introduced some evidence to show that part of the sign was used in barricading the street, and conclude therefrom that such sign was torn down by the respondent.

Mr. M. V. Ahlvin, Assistant Chief Engineer, Division of Waterways, testified (A. 130) that he knew from the surveys that the sign was within the street lines; that the sign was situated wholly on the street (A. 127) and that it was impossible that part of it should have been used in the con-

struction of the barricade, as the sign was still standing after the barricade was built and was not removed until about three months after the construction of such barricade (A. 127).

Mr. Burke testified that the sign was rebuilt just previous to the time the bridge was put in; about four or five months before it was destroyed (A. 78);—notwithstanding the fact that it had been known for many months prior to that time, that the new bridge would be put in at an elevation of sixteen and one-half (16½) feet above the water level.

There is no question but what the sign was destroyed, but there is nothing in the record to show by whom it was destroyed. There is no evidence connecting the State or any officer or agent thereof with the destruction of such sign.

Taking into consideration the fact that the sign was constructed in the street, and that there is nothing in the record to show that it was destroyed by the State or any representative of the State, we cannot allow an award against the State for the destruction thereof.

Under the rule laid down in the Stein cases, Nos. 2373 and 2374, claimants are not entitled to an award for the loss of rentals resulting from the temporary closing of the street.

Award is therefore denied and the case dismissed.

No. 2377.
FREDERICK A. RUB.

Claimant seeks to recover damages to two (2) lots, one being at the Southeast corner of Western Avenue and Bluff Street, and the other immediately adjoining on the south. The corner lot has a frontage of twenty-five (25) feet on Bluff Street and eighty-five (85) feet on Western Avenue, and is improved with a two-story frame building, 25 x 60 feet, and a small addition in the rear, 15 x 18 feet, which said building fronts on Western Avenue and has a corner entrance at the northwest corner of the building. Claimant bought this property twenty-seven (27) years ago for Twelve Thousand Dollars ($12,000.00), the present building being then upon the property.

The other lot, which fronts on Bluff Street, is 50 x 85 feet, and was purchased by claimant fourteen (14) or fifteen (15) years ago for Seventeen Hundred ($1,700.00) or

Eighteen Hundred Dollars ($1,800.00). There was then a dilapidated old one-story frame building thereon. The south half of such building was torn down some years ago, so that for the past five (5) or ten (10) years the North twenty-five (25) feet of this second lot has been improved by a one-story frame building 25 x 90 feet, and the south half of such lot has been vacant.

The new bridge is eighteen (18) feet two (2) inches higher at the crown and 6.29 feet higher at the west wall of the Illinois Waterway than the old bridge. The west approach commences ninety-six (96) feet three (3) inches west of the bridge, and thereby the grade on the Western Avenue approach was raised 3.23 feet, resulting in a seven per cent (7%) grade commencing at a point thirteen (13) feet east of claimant's west property line. There has been no change in grade at the front entrance to the building, the new grade commencing at a point thirteen (13) feet east of such entrance.

George M. Munroe and Thomas P. Lennon, real estate experts for the claimant, estimated the damage of claimant to be Sixty-five Hundred Ninety-six Dollars ($6,596.00), based upon the fair cash value of the property prior to the improvement, and the fair cash value of such property subsequent to the improvement. In explaining how they arrived at that valuation, Mr. Munroe testified as follows:

"Inasmuch as this property was not improved to its highest and best use at that time there was only what you might call a shack located on the property, at least it was a building in very poor condition. Any capitalization of income for that building would not show anything of the true value of the land. The property was unique in that there is very little property like it between the river and the hill, so there were no sales that we could use for comparison, consequently we made a calculation of the net income applicable to the land if the building were improved to the highest and best use. In our judgment the highest and best use of the property would be in a one-story and basement building divided into shops, each with a separate heating plant and with a dividing wall between. I got an estimate on the cost of such a building from Hanson-Peterson Company who are one of the largest and most reliable building contractors in Joliet. I also got an estimate of the cost of construction of such a building from them on the slope as proposed by the State. We then calculated the rental obtainable for these stores, both *before and after the change* in grade, and from these calculations capitalized the net income, after deducting expenses and depreciation to arrive at the total of the property. Deducting the cost of the building would leave a residual value for the land. Our

appraisal of the value of the land before the changes were made as of 1930 and based on a frontage of 86½ feet on Western and 75 feet on Bluff was $19,500.00. Our appraisal of the value of the land after the construction of the waterway and of the Cass Street Bridge and of the approaches was $7,000.00.

"Q. You treated that as being Western Avenue property, did you not? In other words the structure that you theoretically superimposed faced Western Avenue?

"Yes, sir.

"Q. Why did you do that?

"A. Because Western Avenue is a better street—higher value street, and any building to be erected on it would face the higher value street rather than the side street which, in this case, would be Bluff Street regardless of how the lots might be platted."

The valuation placed on the property by these experts was based upon their opinion that the property was not improved to its highest and best use at this time; and that the highest and best use of the property would be a one-story and basement building divided into separate shops all facing on Western Avenue, and covering the corner lot as well as the lot adjoining the corner.

This was not the proper method of arriving at the amount of damage sustained by the claimant. Without doubt, the rental value of the property should be taken into consideration, along with all other proper elements, in determining the value of the property. *City of Chicago* vs. *Witt*, 289 Ill. 520; *City of Chicago* vs. *Jackson*, 333 Ill. 345.

The rental value to be considered, however, should be the present rental value and not the rental value which might possibly be anticipated as the result of demolishing the present buildings and constructing a new building of an entirely different type.

The evidence shows that the corner lot, having a frontage of twenty-five (25) feet on Bluff Street and eighty-five (85) feet on Western Avenue, was acquired by claimant about 1907, and that such lot and the building thereon is occupied as a saloon, and has been occupied for that purpose and as a soft drink parlor for many years; that the adjoining lot, having a frontage of fifty (50) feet on Bluff Street and a depth of approximately eighty-five (85) feet, was acquired by claimant about 1920, and that such lot and the building thereon was occupied as a bowling alley and transfer office. There is no evidence in the record which discloses

any damage to this lot. Nevertheless, the experts for claimant, in making their estimates of damages, based their values upon rentals to be obtained from a building to be erected on both lots.

Considering the corner lot alone, a building such as was contemplated by such experts could not be erected, as the corner lot was only twenty-five (25) feet in width. Furthermore, there is nothing in the record to indicate that under the proposed construction there would be any demand for such rooms for rental purposes, and the evidence as to local conditions makes it very questionable whether such rooms could be rented to any advantage.

The true measure of damages for land not taken is the difference between the fair cash market value of the property unaffected by the improvement, and its fair cash market value as affected by it. *Department of Public Works* vs. *Caldwell*, 301 Ill. 242; *Department of Public Works* vs. *McBride*, 338 Ill. 347.

Damages must be direct and proximate, and not such as are merely speculative and remotely contingent. *Department of Public Works* vs. *McBride*, 338 Ill. 347; *Illinois Power and Light Corporation* vs. *Barnett*, 338 Ill. 499.

Considering the law as laid down by our Supreme Court, we are forced to the conclusion that the opinions of the experts for the claimant were based upon matters which they had no right to take into consideration in arriving at their conclusions.

Charles H. Noble and George H. Hill, real estate experts produced by the respondent, each placed the damage to the claimant's property at Three Thousand Dollars ($3,000.00). They testified that the real frontage of the property is on Bluff Street; that the property has been used as a saloon for many years; and that it is now being put to its best use, to-wit, for a saloon.

The court viewed the premises, and considering all of the evidence, we feel that if claimant is awarded Three Thousand Dollars ($3,000.00), he will be justly and fully compensated for the damage he has sustained.

IT IS THEREFORE ORDERED that an award be entered in favor of the claimant, Frederick A. Rub, for the sum of Three Thousand Dollars ($3,000.00), payment to be made by

the Department of Public Works and Buildings of the State of Illinois, within fifteen (15) days from the entry of this order, in accordance with the stipulation heretofore filed herein.

No. 2378.
ALBERT ST. JULIEN AND FRANK ST. JULIEN.

No. 2379.
HELEN ST. JULIEN.

Helen St. Julien is the owner of a lot on the north side of Jefferson Street, known as 103 East Jefferson Street, which lot has a frontage of twenty-four (24) feet on Jefferson Street and a depth of eighty-six (86) feet; it is improved by a frame building which is two stories high in front and one story in the rear, the front portion being approximately 21 x 40 feet, and the rear portion 21 x 30 feet, which said building is situated 110 feet 2 inches east of the east end of the Jefferson Street Bridge. For a long time prior to the construction of such bridge, this building was occupied by the claimants, Albert and Frank St. Julien, for the sale of harness goods, luggage and bags, trunks, suitcases, valises and auto supplies, the value of the stock being approximately $3,500.00. The stock was an open display.

The claimant, Helen St. Julien, seeks to recover damages to her property as the result of the construction of the bridge, and the approaches thereto, and the claimants, Albert and Frank St. Julien, seek to recover damages for the loss of business during the time the bridge and the approaches thereto were being constructed, as well as damages for the injury done to their mercantile stock on account of the dirt and dust which naturally resulted from the making of the improvement.

Mr. George M. Munroe and Mr. Thomas P. Lennon, real estate experts for claimant, Helen St. Julien, stated that in their opinion, the damage to the real estate as of the date of the taking out of the Jefferson Street Bridge, to-wit, April 25, 1932, was $5,600.00 plus the cost of remodeling the building and raising the same to conform to the new grade.

Mr. George H. Hill and Mr. Charles N. Noble, real estate experts called by the respondent, testified that in their

opinion the damage to the real estate was $3,600.00 plus the cost of remodeling the building and raising the same to conform to the new grade.

Mr. Alfred Locher, an estimator for the Kaiser-Ducett Co., a construction company, and Mr. Oscar C. Kaiser, President of the said Company, estimated the cost of remodeling the building and raising the same to conform to the new grade, at $2,500.00, while Mr. Ahlvin, Assistant Chief Engineer, Division of Highways, a witness for the respondent, estimated the cost of such work to be $1,500.00.

Mr. Locher and Mr. Kaiser who estimated the cost of remodeling the building and raising the same to conform to the new grade, as witnesses for the claimant, and Mr. M. V. Ahlvin, who made similar estimates on behalf of the respondent, were agreed as to the method to be followed, but differed as to quantities and prices. Mr. Locher and Mr. Kaiser prepared a detailed and itemized statement of costs and included among the items a total of Seven Hundred Fifty-four Dollars ($754.00) for raising the building and Six Hundred Fifteen Dollars ($615.00) for masonry work. Mr. Locher stated that if he received a figure for the doing of the work less than the amount which they estimated, their estimate would be lowered correspondingly.

Mr. Edward Anderson, a general masonry contractor of Joliet, with twenty years' experience in his line of work, estimated the cost of the masonry work at Four Hundred Dollars ($400.00), being Two Hundred Fifteen Dollars ($215.00) less than the amount of the estimate made by Mr. Locher and Mr. Kaiser.

Mr. Sam Davidson, a house mover of Joliet, having twenty-five years' experience in work of that kind, estimated the cost of raising the building at Four Hundred Ninety Dollars ($490.00), being Two Hundred Sixty-four Dollars ($264.00) less than the estimate of Mr. Locher and Mr. Kaiser. The estimate prepared by Mr. Locher and Mr. Kaiser also contains an item of Two Hundred Three Dollars ($203.00) for "general conditions" which is not further itemized or explained.

Considering all of the evidence, and particularly the fact that the estimate made by the witnesses for the claimant for raising the building, was Two Hundred Sixty-four Dol-

lars ($264.00) higher than the price for which the work could have been done, and that their estimate for masonry work was Two Hundred Fifteen Dollars ($215.00) higher than the price for which the work could be done, we feel that the estimate made by Mr. Ahlvin forms a more reliable basis for awarding damages.

The court viewed the premises and after giving careful consideration to all of the testimony in the record, we feel that if the claimant, Helen St. Julien, is awarded $5,100.00, she will be justly and fully compensated for all of the damage that she has sustained by reason of the construction of the bridge in question and the approaches thereto.

Award is therefore entered in favor of the claimant, Helen St. Julien, and against the State of Illinois for the sum of Fifty-one Hundred Dollars ($5,100.00), payment to be made by the Department of Public Works and Buildings of the State of Illinois, within fifteen days from the date of the entry of this order, in accordance with the stipulation heretofore filed herein.

No. 2378.

ALBERT ST. JULIEN AND FRANK ST. JULIEN.

With reference to the claim of Albert St. Julien and Frank St. Julien for damages on account of loss of business during the time the bridge and the approaches thereto were being constructed, we have heretofore held in the case of *Grassle* vs. *State*, No. 2339 and *Samuel Stein and Sadie Stein* vs. *State*, No. 2373, that the State is not liable for such damages, and consequently no award may be allowed therefor.

With reference to the claim of Albert St. Julien and Frank St. Julien for damage to their mercantile stock on account of the dirt and dust which naturally resulted from the making of the improvement, the evidence in the record is rather meagre. Albert St. Julien testified that they carried a mercantile stock of $3,500.00, consisting of men's billfolds, ladies' handbags, trunks, suitcases, valises, auto supplies and harness goods; that the stock was an open display and was damaged by the dust, sand and cement which came into the store day after day during the progress of the work. No

testimony as to this item of damage was offered on behalf of the respondent.

The evidence offered on behalf of the claimant showed a direct physical injury to the property of the claimants, for which they are entitled to be compensated. *City of Winchester* vs. *Ring*, 312 Ill. 544.

There is very little evidence to show what, if anything, the claimants did to minimize their loss. Under the law they were required to make all reasonable efforts to render the loss as small as possible, and they are not permitted to recover damages for any increase of loss consequent upon a failure to perform that duty. *Hartford Deposit Co.* vs. *Calkins*, 186 Ill. 104; *C. & N. W. Ry. Co.* vs. *Stroud*, 129 Ill. App. 348; *Scherrer* vs. *Baltzer*, 84 Ill. App. 126.

The burden of proving that claimants failed to use a reasonable degree of diligence in minimizing their damages was on the respondent, and in the absence of any evidence on that question, we must take it for granted that the claimants performed their duty in that regard.

From claimants evidence, it appears that the damage to the stock was approximately twenty per cent (20%), making a loss of Seven Hundred Dollars ($700.00). No evidence was offered by the State to controvert such testimony.

Award is therefore entered in favor of the claimants, Albert St. Julien and Frank St. Julien, and against the State of Illinois, for the sum of Seven Hundred Dollars ($700.00), payment to be made by the Department of Public Works and Buildings of the State of Illinois, within fifteen (15) days from the date of the entry of this order, in accordance with the stipulation heretofore filed herein.

(Nos. 1883-1884—Consolidated—Claims denied.)

WILLIAM E. ANDRES, Nos. 1883, WILLIAM E. ANDRES, ADMINISTRATOR OF THE ESTATE OF ALMA ANDRES, Deceased, No. 1884, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

HARRY I. HANNAH, for claimant.

OTTO KERNER, Attorney General, for respondent.

PERSONAL INJURY—*negligence of employee of State Charitable Institution—State not liable for.* The State in the conduct of the Illinois State Hospital, a charitable institution, exercises a governmental function and is not liable for the torts or negligence of its employees, servants or agents, in the performance of their duties in carrying out the work of such institution.

WORKMEN'S COMPENSATION ACT—*provisions of not applicable to attendant at State Hospital.* The Workmen's Compensation Act does not automatically apply to all employees of the State, but only when they are employed in a department engaged in extra hazardous enterprises named in the Act and one employed as an attendant at a State Hospital is not engaged in extra hazardous employment, and if injured while so employed no award for compensation will be made under Act.

SAME—*injury must arise out of and in the course of employment.* Illness of claimant and death of his intestate, alleged to have been caused by eating tainted food furnished them by the State at, and while they were employed as attendants at State Charitable Institution, are not injuries arising out of and in the course of employment.

EQUITY AND GOOD CONSCIENCE—*when award on grounds of will be denied.* Under the facts in this case and the authority of *Crabtree* vs. *State*, 7 Court of Claims Reports, 207, an award on the grounds of equity and good conscience must be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On motion of the plaintiff, the above entitled cases have been consolidated, as the alleged injury and resulting damages arose out of the same facts.

The declaration in each case is a complaint against the State of Illinois, in a plea of trespass on the case, and alleges that William E. Andres and Alma Andres were on or about the 1st day of March, 1931, employed as attendants in the Illinois State Hospital at Elgin, and while so engaged in the course of their duties, were fed with food furnished and prepared by the said State of Illinois, through its officers, agents and employees, and while so engaged in the course of their duties as such attendants, it became and was the duty of the said State of Illinois to furnish them with pure and wholesome food, properly prepared; yet the defendant, the State, not regarding its said duty to use due care in that behalf, did furnish the said William E. Andres and Alma Andres, while so engaged in the course of their duties, tainted and unwholesome food and which was not properly prepared, that is to say, to-wit, meat that was tainted and infected, and not properly cooked and prepared, and as a result thereof the said Alma Andres became ill and sick and infected with disease, to-wit: Trichinosis, and as a result thereof she be-

came sick, lame and disordered, and so remained until the 4th day of June, 1930 when she died as a result of the disease so incurred as aforesaid. The declaration then alleges her next of kin and claims damages in the sum of $10,000.00. In this declaration there is a second count, but there is no substantial difference in the averment so far as liability is concerned, from the first count, except that William E. Andres did not die. The averments in the case of *William E. Andres* vs. *The State of Illinois,* are substantially the same.

The Attorney General has made a motion to dismiss this case on the grounds that it does not state a cause of action.

The State, at Elgin, Illinois, maintains a charitable institution known as the Illinois Northern Hospital for the Insane, and the State may under the law, receive any grant, gift, donation, devise or bequest of real or personal property for the use of any charitable institution. This institution is also maintained by appropriation by the legislature, though a charge is made for the care of its inmates.

In the case of *Parks* vs. *Northwestern University,* 218 Ill. 381, the declaration alleges that the University undertook, for hire, to teach Parks the science of dentistry, dental surgery, etc., and charged that he received injuries resulting in the loss of an eye through the negligence of one of the professors employed by the University while Parks was in his charge as a student in a class-room or laboratory of the University. A demurrer was sustained to the declaration by the Superior Court of Cook County and the cause dismissed. The ground of the demurrer was that the University is a charitable institution, organized for the purpose of disseminating education and professional learning, and that the doctrine that the employee shall be liable to respond for the negligent act of the employer has no application to it. Without an extended discussion of this case, the Supreme Court held that in the Statute of charitable uses, (43 Eliz. chap. 4.) which is a part of the common law of this State, "schools of learning, free schools," etc., are mentioned as charitable objects, and the fact that the appellee requires its students to pay tuition does not change its character as a charitable institution, and held that a charitable institution was exempt from liability, or damages resulting from the negligent acts of its servants.

To the same effect is the case of *Hogan* vs. *Chicago Lying-In Hospital*, 335 Ill. 42 where it was held that a purely charitable corporation is not liable for the torts or negligence of its employees, servants or agents in the performance of their duties in carrying on the work of the corporation.

Counsel for plaintiff state that they are fully aware that the State is not subject to a suit except by its own consent as provided by law, and that it has also been held by this court that the conduct of a hospital is not an extra hazardous enterprise. He further states that he is aware that as a general rule of law the doctrine of respondeat superior does not apply to the State, and states that he relies upon the Court of Claims Act as to the jurisdiction of the Court of Claims, which provides that the Court of Claims has jurisdiction:

"To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience discharge and pay."

Counsel also states that the foregoing is in addition to its powers to hear cases arising under the Workmen's Compensation Act.

The declaration attempts to state a cause of action at common law in a plea of trespass on the case, and does not purport to state any facts which would bring these cases under the Compensation Act. These declarations allege that the parties, while engaged in the course of their duties were fed impure and poisonous food, furnished and prepared by the State of Illinois, through its officers and agents. While the declaration alleges that they were engaged as attendants, it does not set forth of what their work consisted.

Under Section 3 of the Compensation Act, the provisions thereof apply automatically and without election to the State, and others engaged in any department of the enterprises or businesses mentioned therein, and there are ten different businesses and enterprises mentioned, but neither of these include an attendant at a State Hospital. While this would not be necessary, it would be necessary to aver facts which would show what the duties of the attendants were at the time of the injury to the end that this court may determine

if such attendants do come under the provisions of Section 3 of the Compensation Act.

Section 6 of the Court of Claims Act, provides that the court shall have power:

"To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the 'Workmen's Compensation Act,' the Industrial Commission being hereby relieved of any duty relative thereto."

While it is true that Section 4 of the Compensation Act defines the term "employer" as used in that Act to include the State and every person, firm, public or private corporation, including hospitals, the service or duties of the employee must be one of those that come within the enterprises or businesses enumerated in Section 3 of the Act.

The specific charge in each of these cases is that the respective parties, while engaged in the course of their duties, were fed with food furnished and prepared by the State, by its employees, which was poisonous. We take it from the averments in the declaration, although no specific charge is made, that a part of the compensation that these parties were to receive, were their meals. It would be absurd and ludicrous to hold that these plaintiffs were engaged by the State to eat meals.

It is fundamental under the Compensation Act that a compensable injury must arise "out of" and "in the course of" the employment. The words "in the course of" the employment refer to the time, place and circumstances under which the accident takes place. The words, "arising out of" the employment refer to the origin or cause of the accident as the result of a risk reasonably incidental to the employment, which might have been reasonably contemplated by a person entering the employment as incidental to it.

Dietzen Co. vs. *Industrial Board*, 279 Ill. 11; *Mueller Const. Co.* vs. *Industrial Board*, 283 Ill. 148.

In the latter case, the Supreme Court of Illinois cites as a concrete statement of the law the language of the Supreme Court of Massachusetts in McNicol's case, 215 Mass. 497, that an injury may be said to "arise out of the employ-

ment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a national consequence."

In the case of *Vincennes Bridge Co.* vs. *Industrial Commission*, 351 Ill. 444, on page 450 of the opinion the court held that there must be a proximately causative relation between the nature of his work and the injury, so that it may be sure that the injury had its origin in a risk connected with the employment, from which the injury, though unforeseen, may after the event be recognized to have flowed as a rational consequence. The court here cited numerous authorities.

As said above, these plaintiffs were not employed to eat food, but apparently the furnishing of food by the State was a part of their compensation, and the eating thereof was not a part of their duties.

Counsel for plaintiff calls attention to Section 4 of the Court of Claims Act which provides that the court shall have jurisdiction:

"To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

From the above we have seen that there is no legal liability arising out of the facts in this case that would bind a

private employer, and there is nothing stated in the Act of the Court of Claims which would bind the State where a private individual, under like circumstances, would not be bound. The law does not give an employee of this State any greater rights than an employee of a private individual has under like circumstances.

In the case of *Crabtree* vs. *State of Illinois*, 7 Court of Claims Reports, page 207, we held that:

"The jurisdiction of the Court of Claims in actions for compensation by State employees for accidental injuries is derived from Paragraph 6 of Section 6 of Act creating court, and is the same in such actions as Industrial Commission has in other cases and the court in consideration of such cases must be guided by provisions of Workmen's Compensation Act."

In the same case, in commenting upon equity and good conscience doctrine, we said:

"The provisions of Paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one."

The motion of the Attorney General to dismiss this case will therefore be sustained, and counsel for plaintiff may have thirty days after the filing of this decision within which to amend his complaint pursuant to Rule 31 of this court, and if he decline or fail to so amend, final judgment will be entered dismissing the claim.

(No. 2410—Claimant awarded $45.00.)

DR. N. A. BALDING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WILLIAM M. SCANLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*necessary first aid, medical, surgical and hospital services—when award made for.* The facts herein are set forth in *Hutton* vs. *State*, No. 2407, post, and the opinion in that case applies herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The facts in the case of Dr. N. A. Balding are fully set forth in the case of Dr. Charles J. Hutton, No. 2407, decided at the present term of this court and the reasons for the allowance of an award are therein stated. To save repetition reference is, therefore, made to that cause.

An award is herein allowed in favor of Dr. N. A. Balding in the sum of $45.00.

(No. 2471—Claimant awarded $263.66.)

BOARD OF SCHOOL INSPECTORS OF THE CITY OF PEORIA, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

H. D. MORGAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

RETAILERS' OCCUPATION TAX—*when award for refund may be made.* Under the provisions of the Statute requiring payment of Retailers' Occupation Tax by those engaged in the business of selling tangible personal property at retail, a payment of said tax by one not obligated to do so thereunder may be recovered and an award for refund of amount may be made.

SAME—*Public school supplying students with food at cost—not subject to.* Cafeterias operated by public school boards for the purpose of supplying students attending said schools with food at cost price are not engaged in the business of selling tangible personal property at retail and are not subject to provisions of Retailers' Occupation Tax Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant operates three cafeterias for the benefit of students attending its schools; same being operated at cost and not for profit. Under directions of the Director of Finance of the Department of Finance of the State of Illinois, it paid a Retailers' Occupation Tax of two per cent (2%) on the sales of food made in these cafeterias; the payments being as follows:

October 12, 1933	$ 67.41
November 10, 1933	72.90
December 10, 1933	71.78
January 10, 1934	51.57
Total	$263.66

In February, 1934 the Department of Finance issued Special Rule No. 81, whereby the claimant was advised that "Cafeterias operated by public school boards are held not to be engaged in the business of selling tangible personal property at retail, within the meaning of the Illinois Retailers' Occupation Tax Act."

A claim for refund was filed by claimant with the Department of Finance on or about the 27th day of March 1934, and the claim was allowed and a credit memorandum for the full amount of refund was issued by that department. This credit memorandum was in the usual form and could not be cashed and could only be used for payment of further taxes. It was, therefore, of no value to claimant and as the department has no funds available to make a cash refund, claimant must seek its redress in this court. The Act under which this tax was paid provides as follows:—

"If it shall appear that an amount of tax penalty or interest has been paid which was not due, under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act, from the person who made the erroneous payment, *or such amount shall be refunded to such person by the department.* Section 6 of Retailers' Occupation Tax Act. Cahill's Ill. Revised Statutes. Chap. 120, Sec. 431."

"The tax levied by the Retailers' Occupation Tax Act is an occupation tax and not a property tax. The tax is paid for the privilege of engaging in the occupation of a retailer of tangible personal property. *Reif vs. Barrett*, 355 Ill. 104."

It appears, as a matter of fact, that the cafeterias in question are not engaged in the business of selling tangible personal property at retail, but merely in supplying students who attend the schools with food at a cost price. As no tax was due and as the Department of Finance has indicated that fact by issuing credit memo, which in itself evidences the justness of claimant's claim, but which cannot be cashed because of no appropriation, an award is proper and claimant is legally entitled thereto. The issuance of a voucher in payment of such an award, however, should be conditioned upon the surrender to the Department of Finance for cancellation of the credit memo. heretofore issued by it.

The claim is allowed and an award made in the sum of $263.66.

(No. 2149—Claim denied.)

GEORGE E. BROWN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

CHARLES P. KANE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State Highway Employees in blockading road.* Where damage to property is sustained as the result of the negligence of State Highway employees in barricading highway and failing to place warning light or signal thereon, an award will be denied, as the State in the maintenance of its roads acts in a governmental capacity, and the doctrine of respondeat superior does not apply to it.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on April 14, 1933, and alleges therein that on the 19th day of October A. D. 1931 he was driving his automobile in a northerly direction on S. B. I. Route No. 2, at a point about two miles south of the city of Bloomington; that he was in the exercise of all due care and caution for his own safety; that it was the duty of the respondent, through its employees and agents, to keep and maintain said public highway in such condition as not to endanger the life, limb or property of persons traveling upon the same; that said respondent disregarded its duty in that behalf, and through its employees or agents carelessly and negligently barricaded, obstructed and blocked said highway and failed to place a warning light or signal thereon, and that by reason of such negligence and carelessness, the claimant, together with his said motor vehicle, was thrown against and upon said obstruction or barricade and the motor vehicle was forced off the road into a ditch, whereby the claimant sustained serious injuries, and his motor vehicle was damaged and destroyed; for all of which said damages the claimant seeks to recover in this case.

The Attorney General contends that there is no liability on the part of the State, and that the case should be dismissed.

This court has repeatedly held that in the maintenance of its hard-surfaced roads the State of Illinois is acting in a governmental capacity, and that the doctrine of respondeat superior does not apply to the State in the exercise of any of

its governmental functions, in the absence of a Statute making it so liable. *Braun* vs. *State of Illinois*, 6 C. C. R. 154; *Chumbler* vs. *State*, 6 C. C. R. 138; *Bucholz* vs. *State*, 7 C. C. R. 241.

Our Supreme Court, in numerous cases, has held this to be the law. *Minear* vs. *State Board of Agriculture*, 250 Ill. 546; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

In the absence of a legal liability on the part of the State if the State were suable, we have no jurisdiction to allow an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Johanna Morrissey*, vs. *State*, No. 2233, decided at the January term, 1934.

Under the well established law of this State, there is no legal liability on the part of the State, and award must therefore be denied.

Award denied. Case dismissed.

(Nos. 2152, 2153, 2154—Consolidated—Claims denied.)

RICHARD CAHILL, No. 2152, GEORGE DENNY, No. 2153, JULIA PORTER, ADMX., No. 2154, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

E. J. GOREY, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*State not liable for personal injuries sustained by reason of negligence of State Highway employees.* In the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages caused by a defect in the construction of or failure to maintain same in a safe condition for travel.

MR. JUSTICE YANTIS delivered the opinion of the court:

The three above numbered cases were filed separately, but by agreement of counsel, were afterwards consolidated. The facts involve little dispute and are as follows:

On the 18th day of December, 1932, between five and six o'clock A. M., Richard Cahill, George Denny and Ernest B. Porter were riding in a Plymouth automobile on S. B. I. Route No. 18 eastward toward the village of Lisle. George Denny was the owner of the car, Richard Cahill was driving same

and Ernest B. Porter was in the rear seat. Route No. 18 crossed over and above Route No. 53 on a concrete elevated bridge which was elevated approximately fifty feet (50'). On the north and south sides of Route No. 18 for a distance of approximately six-hundred feet (600') on both sides of such bridge was a concrete wall or railing, which was about four feet (4') high above the surface of the highway; that a connecting road, ramp or incline extended in a southerly direction from Route 18 for a distance of about six hundred feet (600') where it connected with Route 53.

Claimant contends it was the duty of respondent to have so built and so maintained the highway at the point in question, that it would furnish safe and convenient passage to all persons traveling same, but that it had carelessly and negligently constructed the concrete wall in question and had permitted same to remain unguarded, unlighted and without warning and that as a result the claimants while in the exercise of due care and diligence for their own care and safety, were thereby, and through the negligence of the State, injured as alleged. The facts further appear that it was a misty, foggy morning. There was no reflecting light or signal on the concrete end-post in question, and the record indicates that the conditions were such as to easily confuse a driver who was not in the exercise of more than ordinary care. It is a case which appeals to the sympathetic minds of the court, but in neither of the three claims in question can an award against the State be authorized.

The State, in constructing the ramp or incline in question, was endeavoring to improve the traveling conditions for the general public. Considerable testimony appears in the record to show the condition and manner of construction of the highways at the intersection in question, and to show that such construction was dangerous to the public, and that the failure to erect warning signals that could be seen day or night, was negligence upon the part of the employees of the Highway Department. As stated in *Morrissey* vs. *State*,

"In the opinion of the court it is not necessary to discuss at length the evidence in detail. As shown by the claim and the record, the highway and the concrete abutment of which complaint is made as to the method of construction and maintenance, were built by, are owned and are controlled by the State of Illinois. In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of its governmental functions, it does not become liable in actions of tort by

reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a Statute creating such liability."

Morrissey vs. *State of Illinois*, 2 C. C. R. 454.

The Highway Department of Illinois, like the State Board of Agriculture, is an arm or agency of the State, existing for the promotion of the public good.

As stated in the "Minear Case", "If, as we hold, the State Board of Agriculture is an agency of the State in the exercise of governmental functions, it is not liable, under the common law for injuries claimed to have been sustained as a result of negligence." (*Minear* vs. *State Board*, etc. 259, Ill. at 559.)

The fact that specific power had been granted in the Act creating the State Board of Agriculture for it to sue and be sued, was there held not to subject the State to a liability for torts. As the court there said, there is a distinct difference between conferring suability as to debts and other liabilities, for which the State is now liable and extending liability for causes not heretofore recognized.

The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or maintenance of a public road, and in the absence of such statute, the court is of the opinion that it should make no award.

Chumbler vs. *State*, 6 C. C. R. 138.

Hollenbeck vs. *County of Winnebago*, 95 Ill. 148.

The three claims are, and each of them is, hereby denied and the respective claims are dismissed.

(No. 1786—Claim denied.)

J. O. CARDIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

B. W. COVALDI AND MOSES PULVERMAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSEBMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*loss of health—when claim for, in nature of petition for permanent pension, under doctrine of equity and good conscience will be denied.* No award will be made, under doctrine of equity and good conscience, nor is there any justification in law for same, where claim in the nature of petition for permanent pension is filed by former guard at State-

ville State Prison on account of nervous breakdown alleged to have been caused by nature of and performance of work as such guard, which was identical with and under same conditions as other guards in the same institution.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed July 3, 1931, for "a certain sum of money each month during the existence of claimant's disability." The declaration alleges that claimant went to work as a night guard at Stateville State Prison on October 8, 1929, and continued to work until December 18, 1930; that prior to such employment he was examined by Dr. M. Harris and was found physically fit as to his nervous system and physical being; that during his service as a prison guard, he worked thirteen or fourteen hours per night; was compelled to sit in a little sentry box with glaring lights in his face; that he had to call the prison operator every fifteen minutes during the night hours; and that in the daytime it was impossible for him to sleep because of the constant work and noise by other employees of the prison; that some time during August, 1930, lightning struck a post nearby which added to his nervous condition and that in November, 1930, he fell on the ice on his way to work and that he hurt his side and ribs; that claimant's condition gradually weakened and he went to the Speedway Hospital in Chicago on June 30, 1930; was sent from there to the Government Hospital at Danville, Illinois; obtained two months leave of absence, during which time he was attended by a physician; that he returned to Stateville Prison on August 25, 1930, and worked until December 16, 1930, when he had a nervous breakdown and that he left the institution on December 18, 1930. The complaint is in the nature of a general petition for a permanent pension of such amount as may appeal to the equitable mind of the court.

Counsel for claimant in their statement and brief (page 14) state as follows:

"We admit that under the decisions of this court the State, as a matter of law, is not liable for injuries sustained by its employees while in the discharge of their duties, but we submit that under the peculiar circumstances of this case, it is one with great merit and in equity and good conscience and in the interest of social welfare and justice the court should enter an award in favor of this man."

Plaintiff cites a number of cases appearing in Volume 4, C. of C. Reports, wherein the court held that, although no legal

basis for an award existed a recommendation would be made that the Legislature make an appropriation as an act of social justice and equity.

We believe the correct rule for the consideration of claims of this character is fully considered and set forth in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, wherein it is said:

"Claimant urges, however, that he should be awarded compensation as an act of justice and equity regardless of the principles of law involved. The jurisdiction of this court is fixed by law and it has no powers except those given by the Act creating it. Section six (6) of that Act provides: 'The Court of Claims shall have power to hear and determine all claims and demands, legal and equitable, liquidated, and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay'. It is obvious from the language of this Statute that no claim against the State can be allowed by this court unless there is either a legal or equitable obligation resting upon the State to pay a claim, then justice requires that the State should pay it * * *.

"Claimant's idea seems to be that equity is used in this Statute as nothing more nor less than the power of the court to decide each case according to a high standard of morality and abstract right, regardless of the law. Such a construction would leave this court with practically no limitation upon its power to render judgments against the State."

"Before a claimant can have an award against the State he must show he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one."

The record shows that the claimant was situated the same as all other guards at the prison and performed the same duties as such other guards. Every other guard at every prison in the State might with equal right present a similar claim. There is no law of the State that would justify this court in making an award to an employee under such circumstances. Nothing appears to justify such an award and the claim is therefore denied and case dismissed.

(No. 2291—Claim denied.)

WILLIAM P. CONGDON, ADMINISTRATOR OF THE ESTATE OF WALTER CONGDON, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

JOHN BENEDEK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, DEATH—*negligence of State highway employees—State not liable for.* In the construction and maintenance of its roads, the State acts in a governmental capacity and does not become liable in actions of tort, by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein asks an award of Ten Thousand Dollars ($10,000) for personal injuries due to the death of Walter Congdon while traveling by auto on one of the State highways, and as a basis therefor, alleges that on the first day of April the State of Illinois was possessed of and had control of a highway in Lisle Township, DuPage County, known as S. B. I. No. 18, which intersects S. B. I. No. 53, the latter passing underneath the viaduct or bridge on Route 18, and the two roads being connected by a paved side, or connecting, road; that at the southwest end of said viaduct there is a concrete rail approximately four feet high; that it was the duty of respondent to keep the highway free from obstruction and to have same sufficiently lighted so as to enable people riding or driving thereon to readily discern any obstructions, and so as not to endanger the safety of persons riding upon said highways; that respondent disregarded its duty, and carelessly and negligently permitted the concrete wall or obstruction to be or remain unguarded and unlighted in the night time; that by reason of such purported negligence of respondent, the automobile of one Joseph Fisher, then driven by the latter, and in which the said Walter Congdon was riding, collided with said rail and that Walter Congdon thereby received injuries from which he died.

The complaint further avers that Walter Congdon left surviving—his father, mother and three brothers as his only next of kin and as the result of his death that they have been and will be deprived of large sums of money and valuable services, which he was accustomed to perform and would have contributed to their benefit in the future.

The Attorney General has filed a motion to dismiss said complaint for the reason that in the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of same does not become liable in tort by reason of the negligent acts of its agents.

The State, in constructing the ramp or incline in question, and the concrete abutment that formed a part of such general

road improvement, was endeavoring to improve the traveling conditions for the general public. In the opinion of the court the objection by the Attorney General is well founded and the motion to dismiss the claim should be allowed.

"In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of its governmental functions it does not become liable in actions of tort, by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. *Morrissey* vs. *State*, 2 C. C. R. 454; *Mincar* vs. *State Board, etc.*, 259 Ill. at 559."

The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or the maintenance of a public road, and in the absence of such a statute, this court is of the opinion that no award should be made on the claim herein filed.

Chumbler vs. *State*, 6 C. C. R. 138.

Hollenbeck vs. *County of Winnebago*, 95 Ill. 148.

The motion of the Attorney General is allowed and the claim dismissed.

(No. 2860—Claim denied.)

GEORGE N. CRAWFORD AND C. J. CLYMER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

MARTIN J. GANNON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State Highway employees—claim under grounds of equity and good conscience, denied.* Where claim is for destruction of hay alleged to have been caused by negligence of State Highway employees engaged in burning brush in permitting fire to spread to claimants' land, an award on the grounds of equity and good conscience will be denied under authority of *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants allege that on March 1, 1933, they were the owners of ten acres of hay land and one hundred loads of manure, located on the farm of George N. Crawford in Lee County, Illinois; that the State, through its employees, while engaged in repairing and clearing S. B. I. Route No. 6 and

while engaged in burning brush and dead grass, negligently suffered a fire to be unattended and suffered same to spread over the said lands, and that thereby ten acres of hay and approximately one hundred tons of manure on said land were burned and destroyed, all to the total value of $425.00.

The State has filed a motion to dismiss the claim, for the reason that the declaration does not state a sufficient cause of action against the State, whereby an award could legally be made.

Counsel for the claimants has filed a reply brief, wherein they state, that while there might be no legal basis for a claim, yet in equity and good conscience, claimants should be paid damages herein. In support of their contention, they have cited a number of cases wherein this court, as previously constituted, has held that "while no legal liability existed, wherein an award might be made, yet in 'equity and good conscience' an award would be made on the ground of social justice."

The construction which this court believes it should place upon its jurisdictional rights, has been set forth in the case of "*Crabtree* vs. *State*, 7 C. C. R. 207" and for brevity, reference is made thereto. Provision of Paragraph 4 of Section 6 of the Court of Claims Act with reference to "equity and good conscience," merely defines the jurisdiction of the court, and does not create a new liability against the State, nor does it increase any existing liability. The jurisdiction of the court is limited to claims under which the State would be liable, in law or equity, if it were suable, and if the claimant fails to bring himself within the provision of some law giving him the right to an award, he cannot invoke the principles of "equity and good conscience" to secure one.

"It is a rule of almost universal application, that no government is liable for the negligence or misfeasance of its officers and agents in the absence of a Statute making it liable. *Gibbons* vs. U. S., 8 Wal. 269; *U. S.* vs. *Kirkpatrick*, 9 Wheaton 720; *Jorgensen* vs. *State*, 2 C. C. R. 134; *Reliable Coal & Mining Co.* vs. *State*, 7 C. C. R. 56."

As the declaration does not state a cause of action against the State, the motion to dismiss is allowed and the claim dismissed.

(No. 2278—Claimant awarded $1,311.31.)

JOSEPHINE GROJA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

EDWARD KELLY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where State highway patrolman sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, an award will be made to his legal dependents, in accordance with provisions of Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Just prior to and on the 28th day of May, A. D. 1933, Richard Groja was in the employ of the respondent as a State highway patrolman, at a salary of $160.00 per month. On the last mentioned date, while riding his motorcycle on the Rand Road near DesPlaines, in answer to a police call, the motorcycle in some manner left the road and collided with a tree, whereby said Groja sustained injuries which resulted in his death on the same date.

Said decedent left him surviving the complainant, Josephine Groja, his widow, and Marilyn Groja, aged seven months, his child, as his sole and only heirs-at-law and next of kin, both of whom were dependent on the deceased at the time of his injury for their support.

There is no dispute as to the facts, and it is conceded by the respondent that at the time of the accident in question, said decedent and said respondent were operating under the provisions of the Workmen's Compensation Act of this State, and that the accident in question arose out of and in the course of the employment of said decedent.

We therefore find as follows:

1. Under the provisions of Sections 7A, 7G and 7H3, the widow and minor child of said decedent are entitled to compensation in the total amount of $4,450.00; the said Josephine Groja being entitled to $4,000.00, and the said Marilyn Groja being entitled to $450.00.

2. That said compensation is payable in weekly installments of $15.00 commencing on the 29th day of May, 1933.

3. That it is to the best interests of all parties concerned that the compensation to which the said Marilyn Groja is entitled as aforesaid be paid to her mother, Josephine Groja, for the support of said child.

4. That payment by the respondent in weekly installments is not practicable under existing laws, and that it is to the best interest of the parties concerned that the compensation to be paid as aforesaid be commuted to an equivalent lump sum in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

It is therefore ordered that the compensation to which the said Marilyn Groja is entitled as aforesaid, be paid to her mother, Josephine Groja, for the support of said child; and that the total compensation to be paid to the claimant herein be commuted to an equivalent lump sum in accordance with the provisions of Section nine (9) of the Workmen's Compensation Act.

As we compute it, the total amount of compensation to be paid as aforesaid, is $4,311.31.

IT IS THEREFORE HEREBY ORDERED that an award be and the same is hereby entered in favor of the claimant, Josephine Groja, for the sum of Forty-three Hundred Eleven Dollars and Thirty-one Cents ($4,311.31).

(No. 2323—Claim denied.)

ROSE M. DOWNEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

ROSE M. DOWNEY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*complaint for — when defective.* Where complaint shows that claim is based on negligence of employee of State no cause of action is stated and motion to dismiss will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, on February 7, 1934, filed her complaint alleging that on May 14, 1933, an Illinois State truck backed into her Packard car and that as a result thereof, she had to have the left front fender of her car straightened and refinished, at a total expense of Nine and Seventy-five/100 Dollars ($9.75).

The Attorney General has filed a motion to dismiss the claim for the reason the declaration does not state a cause of action for which an award could properly be made.

The declaration is drawn on the theory that "The State is liable for injuries caused by the negligent conduct of its employees." "The State, however, is not liable for damages caused by the negligence of its servants, agents or employees, unless there is a Statute expressly making it so liable. This rule has been uniformly held to apply to all cases considered by the present court."

Braun vs. *State*, 6 C. C. R. 104.

Reliable Coal & Mining Co. vs. *State*, 7 C. C. R. 56.

The motion of the Attorney General to dismiss the claim is allowed and the claim is dismissed.

(No. 2281—Claimant awarded $4,280.06.)

CLEETA ELLIOTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

MILLER, ELLIOTT & WESTERVELT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made.* Where State highway patrolman sustains accidental injuries arising out of and in the course of his employment, resulting in his death, an award for compensation will be made under provisions of the Act.

SAME—*death of employee—posthumous child, award for benefit of.* A child of State highway patrolman, unborn at time of his injury and death resulting therefrom, but in being at time of filing and hearing of claim for compensation, is entitled to compensation as a legal dependent, under Workmen's Compensation Act, and an award may be made for the benefit of such child.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation of facts filed herein, it appears that the claimant is a resident of Chillicothe, Illinois, and is the widow of Joseph Morritte Elliott, deceased; that the latter was employed by the State Department of Public Works and Buildings, Division of Highways, as a State highway patrolman on Route No. 29; that on October 20, 1933, while riding

in an automobile owned by the State of Illinois and driven by Herman J. Rohman, also a State highway patrolman, he sustained fatal injuries caused by the car skidding into a culvert and turning over on the wet pavement on State Highway Route No. 24, five miles south of Pekin, Illinois; that at the time of the accident he was engaged in the performance of his duties as highway patrolman, acting under orders of his superior officer, Sergeant Mollohon. At the time of his death, Joseph Merritte Elliott left surviving his widow, Cleeta Elliott, claimant herein, and an unborn child as sole and only heirs at law; said child was born on the 4th day of February, 1934, and is now living and is named Joseph Merritte Elliott; that the claimant and said deceased were living together as husband and wife at the time of his death, and that he was her sole support, and that his average annual earnings, at the time of his death, were in excess of $1,000.00 per year, with a monthly salary of $150.00. That the claim is filed under the provisions of the Workmen's Compensation Act of Illinois, and pursuant to the provisions of Paragraph 6, Section 6, of the Court of Claims Act.

Claim is made on behalf of claimant as the surviving widow for $4,000.00, and for an additional $450.00 by reason of the child, Joseph Merritte Elliott. The validity of the claim for $4,000.00 is conceded by the Attorney General's office, and the only question is as to the granting of an award for the benefit of the child who was unborn at the time of the death of its father. Cahill's Revised Statute on Descent, Section 9, Chapter 39, provides as follows:

"A posthumous child of an intestate shall receive its just proportion of its ancestor's estate in all respects, as if it had been born in the lifetime of the father.

"At common law, a child *en ventre sa mere* is deemed to be living at the time of the death of an intestate for the purpose of inheritance by descent."

Tomlin vs. *Laws*, 301 Ill. 616.

The citations of claimant support the doctrine that a child *en ventre sa mere* at the time of the father's death is deemed to have been born so far as it is for the benefit of such child, and that it will be entitled to claim for compensation as a legal dependent. Had the deceased lived, the child would have been able to look to him for its natural support, and the

court is of the opinion that such child should be regarded as *in esse.*

We therefore find that under the provisions of the Compensation Act, the claimant, Cleeta Elliott, is entitled to an award of Four Thousand Dollars ($4,000.00), for herself, and the sum of $450.00 for the support of the minor child, Joseph Merritte Elliott, all payable in weekly installments of Fifteen Dollars ($15.00), commencing on the 21st day of October, A. D. 1933.

Payment by the respondent in weekly installments, however, is not practicable under existing laws and the respective awards will therefore be commuted to an equivalent lump sum in accordance with Section 9 of the Workmen's Compensation Act.

As we compute it, the amount due the claimant, Cleeta Elliott, after commutation to an equivalent lump sum as aforesaid, is Thirty-eight Hundred Forty-seven Dollars and Twenty-five Cents ($3,847.25), and the amount due for the support of said minor child, Joseph Merritte Elliott, after commutation to an equivalent lump sum as aforesaid, is Four Hundred Thirty-two Dollars and Eighty-one Cents ($432.81).

IT IS THEREFORE HEREBY ORDERED that an award be and the same is hereby entered in favor of the claimant, Cleeta Elliott, for herself and said child as above stated in the total sum of $4,280.06.

(No. 2411—Claimant awarded $172.67.)

EVANGELICAL DEACONESS HOSPITAL OF LINCOLN, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WILLIAM M. SCANLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*necessary first aid, medical, surgical and hospital services—when award made for.* The facts in this case are set forth in *Hutton vs. State*, No. 2407, *post*, and the opinion in that case applies herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The facts in the case of Evangelical Deaconess Hospital are fully set forth in the case of Dr. Charles J. Hutton, No. 2407, decided at the present term of this court and the reasons for the allowance of an award are therein stated. To save repetition reference is, therefore, made to that cause.

An award is herein allowed in favor of Deaconess Hospital of Lincoln, Illinois, in the sum of $172.67.

(No. 2177—Claimant awarded $1,509.91.)

RALPH C. FOSTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

HARRIS & HARRIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries from exposure to cold — when accident arising out of and in course of employment.* Where employee, because of his duties is exposed to a special or peculiar danger from the elements, a danger that is greater than that to which other persons in the community are subjected, and an unexpected injury is sustained by reason of the elements, the injury constitutes an accident, arising out of and in the course of the employment within the meaning of the Workmen's Compensation Act.

SAME—*same—when award may be made.* Where employee of State is continuously engaged throughout night in assisting to remove snow from public highway, during severe snow storm in temperature of from 19 to 21 degrees below zero, at unprotected place, with no provision for obtaining occasional warmth being furnished, and as a result of exposure to cold suffers loss of toes from freezing, an award for compensation may be made under the provisions of the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Ralph C. Foster filed his complaint on May 17, 1933, asking an award under the Compensation Act for injuries sustained through frostbite while engaged in removing snow from S. B. I. Route No. 95. It has been stipulated between claimant and respondent that the occupation of claimant at the time in question was that of a day laborer, that his wages were thirty-five cents (35c) per hour on an eight and one-half hour a day basis, six days a week, and that by virtue thereof and under Section 10-E of the Compensation Act, his average wage would be $18.00 per week.

Claimant was employed with others from five o'clock p. m., on February 7, 1933, until 7:30 o'clock in the morning of February 8, 1933, during a severe snow storm, to assist in removing snow from S. B. I. No. 95. It was extremely cold, from nineteen to twenty-four degrees below zero, and very windy. A snow storm had been raging and in places the drifts were five feet deep. Every effort was apparently being made by the crew, in which claimant was working to get the roads open. There was no shelter, except on one or two occasions, when the men stopped work and went to a nearby farmhouse to get warm. As a result of the exposure to the severe weather, claimant froze his feet during the night. Claimant did not know his feet were frozen until he arrived home the next morning and attempted to remove his shoes. A doctor was called and he was treated for frozen feet and on March 19, 1933, was operated upon. The great toe on the right foot was removed by amputation into the foot, the second toe was entirely removed, the third toe at the third joint was removed and the fifth toe at the first joint. On the left foot the great toe was completely removed. Claimant remained under treatment at the hospital for five weeks after the operation, and the feet eventually healed and about the first of September, 1933, he was able to discard his crutches and thereafter walk.

Claimant incurred a bill of $69.00 with Dr. McPherson; a hospital bill at the Marietta Phelps Hospital of $142.35; a medical bill due Dr. J. W. Hermetet of $164.00, all of which are shown to be reasonable charges.

Claimant was paid $7.25 by the State for his work on the night his feet were frozen, and was thereafter paid $44.44 while in the hospital. It appears that notice of the injury was duly given and the claim filed, as provided under the terms of the Compensation Act.

On the night of the injury claimant was wearing a pair of common black cotton socks, ankle high shoes, and four-buckle overshoes. He had on a big fur coat, his shoes were in good condition, and his overshoes were comparatively new. James Hainline, a fellow-workman, testified that he froze his finger while engaged in the work, and while there was a vacant farmhouse where the men built up some sort of fire at one time, when nearby, there was no place where

they could warm themselves at any regular intervals, nor did the nature of the work of keeping the snow cleared from the road-way throughout the night, permit of much opportunity to thus warm themselves.

It seems that the only question at issue is one of law, viz: whether or not the freezing of the feet of claimant is an accidental injury, compensable under the Workmen's Compensation Act. It is admitted he was an employee of the State and acting within the scope of his employment at the time complained of. Claimant contends that the accident arose out of and in the course of his employment and that the nature of his work subjected him to exposure to the elements in a much greater degree than that to which others in the community were subject. Claimant contends that where an employee, because of his duties, is exposed to special or peculiar danger from the elements or weather conditions, greater than that to which others in the community are exposed, and that an unexpected injury is sustained thereby, such injury constitutes an accident arising out of, and in the course of, employment and compensation is payable therefor.

A case with citations contained therein, in point, is that of *Consumers Company* vs. *Industrial Commission*, where claimant suffered injuries through frostbite, while engaged in shoveling coal. In that case no compensation was allowed and the court said:

"Injuries resulting from exposure to weather conditions, such as heat, cold, ice, snow or lightning, are generally classed as risks, to which the general public is exposed, and not within the purview of Workmen's Compensation Acts, although the injured person at the time he received his injury may have been performing duties incident to, and in the course of his employment. The rule is generally recognized, however, that if an employee, because of his duties, is exposed to a special or peculiar danger from the elements, a danger that is greater than that to which other persons in the community are subjected, and an unexpected injury is sustained by reason of the elements, the injury constitutes an accident, arising out of and in the course of the employment within the meaning of the Workmen's Compensation Acts. If the character of the employment is such as to intensify the risks that arise from extraordinary natural causes, an accident under such circumstance is one arising out of the employment."

Consumers Company vs. *Industrial Commission*, 324 Ill. at 155.

The Attorney General, in his brief, cites this further wording from the above opinion:

"The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. If the accident under the circumstances of the employment was merely a consequence of the severity of the elements to which persons in the locality, whether so employed or not, were equally exposed, it is not compensable."

Considering the language of the entire opinion just cited, and the citations therein contained, this court is of the opinion that the claim at bar is compensable under the Workmen's Compensation Act.

Claimant on the night in question was engaged in work that exposed him in an extra-ordinary degree, to the effects of the elements. Helping to clear the roadway throughout the night in a blizzard, with a temperature from ten to twenty degrees below zero, exposed him to special and peculiar danger of freezing, greater than that shared by other persons in the same locality. Working in the particular spots where the snow was drifted placed him in position more hazardous and more severe than those not similarly working. The demand for constant and active service with no adequate opportunity of warming himself from time to time, brings claimant within the approval of the cases cited. None of the material circumstances on which a denial of relief in the Consumers Case *(supra)* were present here. The place where claimant worked was unprotected, no place was provided by the State where claimant and the other men could occasionally warm themselves, and although claimant was apparently warmly dressed, he suffered the injuries complained of. As a further indication of the severity of the immediate work in which he was engaged, is the fact of the freezing of a finger by one of his fellow workmen, James Hainline.

Under the facts appearing herein, compensation should be allowed as follows, on the basis of wages at $18.00 per week:

For loss of great toe on right foot, 50% of average weekly wage for 35 weeks.

For loss of second toe on right foot, 50% of average weekly wage for 12 weeks.

For loss of third toe on right foot, 50% of average weekly wage for 12 weeks.

For loss of first phalange on fifth toe of right foot (Compensable on basis of one-half of total loss of toe) 50% of the average weekly wage for 6 weeks.

For loss of great toe on left foot, 50% of average weekly wage for 35 weeks.	
Total for specific loss—100 weeks at $9.00 per week.....	$900.00
Also for temporary total incapacity for 31 weeks from the 8th day of February, 1933 to September 13, 1933, and 50% of the average weekly wage, or $279.00, against which is a credit of $44.44 previously paid, leaving a balance for temporary total incapacity of..	$234.56
Dr. Mac Pherson, medical account.....	69.00
Marietta Phelps Hospital	142.35
Dr. Hermetet, medical account.....	164.00
Total	$1,509.91

The record indicates that the services of the doctors in question and the hospital were rendered at the request of the State, through Herbert Oakman, Maintenance Supervisor, District No. 4, State Highway Department. The court is of the opinion that these bills should, under the evidence, be allowed.

An award is therefore made in the sum of Fifteen Hundred Dollars and Ninety-one Cents ($1,500.91). As the period during which the weekly payments would be made under ordinary practice will have expired by the time the lump sum payment is available by appropriation of the Legislature, no commutation to a lump sum will be made. In paying the award a voucher of $69.00 should be issued to claimant, for the use of Dr. C. H. MacPherson; another to claimant for use of Dr. J. W. Hermetet for $164.00; another to claimant, for the use of Marietta Phelps Hospital for $142.35 and the balance of $1,134.56 should be payable to claimant.

(No. 2178—Claimant awarded $232.25.)

ROSE GABRIEL, WIDOW OF ANGELO GABRIEL, DECEASED, AND MOTHER OF FRANCES, ANTHONY, GENEVIEVE AND ANGELO GABRIEL, MINOR CHILDREN OF SAID DECEASED. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

Rehearing allowed January 9, 1935.

S. E. PIANCENTI AND HENRY POLLENZ, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*maximum amount in case of death leaving three or more children under 16 years of age—how computed.* Where the maximum amount of $4,000.00 is provided under Workmen's Compensation Act and employee leaves three or more children under the age of sixteen years at the time of his death, the amount of compensation is not arbitrarily raised to $5,550.00, but the proper amount is the actual amount of four times the annual average earnings, but not more than $5,500.00.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under the stipulation of facts herein, it appears that Angelo Gabriel was an employee on May 19, 1932, of the Division of Highways, Department of Public Works and Buildings, of the State of Illinois, and was employed in the Maintenance Department as a helper on S. B. I. Route No. 49; that while engaged on said date in pouring asphalt on said highway, he was hit by an automobile then being operated over said highway by one Joseph O. Smith, of Manteno, Illinois; that he thereby sustained injuries which necessitated his removal to St. James Hospital at Chicago Heights, and which resulted in his death on July 10, 1932. It further appears that he was paid at the rate of fifty cents (50c) per hour for nine hours a day and five and one-half (5½) days per week; his wage being approximately $24.75 per week or an average annual wage of Twelve Hundred Eighty-seven Dollars ($1,287.00).

Rose Gabriel, widow of the deceased was appointed administratrix of his estate. Deceased left surviving besides the widow, four minor children, all of whom are under sixteen years of age and residing with the mother.

A suit was instituted against Joseph O. Smith by the administratrix and a settlement was made with the defendant's insurance company on December 24, 1932, for the sum of Four Thousand Eight Hundred Dollars ($4,800.00).

Claimant contends for herself and on behalf of the said children that as decedent's annual earnings were $1,287.00 they are entitled to receive compensation of four times that amount with the $4,000.00 maximum increased to $5,500.00 because of the four minor children; deducting therefrom, however, the amount of $4,800.00 above mentioned and with a further deduction of $115.75 paid to Angelo Gabriel after the accident and before his death, making a demand of $584.25.

The claim is made under the Workmen's Compensation Act and the Attorney General does not take issue with the claimant either as to facts or law, admitting the liability of

the State upon the foregoing basis. The court must determine the correct amount of the award under Section 7, Paragraphs A, (h)1, (h)2 and (h)3, W. C. A. i. e. when four times the annual wages is less than the increased maximum, should such maximum be awarded, or only an amount equal to four times the annual wages.

Under the recent decision of the Supreme Court of Illinois in *Monccaqua Coal Company* vs. *Industrial Commission*, (June Term, 1934), it is held that in a case where the maximum amount of $4,000.00 is provided and there are three or more children under the age of sixteen years at the time of the death of the employee, the amount is not arbitrarily raised to $5,500.00 but the proper amount is the actual amount of four times the annual average earnings, but not more than $5,500.00.

In the present case the annual earnings are shown to be $1,287.00. Four times that amount is $5,148.00. Deducting the amount already received from the State, i. e., $115.75, and the sum received from Joseph O. Smith, i. e., $4,800.00, leaves a balance due claimant of $232.25.

It appears that the State has paid all the regular hospital and medical accounts. The claimant has properly stated the subrogation rights of the State, and an award is therefore allowed to Rose Gabriel for herself and the support of said children for the balance due of $232.25.

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

A petition for rehearing having been heretofore granted on January 9, 1935, and the above cause now again coming before the court upon the petition of claimant to affirm the original award, and the same having been considered, the court finds that the opinion heretofore filed on December 11, 1934, is in accord with the law and the facts. Said original opinion is hereby reaffirmed and an award is entered in favor of plaintiff, Rose Gabriel, for herself and the support of her minor children for the balance shown to be due her in the premises in the sum of Two Hundred Thirty-two and 25/100 Dollars ($232.25).

(No. 2409—Claimant awarded $70.00.)

DR. E. G. GAFFNEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WILLIAM M. SCANLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*necessary first aid, medical, surgical and hospital services—when award made for.* The facts in this case are set forth in *Hutton* vs. *State*, No. 2407, *post*, and the opinion in that case applies herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The facts in the case of Dr. E. C. Gaffney are fully set forth in the case of Dr. Charles J. Hutton, No. 2407, decided at the present term of this court and the reasons for the allowance of an award are therein stated. To save repetition reference is, therefore, made to that cause.

An award is herein allowed in favor of Dr. E. G. Gaffney in the sum of $70.00.

(No. 1784—Claimant awarded $375.00)

FRANKLIN J. GAYLES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

BENJAMIN C. POLLARD, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award for may be made.* Where member of Illinois National Guard, while on duty, was ordered to his tent, by his superior officer and while there was unwarrantedly assaulted by said officer, resulting in facial disfigurement, and injury which interferes with the orderly conduct of his work, which injury may be cured by surgical operation, an award may be made for such disfigurement and the cost of such operation.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, F. J. Gayles, was a member of the 8th Infantry Headquarters Company, 2nd Battalion Illinois National Guard and on August 3, 1930, was on duty with his Company at

Camp Grant, Rockford, Illinois. He was ordered by his Commanding Officer, Lieutenant Christley, to go to his tent. Instead of directly doing so, he went to a telephone and then entered his tent. After being in the tent for a brief time, First Sergeant Ward, who had been searching for claimant to determine why he had not obeyed the command of Lieutenant Christley, came to his tent door and called him out; claimant walked to the door of the tent and Sergeant Ward stated "That he was tired of his damn foolishness," and thereupon struck claimant with a pistol across the nose, whereby claimant was rendered unconscious, suffered a cut and broken nose and general bruises to the mouth and face; that as a result his nose is stopped up and he cannot breathe clearly; that he still requires treatment for same and that there is a daily discharge of blood from same; that claimant is a Post Office employee and that his disability interferes in the ordinary conduct of his work. Claimant also complains that prior to his injury he had been in good health, but that after the attack in question he found that he was suffering from a slight hernia. Claimant seeks $3,000.00 award to cover the cost of an operation to his nose; for a hernia operation and to recompense him in a general way for the loss in ability claimed to have been suffered by him.

The declaration alleges that the assault in question occurred while claimant was *in the exercise of his rights and duties as a soldier.* Complaint also states that a military board was called and that the findings of the board were in affiant's favor, as he is informed and believes.

The report of the military board shows a diagnosis as follows:

"Two lacerated wounds on nose, severe;"
(1) Left lateral aspect 1½ inch,
(2) Right lateral aspect 1 inch- probable fracture,
"Injury occurred in line of duty."

Regardless of what the record shows as to what claimant had been doing earlier in the day, he was in his tent in compliance with instructions of his Commanding Officer at the time of the assault by Sergeant Ward.

What is meant by the expression *"while in line of duty"* is not always easy to determine.

In the claim of Gillespie for pension we find an apt illustration of the interpretation of the words, *in line of duty* (2 Dec. Dept. Int. Pensions 16) the claim was based upon an injury the claimant received in an altercation with a member of his company, in which the latter struck Gillespie upon the head with a board and injured his skull. The claim was disallowed upon the ground that the injury was not received while he was "in the line of duty." The question involved in the claim was stated as being, not whether claimant was to blame for the conduct of his assailant, but whether the blow struck by the latter was a necessary or even a reasonable incident of line of duty.

In passing upon a similar case the Pension Department of the Federal Government has said "the department holds in this and all similar cases that the wound, injury or disease must be the natural, probable or approximate result either mediate or immediate of the soldier's military duty, and that the phrase *line of duty* denotes that an act of duty performed, in order to entitle claimant to a pension, must have relation of causation, mediate or immediate to the wounds or injury which produced the disability or death."

The principal loss suffered by claimant is one of physical blemish and the continuing injury to his nose. The testimony of Dr. Gayles is that if an operation is performed upon the patient's nose he would again get normal functions of the nose, and that the probable total cost including hospitalization and medical service would not be in excess of $175.00.

No recoveries can be allowed under *Section 10, Article 16 of the Military and Naval Code of Illinois* for that section provides:

"for an allowance of stated pay in cases where the officer or enlisted man is wounded or disabled while on duty and lawfully performing the same, so as to have *prevented him from working at his profession, trade or calling.*"

Under Section 11, Article 16 of said code "any officer or enlisted man who shall be injured while performing his duty in pursuance of orders, shall have a claim against the State for financial help and the State Court of Claims shall adjust the same as the merits of each case may demand."

The court is in great doubt as to whether claimant was injured while performing his duty in pursuance of orders, within the meaning of the above Section 11, but whether he was performing any duty or not, he was in his tent where he had been ordered to go by his Commanding Officer. The unwarranted attack by Sergeant Ward causes the court to feel justified in extending every reasonable relief that can be justified by the court. An operation will remedy the nasal trouble at a cost not to exceed $175.00. There is nothing in the record sufficient to show any connection between the blow on the nose

and the small hernia which patient found himself to be troubled with at a date shortly thereafter, and no award can be justified for the existence of same or for an operation in the relief thereof. The record does not disclose any decrease in the actual amount of claimant's earnings, but there is a facial disfigurement which is apparently of a permanent character.

Under the Employers' Liability Act of Illinois claimant would be allowed whatever amount might be fixed upon arbitration of the claim not to exceed one-fourth of the amount payable as a death claim under *Section 7-A* of the Act. It is difficult to visualize claimant's appearance from the meager record at hand, but considering the record as we find it, an award for $200.00 will be allowed for facial disfigurement and $175.00 for medical and hospitalization care incident to a nasal operation, making a total of $375.00.

An award is, therefore, made in favor of claimant in the sum of Three Hundred Seventy-five Dollars ($375.00).

(No. 2292—Claim denied.)

KARL GINGRICH, ADMINISTRATOR OF THE ESTATE OF LENA GINGRICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

JOHN BENEDEK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*death—negligence of State highway employees—State not liable for.* This claim arose out of the accident involved in *Congdon vs State*, No. 2291, *ante*, and the opinion in that case controls herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim grows out of the same state of facts as alleged in the case of *William P. Congdon, Administrator, etc.* vs. *State*, No. 2291, considered at this same term.

From the declaration filed herein, it appears that Lena Gingrich was a passenger in the automobile of Joseph Fisher and was killed when the automobile crashed into a concrete abutment constructed at the intersection of S. B. I. Routes 18

and 53. The Attorney General has filed a motion to consolidate this claim with No. 2291, supra, and thereby to dismiss the claim. For the purpose of considering the pleadings, the motion to be consolidated is allowed and under the opinion filed in the Congdon case (No. 2291) this claim is dismissed.

(No. 2078—Claimant awarded $55.53.)

GOODYEAR SERVICE, INCORPORATED, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

ROY GEIBE HILL, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where it appears that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed February 24, 1933, asking a refund of $55.53 alleged due claimant for auto supplies in the total sum of $55.53. The records show that the merchandise in question was furnished by the Lincoln Tire Company to the Bureau of Machinery of the State of Illinois, and that, that company has been succeeded by Goodyear Service, Incorporated; the merchandise (auto tires) were supplied to Mr. Cleaveland and the only reason apparently for the delay in payment is, that the appropriation lapsed before the presentation of the bill.

"Where the facts are undisputed that the State has received supplies legally ordered and that a bill therefor was not presented for payment until after the lapsing of the appropriation out of which such bill could have been paid, an award for the amount due will be made, unless it appears there has been an unreasonable and unexplained delay upon the part of the claimant."

Shell Petroleum Corp. vs. *State*, 7 C. C. R. 224.
Grant Tire Company vs. *State*, 7 C. C. R. 183.

An award is made for Fifty-five and 53/100 Dollars.

(No. 2358—Claimant awarded $30,333.92.)

GREAT LAKES CONSTRUCTION COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

OSWALD D. LUBY, GEORGE E. BILLETT AND JOHN J. GREALIS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*compensation for extra work not provided in—when award may be made.* Where it is stipulated and agreed by and between the parties and the proper State Department, that claimant is entitled to an award in a sum fixed therein, for extra work done in performance of contract for construction of a building, at request of said department and not within the terms of said contract, and such stipulation fully and fairly sets forth the facts and shows allowance for all just credits of the parties, an award may be made in accordance with the said stipulation.

Per Curiam:

The claimant is, and for a number of years past has been, engaged in business as a general building contractor, and on April 9, 1934, filed its complaint herein in which it sets forth:

That on December 4, 1928, it entered into a contract with the respondent through the Department of Purchases and Construction, for the construction of a drill hall and stable section of the Armory for the 124th Field Artillery, Illinois National Guard, at Cottage Grove Avenue and East 52nd Street, Chicago, for the sum of Three Hundred Fourteen Thousand Nine Hundred Two Dollars ($314,902.00); that the claimant performed all of its obligations under said contract and completed the construction work provided for therein, on or about the 24th day of October, A. D. 1929, and that the same was duly accepted by the State of Illinois on or about the 1st day of November, A. D. 1929; that from time to time during the process of construction under said contract, the respondent ordered the claimant to make certain changes and additions in said construction which were not provided for by the terms of said contract; that pursuant to such orders the claimant furnished the labor and material required for such changes and additions, and that the same were completed and accepted by the respondent during the process of such con-

struction, and that because of such changes and additions, the claimant became entitled to receive extra compensation in the amount of $71,112.08.

That during the process of such construction, the respondent ordered the claimant to make certain other changes and omissions from the requirements of such contract, for which the respondent was entitled to receive credits in the form of deductions from the original contract price, amounting to the sum of $8,827.00.

That on the 6th day of December, A. D. 1929, the claimant and the respondent entered into another contract, for the construction of certain additions to the building provided for in the contract of December 4, 1928, to-wit, an addition to the building known as the "Head House" and an addition to the building known as the "Stable Building;" that thereafter the architects and agents of the respondent ordered certain partitions to be installed in said building, and certain bunkers to be installed in the basement thereof; that all of said work was completed and installed by the claimant and duly accepted by the respondent; that by reason thereof the claimant became liable to pay the respondent for said extra or additional work on said contract of December 6, 1929, the sum of $4,772.15, no part of which has been paid.

That an appropriation was duly made by the General Assembly of the State of Illinois for the work embraced in the contract dated December 4, 1928, and an appropriation was also duly made by the General Assembly of the State of Illinois for the work embraced in the contract dated December 6, 1929.

That by reason of the foregoing, there became due to the claimant under the original contract of December 4, 1928, the sum of $314,902.00.

That there also became due to the claimant for extras and additions to said original contract as hereinbefore set forth, the sum of $71,112.08.

That there also became due to the claimant under said contract of December 6, 1929, the sum of $4,772.15, making a total gross amount due the claimant of $390,786.23.

That the respondent is entitled to a credit on account of omissions from said original contract, as hereinbefore set forth, in the amount of $8,827.00.

That the respondent has paid the claimant on account of the aforementioned contract of December 4, 1928, and the extras thereunder, the total sum of $345,363.48, making a total credit to the respondent, of $354,190.48, and leaving a net balance due the claimant of $36,595.75.

The complaint sets out in great detail the various changes ordered and made, as well as a copy of the original contracts and other papers and documents relative to the various additions, omissions, changes and modifications made, etc., and concludes with a demand for judgment in the amount of $36,595.75.

After the filing of the complaint herein, various conferences were had between the officers of the claimant and the Supervising Architect of the Department of Public Works and Buildings of the respondent, for the purpose of determining the amount to which the claimant was rightfully entitled under the terms and provisions of said original contracts and the changes thereafter made by the respondent, for alterations, additions and omissions.

As the result of such conferences, the parties thereto arrived at an agreement as to the amount due the claimant, and a stipulation of facts was prepared and filed in this court which provides in the concluding paragraphs thereof as follows:

"Fourth: That the net balance due to the claimant from the respondent herein on account of the amount of the contract and extras described in the complaint herein, after deducting all credits for payments made by the respondent to the claimant thereon, and all credits for omissions from the work originally contracted for, is the sum of Thirty Thousand Three Hundred Thirty-three Dollars and 92/100 Cents ($30,333.92).

"Fifth: That judgment may be entered herein for the claimant and against the respondent for said sum of Thirty Thousand Three Hundred Thirty-three Dollars and 92/100 Cents ($30,333.92)."

Such stipulation was executed on behalf of the respondent by the Attorney General and approved by the Supervising Architect of the Department of Public Works and Buildings.

It appearing to the court that such stipulation fairly sets forth the results which would have been developed by the taking of evidence in the case; that the same is just and fair; and that an award in the amount set forth therein, to-wit,

$30,333.92, is recommended by the Department of Public Works and Buildings of the respondent,

THEREFORE, IT IS HEREBY ORDERED that an award be and the same is hereby made and entered in favor of the claimant for said sum of Thirty Thousand Three Hundred Thirty-three Dollars and Ninety-two Cents ($30,333.92).

(No. 2395—Claimant awarded $990.00.)

GUARANTY TRUST COMPANY OF NEW YORK, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

CHAPMAN & CUTLER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS, FOREIGN—*franchise tax—constitutional law.* The State cannot exact from a foreign corporation, licensed by it to do business, such amount as it deems advisable for an initial franchise tax, but the amount of same must be reasonable and based on the amount of property held by it and the business transacted by it in this State and a Statute fixing a minimum amount of franchise tax based upon its authorized capital, without regard to and in excess of amount based upon property so held by it and business transacted by it in this State is in violation of Section 1 of Article 14 of the Constitution of the United States.

SAME—*same—paid under protest when may be recovered.* Where franchise tax is paid under protest and proceedings are instituted within time required by Statute to restrain payment of same into State treasury, upon which temporary injunction is issued, an award for refund will be made, upon law under which same was collected being declared unconstitutional, where State officer, despite notice of said temporary injunction, pays same into State treasury.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a claim for a tax refund. The claimant, Guaranty Trust Company of New York, is a corporation organized and existing under the laws of that State with capital stock outstanding in the amount of $90,000,000.00 and was in the year 1932 duly qualified to do business in the State of Illinois. It filed its annual report in 1932 with the Secretary of State and a franchise tax based on said report, which was the minimum tax assessable against a corporation having a capital stock

of the amount stated, was assessed against it in the sum of $1,000.00. The assessment was claimed to be invalid as being in contravention of constitutional provisions, including Section 1 of Article 14 of the Constitution of the United States, commonly known as the "Due Process Clause." Claimant paid the amount of tax under protest to avoid penalties which it was instructed would be imposed if it failed to pay, including its right to do business in the State of Illinois, forfeiture of which right was threatened unless payment was made.

Within thirty days after making the payment, claimant, in compliance with provisions of the Statutes of Illinois, filed its bill in the Circuit Court of Sangamon County to enjoin the Secretary of State of Illinois from paying into the State treasury the amount thus delivered to him under protest. A temporary injunction was issued, restraining the Secretary of State from paying the money to the State Treasurer and the writ was served upon the then Secretary of State. The latter disregarded the injunction and delivered the money to the State Treasurer.

Thereafter the Supreme Court of Illinois in the case of *St. Louis and Southwestern Railway Company* vs. *Stratton*, 353 Ill. 273 held—the Statute under which the assessment was made, and any assessments to be made thereon to be invalid because it was in violation of the *due process and Interstate Commerce Clause of the U. S. Constitution.*

Claimant thereafter on May 15, 1934, served notice on the Attorney General of the State of Illinois that it would apply to the court for the entry of a decree in its favor in the proceeding then pending in the Circuit Court of Sangamon County, and thereupon learned for the first time that the payment which it had enjoined had been disregarded by the former Secretary of State, and thereupon claimant filed its complaint in this court. The proper amount of tax that should have been paid by claimant, in view of the unconstitutionality of the Act in question, for its annual franchise tax for the year 1932 based upon its business done from property located within this State, was $10.00, making the amount of claim herein $990.00. Claimant contends also for interest upon said money. The Attorney General has not interposed

active objection to the allowance of the sum of $990.00 but takes issue with the claimant in its request for interest.

The case of *St. Louis and Southwestern Railway* vs. *Stratton, supra,* held: that the State could exact from a foreign corporation for an initial fee such amount as it deemed advisable, but that when the corporation had once been admitted to do business in this State, then the latter could not impose an unreasonable burden upon the corporation, and the franchise tax exacted in such cases must be reasonable and based on the amount of property held in this State and the business transacted in this State.

Claimant observed all the necessary precautions to protect its rights to a refund. The money was paid under protest. Suit to restrain the forwarding of such money by the Secretary of State to the State Treasurer was filed within thirty days and a temporary injunction was issued. Claimant is entitled to an award.

In its request for interest claimant states that it has been unable to find any authorities in Illinois which touch upon the question of the court's power to allow interest on its award against the State. In the citation of Editor's views from 59 Corpus Juris, Page 297, Section 455, claimant states:

"Where the Legislature has expressly authorized a suit against the State and empowered the court to render an award and judgment, as right and justice may require, the court may include interest in the judgment."

It has not been the practice of this court to allow interest on awards, but even under a liberal reading of the above editorial comment, we do not believe an award of interest would be justified in this case. Interest would only be justified if there had been an unreasonable and vexatious delay in the payment of this claim. The payment of the tax in question was originally made because of a then existing Statute. The claim for refund was filed on June 7, 1934, and an award is being granted thereon in apt time to permit an appropriation by the next succeeding session of the Legislature held thereafter. Claim for interest is denied and an award is made in favor of claimant for the principal sum of $990.00.

(No. 2407—Claimant awarded $70.00.)

DR. CHARLES J. HUTTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WM. M. SCANLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*necessary first aid, medical, surgical and hospital services—when award made for.* Under Workmen's Compensation Act, employer is required to provide necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services thereafter, where employee suffers accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, and an award may be made to those furnishing such services for the reasonable value thereof.

INTEREST—*when claim for not justified.* Where there is no showing of any unreasonable or vexatious delay in payment an allowance for interest is unwarranted and cannot be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks settlement for medical services furnished to William L. Dingler of Peru, Illinois.

Four other claims growing out of the same circumstances have been filed, i. e.: *Dr. George E. Kirby* vs. *State*, No. 2408; *Dr. E. C. Gaffney* vs. *State*, No. 2409; *Dr. N. A. Balding* vs. *State*, No. 2410 and *Evangelical Deaconess Hospital* vs. *State*, No. 2411, and to save repetition, reference will be made in the opinions of those cases to this case.

William L. Dingler was employed by the State of Illinois as an automobile investigator and on October 17, 1931, in traveling the territory in which his employment necessitated his going, he was riding a motorcycle with a side-car attached enroute from Peru, Illinois, on S. B. I. Route No. 4. When about two miles southwest of Atlanta, Illinois, he collided with a horse-drawn hay rack wagon while attempting to avoid a collision with an aproaching motor vehicle. As a result of said accident Dingler was thrown onto the concrete pavement and suffered a basal, frontal and two bilateral fractures of the skull with serious injuries to other parts of the body.

Claimant was called to the scene of the accident, rendered first aid; caused Dingler to be removed to claimant's office in Atlanta, Illinois; and from there had him removed by ambulance to the Evangelical Deaconess Hospital, at Lincoln, Illi-

nois, thirteen miles distant from Atlanta, that being the nearest hospital having suitable equipment and facilities; that upon arrival at the hospital Doctors E. C. Gaffney and N. A. Balding were called in consultation and thereafter Dr. George E. Kirby was also called into the consultation. The patient, William L. Dingler, remained unconscious from the time of the accident on October 17, 1931, until Tuesday, October 20, 1931, and claimant, Dr. Hutton, made trips from Atlanta to the hospital on the 18th, 19th, 20th, 22nd and 25th days of October, 1931. The patient remained at the hospital from October 17, 1931, to November 2, 1931, a period of 2 2/7 weeks and during said period of time the hospital provided him with a day nurse for twelve days and a night nurse for eight days, various X-rays were taken and medical dressings and medicines were furnished by the hospital.

Notice of the accident was telephoned to the office of the Secretary of State at Springfield and that office ordered the best medical care and attention possible rendered to Dingler. This was confirmed by a personal representative from the office of the Chief of the Automobile Investigators and the several physicians and hospital were authorized to render all services necessary and that the bills for same should be forwarded to the Automobile Department of the Secretary of State's office for payment. The instructions were ratified on other succeeding days. The bills were later submitted to the Secretary of State's office, and payment declined for the reason that that office had no appropriation from which payment could be made.

Claimant, *Dr. Charles J. Hutton's* Bill of Particulars requests payment as follows:

Oct. 17, 1931—Office visit, Lincoln Hospital call and X-ray..	$25.00
Five visits to Hospital at Lincoln (13 mi. from Atlanta at $12.00 each)	60.00
Total	$85.00

Claims have also been filed by the other three doctors and the hospital as follows:

Dr. E. C. Gaffney, Lincoln, Ill. (Case No. 2409.)

Oct. 17, 1931—Consultation on skull fractures.....	$10.00
24 visits to hospital, at $2.50 each.....	60.00
Total	$70.00

Dr George E. Kirby, Spring Valley, Ill. (Case No. 2408.)

Oct. 18, 1931—Consultation at Lincoln, Ill.	$35.00
Nov. 4th, 5th and 6th, 1931—3 house calls at Peru, Ill. (4½ mi. from Spring Valley, at $3.00 each)	9.00
Nov. 16, 1931—Office call and X-Ray	6.00
Dec. 3, 1931—Office call	1.50
Total	$51.50

Dr. N. A. Balding, Lincoln, Ill. (Case No. 2410.)

Oct. 17, 1931—Consultation	$10.00
14 visits to Hospital at Lincoln at $2.50 each	35.00
Total	$45.00

Evangelical Deaconess Hospital, Lincoln, Ill. (Case No. 2411.)

Oct. 17, 1931 to Nov. 2, 1931—Room and board, 2 2/7 weeks, at $24.00 per week	$54.86
Day nurse, 12 days at $5.00 per day	60.00
Night nurse, 8 nights at $5.00 per night	40.00
Dressings and medicine	.86
Head X-Ray	10.00
Laboratory	2.00
Two meals	.70
Telephone service	4.25
Total	$172.67

The accident suffered by William L. Dingler occurred while he was an employee of the State and the injury arose out of and in the course of his employment. There seems to be no question but what such employment was extra hazardous and within the Workmen's Compensation Act. The several claimants rendered the services stated under proper circumstances and are entitled to payment therefor.

"8 (A) The employer shall provide the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services thereafter. Sec. 8, Workmen's Compensation Act."

Claimants in each case also ask that they be allowed interest on their claims at the rate of five per cent (5%) per annum from the 25th day of October, 1931.

There is no showing of any unreasonable or vexatious delay in paymont.

"Creditors shall be allowed to receive interest at five per cent (5%) * * * on money withheld by an unreasonable and vexatious delay of payment. Sec. 2, Chap. 74 Ill. Rev. Statutes."

No allowance for interest is warranted in either of the cases herein considered for the reason that such claims were filed on June 21, A. D. 1934, and are being disposed of in apt time for an appropriation by the first succeeding Legislature thereafter.

The prevailing charge for local physicians' calls is apparently $2.50 each. An additional charge of fifty cents per call, or a total of $3.00 per visit was charged by Dr. Kirby in going from Spring Valley, to Peru, Illinois. The record discloses that Dr. Hutton traveled thirteen miles from Atlanta to Lincoln, Illinois on each of his several visits, for each of which an allowance of $9.00 is made.

An award is, therefore, allowed in this case, i. e., *Dr. Charles J. Hutton* vs. *State,* No. 2407 in the sum of $70.00.

(No. 2408—Claimant awarded $51.50.)

DR. GEORGE E. KIRBY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WILLIAM M. SCANLAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*necessary first aid, medical, surgical and hospital services.* The facts in this case are set forth in *Hutton* vs. *State,* No. 2407, *ante,* and the opinion in that case applies herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The facts in the case of Dr. George E. Kirby are fully set forth in the case of Dr. Charles J. Hutton, No. 2407, decided at the present term of this court and the reasons for the allowance of an award are therein stated. To save repetition reference is, therefore, made to that cause.

An award is herein allowed in favor of Dr. George E. Kirby in the sum of $51.50.

(No. 1970—Claim denied.)

ELMER NAFZIGER, RECEIVER OF CHICAGO, SPRINGFIELD & ST. LOUIS RAILWAY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.
Rehearing denied January 9, 1935.

STEVENS & HERNDON, for Claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—*construction of, governmental function.* It is the settled law that in the construction and maintenance of public highways the State exercises a governmental function, and therefore is not liable for the negligence of its servants and agents in connection therewith.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of $1,995.18 which he claims to have expended in and about the repairing and rebuilding of certain railway cars, the repairing of a certain sidetrack, and the derailing of certain cars, all of which he claims was made necessary by and as the result of the carelessness and negligence of the servants and agents of the respondent.

The evidence offered on behalf of the claimant shows that prior to and on the 13th day of August, A. D. 1931 the claimant was in possession of and operating a certain railway between Springfield and Lock Haven in this State, and particularly between the city of Waverly in Morgan County and the city of Modesto; that in the Spring of 1931, a sidetrack was constructed about one-half mile south of said city of Waverly to accommodate the O'Connor Construction Co., which company was then engaged in constructing hard roads for the State; that such company completed its work in July, 1931; that thereafter said sidetrack was assigned to the State Highway Department and was used by such department in connection with the unloading of material used in the construction of S. B. I. Route 111 south of Waverly; that said sidetrack was approximately 1,200 feet in length, and was constructed with a descending grade from the north to the south; that it was on the east side of the main line, and connected with such main line at the north end thereof, the south

end being a stub end; that the Highway Department had a cement house and two pits or bins alongside of such sidetrack, for unloading purposes; that for several days prior to August 13, 1931 the State Highway Department was engaged in the construction of S. B. I. Route No. 111 between Modesto and Waverly; that on the 12th day of August, A. D. 1931, about five-thirty o'clock P. M., the employees of the claimant placed fourteen cars loaded with road material for said State Highway Department on said sidetrack; that all of such cars were coupled together when left on said sidetrack; that blocks were placed under the wheels of several of such cars; that hand brakes were set on each of the three cars at the south end of said string of fourteen cars, and the air brakes set on all of said cars; that some time during the night of August 12th or the morning of August 13th, said cars started in motion and ran down said sidetrack to the south end thereof, thereby derailing and damaging three of said cars.

The evidence is not clear on the question as to whether or not the employees of the respondent moved one or more of said cars on the night of August 12th, after they had first been spotted, nor does the evidence satisfactorily disclose what caused the cars to start in motion.

The respondent contends that the air gradually escaped from the air brakes, thereby rendering them ineffective; that on account of the steep grade of the sidetrack, the hand brakes and blocks were insufficient to hold the cars after the air brakes became ineffective; and the cars were started in motion by reason of such facts.

It also appears from the evidence that on the morning of August 13th the claimant pulled eleven of said cars back to the north end of the track, leaving the three cars which previously had been derailed, at the south end of the track; that three of such eleven cars contained cement and the three cars of cement were spotted near the north end of the sidetrack; that the other cars contained sand and gravel and were spotted at the pits about three or four car-lengths south of the cement cars; that hand brakes were set on said eleven cars after they had been returned to the north end of the track and blocks placed under the wheels of some of the cars; that thereafter some of the employees of the respondent at-

tempted to move said cement cars to the south for convenience in unloading, and in so doing released the brakes on said cars and kicked the blocks from under the wheels, whereby said cars were started in motion; that after said cars were started, it became impossible to stop them and they again ran down the track and collided with the aforementioned sand and gravel cars, and the entire string of cars ran to the end of the sidetrack, where they collided with the three cars which had been derailed the previous evening, thereby causing considerable additional damage.

It is stipulated that the cost of labor and materials for making the repairs made necessary by the two accidents in question was $1,995.18.

The Attorney General contends: first, that the damages resulting to the claimant were not the result of any carelessness or negligence on the part of the servants or agents of the respondent; second, that the doctrine of respondeat superior does not apply to the State under the facts in this case, and that there is no liability on the part of the State even though the damages in question were the result of the carelessness and negligence of its servants and agents.

In the view we take of the case, it is unnecessary to consider the question as to whether the damages in question resulted from carelessness or negligence on the part of the servants or agents of the State.

This court has held in numerous cases that in the construction and maintenance of its S. B. I. roads, the State acts in a governmental capacity, and therefore is not liable for the negligence of its servants and agents in connection therewith, in the absence of a Statute making it so liable. *Chumbler* vs. *State*, 6 C. C. R. 138; *Braun* vs. *State*, 6 C. C. R. 104; *Bucholz* vs. *State*, 7 C. C. R. 241. This has been the recognized rule of law in this State for many years. *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

Claimant contends that the respondent in doing the work in question acted in the same capacity as a private contractor and not in a governmental capacity, and was therefore liable for the acts of its servants and agents in connection there-

with. However, claimant cites no authority in support of its contention, and we have been unable to find any authority therefor in this State. Our courts have held that, among others, the following activities of municipal or quasi-municipal corporations involve governmental functions, to-wit:

The construction of a school house, (*Kinnare* vs. *City of Chicago*, 171 Ill. 332); maintaining a hospital, either as a charity or in the exercise of police power, (*Tollefson* vs. *City of Ottawa*, 228 Ill. 134); the management and operation of the State Fair, (*Minear* vs. *State Board of Agriculture*, 259 Ill. 549); maintaining and operating a park, (*Stein* vs. *West Chicago Park Commissioners*, 247 Ill. App. 479); the maintenance and operation of a swimming pool, including the conveyance of children to and from the same, (*Hendricks* vs. *Urbana Park District*, 265 Ill. App. 102; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234).

Such conclusions were reached notwithstanding the fact that in the case involving the maintenance of a swimming pool, (*Stein* vs. *West Chicago Park Commissioners*) a fee was charged for its use; and in the case involving the maintenance of the State Fair Grounds (*Minear* vs. *State Board of Agriculture*), an admission fee was charged.

In all or practically all of the cases above cited the question involved was whether the defendant was acting in a governmental capacity or a proprietary capacity, and the question as to what is necessary to constitute a governmental function, and the distinction between governmental functions and proprietary functions were considered and discussed. Upon consideration of the cases above cited, and other cases bearing on the question, we have no hesitancy in holding that in the construction of its hard-surfaced roads the respondent is engaged in a governmental function.

In the absence of a Statute making the State liable for the negligence of its servants and agents in connection with governmental functions, this court has no authority to allow an award against the respondent for such negligence.

IT IS THEREFORE ORDERED that award be denied and the case dismissed.

OPINION ON PETITION FOR REHEARING.

Per Curiam:

On petition for rehearing the claimant contends that in the construction of its hard-surfaced roads the State is not engaged in a governmental function, and as authority for its contention cites the case of *Hanrahan* vs. *City of Chicago*, 289 Ill. 400; *City of Chicago* vs. *Seben*, 165 Ill. 371; and McQuillin on Municipal Corporations, 2d Edition, Volume 6, pages 798-801; also *Byrne* vs. *Chicago General Railway Co.*, 169 Ill. 75; and *City of Chicago* vs. *Tribune Company*, 307 Ill. 595.

Neither of the two cases last cited involve the question which is involved in this case, and neither of such cases is authority for the proposition contended for by claimant.

The case of *Hanrahan* vs. *City of Chicago* and the case of *City of Chicago* vs. *Seben* involve the question of the liability of a city for personal injuries sustained by reason of the negligence of such city in the maintenance of its public streets. There is no question but what a city is liable for the negligence of its servants and agents in the maintenance of its public streets, but the law making it so liable is regarded as an exception to the general rule, and is based upon the theory that cities are organized at the instance and request of their own citizens and for considerations which affect, more or less, their private interests; they are regarded as corporations created for their own benefit, and therefore as to the maintenance of the streets within their corporate limits, they are considered as acting in a municipal or ministerial and not in a governmental capacity. *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Johnson* vs. *City of Chicago*, 258 Ill. 494; *Roumbos* vs. *City of Chicago*, 332 Ill. 70.

The case of *City of Chicago* vs. *Seben*, cited by claimant, was analyzed and considered by the Supreme Court in the case of *Kinnare* vs. *City of Chicago*, 171 Ill. 332, in which last mentioned case the court distinguished between the duties thrust upon a city by the General Assembly through the General Corporation Act, as in the Seben case, and the duties performed by the City as an agency of the State in the general administration of State government, as in the Kinnare case, in which case it was held that the City was not

liable for the negligence of its servants and agents in the construction of a schoolhouse.

In the Kinnare case, the Supreme Court quotes with approval from Dillon on Municipal Corporations as follows:

"The general doctrine of the American courts, as we shall presently see, in *respect of municipal corporations proper*, has been to hold them civilly liable for injuries from defective streets, although the ground for the distinction—which gives a cause of action if the injury happens within the limits of the municipality having control of the streets therein and denies it if it happens within the limits of a township or county having like control over highways and adequate means of discharging its public duties in respect thereto—is not as satisfactory to the mind as could be desired."

In the case of *Roumbos* vs. *City of Chicago*, 332 Ill. 70, the court, on page 77, said:

"Cities become incorporated by the voluntary act of their inhabitants, for the benefit of the territory incorporated and the people residing within the corporation. By their incorporation they receive certain powers and privileges and assume certain duties and obligations. So far as they are exercising these privileges and duties in the interest of the general public (the people of the State at large) they represent the sovereignty of the State and are not liable for the negligence of their officers and agents in the performance of such duties, but so far as their acts concern merely the interest of the particular locality and its inhabitants they are responsible, the same as private corporations."

It is well settled in this State that the law which makes a city liable for the negligence of its servants and agents in the construction or maintenance of its streets, does not apply to townships, or counties, nor by analogy to the State.

Some of the cases which hold that the construction and maintenance of roads and bridges are governmental functions for which there is no liability on the part of a county or township in the absence of a Statute making it liable, are the following: *Hedges* vs. *County of Madison*, 1 Gilman 566; *Town of Waltham* vs. *Kemper*, 55 Ill. 346; *Bussell* vs. *Town of Steuben*, 57 Ill. 35; *White* vs. *County of Bond*, 58 Ill. 297; *Cooney* vs. *Town of Hartland*, 95 Ill. 516; *Nagle* vs. *Wakey*, 161 Ill. 387.

Under the well established law of this State, there can be no question but what the *State* in the construction and maintenance of its hard-surfaced roads is acting in a governmental capacity.

The petition for rehearing is therefore denied.

(No. 2317—Claimant awarded $177.66.)

NATIONAL LOCK CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

HALL & DUSHER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MOTOR FUEL TAX—*claim for refund—limitations.* Where Statute provides method of obtaining refund of motor fuel tax, and fixes time within which claim for same must be made, failure to comply with requirements of same in making claim within time provided, will be a bar to the allowance of an award for such refund.

SAME—*mistake of fact—negligence not considered.* Failure of agent of claimant to apply for refund of motor fuel tax within period of limitation fixed by law is not mistake of fact.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed to recover the sum of $550.98 under the Motor Fuel Tax Law, claimed as a refund on gasoline used in the Plating Department of claimant's factory. The claim was filed with the Department of Finance on December 11, 1933 and payment of such refund was declined by that department under the statement, "That it was without authority to accept claims for refund on gasoline which had been purchased more than six months prior to the date of the filing of the claim."

The claim consists of three items:

Tax paid on 6,555 gallons of gasoline purchased on February 12, 1932	$196.65
Tax paid on 5,922 gallons of gasoline purchased on May 26, 1933	177.66
Tax paid on 5,889 gallons of gasoline purchased on January 9, 1933	176.67
Total tax	$550.98

Claimant alleges that it requires from three to five months to use a tank car of gasoline; that it was the duty of claimant's purchasing agent to file a claim for tax refund with the Department of Finance; that C. G. Strote was employed as such purchasing agent and that through his negligence, the claim was not filed. Claimant further states that the Purchasing Agent, Strote, was thereafter transferred

because of general negligence and other unsatisfactory conduct.

The proof supports these statements: The Attorney General has filed a motion to dismiss the claim for the reason it does not state any cause against the State for which an award may be allowed, due to the fact that no claim for such refund was filed with the Finance Department within six months after the date on which the motor fuel was lost or used by the claimant. Claimant in its Reply Brief contends that the case at bar (Page 2 Reply Brief) is similar to the cases cited by the respondent, where a franchise tax is paid through "a mutual mistake of fact"; claimant contends that the State has agreed it would make refunds when the gasoline for which a tax has been paid has not been used for motor vehicles on the highways and that the requirements that the claim for refund must be filed with the Department of Finance within six months after the date on which the motor fuel was used, is only an administrative convenience; that the right for a refund continues after the six months period regardless of whether a claim is filed within that time, or whether claim is filed with the Finance Department, but that after such six months the Claims must be filed with the Court of Claims.

Comparison of the case at bar with those where a "mutual mistake of fact" has been made, is not good, for the reason that no mistake has been made by anyone in regard to assessment or payment of the tax in question, and the only mistake apparent is the misplaced confidence of claimants in their Purchasing Agent, Strote, and in his failure to apply for a refund within the period of limitation. He was an employee and agent of said claimants for whom they alone were responsible.

It is unfortunate that claimant must suffer loss through the acts of its agents, but in the absence of a legal claim to such refund, this court is without authority to allow same.

"The provision of Paragraph 4, Section 6 of Court of Claims Act with reference to 'equity and good conscience' defines the jurisdiction of the court and does not create a new liability against the State. The jurisdiction of the court is limited to claims under which the State would be liable in law or equity if it were suable. Where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principals of 'equity and good conscience' to secure one."

Crabtree vs. *State*, 7 C. C. R. 207.

"Where or the amount of the franchise tax is computed and collected by the Secretary of State in accordance with law, based on information submitted by the claimant, a claim for rebate of a part thereof alleged to have been excessive on account of error in the information furnished by the claimant, will be denied."

Seiders Inc. vs. *State*, 7 C. C. R. 9.

"Taxes voluntarily paid cannot be recovered unless there is a statute authorizing such recovery."

Wm. Wrigley Jr. Co. vs. *State*, 7 C. C. R. 163.
Richardson, etc. vs. *Kinney*, 337 Ill. 122.
M. & H. Clothing Co. vs. *State*, 7 C. C. R. 139.

Section 13 of the Motor Vehicle Act, specifically provides that claims for reimbursement must be filed not later than six months after the date on which the motor fuel was lost or used by the claimant; that the claim shall be made in accordance with certain forms prescribed by the Finance Department and that, that department may make suitable investigation as it deems necessary. Specific authority for refunds having been made by a specific Statute, and the method of obtaining such refund having been specifically prescribed, the court is of the opinion that a failure to show compliance with those provisions is a bar to an award by this court.

It is apparent that no refund can be allowed as to *two shipments*, but as to the one purchased May 26, 1933 an award is justified, as the claim has been filed within the time of limitation.

An award is therefore made in the sum of One Hundred Seventy-seven Dollars and Sixty-six Cents ($177.66).

(No. 2396—Claimant awarded $190.00.)

OLD COLONY TRUST COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

CHAPMAN & CUTLER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS, FOREIGN—*franchise tax—Constitutional law—when franchise tax paid under protest may be recovered.* The facts in this case are similar to those in *Guaranty Trust Company of New York* vs. *State*, No. 2395, *ante*, and the opinion therein applies with equal force here.

MR. JUSTICE YANTIS delivered the opinion of the court:

This case is similar to that of *Guaranty Trust Company of N. Y.* vs. *State of Illinois* No. 2395, in the Illinois Court of Claims, and is an application for a refund of franchise tax paid under protest, followed by a writ of injunction to enjoin the Secretary of State from paying such funds into the State Treasury. The then Secretary of State in disregard of said injunction paid the money to the State Treasurer, and on or about May 15, 1934 on motion of claimant, a decree was entered in the suit then pending in the Circuit Court of Sangamon County, finding that the assessment against claimant was invalid, declaring that the amount of franchise tax properly assessed against the claimant was $10.00, and directing that the present Secretary of State refunded to claimant the excess that had been improperly collected.

Claimant is a corporation originated and existing under the laws of Massachusetts with capital stock outstanding in the amount of $5,000,000.00 in 1932 and was then qualified to do business in the State of Illinois. It filed its annual report with the Secretary of State of Illinois and a franchise tax based on said report, which was the minimum tax assessable against a corporation with a capital stock of said amount, was assessed against it in the amount of $200.00.

Under the decision of the *St. Louis and Southwestern Railway Company* vs. *Stratton*, 353 Ill. 273 and the *United States Pipe and Foundry Company* vs. *State*, 353 Ill. 516, and under the further findings of the Circuit Court of Sangamon County, claimant is clearly entitled to a refund.

As stated in the Guaranty Trust Company of N. Y. case No. 2395, the claim for interest thereon will be denied.

An award is granted in favor of claimant for the sum of $190.00.

(No. 2241—Claim denied.)

LILLIAN PELLI, ADMINISTRATRIX OF THE ESTATE OF ADOLPH PELLI, Deceased, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.
Rehearing denied April 9, 1935.

JOHN A. FILPI, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, DEATH—*inmate of Elgin State Hospital—assaults by fellow inmates and employees of—State not liable.* In the conduct of the Elgin State Hospital the State exercises a governmental function and the rule of respondeat superior is not applicable to it and it is not liable to respond in damages for death of inmate resulting from assaults of other inmates, or its agents in charge of, or servants employed therein.

SAME—*same—same—award on ground of equity and good conscience denied.* Under the facts in this case an award on the grounds of equity and good conscience is not justified.

MR. JUSTICE YANTIS delivered the opinion of the court:

Adolph Pelli was committed to the Elgin State Hospital on November 6, 1931 under a diagnosis of "Mental Derangement and Acute Alcoholism" with a further medical finding of "Possible beginning Paresis" (a case of general paralysis of the insane). He died on January 10, 1932. An autopsy was held from which the essential findings were as follows:

CAUSE OF DEATH:

Perforation of ileum with generalized peritonitis. Contributing causes were multiple fractures of ribs and emphysema; fracture of right second, sixth, seventh, eighth and ninth ribs; of left sixth, seventh, eighth, ninth and tenth ribs; fracture of the thyroid cartilage; also an opening or congestion of the bowel. The evidence of doctors, attendants and patients discloses that, although Adolph Pelli was not a violent or difficult patient, he was confined with vicious, abusive inmates who assaulted him on different occasions; that such assaults were reported to the officers of the institution, but that little or no attention was given towards preventing a repetition thereof. The record discloses that in addition to these attacks, the patient, Pelli, was misused and man-handled

by various attendants and was so bruised and battered that one attendant, Alonzo Clampton, refused to give hydrotherapy treatments to the patient until the patient's injuries were chartered and until a doctor had inspected the patient. The coroner's jury found that Adolph Pelli came to his death through injuries received by a person or persons unknown, with the recommendation that the three attendants, George Caldwell, John Ribbe and Frederick J. Taylor should be held for further questioning by the States Attorney.

The patient left surviving his wife, Lillian Pelli and one son, William Pelli, now sixteen years of age. The record discloses that the income of Adolph Pelli for several years prior to his death was from $30.00 to $55.00 per week and that prior to his committment to the Elgin State Hospital he had regularly contributed to the support of his wife and son, both of whom were left destitute and without any source of income at his death.

A report by A. L. Bowen, Acting Director of the Department of Public Welfare, dated September 11, 1933, appearing in the Brief of the Attorney General, states that "As a result of the injuries sustained by Pelli, the three employees named were held to be responsible for the injuries and were discharged with the notation, "Abuse of Patients"; that Dr. P. F. Gillette, a member of the Medical Staff of the Elgin State Hospital, had been suspended for thirty days for lack of diligence and was transferred to the Kankakee State Hospital; that Dr. Vanatta, another Staff Physician at Elgin, had also been transferred to the Alton State Hospital; further that the grand jury of Kane County had failed to indict the responsible parties because the evidence against them was solely that of patients.

The claim herein filed is for a Ten Thousand Dollar ($10,000.00) damage and the Attorney General has filed a motion to dismiss same, for the reason that—

"The Rule or Doctrine of *Respondeat Superior* has no application to a sovereign state in the exercise of a governmental function; that in operating and maintaining its penal institutions, the State is exercising such governmental functions and that the State cannot, therefore, be properly asked to respond in damages for injuries sustained by any inmate of such institution, whether due to the acts of other inmates or of attendants and employees therein."

In support of his objection the Attorney General cites the cases of —

"*Sturrock, Admrx.* vs. *State*, 7 C. C. R. 157.
Peeka, Admrx. vs. *State*, 6 C. C. R. 390."

and other cases, which fully sustain his contentions.

Counsel for claimant have filed their *Original Brief*, a *Reply Brief* and a further or *Second Reply Brief*, and stress the right of claimant to an award under the "*equity and good conscience*" theory.

The facts in this case would appeal to the good conscience of any court, but public policy has long established and this court is committed to the rule that "The State cannot be held to respond in damages arising out of the negligent acts of its employees or for injuries suffered by patients in its various penal and charitable institutions."

It is also true that in the care of inmates in the State Hospitals for the Insane, the State is engaged in a humanitarian duty, and the mind is shocked by a disclosure of treatment received by a patient therein, such as is disclosed by the record of this case. While it may have been impossible to obtain an indictment of the responsible parties, because certain portions of the proof would be the inadmissable evidence of inmates, yet the record is sufficient to warrant the hope that neither of the doctors or the attendants involved herein, are now retained as employees of the State in any capacity.

In an early case involving an award by the State, "*Schmidt* vs. *State*, 1 C. C. R. 78" the court, as then constituted, denied relief to an employee of the State who suffered an injury as a result of an assault made upon him by one of the convicts in a penitentiary where claimant was employed. The court there said:—

It is our understanding that the use of the language "to determine the same according to the principals of 'equity and justice'", is meant and used with a legal significance and that the Commission has no power to make an award in any case unless the facts show a legal or equitable claim against the State—; that it is not discretionary with the Commission to make an award, regardless of the question of whether the claimant had a legal claim against the State.

In the same opinion it was stated—

"This is one of those cases that appeals strongly to the sympathy (of the court) and we believe that if the facts in this case are presented to

the Legislature of this State, some relief will be granted; but at the same time we feel compelled to hold that we have no power, under the facts, to make an award in his favor and for that reason we reject the claim."

The question of allowance of claims where no legal right exists and the appeal is made wholly to the conscience of the court, is fully discussed in the case of—

"*Crabtree* vs. *State*, 7 C. C. R. 207."

In the present case the court feels it must adhere to the views therein expressed, but in denying this claim we do go without any prejudice against any other right or procedure which claimant deems advantageous to follow.

Claim denied. Case dismissed.

(No. 2370—Claim denied.)

JOSEPH H. REED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

JERRY A. HARN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee—State not liable for.* The State is not liable for the negligence of its servants or agents, the rule of respondeat superior not being applicable to it.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein asks settlement for the loss of a cow that strayed from claimant's pasture onto S. B. I. Route No. 91 and was killed as a result of being struck down in some manner unknown to the claimant. Claimant further represents that on the day in question, i. e.—on or about February 20, 1934, workmen were employed by the Civil Works Administration in hauling stone and gravel from the pasture in question, the material being used in repairing said hard road; that an agreement existed between claimant and the workmen that they were to keep the pasture gate closed so as to prevent stock from leaving; that the workmen failed to exercise care in closing the gate and that as a result, the cow in question was injured and died with resultant damage to the claimant in the sum of Sixty Dollars ($60.00).

The Attorney General has filed a motion to dismiss the claim for the reason the declaration shows that the workmen whose negligence is complained of, were employed under the C. W. A. and were not employees of the State of Illinois.

The Civil Works Administration was provided for by an Act of Congress and the employment of all who worked therein was made through Federal channels; the State merely co-operating as a means of expediting such charitable or remedial work and labor.

The Illinois Emergency Relief Act provides as follows:

> It shall be the duty of the commission until March 1, 1933, to provide relief to residents of the State of Illinois in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies.
>
> Section 2, Ill. Emergency Relief Commission. (3/1/1933–8/1/35)

Regardless, however, of the question of who may have been the employer of the workmen in question, there could be no award properly made by this court in the claim in question, for the reason that the rule of respondeat superior does not apply to the State in its sovereign capacity and the State is not liable for the negligence of its employees, agents or servants.

The motion of the Attorney General is allowed and the claim dismissed.

(No. 2099—Claim denied.)

GEORGE C. RICE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

WEIL & WEIL, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of State highway employees—State not liable for.* There is no liability on the part of the State for personal injuries caused by the negligence of its servants engaged in maintaining its public highways.

MR. JUSTICE YANTIS delivered the opinion of the court:

George C. Rice, claimant herein, seeks an award from the State under a claim that on the 10th day of September, 1932, while he was riding in his automobile on State Route No. 2 in Marshall County, Illinois, about a mile south of the village of Wenona, and while he was in the exercise of due care and caution for his own safety, the automobile, in which he was riding, ran into a motor truck owned and operated by the defendant, and used by its servants and employees in the business of maintaining and repairing State Highways. Claimant alleges that the defendant through its agents, servants and employees, negligently and carelessly disregarded its duty and parked and stopped its motor truck on the highway so that two vehicles lawfully driven thereon could not pass, and that by reason of such action, the automobile of plaintiff ran against and struck such motor truck; that as a result thereof, plaintiff was violently thrown from his place in said auto and was severely cut, bruised and injured, all as a direct and proximate result of defendant's negligence; that his injuries are permanent; that he has been compelled to spend Eighteen Hundred Dollars ($1,800.00) for physician, surgeon and hospital care; that his automobile has been destroyed with a resultant loss of Five Hundred Dollars ($500.00) and that he is crippled for life, for all of which he seeks damages in the sum of Twenty-five Thousand Dollars ($25,000.00).

The second count of the complaint is similar to the first and charges that the defendant, through its agents, servants and employees wrongfully, negligently and carelessly disregarded its duty and stopped its motor truck upon the highway and by reason thereof the automobile in which claimant was riding struck said motor truck with the resultant injury to claimant.

The third count, similarly drawn, charges that it was the duty of the respondent through its agents, and employees not to allow or cause said truck to be or remain upon any durable hard-surfaced road in a position so as to endanger the person or property of any lawful user thereof; but that respondent through its servants, not regarding said duty, negligently and carelessly permitted such truck to re-

main standing on the highway unattended and without warning or signal, in such manner that the person and property of lawful users of said highway, including the claimant, were endangered, and that by reason thereof the injury complained of, resulted.

The Attorney General has filed a motion to dismiss said complaint for the reason that such complaint is based on the theory that the State is liable for injuries caused by the negligent conduct of its employees in the construction and maintenance of its highways; that in such assumption claimant is in error, and that, inasmuch as no award could be legally allowed to claimant under the facts stated, the claim should be dismissed.

Incorporated in the motion the Attorney General has included a letter from Fred Tarrant, Engineer of Maintenance, in which he states that the State-truck in question was being used for road repair work on the afternoon in question, and that the workmen had placed traffic warnings four-hundred feet beyond the point where the work was in progress. Further statements were also made in the letter as to the speed of claimant's car being excessive under the existing conditions. Disregarding the possible question of contributory negligence, however, and considering the claim upon the averments made therein, no award can be legally claimed herein.

In the construction and maintenance of its roads, the State acts in a governmental capacity, and in the exercise of such governmental functions it does not become liable in action of tort by reason of the malfeasance, misfeasance or negligence of its officers, agents or servants in the absence of a Statute creating such liability. No such statute has been passed in Illinois. Such has been the settled decision of this court for many years.

Morrissey vs. *State*, 2 C. C. R. 454.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
Bucholz, Admrx. vs. *State*, 7 C. C. R. 241.

The State is not liable for damages caused by the negligence of its servants, agents or officers, unless there is a Statute expressly making it so liable.

Braun vs. *State*, 6 C. C. R. 104.

The motion of the Attorney General to dismiss is allowed and the claim is dismissed accordingly.

(No. 2251—Claimant awarded $3,936.47.)

LILLIAN SCHROEDER SHEEHAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

CASSELS, POTTER & BENTLEY and E. DOUGLAS SCHWANTES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employer and employee—what constitutes relation.* Where one is employed as engineering assistant in the construction of a State highway and operates directly under the orders of a State officer, the resident engineer thereon, is responsible to him and subject to his orders, he is an employee of the State.

SAME—*when award will be made.* Where one employed in the construction of State Highway sustains accidental injuries arising out of and in the course of his employment, an award for compensation will be made under provisions of the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

The declaration herein, filed October 8, 1933 alleges that claimant is the widow of James Frederick Sheehan, to whom she was married on June 16, 1932; that on October 31, 1932 while deceased was driving his automobile in a westerly direction on S. B. I. Route No. 173, he was struck by another car driven by one Lewis, a resident of the State of Wisconsin; that at the time of the accident, deceased was employed by the State of Illinois and at the time of the injury was proceeding to an unfinished section of S. B. I. Route No. 173 for the purpose of checking in gravel, pursuant to orders that he had received from the State Engineer in charge of local work.

The earnings of deceased during the year preceding his death are shown to have been Fourteen Hundred Sixty Dollars, ($1,460.00); that due notice of the accident was given to respondent through the resident engineer within a day after its occurrence and that the claim was presented to the Division of Highways on April 21, 1933.

Claimant filed a claim against the immediate contractors in charge of the section of work in question, i. e. Darrow and Barron, with the Industrial Commission of Illinois; a hearing was had before an arbitrator of said Commission, and a de-

cision was there rendered that deceased was not injured while employed by Darrow & Barron.

The only question involved in the claim is whether the deceased husband of claimant was an employee of the State of Illinois, or of Darrow & Barron at the time of his injury.

The resident engineer testified that Route No. 173 is a concrete State Highway and was in process of construction in 1932 at the time of the accident; that Sheehan was an engineering assistant, an instrument man who helped hold the rod, and measure and drive stakes; that he operated indirectly under the resident engineer and was responsible to him; that he directed Sheehan where to go; that Darrow & Barron were contractors, who were constructing the east and west sections of the road in question and that Ray Mann was constructing the middle section. The resident engineer kept an account of Sheehan's time and turned same over to Darrow & Barron; that this time sheet would include the time spent by Sheehan on both the Ray Mann section and the Darrow & Barron section. For some reason Sheehan received checks from Darrow & Barron and the latter was then reimbursed by the State.

If Sheehan was an employee of the State, his widow would be entitled, under the Workmen's Compensation Act and the foregoing facts, to four times the average annual earnings not to exceed $4,000.00. The circumstance of Sheehan receiving his pay-check through Darrow & Barron is confusing as to his employment, but this is explained by the Highway Department. He received all his orders and was exclusively under the control of the resident engineer, who was in the direct employ of the State of Illinois. He received no orders and did no work directly for Darrow & Barron, nor for anyone, other than the State. At the time of the accident he was on his way, pursuant to orders of the resident engineer.

The Supreme Court of the State of Illinois has held that the mere fact that an employee appears on a Company's pay-roll does not make such person an employee of that Company.

Thompson vs. *Industrial Commission*, 351 Ill. 356.

Under the facts in evidence and the law as cited by the claimant, we find that James Frederick Sheehan was an em-

ployee of the State of Illinois, and that the accident in question arose out of and in the course of his employment. The proof indicates that his wages were Thirty Dollars ($30.00) per week, the total sum allowable therefore would be the maximum amount of Four Thousand Dollars ($4,000.00), payable in weekly installments of $15.00, commencing on the 31st day of October, 1932.

Payment by respondent in weekly installments is not practicable under existing laws. We anticipate that the award will be paid in a lump sum about August 1, 1935, by appropriation of the next legislature, at which time 143 weeks compensation will have been earned. The award will therefore be commuted to an equivalent lump sum in accordance with Section 9 of the Workmen's Compensation Act.

As we compute it, the amount due claimant, Lillian Schroeder Sheehan, after commuting to an equivalent lump sum as aforesaid, is $3,936.47.

IT IS THEREFORE HEREBY ORDERED that an award be and the same is hereby entered in favor of claimant for the sum of Three Thousand Nine Hundred Thirty-six Dollars and Forty-seven Cents, ($3,936.47).

(No. 1901—Claimant awarded $158.70.)

LESTER WOLFE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.

MILO D. YELVINGTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation, limitations—infant not within exception.* The provisions of Paragraph H of Section 8, of Workmen's Compensation Act, as amended, are not applicable to infants, unless mentally incompetent, and if employee, under legal age and mentally competent, sustains accidental injuries, for which he claims compensation, he must make claim for and file application for compensation within time provided in Section 24 of the Act, or court will be without jurisdiction to proceed with hearing.

SAME—*claim for medical services not claim for compensation—not governed by Section 24 of Act.* Furnishing of medical and hospital services for injured employee by employer is not payment of compensation and time within which to make claim for same is not governed by Section 24 of the Act but by general five year limitation period.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant's amended complaint avers that "on, to-wit: the first part of the month of May, A. D. 1931" he was employed by the respondent as a common laborer on S. B. I. Route No. 33; that on the aforesaid date while he was engaged in the performance of the duties of his employment, at a point about four miles west of the village of Dieterich in Effingham County, he was injured by accidentally coming in contact with the end of a long-handled shovel, thereby bruising the right side of his abdomen and causing himself great pain and suffering; that notice of the accident was given on the date of the injury; that on the 20th day of July, A. D. 1931, claimant first became aware of the fact that the injuries so sustained by him in the early part of May as aforesaid resulted in a hernia; that on said 20th day of July, A. D. 1931 he notified the respondent of such fact and on the 23rd day of July was operated for such hernia; that he thereby incurred doctor and hospital bills in the amount of $159.30; and that claim for compensation was made on November 20, 1931.

It is admitted that both employer and employee at the time of the accident were operating under the provisions of the Workmen's Compensation Act, and that the injuries arose out of and in the course of claimant's employment.

Claimant's original complaint was filed herein on May 5, 1932, in which he seeks to recover compensation for temporary total disability from July 20, 1931 to the date of the filing of such complaint, and in addition thereto the sum of $159.30 for medical, surgical and hospital services claimed to have been incurred by him.

The Attorney General contends that the case must be dismissed for the reason that claim for compensation was not made and application for compensation was not filed in this court within the time required by Section 24 of the Workmen's Compensation Act.

Claimant contends that at the time of the accident in question he was a minor and that he did not arrive at the age of his legal majority until the 15th day of June, A. D. 1932, and that therefore the limitations imposed by Section 24 of the Workmen's Compensation Act did not apply to him until after he became twenty-one years of age, and cites in

support of his position the case of *Walgreen Co.* vs. *Ind. Com.*, 323 Ill. 194. That case involved an accident which occurred on May 27, 1920, and was based upon the provisions of Paragraph H of Section 8 of the Workmen's Compensation Act of 1919, which provided in part as follows:

"In case an injured employee shall be *incompetent* at the time when any right or privilege accrues to him under the provisions of this Act, a conservator or guardian may be appointed, pursuant to law, and may, on behalf of such *incompetent*, claim and exercise any such right or privilege with the same force and effect as if the employee himself had been competent and had claimed or exercised said right or privilege; *and no limitation of time by this Act provided shall run so long as said incompetent employee is without a conservator or a guardian.*"

However, in 1925 Paragraph H of Section 8 was amended so as to read as follows:

"* * * * * * In case an injured employee shall be *mentally incompetent* at the time when any right or privilege accrues to him under the provisions of this Act, a conservator or guardian may be appointed pursuant to law, and may, on behalf of such *mentally incompetent*, claim and exercise any such right or privilege with the same force and effect as if the employee himself had been *mentally competent* and had claimed or exercised said right of privilege; *and no limitations of time by this Act provided shall run so long as said mentally incompetent employee is without a conservator or guardian.*"

Under the provisions of the Compensation Act of 1919, the exception applied to an "incompetent person". Under the Act of 1925 the exception applies only to a "mentally incompetent person".

No claim is made that the claimant was not mentally competent at the time of the accident in question or thereafter, and consequently the law as laid down in the Walgreen case has no application to this case.

The complaint avers and the proof shows that the accident in question occurred about the "fore part of May, 1931". The original declaration was filed herein on May 5, 1932. A compliance with the requirements of Section 24 of the Act is jurisdictional and is a condition precedent to the right to maintain a proceeding under the compensation Act. *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386; *Chicago Board of Underwriters* vs. *Ind. Com.*, 332 Ill. 511; *Duquoin School District* vs. *Ind. Com.*, 329 Ill. 543; *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262.

Compliance with the requirements of Section 24 being a condition precedent to the right of the claimant to maintain this proceeding, it is necessary for him to make proof of facts showing such compliance. This he has failed to do and this court is therefore without jurisdiction to allow him compensation for the injuries so sustained by him as aforesaid.

Under Paragraph A of Section 8 of the Compensation Act, the employer is required to furnish "the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury."

Prior to 1925 the furnishing of medical services was held to constitute a payment of compensation. By the 1925 amendment of such section, however, it was provided that "the furnishing by the employer of any such services or appliances shall not be construed to admit liability on the part of the employer to pay compensation, and the furnishing of any such services or appliances by the employer shall not be construed as the payment of compensation."

Consequently, under the provisions of Section 8a as it now exists, the furnishing of medical, surgical and hospital services is not a part of the *compensation* to which the employee is entitled, although the employer is still required to furnish the same.

Although the question is not free from doubt, yet considering the fact that the Supreme Court has frequently held that the Compensation Act is remedial legislation and is to be liberally construed in order to give effect to the purpose and object of its adoption, (*Faber* vs. *Ind. Com.*, 352 Ill. 115; *Chicago Cleaning Co.* vs. *Ind. Board*, 283 Ill. 177) we feel that in cases such as this, where the evidence discloses that the relation of employer and employee exists; that the employee has sustained an accidental injury which arose out of and in the course of his employment; and that notice of the accident has been given as required by law;—the employer is required after notice as aforesaid, to provide first aid medical, surgical and hospital services;—and if, after notice of the accident is given as aforesaid, the employer fails or refuses to furnish such services, then the employee may obtain the same at the expense of the employer, even though such employee may be thereafter barred from maintaining

his claim for compensation by reason of his failure to comply with the requirements of Section 24 of the Act as to making claim for compensation and filing application therefor.

We hold, therefore, that under the facts in evidence the claimant is entitled to an award for the amount paid by him for medical, surgical and hospital services as shown by the evidence, to-wit, the sum of One Hundred Fifty-eight Dollars and Seventy Cents ($158.70).

Award is therefore entered in favor of the claimant, Lester Wolfe, for the sum of One Hundred Fifty-eight Dollars and Seventy Cents ($158.70).

(No. 1888—Claimant awarded $63.00.)

THE ALTON RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1935.

WILLIAM L. PATTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CARRIERS—*freight charges—when consignee liable for.* Where State receives shipment of goods under contract with consignor, terms of which were unknown to carrier, providing for delivery, F. O. B. at place received, without payment of freight charges thereon, carrier waiving provisions of the bill of lading requiring payment of same before surrendering possession and State pays consignor for said goods without deducting amount of freight charges it will be liable therefor.

SAME—*same—same.* A consignee becomes liable for freight charges when he accepts goods, without same having been paid, knowing that the carrier looks to him for payment and waives its lien by delivery of the goods.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim is submitted under a stipulation of facts for Sixty-three Dollars ($63.00) freight charges on a carload of brick consigned to the Illinois State Reformatory at Pontiac by Alsey Brick & Tile Company. The brick were purchased from the F. W. Lucke Brick Co., but the latter procured them from Alsey Brick & Tile Company, and the latter shipped

them from Alsey, Illinois under a straight B/L to the Illinois State Reformatory as consignee. The carrier did not until long after the brick were delivered, have any knowledge that the contract originated through the Lucke Brick Company. The brick were delivered to the State without collection in advance of the charges, and the provisions of the B/L that "No Carrier by Railroad shall deliver or relinquish possession at destination of the property covered by this B/L until all tariff rates and charges thereon have been paid", were suspended as to the State Institution. When the railroad finally presented its B/L for payment the payment was declined by the Institution for the reason that the original order placed with the F. W. Lucke Brick Company provided that the brick were to be delivered by them F. O. B. Pontiac. Settlement for the price of the brick was made by respondent with the Lucke Brick Company without deducting the cost of the freight. The State did not know that the freight was not paid and the claimant did not know that the State contract provided for F. O. B. Pontiac delivery.

In a report dated March 30, 1932 by Superintendent of Prisons, F. D. Whipp, the latter states:

"It appears that the Illinois State Reformatory did not protect the railroad by deducting this bill from the bill of F. W. Lucke Brick Company, and from the information we have received, this bill is non-collectible from said company. We believe it is just that this claim be allowed by the Court of Claims."

The authorities seem to indicate a legal liability upon the part of the State, as consignee, regardless of the liability of Lucke & Company under its contract.

"The consignee becomes liable in case he accepts the goods, knowing that the carrier looks to him for payment and waives its lien by delivery of the goods."

10 C. J. 445 Sec. 700.

"In interstate shipments the general rule is that if a consignee accepts a shipment he becomes liable as a matter of law for the full amount of the freight charges."

L. & N. vs. *U. S.*, 267 U. S. 396.

The B/L provided that the Carrier should not make delivery without requiring payment of freight charges and it was stipulated in the B/L by signature of the consignor that

the Carrier should not make delivery without requiring payment of such charges. There was in full force and effect at that time an order of the Interstate Commerce Commission made pursuant to Par. 3 of Sec. 2 of the Interstate Commerce Act as amended by the Transportation Act of 1920 under Sec. 10 of which it was provided as follows:

"The foregoing rules apply to all shippers and consignees except * * * any state or territory or political subdivision thereof."

The State in accepting delivery under this waiver knew or should have known that the consignor was released from liability for the charges. We believe the State is legally liable for the freight and an award is therefore made in the favor of claimant in the sum of $63.00.

(No. 1775—Claimant awarded $1,736.00.)

BENJAMIN A. DAVENPORT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1935.

BENJAMIN A. DAVENPORT, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for permanent partial loss of the use of arm.* Where one employed as a guard at Joliet State Prison sustains accidental injuries arriving out of and in the course of his employment in attempting to quell disorder, as a result of which he suffers permanent partial loss of the use of his left arm, an award may be made for compensation under the provisions of the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed pro se on May 13, 1931, asking for an award of Forty Thousand Dollars ($40,000.00) because of injuries alleged to have been received by claimant while acting as Captain of the Guards during a prison riot at the Illinois State Penitentiary at Joliet.

The record discloses that a general riot occurred in the prison during the noon mess hour on March 14, 1931, during which approximately one thousand inmates of the prison rioted and attempted to escape; that the claimant in the exercise of his duties endeavored to quell the disorder and to re-

store order, and in so doing was hit, struck down and trampled and suffered an injury to the left upper arm and bruises on other parts of the body; treatment was given him by Dr. Charles J. Carlin, one of the physicians at the Joliet Prison and that subsequent examinations were made by Major H. Worthington, managing officer of the Research and Educational Hospital and that claimant's injury to the left arm was pronounced as fifty per cent (50%) permanent disability.

Claimant was relieved from duty for about eight weeks after the accident, but remained at the institution and thereafter resumed the performance of duties of various kinds about the prison and on September 14, 1931, resumed his normal duties as Captain of the Guards. He has received full wages during the time of his disability and has therefore been paid considerably more than any temporary partial disability compensation that could have been allowed under the Workmen's Compensation Act. The only basis for an award at this time is for the alleged permanent partial loss of the use of claimant's left arm, as computed under the terms of the Workmen's Compensation Act.

The record is not very satisfactory as to the extent of this injury, but it does appear that the claimant was employed as a Captain of the Guards at Joliet State Prison. The Workmen's Compensation Act of Illinois applies to the State when it is engaged in one of the enterprises declared by Section 3 of that Act to be extra hazardous. One employed as a watchman or guard at a State prison or hospital for the insane is engaged as an employee under the terms of the Workmen's Compensation Act, *Davis Admx.* vs. *State,* 7 C. C. R. 176.

Under the showing made herein claimant has suffered a fifty per cent (50%) permanent partial loss of the use of his left arm for which an award is made in the sum of One Thousand Seven Hundred Thirty-six Dollars ($1,736.00).

(No. 1725—Claimant awarded $1,067.71.)

VERA D. FOSTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 8, 1935.

BOYER & LEONARD, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injury to State Highway Maintenance Patrolman on way home from work—when award may be made.* A State Highway Maintenance Patrolman proceeding directly home, after work in a motor vehicle furnished by the State for his use in the performance of his duties, and in the territory which he was required to patrol under his employment, is doing an act incidental to his employment, and if he then and there sustains accidental injuries, same will be deemed to have arisen out of and in the course of his employment and an award for compensation may be made in accordance with the provisions of the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On April 14, 1930, and for about six months prior thereto, claimant was employed by the respondent as a maintenance patrolman at a salary of $125.00 per month. He patrolled the road between Foosland and Five Points, in Champaign County, which road commenced about three miles west of Champaign and extended in a northerly direction about thirteen miles to the point where it intersected Route 119, running east and west; thence west on Route 119 to Fisher, thence north through Fisher to Foosland. Both the north and south road, and Route 119 which extended in an easterly and westerly direction, consisted of concrete slabs about nine feet in width, with fifteen-foot dirt shoulders. The intersection of the north and south road with Route 119 was on a Y.

Claimant had been unloading gravel for the State at Mansfield, and after he had finished such work, went back on his own patrol, and filled ruts on such road. About five or 5:20 o'clock in the evening he started home in a Model T Ford truck owned by the State and provided for his use. He was driving in a northerly direction and when he came to the Y at the intersection of Route 119, the car he was driving collided with another motor car driven by one Rose Cantner, as the result of which the car driven by the claimant was badly damaged and claimant's head struck the top of the car, causing a bump on the side of his head and a cut from which the blood flowed. He was taken to a doctor and then went home. He did not work for about a week after the accident. Then he started to work and worked a half day. Shortly after the accident his mind became affected, he developed hallucinations, and his mental condition gradually became worse. He was treated by several doctors and at the suggestion of his family doctor, was taken to the Norbury Sanitorium at Jack-

sonville, Illinois, on September 17, 1930. He was taken to such institution by Mr. Apple, head engineer of the respondent at the Paris, Illinois, office, and Mr. Gordon, supervisor and patrolman for the respondent for that district. At said sanitorium he was treated for post traumatic psychosis, and remained there until he was discharged as improved on December 23, 1930. He returned to his work on January 5, 1931. His salary was paid in full to July 1, 1930. The expenses incurred by him for medical and hospital services, as shown by his Bill of Particulars herein, are as follows:

Norbury Sanitorium Company	$727.61
Dr. L. O. Sale	59.50
Dr. Nortell	10.00

making a total of $797.11, of which amount he paid only the bill of Dr. Nortell in the amount of $10.00.

Claimant now seeks to recover the amount of his medical and hospital bills as above set forth, and compensation for the period from July 1, 1930, to January 5, 1931, to-wit, 26 6/7 weeks. At the time of the accident his wages were $125.00 per month, and he had two children under sixteen years of age.

This court has held in numerous cases that in the maintenance of its hard roads, the State is engaged in an extra hazardous business or enterprise within the meaning of those words as used in Section three (3) of the Workmen's Compensation Act.

Inasmuch as the claimant was on his way home at the time of the accident, the question arises as to whether the injuries sustained by him arose out of and in the course of his employment. In considering a similar question, the Supreme Court in the case of *Fairbank Co.* vs. *Ind. Com.*, 285 Ill. 11, said:

"The employer is liable for compensation only for an injury which occurs to the employee while performing some act for the employer in the course of his employment or incidental to it. When the work for the day is ended and the employee has left the premises of his employer to go to his home, the liability of the employer ceases unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment. * * * * * * The injury occurs in the course of the employment within the meaning of the Workmen's Compensation Act when it occurs within the period of the employment, at a place where the employee may reasonably be and while he is reasonably fulfilling

the duties of his employment or is engaged in doing something incidental to it."

In the case of *Schweiss* vs. *Ind. Com.*, 292 Ill. 90, the Supreme Court said:

"The general rule followed in construing the Workmen's Compensation Act appears to be that a man's employment does not begin until he has reached the place where he has to work or the scene of his duty, and it does not continue after he has left unless the conveyance in which he travels to or leaves the premises is furnished by his employer. (Bradbury on Workmen's Compensation, 3d ed., 468). The controlling factor in determining whether an injury arose out of the employment is whether the employee was within the orbit, area or sphere of his duty, and it has been usually held that if an employee is injured on the premises of the employer in going to or from work he is entitled to compensation for such injuries. (1 Honnold on Workmen's Compensation, Sec. 122; Bradbury on Workmen's Compensation, 3d ed. 473, and authorities cited.) The employment is not limited to the exact moment when the workman reaches the place where he is to begin his work and to the moment when he ceases that work. It includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances surrounding the accident. (Boyd on Workmen's Compensation, Sec. 486.) An accident befalling the workman on his way to or from work cannot be held to arise out of the employment where he has not yet come within or has left the sphere of his employment, and where an employee, without knowledge of the employer, uses a way other than that provided by him, an accident thereon cannot be said to arise out of the employment. (*Corpus Juris*, treatise on Workmen's Compensation Acts, Sec. 68.) Whether an employee in going to or returning from the place of his employment is in the line of his employment is governed and controlled by the particular circumstances and facts of each case. There must be a line beyond which the liability of the employer cannot continue, (and this would apply to the beginning of the employee's work as well as the ending), and the question where that line is to be drawn is a question of fact. (Elliott on Workmen's Compensation Acts, 7th ed. 41.) The area of an employee's duty may be readily ascertained in some cases, as where the premises are confined to a single building or plant or enclosure, and may be much more difficult of ascertainment in other cases, as, for example, where a railroad company's shops and yards and right of way extend for miles on a main line of track of the railroad and for a considerable distance on switch tracks."

In the case of *Scully* vs. *Ind. Com.*, 284 Ill. 567, the court said:

"An injury may occur within the course of the employment and arise out of it, even though it happen while the employee is on his way to or from his usual place of employment or while engaged in the doing of an act that is necessary to or an incident of the employment."

In the case of *Wabash Ry. Co.* vs. *Ind. Com.*, 294 Ill. 119, the court quoted with approval the decision in the case of *Schweiss* vs. *Ind. Com.*, and said:

"One of the controlling factors in determining the question here under consideration is whether the employee at the time of the accident was within the orbit, area, scope or sphere of his employment."

A similar question was involved in the case of *Irwin-Neilsen & Co.* vs. *Ind. Com.*, 346 Ill. 89. In that case the Supreme Court analyzed a number of its previous decisions on the question, and concluded as follows (p. 93):

"Plaintiff in error contends that as Sawyer was on the way to his home rather than to the office of the company he was not in the course of his employment. It has uniformly been held that when an employee travels for his employer and returns after working hours he remains in the course of his employment on the way to his home."

It appears from the cases cited that although the question here involved has been considered by the Supreme Court in numerous cases, yet the decision in practically every case has been governed by facts which were peculiar to that case, and different in some respects from practically every other decided case. After reviewing the cases on the question and considering the circumstances of this case, and particularly the fact that the claimant at the time of the accident was driving a car furnished by the State; that the accident occurred in the territory which he was required to patrol; and that at the time of the accident he was doing something which was incidental to the duties of his employment; we have no hesitancy in holding that the accident in question arose out of and in the course of his employment and that he is therefore entitled to compensation under the terms and provisions of the Workmen's Compensation Act.

Under the evidence, claimant is entitled to compensation from July 1, 1930, to January 5, 1931, to-wit, 26 6/7 weeks, at the rate of $16.00 per week, to-wit, $429.71.

With reference to the medical and hospital services incurred by him and for which he seeks to be paid, another complication arises. There is no question but what the bills of Dr. Sale in the amount of $59.50, and Dr. Nortell in the amount of $10.00, should be paid. The difficulty arises with the bill of the Norbury Sanitorium Company in the amount of $727.61. Claimant might have been treated at a State institution in the

first instance had such treatment been offered him, but there is nothing in the record to indicate that such treatment was offered to him at that time. The evidence discloses that two of his superior officers, to-wit, Mr. Apple and Mr. Gordon, took him to the Norbury Sanitorium at Jacksonville. He remained at such sanitorium until he was discharged on December 23, 1930. It appears from the evidence, however, that Fred Tarrant, Engineer of Maintenance of the respondent, advised the Norbury Sanitorium on October 30, 1930, that he did not feel that the State should be responsible for Foster's maintenance in a private sanitorium, and that it would be necessary for such sanitorium to look to Foster's family or relatives for reimbursement. No notice to that effect was given to Foster at that time or later. However, it appears that Mr. Tarrant wrote to Mrs. Foster on November 24, 1930, enclosing a copy of his previous letter to the Norbury Sanitorium, and advising her that he did not feel that the State was obligated in any way to provide maintenance for her husband in a private sanitorium. Under the circumstances, claimant should have been removed to a State institution within a reasonable time after the notice by Mr. Tarrant to Mrs. Foster as aforesaid, and in default thereof, the State should not thereafter be liable for his maintenance at the Norbury Sanitorium. We feel that a week from the receipt of such notice by Mrs. Foster was a reasonable time within which to have claimant removed to a State institution, and that therefore the State is not responsible for his maintenance at the Norbury Sanitorium after December 2, 1930.

Claimant is therefore entitled to the cost of his care and maintenance at the Norbury Sanitorium from September 17, 1930, to December 2, 1930; the pro rata amount due for such period being $568.50.

Claimant is therefore entitled to compensation as above set forth in the amount of $429.71 and is also entitled to the sum of $638.00 for expenses incurred by him for medical and hospital services as follows, to-wit:

Norbury Sanitorium	$568.50
Dr. L. O. Sale	59.50
Dr. Nortell	10.00

Award is therefore hereby entered in favor of the claimant for the sum of $1,067.71.

Inasmuch as the bills of the Norbury Sanitorium and Dr. L. O. Sale have not been paid by claimant, it is further ordered that the vouchers for said award be issued and be payable as follows, to-wit:

To Vera D. Foster	$139.71
To Vera D. Foster, for the use of the Norbury Sanitorium	568.50
To Vera D. Foster, for the use of Dr. L. O. Sale	59.50
Total	$1,067.71

(No. 2074—Claim denied.)

HERBERT E. CLEVELAND, Claimant, *vs.* STATE OF ILLINOIS, Respondent

Opinion filed January 9, 1935.

JOHN M. PEFFERS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE — *negligence of State highway employee — State not liable for.* Eradication of Canada thistles along highway is maintaining highway and is a governmental function and State is not liable for loss or damage to cattle by poisoning, caused by their eating grass and weeds in claimant's fields upon which State highway employees engaged in such eradication permitted chemicals being used therefor to fall.

MR. JUSTICE YANTIS delivered the opinion of the court:

The declaration herein filed on February 21, 1933, alleges that on September 18, 1932, highway employees of the State were using a spray for eradication of Canada thistles; that said highway employees so negligently operated the spray that quantities of the chemicals fell within a field of claimant's adjoining the highway; that the cattle were attracted by the taste and from there went through the pasture fence onto the highway, where they ate the grass and weeds that had been sprayed and as a result were poisoned; that six Guernsey cows of the value of Eighty-five Dollars ($85.00) each died; that two more became damaged and lessened in value to the amount of One Hundred Seventy Dollars ($170.00) and two others to the amount of One Hundred Twenty Dollars ($120.00), and that claimant lost the value of milk from said herd in the sum of Two Hundred Twenty-

five Dollars ($225.00), making a total claim of One Thousand Twenty-five Dollars ($1,025.00).

Claimant states in his brief that he has failed to find an analogous case, and fails to cite any authority which would authorize this court to hold that there is a basis for legal liability upon the part of the State for the damages in question. Counsel suggests that the law of "Attractive Nuisances" might well apply as cited in the case of *Fallatt* vs. *I. C. Railroad*, 288 Ill. 506.

There is no doubt that Mr. Cleveland, as the owner of the cattle has suffered a substantial loss, but in the absence of some law creating a legal liability against the State, this court believes itself without jurisdiction to make an award.

The declaration is drawn on the theory that the State is liable for injuries caused by the negligent conduct of its employees. The maintenance of a State highway is a governmental function which the State exercises through its officers and employees, and there is no basis for an award by the State for the negligent acts of its employees in maintaining such highway.

Braun vs. *State*, 6 C. C. R. 104.
Derby vs. *State*, 7 C. C. R. 145.

In his reply brief claimant insists that the damage was caused by the State of Illinois rather than by the acts of its servants. The State can only act through its officers, servants or agents, and the court is of the opinion that no award can be properly allowed herein. Claim denied. Cause dismissed.

(No. 2043—Claim denied.)

GEORGE C. GOFORTH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

GEORGE C. GOFORTH, pro se.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PLEADING—*declaration not predicated upon legal ground — when motion to strike will be sustained.* Where claim is filed for recovery of value of musical instruments destroyed by fire in State institution and declaration fails to aver any negligence, or the cause of the fire or that the State failed to use ordinary care in protecting said musical instruments, no cause of action is set forth and motion to strike will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed in this court on January 7, 1933, and alleges that the claimant, George C. Goforth, on November 1, 1930, and for sometime prior thereto was Director of Music at the Illinois State Reformatory at Pontiac, and at the time that George C. Goforth entered into the performance of his duties, June 1, 1930, there was a shortage of musical instruments at the reformatory. George C. Goforth discussed this matter with the superintendent, and was advised that the instruments could not then be purchased, and the claimant volunteered to bring some of his own instruments into the institution and use them until such time as the reformatory could make a purchase of the needed instruments. The declaration sets forth that he brought two gold B Flat Soprano Saxophones with cases, one E Flat Baritone Saxophone and case, and one Cundy-Bettony B Flat Metal Clarinet with case into the institution, and that on November 1, 1930, about 10:45 A. M. at the Illinois State Reformatory, Pontiac, a fire destroyed a two story building which housed a carpenter shop on the main floor and the Department of Music on the upper floor, and these musical instruments. Claimant also avers that he lost a suit of custom-made clothes at $85.00 and shirts and accessories at $36.00, making a total of $121.00. The musical instruments were valued at $908.00. Claimant avers that he is making no claim for the clothing, and states that the musical instruments had been used for approximately two years, and had depreciated in value 20 per cent, and requests that this court enter a judgment for the value of the musical instruments.

A motion to strike has been filed by the Attorney General, and must be allowed for the following reasons: No charge of negligence is contained in the declaration, and if the State were a private individual there would be no liability because there could not be liability for any loss not occasioned by negligence, either by the individual or servants. It is not charged that the State did not take ordinary care of the musical instruments, that means that degree of care that an ordinary person would under like circumstances care for his own property. No negligence is averred; the cause of the fire is not averred, and the declaration is not predicated upon any legal grounds. The motion to dismiss therefore will be sus-

tained, and under the rules of this court, the claimant will have thirty days from the date of the filing of this opinion to file an amended declaration, and in the event he so fails to do, the case will be automatically dismissed.

(Nos. 2191 and 2297, consolidated—Claims denied.)

JOHN A. HANNA AND HATTIE HANNA, No. 2191. J. B. LAMB, JR., No. 2297, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

TOM W. SMURR, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS AND MICHIGAN CANAL—*water flowing from on land—damages—must be paid out of earnings.* Under the Constitution and the Statutes of the State of Illinois all expenses and liabilities incurred in the maintenance and operation of the Illinois and Michigan Canal must be paid out of its earnings.

SAME—*same—same—Court of Claims without jurisdiction to make award.* A claim for damages to land on account of flow of water from Illinois and Michigan Canal is a liability arising out of its maintenance and operation and the Court of Claims has no jurisdiction to make an award therefor.

ILLINOIS WATERWAY—*overflow—damages—Court of Claims without jurisdiction—determined by Waterway Act.* Claims for damages to land by reason of flow of water thereon from waters that are a part of Illinois Waterway must be determined as provided in Act, and Court of Claims has no jurisdiction to make award therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

It appears from the claims filed in the two foregoing cases that John A. Hanna and Hattie Hanna were the owners of certain farm lands located between the Illinois-Michigan Canal and the Illinois River in the East three-quarters of Section fifteen (15), Town thirty-three (33) North, Range two (2) East of the Third Principal Meridian in the County of LaSalle and State of Illinois at the time of the alleged damage.

That J. B. Lamb, Jr., was the tenant on said lands from March 1, 1932 to March 1, 1933. Counsel for claimants and respondent have agreed that these two cases may be consolidated. Attention is called to the existence of another

case now pending in this court upon the claim of John A. Hanna and Hattie Hanna, No. 2192, which involves a claim for damages alleged to have arisen several years prior to the matters set forth in the two claims here under consideration.

Claimants herein allege that it was the duty of respondent to make the necessary repairs to the north bank of the Illinois and Michigan Canal, so as to prevent water passing through the canal flowing into and upon the lands of claimants; that respondent did not regard its duty in that behalf, but failed and neglected and refused to repair a certain break; that from about the month of May 1932, until the 13th day of July, 1932, the respondent, through its agents and servants, failed and neglected to keep the flow of water in the canal retained therein, and negligently and carelessly permitted the same to flow upon and submerge the lands of claimants, thereby destroying crops to the damage of claimants John A. Hanna and Hattie Hanna in the amount of $556.50, and to the damage of claimant J. B. Lamb, Jr., $496.25.

The Attorney General has filed a motion to dismiss the claims upon the ground that if the claims came within the Illinois Waterway Act the Court of Claims should not take jurisdiction, and if the claims are not within said Act, then under the Statutes and Decisions no award should be made because of the constitutional provisions relative to said Illinois and Michigan Canal. Counsel for the State cites the case of *Burke* vs. *Snively*, 208 Ill. 328 and the case of *Hollenbeck* vs. *State of Illinois*, 6 C. C. R. 330. The constitutional and statutory provisions are there set out in detail. The Constitution of 1870 (Separate Sec. 3) provides:

"The General Assembly shall never loan the credit of the State, or make appropriations from the treasury thereof, in aid of railroads or canals: provided that any surplus earnings of any canal may be appropriated for its enlargement or extension."

The only exception made for the voting of appropriations from funds that have reached the treasury of the State, is stated in the last line and is limited to *enlargement or extension of such canal.* Any appropriation to meet expenses or liabilities connected with or growing out of the operation of the canal would be in aid of it. In construing this sec-

tion of the Illinois Constitution the Supreme Court in the Burke case said that the word "aid" should be given its natural and ordinary meaning and means simply to help to support, to assist, to sustain, to succor or to relieve. The court further said:

"We are of the opinion that the true meaning of the constitutional provisions with reference to the canal is, that the Legislature should have power to operate it to the extent, and to the extent only, that the income of the canal would defray the expenses of operation, maintenance and preservation, and that no monies shall be appropriated from the treasury of the State in aid of the operation, maintenance or preservation thereof, and that if the earnings of the canal produced a surplus, appropriations of such surplus might be made to aid in the enlargement or extension of the canal."

We believe it was the intention of the framers of the Constitution to require the expenses and liabilities incurred in the maintenance and operation of the Illinois and Michigan Canal, to be paid out of its earnings. The claims in question all arose out of the maintenance and operation of the canal and could only be payable therefrom.

Section 9 of an *"An Act to revise the law in relation to the Illinois and Michigan Canal and for the improvement of the Illinois and Little Wabash Rivers, approved March 27, 1874"* gives the Canal Commissioners (under Act of April 22, 1871) the control and management of the Illinois and Michigan Canal. The second paragraph of the section makes it their duty to keep the canal, locks and dams in proper repair and condition for use and authorizes them "to enter upon and use, prevent overflow or damage to any contiguous lands, and to procure and appropriate all such material as in their judgment may be necessary or proper, etc.,—and may take proceedings in their official name to ascertain the compensation therefor in the manner at the time provided by law for the exercise of the right of eminent domain; *provided*, that the damages, cost of materials and improvements shall in all cases be paid out of the net proceeds derived from tolls." By the enactment of the Civil Administrative Code in 1917, the rights, powers and duties of the *Canal Commissioners* were given to the Department of Public Works and Buildings, and later in June, 1925, by amendment were conferred upon the Department of Purchases and Construction. Section 9 was not changed by any of these Acts in any other respect.

In 1908 an amendment to said section of the Constitution added the following proviso to the original wording:

"Provided that any surplus earnings of any canal, *Waterway, or waterpower* may be appropriated *or pledged* for its enlargement, *maintenance or its extension.*" The words underscored were added to the amendment.

The Department of Purchases and Construction is clothed with all the powers and duties pertaining to the maintenance of the Illinois and Michigan Canal. It is also the definite conclusion of the court that the Court of Claims has no jurisdiction in claims for damages to property arising under the Illinois Waterway. It is equally apparent that the Court of Claims has no jurisdiction to pass upon claims for damages to property arising out of the construction, maintenance or operation of any portion of the Illinois and Michigan Canal. If the damages claimed relate to those portions of the canal incorporated in the Illinois Waterway, the amount of damages must be determined as provided in the Waterway Act. If they relate to portions of the canal not included in the Illinois Waterway, and come within Section 9 heretofore referred to of the Illinois and Michigan Canal Act, approved March 27, 1874, then the amount of damages must be ascertained and paid as provided by said Section 9. We believe the Department of Purchases and Construction has authority to use its receipts of the canal in any way necessary in the proper maintenance of the canal, turning only such amount into the State treasury as may be left after such maintenance expense. We do not believe that the Court of Claims has authority to make an award—nor that the Legislature would have authority to appropriate money from the treasury of the State for the payment of any award which we might allow under the facts herein. The claims are hereby dismissed.

(No. 2192—Claim denied.)

JOHN A. HANNA AND HATTIE HANNA, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

TOM W. SMURR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS WATERWAY — *claims against for damages to property — how determined and fixed—how paid.* Under the provisions of Section 24 of the Act known as the Illinois Waterway Act all claims for damages to property shall be ascertained, determined and fixed by the Department of Public Works and Buildings and paid out of any monies which shall from time to time be provided for the payment of such claims.

SAME—*same—Court of Claims without jurisdiction in.* In view of the provisions of Section 24 of the Act known as the Illinois Waterway Act, the Court of Claims is without jurisdiction to make award for destruction of crops claimed to have been caused by blockading and obstructing natural flow of water across land of claimant by servants and agents of State in the construction of and work upon the Illinois Waterway.

MR. JUSTICE YANTIS delivered the opinion of the court:

The declaration in this case claims relief for damage and destruction of crops of grain growing upon farm lands of claimants located between the Illinois and Michigan Canal and the Illinois River in Section Fifteen (15), Township Thirty-three (33) North, Range Two (2) East of the Third P. M., in the County of LaSalle and State of Illinois; that such damage and destruction of crops was caused by the blockading and obstructing of the natural flow of water across the lands of claimants by the servants and agents of the State of Illinois in the course of construction of and work on the Illinois Waterway at a portion of same commonly referred to as the "Starved Rock Dam Site."

A motion to consolidate this cause with the case of *John A. Hanna et al.* vs. *State of Illinois,* No. 2191, has been filed by claimants, and an agreement made between the respondent and the parties interested that case No. 2191 and No. 2297 may be consolidated. The motion to consolidate Nos. 2191 and 2192 is denied.

The Attorney General, on behalf of the State, has filed a motion herein to dismiss this case for lack of jurisdiction of this court, and because of the provisions of Section 24 of the Act known as the Illinois Waterway Act, approved June 17, 1919.

The Illinois Waterway Act provides as follows:

"All claims for damages to persons (except to employees) and all claims for damages to property, real or personal, shall be ascertained, determined and fixed by the Department of Public Works and Buildings, and paid out of any monies which shall, from time to time, be provided for the payment of such claims.

"* * * All claims for damages to persons or property shall be filed with the Department of Public Works and Buildings within five years after the injury complained of."

Cahill's Illinois Statute, Chap. 19, Paragraph 114.

Claimant contends that this section does not exclude jurisdiction by the Court of Claims, but this court has repeatedly held and is of the opinion that it has no jurisdiction over the matter complained of herein and the motion of the Attorney General will be allowed.

Motion allowed. Claim dismissed.

(No. 2090—Claimant awarded $2,740.25.)

JESS LIGHTNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

JAMES A. WATSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where claimant, a State maintenance policeman sustains accidental injuries, arising out of and in the course of his employment an award for compensation will be made under provisions of Workmen's Compensation Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 14th day of September, A. D. 1932, the claimant was employed by the respondent as a State highway maintenance policeman, and on the last mentioned date, was on duty at the County Fair at Marion, Illinois. About eleven o'clock that night he and Edgar Modglin, another highway maintenance policeman, left Marion for Cairo, to do police duty there. On account of a confusion of lights, Modglin, who was driving the car, drove into the side of a coal train and as the result of the collision, the claimant sustained serious and permanent injuries to his right hand and right leg, as well as numerous cuts and injuries about the face and body.

All medical and hospital bills were paid by the respondent, and claimant was continued on the payroll at the regular monthly salary of State maintenance police until the time of his discharge on March 15, 1933. At the time of the accident

in question he was earning $175.00 per month, and had one child under sixteen years of age.

It is conceded that at the time of the accident, both claimant and respondent were operating under the provisions of the Workmen's Compensation Act; that on said day the relation of employer and employee existed between them; that on said day the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given and claim for compensation made as required by law; that the only question in dispute is the nature and extent of claimant's injuries, and the amount of compensation to be allowed therefor.

The evidence shows that claimant was in profound shock for three days, and was unconscious for two weeks after the accident; that he sustained a multiple fracture of the right tibia with no misplacement of parts; super-orbital lacerations extending from the base of the nose around the right eye down about one and one-half inches on the right cheek; also fracture of super-orbital process about one and one-half inches by one inch depression; a four-inch laceration under the chin, with small cuts and lacerations on the hands; disarticulation of the left clavicle at a cromial end; and a fracture of the left scapula. There is also some disfigurement of the face, resulting from a scar over the right eye, one inch long; a scar under the right eye, one inch long; and a scar under the chin four inches long. Dr. B. B. Hutton of Harrisburg states that claimant's vision is below normal, but there is nothing in the record to indicate the extent of any loss of vision resulting from the accident.

Claimant was examined by Doctors Harry Phillips and C. D. Nobles of the Anna State Hospital, who state that there is a permanent disability of the right hand resulting from contracture of the fingers, which disability is from forty to fifty per cent, and that the disability to the right leg at this time is approximately fifty per cent, although there is a possibility of a partial correction of this disability by surgery.

Claimant was paid his regular salary from the time of the accident to the date of his discharge, to-wit, March 15, 1933, which time covered the full period of temporary total incapacity, and consequently he is not entitled to recover any compensation for such temporary total incapacity.

From all of the evidence it appears that claimant has suffered the permanent and complete loss of forty per cent of the use of his right hand, and the permanent and complete loss of fifty per cent of the use of his right leg. At the time of the accident, his salary was $175.00 per month and he is therefore entitled to compensation at the rate of Fifteen Dollars ($15.00) per week.

Under Section 8E-12 of the Workmen's Compensation Act, the amount due claimant for permanent and complete loss of forty per cent of the use of the right hand is $1,020.00, and under Section 8E-15 of such Act, the amount due claimant for the permanent and complete loss of fifty per cent of the use of the right leg is $1,425.00. We also find that claimant is entitled to the sum of $300.00 for serious and permanent disfigurement to the face—thereby making a total of Twenty-seven Hundred Forty-five Dollars ($2,745.00), which said amount is payable in weekly installments of Fifteen Dollars ($15.00) commencing on September 15, 1932.

Payment by the respondent in weekly installments, however, is not practicable under existing laws and the award will therefore be commuted to an equivalent lump sum in accordance with Section nine (9) of the Workmen's Compensation Act.

The amount due the claimant after commutation to an equivalent lump sum as aforesaid, is Twenty-seven Hundred Forty Dollars and Twenty-five Cents ($2,740.25).

An award is therefore hereby entered in favor of the claimant, Jess Lightner, for the sum of Twenty-seven Hundred Forty Dollars and Twenty-five Cents ($2,740.25).

(No. 2151—Claimant awarded $1,026.00.)

MARSHALL MANHART, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

VICTOR C. MILLER AND WM. T. HOLLENBECK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made for partial loss of use of leg—award will be denied for partial incapacitation from pursuing employment.* Where evidence, in claim for compensation for accidental injuries

sustained by State highway maintenance employee shows claimant has received compensation for entire period of temporary total disability, that there is no permanent injury, except to right ankle and leg, and an award is justified and made for partial loss of use of said right leg, no award will be made for partial incapacitation from pursuing usual employment.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 13th day of May, A. D. 1931, claimant was employed by the respondent in the Department of Public Works and Buildings, Division of Highways, and was engaged in mowing weeds along the right-of-way of S. B. I. Route No. 1 just north of Walnut Prairie in Clark County.

On the last mentioned date, while claimant was driving a team of mules and operating a mower for the purpose of mowing weeds on the shoulder of the highway, said mower was struck by a truck owned by one Harold Adams, and driven by his agent, which approached from the rear. The force of the collision demolished the mower, killed one of the mules and injured the other. Claimant was thrown onto the pavement between the mules, and the mowing machine passed over him, whereby he sustained injuries to his right ankle and leg, his knee, in the pelvic region and other parts of his body —for which injuries he seeks to recover compensation herein.

It appears from the evidence that said Harold Adams owns no real estate and very little, if any, personal property over his exemptions, and for that reason a judgment against him, if such judgment could be obtained, would avail nothing. Notwithstanding that fact, he bought a new mower for claimant, also another mule, and repaired the harness—borrowing the money for that purpose, which money had not been entirely repaid at the time Adams testified herein. Claimant therefore makes no claim against the State for the damage done to his personal property.

This court has held in numerous cases that in the maintenance of its hard-surfaced roads, the State is engaged in an extra-hazardous business or enterprise within the meaning of Section 3 of the Workmen's Compensation Act. There is no question but what the claimant's injuries arose out of and in the course of his employment and he is therefore entitled to compensation under the terms and provisions of the Workmen's Compensation Act. The respondent paid medical, hospital and other bills in the aggregate amount of $888.10, and

also paid compensation for about eleven months, the exact amount being uncertain, claimant contending that the amount paid was $518.40, and respondent contending that the amount paid was $536.40. Claimant's earnings at the time of the accident were $21.60 per week, and he contends that his earning capacity has been reduced fifty to seventy-five per cent as the result of the injuries sustained by him, and that he is entitled to additional compensation for temporary total disability for six weeks at $10.50 per week, and that in addition thereto, he is entitled to compensation for permanent partial disability for 416 weeks at the rate of $8.10 per week.

It appears from the evidence that although claimant was discharged from the hospital about July 12 or 15, 1931, he continued under the doctor's care for about eleven months after the accident, and that he received compensation for about eleven months at $10.80 per week. Dr. Junkin discharged him on April 19, 1932, and apparently claimant has received compensation for the entire period of temporary total disability.

Section 8d of the Workmen's Compensation Act provides as follows:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

The evidence of Dr. Charles O. Highsmith, a physician who treated claimant at the time of the injury and who was called by him as a witness, is to the effect that there is no permanent injury except to the right ankle and leg and there is no substantial evidence to the contrary. Claimant therefore is not entitled to compensation for any permanent partial disability under Section 8d, but is entitled to compensation for the specific loss sustained by him under Section 8e15. The evidence is not entirely satisfactory, but indicates that the claimant has sustained a loss of fifty per cent of the use of his right leg.

Under the provisions of Section 8e15, claimant is entitled to 95 weeks compensation at $10.80 per week for the loss of 50 per cent of the use of his right leg, to-wit, the sum of $1,026.00, which amount under the terms and provisions of the Workmen's Compensation Act is payable in weekly installments of $10.80 commencing at the time the period of temporary total incapacity ceased, but which amount under the terms of said Act is all now due.

Award is therefore entered in favor of the claimant for the sum of One Thousand Twenty-six Dollars ($1,026.00).

(No. 2239—Claimant awarded $3,019.91.)

REDYTH E. NEWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

CHARLES C. LEE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where it appears from stipulation, that at the time of the accident for which compensation is claimed that claimant's intestate and the State were operating under the provisions of the Workmen's Compensation Act, and that the injuries sustained arose out and in the course of the employment award will be made in accordance with Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

It is stipulated and agreed by and between the parties hereto that prior to and on the 7th day of August, A. D. 1933, Thomas Frank Newell was employed by the respondent under the Department of Public Works and Buildings, Division of Highways, as a painter, and was engaged with a number of other employees in the painting of a bridge on S. B. I. Route No. 130, over the Embarrass River near Charleston, Illinois; that it was part of the contract of employment that the claimant and other employees working on said bridge should receive for their services thirty-five cents (35c) per hour, and in addition thereto should be transported by the respondent from the City of Charleston to their work each morning, and should be returned at the end of the day's work, to the place from which they started; that one Frank Crable, an agent of the respond-

ent, was in charge of the painting crew, as a foreman, and took the men to their work in the morning and returned them from their work in the evening in a State truck which was kept in Charleston; that on August 7, 1933, while said Frank Crable was driving said truck and was returning from said bridge with the members of the painting crew after the completion of the day's work, said truck collided with another automobile driven by one Archie Layton, and as the result of such collision, said Thomas Frank Newell sustained injuries from which he died the next day; that said Thomas Frank Newell left him surviving the claimant, Redyth E. Newell, his widow, and Thomas Mac Newell, aged thirteen years, and Doris Jean Newell, aged nine years, his children, as his sole and only heirs at law; and that said Archie Layton is insolvent and has no property subject to execution.

It is further stipulated that at the time of the accident in question the claimant's intestate and the respondent were operating under the provisions of the Workmen's Compensation Act; and that the injuries sustained by said claimant's intestate arose out of and in the course of his employment.

Under the facts as stipulated, there remains nothing for this court to do but fix the amount of the award. Upon consideration of the facts stipulated herein, the court finds as follows:

1. That under the provisions of Sections 7A, 7G and 7H1, the widow and minor children of said decedent are entitled to compensation in the total amount of $3,100.00; the said Redyth E. Newell being entitled to $2,500.00 and the said Thomas Mac Newell and Doris Jean Newell being entitled to $300.00 each.

2. That said compensation is payable in weekly installments of $12.00 commencing on August 9, 1933.

3. That it is to the best interests of all parties concerned that the compensation to which said Thomas Mac Newell and Doris Jean Newell are entitled as aforesaid be paid to their mother, Redyth E. Newell, for the support and maintenance of said children.

4. That payment by the respondent in weekly installments is not practicable under existing laws; and that it is to the best interests of the parties concerned that the compensation to be paid as aforesaid be commuted to an equivalent

lump sum, in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

5. It is therefore ordered that the compensation to which the said Thomas Mac Newell and Doris Jean Newell are entitled as aforesaid be paid to their mother, Redyth E. Newell, for the support of said children; and that the total compensation to be paid to the claimant herein be commuted to an equivalent lump sum in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

As we compute it, the total amount of compensation to be paid as aforesaid, after commutation to an equivalent lump sum is Three Thousand Nineteen Dollars and Ninety-one Cents ($3,019.91).

IT IS THEREFORE HEREBY ORDERED that an award be and the same is hereby entered in favor of the claimant, Redyth E. Newell, for the sum of Three Thousand Nineteen Dollars and Ninety-one Cents ($3,019.91).

(No. 2062—Claim denied.)

GOLDIE RYAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

J. A. MERRY AND EDWARD E. ADAMS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of State highway police — State not liable for.* The State in the maintenance of its State highway police is acting in a governmental capacity and is not liable for their negligence under the doctrine of respondeat superior.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant, Goldie Ryan, filed her complaint herein on January 20, 1933, and alleges therein that on the 10th day of November, A. D. 1932, she was in the possession of a certain Dodge sedan, and was driving the same in a southerly direction upon a certain public highway in Christian County, to-wit, S. B. I. Route 24, at a point between the City of Taylorville and the hamlet of Velma, in said county; that as she was driving said automobile on said highway and was ap-

proaching her home, which was on the east side of said highway, she held out her left hand plainly for the purpose of indicating that she intended to make a left-hand turn from the highway into the driveway of her home; that at the same time one Walter L. Moody, Chief of the State Highway Police, was driving a Chrysler sedan, the property of the State, in the exercise of his duties as such Chief of Highway Police, and going in the same direction as the claimant, to-wit, in a southerly direction; that it was the duty of said Walter L. Moody to drive and operate his said car with reasonable care and caution, so as to avoid injury to persons lawfully upon said highway; that said Moody disregarded his duty in that behalf and drove his said automobile at an excessive rate of speed, to-wit, sixty-five (65) miles an hour, and so negligently, carelessly and recklessly managed said car, that he failed to see, or disregarded the signal made by the claimant, and attempted to pass the claimant upon her left, just as she was turning into the driveway of her home, whereby the automobile so being driven by said Walter L. Moody as aforesaid, ran and struck with great force and violence upon the automobile then and there being driven by the claimant, whereby she was greatly bruised and injured in and about her person and was incapacitated for work for the period of two weeks; for which injuries she seeks to recover herein.

The Attorney General has entered a motion to dismiss the case for the reason that there is no liability on the part of the State of Illinois under the facts set forth in the complaint filed.

There can be no question but what the State in the maintenance of its State Highway Police is acting in a governmental capacity. This court has repeatedly held that the State, in the exercise of its governmental functions, is not liable for the negligence of its servants and agents under the doctrine of *respondeat superior*, in the absence of a Statute making it so liable. *Morrissey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs. *State*, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77; *Chumbler* vs. *State*, 6 C. C. R. 138; *Braun* vs. *State*, 6 C. C. R. 104; *Derby* vs. *State*, 7 C. C. R. 145; *Bucholz* vs. *State*, 7 C. C. R. 241.

This rule is supported by numerous decisions of the Supreme Court of this State. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

There being no legal liability on the part of the State if the State were suable, this court has no jurisdiction to enter an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term, 1934, of this court.

The motion of the Attorney General will therefore be sustained and the case dismissed.

(No. 2063—Claim denied.)

JOHN F. RYAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

J. A. MERRY AND EDWARD E. ADAMS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

The facts in this case are fully set forth in the case of *Goldie Ryan* vs. *State*, No. 2062, *ante*, and the opinion in same controls here.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

This case arises out of the same accident which was involved in the case of *Goldie Ryan* vs. *State*, No. 2062. The claimant herein is the husband of said Goldie Ryan, and was the owner of the car which was damaged in that accident, and seeks in this case to recover damages done to his car as the result of such accident. The facts in the case are fully set forth in the case of *Goldie Ryan* vs. *State*, No. 2062, to which reference is hereby made. What is said in that case applies with equal force to this case. For the reasons set forth in the case of *Goldie Ryan* vs. *State*, No. 2062, award herein is denied and the case dismissed.

(No. 2203—Claim denied.)

RUTH THETFORD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1935.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SALARY—*civil service—claim of employee not lawfully appointed in position classified under—when denied.* Where claim is made for salary for services claimed to have been rendered in a position classified under civil service by one not appointed or qualified under the provisions of the Civil Service Act, and rules of the Civil Service Commission made thereunder, an award must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed pro se June 29, 1933, for Six Hundred Nine and 66/100 Dollars. Claimant alleges that she was employed on June 27, 1927, as an attendant at the Chicago State Hospital at Dunning and has been continuously in the employ of the State since that time, except during the months of January, February, March and April, 1931, and that she is now in the employ of the State as an attendant, although performing the services of a staff stenographer, receiving a salary as such of Fifty-four Dollars ($54.00) per month.

Claimant was employed as an attendant at Forty-five Dollars ($45.00) per month. The Bill of Particulars filed by claimant seeks an award of $100.00 per month for the months of April, May, June, July, August and September, 1932—and $9.66 for the month of October, 1932—or a total of Six Hundred Nine and 66/100 Dollars ($609.66), for *services rendered as a record clerk.* A stipulation herein filed states that claimant was first employed as an attendant on June 27, 1927; that she resigned on December 31, 1930; that she was re-employed on May 13, 1931; that she was not paid any salary for the months of April to September inclusive nor for the first three days of October, 1932; that on May 13, 1931, she again worked in the office of the hospital as record clerk receiving an attendant's salary of Sixty Dollars ($60.00) per month; that in September, 1931, she passed a Civil Service examination as record clerk, the salary of which was One Hundred Dollars ($100.00) per month. Claimant was disapproved by the Civil Service Commission as record clerk

on October 4, 1932, and on said date went into service as an attendant, receiving a salary regularly thereafter as such.

On March 30, 1932 the Civil Service Commission notified Dr. Daniel D. Coffey, managing officer of the hospital that there were a number of eligibles ahead of Mrs. Thetford and that they had not been authorized to approve her employment as a record clerk. On April 30, 1932 the Commission notified Dr. Coffey that claimant was classified as an *attendant* and that they had no authority to certify her as a record clerk ahead of others having preferential standing. On May 6, 1932 the Commission notified Rodney H. Brandon, Director of the Department of Public Welfare that "On March 30, 1932 we wrote Dr. Coffey that we would not approve the employment of Ruth Thetford—as record clerk, but she appears on the April roll as such". On May 12, 1932 Dr. Coffey's pay-roll list was returned to him with Ruth Thetford's name stricken. On September 12, 1932 Dr. Coffey notified the State Civil Service Commission that Mrs. Thetford had been advanced to record clerk automatically because of the failure of others, employed in his office as record clerks, to pass such examinations. On November 17, 1932 the Civil Service Commission notified A. L. Bowen, Superintendent of Charities that "Vouchers for Ruth Thetford as record clerk had not, and would not be approved because the managing officer had been notified not to carry her as such."

The position of *record clerk* was within the Civil Service classification and no appointment could be made thereto, except upon the certification by the Commission from the eligible list under such classification. If there had been no eligible list, then a temporary appointment could have been made by the appointing officer with the authority of the Commission, such appointment to remain in force only until a regular appointment could be made. Claimant was never certified to the appointment of the position as record clerk nor was any temporary appointment to such position approved by the Commission. The appointment of claimant as record clerk by Dr. Coffey required the approval of the Civil Service Commission, and as the Commission not only did not approve but directly disapproved such appointment, claimant was not authorized to serve as such. Claimant could not, through the co-operation of Dr. Coffey, create a

liability against the State by seeking out and performing services for the State for which no proper authorization had been given.

The Civil Service Law requires that the Civil Service Commission shall certify to the State Auditor all appointments to offices and places in the classified civil service and all vacancies occurring therein. There is no showing that she performed any duties as an attendant during the period for which an award is sought and she could not well contend for compensation as a record clerk and at the same time ask for an award for services rendered as an attendant. Apparently an attempt was made to evade the Civil Service Commission's rulings and to carry the claimant on the payroll at an advanced wage over that which she was entitled to receive under her employment. Such efforts continued for six months and three days. No action was taken by the claimant during that time with the Civil Service Commission. Had the employment been for but a month or two and had the claimant made any effort through the Commission during that time for an adjustment, an award might be justified. No employee nor managing officer should be encouraged to continue in an employment in the manner herein indicated in the belief that they have everything to gain and nothing to lose, and that if they failed to collect the larger salary they might always obtain an award for the smaller. As there is nothing in the record upon which to base an award to claimant as an attendant at the hospital, the claim is dismissed.

(No. 2499—Claimant awarded $12.50.)

THE AUTOMATIC RECORDING SAFE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

THE AUTOMATIC RECORDING SAFE COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*amount paid in excess of that due—when award for refund may be made.* Where claimant inadvertently pays amount of franchise tax, in excess of that it was legally required to pay, without fault on its part, an award for reimbursement of excess may be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

During the month of May, 1934 claimant received from the Secretary of State a statement for a franchise tax in the amount of $63.40, based upon its capital stock and paid-in surplus of $126,802.00, and thereafter paid the tax claimed to be due as per the statement rendered.

In June, 1934 claimant reduced its capital stock $25,000.00, and on June 22nd, 1934 received a corrected statement of the amount of the franchise tax due from it on its stated capital and paid-in surplus as thus reduced, to-wit, a tax of $50.90.

Thereafter claimant filed its claim herein to recover the amount overpaid by it as aforesaid, to-wit, $12.50.

It appears that the excess payment was made pursuant to a statement rendered by the Secretary of State; and that the same was made without any fault or neglect on the part of the claimant. Having inadvertently paid more than it was legally required to pay without any fault on its part, claimant should be reimbursed the amount of such excess payment.

Award is therefore hereby entered in favor of the claimant for the sum of Twelve Dollars and Fifty Cents ($12.50).

(No. 2341—Claim denied.)

CHLOE AYER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

GILLESPIE, BURKE & GILLESPIE AND ROLLA BABCOCK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CIVIL SERVICE EMPLOYEE — *removal and reinstatement — when claim for back pay denied.* Claim for salary during time employee in position, classified under civil service was wrongfully removed therefrom will be denied even though reinstatement is ordered by Civil Service Commission, where claimant fails to comply with requirements of Civil Service Act.

SAME—*claim for back pay—laches.* Where one omits to assert a right for an unreasonable length of time, he may be barred from obtaining relief when to afford same would be to the prejudice of the other party.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Five Thousand Nine Hundred and Fifty Dollars ($5,950.00) for back salary alleged to be due her, as an employee of the State of Illinois. About December, 1919 claimant passed a Civil Service examination, was certified and assigned to a position of tax clerk at a salary of One Hundred Seventy-five Dollars ($175.00) per month, which position she held until March 15, 1929. At this point the record is uncertain. Claimant states that she was asked to resign and refused to do so, but a notation appears on the records of the Civil Service Commission on March 15, 1929 that claimant had resigned. The last pay she received, according to the records of the Commission, was for one-half month in March, 1929. If a resignation was signed by Mrs. Ayer same cannot be located in the files of the Civil Service Commission.

The records disclose, however, that on May 13, 1929 claimant was appointed to a position as clerk in the general office of the Department of Public Welfare, she accepted that appointment and continued therein under that classification until May 19, 1929. On July 10, 1931 an affidavit was filed by Mrs. Ayer's attorney with the Civil Service Commission and a hearing was granted claimant for reinstatement, and on January 12, 1932 claimant was reinstated to her position as tax clerk in the Department of Finance. Claimant thereafter continued in such employment until July 15, 1933, when she was laid off because of the abolishment of said position of Tax Clerk. From the foregoing it appears that claimant seeks an award from March 15, 1929 to January 12, 1932 at One Hundred Seventy-five Dollars ($175.00) per month, or Five Thousand, Nine Hundred Fifty Dollars ($5,950.00).

"Whenever an employee who has been removed, discharged or reduced shall file with the Civil Service Commission within five days after his removal, discharge or reduction, a statement in writing alleging that his removal, discharge or reduction was made for political, racial or religious causes and that he believes that upon a hearing he will be able to establish such a fact, it shall be the duty of such commission to order a hearing. The time and place of such hearing shall be fixed by the commission and due notice thereof given to the appointing officer and the employee.

* * * * * * *

"If upon such hearing the commission shall find that the removal, discharge or reduction was made for political, racial or religious causes it shall

enter an order reinstating the employee in his former position and directing the payment of all back salary due."

From, *Section 12—Civil Service Act of Ill.*

The Civil Service Commission in reinstating claimant expressly called attention to the fact that it was not making any recommendation for the allowance of back pay. The application for reinstatement was not filed within five days as required by the foregoing Act. In her Reply Brief claimant states that she had no right to file a statement and apply for a hearing since no charges were filed against her and the Commission had no jurisdiction to act; further that there is no time prescribed by the Act within which claimant herein might have applied for a hearing and that the five day limitation applies only to cases where charges have been filed, and that the Commission had no jurisdiction to act.

The Commission had the same authority and jurisdiction to act within a reasonable time after claimant states she was discharged as it did to act when she finally filed her application for a hearing for reinstatement on July 10, 1931. If the Commission had authority to hear her application at the later date and to make a valid order reinstating her, they could have heard the same had she made her request within a reasonable time or within the five days contemplated by the foregoing section of the Act.

"Laches consists of such neglect or omission to assert a right as taken in conjunction with lapse of time more or less great and other circumstances causing prejudice to the other party operates as a bar."

Carroll vs. *Houston*, 341 Ill. 531-538.

"Where a civil service employee has been wrongfully discharged it is his duty to file with the Civil Service Commission within five days after such discharge a statement in writing alleging that he had been discharged for political, racial or religious causes, and that he believes that upon a hearing he would be able to establish such fact and unless such statement is so filed the discharge becomes final and binding."

Osborne vs. *Bradford*, 346 Ill. 464.

Examination of the evidence taken herein discloses that there was considerable difficulty in regard to the work and employment of claimant for some time before she was discharged in March, 1929. Whether she was discharged with all the formalities of Civil Service notifications or not, or

whether she upon request filed her resignation under the pressure of the Director of the Finance Department, is somewhat in doubt, but in either event she failed for a long period of time to seek to establish any right to reinstatement or a claim to payment. The Civil Service Commission in reinstating her did not see fit to make any allowance for back pay, and this court is of the opinion that no award for same is warranted. Claimant contends that this was not a reinstatement and that the only effect of the order of the Commission made upon her application, was to send her back to work. Claimant submitted herself to the jurisdiction of the Civil Service Commission and the order of that body entered, January 12, 1932 reads:

"That in view of the fact that Mrs. Ayer was certified as tax clerk in the civil service of the State, the commission directs that she shall be reinstated to the position of tax clerk in the Department of Finance."

An award is denied and the claim dismissed.

(Nos. 1942, 1943, consolidated—Claimants awarded $296.25.)

GUSTAVUS M. BLECH, No. 1942; EDGEWATER HOSPITAL CORPORATION, A CORPORATION, No. 1943, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

LINENTHAL, SCHEYER & MYLES, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

MEDICAL SERVICES AND HOSPITAL CARE FURNISHED MEMBER OF ILLINOIS NATIONAL GUARD—*when award may be made for.* Where member of Illinois National Guard becomes seriously ill, while engaged in performance of his duties, requiring immediate surgical attention and hospital care, which were furnished at request of his military superior, an award may be made for the fair and reasonable value thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Both of the above cases arise out of the same transaction and involve the same subject matter, and therefore, by agreement of counsel for both claimants and the Attorney General, the cases are consolidated for the purpose of consideration.

In the declarations on file it is averred that on or about November 11th, A. D. 1930, the claimant, Dr. Gustavus M. Blech, at the special instance and request, and at the direction of Major Leo C. DuBois, Regimental Surgeon of the 202nd Coast Artillery, performed an appendectomy on Private James Wall, an enlisted man and member of the 202nd Coast Artillery, Illinois National Guard, who became so seriously ill while attending a session of the drills, that he had to be immediately removed and operated upon for appendicitis. It is further averred that the charge of the claimant, Dr. Gustavus M. Blech, for his services in performing the operation is $200.00, and that no part thereof has been paid.

The claim of Edgewater Hospital Corporation is for hospital services rendered to said Private James Wall, in connection with the aforementioned operation, for which claimant asks the sum of $96.25.

It appears that the services of Dr. Blech as well as the services of the Edgewater Hospital Corporation, were rendered at the instance and request and at the direction of Major Leo C. DuBois, Regimental Surgeon of said 202nd Coast Artillery, to a member of that Regiment.

The act of the Major being within the apparent scope of his duty and there being no evidence that the charge made is unreasonable, IT IS THEREFORE ORDERED that the claimant, Dr. Gustavus M. Blech, be and he is hereby awarded the sum of Two Hundred Dollars ($200.00); and that the claimant, Edgewater Hospital Corporation, be and it is hereby awarded the sum of Ninety-six Dollars and Twenty-five Cents ($96.25).

(No. 2289—Claimant awarded $2,500.00.)

MAUDE CHARLES, ADMINISTRATOR DE BONIS NON, OF THE ESTATE OF JOHN D. CHARLES, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

JOHN J. KRITZER AND ERLE P. FIELD, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award will be made for the death of a member of Illinois National Guard.* An award may be made for the death of a member of the Illinois National Guard, resulting from injuries sustained while in the performance of his duties as such, under authority of Section 11 of Article 16 of the Military and Naval Code of Illinois.

SAME—*member of Illinois National Guard—rights of governed by Military and Naval Code.* Section 11 of Article 16 of the Military and Naval Code providing that in every case where an enlisted man shall be killed while performing his duties, his heirs or dependents shall have a claim against the State for financial assistance and help is clear and unambiguous, and such claim must be governed by said section.

SAME—*same—resort to Workmen's Compensation Act in determining amount of compensation, not required by law.* There is no provision of law which requires Court of Claims to be guided by the provisions of the Workmen's Compensation Act, in determining amount of award in cases arising under the Military and Naval Code, or which prevents it from using any other proper basis in arriving at amount thereof, justified under the evidence in each particular case.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 23rd day of November, A. D. 1933, John D. Charles was engaged in the military service of the State of Illinois, being a member of Battery B and attached to Headquarters Battery and Combat Train, 123rd Field Artillery, and on the last mentioned date was stationed at Taylorville, having been called out for the purpose of quieting disturbances in the mining region in that vicinity.

About seven o'clock P. M. on the evening of November 23, 1933, said John D. Charles was in the barracks getting his pistol preparatory to going out on detail. Just prior to that time Springfield rifles had been issued to another detail at the same place, and the members of said last mentioned detail were still in the barracks and were loading their rifles. A rifle in the hands of one of the members of such detail was accidentally discharged and the bullet therefrom struck Private John D. Charles, passing through both legs. He was given immediate medical and hospital attention, but an infection developed and one of his legs was amputated in an effort to save his life. The effort was unavailing, however, and said John D. Charles died on November 28, 1933 as the direct result of the wounds he received as aforesaid.

Said soldier left him surviving Samuel A. Charles, his father; Maud Charles, his mother; Arthur Charles and James

Charles, his brothers; and Mabel Charles and Lila Charles Parsons, his sisters; all of whom are of legal age.

Samuel A. Charles, father of decedent, was appointed administrator of the estate of said decedent by the County Court of Warren County, and filed his complaint herein for the recovery of damages on account of the death of said decedent.

While the claim was pending in this court, said Samuel A. Charles died and said Maud Charles was duly appointed administratrix de bonis non of the estate of said John C. Charles, deceased, by said County Court of Warren County, and was thereafter substituted as claimant herein.

Thereafter on motion of the claimant, said Maud Charles, individually, and Arthur Charles, James Charles, Mabel Charles and Lila Parsons were made additional claimants.

Section 11 of Article 16 of the Military and Naval Code of this State provides as follows:

"In every case where an officer or enlisted man of the 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 or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims, the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the Medical Department."

A military board of inquiry found that the injuries sustained by the decedent were received by him while in the performance of and in the line of his duty.

The Attorney General suggests that claimant's right to recover must be based either upon the Military and Naval Code, the Injuries Act, or the Workmen's Compensation Act; that if claimant's rights are governed by the Military and Naval Code, she is entitled to an award, but that if claimant's rights are governed either by the Injuries Act or the Workmen's Compensation Act, no award should be allowed under the facts in the record. It seems to us, however, that the provisions of Section 11 of Article 16 are clear and unambiguous, and that the rights of the claimant herein must be governed by such section. Section 11 specifically provides that *in every case* where an enlisted man shall be killed while performing his duties, his heirs or dependents shall have a claim against

the State for financial help and assistance, and that this court shall act on and adjust the same as the merits of each case may demand. Apparently it was the intention of the Legislature that financial help or assistance should be given in every such case and this court was given jurisdiction to act on and adjust each claim as the merits of each case may demand.

The evidence shows that said John D. Charles was 23 years of age at the time of his death, and had been in the military service of the State for a period of four years prior to the accident in question; that when he was not actually engaged in the military service of the State, said John D. Charles, for a period of six or seven years prior to the accident, had been employed by the Monmouth Dairy and Ice Cream Company, in which his father was interested; that he did not work steadily during the winter months, but when he worked he earned $15.00 or $20.00 per week; that he gave most of his earnings to his mother and used the rest himself; that aside from necessary clothing and other incidental expenses, he used this money in contributing to the care of the family; that his mother was saving the money for him in a way, and used part of it at times with his consent.

In some cases which have heretofore come before this court, the provisions of the Workmen's Compensation Act of this State have been taken into consideration in determining the amount of the award. Resort to the provisions of such Act, however, was merely advisory, and there is no provision of law which requires us to be guided by the provisions of the Workmen's Compensation Act in cases arising under the Military and Naval Code, or which prevents us from using any other proper basis in arriving at the amount of the award, which under the evidence meets the demands of the particular case.

The only statutory provision for our guidance is the requirement of Section 11 of Article 16 of the Military and Naval Code to the effect that we shall adjust each case as the merits thereof demand.

Under the evidence in the record, we feel that the claimant, Maud Charles, administratrix de bonis non of the estate of John D. Charles, deceased, should be awarded the sum of $2,500.00.

Award is therefore entered in favor of the claimant, Maud Charles, Administratrix de bonis non of the estate of John D. Charles, deceased, for the sum of Twenty-five Hundred Dollars ($2,500.00).

(No. 2413—Claim denied.)

JULIA GRANT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

MARGUERITE R. GARIEPY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claimant not employee of State.* No compensation can be recovered from State under Workmen's Compensation Act by one not an employee thereof.

SAME—*only applicable to extra hazardous enterprises.* The Workmen's Compensation Act only applies to employees of the State when they are engaged as such in an employment in a department of the State which is engaged in extra hazardous enterprises named in the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein alleges that she was employed by the State of Illinois on and for some time prior to February 3, 1934 *as an employee for the Civil Works Service, a project supported by the Emergency Relief Commission;* that the nature of her work was to canvass for the NRA getting signatures of housewives, and to give them in return Blue Eagle posters; that while so employed and on said date she tripped in a hole in the sidewalk and injured her right leg; that she received first aid treatment and is still in need of medical care, because of a permanent disability to her right leg. Wherefore claimant asks compensation under Section 8 of the Workmen's Compensation Act of Illinois.

The Attorney General has filed his motion to dismiss the claim on the grounds that—

"The State is not liable as an employer for one engaged in activities for the NRA, and for the reason that the claimant was not an employee of the State of Illinois at the time of the accident."

The record of the Illinois Emergency Relief Commission contains the following letter from the NRA offices:—

National Recovery Administration
Washington, D. C.
1115 New Post Office.
Chicago, Illinois, February 9, 1934.

Mrs. B. Beverly,
Placement Department,
Civil Works Service,
126 North Wells St.,
Chicago, Illinois.

Dear Mrs. Beverly:

Below I am giving you a record of three canvassers who have been injured and one who has been in ill health: * * *

Julia Grant,

4720 Dorchester Ave.

Identification No. 8-527.

On Friday, February 2nd, Miss Grant reported that she had twisted her knee while crossing a street and has not worked since. On February 3rd, she went to Dr. George Dittmann. On February 6th, she saw Dr. Oliver C. Foreman, from whom she obtained a letter stating that she would be unable to work on account of her knee. She was removed from the payroll as of February 2nd.

(s) Ruth E. Porter, Supervisor,
for Mrs. E. A. Conkey,
Foreman CWS Project No. 21.

It is apparent that claimant was not employed by the State of Illinois and could not be classified as a State employee and no award can be made to her as such.

In addition to this, there is nothing in the complaint to indicate that the claim in question would be compensable. The case seems analagous to that of:—

"*Chicago Circular Ad. Service* vs. *Indus. Com.*, 332 Ill. 156, wherein an employee of appellant was distributing circulars for his employer while traveling on foot from house to house. The court held that such employment was not extra hazardous and that no compensation was allowable."

Under the contentions of *Claimant's Reply Brief* every employee of the State of Illinois would be within the terms of the Workmen's Compensation Act. The State is engaged in many activities, and the Workmen's Compensation Act applies to many of its employees because of the particular nature of the business in which such employees are engaged or the hazardous nature of their individual employment, but this

court is not of the opinion that every employee of the State of Illinois, regardless of the Division or Department or nature of his employment, is within the Act.

For the reason that the injury is not compensable under the terms of the Workmen's Compensation Act—and for the further reason that in the distribution of Blue Eagle posters and organization activities of the NRA, the State of Illinois was not claimant's employer, we are of the opinion that no claim could arise against the State of Illinois under the facts alleged.

The motion of the Attorney General is allowed and the claim dismissed.

(No. 2306—Claim denied.)

METROPOLITAN TRUST COMPANY, A CORPORATION, AS ADMINISTRATOR OF THE ESTATE OF MARIE DAMICO, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

CLIFFORD G. ROE AND ROBERT S. COOK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*death—negligence of employees of State—State not liable for.* The facts in this case are similar to those in *Trombello* vs. *State*, No. 2237, ante, and the opinion of the court in that case controls herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed its declaration herein on January 5, 1934, and alleges therein in substance that on the 20th day of July, A. D. 1933, Marie Damico, claimant's intestate, then a child of the age of thirteen years, was a patron of a certain swimming pool in Ogden Park, in the County of Cook and State of Illinois; that on said date the respondent was in control of and maintained said park for the benefit of the residents and citizens of Illinois; that it thereby became the duty of the respondent to protect the life and limb of its residents and citizens and to keep said swimming pool in a safe condition; that it failed in the performance of its duties in that behalf, in that it failed to place and maintain a screen over a certain

water outlet pipe, which said pipe was ten inches in diameter; that by reason of such neglect of duty, said Marie Damico who entered said pool on said 20th day of July, A. D. 1933 about seven o'clock P. M., was immediately caught by the suction and drawn into said outlet pipe; that although she was a good swimmer, she could not extricate herself therefrom; that several lifeguards tried to extricate her but were unable to do so on account of the suction; that before the flow of the water from such outlet pipe could be shut off and the child's body removed, she was dead.

Claimant's intestate left her surviving her father and mother, one brother and sister, as her only heirs at law.

Letters of administration were issued to Metropolitan Trust Company by the Probate Court of Cook County, Illinois, and said administrator filed its claim herein, and seeks to recover the sum of $10,000.00 from the respondent on account of the death of said decedent under the facts set forth in the complaint.

The Attorney General has entered a motion to dismiss the case for the reason that the State is not liable under the facts set forth in the complaint.

For the purpose of the motion, the court must assume the truth of the averments of the complaint with reference to the control and maintenance of said pool by the respondent.

The question then arises as to whether there is any liability on the part of the State for the negligence of its servants and agents in the operation and control of a swimming pool maintained by it.

The liability of a municipal corporation for the negligence of its servants and agents in connection with the maintenance of a municipal swimming pool, was considered by our Supreme Court for the first time in the recent case of *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234. After reviewing the authorities in the different States, the court held that the maintenance of a swimming pool was a governmental and not a proprietary function, and that the general rule as to exemption from negligence applies. The same conclusion was reached by the Appellate Court of this State in the case of *Stein* vs. *West Chicago Park Commissioners*, 247 Ill. App. 479; *Hendricks* vs. *Urbana Park District*, 265 Ill. App.

102; and *Love* vs. *Glencoe Park District*, 270 Ill. App. 117, in each of which cases the facts were quite similar to this case.

This court has applied the law as above set forth in the case of *Stein, Admr.* vs. *State*, 6 C. C. R. 329; and in the case of *Raffaele Trombello, et al.* vs. *State*, No. 2237, decided at the January term, 1934.

It is the well established law of this State and other States that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents in the absence of a Statute making it so liable. *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; *Stein* vs. *West Chicago Park Commissioners*, 247 Ill. App. 479; *Hendricks* vs. *Urbana Park District*, 265 Ill. App. 102; *Love* vs. *Glencoe Park District*, 270 Ill. App. 117; 25 R. C. L. p. 407; sec. 43; 8 R. C. L. Supp. p. 5580, sec. 43.

The Legislature has not enacted any law making the State liable in cases of this kind, and consequently we have no authority to allow an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term, 1934, of this court.

Award must therefore be denied and the case dismissed.

(No. 2506—Claimant awarded $132.14.)

W. B. READ & COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

W. B. READ & COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for price of.* Where it clearly appears that supplies were ordered by State and received by it, and no question is raised as to the price thereof an award may be made for their payment.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein alleges that on *June 1, 1930* W. B. Read & Company furnished to the Illinois School for the Blind certain supplies set out in their Bill of Particulars amounting

to the sum of One Hundred Thirty-two and 14/100 Dollars ($132.14). A report from the school at Jacksonville with invoice attached shows that the goods were received and accepted and that the bill is unpaid.

The claim seems to fall within the rule mentioned in the Shell Petroleum case (reported 7 C. C. R. 224).

"Where the facts are undisputed that the State has received supplies as ordered by some department, within their authorized limitation, and that the bill for same was not presented for payment before the lapse of the appropriation out of which it could have been paid, an award for the amount due will be made."

Franklin Coal Co. vs. *State*, 7 C. C. R. 114.

There being no question raised as to the validity of the account and the claim having been filed within five years, an award is made to claimant in the sum of One Hundred Thirty-two and 14/100 Dollars ($132.14).

(No. 2507—Claimant awarded $179.84.)

W. B. READ & COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

W. B. READ & COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for price of.* The facts in this case are similar to those in *Read* vs. *State*, No. 2506, ante, and what was said in that case applies with equal force herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant alleges that on November 7, 1929 it furnished goods to the Illinois State Reformatory at Pontiac, Illinois as per Bill of Particulars attached, amounting to One Hundred Seventy-nine and 84/100 Dollars ($179.84). A statement in the record, signed by the receiving officer of the reformatory states that the merchandise was received and accepted and that the bill was correct; further that the reason same was not paid was that no invoice was received therefor until May 23, 1934. Apparently the original invoice was misplaced and the appropriation out of which same could have been paid therefore lapsed.

This case is similar to that of the same claimant decided at this same term, i. e.—*Read* vs. *State Court of Claims* No. 2506, and an award is herein made in favor of claimant in the sum of $179.84.

(No. 2492—Claimant awarded $30.08.)

WILLIAM C. SCHREIBER LUMBER CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

HOFF & HOFF, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid and no question is raised as to amount claimed or reasonableness of charges, an award for price thereof will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On June 12, 1933 the Division of Purchases and Supplies of the respondent ordered certain lumber from the claimant, for delivery to the Illinois State Penitentiary at Joliet. Delivery was made on June 22nd, 1933 and the claimant states that invoices therefor in the amount of $30.08 were mailed to respondent on August 24, 1933. However, such invoices were not received by the proper officers of the respondent, and after some correspondence regarding the matter, claimant mailed and respondent received a statement of account in the amount of $30.08 on May 4, 1934. By that time the appropriation from which payment should have been made had lapsed, and claimant was advised that it would have to file its claim in this court.

The merchandise in question was ordered by the proper authorities of the respondent and the delivery thereof duly made. No question is raised as to the amount claimed or the reasonableness of the charges made. There is nothing in the record to indicate any unreasonable delay on the part of the claimant in presenting its claim, and an award is therefore

entered in favor of the claimant for the amount claimed, to-wit, Thirty Dollars and Eight Cents ($30.08).

(No. 2512—Claimant awarded $100.39.)

SINCLAIR REFINING COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

SUPPLIES—*when award may be for price of.* The facts in this case are similar to those in *Shell Petroleum Coropration* vs. *State*, 7 Court of Claims Reports, 224 and what was said therein is applicable and controlling here.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant seeks to recover the sum of One Hundred Dollars and Thirty-nine Cents ($100.39) for 159.3 gallons of compound cylinder oil; 160.1 gallons bearing oil; and 29.4 gallons lard oil, purchased from it by respondent through Mr. A. W. Daily, State Purchasing Agent of the Division of Purchases and Supplies, and delivered by claimant to Kankakee State Hospital, part being delivered on February 15, 1933 and part on March 10, 1933.

The claim was not presented in time for payment out of the current appropriation, and said appropriation thereafter lapsed. When the claim was presented there were no available funds out of which payment could be made.

The oil in question was purchased by the proper authorities of the respondent, and delivery thereof was duly made. No question is raised as to the amount of the claim or the reasonableness thereof. There is nothing in the record which indicates that the claimant has delayed unreasonably in presenting its claim, and it is therefore ordered that an award be and the same is hereby entered in favor of the claimant for the amount claimed, to-wit, One Hundred Dollars and Thirty-nine Cents ($100.39).

(No. 2399—Claim Denied.)

HENRY SWAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

GARIEPY & GARIEPY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*not applied to all employees of State.* The Workmen's Compensation Act does not automatically apply to all employees of the State, but only when they are engaged as such in an employment in a department of the State, which is engaged in extra-hazardous enterprises named in the Act.

SAME—*conduct of extra-hazardous and non-extra-hazardous enterprises.* The fact that the State in some of its departments might be engaged in extra-hazardous enterprises and its employees while so engaged subject to the provisions of the Act, does not make the provisions of the Act applicable to all its employees regardless of the nature of their employment.

SAME—*pleading—procedure.* Where motion of Attorney General to dismiss is sustained and claimant fails to file amended complaint within time provided by rules of court final judgment will be entered dismissing claim under rule 31 of this court.

Claimant filed his complaint herein on January 14, 1934, and alleges therein in substance that prior to and on the 25th day of October, A. D. 1933, he was an employee of the respondent at the Illinois Emergency Relief Commission Shelter House at 1210 South Morgan Street; that on said date he sustained an accidental injury "which arose out of and in the course of his employment, by falling when stepping off the curb into a torn-up street while on an errand for said respondent"; whereby he sustained injuries causing a permanent disability to his right leg, for which he asks compensation under the provisions of the Workmen's Compensation Act.

The Attorney General has filed a motion to dismiss the case for the reason that the respondent is not liable for the injuries so sustained by the claimant. Claimant contends that "if the State in any of its departments or enterprises is actually engaged in an extra-hazardous business or enterprise as defined in Section 3 of the Workmen's Compensation Act, then all of the employees of the State, whether engaged in the extra-hazardous or non-extra-hazardous business of the State, are subject to the provisions of the Workmen's

Compensation Act", and cites *Illinois Publishing Co.* vs. *Ind. Com.*, 290 Ill. 189, which holds in effect, that if the employer is engaged in an enterprise or business within the provisions of Section 3 of the Compensation Act, then all of his employees, in any department of such business or enterprise are under the Act even though their duties involve no hazards and do not bring them in contact with any of the hazardous parts of such enterprise or business.

The complaint, however, does not allege any facts from which it appears that the respondent is engaged in any of the enterprises or businesses which are declared to be extra-hazardous under the provisions of Section 3 of the Act.

In carrying on the various functions for which the State was organized, it is engaged in a large number of different activities of various kinds, many of which are separate and distinct from each other, and practically complete in themselves, some of which are or may be hazardous in their nature and others of which clearly are not hazardous in any respect whatsoever. The question frequently arises, therefore, as to when the State and its various employees come within the provisions of the Workmen's Compensation Act, and when not.

In considering a similar question, Angerstein in his work "The Employer and the Workmen's Compensation Act of Illinois", on page 39 says:

"The business itself is the determining factor. For illustration, an employer might own a factory containing power-driven machinery, etc., which automatically would bring it under the Act. All the employees of such factory would be under the Act regardless of what their duties were, just so long as they were engaged in any department of the business, and this would include stenographers, salesmen, clerical help, etc. The same employer might own and operate a clothing store entirely separate and apart from the factory, in which store there were no appliances or machinery of any description. This clothing store, therefore, would not come under the Act automatically, and the employees, therefore, would not be under the Act unless and until the employer had filed his written acceptance of the Act with the Industrial Commission."

In the case of *Peterson* vs. *Ind. Com.*, 315 Ill. 109-202, the employer was engaged in farming, and also operated a sawmill on the same tract of land. The employee was injured while working in the sawmill, and the court held that although the employer was not under the Act as to the work on the farm, yet the operation of the sawmill was an inde-

pendent enterprise of a hazardous nature, and as to such enterprise the employer was under the Act. In that case the court said:

"It is not required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated in the Act to make him liable for compensation. A man may engage in two kinds of business, one not within the Workmen's Compensation Act and the other may be within the Act because it is extra-hazardous. (*Vaughn's Seed Store* vs. *Simonini*, 275 Ill. 477; *Davis* vs. *Ind. Com.*, 297 Ill. 29). * * * * * * We are of the opinion that plaintiff in error and the deceased at the time of the accident were both under the provisions of the Workmen's Compensation Act."

The same conclusion was reached in the case of *Davis* vs. *Ind. Com.*, 297 Ill. 29, where the employer owned a hardware business and also owned an apartment building which he rented at a profit; also in the case of *Walsh* vs. *Ind. Com.*, 345 Ill. 366, where the employer was in the small loan business, and also owned eight (8) or ten (10) houses which he kept in repair.

We conclude, therefore, that the State in the conduct of the various activities under its control is in the same position as an individual or a corporation which is engaged in a number of different enterprises or businesses, some of which are or may be extra-hazardous and some not; that each business or enterprise must be considered separately, and the liability of the State in each case depends upon whether that particular business or enterprise comes within any of the provisions of Section 3 of the Compensation Act, or whether such business or enterprise is extra-hazardous in fact.

Hence, when any employee of the State seeks to recover compensation for injuries sustained by him, it is necessary for him to aver and prove that he was engaged in some department of an enterprise or business which is extra-hazardous within the meaning of Section 3 of the Compensation Act, or which is extra-hazardous in fact.

There is nothing in the complaint to indicate that claimant was engaged in any department of a business or enterprise which is extra-hazardous within the meaning of Section 3 of the Act, or is extra-hazardous in fact, and consequently the motion of the Attorney General must be sustained.

Under the rules, the claimant has thirty days in which to file an amended complaint. Unless an amended complaint showing a right of action against the respondent is filed within thirty days from the date of the entry of this order, final judgment will be entered dismissing the claim.

(No. 2371—Claimant awarded $390.00.)

LEROY THOMPSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

DOVE & DOVE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made.* Where it unquestionably appears that claimant has sustained accidental injuries arising out of and in the course of his employment, while engaged in employment found to be extra-hazardous an award will be made for compensation in accordance with the provisions of the Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

LeRoy Thompson, the claimant, filed his petition for claim in this court on April 29, 1934, alleging that while he was employed by the State as a maintenance laborer on State Route No. 16 on or about November 7, 1933, and while assisting another employee of the State in loading a picket fence, commonly called a snow fence onto a truck, he strained himself, which strain caused a hernia; that it was accompanied by severe pains; that his foreman had notice at the time of the injury, and that the injury arose out of and in the course of his employment.

From the medical testimony introduced, it appears that claimant did suffer a hernia.

At the time of the injury, claimant was receiving $3.15 per day and has three children, aged nine years, four years and one and one-half years respectively. His surgeon operated upon him for this injury and he was out of employment thirty weeks.

No question arises upon the record as to the law or the facts. Clearly, claimant was under the Compensation Law of Illinois. We find that his surgeon's and hospital bill have

been paid in the sum of $148.00, but claimant has not been paid under the Compensation Act.

We, therefore, hold that he is entitled to $13.00 per week for thirty (30) weeks, or a total of $390.00, and recommend to the Legislature that an appropriation for that sum be made to the claimant, LeRoy Thompson.

(No. 2275—Claim denied.)

JOHN WADDELL AND ALMA WADDELL OF KANSAS CITY, DOING BUSINESS AS THE HILL MANUFACTURING COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.

KAPLAN & KAPLAN, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*purchase of property by State officer when no appropriation made for payment thereof—award denied.* Where claimant installed certain devices in State institutions on recommendation of State officer without any appropriation having been made for the payment thereof an award for the price of same must be denied as under Section 30 of the State Finance Act no officer has the right to contract any indebtedness on behalf of the State in excess of the amount of money appropriated therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants on the 29th day of December, 1931 sold and immediately thereafter installed at the Joliet Stateville Penitentiary one Hill Non-Condensable Gas Separator; and they also installed a similar machine at the Chicago State Hospital, at a charge of Three Hundred Seventy-five Dollars ($375.00) each with additional express of Three and 22/100 Dollars ($3.22) or a total of Three Hundred Seventy-eight and 22/100 Dollars ($378.22) for each of said machines for which they ask an award with interest at six per cent (6%) from December 29, 1931. Claimants contend that said machines have been in constant use and operation at said institutions from the time they were installed. Claimants contend there is an implied contract of sale, under the provisions of the Uniform Sales Act which provides as follows:

"When goods have been delivered on approval or on trial or satisfaction or other similar terms, the property therein passes to the buyer * * *

(b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, and if a time has been fixed for the return of the goods, at the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time."

Sec. 121 Cahill's Rev. Statutes Par. 22, Rule 3, Part 2.

On February 25, 1932 A. L. Bowen notified C. Herrick Hammond, Supervising Architect as follows:

"In reply to yours of February the sixteenth, on the subject of the gas separator in the refrigerating system at the Chicago State Hospital, let me advise that the financial condition of the treasury makes it impossible to approve the purchase of the equipment which has been installed on trial by the Hill Manufacturing Company."

On March 1, 1932 L. A. Snider, Consulting Engineer of the Department of Purchases and Construction, through whom the installation had been effected notified claimants as follows:

"Some time ago I recommended that the gas separator furnished for Chicago State Hospital be purchased.

I forwarded your invoice in the amount of $378.36 to Springfield with my letter of recommendation. I have just been advised by Springfield that it will be impossible to approve the purchase of this equipment. I am requested to advise you and ask that you remove the equipment at Chicago State Hospital at no expense to the State.

I am sorry that it is necessary to so advise you, because the equipment has proved to be very efficient and desirable. I am sure that it would pay for itself in a very short time. Mr. A. L. Bowen, Superintendent of Charities for the Department of Public Welfare, has found it necessary to refuse approval for this purchase, stating that the financial condition of the treasury makes purchase impossible.

I know that you will be particularly disappointed in this matter because you came to my office, sent by Mr. Rodney H. Brandon, Director of the Department of Public Welfare, with the request that you be permitted to demonstrate your equipment. You will, however, appreciate the fact that this office can do no more than it has done, as final decision in a matter of this kind rests with the department in Springfield.

At this date I do not have any instructions with reference to the equipment furnished by you and installed at Illinois State Penitentiary."

A statement in the record by A. L. Bowen, Director of the Department of Public Welfare recites that the equipment in question was installed on a trial basis and that the purchase of the equipment could not be authorized regardless of whether same was satisfactory or otherwise, because of the financial condition of the treasury. At the time of the in-

stallation in question the Department of Purchases and Construction had the power to procure and supply all plumbing, light and engine supplies needed by the several departments. No officer, institution, department, board of commission was authorized to contract any indebtedness in behalf of the State nor assume to bind the State in an amount in excess of the money appropriated, unless expressly authorized by law —Sec. 30 State Finance Act.

The machines in question were installed about the end of 1931 at the apparent solicitation of Claimants. As early as February 25, 1932 notice was given them that the machines could not be purchased and that same should be removed. For some reason claimants did not see fit to remove the machines and now seek to, indirectly through the Court of Claims, receive payment for that which the State at that time would not buy in a direct manner. The machines have at all times since the notice in February, 1932, awaited the pleasure of claimants. The fact that claimants have preferred to leave the machines in the possession and use of the State in the apparent belief that eventually they might be paid for is their privilege, but no award for the price of such machines is justified thereby. To grant an award under the conditions herein stated would be to establish a rule or precedent, which the court does not believe to be warranted by law. Claim is denied, and case dismissed.

(No. 1985—Claim denied.)

AMELIA STREITMATTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1935.

J. EDWARD RADLEY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PLEADING—*where complaint fails to set forth cause of action—award denied.* Where complaint fails to set forth facts showing any liability on the part of the State, award must be denied.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed her complaint herein on September 19, 1932 and alleges therein in substance that on July 31, 1932

she was the owner of a Town Sedan Ford which was then and there being used and operated by the respondent through its servants and agents in transporting troops of the Illinois National Guard from the Armory in Peoria to the rifle range seven (7) miles north of said city; that said auto while being used for such purpose, was damaged, broken and destroyed.

The complaint also avers that the agent of the respondent who was operating said automobile as aforesaid, was in the exercise of ordinary care and caution for his own safety, and had due regard for the rights of other automobiles in and upon said highway; that the coroner's inquest found that said accident was unavoidable; that a board of officers impanelled to investigate said accident found that no blame attached to the respondent or its servant driving and operating said automobile; and that by reason of the loss of her car as aforesaid, claimant has sustained damages in the amount of Seven Hundred Dollars ($700.00).

The Attorney General has moved to dismiss the case for the reason that there is no liability on the part of the respondent under the facts set forth in the complaint.

This court has no authority to allow an award in any case unless there would be a legal liability on the part of the State to pay the same if the State were suable. *Crabtree* vs. *State*, 7 C. C. R. 207; *Watkins* vs. *State*, 6 C. C. R. 172; *Perry* vs. *State*, 6 C. C. R. 81; *Peterson* vs. *State*, 6 C. C. R. 77.

The complaint does not allege any negligence on the part of the respondent;—on the contrary, it alleges that no blame attached to the respondent or its agent who was operating the car. Even if the accident had resulted from the negligence of the servants and agents of the respondent, there would be no liability on the part of the respondent in the absence of a Statute making it liable therefor. *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange*, 354 Ill. 234.

There being no liability on the part of the State under the facts set forth in the complaint, award must be denied.

Award denied. Case dismissed.

(No. 2060—Claimant awarded $1,620.00.)

GEORGE WALLIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1935.

A. H. HANNEKEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*loss of vision of eye—when award made for.* Where claimant was employed by State in the maintenance and repair of its highways and while so doing sustains accidental injuries, arising out of and in the course of his employment, resulting in the loss of vision of an eye, an award for compensation will be made in accordance with the provisions of the Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on January 24, 1933, alleging that on the 10th day of November, 1932, and for a long time prior thereto, the State of Illinois had under its management, control and supervision, a cement paved highway, running between the City of Dixon, Lee County, Illinois, and the City of Sterling, Whiteside County, Illinois, being State Highway Number 6, commonly known as The Lincoln Highway; that on that date and for a long time prior thereto, the plaintiff was employed by the State in the doing of maintenance and repair work upon this highway, at a weekly wage of Twenty-seven Dollars ($27.00) per week; that on the 10th day of November, 1932, the claimant was drilling holes in a dip in the cement pavement of said highway with a drill driven by compressed air, which holes were to be filled with a mixture of earth and cement pumped into the same by means of a machine known as a mud jack; that attached to the shank of the drill was a device known as a cutting cap which actually cut the holes into the cement pavement; that on the day aforesaid, a new cutting cap was being replaced on said machine; that said cutting cap was furnished by the State and was put on said machine under the direction of the proper authorities; that while replacing the cap, a part of the machine was placed in a vise and was being struck with a hammer in order to loosen it, and while the claimant was striking the same with a hammer, a particle of steel became dislodged from said cutting cap, and struck the plaintiff's eye, penetrating the lower lid and lodging in the back end

of the eye ball, and penetrating the edge of the lens of said left eye, and by reason thereof, the claimant has lost the complete sight of his left eye.

It is agreed that his average weekly wage was Twenty-seven Dollars ($27.00) per week.

Under the direction of the district engineer in charge of the State Highway offices in the city of Dixon, Illinois, plaintiff called upon Dr. Harry S. Gradle, in Chicago, and the plaintiff was confined to the Michael Reese Hospital from the 15th day of November, 1932 to the 23rd day of November, 1932. Dr. Gradle removed the particle of steel from the eye. Plaintiff then returned to his home in Dixon, Illinois on the 23rd day of November, 1932 and was under the care of Dr. W. A. McNichols.

Plaintiff avers in his declaration that he has been advised that the State has paid or has agreed to pay all the necessary medical, surgical and hospital expenses incurred by him as the result of the injury, and that the State further paid the plaintiff fifty per cent. of the weekly earnings to which he would have been entitled, from the 10th day of November, 1932 to the 3rd day of January, 1933, and damages in the sum of Five Thousand Dollars ($5,000.00) was asked.

We must treat this as a claim filed under the Compensation Act.

Evidence was taken which substantiated the allegations of fact in the complaint, and there was a total loss of vision of the left eye.

Under the Compensation Act, for the loss of the sight of an eye, fifty per cent. of the average weekly wage during one hundred and twenty weeks is provided as compensation.

From the evidence, it appears that the injury arose out of and in the course of the employment. It does not appear whether or not the claimant had any children under sixteen years of age at the time of the injury.

We, therefore, hold that he was entitled to one-half of his weekly wage, which was Twenty-seven Dollars ($27.00) for one hundred twenty weeks, making a total of One Thousand Six Hundred Twenty Dollars ($1,620.00), and we recommend an appropriation be made for that amount.

(No. 2067—Claim denied.)

WISCONSIN BRIDGE & IRON CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1935.

LAFROM, TIOHE, ENGELHARD & PECK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*performance delayed by other contractors—claim for damages—specifications.* Where specifications, forming part of contract for erection of bridge, provide payment for steel to be used therein before erection, and same is fabricated and payment received therefor, it is clearly indicated that storage and rehandling of same was anticipated, and an award for damages for same will be denied on account of failure of another contractor to complete work so that said steel might be used without storing and rehandling.

SAME—*riots in city preventing performance of—State not liable for damages.* Where riots and strikes in a city prevent or impede the performance of a contract there is no liability on the part of the State as the Statutes of Illinois provide for a specific liability upon the part of cities in such cases and there is no Statute fixing any liability against the State.

SAME—*damages for Act of Municipal Corporation.* The State is not liable for damages caused by an Act of a Municipal Corporation.

SAME—*method of measurement of work under.* Where specifications forming part of contract provide method of measurement of weight, which has been in use in State for many years such method will not be departed from.

SAME—*extra compensation.* Where an award would constitute extra compensation it cannot be allowed under the Constitution.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim as originally filed on February 7, 1933, contained two items of damages alleged to have been occasioned by the respondent in connection with a bridge contract awarded to claimant on S. B. I. No. 121 over the Illinois River near Pekin, Illinois.

The first item of the claim, as stated in plaintiff's Bill of Particulars is as follows:

Labor and expense of shop crew, storing and rehandling structural steel work for the approach to the Cedar Street Bridge at Peoria, Route No. 121, Sec. 103C, due to J. L. Simmons Company's inability to complete the substructure in accordance with their proposed schedules.	$4,052.00

The second item of plaintiff's claim grew out of labor troubles experienced by plaintiff and includes—

> Insurance, deputy sheriff fees, taxes, flood lights, guards, labor, additional equipment, attorney fees and court costs incident to injunction proceedings in a total of.....$10,907.97

An amended declaration was filed on December 27, 1933 which includes the two foregoing items and an additional item for an extra allowance on steel and iron used in the bridge, in addition to the weights as previously determined by the State Engineers to the amount of.....$ 3,393.70 making a total claim by plaintiff herein of..... 17,453.67. As to its first cause of action claimant contends that upon the contract being awarded to it for the bridge in question, a letter was written to it by the Division of Highways, Department of Public Works and Buildings which stated—

> "This contract is awarded to you upon condition that you will start work on this section immediately and will prosecute the work as outlined in the special provisions included in your proposal."

Claimant contends that immediately thereafter representatives of the Highway Department met with claimant and agreed upon a Schedule of Progress for the construction of the work covered by the contract; that it was agreed that the substructure for the bridge that was being built by other parties would be ready so that claimant could begin its operations for erecting the superstructure on April 1, 1932; that claimant was prevented from shipping its material in accordance with the Progress Schedule because the bridge site was being used by the substructure contractor. Claimant contends that it was necessary by reason of the delay in substructure work, for it to store and rehandle its fabricated material; that the cost of work, unless otherwise designated in the specifications, is figured on the basis of fabrication and immediate shipment, and that this is the basis upon which claimant figured on this job (Plaintiff's Brief, P. 4).

The respondent contends that the report of the Highway Department states that it is common practice for the structural steel to be fabricated early and remain in storage either in plant or at the bridge site until the workmen are ready for same; that the specifications permit payment for steel in

storage pending erection and that such provision for payment was actually taken advantage of by the plaintiff in the amount of $65,457.67 paid May 13, 1932—$11,653.91 paid June 28, 1932—and $18,316.78 paid July 22, 1932, all for steel in storage.

Plaintiff's claim must be determined by the conditions and provisions stated in the contract. Claimant concedes that its contract did not require it to begin work specifically on April 1, 1932, and that there was no guarantee that work could be started on that date. Claimant knew when it received the letter of award, dated December 1, 1931, stating that "This contract is awarded to you upon condition that you will start work on this section immediately, etc.," that the substructure work had to be advanced to certain stages before the actual superstructure construction could take place. The estimate of time made by plaintiff for the fabrication of its steel work was a matter for its own judgment and the fact that the State advanced the claimant a total of $65,457.67 in May, 1932—$11,653.91 in June, 1932—and $18,316.78 in July, 1932, under a section of the specifications (96) indicates that storage and rehandling of structural steel was anticipated at the time the contract was made, and that plaintiff took full advantage of its opoprtunity to obtain such advance payment.

No legal ground existing for an award for *item one* of plaintiff's claim, an award therefor is denied.

PLAINTIFF'S SECOND CAUSE OF ACTION, i. e.—Claim for special items of expense arising by reason of labor troubles in connection with the performance of the contract in question carries with it no legal basis upon which an award could be predicated. Claimant contends that because the Governor of Illinois did not order out a military force to protect the claimant in its work, that the State should be liable for any expense to which claimant was put in hiring armed guards or any additional expenses to which it was put. The Statutes of Illinois provide for a specific liability upon the part of cities in case of strikes and riots, but there is no Statute fixing any legal liability against the State in such matters. In the absence of any such legal liability this court cannot justify an award. Another portion of this item of plaintiff's claim is based upon an understanding which it had that it could place a derrick on the portion of the bridge owned by the City of Peoria, but that at some stage of the construction work it was

ordered by the City of Peoria to remove its derrick from the Peoria side of the bridge and as a result additional truck expense was incurred in handling its material. Under no process of legal reasoning can the State be held responsible for the action of the officials of the City of Peoria. Any award to claimant under *item two* is hereby denied.

PLAINTIFF'S THIRD CLAIM results from a controversy over the method of computing the weights of structural steel, iron and steel castings. It is agreed that the method of determining the weight is not by actual weighing, but such weight is computed according to certain methods of measurements existing in the steel and construction industry. The contract in question was awarded under "Standard Specifications for Road and Bridge Construction" adopted by the Highway Department of Illinois on February 1, 1930. Section 44.4 thereof contains the following:

"The weight paid for shall be the weight given in the contract, or revised by authority of the engineer."

Claimant cites *Section 39.19, Method of Measurement*, which provides:

"The quantities of the various items which constitute the completed and accepted structure will be measured for payment according to the plans and specifications for the several pay items."

Also, *Section 39.20 Basis of Payment:*

"The quantities, measured as provided herein, will be paid for at the contract unit prices for the several pay items constituting the structure and listed in the proposal, which price shall be payment in full for all foundation and substructure work, removal of existing structures, furnishing, preparing, fabricating, transporting, placing, and erecting all materials for the complete structure, for all shop work, painting, and field work, for all labor, equipment, tools, and incidentals, necessary to complete the work as required herein."

Claimant contends that under the specifications and contract, the computed weight for which it was to be paid should have allowed variation for overrun on plates over thirty-six inches in width and on iron or steel castings, and for weight of paint. The method of payment used by the Division of Highways is based on nominal weights without allowance for overrun or weight of paint, and has been used by that Depart-

ment for the past twenty years. The record shows that eleven states out of a total of twenty-five are using the same method as Illinois. Claimant in its introduction of evidence and in its argument refers to other methods of determining weights and refers specifically to the rules of the American Society for Testing Materials, and the American Institute of Steel Construction, Inc.

Claimant submits (Brief p. 21). The sole question presented in claimant's *third cause* is whether or not the methods used by respondent in computing the weights upon which claimant was paid is in accordance with well recognized engineering practice. *Section 9.1* of the *standard specifications* seems, by its general wording, to refer to roadway rather than bridge construction, but if it may be said to pertain also to the latter, then the wording "actual quantities of work * * * shall be measured by the engineer * * * in accordance with well recognized engineering practice" when considered with Section 44.4 of the Specifications gives to the State Engineer discretion in the method and manner of computing the weights of steel and iron. Apparently the State Engineer in this instance followed a rule which had up to that time received approval in many States and one that has been followed in Illinois for twenty years. The fact that the steel manufacturing industry had adopted a different rule, or even that the State of Illinois since that time has changed its rule, would not affect the engineer's right at the time stated, to follow the rule which he did. The Constitution of Illinois provides as follows:

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any * * * contract or after service has been rendered or a contract made, nor authorize the payment of any claim or part thereof hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Sec. 19, Art. IV Constitution of Illinois.

An award for *item 3* is also denied, and plaintiff's claim is hereby dismissed.

(No. 2176—Claimant awarded $180.00.)

WILL A. AKIN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

L. R. STEWART, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award under will be made.* Where only question in dispute is amount of compensation for injury, and evidence shows inability of claimant to work on account thereof, and serious and permanent disfigurement, an award will be made in accordance with the provisions of the Workmen's Compensation Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 3d day of March, A. D. 1933, claimant was employed by respondent as Industrial Superintendent at the Southern Illinois Penitentiary at Menard. The Attorney General concedes that on the last mentioned date claimant was engaged in an extra-hazardous employment within the meaning of the Workmen's Compensation Act; that on said day he sustained an accidental injury which arose out of and in the course of his employment; that notice of accident was given and claim for compensation made as required by law; that claimant's wages were $40.00 per week, and that he had two children under sixteen years of age at the time of the accident.

It is also agreed by counsel for claimant and respondent that medical and hospital services were furnished by the respondent, and that the only question for determination is the nature and extent of claimant's injuries and the amount of compensation to be paid therefor.

The evidence discloses that at the time of the accident claimant was helping to move a load of material in a dump truck. While turning a crank to raise the load for the purpose of dumping it, the truck kicked, and jerked the lever out of claimant's hand in such manner as to strike him on the right side of the head, whereby he sustained injuries to his head from which he still suffers, also a wound on his jaw about four inches in length, and one of his molar teeth was injured so that it had to be removed. Seven stitches were required to

sew up the wound, and claimant now has a permanent and easily noticeable scar about three inches in length, extending from a point just below the mouth, down across the jaw bone and about an inch on to the neck, running downward and outward.

As the result of the accident, Akin claims that he was incapacitated for work for the period of ten weeks, and there is no evidence to the contrary.

Upon a consideration of the evidence we find that claimant is entitled to recover ten (10) weeks' temporary total compensation at the rate of $16.00 per week, and in addition thereto is entitled to twenty (20) weeks' compensation for serious and permanent disfigurement of the face—in all, thirty (30) weeks at $16.00 per week, making a total of $480.00.

Award is therefore entered in favor of the claimant, Will A. Akin, for the sum of Four Hundred Eighty Dollars ($480.00).

(No. 2171—Claim denied.)

HERMAN J. ARNOLD, ADMINISTRATOR OF THE ESTATE OF AMBROSE SULLIVAN, Deceased, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

DOWNING & HELFRICH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—limitations.* Where no compensation has been paid for the injury complained of, demand for same within six months after injury is jurisdictional and is a condition precedent to the right to maintain a proceeding under the Workmen's Compensation Act.

SAME—*same—pleading.* Where motion of State to dismiss is sustained and claimant fails to file amended complaint within thirty days final judgment will be entered dismissing claim under Rule 31 of this court.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For about eight days prior to the 16th day of June, A. D. 1932, Ambrose Sullivan had been employed by respondent in mowing weeds on S. B. I. Routes Nine (9), Three (3) and Ninety-five (95) in McDonough County, under the supervi-

sion of Jesse Walters, Highway Maintenance Superintendent. Sullivan lived about two miles north of Macomb, and was the owner of a team of horses and a mower which he used in his said work. For the first few days of his employment he worked near his home, and drove his team home at the end of the day's work. After the first few days, he was at some considerable distance from his home at quitting time, and on those days he left his team and mower with some farmer who lived near the place where he stopped work, and rode home with Mr. Jesse Walters, the Maintenance Superintendent, and the next morning he would come out with his Maintenance Superintendent to the place where he left his team the night before. The matter or custom of riding back and forth with the Maintenance Superintendent was not a part of the contract, but was a sort of mutual arrangement or understanding between them. The same custom existed with other men who were also employed in mowing weeds. The mowers ordinarily worked nine hours a day, usually commencing at seven o'clock a. m., and quitting at five o'clock p. m. Sometimes they started a little before seven or a little after seven, but they aimed to start work at seven o'clock. Their time commenced when they got on the job. On a wet morning their time commenced when the weeds were dry enough to mow.

On June 15, 1932, Sullivan was about seven miles from his home when he quit work. He left his team and mower with a farmer living about forty rods north of S. B. I. Route 95, and rode home with his Maintenance Superintendent.

The next morning the Maintenance Superintendent in driving out to work met Sullivan about one-half mile from his (Sullivan's) house, and stopped to pick him up. The Maintenance Superintendent was driving a small pick-up truck with a single seat, and there were two men riding in the seat with the driver. Sullivan rode in the back of the truck, which went north on Route 3 to the Junction and then east on Route 95, to a point about seven miles from Macomb where the Maintenance Superintendent stopped the truck so that Sullivan could get out and get his team and mower. Sullivan got out and started across the road to the north. Just then Mr. Walters, the Maintenance Superintendent, called to him and he came back. In this connection Mr. Walters testified:

"It had come a rain the day before and we were in doubts whether it was going to dry enough to go on mowing. After he got out I spoke to him, and I said, 'Mr. Sullivan, you can use your own judgment about when to start.'"

Homer B. Carey, the only other witness who testified as to this conversation, said:

"Mr. Sullivan got out and started across the road and Jess hollered at him and called him back and told him that it was too wet, we wouldn't hitch up for about two hours until it got a little dryer."

After this conversation, Sullivan started back across the road again to the north. Just then one Keith Sapp who was also driving east on said Route 95, approached the State truck, and turned to the left to pass it just as Sullivan was crossing the road the second time. Sapp turned further to the left to avoid an accident, but Sullivan evidently became confused, and ran into the side of Sapp's car, whereby he was thrown to the pavement, and sustained injuries from which he died while being taken to the hospital.

Sullivan left him surviving his wife and four children, two of whom were under sixteen years of age at the time.

Sullivan's earnings were eighty-five cents (85c) per hour for himself, team and mower, of which amount forty cents (40c) was regarded as his for his individual services and the balance for the team and mower. Claimant, as administrator of the estate of said decedent, seeks to recover compensation under the terms and provisions of the Workmen's Compensation Act.

The Attorney General contends that claimant is not entitled to recover for the following reasons:

1. No claim for compensation was made within six months after the accident, as required by Section 24 of the Workmen's Compensation Act.

2. The accident in question did not arise out of the employment of said decedent.

We have examined the evidence carefully and do not find any evidence whatsoever which bears in any way upon the question as to whether any claim for compensation was made.

The making of claim for compensation within six months after the accident, in accordance with the requirements of Section 24 of the Workmen's Compensation Act, is jurisdictional, and is a condition precedent to the right to main-

tain a proceeding under the Compensation Act. *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386; *Inland Rubber Co.* vs. *Ind. Comm.*, 309 Ill. 43; *Bushnell* vs. *Ind. Comm.*, 276 Ill. 262; *Haiselden* vs. *Ind. Board*, 275 Ill. 114.

The making of claim for compensation being a condition precedent to the right to recover, we have no jurisdiction to proceed further with the case. It therefore becomes unnecessary to consider the question as to whether the accident in question arose out of and in the course of deceedent's employment.

For the reason above set forth, award must be denied. Under the rules the claimant has thirty days in which to file an amended complaint. Unless an amended complaint stating a cause of action against the respondent is filed within thirty days from the date of the entry of this order, final judgment will be entered dismissing the claim.

(No. 2433—Claimant awarded $82.50.)

AUDREA DU VAL LABORATORIES, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

HELMER HANSEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid under mistake of fact—may be recovered.* Where it clearly appears that claimant was assessed and paid franchise tax in excess of amount lawfully due therefor, due to error of Secretary of State in computing same, an award for such excess may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant submits its claim under a statement that there is no dispute concerning the facts in the present case, the matter for determination by the court being the question of whether the Secretary of State may for the purpose of computing the Annual Franchise Tax of an Illinois corporation disregard the annual reports filed by such corporation.

The claim was filed on July 13, 1934, for One Hundred Dollars as refund of a franchise tax which claimant claims to have paid in excess of the amount properly due. Claimant

alleges that it was incorporated under the laws of Illinois on October 23, 1928, with an *authorized* capital stock of Twenty-five Thousand Dollars ($25,000.00); that during that year Two Thousand Dollars ($2,000.00) worth of such capital stock was issued, which amount remained outstanding down to and including September 5, 1933, at which time four and one-half (4½) shares were surrendered for cancellation and that the capital stock remaining thereafter has been One Thousand Five Hundred Fifty Dollars ($1,550.00). That on or about October 10, 1929, claimant amended its charter by increasing the capitalization to Seventy-five Thousand Dollars ($75,000.00) consisting of Five Hundred (500) shares of preferred stock of the par value of One Hundred Dollars ($100.00) per share and Five Thousand (5,000) shares of common stock of no par value; that no part of such increased capital stock was ever issued; that during the years 1930, 1931 and 1932 claimant filed with the Secretary of State of Illinois, as required by law, its annual report and in answer to interrogatory No. 10 in each of said annual reports, claimant offered to pay a franchise tax based upon its entire issued capitalization of Two Thousand Dollars ($2,000.00); that upon each of said reports being filed, the Secretary of State mailed to claimant a notice in writing that there was due the State for the year next ensuing commencing respectively on July 1, 1930, 1931 and 1932 the sum of Thirty-seven and 50 100 Dollars ($37.50) with the statement that such franchise tax was based upon all of claimant's *authorized* capital stock of Seventy-five Thousand Dollars ($75,000.00), although the entire capital that had been issued, at no time exceeded Two Thousand Dollars ($2,000.00); that the franchise tax for each of the said three years upon a Two Thousand Dollars ($2,000.00) capital would have been *Ten Dollars* ($10.00) instead of Thirty-seven and 50/100 Dollars ($37.50); that upon receipt of such notices for said years claimant paid Thirty-seven and 50/100 Dollars ($37.50) on July 25, 1930—Forty-one and 25/100 Dollars ($41.25), (including penalty of 10%) on June 30, 1931—and Thirty-seven and 50/100 Dollars ($37.50) on June 28, 1932. Claimant avers that said payments were made in reliance upon the accuracy of said notices, and to avoid the penalties for failure to pay such franchise tax when due. Apparently the first objection that

was made by plaintiff to such payment was in a letter addressed to the Secretary of State on August 8, 1933. Claimant in its argument contends that as each of the annual reports showed that the amount of stock actually issued was at no time in excess of $2,000.00, and inasmuch as said reports were made upon the forms prescribed and furnished by the Secretary of State, and were prepared and filed for the specific purpose of informing the latter of the amount of capital stock then issued, upon which the assessment of an Annual Franchise Tax for the ensuing fiscal year should be based, that it did not lie within the province of the Secretary of State to adopt, as the basis for such annual tax, other records or data in conflict therewith. Claimant contends that the Secretary of State made a mistake and computed the franchise tax on an erroneous basis and that inasmuch as he did not have the power to assess a tax in excess of Ten Dollars for each of said years, that a refund should be allowed in the sum of Eighty-five and 25/100 Dollars ($85.25).

The reason for the assessment, on the basis stated, is clearly apparent. The Secretary of State had before him at the time of the assessment, the amendment voted by claimant increasing its capital stock,—the resolution whereof recited that the additional Seventy-five Thousand Dollars ($75,000) worth of stock was *to be issued at once* and paid in cash. This resolution and amendment were made on the 28th day of September, A. D., 1929.

If claimant recovers it must be on the basis of a "mutual mistake of fact." The Corporation Act of Illinois provides:

"The Secretary of State shall from the Annual Report filed assess a tax at the rates herein prescribed against each corporation.

"He shall from the best available information also assess such tax on all corporations organized or admitted between January 15th and March 1st."

The Secretary of State should have assessed the tax from the annual report filed by claimant. It is true the amendment to their charter, stating an immediate proposed increase, would well put the Secretary of State on inquiry, but would not in itself justify assessing a franchise tax on a basis other than that indicated by the annual report.

The original certificate of incorporation showed a proposed issue of stock in the amount of Two Thousand Dollars,

($2,000.00) and the latter amount is the one that appears in the annual reports as the amount of issued stock.

"Where there is no controversy as to the facts and it appears that a franchise tax was erroneously paid by reason of a mistake in computation an award will be allowed."

6 C. C. R. 206.
7 C. C. R. 6.

Claimant filed a correct report stating the amount of stock issued but the Secretary of State erroneously submitted a statement for fees, not based thereon. Claimant apparently accepted the statement as being based on the correct figures in the report. A mutual mistake having occurred, a refund is due claimant and an award is therefore made in the sum of $27.50 for the excess charge made for each of the years of 1930, 1931 and 1932, making a total of Eighty-two and 50/100 Dollars ($82.50).

(No. 2368—Claim denied.)

CARLIN FRARY GIBBS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

AUGUST C. MEYER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injury must arise out of and in the course of employment.* To recover compensation under Workmen's Compensation Act, injury complained of must arise out of and in the course of the employment of claimant.

SAME—*claimant under, part time teacher and also student, University of Illinois.* Where claimant, employed as part time teacher at University of Illinois and when not teaching, privileged to do as he saw fit, or might be required of student doing work toward a degree, is injured while conducting an experiment in the course of his studies, and not while acting as such teacher, such injury does not arise out of and in the course of his employment and an award for compensation will be denied.

MR. CHIEF JUSTICE HOLLEBICH delivered the opinion of the court:

For some time prior to and on the 15th day of May, A. D. 1933, claimant was acting as assistant in chemistry in the Department of Chemistry in the University of Illinois, pursu-

ant to employment by the Board of Trustees of such University. On the date last mentioned, about nine o'clock p. m., while assembling laboratory apparatus and attaching a rubber tube to a glass arm of a distilling flask in connection with the performing of an experiment with chemicals of various kinds, the glass tube broke and one of the fragments cut the little finger of claimant's left hand, severing a tendon, which retracted, necessitating an operation, and resulting in the permanent loss of part of the use of such little finger.

It seems to have been taken for granted both by claimant and respondent that the respondent was engaged in a hazardous business or enterprise within the meaning of Paragraph seven (7) of Section three (3) of the Workmen's Compensation Act, which provides in substance that the provisions of the Act shall apply automatically to all employers and all their employees engaged in any department of any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities.

Although such assumption may be justified by facts within the knowledge of counsel for the respective parties, yet the present state of the record does not justify the same.

The Attorney General takes the position that the accident in question did not arise out of and in the course of claimant's employment, and if he is correct in such contention, it will be decisive of the case, as under such circumstances claimant will not be entitled to an award even though he was engaged in an extra-hazardous enterprise at the time of the accident. We will therefore consider the question raised by the Attorney General.

The question as to when an accident arises out of and in the course of the employment has been considered by our Supreme Court in many cases, and the words "arising out of" and the words "in the course of" now have a fixed and definite meaning. In the case of *Board of Education* vs. *Industrial Commission*, 321 Ill. 23, the court said:

"It was incumbent on the defendants in error to prove that the injury to their husband and father arose 'out of and in the course of' his employment. These words have often been discussed and defined by this court, and it is now well established that the words 'out of' point to the origin of the cause of the accident, and that the words 'in the course of' point to

the time, place and circumstances under which the accident occurred. These words are used conjunctively, and there can be no recovery in this case unless the injury occurred in the course of the employment and also arose out of the employment. The full meaning of this statement is, in substance, that the accident must result from a risk incidental to the employment and while the employee is doing that which he is reasonably required to do within the time of his employment and at the place where he may be reasonably expected to be while discharging the duties of his employment. *Dietzen Co.* vs. *Ind. Board*, 279 Ill. 11; *Morris & Co.* vs. *Ind. Com.*, 295 id. 49; *Mueller Construction Co.* vs. *Ind. Board*, 283 Ill. 148; *Vincennes Bridge Co.* vs. *Ind. Com.*, 351 Ill. 449."

In the case of *Edmunds* vs. *Ind. Com.*, 350 Ill. 197, the court said:

"Employees are not in the course of their employment even though they may be in the general area of it, if they are not engaged in the particular duties for which they were employed or some work incidental thereto."

In the case of *Cruzan* vs. *Ind. Com.*, 350 Ill. 407, the court said:

"It is not enough that the injured person may be present at the place of the accident because of his work unless the injury is the result of some risk of the employment. * * * * * * One claiming compensation under the Compensation Act for the death of an employee must prove by direct and positive evidence or by evidence from which the inference can fairly and reasonably be drawn, that death was caused by an accidental injury which occurred not only in the course of the employment of the deceased but also arose out of such employment."

However, it is not always a simple matter to apply the definitions given to the facts in the particular case.

In this case it appears from the evidence that the claimant's position was what is known as a teaching fellowship; that teaching fellows in positions similar to that of the claimant are employed to teach part time in order to make it easier for them to carry on advanced work for which they have shown special aptitude; that an assistant is appointed primarily for his teaching ability, but as a secondary requirement he must be capable of doing competent graduate work toward an advanced degree; that the acceptance agreement between claimant and the Board of Trustees of the University under which claimant was working at the time of the accident in question recites as follows:

"That the Board of Trustees of the University of Illinois has appointed you to the position of assistant in chemistry on one-half time for the second semester of the academic year 1932-33 at a cash compensation of three

hundred dollars ($300) (with exemption from tuition incidental, and laboratory fees in the Graduate School, except matriculation or diploma fees)."

The evidence further shows that no assistant is appointed unless he is an active student for an advanced degree, which in turn requires research work involving laboratory experimentation; that if the claimant were to discontinue his research work or it was to prove unsatisfactory, he would not be retained after the expiration of his existing contract.

Dr. C. S. Marvel, Professor of Chemistry at the University and claimant's research director, was inclined to regard the work being done by the claimant at the time of the accident as part of his duties, while Dr. Roger Adams, head of the Chemistry Department of the University, was inclined to the opposite view.

The evidence shows that claimant's teaching hours were from eight to ten, and ten to twelve m., and from five to six p. m.; that on the date in question he returned to Room 214B in the Chemical Building, about seven-thirty p. m., to do certain research work; that the work upon which he was engaged at the time of the accident in question was in connection with his work for his doctor's thesis; that he received credit toward his graduate degree for such work; that he expects to receive his degree in February, 1935.

Claimant testified that a fair characterization of the arrangement between the Board of Trustees and himself is as follows: That while at the University, registered as a graduate student doing work towards his doctor's degree, the University during the second semester of the academic year 1932-33 employed him for half time at the stated compensation, the other half of the time being his own to do as he saw fit or as might be required of a student doing work towards a doctor's degree.

Although the matter is not entirely free from doubt, we are inclined to the opinion from all the evidence that at the time of the accident the claimant was not engaged in the performance of any of the duties required of him by his contract of employment or in the doing of anything which was incidental to the performance of such duties. He was employed as an instructional assistant to do teaching work, and the graduate work was no part of the work for which he was employed and paid—but he was required by the rules of the Chemical Department to do such research work if he was to

remain in the Graduate School and pursue his studies therein.

The evidence shows that the work upon which the claimant was engaged at the time of the accident was not teaching work, but was his own individual work done for the purpose of obtaining his degree, and incidentally for the purpose of enabling him to remain in the Graduate School, but was not a part of the duties of his employment within the terms of his contract.

We conclude, therefore, that the accident to the claimant did not arise out of and in the course of his employment and award must therefore be denied.

Award denied. Case dismissed.

(No. 2345—Claimant awarded $2,868.24.)

THE EDWARD GILLEN DOCK, DREDGE AND CONSTRUCTION COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

CLARENCE W. HEYL, for claimant.

OTTO KERNER, Attorney General, for respondent.

CONTRACTS—*damages—stipulation—when award may be made on.* Where it appears from stipulation entered into between the parties, that claimant, while engaged in the performance of a contract for the construction of a State highway entered upon land at the direction of said State Department, title to which, through no fault and without knowledge of claimant had not been acquired by State, as a result of which owner of said land sued claimant and recovered judgment for such entering, an award may be made upon such stipulation for amount of said judgment and reasonable attorney's fees and costs in the defense of such suit.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case comes to the court on a complete stipulation of facts, signed not only by counsel for the respective parties, but also by the Assistant Director and Acting Director of the Department of Public Works and Buildings of the State of Illinois, and approved by the Chief Engineer of the Division of Highways.

It appears that on October 21, 1933, the Edward Gillen Dock, Dredge and Construction Company, a corporation, entered into a stipulation with the Department of Public Works and Buildings wherein it was agreed that it should file its suit

in the Court of Claims of this State and that said court may enter a judgment in favor of the plaintiff based upon the facts and agreements set forth in that stipulation. The original of the stipulation was attached to the declaration of the plaintiff filed in this court.

It was further agreed that upon a hearing this court should award the plaintiff a judgment in the sum of Twenty-eight Hundred Sixty eight Dollars and Twenty-four Cents ($2,868.24). The original stipulation is made a part of the declaration.

Plaintiff averred that its claim is based upon said stipulation and agreement and that said stipulation and agreement was duly executed by the Assistant Director and Acting Director of the Department of Public Works and Buildings of the State of Illinois, approved by the Chief Highway Engineer of the Division of Highways of the State of Illinois, and further approved by the Attorney General of the State of Illinois. The facts are as follows:

The General Assembly, prior to July 26, 1926, appropriated funds and authorized the construction of a road in Fulton County, Illinois, to be known and designated as "Copperas Creek Lock Road," Section one being a road extending from the Village of Banner to Copperas Creek Locks on the Illinois River in Fulton County. The original contract was let by the Department of Public Works and Buildings, Division of Highways, of the State of Illinois, to one Charles E. Bradbury, of Canton, Illinois, as contractor. Prior to the time of the letting of this contract, the said Department took a certain release of right of way and dedication of the lands claimed to have been owned by Dan W. Voorhees, Sr. The description is set out in a certain stipulation contained in the file. The release of right of way and dedication was signed by Joseph A. Weil, administrator of the estate of Dan W. Voorhees, Sr., deceased, and not by any of the heirs at law of the said Dan W. Voorhees, Sr., and consequently had no legal force and effect. It does not appear that the Department of Public Works and Buildings of this State ever secured an opinion from the Attorney General upon the title of this land, neither does it appear just why this Department assumed to act without such an opinion in a matter involving important legal questions, but it appears that the Department of Public Works and

Buildings, Division of Highways, of the State of Illinois, went upon the said lands upon the assumption that the release and dedication above referred to gave it the right of way to take the lands for the purpose of the construction of a highway thereon.

It appears from the stipulation that Charles E. Bradbury, the original contractor, defaulted in the contract and was unable to complete the same and the surety on his bond, the New Jersey Fidelity & Plate Glass Insurance Company, of Newark, New Jersey, a corporation, went upon said premises for the purpose of attempting to complete said construction and on April 11, 1929, the said bonding company, then bound to complete said road for and on behalf of said Charles E. Bradbury as the original contractor, entered into a written contract with the Edward Gillen Dock, Dredge and Construction Company, a corporation, of Beardstown, Illinois, the original of which said contract is attached to the stipulation, and made a part thereof.

After the making of the contract, the last mentioned company was directed by the then officers and engineers of the Department of Public Works and Buildings, Division of Highways, of the State of Illinois, to go upon said premises and complete the original contract and this company did, thereupon, go upon said premises described in the contract and continue the prosecution of the work under the contract until the same was completed. The Department of Public Works and Buildings accepted the work and the Edward Gillen Dock, Dredge and Construction Company was paid for the performance of the contract after the approval of the work by the proper officers of the Division of Highways.

It further appears from the stipulation that some time during the progress of the work, the construction company was advised by someone that the State did not have title to that portion of the road being constructed over the premises of Dan W. Voorhees, Sr., deceased, and thereupon the construction company took the matter up with the Division of Highways and reported to it this information, and the State Department, by its then duly authorized officers, directed the construction company to proceed with the work and to pay no attention to the complaints that were made as to the sufficiency of the State's title.

Thereupon the Edward Gillen Dock, Dredge and Construction Company did proceed with the work and completed the same in good faith under the direction of the Division of Highways upon the premises as surveyed and staked out by the Department of the Division of Highways.

About the time the work was completed and before the construction company had removed its equipment, it was duly served with a summons in a case brought in the Circuit Court of Fulton County, Illinois, to the May, 1930, Term, by one B. M. Chiperfield, as plaintiff, being Law No. 22696, in which the plaintiff claimed damage in the sum of Five Thousand Dollars ($5,000.00), for trespass to real estate, charging that the Edward Gillen Dock, Dredge and Construction Company, with force and arms broke and entered the premises of the plaintiff and fell, cut and destroyed certain trees and saplings, and had excavated in various places upon said premises and had thrown earth upon other portions of the premises and deprived the plaintiff of the use, occupancy and enjoyment of the premises. The Chiperfield premises were adjacent to the premises owned by the estate of Dan W. Voorhees, Sr., and upon the same date another suit was commenced against the construction company on behalf of the owners of the Voorhees lands, the description of which is stipulated and contained in the file, and against the Edward Gillen Dock, Dredge and Construction Company, and known as Law No. 22697. The damages in this latter case, however, were claimed to be Ten Thousand Dollars ($10,000.00).

The allegations of the latter *declarations* were similar to those of the Chiperfield case and in addition thereto the destruction of one thousand trees and saplings, the property of the said plaintiff, growing upon said premises, were charged.

The Edward Gillen Dock, Dredge and Construction Company employed Clarence W. Heyl as its attorney to look after the defense of these cases and he prepared and filed the necessary pleadings and did the necessary preliminary work for a trial of these cases which included numerous conferences with the State Highway officials, an investigation as to the title of the lands in question, examination of numerous witnesses and so forth, and making several trips from his office in the City of Peoria to Springfield and to the situs of the construction work.

The stipulation filed herein on behalf of all the parties goes into considerable detail. The Chiperfield case was finally settled for the sum of Five Hundred Dollars ($500.00) and the Voorhees case was finally settled for the sum of Two Thousand Dollars ($2,000.00).

It fairly appears from the stipulated facts that the Edward Gillen Dock, Dredge and Construction Company were lulled into the belief that they had a perfect legal right to proceed to carry out the provisions of their contract for the construction of a road upon the premises that the State had no right to enter or build a road thereon.

And it further appears that this construction company became liable for the reasonable attorneys fees in the defense of their actions. The stipulation sets forth that the Chiperfield case was settled for Five Hundred Dollars ($500.00), proper releases taken and the money paid by the Highway Department.

It further appears from this stipulation that the sum of Two Thousand Dollars ($2,000.00) was a reasonable amount to pay for the Voorhees land.

Clarence W. Heyl has filed an itemized account of his attorneys fees and his expenses and costs expended, and it has been stipulated that a reasonable and customary charge as attorneys fees for the services rendered in these cases to the construction company is the sum of Eight Hundred Dollars ($800.00), and to this is added for telephone and telegraph charges, traveling expenses and incidentals in connection with the litigation, the sum of Fifty-three Dollars and Twenty-four Cents ($53.24), and further sum of $15.00 court costs.

We therefore recommend that the Legislature make an appropriation to the Edward Gillen Dock, Dredge and Construction Company, a corporation, for the sum of Two Thousand Dollars ($2,000.00), to pay a certain judgment rendered against it in the Circuit Court of Fulton County, in Law Case No. 22697, it having been stipulated that no interest should be charged upon this judgment for a period of two years from July 1, 1933; and the further sum of Eight Hundred Sixty-eight Dollars and Twenty-four Cents ($868.24), as attorneys fees and costs and that this money be paid to the said construction company when proper deed of conveyance, conveying the premises which is the subject of this controversy, to

the State of Illinois, be delivered to the Attorney General for his approval.

(No. 2498—Claim Denied.)

H. C. HUSSMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

H. C. HUSSMAN, Pro Se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

BAILMENTS—*use of bailor—loss of bailed property.* Where bailment is for sole benefit of bailor, the bailee is only liable for bailed property when he is guilty of gross negligence.

PROPERTY DAMAGE—*negligence of State employees—State not liable for.* The State is not liable for the negligence of the employees of the State arsenal.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

This case is submitted upon a stipulation of facts from which it appears that for some time prior to the 18th day of March, A. D. 1934, claimant was a CWA worker assigned to duty as a carpenter at the Illinois State Arsenal, at Springfield, under the direction of the custodian of said building, to assist in the repair work then being done thereon. Claimant commenced work on December 19, 1933, and continued such work until the destruction of the building by fire on February 18, 1934. Claimant furnished his own tools which, during the course of the work, were kept in his own chest in a room provided with a lock and key, which room was furnished by the custodian of the building for that purpose, for the convenience of the claimant and other workers.

A fire occurred in said building between eleven o'clock a. m., and one o'clock p. m., on Sunday, February 18, 1934, the origin of which does not appear from the stipulation, and the chest of tools belonging to the claimant, together with other tools in said room, were destroyed or rendered of no value, as the result of the fire.

Claimant seeks to recover the value of his tools thus destroyed and has filed his claim herein for the sum of $122.50.

From the facts contained in the stipulation, it appears that the leaving of his tools in the Armory by the claimant was for his own convenience and without charge, and therefor constituted a bailment for the sole benefit of the bailor.

Under the ordinary law of bailments of this class, the bailee is liable where the destruction of the property bailed is the result of gross negligence on his part. In this case, however, where the State is bailee a different rule applies. In the conduct and maintenance of the State Arsenal, the State is engaged in a governmental function and the rule has been repeatedly announced in this and other courts, that in the exercise of a governmental function the State is not liable for the negligence of its servants and agents in the absence of a Statute making it so liable. *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; *Chumbler* vs. *State*, 6 C. C. R. 138; *Braun* vs. *State*, 6 C. C. R. 104; *Bucholz* vs. *State*, 7 C. C. R. 241.

Consequently there can be no liability in this case, even if there was any evidence to show that the fire which destroyed the articles bailed was the result of gross negligence on the part of the servants and agents of the respondent.

Award must therefore be denied.

Award denied. Case dismissed.

(No. 2488—Claimant awarded $156.64.)

KLEIN & COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

THOMAS ROSENBERG, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*payment under mistake of fact—may be recovered.* Where it is shown that claimant paid franchise tax in amount as directed by Secretary of State, which amount was in excess of that lawfully due, owing to error of Secretary of State in computing amount of same, an award for refund of such excess may be made.

SAME—*same—limitations.* A claim for refund of franchise tax, accrues on payment of same and will be barred by Statute of Limitations unless made within five years from date of such payment.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover the sum of Two Hundred Thirty and 36/100 Dollars ($230.36) for franchise tax alleged to have been erroneously paid to the State for the years 1928 to 1933 inclusive. A stipulation of fact has been entered into between claimant and respondent; that claimant filed its annual reports for the years 1927 to 1933 inclusive; that such annual reports except for the year 1931 gave the issued capital stock as follows:

Common	$200,000.00
Preferred	26,275.00

That its annual report for 1931 gives the issued stock as follows:

Common	$200,000.00
Preferred	23,225.00

which is an error in the statement of preferred stock, which item should have been in the amount of $26,275.00. The stipulation of fact further shows that claimant received statements from the Secretary of State each year calling for the payment of One Hundred Fifty Dollars ($150.00) based on the figure of Three Hundred Thousand Dollars ($300,000.00) *authorized* capital stock; that said amount was paid by mistake and that claimant, in fact, has been over-charged the following amounts:

1928	$36.86	1931	$40.51
1929	36.86	1932	42.38
1930	36.86	1933	36.86

Claimant contends that only recently did it come to its attention that it had been making such overpayments.

Under the provisions of the 1919 Corporation Act the Secretary of State should have assessed the tax on the amount of *issued stock* shown by the *Annual Reports* filed by claimant. The Secretary of State notified claimant the amounts which were claimed to be due, contrary to the reports so filed and, no doubt, the claimant accepted such information as authorative computations of the amount of tax due. In a report dated September 5, 1934, from the Corporation Department of the Secretary of State's Office it is stated:

"According to our computation it would appear the Company would not be entitled to refunds of more than the following amounts:

1927	None	1931	$40.54
1928	$36.86	1932	42.38
1929	36.86	1933	36.86"
1930	36.86		

No award can properly be allowed by the court for the items above that were paid prior to 1930, because of the Five-year Limitation Statute of this court. The limitation period would date from the time the right of action accrued, which was in this case the day the tax was paid. The only items within such five-year period are those paid in 1930, 1931, 1932 and 1933.

As the tax during those years was not assessed in accordance with the annual report filed by plaintiff, but was mistakenly computed by the Secretary of State on another basis and the plaintiff thereupon paid the amount requested under an apparent mistaken idea that the tax was figured upon the amount of stock stated in the annual report as having been issued, a refund is due the claimant for the excess amount paid.

An award is therefore made to claimant for such excess on the following items, to-wit:

$36.86 paid in 1930
40.54 paid in 1931
42.38 paid in 1932
36.86 paid in 1933

making a total award of $156.64.

(No. 2477—Claim denied.)

JOSEPH MARTIN AND HAROLD KELLERMAN, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

NELSON B. LAYMAN, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage—negligence of State Highway Police Officer.* In the maintenance of its State police, the State is engaged in a governmental function and is not liable under the doctrine of respondeat superior for their negligence.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The complaint herein alleges in substance that on June 4, 1934, about 7:40 p. m., the claimant, Joseph Martin, was driving his team and wagon in an easterly direction on S. B. I. Route No. 152, at a point about one and one-quarter miles east of Pyatt Station in Perry County; that the claimant, Harold Kellerman, was an employee of the claimant, Joseph Martin, and was riding as a passenger in said wagon; that the claimants were in the exercise of all due care and caution and that said wagon was being driven on the right of the center of the concrete roadway; that at that time one Tangman who was then and there in the employ of the respondent as a maintenance police patrolman, was driving a motorcycle of the defendant on said road and was travelling in the same direction as claimants; that said Tangman was traveling at a high rate of speed and negligently drove said motorcycle against the rear end of the wagon in which the claimants were riding, whereby said claimants were thrown from said wagon to the ground, the wagon was destroyed, the horses injured, and claimants each sustained personal injuries and lost work as the result thereof; for all of which the claimant, Joseph Martin, seeks to recover the sum of $341.00, and the claimant, Harold Kellerman, the sum of $21.00.

The Attorney General has filed a motion to dismiss the case for the reason that there is no liability on the part of the State under the facts alleged in the complaint.

The complaint apparently is drawn upon the theory that the State is liable the same as a private corporation would be for the negligence of its servants and agents. Such, however, is not the law. We have uniformly held that in the maintenance of its hard-surfaced roads, and in the maintenance of its State police, the State is engaged in a governmental function. We have also held in numerous cases that in the exercise of its governmental functions, the State is not liable under the doctrine of *respondeat superior* for the negligence of its servants and agents in the absence of a Statute making it so liable. *Morrissey* vs. *State*, 2 C. C. R. 254; *Tuttle* vs.

State, 5 C. C. R. 3; *Peterson* vs. *State*, 6 C. C. R. 77; *Chumbler* vs. *State*, 6 C. C. R. 138; *Braun* vs. *State*, 6 C. C. R. 104; *Derby* vs. *State*, 7 C. C. R. 145; *Bucholz* vs. *State*, 7 C. C. R. 241.

This rule is supported by numerous decisions of the Supreme Court of this State. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

There being no legal liability on the part of the State if the State were suable, this court has no jurisdiction to enter an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January term, 1934, of this court.

The motion of the Attorney General will therefore be sustained and the case dismissed.

(No. 2086—Claim denied.)

WILLIAM STACK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

THEODORE D. KAHN AND THEODORE A. LENTIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CIVIL SERVICE—*employee's claim for compensation.* Where one files claim for compensation as a civil service employee it is incumbent upon him to establish his right to the compensation claimed, and it is not sufficient to show that he performed labor for the State in a civil service classification, but he must establish his right to perform such services under that classification, either as a temporary appointee, under a permit, when there is no eligible list, or as a regular appointee from the eligible list.

SAME—*temporary appointment—duration of.* A temporary appointment to a civil service position continues in force, only until an examination for that particular classification is held and a regular appointment made under the provisions of the Civil Service Act.

CIVIL SERVICE EMPLOYEE—*recovery of compensation—condition precedent to.* Claimant for compensation for services rendered as a civil service em-

ployee must show as a condition precedent to his right to recover, if he is not a regular appointee, that there was no eligible list for his classification during the time for which he claims compensation.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on March 9, 1933, in which he asks for an award in the amount of $1,302.00 for work done by him as a painter at the State Hospital for the Insane at Dunning, Illinois, from January 1, 1932, to June 10, 1932.

All of the facts which are before the court have been stipulated by the parties. There are numerous facts in connection with the issues involved, which should have been presented to the court for a proper determination of the case, which have not been stipulated, or which appear by inference only, and not by way of direct averment.

From the facts stipulated and the inferences which may reasonably be drawn therefrom, it appears that claimant was appointed as a painter at the State Hospital at Dunning on May 15, 1930, by Dr. Daniel B. Coffey, managing officer of such hospital, and continued in such employment until June 10, 1932, at which time he resigned voluntarily, but subject to the question of the legality of such employment from January 1, 1932, to July 10, 1932; that he performed his work at all times in a satisfactory manner; that he received the compensation due him for his services from May 15, 1930, to December 31, 1931; that he has received no compensation for his services from January 1, 1932, to June 10, 1932; that he now claims compensation for forty-one (41) days between January 1, 1932, and March 15, 1932, at $14.00 per day, and for sixty-one (61) days between March 15, 1932, and June 10, 1932, at $11.28 per day; that the position held by the claimant was a civil service position; that claimant's appointment on May 15, 1930, was a temporary appointment made with the authority of the Civil Service Commission; that some time prior to January 1, 1932, a civil service examination was held for the classification of a painter; that claimant had notice or knowledge of such examination but failed to take the same; that thereafter claimant filed an affidavit to the effect that he was prevented from

taking such examination by sickness; that on January 8, 1932, the Civil Service Commission notified Dr. Coffey, managing officer of said Dunning Hospital, that claimant could not be continued in the classification of a painter, inasmuch as such Commission had an eligible list in that classification; that regardless of such notification claimant was continued on the payroll until the time of his resignation on June 10, 1932.

Under the Civil Service Act, when there is no eligible list, the appointing officer may, with the authority of the Commission, make temporary appointments to remain in force only until regular appointments under the provisions of the Act can be made. Hurd's Revised Statutes, 1933, Chapter 126A, Sec. 10. Consequently, when claimant was appointed "on a permit," as stated in a letter of the Civil Service Commission relative thereto, he knew that his appointment was temporary, and that it could remain in force only until an examination for that classification was held, and a regular appointment made under the provisions of the Civil Service Act. Claimant also knew that prior to January 1, 1932, an examination was being held for his classification, as he sought to excuse his absence therefrom by an affidavit to the effect that he was sick at that time. There is nothing whatsoever in the record to show that claimant at any time took the civil service examination for his classification.

It is incumbent on the claimant to establish his right to the compensation claimed. Being a civil service employee he must establish his right under the terms and provisions of the Civil Service Act. It is not sufficient in such a case, merely to show that he performed labor for the State in a civil service classification. He must establish his right to perform such services under that classification, either as a temporary appointee "under a permit" when there is no eligible list, or as regular appointee from the eligible list. Inasmuch as claimant was appointed temporarily on a permit, in May, 1930; and inasmuch as a civil service examination for his classification was held prior to January 1, 1932, claimant was required to show, as a condition precedent to his right to recover, either that there still was no eligible list for his classification during the time for which he claims compensation, or that he was regularly appointed from the civil service list. This follows

of necessity from the requirements of Section three (3) of the Civil Service Act to the effect that "no appointments to any of such offices or places shall be made except under and according to the provisions of this Act and of the rules hereinafter mentioned." Such requirements of the Civil Service Act must be held to be mandatory, otherwise such Act would be entirely ineffective.

Claimant has failed to establish his right to recover under the terms and provisions of the Civil Service Act, and an award must therefore be denied.

Award denied. Case dismissed.

(No. 2331—Claimant awarded $1,495.00.)

EVERT POFF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.

GERALD G. GINNAVEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—claim for governed by Military and Naval Code.* Where it is stipulated that member of Illinois National Guard is injured while in the performance of his duties, claim for financial help or assistance is authorized and governed by Section 11 of Article 16 of the Military and Naval Code, and an award may be made thereunder, in such amount as the merits of the claim may demand.

MILITARY AND NAVAL CODE—*Workmen's Compensation Act—resort to terms of in determining amount of, under Section 11 of Article 16.* The court, while not required to under any law, may resort to provisions of Workmen's Compensation Act in determining amount of award in claims under Section 11 of Article 16 of Military and Naval Code.

SAME—*same.* Where award is made for personal injury under provisions of Section 11 of Article 16 of Military and Naval Code, for partial loss of use of right leg, using provisions of Workmen's Compensation as basis in determining amount, same will include and be for partial loss of use of right ankle.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant and the Attorney General have stipulated the following facts in this case, to wit:

"That Evert Poff resides at 901 North Third Street, Springfield, Sangamon County, Illinois. That on the 21st day of February, A. D. 1931, that the said Evert Poff was a private in the machine gun troop of the 106th Cavalry, Illinois National Guard, and was then and there under orders of his superior officer of said National Guard attending a drill at the State Fair Grounds north of the City of Springfield, Illinois, and during said drill was riding a cavalry horse and while in the line of duty his horse stumbled, slipped or fell, pinning and crushing his right foot under the body of said horse; that as a direct result thereof the said Evert Poff was injured, in and about his foot and leg; that pursuant to orders he was sent to Dr. G. B. Lutyens for medical attention and later after receiving three months' treatments from said physician was treated by Dr. Percy Taylor for a period of two months; that later under direction of his superior officer said Evert Poff was sent to Dr. J. I. Ford, for treatment; and later under the direction of his superior officer was examined and treated by Dr. G. D. Lockie; that on November 10th, A. D. 1931, said claimant was ordered to Hines Hospital at Chicago, for examination by the State Medical Board; that on December, A. D. 1931, said claimant was ordered to St. John's Hospital, Springfield, Illinois, his right foot placed in a plaster cast for a period of two weeks; that said claimant received further medical treatment from Dr. G. D. Lockie, in August, 1933, and was later sent to Illinois Research Hospital in Chicago for examination and treatment where he remained for a period of nine days; later under direction of his superior officer he was sent to Dr. J. I. Ford, who made an arch support and brace for said right foot which claimant is now wearing. It is further stipulated that said claimant was paid by the State of Illinois the sum of Sixty Dollars ($60.00) per month from the 21st day of February, A. D. 1931, to the 21st day of October, A. D. 1931."

It is further stipulated "that the only questions in dispute are the nature and extent of the disability, if any, or if his present condition and disability was aggravated by the injury and if claimant has a permanent disability, what amount should be allowed as just compensation for said disability."

If claimant is entitled to an award, it must be based upon Section Eleven (11) of Article Sixteen (16) of the Military and Naval Code of this State, which provides as follows:

"In every case where an officer or enlisted man of the 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 or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand. Pending action of the Court of Claims the Commander-in-Chief is authorized to relieve emergency needs upon recommendation of a board of three officers, one of whom shall be an officer of the medical department."

The Medical Examining Board which examined claimant at Hines Hospital on November 10, 1931 found that trauma

was the initial cause of claimant's condition; that such condition was complicated by a secondary infectious process of the Achilles tendon to a moderate degree; that claimant's throat showed evidence of infected tonsils, and recommended that such tonsils be removed for the purpose of attempting to eliminate the cause of infection;—which recommendations were thereafter complied with, as appears from the stipulation.

It appears from the evidence that the original injury was not in itself serious but an arthritic condition developed thereafter, which arthritis was superinduced by the injury.

In July, 1931 Dr. Ford of Springfield, at the request of the Adjutant General's office, prepared an arch support for claimant's foot, which he wore until December, 1933, at which time Dr. Ford made another arch support which claimant was still wearing at the time of the hearing herein. Until the time the first arch support was made for claimant, he used crutches all the time.

Claimant attended the drills of his Company during the time he was laid up and went to Taylorville with the Company in February, 1932, remaining there for twenty-nine days. He also went to Harrisburg with the Company in 1933 and remained there for two weeks. He was given the usual pay allowance, and was given work which would not require him to do any walking.

Claimant still complains of pain in his foot, shooting up his leg; also claims that such pain interferes with his sleep; that after sleeping three or four hours, the pain becomes so severe that he has to get up and rest the muscles of his leg before he can go back to bed.

The extent of claimant's injury is not entirely clear. His counsel suggests that the $420.00 service pay which he received since the date of his injury be considered as temporary total compensation and that in addition thereto, claimant should receive compensation under the terms and provisions of the Workmen's Compensation Act for loss of fifty per cent of the use of his right leg and loss of eighty per cent of the use of his right foot.

There is evidence to the effect that claimant sustained a loss of fifty per cent of the use of his right leg and the

Attorney General concedes that if claimant is entitled to an award, the disability to the right leg is fifty per cent.

Section 10 of the Military and Naval Code provides for one-half active service pay to enlisted men who may be wounded or disabled while on duty, and under the provisions of such section claimant received the sum of $420.00. Section 11 provides for financial help or assistance in case an officer or enlisted man is wounded or killed while performing his duty, and further provides that "the State Court of Claims shall act on and adjust the same as the merits of each case may demand." The amount to be awarded to any officer or enlisted man under Section 11 is left entirely to the discretion of the Court of Claims and no limitation is placed upon their action except that the amount of the award shall be "as the merits of each case may demand."

So far as the temporary disability is concerned, we are disposed to accede to the suggestion of counsel for claimant to the effect that the service pay received by claimant be considered as compensation for such disability.

In cases involving what is known in the Workmen's Compensation Act as a "specific loss", this court has in several cases made an award in accordance with the terms and provisions of the Workmen's Compensation Act, and it appears to the court that in this case an award based upon the terms and provisions of the Workmen's Compensation Act would be such as the merits of the case demand.

However, under the evidence an award cannot be made for the loss of a portion of the use of the right leg and also for the loss of a portion of the use of the right foot, as there was but one injury, and compensation for the loss of the use of the leg includes the foot. Applying the provisions of the Workmen's Compensation Act, claimant is entitled to an award for the loss of fifty per cent of the use of his right leg; that is to say, he is entitled to compensation at the rate of Fifteen Dollars ($15.00) per week for ninety-five (95) weeks, making a total of Fourteen Hundred Ninety-five Dollars ($1,495.00).

Award is therefore entered in favor of the claimant for the sum of Fourteen Hundred Ninety-five Dollars ($1,495.00).

(Nos. 1726, 1727, 1728, consolidated—Claims denied.)

JOHN CONNOR, No. 1726, MYRTLE CONNOR, No. 1727, DELLA CONNOR, No. 1728, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1935.

G. A. HICKMAN AND CARL CHOISSER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence—what must be shown in order to recover for.* Before one may recover from another on grounds of negligence, he must show that other owed a duty, failed to perform it and the resulting damage.

NEGLIGENCE—*respondeat superior—not applicable to State.* The doctrine of *respondeat superior* is not applicable to the State and even if negligence on part of agents or employees of the State is proven, State is not liable and an award will be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

These claims were all filed February 24, 1931, and all arise from the same state of facts which all occurred at the same time. Number 1726 is the claim of John Connor. The claimant alleges that on the 16th day of September, 1930, in the Village of Ramsey, County of Fayette and State of Illinois, that he was the owner of and lawfully occupying and driving a certain Ford roadster in which he was then riding in a southerly direction on the westerly side of a certain highway in Fayette County, and was in the exercise of all due care and caution for his own safety and for the safety of his property, and avers that the defendant, the State of Illinois, by its servants and agents, to-wit: W. L. Moody and C. E. Caldwell, State patrolmen, were possessed of a certain Hupmobile automobile and were then and there driving in a northerly direction approaching a certain railroad crossing in the Village of Ramsey, which crossing was being held closed by the agents of the Nickle Plate Railway Company in order to permit the safe crossing of one certain engine and train of cars and it is further alleged that it became and was the duty of the agents of the State to obey and abide by the signals of the agent of the railway company to stop until such time as the said engine and train of

cars had passed, but this they failed to do, but carelessly, negligently and improperly refused to use care and caution in this behalf for the safety of plaintiffs and others using the highway, but so negligently, improperly and recklessly managed its car that the same collided with, ran into and against the car in which the plaintiff was driving with great force and violence and overturned the same and the plaintiff was badly injured and suffered severe shock to his nervous system, and the declaration contains other averments concerning the injuries.

Claim No. 1727 is the claim of Myrtle Connor, and No. 1728 is the claim of Della Connor.

In claim No. 1726 damages in the sum of Two Thousand Dollars ($2,000.00) are asked; in claim No. 1727 damages in the sum of Thirteen Hundred Dollars ($1,300.00) and in claim No. 1728 the same amount.

From the testimony of John Connor, the claimant in No. 1726, it appears that in the Ford coupe at the time of the accident was his wife, Myrtle Connor, and Della Connor and Frank Cockrum, together with plaintiff, four of them being in a Ford coupe; that at about eleven o'clock at night he started to turn off to the left; that he was run into by a car and the front wheels of the car were off the pavement at the time the other car struck him. The road upon which both cars were driving ran north and south through Ramsey.

It appears from the evidence that a railroad track crosses the State highway at right angles. Claimant had turned off at the left on the easterly side of the highway, north of the railroad and John Connor testified that a train was standing across the hard road and a flagman was there to stop traffic. The car that struck him came from the south. Connor testified that the flagman attempted to stop this car but was not successful. It came right on, ran into his car. Connor's testimony must be in error because if the train was standing across the State highway, the car that struck Connor could not have crossed the railroad. This north bound car was driven by Walter Moody, who with another patrolman, were in uniform and driving a Hupmobile car that was privately owned. The testimony of Connor is largely his conclusions of facts. He testified that he was using due care and caution with reference

to his driving; that the collision tore his car all to pieces and crippled his wife and the other woman. On direct examination he stated that his car was worth Three Hundred Dollars before it was struck; that afterwards it was sold for Three Dollars for junk.

In our view of the case it will be unnecessary to go into the various injuries received by these parties. On cross examination Connor stated that his car was a 1925 model Ford; that he had purchased it second hand for Fifty Dollars or Seventy-five Dollars in the Spring of 1930; that he had put new equipment on it such as piston rings and rods and new tires. The accident occurred on September 26, 1930.

On cross examination he stated that the accident occurred about eleven o'clock and we assume this was p. m.; that he had plenty of room to drive up and stop off of the hard road; that the brakeman was on the hard road apparently about to couple-up a train; that he had seen the lights of the other car as Connor drove up to the track.

Myrtle Connor testified that she was the wife of John Connor and had been knocked out of the car. She had been sitting on the right hand side; she did not see the car coming before she was struck; she saw the train and the brakeman and the car was coming fast, "maybe 60 or 70 miles an hour." On cross examination she said her husband had driven the car over to the left hand side of the pavement directly in the line of traffic coming south.

Della Connor, another witness, testified that she was in the car at the time and had been thrown out and did not know anything else until she came to in the doctor's office. She testified that she did not see the car until she was struck. She also testified that the brakeman was "right at the road with a lantern waving it."

Frank Cockrum testified that he was a teamster and was riding in the car at the time of the collision. He said he saw a light coming up the road and they were hit by a car, and that this car was coming pretty fast. He was knocked unconscious.

Walter Moody testified that he was superintendent of the State patrol of Illinois; that he was in the vicinity of Ramsey at about eleven o'clock in a privately owned Hupmobile and had been driving about fifty miles an hour; that he came up to the crossing and slowed down; that he turned off of the

hard road and was hit by this other car; that there was a flagman on the back end of a car that was west of the crossing on the railroad track. He testified that he had to turn to the right to avoid striking the other car and when the collision occurred he was four and one-half feet off the pavement; that after the accident he was sixty-five feet beyond the place where it occurred and on the other pavement, apparently meaning on the other side of the road. Moody's car was never on the left hand side of the road until after the accident.

On cross examination he testified that the brakeman at the crossing was 60 or 70 feet from the hard road and that at the time of the accident, he was driving about 25 miles an hour.

Substantially to the same effect was the testimony of witness Caldwell. Moody was recalled and stated that he was 40 feet away from the Ford car when he saw it turn to the left, and that he attempted to avoid it.

It is very apparent that the testimony of the owner of the car is in error when he says that a railroad train obstructed the highway because it appears that the car driven by the highway patrolman was driven across the railroad track on the highway. We are not surprised that some of the inmates of the Ford car did not see the Hupmobile being driven toward them. When there are four people riding in a Ford coupe each of them would be greatly crowded and not in a very good position to see.

The declaration avers that it was the duty of the agents of the State to stop their automobile "in order to permit the safe crossing of one certain engine and train of cars, and there became and was the duty of the State of Illinois to obey and abide by the signals of the agent of the said railroad company to stop until such time as the said engine and train of cars had passed."

Without further comment upon this alleged duty, certain it is that before one may recover from another on the grounds of negligence he must show that such other person owed him a duty, failed to perform that duty, and the resulting damages.

The alleged duty complained of here was a duty that was owed to the railroad company. It does appear, however, that some of the occupants in the Ford coupe did suffer painful and severe injuries, but because the doctrine of *respondeat su-*

perior does not apply in the State of Illinois, even though there had been negligence on behalf of agents of the State, there could be no recovery.

After a consideration of all the evidence we hold that as a matter of law in all three cases there was contributory negligence.

Without unduly extending this opinion, we hold that there is no liability on behalf of the State in each of these cases. Cases dismissed.

(No. 1729—Claim denied.)

ANNE HUNTINGTON, A MINOR, BY E. D. HUNTINGTON, HER FATHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1935.

THOMAS A. MURPHY AND SOMMERS & SOMMERS, for claimant.

OSCAR E. CARLSTROM, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of agents or servants of State—State not liable for.* The doctrine of respondeat superior is not applicable to the State and it is not liable for the torts or negligence of its servants or agents.

SAME—*same—pleading—when demurrer may be sustained.* Where complaint shows that injury for which claim is made was due to negligence of the agents or servants of the State, demurrer may be sustained and claim dismissed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On February 25, 1931, claimant filed her claim by E. D. Huntington, her father and next friend, and alleges that claimant was a minor of the age of four years, and resided with her father in the City of Chicago, and that prior to the month of February, 1929, she was regularly enrolled as a student in the kindergarten department of the Alice Barnard Public School, which is located at 104th and Church Streets, in the City of Chicago, Illinois, and that school was, at all times mentioned in the claim and was, on the date of filing the claim under the jurisdiction of, and operated and controlled by the Board of Education of the City of Chicago; that "the Board of Education of the City of Chicago" is a body politic and corporate, created by Statute, and is an agency of the State of Illinois, having existence for the sole pur-

pose of performing certain duties deemed necessary to the maintenance of an efficient system of free schools, within the City of Chicago.

It is further alleged that in the month of February, 1929, one of the lavatories of that school was heated in part at least, by an open gas plate suspended on the wall, but in that position, the gas plate did not heat the room to a proper temperature, and that at the request of the teacher of the kindergarten department, the janitor instructed one of his assistants to remove the plate from the wall and to place it on the floor of the lavatory, with the further instruction that the said plate should not be lighted during the hours that school was in session; that on the 26th day of February, 1929, the plate was placed on the floor of the lavatory and was permitted to remain lighted during school hours; that the lavatory was in almost constant use by the children in the kindergarten department; that about 1:30 p. m. on the last mentioned date, all of the children in the kindergarten class in the said school, were formed in line and marched to the lavatory by their teacher, and remained in line formation awaiting their turn, and that the claimant was standing in line at a point immediately in front of the spot on which the lighted gas plate had been placed, when she was pushed and shoved by another pupil, and the claimant fell in a sitting position upon the lighted gas plate, her clothing caught fire, and she was severely burned on the back of her body, from the buttocks to the neck, and upon the upper parts of both arms.

It is further alleged that claimant was confined to her bed for more than five months, and still requires medical care and attention; that she has been badly disfigured and the disfigurement is permanent; that her nervous system has been seriously affected, and that she will never fully recover from the effects of the aforesaid injuries.

It is further alleged that the cause of the injuries sustained by the claimant were and are proximately and solely chargeable to the careless and negligent conduct of the servants and employees of the Board of Education, and that by reason of the injuries, the parents of the claimant have been obliged to and did expend the sum of Fourteen Hundred Dollars ($1,400.00), and will be obliged to spend other large sums of money in and about attempting to heal and cure the claim-

ant, all to the damage of the claimant and her parents in the sum of Ten Thousand Dollars ($10,000.00).

It will be noted that the claimant is attempting to recover damages on behalf of her parents, but inasmuch as the Attorney General has not raised this question, we will confine our opinion to questions raised by demurrer filed by the Attorney General.

A general and special demurrer was filed and it is set up: First, that the doctrine of *respondeat superior* is not applicable to the State; Second, that in the absence of a Statute the State is not liable for the negligence of its officers, agents and employees; Third, that the Alice Barnard Public School of the public school system of Chicago, is under the direct supervision and control of the Board of Education of the City of Chicago, a body politic, being a non-profitable corporation created by the State of Illinois in the exercise of its governmental function and the State, therefore, is not liable for damages resulting from the negligence of said corporation, or its agents.

This court and text writers generally have held that the doctrine of *respondeat superior* is not applicable to the State and for that reason the demurrer is sustained. Case dismissed.

(Nos. 1723-1776, consolidated—Claims denied.)

EDMUN SCHWEIZER, No. 1723, E. ALBERTINE WILLIAMS, No. 1776, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1935.
Rehearing denied May 14, 1935.

M. A. BRENNAN; W. W. WHITMORE; WM. R. BACH AND L. EARL BACH, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of State employee—when no award will be made for.* Where it appears that injuries for which damages are claimed are alleged to have been the result of the negligence of employees of the State an award will be denied, as the State is not liable for the negligence of its agents and employees.

SAME—*negligence—proximate cause—contributory negligence.* The negligence charged must be the proximate cause of the injury and claimant must not be guilty of contributory negligence.

MR. JUSTICE YANTIS delivered the opinion of the court:

On the night of January 13, 1930, Edmun Schweizer and Miss E. Albertine Williams were driving in the former's automobile between Bloomington and Saybrook, Illinois. The night was foggy and the pavement wet. Plaintiff Schweizer testified that several cars passed him and that he could see the tail lights for quite a distance after they went by. Approximately 17 miles east of Bloomington, at about 7:00 o'clock that evening he ran into the rear end of a snowplow then owned and being operated by the State of Illinois. There was snow and slush, and the snow plow had been used all day to clear the pavement for the use of the travelling public. It became broken so that it was necessary to stop where it then stood on the hard road. It was on its lawful side of the road, but was standing still at the time of the accident. According to the testimony, the stop would be characterized at law as an "Emergency Stop." The signal lanterns had burned out about 30 minutes before the accident, and the only lights were the head lights and the red rear light on the back of the cab. Plaintiff testified that he was approximately thirty feet from the snow plow when he first saw it; that he discovered afterwards that there was a tail light on the top of the cab of the snow plow and that the body of the plow extended six or eight feet back from the cab.

The father of Albertine Williams testified that he reached the scene of the accident shortly after it occurred; that the condition and position of the automobiles were the same as testified to by other witnesses; that he drove up behind the State truck, or snow plow, from the rear, the same as young Schweizer had done, and that he could see the tail light on the snow plow when about 20 rods distant from same, but that when he got closer the windshield visor of his own car cut off the view of the tail light because of the height of the latter from the ground.

Both Edmun Schweizer and E. Albertine Williams received injuries in the accident, of a serious nature. The former has filed his claim for moneys expended for medical care in the sum of Twenty-five Dollars, ($25.00); personal injuries, One Thousand Dollars ($1,000.00), automobile damage Four Hundred Seventy-five Dollars ($475.00) or a total of One Thousand Five Hundred Dollars ($1,500.00). Miss Wil-

liams has filed her claim for One Hundred Dollars ($100.00) hospital expense; Forty Dollars ($40.00) medical expense and One Thousand Eight Hundred Sixty Dollars ($1,860.00) for physical injuries, disfigurement, pain and suffering.

The record does not show that the proximate causes of the accident were from the negligent acts of the State or its employees, and that the plaintiff Schweizer was free of any *contributory negligence.* The snow plow was engaged in attempting to clear the road to make it safer for the traveling public. The breakdown constituted an "Emergency Stop." The pavement was snowy and wet, and the night was extremely foggy, requiring more than ordinary care on the part of anyone operating an automobile on the highway. Plaintiff Schweizer's statement that he did not see the tail light or the car until within thirty feet, indicates that he was not watching the roadway ahead with the degree of care which the conditions required, because the witness, Edgar J. Williams, father of the co-plaintiff, testified that he could see the tail light on the snow plow twenty rods before he reached it.

The Attorney General also contends that no award should be entered herein because of the rule, that the State is not liable for the negligence of its agents and employees unless there is a Statute making it liable. There being no such Statute in regard to the rule of *respondeat superior* as applied to this character of claim, no award can be allowed. The contention of the Attorney General is properly made. The State acts in its sovereign capacity and is not liable for the torts or negligence of its agents in the construction and maintenance of its hard road system.

Derby vs. *State,* 7 C. C. R. 145.

Claim denied. Case dismissed.

OPINION ON PETITION FOR REHEARING.

Per Curiam:

This cause now again coming before the Court on Claimant's petition for rehearing and the court having reviewed the record and being fully advised in the premises finds that the petition for rehearing is without merit.

As stated in the original opinion the record discloses that the highway in question is one built and maintained by the State of Illinois. In the construction and maintenance of its

roads the State acts in a governmental capacity and in the exercise of such functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a Statute creating such liability. The General Assembly has never enacted a law making the State liable for damages arising as complained of in this case. This court does not consider that it has authority or power to make an award under the facts appearing herein. See

Bucholz Admx., etc. vs. *State*, 7 C. C. R. 241.
Crabtree vs. *State*, 7 C. C. R. 207.

THE PETITION FOR A REHEARING IS DENIED and the original opinion filed herein on March 12th is re-affirmed and the above case is dismissed.

(No. 1813—Claim denied.)

ELERY TASCHER, AND ELERY TASCHER, NEXT FRIEND OF CHARLES TASCHER, A MINOR, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1935.

J. N. MOORE AND WENDELL P. KAY, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

PERSONAL INJURY — *negligence of State employee — State not liable for.* The State is not liable for the negligence of its servants or agents.

SAME—*pleading—when motion to dismiss may be sustained.* Motion to dismiss claim may be sustained where complaint clearly shows that injury for which same was made was caused by the negligence of an employee of the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant in this case alleges that on or about July 9, 1930, the State of Illinois, through its Highway Department and divers employees was engaged in the construction of a part of State Route No. 49, at a point on Route 49 about one mile south of its intersection with Route 8, Iroquois County, and had in its employ one Harold Seivert, who was driving a loaded truck over Route No. 49, and that this truck was being driven at about twenty-five miles per hour, and as the driver of the truck approached a point on Route No. 49 on which the home of the claimant abutted, he saw a

United States mail car or automobile immediately west of the shoulder on Route No. 49, and said Seivert also saw Elery Tascher driving a team of horses across Route No. 49 to a field to the west of the route.

The declaration also avers that Charles Tascher started across Route No. 49 in an easterly direction east of the car belonging to the mail carrier, but said Seivert, wholly disregarding his duty in that behalf, operated and drove his truck negligently and recklessly in such a manner, that he approached without warning the point on said Route No. 49 where said Charles Tascher was passing, and the truck was propelled with great force and violence against the head of said Charles Tascher, knocking him down, fracturing his skull and running over the right foot of the said Charles Tascher, crushing the muscles, tendons and ligaments in the foot.

It is also averred that the said Charles Tascher suffered permanent injuries; was confined to a hospital at Watseka, Illinois, for two weeks; that he incurred a hospital bill of $66.95, a doctor bill of $75.00, and a nurse bill of $64.00; that his mother boarded near the hospital to give him the care needed under the circumstances and for that expended the sum of $10.00.

Claimant also claims a permanent disfigurement to his right foot, and alleges that it will remain permanently shorter and much broader than his other foot and causes a considerable limp.

It is also averred that Charles Tascher tires easily, and this unfits him to do his share of the farm work, and that the right foot requires different shaped shoes than the one on the left foot; that his earning ability has been greatly impaired; that he now suffers and will suffer for the rest of his natural life, the humiliation and shame of being a cripple, and alleges damages in the sum of $3,000.00.

In the same declaration, Elery Tascher claims and avers that he paid the hospital bill, doctor bills, nurse's bill and the expenses of the boy's mother in the aggregate sum of $216.95, and that by reason of the injuries sustained by Charles Tascher, the services of said Charles Tascher has diminished in the sum of $500.00, and that by reason thereof, the said defendant is indebted to him in the sum of $716.95, for which he makes claim.

The case stands in this court on a motion to dismiss. While there may be other grounds for dismissing the same, that is, technical grounds on questions of pleading, we prefer to consider this case from the standpoint of whether or not the State of Illinois should be held liable. The Attorney General urges that the motion to dismiss should be allowed and the claimants barred from maintaining their alleged tort action for the reason that the doctrine or rule of *respondeat superior* has no legal application to a sovereign State in the exercise of a governmental function.

In the case of *Seymour* vs. *VanSlyck*, 8 Wend. 403, 422; *United States* vs. *Kirkpatrick*, 9 Wheat. 720, 723, it was held:

"The government itself is not responsible for the misfeasances, or wrongs, or negligences or omissions of duty of the subordinate officers of agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties and losses which would be subversive to the public interest; and indeed, laches are never imputable to the government."

This rule has been followed and applied by this court in many instances where claims have arisen as the result of negligence of officers or servants of the State of Illinois.

In the case of the *City of Chicago* vs. *Williams*, 182 Ill. 135, on page 138, the Supreme Court, after reviewing certain cases concerning the liability of municipal officers said: "But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred."

While there may be some language in the Court of Claims Act to the effect that a case of the kind at bar could be maintained, in this court, we cannot ignore the express constitutional provisions, and must hold that there is no express right to bring a suit of this kind in this court.

The rule announced in the Williams case has been approved by our Supreme Court in many cases prior to that and also subsequent to that time.

Regrettable as it is, we must hold that neither claimant has set forth a cause of action against the State, and the motion to dismiss must be sustained for the reasons hereinbefore set forth. Case dismissed.

(No. 2468—Claimant awarded $20.00.)

WILLIAM S. BAILEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

WILLIAM S. BAILEY, claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case* vs. *State*, 2649, *post.*

MR. JUSTICE YANTIS delivered the opinion of the court:

William S. Bailey, a member of the Howitzer Co., 130 Inf. I. N. G. was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

Claimant states that the injuries received by him were as follows: Cuts on two fingers of the right hand, burns received while being dragged along the side of the bus in escaping therefrom, and a bruise on the fore part of the right leg.

Claimant testified that his right leg was affected for a week or ten days, preventing him from doing ordinary labor; that during a part of that time he was at Camp Grant; that after he returned from Camp Grant his injuries did not prevent him from performing his usual labors.

A Military Medical Board examined him on August 8, 1934 and found that there was no permanent disability. Claimant agrees with this report.

Claimant's usual wages were $18.00 per week; he is married and has three children, ages 11, 9 and 7. Taking into consideration the time that he was disabled and his earnings, an allowance of $20.00 would be merited. Under authority of the Military and Naval Code an award is therefore allowed claimant in the sum of Twenty Dollars ($20.00).

(No. 2446—Claimant awarded $7.50.)

EARL R. BRAKE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

EARL R. BRAKE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2649, *post*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Earl R. Brake was a member of the Howitzer Co., 130th Inf. I. N. G. and was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs *State*, C. of C. No. 2469.)

A Military Medical Board made a physical examination of claimant on August 8, 1934, and found that there is no sign of scars or disability of any kind existing. Claimant testified that he was in the bus immediately behind the one that caught fire and that upon arriving where the bus was burning, he jumped on the running board of a private automobile to instruct the driver to go into Pana and send out nurses and doctors. While on the running board another car drove along side and caught claimant's leg between the rear fenders of the two cars; that the leg was skinned and the muscles strained and the calf of the leg was bruised as a result. Claimant suffered temporary disability for two or three days, then went to Camp Grant with his Company and after he returned from Camp Grant was treated for about a week. He testified, however, that after his return from Camp Grant, there was no disability that made him unable to perform the duties of his regular employment. Claimant agrees with the report of the medical board as to permanent disability, and the court therefore finds, under authority of the Military Code that an allowance of $7.50 is merited and an award is made in favor of claimant in the sum of Seven and 50/100 Dollars ($7.50).

(No. 2467—Claimant awarded $250.00.)

EDWARD F. BROOKS, A MINOR BY J. FLOYD BROOKS, HIS NEXT FRIEND. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing denied May 14, 1935.

EDWARD F. BROOKS, A MINOR, BY J. FLOYD BROOKS, HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case* vs. *State*, 2649, *post*.

MR. JUSTICE YANTIS delivered the opinion of the court:

Edgar F. Brooks, a minor files his claim herein by J. Floyd Brooks, his next friend and a stipulation has been filed that he was one of the members of the Howitzer Co. of the 130th Inf. I. N. G. who was injured in the bus-fire that occurred near Pana, Illinois, on July 26, 1933, while claimant was on duty as a member of said Company. The injuries received by claimant were duly considered by medical boards at various times, the last of which was on August 8, 1934. That report shows that while burns were received by claimant on the face and neck, no scars appeared. There are some scars on the body, none of which cause any disability. An X-ray examination shows the possibility of a fracture having occurred on the right shoulder. The Military Board estimated the permanent partial disability at ten per cent (10%). Claimant stated that the shoulder injury was the result of his jumping from the burning bus. Claimant was moved to the Pana Hospital immediately after the accident and remained there three days. He then went to Camp Grant for further training with his Company, where he received regular military pay. Prior to the accident he was employed in an A. & P. store on Saturdays outside of school hours. At the time of the hearing he did not recall at what rate he had received wages. In September following the accident he was re-employed by the Davidson Biscuit Company and had been continuously employed by such company from that time until the date of the hearing. He testified that he has been compensated through the Adjutant General's Office for the loss of time due to injuries, in the sum of One Hundred Eighty Dollars ($180.00).

At the time of the accident claimant was a senior in high school and after regaining employment worked six hours a day and attended high school in the afternoon so he could graduate. His testimony is that he is paid forty cents (40c) per hour for six hours a day. He further testified that he was in accord with the ten per cent (10%) disability finding made by the Military Medical Board.

Considering this claim under the same rules we have followed in determining awards in similar claims we find that claimant should receive an award of Two Hundred Fifty Dollars ($250.00). The State has paid or has assumed payment for medical, nursing and hospital fees amounting to Sixty-two and 75/100 Dollars ($62.75) in addition to the One Hundred Eighty Dollars ($180.00) previously paid claimant. A further award is hereby entered in his favor in the sum of Two Hundred Fifty Dollars ($250.00).

(No. 2451—Claimant awarded $36.75.)

LLOYD G. BROWN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

LLOYD G. BROWN, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2649, *post*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Lloyd G. Brown, a member of the Howitzer Co. 130th Inf. I. N. G., was in the military bus-fire accident that occurred near Pana, Ill., on July 26, 1933.

A Military Medical Board examined claimant at Camp Grant on August 8, 1934, and reported there was no permanent disability. Claimant testified he agreed with that report. The record discloses that claimant was a married man with one child ten months old at the time of the hearing. He operates a small truck farm and estimates his earning at approximately $300.00 per year. In the military bus-fire he suffered burns to both ears, his right leg was sprained and his side was also bruised. Following his return from Camp Grant he was unable to perform his usual duties for a period of about three weeks.

The record indicates that claimant merits an allowance for three and one-half weeks temporary disability. If the Compensation Act rules were applied a minimum allowance of $7.50 per week would be increased to $11.00 because of one

child under sixteen years of age. An allowance will be made upon this basis and an award is hereby entered in favor of claimant in the sum of Thirty-six and 75/100 Dollars ($36.75).

(No. 2195—Claimant awarded $3,722.33.)

RUTH L. BROWN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

R. WALLACE KARRAKER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*death resulting from sunstroke—when accident arising out of employment—when award may be made for.* The facts in this case are analagous to those in *Foster* vs. *State*, No. 2177, *ante*, and the opinion of the court in that case applies with equal force herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation of facts filed herein it appears that claimant, Ruth L. Brown, is the widow and only heir-at-law of Charles R. Brown, deceased; that the latter was an employee of the State of Illinois and had worked in the Division of Highways for over thirteen years; that at the time of the accident complained of his salary was Two Hundred Dollars ($200.00) per month. It further appears that on Saturday afternoon, July 21, 1934, this employee, Brown, was working on S. B. I. Route No. 84, Section 102-X, assisting in laying forms and operating the "bull float," an instrument used in leveling the surface of the concrete pavement. The temperature on the day in question was about 106° in the shade. The employee was working in a depression where the highway declined and crossed a valley. He was working in the direct rays of the sun where the temperature was between 115° and 120° Fahrenheit. The crew engaged in the work was short-handed and did not have the normal number of employees for such work and in addition, the job was being rushed or hurried in an effort to finish the same. The employee, Brown, was overcome from the heat on the day in question and died on July 22, 1934. The attending physician, Dr. J. L. Klein, certified that in his opinion the cause of death was the result of sunstroke.

In claims for compensation arising from injury or death by sunstroke each case must stand on its own proof. The mere fact that an employee while in the course of his employment and engaged in performing the duties of his employment, suffers injury or death as a result of sunstroke or heat prostration, does not establish a compensation liability. It must appear that the employee was subjected to a substantially increased hazard over that to which the public in general and other workmen in the same locality were subjected, and that the sunstroke was due thereto, so that the injury might be said to arise "out of" the employment. (Angerstein, P. 85, Par. 47.)

It appears from the record that this employee at the time of being overcome by the heat was being subjected to a more severe and different degree of exposure from that of the public in general and from other workmen. He and a limited number of associates were engaged in doing the work that ordinarily would have required the services of a larger number and at a particular spot where the degree of heat was in excess of that found to exist in general. While it is difficult to determine when an injury from heat prostration is compensable we believe the facts in the instant case justify a finding that an award is due plaintiff herein.

The employee's wages were Two Hundred Dollars ($200.00) per month, and a maximum allowance of Four Thousand Dollars ($4,000.00) is authorized by the Workmen's Compensation Act. Under our practice such award should be commuted to a lump sum payment. Thus commuted the amount payable would be Three Thousand Six Hundred Eighty-eight and 33/100 Dollars ($3,688.33).

The record further discloses that a hospital bill of Fifteen Dollars ($15.00) is due the Belleville Hospital in Muscatine, Iowa, and a doctor's bill of Nineteen Dollars ($19.00) is due Dr. J. L. Klein of Muscatine, Iowa, and the award herein includes these two items.

An award is therefore entered in favor of plaintiff, Ruth L. Brown, in the sum of Three Thousand Seven Hundred Twenty-two and 33/100 Dollars ($3,722.33).

(No. 2454 Claimant awarded $250.00.)

DWIGHT G. CARTER BY DAVID CARTER, HIS NEXT FRIEND, Claimant,
vs.
STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

DWIGHT G. CARTER BY DAVID CARTER, HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY *member of Illinois National Guard when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2619, *post*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Dwight G. Carter, injured in the Pana military bus-fire accident on July 26, 1933, has filed his claim pro se for such award as the judgment of this court may consider of merit.

Claimant was a member of the Howitzer Co. 130th Inf., I. N. G. The Medical Board in this, as in the other cases growing out of the accident, made findings at various times, the last of which was on August 8, 1934, at which time they found claimant had suffered permanent partial disability of ten per cent (10%). This disability was the result of burns and injuries to his left shoulder, hand and right leg. The backs of both his hands were burned, the inside of the left hand, the right leg was burned and he suffered a strain in the left shoulder. The sides of his face, neck and ears were burned, but no serious scars appear to have resulted therefrom. Claimant was engaged in farming prior to the accident; is unmarried and makes his home with his father and mother. He was farming for himself, owned his own horses and rented land from a neighbor. He has signed and filed herein his approval of the medical board's finding of permanent partial disability of ten per cent (10%), as determined by the board in its examination of August 8, 1934. The records show that he had been paid through the Adjutant General's office Four Hundred Twenty-eight Dollars ($428.00), from July 25, 1933, to February 26, 1934, and that the State had also paid for him, or assumed the obligations of, medical and hospital fees amount-

ing to Two Hundred Eighty-three and 85/100 Dollars ($283.85).

There is nothing in the record to indicate what claimant's earnings were during the year immediately prior to the accident.

If plaintiff was making his claim as an employee the amounts previously paid him would exceed any allowance due him under the Workmen's Compensation Act. We believe the court is justified, however, in disregarding the payments heretofore made in considering the ten per cent (10%) permanent partial disability. Such disability will be figured upon the basis of the minimum provided by the Workmen's Compensation Act in case of death, i. e. ten per cent (10%) of Two Thousand Five Hundred Dollars ($2,500.00), or Two Hundred Fifty Dollars ($250.00)—*and an award is therefore made to claimant in the sum of two Hundred Fifty Dollars ($250.00);* same to be in addition to any payments heretofore made, and it is further ordered that any payments heretofore approved shall be discontinued, upon the issuance of a warrant in payment of this award.

(No. 2469—Claimant awarded $5,000.00.)

MARLOW CASE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing granted May 14, 1935.

MARLOW CASE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for under Military and Naval Code.* An award may be made for personal injuries sustained by a member of the Illinois National Guard, while in the performance of his duties as such, under authority of Section 11 of Article 16 of Military and Naval Code, in such sum as the court shall deem just under the facts of the case.

SAME—*same—resort to Workmen's Compensation Act in determining amount of award.* While the Court of Claims may resort to the provisions of the Workmen's Compensation Act, as a guide in determining the amount of an award in cases arising under Section 11 of Article 16 of the Military and Naval Code there is no provision of law obligating it to do so, or which prevents it from using any other proper basis in arriving at amount thereof, justified under the evidence in each particular case.

MR. JUSTICE YANTIS delivered the opinion of the court:

Marlow Case, claimant herein, was a member of Howitzer Company 130th Infantry, Illinois National Guard, on the 26th day of July, A. D. 1933, and was one of the men injured in the motor bus fire that occurred near Pana, Illinois, on that date. He files his claim herein pro se.

Claimant's Company had been engaged in active duty at Taylorville in Christian County, under orders of the Governor of this State, as Commander-in-Chief of the National Guard, to assist the sheriff of that county in maintaining peace during a strike then in progress among the coal miners of that county.

On the above date, the Company under command of Captain Edward G. Johnston, started on its homeward trip from Taylorville to Mt. Vernon, Illinois; transportation being furnished by the State of Illinois in two automobile buses chartered by the State through its Military Department from the Illinois Terminal Transportation Company. When about four miles northwest of Pana one of the buses caught fire and the flames spread so quickly throughout the interior of the bus No. 200, that the passengers were compelled to leap from the moving bus, thereby receiving not only serious burns, but other accidental injuries. First aid and hospital care was immediately given and the State, through the Adjutant General's office and under approval by this court, has made certain payments to various ones of the injured men, as will appear in the individual cases.

A military Board of Inquiry that met after the accident found that the injuries received by the various men were sustained in the line of duty as members of said Company, and that the injuries occurred through no fault or neglect on the part of any officer or enlisted man of the Illinois National Guard. The transportation company that owned the bus is, from the records, apparently a subsidiary of the North American Light & Power Company, which in turn is the parent company of the Illinois Power & Light Corp., and the Illinois Traction, Inc., and was granted a charter on the 15th day of November, 1930. The general offices are now located in the Mid-west Terminal Building, 12th and Lucas Streets, St. Louis, Missouri, according to investigation and reports made by the Illinois Commerce Commission, following the fire; and

the transportation company is indemnified to the extent of Fifteen Thousand Dollars ($15,000.00).

Private Marlow Case was seated directly back of the driver. He received the most severe scars and burns of any member of the Company except those who died as a result thereof. The reports of the Military Board and the written testimony of witnesses and the oral examination of Private Case in open court, disclose that his entire face is covered with scars with Keloid formation; both ears being burned so severely that they are merely vestigial. There is a bi-lateral retraction of the lids because of scars, preventing the closing of either eye. The Dorsum of each hand is covered with scars and Keloid formations preventing the flexing of the hands or their use in general physical labor. There were severe first, second and third degree burns on the legs and shoulders and the scalp above the right ear was burned, preventing the growth of hair above the right ear. Further medical reports estimate that claimant suffers a permanent partial disability of seventy-five per cent (75%), as a result of all the various injuries sustained. Oral proof and examination in open court disclose that because of the Keloid formation and burned eyelids and ears, claimant is seriously restricted, if not prevented, from obtaining any kind of position where the duties would depend upon contacts with the public in general. On the other hand, he cannot perform general physical labor because of the drawn and injured condition of both hands and his physical inability to withstand excessive heat.

Claimant is twenty-one years old, a high school graduate and had finished one year in Blackburn College. He was attempting to educate himself as a Professor in Agriculture and during his vacation periods he was engaged in active farm work. When engaged in such labor he earned from Two Dollars ($2.00) to Three Dollars ($3.00) a day. He is unmarried and had been a member of the Militia Company for about three years.

The Court of Claims is asked to adjust this claim under the provisions of *Section II, Article XVI*, of the *Military and Naval Code of Illinois*, which provides as follows:

"In every case where an officer or enlisted man of the 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 Com-

mander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

The claim filed by plaintiff states that medical, nursing and hospital fees amounting to One Thousand Three Hundred Eighty-six and 85/100 Dollars ($1,386.85) have been paid or assumed by the State for him. The record further discloses that from the date of the accident July 26, 1933, to February 22, 1934 the sum of Four Hundred Twenty Dollars ($420.00) has been advanced and paid to claimant through the office of the Adjutant General under authority of the Military Code; and since that time under approval by this court, further payments have been made which will aggregate approximately Five Hundred Fifty Dollars ($550.00) additional.

The Court of Claims is not definitely committed to the observance of the provisions of the Workmen's Compensation Act or any other specific guide in determining what awards shall be made in cases arising under the Military Code, but it has in many instances, followed the Compensation Act as a reasonable guide in such matters. The claim of Private Case appeals most strongly to the court. He is a young man, with *splendid prospects* for the future at the time of the accident in question. His previous earnings had been small compared to the probable returns in the work for which he was educating himself. His ability to support himself in the future is restricted to a minimum, and the medical record rates him as being seventy-five per cent (75%) disabled. Under the most liberal construction of the Compensation Act he could not be allowed more than Two Thousand Five Hundred Dollars ($2,500.00) under Section 8-B for temporary total incapacity; and a sum of One Thousand Eight Hundred Seventy-five Dollars ($1,875.00) for permanent partial disability, or a total of Four Thousand Three Hundred Seventy-five Dollars ($4,375.00), and in the ordinary Workmen's Compensation Case there would be deducted from this, the amount already paid of approximately Nine Hundred Seventy-five Dollars ($975.00). The court is of the opinion that the claimant's condition and the nature of his service are such that a more liberal award than one allowable under the Compensation Act is justified, and under authority of

the Military and Naval Code, such award should be made without regard to the amounts advanced through the Adjutant General's office. We believe such advancements should be continued until the award herein made is paid, and it is therefore ordered:

That approval is hereby entered for the continued payment through the Adjutant General's office and regular military channels of daily pay in the sum of Two Dollars ($2.00) per day to Private Marlow Case pending an appropriation by the Legislature of Illinois for the award hereinafter made; such payment to cease if and when a voucher in payment of said award is issued to said Marlow Case.

We further find that the merits of the claim of Marlow Case justify an award under the provisions of the Military and Naval Code of Five Thousand Dollars ($5,000.00) and we therefore make and recommend an award in his favor in said sum.

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

This matter again coming before the court upon the application of claimant by E. G. Johnston, Capt. of the Mt. Vernon Howitzer Co., 130th Inf. for the allowance of further hospitalization to relieve claimant of partial effects from the injuries complained of, and the court being further advised in the premises, and it appearing from the further evidence herein that Marlow Case was examined on April 10, 1935 by Dr. V. P. Blair of St. Louis, Missouri, as per a report of the latter on file herein, and it being apparent that claimant's injuries may be relieved to some extent by further surgical treatment and hospitalization.

IT IS HEREBY ORDERED, that this cause remain upon the docket of this court for the purpose of allowing an additional award for such expense if any, as may hereafter be shown to have been properly incurred in surgical treatment and hospitalization given to claimant for the purpose of effecting relief from the injuries and disfigurements herein complained of. This supplemental order shall not delay the payment of any award heretofore made herein.

(No. 1829—Claimant awarded $937.50.)

JAMES E. CHASE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

JAMES E. CHASE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where a State employee sustains accidental injuries arising out of and in the course of his employment, *while engaged in extra* hazardous occupation an award will be made under provisions of the Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, James E. Chase, filed his petition setting forth that on the 4th day of August, 1931, he was employed by the State of Illinois at the Elgin State Hospital as mechanics helper, and had been so employed for sometime prior thereto, and at the direction of his superior officer, he was requested to frame a piece of lumber, and in doing this he was using a jointer. During the process of the work and while pressing down with his left hand, the knives struck a knot which hurled the timber from under his hand, permitting his left hand to drop into the knives, badly lacerating the third, fourth and fifth fingers of the left hand. He was taken to a hospital and given immediate attention where he was confined three weeks, being under the care of Dr. Wiltrakis. About 1:30 o'clock on the same afternoon, the third finger was amputated at the first joint and both the fourth and fifth fingers were amputated at the second joint, and he claims Fifteen Hundred Dollars ($1,500.00) damages.

It appears from the record that the claim arose out of and in the course of employment and that the proper authorities had prompt notice, and the State is bound by the provisions of the Workmen's Compensation Act.

Under the Compensation law, Item 3, subsection (e) Section 8 of the Workmen's Compensation Act provides that for the loss of a second finger, the employee shall receive fifty percentum of the average weekly wage during thirty-five weeks. The employee was earning from $115.00 to $120.00 a month at the time he was injured. The record does not disclose that he had any dependents.

Section 4 of the same subsection above referred to, provides that for the loss of the third finger, the employee shall receive fifty percentum of the average weekly wage during twenty-five weeks.

Item 5 of the same subsection provides that for the loss of a fourth finger, the employee shall receive fifty percentum of the average weekly wage during twenty weeks.

Under Item 6 of the same subsection it is provided that the loss of the first phalange of the finger shall be considered equal to the loss of one-half of such finger and compensation shall be one-half of the amounts above specified.

The maximum amount which this employee would be entitled to under the Compensation Act would be Fifteen Dollars ($15.00) per week. He therefore would be entitled to one-half of the amount of 35 weeks at $15.00 per week, because but one phalange was amputated, or.....$262.50
For the third finger, 25 weeks at $15.00 per week, or 375.00
For the fourth finger, 20 weeks at $15.00 per week, or 300.00

making a total of..... $937.50.

We, therefore, award the claimant here, the sum of Nine Hundred Thirty-seven Dollars and Fifty Cents ($937.50).

(No. 2453—Claimant awarded $33.50.)

CHAMP CLARKE, A MINOR BY BEN CLARKE, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

CHAMP CLARKE, A MINOR, BY BEN CLARKE, HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which was filed claim and award made in case of *Case vs. State*, No. 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Champ Clarke, a member of the Howitzer Co., 130th Inf. I. N. G. was in the military bus-fire accident that occurred near Pana, Ill. on July 26, 1933.

Claimant resides with his parents on a farm and was employed by his father at $15.00 per week at the time of the accident. He also played in a band at such times as they called him, and when he thus played received $10.00 per week. The evidence does not show that he received any calls or that the band had need of his services following the accident or that he lost any wages in such connection.

A Military Medical Board passed upon his physical condition in August, 1934 and reported that he had no permanent disability. The evidence shows, however, that Private Clarke received a skinned elbow, a skinned hip and a slight dislocation of one shoulder in the bus-fire accident; also that the shoulder gave him considerable temporary trouble for about four weeks after the accident. During two of these weeks he was in Camp at Camp Grant in military service and received the usual pay therefor. At the time of the fire he lost a pair of glasses valued at Ten Dollars ($10.00) and toilet articles valued at Five Dollars ($5.00).

It appears from the entire record that claimant should be reimbursed for the items of property lost in the sum of Fifteen Dollars ($15.00) and compensation for temporary disability for two and one-half weeks on the basis of the Compensation Act scale of $7.50 per week.

AN AWARD IS THEREFORE MADE in favor of Ben Clarke for the use of Champ Clarke in the sum of Thirty-three and 50/100 Dollars, ($33.50).

(No. 2406—Claimant awarded $500.00.)

WILLIAM J. CONNELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ANDREWS & YOUNG, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *non-liability of employer for accidents occurring off his premises—exception.* An exception to the general rule that the employer is not liable for compensation for injuries suffered in accidents occurring off his premises, may be found where employee is accidentally injured, while returning from his labors and while riding in a vehicle provided by his employer for his transportation from said labors.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was employed by respondent at the Dixon office of the Division of Highways, as a painter, at a salary of One Hundred Eight Dollars ($108.00) per month. On June 21, 1933 while riding on a State Highway truck from the place of his work near Kewanee to the Paint Shop at Dixon, the truck collided with another automobile at an intersection of State Highways in Annawan, Illinois, and claimant was injured; the injuries consisting of a V shaped cut about two inches long on his chin; a cut on his left cheek about two inches long and the loss of three upper teeth, and the loosening of all the other upper teeth, resulting in their later removal; also a skin cut one inch long above the hair line on the right side of the forehead. All of plaintiff's medical expenses, and the cost of a new set of upper teeth have been paid for by the State, as his employer, and plaintiff has received full pay during his temporary total incapacity and is still employed by the State. He was thirty-two years of age at the time of the injury and he had two children, one aged eleven and another aged eight years. Additional compensation was claimed in the sum of "One Thousand Dollars ($1,000.00) for serious and permanent disfigurement to the face and head, under Paragraph 8-C of the Workmen's Compensation Act."

In his Statement, Brief and Argument, plaintiff submits the following: "The question which complainant desires to present is whether he is entitled to any further compensation for the disfigurement caused by the scars and the loss of teeth; * * * that because he still suffers severe headaches as a result of the brain concussion * * * his recovery is not complete, and this court should allow his claim to stand open so that if, at any time in the future, the consequences of the brain concussion and injuries become so serious as to amount to incapacity, complainant will not be barred from having any further award to which he may be entitled under the law."

The Statute under which claims of employees are heard by this court specifies that same shall be considered under the provisions of the Workmen's Compensation Act of Illinois.

Any question as to deferred or an increasing disability that plaintiff may desire to urge in the future will therefore be governed by the terms of that Act.

While plaintiff at the time of the accident was not at the scene of his labors but was returning therefrom, he was riding in a State truck. As the State was providing the means of conveyance, this claim comes within the exception as to non-liability of the employer for accidents occurring off the premises.

He is entitled at this time, under the proof, to an award for physical disfigurement. His counsel in their Brief and Argument state that "complainant himself is unable to compute the pecuniary measure of the injuries to him." Plaintiff's disfigurement has not in fact interfered with his employment as he is still employed by the State. Such disfigurement might well affect his opportunity for employment in a general way, however. From the evidence in the record, including the photograph appearing therein, an award of Five Hundred Dollars ($500.00) is allowed.

(No. 2462—Claim denied.)

AARON GOOCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing denied March 14, 1935.

AARON GOOCH, *pro se.*

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY — *member of Illinois National Guard — when award denied.* Where the evidence shows that claimant suffered only a slight injury with no permanent effects and did not lose any time from his regular employment as a result of an accident while in the performance of his duties as a member of the Illinois National Guard, an award will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Aaron Gooch was a member of the Howitzer Co. 130th Inf. I. N. G. and was in the military bus-fire accident near Pana, Illinois on July 26, 1933. At that time he was residing in Mt. Vernon, Illinois, but at the time of the hearing herein he was residing at 403 North 7th Street, DeKalb, Illinois. Prior to the accident he was a mechanic. In the acci-

dent he suffered only a slight injury to the left elbow and testified that he was not disabled and did not lose any time from his regular employment as a result of the accident.

Claimant was examined by a Military Medical Board in August, 1934, and was found by the board to have received no permanent disability. Claimant testified that he approved the finding of the Military Medical Board. If there was any basis upon which the Court could base an award for financial help or assistance to Private Gooch such award would be made, but in the absence of such showing and there being nothing in the record upon which to base an award, no recommendation for an award is made and the claim is dismissed.

(No. 2447—Claimant awarded $16.50.)

HOWARD F. GREATHOUSE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

HOWARD F. GREATHOUSE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Howard F. Greathouse, a Sergeant in the Howitzer Co. 130th Inf. I. N. G., was in the military bus-fire accident that occurred near Pana, Illinois on July 26, 1933.

A Military Medical Board made a physical examination of claimant on August 8, 1934 and found that no evidence of disability or disfigurement existed. Claimant testified that he received lacerations on the leg and elbows in the bus-fire; that he received treatment from Dr. Hamilton at Mt. Vernon and at Camp Grant where he went after the accident. He further testified that he was unable to work before he went to Camp Grant and about a week after he returned therefrom. Claimant is married and has one child eight years old and was earning Twenty Dollars ($20.00) per week as a clerk. Application of Workmen's Compensation Act Rules seems equitable.

On the basis of wages and time lost an award of Sixteen Dollars and Fifty Cents ($16.50) is hereby made in favor of claimant.

(No. 2461—Claimant awarded $1,000.00.)

NETTIE HALE, ADMR'X. OF THE ESTATE OF MORRIS HARPER, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing granted May 14, 1935.

NETTIE HALE, ADMR'X. OF THE ESTATE OF MORRIS HARPER, DECEASED, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case vs. State*, 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Morris Harper was a member of the Howitzer Co. of the 130th Inf. I. N. G. and lost his life in the military bus-fire accident near Pana, Illinois on July 26, 1933. His mother, Nettie Hale was appointed administratrix of his estate and has filed this claim pro se.

Deceased was twenty years of age at the time of his death and left as his heirs—his mother, one married sister, a brother sixteen years of age, another brother fourteen years of age and a half brother two years of age. His father is dead and his mother has again married. Deceased resided with his mother, stepfather and brothers at the time of his death, living on a farm in Jefferson County. His sister was married and lived in her own household.

Deceased worked on the farm, helping with the farm work and all the duties about the house and home. He also worked away from home when he could obtain anything to do. The money that Morris earned he used for clothing and contributed a part to his mother.

The State has paid or assumed payment of medical and other fees amounting to Four Hundred Twenty-five and 10 100 Dollars, ($425.10). Because of the meager proof in the

record as to contributions by the deceased to his mother's support, it is difficult to determine what award can be allowed in this case. If we strictly applied the rule of the Workmen's Compensation Act no award would be made. This court, however, is not limited by said Act in acting on claims submitted under the Military and Naval Code.

"In cases where an officer or enlisted man of the National Guard is killed while performing his duty, etc., his heirs or dependents shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

Sec. II Art. XVI Military & Naval Code of Ill.

Because it is apparent that the deceased soldier was contributing by his labor something to his mother and family's support, although to a limited extent, an award for their financial help and assistance seems merited, and an award is hereby entered in favor of Nettie Hale, as the mother of said Morris Harper, deceased, in the sum of One Thousand Dollars ($1,000.00).

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

Application of the above named claimant for a re-consideration of the award of One Thousand Dollars ($1,000.00) heretofore made in her favor has been duly considered and the entire record in connection with the military bus-fire accident out of which the death of Morris Harper resulted, has been reviewed.

The contributions to the support of claimant by the deceased, as shown by the record, were so meager, there is no theory upon which an award to the amount of One Thousand Dollars ($1,000.00) as heretofore granted can be sustained, except by giving to her the benefit of the provisions of the Workmen's Compensation Act. Accepting such Act as a guide the court in its original opinion made an award of One Thousand Dollars ($1,000.00) to claimant. No sufficient basis for a change of such award being evident, the award heretofore made is hereby re-affirmed and such award of One Thousand Dollars ($1,000.00) in favor of Nettie Hale as the mother of Morris Harper, deceased, is hereby recommended.

(No. 2456—Claimant awarded $9.85.)

ASHLEY W. HARLOW, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ASHLEY W. HARLOW, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for, under Military and Naval Code.* This claim arose out of occurrence for which claim was filed and award made in case of *Case vs. State*, No. 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Ashley W. Harlow has filed his claim as another of the members of the Howitzer Co. 130th Inf. I. N. G. who was in the military bus-fire accident near Pana, Illinois on July 26, 1933. (See *Case* vs. *State*—C. of C. No. 2469.)

A Military Medical Board in considering his case on August 8, 1934 found there were no visible scars and no disability. Claimant in his testimony herein agrees with the conclusion reached by the medical board and states that the only effects upon him as a result of the accident were burns across the knuckles of the left hand, the left side of his nose and a bruised elbow. He was not regularly employed prior to the accident but had been working on Saturdays on the basis of $18.00 per week. The State has assumed the payment of medical expense in his behalf of $4.50.

Claimant lost personal effects of the value of Eighty-five Cents (85c). There being no permanent disability the only loss of time that could be calculated for which claimant might be entitled to compensation would be three days, between the time of the bus-fire and his departure for Camp Grant. If the Compensation Act was applied there could be no award, but the court under authority vested in it under the Military and Naval Code, is of the opinion that claimant should be compensated for the three days time on the basis of his wages at $18.00 per week and also for the loss of property, and on this basis a total award of $9.85 is allowed.

(No. 2112—Claimant awarded $1,350.00.)

ELIJAH F. HAYES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing granted May 14, 1935.

ELIJAH F. HAYES, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for.* An award may be made to member of Illinois National Guard for personal injuries sustained by him while in the performance of his duties as such, under authority of Section 11 of Article 16 of the Military and Naval Code.

SAME—*same—Workmen's Compensation Act does not control—may be resorted to as guide.* The Workmen's Compensation Act does not control in determining the amount of an award in cases arising under the Military and Naval Code but its provisions may be resorted to as a guide, in the discretion of the Court of Claims.

MR. JUSTICE YANTIS delivered the opinion of the court:

Corporal Elijah F. Hayes has filed his claim pro se under a stipulation that he was a member of the Howitzer Co. of the 130th Inf. I. N. G. and was injured on July 26, 1933 in the bus-fire near Pana, Illinois while on duty as a member of the National Guard of this State; that his injuries have been duly considered by a Medical Board on September 23, 1933, July 26, 1933, January 14, 1934 and August 8, 1934.

Claimant is forty years of age and had been a member of the Militia since January 3, 1930. Prior to the injury he was engaged as an automobile mechanic and was earning Thirty-seven Dollars ($37.00) per week. He is a widower without any children and testified that the most serious injuries received by him in the bus-fire were severe burns on the left hand, and in the lumbar region of the back and on the neck and back of the left ear. There is some stiffness in the left hand, causing inability to grasp tightly. In its final examination at that time the Military Medical Board considered X-ray films made on August 10, 1934 showing a bony deformity in his shoulder, and the Board estimated his permanent partial disability at twenty-five per cent (25%). There is evidence of a hernia operation performed several years ago and a recurrence of such hernia shortly before

the accident in question, but in no way connected with the accident.

Payments have been made to the claimant under the provisions of Section X Art. XVI of the Military Code through the Adjutant General's Office from July 25, 1933 to February 26, 1934 in the sum of Four Hundred Fifty-four and 75 100 Dollars ($454.75). Under approval of this court further payments have been made to claimant through the Adjutant General's Office.

In addition thereto the State has paid or assumed payment for medical, nursing and hospital fees for claimant to the amount of Two Hundred Eighteen and 75/100 Dollars ($218.75). Claimant testified that the burn to his left hand and the dislocation of his shoulder comprise the most serious injuries; that the burn to his right hand was the most painful at the time of the accident, but that there seems to be no permanent injuries thereto.

While the Workmen's Compensation Act does not control in claims of this character, we believe its provisions are properly considered as a guide. That Act provides for a payment of fifty per cent (50%) of the average weekly wage with a maximum of Fifteen Dollars ($15.00) for 225 weeks for the loss of an arm or the total loss of its use. Claimant's earnings would entitle him to the maximum of Fifteen Dollars ($15.00) per week if figured by this rule. Twenty-five per cent (25%) disability of loss of an arm would figure $15.00 times 56-¼ weeks—or Eighth Hundred Forty-four Dollars ($844.00). If the Compensation Act was to be strictly applied, the amounts heretofore paid would be approximately the same as the amount due for temporary total incapacity. If we consider the twenty-five per cent (25%) disability finding as made by the Medical Board to apply to claimant's general physical ability instead of treating it as a disability to the left arm alone we would consider his award on the basis of a maximum death benefit of Four Thousand Dollars ($4.000.00); twenty-five per cent (25%) of which would be One Thousand Dollars ($1,000.00).

Under the authority of the Military and Naval Code and under all the facts shown by the Record, and the various medical reports, the court is of the opinion that an allowance should be made on the latter basis, *and an award is therefore allowed in the sum of One Thousand Dollars ($1,000.00).*

IT IS FURTHER ORDERED, that payments heretofore authorized and approved under orders of this court to claimant shall be discontinued upon the issuance of a warrant in payment of said award.

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

Application of the above named claimant for a reconsideration of the award of One Thousand Dollars ($1,000.00) heretofore made in his favor has been duly considered and the entire record in connection with the military bus-fire accident, out of which the injuries to claimant resulted, has been reviewed. As the injuries growing out of this accident were suffered by the various claimants while engaged in military service, the reports of the Military Medical Boards are entitled to earnest consideration. In the case of Corporal Hayes, the last of such reports was that of August 8, 1934. The award of One Thousand Dollars ($1,000.00) was based upon the evidence as disclosed in his case and the court finds no sufficient basis for a modification or change of the amount of that award. However a further showing has been made over the signature of Dr. V. P. Blair of St. Louis, Missouri, that an examination of claimant under date of April 10, 1935 shows that certain skin graft can be made across the dorsum of the left hand, which the doctor believes will release the hand sufficiently to permit the closing of same and to also remove the tenderness now existing. Such operation involves an estimated hospitalization of four weeks time and a surgical charge of Three Hundred Fifty Dollars ($350.00).

Again following the practice in connection with the Workmen's Compensation Law, and believing from the record that the surgical treatment in question will relieve the claimant to some extent of the disability now existing,

IT IS THEREFORE ORDERED that this cause shall remain upon the docket for such further orders and awards if any as may prove legal and proper, in addition to the specific award hereinabove made, for surgical care and hospitalization as hereinabove indicated.

(No. 2443—Claimant awarded $15.00.)

ALVA D. HOWARD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ALVA D. HOWARD, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for under Military and Naval Code.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Alva D. Howard, a member of the Howitzer Co. 130th Inf. I. N. G. was in the military bus-fire accident that occurred near Pana, Illinois on July 26, 1933. (See *Case* vs. *State*—C. of C. No. 2469.)

A Military Medical Board made a physical examination of claimant on August 8, 1934 and found that there is no evidence of laceration of the right leg or disability of the back apparent. Claimant testified that when he leaped from the window of the burning bus he strained his back; however he agrees with the report of the medical board. There was no apparent loss of time and no permanent disability. Claimant lost a wrist watch valued at Ten Dollars ($10.00) and certain other personal effects for which an allowance should be made. Under authority of the Military and Naval Code, and the evidence appearing in this case an award is made in favor of claimant in the sum of Fifteen Dollars ($15.00).

(No. 2455—Claimant awarded $23.10.)

ROLLIE HUGHEY, A MINOR, BY J. B. HUGHEY, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ROLLIE HUGHEY, a minor by J. B. Hughey, his next friend, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and

award made in case of *Case* vs. *State*, No. 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Rollie Hughey, a member of the Howitzer Co. 130th Inf. I. N. G. was in the military bus-fire accident that occurred near Pana, Illinois on July 26, 1933.

Claimant is an unmarried man and employed by his father in Highway Construction work. His compensation was forty cents (40c) per hour for nine hours a day and an average of about five and one-half (5½) days a week. Claimant went to Camp Grant following the accident and after his return was unemployed approximately two weeks because of the injuries he had received in the bus-fire. These injuries consisted of burns on both arms from the elbows to the hands with minor bruises. Claimant further testified that the burn on his left hand had not healed when he left Camp Grant.

A Military Medical Board examined him on August 8, 1934 at Camp Grant and reported that there is no evidence of disfigurement or permanent disability. Claimant agrees with that report.

In the claim filed by claimant herein he asks an award for personal property of an estimated value of Twenty-five Dollars ($25.00) claimed to have been lost in the fire, but no proof or evidence in regard to such loss appears in the record.

Under the evidence herein submitted and basing consideration of the claim upon the general provisions of the Workmen's Compensation Act, an allowance for two and one-half weeks, covering the period between the fire and the service at Camp Grant and two weeks thereafter, will be made.

An award is therefore entered in favor of J. B. Hughey for the use of Rollie Hughey in the sum of Twenty-three and 10/100 Dollars ($23.10).

(No. 2101—Claimant awarded $512.27.)

JOHN T. HEATHCOCK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing denied April 9, 1935.

JOHNSON & PETERSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where it appears from stipulation of facts entered into between parties in claim for compensation for accidental injuries that claimant is entitled to same, an award will be made in accordance with the provisions of the Act.

SAME—*stipulation of facts—duty of court thereunder.* Parties entering into stipulation of facts upon which case is submitted for decision cannot stipulate as to conclusion to be reached by the court from such stipulation, as it is the duty and province of the court to apply the law to the facts as stipulated.

SAME—*when award for partial loss of use of leg will not be made.* Where it appears from stipulation of facts that the condition resulting from the accident is a partial fixation of ankle joint, same being localized in ankle joint, causing partial loss of use of foot, award must be founded upon basis of total loss of use of foot and not on total loss of use of leg.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff was a Highway Patrolman employed by the State of Illinois in the Division of Highways on the 13th day of April, 1932. He was working upon and about the earth shoulders of State Route No. 7, and while employed in the regular course of his duties was operating and riding upon a drag. While doing so he was thrown to the ground, the drag fell upon him and he suffered a compound dislocation of the Tibia of the right leg at the ankle joint and also a compound fracture of the Fibula of the right leg about three inches above the lower end of said right Fibula. A stipulation of facts entered into between the parties hereto further recites "That by reason of said accident the muscles, tendons, ligaments and tissues of the ankle joint of said right leg and foot were torn and bruised; that by reason thereof, and when in the process of healing, certain fibrous tissue formed in and about said ankle joint producing a partial fixation of said ankle joint known as Ankylosis; * * that he became partially incapacitated from pursuing his customary and usual line of employment as a farmer; that same was a result of the partial loss of the use of said right leg and foot; and that the partial loss of the use of said right leg and foot is forty per cent (40%) of the total use of said member." The required averments as to notice, demand, etc. are alleged.

Claimant was unable to work from the day of his injury, April 13, 1932, to August 22, 1932, during which time he was paid his full wages. Under the stipulation it is agreed that in the allowance of any award the sum of Two Hundred

Sixty-six and 95/100 Dollars ($266.95) should be credited, because of such payment of wages in full during the period of incapacity.

As above quoted, the stipulation states that the condition which finally resulted from the accident is "A partial fixation of the ankle joint." The concluding words of the stipulation as to the extent of the loss or injury are "That the partial loss of use of said right leg and foot is 40% of the total use of said member."

As the permanent condition is localized in the ankle joint, a total loss could only be of the foot. A partial loss must be founded upon the basis on which a total loss would be computed. If an amputation of the foot had resulted it would, from the facts alleged, have apparently been little more than three inches above the ankle. An amputation of a foot, if made well below the knee, is considered a loss of a foot, and not a partial loss of a leg (Angerstein, Section 309, Page 570).

The evidence here supports an allowance to plaintiff on the basis of forty per cent (40%) for loss of use of his right foot. His average wages were $28.85 per week. A total loss of a foot would entitle him to fifty per cent (50%) of his wages for one hundred thirty-five weeks (135). A forty per cent (40%) loss entitles him to an award of Seven Hundred Seventy-nine and 22/100 Dollars ($779.22). From this a deduction is to be made, under the terms of the stipulation, of Two Hundred Sixty-six and 95/100 Dollars, ($266.95), making an allowance of Five Hundred Twelve and 27/100 Dollars, ($512.27).

An award is therefore allowed in favor of plaintiff in the sum of Five Hundred Twelve and 27/100 Dollars ($512.27).

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

An opinion was filed in this cause on March 13, 1935 granting to petitioner an award in the sum of Five Hundred Twelve and 27/100 Dollars ($512.27). On April 3, 1935 plaintiff filed his Petition for Rehearing, asking that said award be changed and allowed in the sum of Seven Hundred Twenty-two and 29/100 Dollars ($772.29).

The basis of said petition is that a Stipulation of Facts was entered into between the parties in which it was agreed "That the partial loss of use of said right leg and foot is 40% of the total use of said member"; that it had been definitely agreed between the parties that a net award of Seven Hundred Seventy-two and 29/100 Dollars ($772.29) should be allowed and that it was the intention of the parties that by said stipulation it was to be agreed (Par. 8 Petition for Rehearing) "That any award entered would be based on the 40% loss of use of said right leg and foot." In his Petition for Rehearing Plaintiff purports to quote Angerstein Section 435, Page 718-20 by saying "That the stipulation of the parties hereto as to material facts is binding upon this court." The wording found in the reference so cited reads "A stipulation by the parties as to the facts, so long as it stands, is conclusive between them and cannot be met by evidence tending to show that the facts are otherwise."

The original opinion herein recites the stipulation in much detail and that stipulation specifically stated that the condition resulting from the accident was "A partial fixation of said ankle joint." In its opinion the court gave full consideration to the Stipulation of Facts between the parties. The conclusion to be reached from such Statement of Fact was for the court to determine. The basis upon which the conclusion was reached is fully set out in the opinion.

Under the stipulation herein filed the only award either partial or total that could be made would be incident to the loss of or loss of use of plaintiff's foot.

No matters appearing in the Petition for Rehearing upon which a different result might be obtained the petition is denied and the original award re-affirmed.

Mr. Chief Justice Hollerich, dissenting.

(No. 2444—Claimant awarded $12.50.)

BURRELL M. HULBERT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

BURRELL M. HULBERT, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Burrell M. Hulbert, a member of the Howitzer Co. 130th Inf. I. N. G. was in the military bus-fire accident that occurred near Pana, Illinois on July 26, 1933.

Claimant is a brother of Private Wilburn Hulbert who died as a result of burns received in this same accident. (C. of C. No. 2421.)

Claimant received a cut and a burn to his hands; and his face and hair were burned to some extent in getting out of the bus window to escape the flames. He was an employee at the Mt. Vernon Foundry on the basis of $25.00 per week. A Military Medical Board made a physical examination on August 8, 1934 and found that there was no evidence of scars or disability in this case. There is no evidence that claimant lost any time or wages by reason of disabilities suffered in the fire except approximately a week between the time of the bus-fire and the time he went to Camp Grant. Under the theory of allowance followed by the court in most cases of this character, an allowance of $12.50 would seem merited, under authority of the Military Code, and an award is therefore made in favor of claimant for the sum of Twelve and 50/100 Dollars ($12.50).

(No. 2421—Claimants awarded $1,456.00.)

GLADYS HULBERT, ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

Rehearing denied May 14, 1935.

D. C. THOMPSON, for claimant, GLADYS HULBERT.

ALVA L. HULBERT, BURRELL M. HULBERT AND HELEN HULBERT, intervening petitioners, pro se.

OTTO KERNER, Attorney General; JOHN KABERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for death under Military and Naval Code.* Where member of Illinois National Guard sustains personal injuries, resulting in his death, while in the performance of his duties, an award may be made to his heirs or dependents under the provisions of Section 11 of Article 16 of Military and Naval Code, in such amount and in such proportions as the court may deem justified under the merits of the case.

MILITARY AND NAVAL CODE—*Workmen's Compensation Act, provisions as guide in claims under.* The Court of Claims is not legally obligated to observance of the provisions of the Workmen's Compensation Act in determining the amount of awards in cases under Military and Naval Code, but may in its discretion follow same as a reasonable guide.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is one of the claims arising out of the National Guard motor bus fire accident that occurred near Pana, Illinois on the 26th day of July, 1933; being the only one of such claims in which claimant appears by an attorney; all other claimants having filed their claims pro se.

Wilburn Hulbert, from whose death this claim arises, was a member of Howitzer Co. 130th Inf. Ill. National Guard. Immediately prior to the 26th day of July 1933 he had been on actual and active duty at Taylorville, Christian County, Illinois, under orders of the Governor of this State, assisting in restoring peace in a mine strike existing there. On said date said Company, under command of Capt. Edward G. Johnston, was ordered by proper authority to return to its headquarters at Mt. Vernon, Illinois, and at the time of the accident in question, Wilburn Hulbert, with other members of his Company, were being transported in an automobile bus, chartered by the State through its Military Department from the Illinois Terminal Transportation Company.

At a point about four miles northwest of Pana, Illinois the bus caught fire and flames quickly spread throughout the interior of same. Wilburn Hulbert, like several of his comrades, was seriously burned and was compelled, because of the sudden spreading of the flames, to leap from the moving bus. His head, face, body, arms and legs were burned; such burns covering about five-sixths of the surface of his body, and as a result thereof he died the following day, July 27, 1933.

The Military Board of Inquiry found that the injuries received by Wilburn Hulbert were sustained in the line of duty, as a member of said Company, and that such injuries

occurred through no fault or neglect on the part of any officer or enlisted man of the Illinois National Guard.

The young man, at the time of his death, was nineteen years of age, he left no wife nor children, but left as his heirs-at-law—his father, John L. Hulbert; a brother, Alva Hulbert; a brother, Burrell M. Hulbert; and a sister, Helen Hulbert. Alva Hulbert had been married for a number of years and maintained a home for himself and his immediate family. The brother, Burrell Hulbert, was married about the year of 1931 and lived with his wife several months, but was living as a single man at the time of the accident. He also, was a member of the National Guard. Helen Hulbert was a minor and at the time of the accident was residing with her brother, Alva Hulbert. Wilburn Hulbert's mother died about 1926, and on the 18th day of July, 1928 an order was entered in the County Court of Jefferson County, Illinois, upon petition duly filed and heard, finding Wilburn Hulbert to be a dependent child, by reason of the neglect by the father and the immoral condition of the latter's home; further ordering that the boy be taken from the care, custody and control of the father, John Hulbert; that he become a ward of the court, and placed in the custody of his brother, Alva Hulbert *until the further order of the court.* A similar order at the same time was entered in regard to the dependency, care and custody of Helen Hulbert, who at that time was eleven years of age.

John L. Hulbert married his present wife, Gladys Hulbert, in October, 1929. She was appointed Administratrix of the Estate of Wilburn Hulbert and filed this claim as such administratrix, but later John L. Hulbert was, by a stipulation, substituted as claimant in her place.

An intervening petition has been filed by Alva L. Hulbert, Burrell M. Hulbert and Helen Hulbert, alleging that Wilburn Hulbert contributed to the family expenses of Alva L. Hulbert and Helen Hulbert and also to the family expenses of John L. Hulbert, and that inasmuch as Burrell M. Hulbert was making his home at such times as a part of the family circle of either Alva L. Hulbert or John L. Hulbert; that Wilburn Hulbert was also therefore contributing to the living expenses of his brother, Burrell M. Hulbert. The Intervening Petitioners therefore ask that consid-

eration be given to their rights and that they individually be awarded such portion of any award that may be made, as the court may deem proper.

From the testimony it appears that for a short time after the legal custody of the son and daughter were taken from John L. Hulbert, the latter and all the children lived at the home of his son, Alva L. Hulbert. Later the father and his two younger boys rented a place and lived together, Wilburn then being about sixteen years of age. In February, 1930 John L. Hulbert, having re-married, went to Wayne County where he lived for about a year, and the two boys lived in Mt. Vernon, Wilburn staying most of the time in the home of his brother Alva. From September, 1931 until July, 1933 Wilburn lived part of the time in his father's home, part of the time with his brother Alva, and part of the time he and his brother, Burrell, roomed with other parties. Some time between two weeks and a month prior to leaving for riot duties at Taylorville the two boys left their father's home and from then on either made their home with their brother Alva, or roomed with third persons.

Wilburn Hulbert was apparently an industrious young man and had been employed with the Mt. Vernon Furnace Company more or less regularly for several years. His earnings were from $13.00 to $15.00 per week. Prior to 1926 the father, John L. Hulbert, was a railroad engineer. At the time of the hearing he was employed by the CWA four days a week for eight hours a day at Forty Cents (40c) per hour. The wife, Gladys Hulbert, testified that she was employed picking chickens, but had not worked any after January 3, 1933. The deceased soldier paid board and room rent of $3.50 to $4.00 per week to his brother Alva L. Hulbert, during the time that he stayed there. This brother testified that after his father "got out of his trouble he came to my house; the boys were working, so I thought they could support my father." During the time Wilburn Hulbert lived at the home of his father it does not appear that he paid a definite stated amount for room and board, but apparently he contributed to the payment of rent, helped buy furniture on the installment plan and from time to time gave his father sums in cash. Burrell M. Hulbert testified to having contributed from $60.00 to $70.00 toward his father's support during the eight months that he lived there.

The sister, Helen Hulbert, testified that her brother Wilburn had bought most of her clothes and gave her money whenever he could spare it, and that he also bought her school books; that whenever she wanted anything to help feed and clothe herself she got it from Wilburn; that she did not pay board while living at her brother Alva's, and at the time of the accident, and for a short period prior thereto, she was working at the farm home of a Mr. Johnson for her room and board.

Burrell M. Hulbert testified that he had not been working for about two years; that his brother Wilburn was working during that time and whenever he wanted money he would get it from Wilburn; that Wilburn helped him buy clothing and that he was rooming with Wilburn for several weeks before they went to Taylorville with the militia. He also testified that Wilburn was the owner of an automobile. He also testified that during an eight month's period Wilburn contributed to his father's support, "all he made". In view of the fact that the record shows that Wilburn at all times paid his own way and bought his own clothing he could not have contributed to his father's support, everything that he earned. Andrew S. Grant, a witness called on behalf of claimant, testified that John L. Hulbert, the two younger boys and Helen lived in one of his apartments for about six weeks; that one of the boys paid the rent and the other paid the grocery bills. John L. Hulbert testified that during the last two years of Wilburn's life, the latter contributed about $438.00 per year to his support.

From all the foregoing it is apparent that while no regular contributions were made by Wilburn Hulbert to any member of his family, he did indirectly through payment of board, the buying of furniture and gifts of money and clothing, contribute to the support of his father, stepmother, two brothers and sister.

"In every case where an officer or enlisted man of the 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 or assistance and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

Sec. 11, Art. XVI, Military Code.

Claimant, John L. Hulbert, asks that the total amount of such award as may be made shall be paid to him; that such award should be figured under the Workmen's Compensation Act and that such claimant should be allowed not less than $2,500.00 and any sum the court may see fit above that up to $4,000.00.

The existence of dependency and the extent of it are questions of fact. There is a distinction between the mere receiving of contributions, and claims to compensation by reason of the dependency of the parent linked with the fact of contributions by a deceased. The rule is that dependency must be based on evidence that the parent was dependent on the deceased for support at the time of the death of the deceased and that the latter had been contributing to the parent in a substantial manner. (*Yellow Cab Co.* vs. *Ind. Com.* 333 Ill. 49). Such dependency must be shown to exist at the time of the decease of the employee. Where dependency existed but terminated before the accident, it as a matter of law, does not exist. (*Wedron Silica Co.* vs. *Ind. Com.* 312 Ill. 119.) The fact that the father expected to be dependent upon the deceased in the future or that he was saving money for the time, is not sufficient to support an award, as the dependency must be at the time of the death and not a contemplated future dependency. (*Hamer-Paskins Co.* vs. *Ind. Com.* 331 Ill. 65.)

In *Bauer & Black* vs. *Ind. Com.* 322 Ill. 165, it was held that the parents were not entitled to compensation for the death of an adult daughter who had made payments not exceeding the value of board and room.

The Court of Claims is not definitely committed to observance of the Compensation Act provisions in determining what awards shall be made in cases arising under the Military Code, but has in many instances followed such Act as a reasonable guide. Under Sec. 7, Par. C, of the Workmen's Compensation Act, if an employee leaves any parent who at the time of injury was partially dependent upon the earnings of the employee, such parent shall receive such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less than $1,000.00 and not more than $3,750.00 in any event. The record indicates an average wage

of $14.00 per week *when deceased was working*, but that he only worked a portion of each year. His annual earnings could not have apparently exceeded $728.00 per year. Four times that amount would be $2,912.00. The record does not disclose any satisfactory way in which the proportion of the amount spent by deceased on himself and what part he contributed toward the support of his father, brothers and sister can be determined. It is apparent that he spent $7.00 or $8.00 a week for lodging, board, clothes and automobile. If an average of $7.00 is taken it would leave $7.00 per week which might have been contributed to the father, brothers and sister. Four times this amount on an annual basis would be $1,456.00, being a fair proportion as contemplated under Par. C. of Sec. 7 of the Compensation Act.

If we adhered strictly to the Compensation Act there is some doubt whether an award to either of the claimants could be justified, for the deceased was living separate and apart from all, except his brother Burrell at the time of the accident in question, and is not shown to have been contributing any sum to either of claimants for several weeks prior thereto.

Under the authority granted the court, however, under the Military and Naval Code and considering the merits of the claim of each member of the family of Wilburn Hulbert, deceased, the court is of the opinion that a total award herein of $1,456.00 is legal and just, and is such as the merits of this case demand.

In the absence of any set rule by which we should determine a division of an award herein, the following order is entered: An award of One Thousand Four Hundred Fifty-six Dollars ($1,456.00) is made because of the death of Wilburn Hulbert, by reason of the estimated contributions made by him to his family's support as hereinabove set forth; said sum shall be divided into four equal portions, one of which shall be payable to each of the following in the amounts stated, and awards are made as follows:

To—John L. Hulbert	$364.00
Alva L. Hulbert	364.00
Burrell M. Hulbert	364.00
Helen Hulbert	364.00
Total	$1,456.00

(No. 1831—Claim denied.)

ROBERT W. JOHNSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

B. M. DAVISON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, SUSTAINED ON PUBLIC HIGHWAY—*when State not liable for.* In the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages for personal injury sustained thereon caused by either a defect in the construction or failure to maintain same in a safe condition for travel.

SAME—*respondeat superior.* The doctrine of *respondeat superior* does not apply to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Robert W. Johnson, filed his declaration on November 16, 1931 alleging that the State of Illinois was possessed of a certain State Aid Road in Sangamon County, Illinois, and it was the duty of the State to maintain and keep the highway in a good and safe condition and in a proper state of repair, and notwithstanding its duty in this behalf on the 13th day of August, 1931, the claimant was driving over the road in the night-time, and near and between station 12-00 and 13-50, which was a part of that portion of the highway known as State Aid Road 5-15-D, he struck a pavement brick on the edge, which caused the plaintiff to lose control of his automobile and the car left the pavement and struck a telephone pole, and the claimant did sustain very serious injuries, consisting of a fracture of the elbow, dislocation of the right shoulder and vertebra of lower neck, besides various cuts and bruises.

The declaration avers that the claimant spent Two Thousand Dollars ($2,000.00) in endeavoring to be cured, and Thirty Dollars ($30.00) in repairing his automobile, and damages in the sum of Two Thousand Thirty Dollars ($2,030.00) is asked.

This court has on many occasions held that the doctrine of respondeat superior does not apply to the State.

The State exercises governmental power in the construction and maintenance of its highways and is not liable for the

misfeasance, malfeasance, or negligence of its officers. The State would become liable only where a claimant could show a legal or equitable right to recover.

Walsh vs. *State*, 6 C. C. R. 421.
Stoddard vs. *State*, 6 C. C. R. 27.
Peterson vs. *State*, 6 C. C. R. 77.

The cause will, therefore, be dismissed.

(No. 2448—Claimant awarded $16.20.)

CLIFFORD R. KARCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

CLIFFORD R. KARCH, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2649, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Clifford R. Karch was a member of the Howitzer Co. 130th Inf. I. N. G. and was in the military bus-fire accident that occurred near Pana, Illinois on July 26, 1933.

Claimant testified that both ears and both hands were burned in the bus-fire, his hip was bruised and the hair was burned off the back of his head. In his claim he stated he had lost two weeks work at $30.00 per week.

A Military Medical Board examined claimant at Camp Grant, on August 8, 1934 and found that he suffered no permanent disability. Claimant stated in the record that he agreed with this finding.

Private Karch was employed by the Mt. Vernon Furnace Mfg. Co. and was paid approximately Forty Cents (40c) an hour. On the basis of a nine-hour, six-day a week job his wages would have been $21.60 per week.

The record further discloses that Private Karch received the burns on his hands in tearing the burning clothes off Private Harper. The latter, as is indicated in other claims filed in connection with this same accident, died as a result

of the burns he received. While no permanent disability exists in this case, claimant was incapacitated from active labor for approximately 10 days and an award is hereby made in line with the provisions of the Workmen's Compensation Act, in his favor on the basis of his usual wages over a ten day period in the sum of Sixteen and 20/100 Dollars ($16.20).

(No. 2459—Claimant awarded $30.00.)

HOWARD L. LEGGEE, A MINOR, BY EUNICE LEGGEE, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

Claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for, under Military and Naval Code.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is another of the members of the Howitzer Co. 130th Inf. of the I. N. G. that was a passenger in the military bus that burned near Pana, Illinois on July 26, 1933. According to the record he was earning $20.00 per week at the time of the accident. The medical board's report of his physical examination, made on August 8, 1934, shows some slight scars on the forearm but no disability from any of the injuries. Two or three days after the accident claimant went to Camp Grant with his Company and received the usual pay for his services there. His testimony in this record states that after his return from Camp Grant he was disabled *for about three weeks.* He has indicated that he agrees with the report of the medical board that he received no permanent disability from the accident. His medical bills have been assumed by the State in the sum of Seven and 50/100 Dollars ($7.50). (See *Case* vs. *State*—C. of C. No. 2469.)

In view of the record an award, based on his wages and loss of time is made in the sum of Thirty Dollars ($30.00), under authority of the Military and Naval Code.

(No. 2457—Claimant awarded $27.50.)

JOE F. LOVIN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

JOE F. LOVIN, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *member of Illinois National Guard.* Where member of Illinois National Guard was injured in performance of his duties as such, an award may be made on the basis of the compensation provided in the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Joe F. Lovin was a member of the Howitzer Co. 130th Inf. I. N. G. and was one of the soldiers injured in the Military bus-fire accident that occurred near Pana, Illinois on July 26, 1933. A Military Medical Board under a report dated August 8, 1934 found that there is no disability and no disfigurement except a slight fullness of the left side of the lower lip, noticeable only when direct examination of same is made. Claimant testified herein that he was employed by his father under the latter's contract as a mail messenger and received from his father Sixty Dollars ($60.00) per month and board and room, the latter items being estimated by him to be worth Forty Dollars ($40.00) per month. Claimant is married and has one child, three and one-half years of age. He testified that while he went to Camp Grant and received regular pay while there as a soldier, that upon his return from Camp Grant, he lost approximately two weeks employment in his regular work, because of his physical condition resulting from the fire. Taking the Workmen's Compensation Act as a guide and figuring claimant's wages at $25.00 per week with an additional allowance for one child, an allowance of Twenty-seven Dollars and Fifty Cents ($27.50) would be computed.

An award is therefore made in the sum of $27.50.

(No. 2460—Claimant awarded $167.50.)

CARL M. McINTIRE, A MINOR, BY L. L. McINTIRE, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing granted May 14, 1935.

CARL M. McINTIRE, a minor by L. L. McINTIRE, his next friend, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Carl M. McIntire filed his claim as a minor by his next friend, L. L. McIntire. Claimant was a member of the Howitzer Co. 130th Inf. of the I. N. G. on the 26th day of July, 1933 and was in the military bus-fire accident of that date. Claimant testified before the Military Board that was called in said matter on July 26, 1933, and at that time stated that his hair was only singed on the back of his head and that he had a contusion of the left shoulder and a sprain of the left hand, caused by his fall in escaping from the burning bus. Further evidence found in the record discloses that immediately prior to the time of the accident he was employed as a lifeguard at the City Swimming Pool in Mt. Vernon, Illinois at wages of $3.00 per day; that he was unable to work on account of the injuries received in said accident for a period of twenty-five days. The military board directed him to the care of Dr. C. O. Hamilton of Mt. Vernon and the claim filed herein shows that medical bills amounting to Eleven Dollars ($11.00) have been paid or assumed by the State. (See *Case* vs. *State*—C. of C. No. 2469.) Claimant was apparently unmarried, and according to the record an allowance estimated under the rules of the Compensation Act on a basis of $3.00 per day, seven days per week for 3 4/7 weeks, or Forty-one and 07/100 Dollars ($41.07) would be a proper award. In view of the fact that the claim shows that actual wages were lost for a period of twenty-five days

at Eighteen Dollars ($18.00) per week, an award in reimbursement thereof in the sum of Sixty-seven and 50/100 Dollars ($67.50) is allowed, under authority of the Military and Naval Code.

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

This matter again coming before the court upon the application of claimant by E. G. Johnston, Capt. of the Mt. Vernon Howitzer Co., 130th Ill. Inf. for the allowance of a further award in the sum of One Hundred Dollars ($100.00) for a facial scar resulting to claimant from the injury suffered in said accident, and it appearing to the court from a re-examination of the evidence that such additional award is in conformity with the evidence herein, same is allowed and the order heretofore entered in this cause recommending an award of Sixty-seven and 50/100 Dollars ($67.50) to Carl McIntire is reconsidered and a total award is hereby made in his favor in the sum of One Hundred Sixty-seven and 50/100 Dollars ($167.50).

(No. 2452—Claimant awarded $11.25.)

LEE C. MOORE, A MINOR, BY MORTON MOORE, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

LEE C. MOORE, A MINOR BY MORTON MOORE HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Lee C. Moore, a member of the Howitzer Co. 130th Inf., I. N. G., was in the military bus-fire accident that occurred near Pana, Ill., on July 26, 1933.

Claimant filed his claim as a minor, but at the time of the hearing testified that he was now twenty-one years of age. Immediately prior to his military service at Taylorville he was engaged as a truck driver at Mt. Vernon, Illinois. While his testimony does not show what his regular wages were, his sworn claim states that the loss of time suffered by him was three weeks at $24.00 per week. His claim also sets forth that he lost personal property in the fire to the value of $25.00 but there is no evidence in the record of that fact. A Military Medical Board passed upon his physical condition on August 8, 1934, and reported that he had received no permanent disability. Plaintiff testified that his left knee, both hands and a place on his hip were burned; that he was unable to perform his regular duties for about a week after his return from Camp Grant. Plaintiff further testified that he does not know at this time whether the injuries to his knee will interfere with his earning capacity in the future.

The record indicates that claimant merits an allowance for one and one-half weeks temporary disability. If the Compensation Act rules were applied an allowance of $7.50 per week would be merited. An award is therefore made in the sum of Eleven and 25/100 Dollars ($11.25), in favor of claimant.

(No. 1891—Claimant awarded $82.40.)

MEDUSA PORTLAND CEMENT COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

MEDUSA PORTLAND CEMENT COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount will be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The Medusa Portland Cement Company, 1002 Engineers Building, Cleveland, Ohio, presented its claim for the balance

due on three hundred (300) barrels of cement that it sold to the State on the 21st day of May, 1931, to be used at the St. Charles School for Boys, St. Charles, Illinois, claiming a balance of Eighty-two Dollars and Forty Cents ($82.40). The claim was filed March 28, 1932, for this amount.

The State authorities thought that this charge could all be taken care of by a return of empty sacks on hand, but credits were allowed as empty sacks were returned, and there still remained due the sum of Eighty-two Dollars and Forty Cents ($82.40). The final bill was not presented until the appropriation lapsed and payment could not be made.

"Where the facts are undisputed that the State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made. *Shell Petroleum Corp.* vs. *State*, 7 C. C. R. 224; *Franklin County Coal Co.* vs. *State*, 7 C. C. R. 114; *H. Channon Co.* vs. *State*, 7 C. C. R. 97."

The claim, therefore, in the sum of Eighty-two Dollars and Forty Cents ($82.40), in favor of the Medusa Portland Cement Company, 1002 Engineers Building, Cleveland, Ohio, will be allowed and recommendation made that an appropriation be made for that amount.

(No. 2400—Claimant awarded $615.34.)

DONALDA ELIZABETH MORRISON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

DONALDA ELIZABETH MORRISON, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award may be made.* Where it appears from a consideration of the facts stated and the law applicable thereto that claimant is entitled to compensation for personal injuries, an award may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Six Hundred Fifteen and 34/100 Dollars ($615.34) for injuries sustained by her on March 11, 1934. The complaint avers that on that date she

was employed by the State of Illinois as Director of the Health Service for the State Teachers' College at DeKalb, Illinois; that she was enroute from performing duties as Director of the Health Service to the performance of duties as Director of the Dining Room Service, and was going from her clinic in the administration building to the college dormitory; that as she walked down the west stairway on the second floor of the administration building, a portion of the marble slab on the top step became loose from its position by her stepping upon same, causing her to fall eight or ten steps, thereby injuring her spine and causing her pain and suffering from March 11, 1934, to April 26, 1934—and causing her to expend for medical, hospital and nursing fees a total of Six Hundred Fifteen and 34/100 Dollars ($615.34).

Claimant's wages were One Hundred Eighty Dollars ($180.00) per month for eleven months per year. Her duties listed in detail in her complaint were, in general, to organize and supervise the physical condition of Freshmen students, to maintain a clinic for such purpose and in addition to her supervisory duties as a nurse, to examine and supervise the preparation of foods for the students.

Under an amendment to her complaint, claimant represents that the buildings owned and controlled by the State at DeKalb, known as the Northern Illinois State Teachers' College, include a three-story brick building, known as the administration building; a four-story brick building with elevators and fire escapes, known as Williston Hall and several other buildings; all heated by a central steam heating plant located in the administration building; that certain statutes and ordinances in existence at the time of the accident required the maintenance of fire escapes in a portion of these buildings and also specified certain provisions in regard to the construction thereof.

The only question involved is whether plaintiff's claim comes within the provisions of the Workmen's Compensation Act.

Under the facts stated and from a consideration of such facts and the cases and statutes cited, plaintiff is apparently entitled to an award and same is recommended in the sum of Six Hundred Fifteen and 34/100 Dollars ($615.34).

(No. 2450—Claimant awarded $45.00.)

RALPH R. PATE, A MINOR, BY RALPH R. PATE, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

RALPH R. PATE, A MINOR BY RALPH R. PATE, HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Ralph R. Pate, a member of the Howitzer Co. 130th Inf., I. N. G., was in the military bus-fire accident that occurred near Pana, Ill., on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

Private Pate was a school boy at the time of the accident; his only employment being such odd work as he could obtain during vacation periods. At the time of the hearing upon this claim Ralph R. Pate, Jr., was absent, and his father and next friend testified that six weeks after the accident his son joined the U. S. Marines; that during the time between the accident and September 1st, he suffered from burns on his left leg below the knee and burns and cuts to his hands; also that his ears and eyelashes had received some burns.

Apparently Private Pate suffered no permanent disabilities or he would not have been accepted for service in the Marines. Under the testimony, the authority of the Military Code, and following the rule adopted in certain similar cases, an allowance on the basis of $7.50 per week for six weeks, or $45.00, seems merited. An award is therefore made in favor of Ralph R. Pate, Sr., for the use of Ralph R. Pate, Jr., in the sum of Forty-five Dollars ($45.00).

(No. 2310—Claim denied.)

CORNELIUS REARDON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

CORNELIUS REARDON, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ATTORNEY AT LAW — *fees, expenses — when award for denied.* Where claimant rendered services as attorney at law and incurred expenses in connection with construction of bridge by State and in injunction proceedings concerning same, without any lawful contract of employment, an award for payment for same must be denied, even though such services were beneficial to State.

SAME—*contract of employment—not implied.* No contract can or will be implied with attorney-at-law for payment for services rendered and expenses incurred, even though beneficial to State where offer to render services to State is not accepted by Attorney General.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff herein has filed his claim for eighty-one (81) days legal services, in the amount of Four Thousand Fifty Dollars, ($4,050.00)—and the following expenses: Telephone Tolls, Ten Dollars ($10.00); Witness Fees to George Arundale, Twenty Dollars ($20.00); for services of Louis Johnson and Clarence Johnson in setting stakes for right-of-way, Fifteen Dollars ($15.00) *each*, making a total claim of Four Thousand One Hundred Ten Dollars ($4,110.00). The claim grows out of the removal of an old bridge across the Illinois River at Morris, Illinois, and the construction of a new bridge near that point, on State Route No. 47.

When the State was about ready to advertise for bids for the construction work, an injunction was granted by the Circuit Court of Grundy County, enjoining the Highway Department from letting a contract for the bridge in question. On January 21, 1933, a number of the business and professional men of the City of Morris attended a meeting of their local Chamber of Commerce for the purpose of working out plans to obtain a speedy construction of the new bridge. Plaintiff, on January 23, 1933, wrote a letter to the Attorney General, informing him of the meeting and the desires of the people of the community, as expressed at such meeting. Thereafter a number of communications were exchanged between plain-

tiff and the Attorney General's office, and plaintiff apparently took an active part, both in outside efforts and court procedure, to obtain a dissolution of the injunction, and to expedite the plans for the construction of the bridge in question.

In his complaint, plaintiff seeks an award for services in connection with said injunction suit and various condemnation suits that followed, on the theory of an original employment as an attorney by the Attorney General, based upon the letters and telegram received by plaintiff from the Attorney General. In his written brief and argument, plaintiff states that:

"Regardless of whether or not the correspondence between claimant and the office of the Attorney General amounted to a contract of employment, the State of Illinois, through the office of the Attorney General and through the Department of Highways, has received the benefit of my labor and expenditures."

In claimant's Exhibit "I" appears a letter from him to the Attorney General, dated January 18, 1933, as follows:

"I believe you will realize the importance of instituting condemnation proceedings through your office at a very early date, and if I can be of any further help to you locally, I am at your service."

In a letter dated January 23, 1933, claimant wrote as follows:

"A committee was appointed for the purpose of extending cooperation on the part of those assembled with the Highway Department and your office, but with no inclination on our part to dictate a course of procedure." * * *

"I am somewhat reluctant to press this matter to your attention at this time but the seriousness of the situation makes me feel justified in what I am doing."

In a letter from claimant to the Attorney General on February 11, 1933, appears the following:

"The writer was chosen as chairman of a committee to try to get some action on this matter and I am approached daily by some of those business men inquiring what progress is being made. * * *

"I trust, therefore, that you will pardon me for my persistency in this matter and I again offer my services to represent you in court in an effort to have the pending injunction suit dismissed which seems logically the first move to be made." * * *

The Attorney General replied to this letter under date of February 18, 1933, as follows:

"I appreciate your offer of services and should it be necessary I will be pleased to avail myself of your very kind offer."

From the examination of the record, there can be no doubt but that plaintiff rendered valuable service in helping end the difficulties surrounding the construction of the bridge in question, but it is also apparent that he entered into active participation in the matter as a local citizen of the community of Morris, just as did the other citizens who participated in the meeting of the Chamber of Commerce, about which plaintiff wrote to the Attorney General. The Attorney General's office apparently accepted plaintiff's proffer of local aid and cooperation in the spirit in which it was apparently offered, and every act taken by claimant was apparently in behalf of the citizens of Morris.

The Attorney General denies that claimant was ever employed by his office as an attorney for the State and the record fails to support claimant's contention that he was so employed. Neither can any award be granted on the theory of an "Implied Contract." Plaintiff was apparently acting for the community in which he lived and in the interest of himself and his neighbors.

The claim therefore is hereby denied.

(No. 2383—Claimant awarded $3,835.60.)

LAURA REDDING, ADM'RX., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

JAMES M. BARNES AND W. H. ABSHER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where State employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in his death, an award for compensation will be made to his dependents under provisions of the Act.

SAME—*grandchild not classed as child under.* Although the grandchild of a deceased employee resided in his home and was supported by him since

birth, if it does not appear that she was adopted legally by said employee, said grandchild cannot be classified as a child under the Workmen's Compensation Act and no award can be made for her benefit.

MR. JUSTICE YANTIS delivered the opinion of the court:

Charles O. Redding was employed by the State of Illinois on and prior to the 26th day of November, A. D. 1933, as a fireman at the Illinois State School for the Deaf at Jacksonville, Illinois. On the day stated at about 1 o'clock in the morning he was engaged in firing the boilers used in heating and lighting the school, and while so doing suffered a hernia attack. The record shows that while engaged in firing the boiler he was suddenly seized with severe pain in the right lower part of his abdomen; that he was unable to stand and was immediately taken to the hospital. In a consultation between the State physician and other doctors, it was found that the patient had a right inguinal hernia requiring immediate operation. The patient died on December 17, 1933. Medical proof shows that the operation was a result of the accident and that pneumonia set in thereafter as a result of the shock and trauma of the operation.

The proof shows that the hernia was of recent origin; that its appearance was accompanied by pain; that it was immediately preceded by trauma arising out of and in the course of the employment and that the hernia did not exist prior to the injury. The deceased left surviving him—his wife, Laura Redding of 624 South Diamond Street, Jacksonville, Illinois, and a grandchild thirteen years old, being a deceased daughter's child, by the name of Marjorie Beerup, who had lived and been supported by deceased ever since her birth; her father's address being unknown and no help having been given by him. Mr. and Mrs. Redding had been married forty years, and she and the grandchild were fully dependent upon deceased for their support. The wife files this claim as administratrix of his estate.

A stipulation filed herein states that the salary of deceased was $130.00 per month, subject to a voluntary cut of ten per cent (10%); also that the hospital and medical services had been necessarily incurred in the sum of $219.62, none of which have been paid. An amendment to the complaint further alleges that the building where deceased was

employed is a brick one-story building, housing the power plant, boiler plant, boilers, coal bunkers, machinery, electric motors and dynamos.

The proof justifies an award for the death of claimant's intestate as a result of the hernia in question. Counsel for claimant has raised the question of whether any additional amount may be legally claimed because of the thirteen year old grandchild of deceased, who lived in the home and was dependent upon him for support.

An award herein must be based under Section 7-A of the Workmen's Compensation Act which provides that if the employee leaves any widow, child or children, whom he was under legal obligation to support at the time of his injury, then in case of death a sum is payable equal to four times the average annual earnings of the employee, but not less in any event than Two Thousand Five Hundred Dollars ($2,500.00) and not more in any event than Four Thousand Dollars ($4,000.00).

Although the grandchild of deceased resided in the latter's home, it does not appear that she was ever legally adopted as a child by the grandfather and the court is without authority under the Workmen's Compensation Act and proof to classify such grandchild as a child of the deceased.

We therefore find that under the provisions of the Workmen's Compensation Act the claimant is entitled to an award of Four Thousand Dollars ($4,000.00) payable in weekly installments of Fifteen Dollars ($15.00) per week commencing on the 26th day of November, 1933. Payment by the respondent in weekly installments, however, is not practicable under existing laws and the award will therefore be commuted to an equivalent lump sum in accordance with Section 9 of the Workmen's Compensation Act.

The amount due claimant, Laura Redding, after commutation to an equivalent lump sum as aforesaid, is Three Thousand Eight Hundred Thirty-five and 60/100 Dollars ($3,835.60).

An award is therefore entered in favor of claimant for Three Thousand Eight Hundred Thirty-five and 60/100 Dollars ($3,835.60).

(No. 2466—Claimant awarded $5,500.00.)

STANLEY F. RUSSELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing granted May 14, 1935.

STANLEY F. RUSSELL, claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which filed claim and award made in case of *Case* vs. *State*, 2469 *ante*, under provisions of Military and Naval Code and opinion in that case applies with equal effect here.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is apparently the second most serious claim presented by those who survived the military bus-fire that occurred about four miles northwest of Pana, Illinois, on July 26, 1933. Further reference to the details thereof are here omitted because they are fully set forth in other cases involved in the same accident, among which is that of *Marlow Case* vs. *State*, No. 2469, and *Gladys Hulbert, Admx.* vs. *State*, No. 2421.

The record herein discloses that claimant Stanley Russell was a private in the Howitzer Co. 130 Inf. I. N. G. and on the 26th day of July, A. D. 1933, was a passenger with his comrades in the motor bus in question; that after the fire a military board considered his case. Their report and the evidence presented herein disclose that claimant suffered extensive second and third degree burns to his right thigh, left thigh from knee to hip, left arm, preventing the flexing of the fingers of the left hand, and wrist; shoulder burns and deep scars on the face with severe burns of the eyelids. The medical board estimated the permanent partial disability of fifty-five per cent (55%). Dr. H. M. Swift of Mt. Vernon, Illinois estimates the permanent disability to the left arm at seventy-five per cent (75%) and to the right hand at twenty-five per cent, (25%); also about twenty-five per cent (25%) disability to the left shoulder. Claimant's eyes are affected with a nervous paralysis and he is unable to fully close the lids. The medical testimony is that such disability will increase with time. Claimant also has suffered about twenty

per cent (20%) disability of the left leg because of burns on the thigh.

Claimant has received payments through the Adjutant General's office and the Military Department from July 25, 1933, to February 22, 1934, in the sum of Four Hundred Thirty Dollars ($430.00); also an emergency allowance during said time of One Hundred Eighty Dollars ($180.00). In addition thereto, this court has authorized further payments, under the provisions of the Military Code, which to this date, if they have been made, will amount to approximately Seven Hundred Ninety Dollars ($790.00). Plaintiff's complaint recites that the further sum of One Thousand Two Hundred Fifty-eight and 40/100 Dollars, ($1,258.40) has been paid or assumed by the State of Illinois for medical, nursing and hospital fees. A further award is asked by claimant under the provisions of the Military and Naval Code, because of the injuries suffered by him.

Claimant is twenty-nine years of age; is married and resides with his wife and two children, one seven years of age and the other eight years of age. He had been a member of the Militia Company for three years prior to the accident. Prior to that time he had conducted a five-acre truck farm for a living and has been unable to do so since that time because of his physical condition. He is unable to close the left hand and testifies that he has no grip in the right hand. Prior to his truck farming he worked for four years as an attendant at the Illinois State Hospital at Dixon, Illinois.

This case, as was stated in the Opinion of the Marlow Case claim, appeals most strongly to the sympathy of the court. In the absence of any better rules to guide us in determining a proper and just award to be made under the authority granted in Section II, Article XVI of the Military and Naval Code of Illinois, the provisions of the Workmen's Compensation Act afford the most liberal guide for our determination. In making our award we do not take into account the considerable sum of One Thousand Two Hundred Fifty-eight and 40/100 Dollars ($1,258.40) paid by the State for medical and hospital attention, or the advancement made through the Adjutant General's office of approximately One Thousand Four Hundred Dollars, ($1,400.00).

Claimant's compensation if figured under Section 7 of the Workmen's Compensation Act would amount to Two Thou-

sand Five Hundred Dollars ($2,500.00), with an increase to Three Thousand One Hundred Dollars ($3,100.00) because of two children under the age of sixteen years. The percentage of permanent disability indicated by the Medical Board, i. e., fifty-five per cent (55%) of the total death benefit, would indicate a loss of One Thousand Seven Hundred Fifteen Dollars ($1,715.00).

Because of the serious and permanent disability disclosed by the evidence and under the authority of the Military Code, an award is herein made in the sum of Five Thousand Five Hundred Dollars, ($5,500.00); and it is further ordered that payments heretofore authorized to be made through the Adjutant General's office shall cease upon the issuance of a State warrant in payment of said award.

SUPPLEMENT ORDER ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

This matter again coming before the court upon the application of claimant by E. G. Johnston, Capt. of the Mt. Vernon Howitzer Co., 130th Ill. Inf. for the allowance of further hospitalization to relieve claimant of partial effects from the injuries complained of, and the court being further advised in the premises and it appearing that said claimant, Stanley F. Russell, is still in need of medical or surgical treatment, which it is represented will relieve him to some extent from the injuries and disfigurements, under which he now suffers, and that it has been recommended by a Military Medical Board which examined claimant that he be sent to Dr. Blair at St. Louis, Missouri, for plastic surgery.

IT IS THEREFORE HEREBY ORDERED that this cause remain upon the docket of this court for the further allowance of such sums, if any, as may be properly allowable for surgical services and hospitalization rendered claimant hereafter in obtaining further relief from the effects of said accidental injuries.

IT IS FURTHER ORDERED, that the award heretofore made in favor of Stanley F. Russell in the sum of Fifty-five Hundred Dollars ($5500.00) *shall be paid to the Adjutant General* of the State of Illinois *for the use of said Stanley F. Russell and his family;* and the warrant shall issue accordingly; said award to be disbursed by the Adjutant General as fol-

lows: One Thousand Dollars ($1,000.00) to be paid to said Stanley F. Russell upon receipt of the warrant by the Adjutant General; the balance remaining, i. e., Four Thousand Five Hundred Dollars ($4,500.00) shall be paid by the Adjutant General to said Stanley F. Russell as follows, to-wit: At the rate of One Hundred Dollars ($100.00) per month until the further order of this court.

The court hereby retains jurisdiction of this cause for the purpose of making such other and further orders herein as the facts may hereinafter justify.

(No. 2307—Claim denied.)

LINDA SCHENK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

CARL A. SWENSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim under—proof.* In order to sustain claim for compensation under Workmen's Compensation Act it must be proven that injury for which claim is made was accidental and arose out of and in the course of the employment of the claimant and while engaged in extra hazardous enterprise.

SAME—*same—evidence.* Where the evidence discloses that condition complained of and for which claim for compensation is made is the result of illness of long standing and not as result of accidental injury arising out of and in the course of employment an award must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant, Linda Schenk, is the surviving widow of Henry Schenk; the latter being employed as a carpenter and sub-foreman in the Maintenance Division at Camp Grant, Illinois; his employment usually lasting from July to October. His wages were Eight Dollars ($8.00) per day. He died on the 15th day of September, 1933, and plaintiff claims that his death was due to injuries resulting in an accident arising out of and in the course of his employment on the 22nd day of July, A. D. 1933. The proof fails to support the claim. A stipulation as to the testimony of Dr. Charles L. Leonard states that the latter attended Schenk in his illness; that the cause of death of said Henry Schenk was "acute

decompensation of the heart due to long standing hypertension." Plaintiff testified that from the 18th to the 21st of July, 1933, her husband went to work each day but that he was "weak and all in." The question at issue is as to whether or not Henry Schenk suffered an accidental injury which arose out of and in the course of his employment. There is an entire absence of any evidence in the record as to any accidental injury having occurred.

The testimony of Dr. Bourland is that from examinations made by him this employee had been suffering from Arteriosclerosis over a period of more than a year prior to August 29, 1933, and that his heart condition at the latter date did not indicate anything in the nature of an acute strain or injury having occurred, but that the examination disclosed an extensive disease of the heart and blood vessels with no evidence of traumatism, which would ordinarily show in case of an injury.

The theory of plaintiff is apparently that her husband engaged in lifting and in heavy work which put an additional strain upon his heart and was a contributory factor in his death. The evidence does not support this.

A fellow-employee, John Volla, testified that he saw Henry Schenk and five or six other men lifting platforms on the 18th day of July and that evening he called on Schenk at his home and the latter was complaining of his side near the heart.

C. B. Knodle testified to seeing men working at Camp Grant on the 13th and 14th of July putting up tents "and noticed Henry working with those men." Roy W. Wilson, a fellow-employee, testified that "Schenk complained of his stomach." This witness further testified that he was a truck driver and helped the men in loading the tent platforms and that Schenk "told me where to put them and which ones to take out"; further, "that he did not see Schenk lifting platforms at any time," but that "he showed me how to do the work—he told me he had trouble with his stomach." This witness further testified that the loading of the platforms was handled by seven or eight men and that the platforms would weigh about 500 pounds.

It appears from the testimony of Schenk's foreman, Dan Sullivan, that Schenk had stored the tent supplies in previous years and knew where they were and that the foreman in-

structed Schenk to keep the blue prints, and not to do anything but just show the men where the material was to go. The testimony in general and the evidence of the doctors disclose that the death of Henry Schenk was due to heart trouble of long standing and there is no proof by which an award under the Workmen's Compensation Act can be justified. The claim is therefore dismissed.

(No. 2463—Claimant awarded $10.00.)

CHARLES J. STEVENSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

CHARLES J. STEVENSON, claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case* vs. *State*, 2469, *ante*, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Charles J. Stevenson was a member of the Howitzer Co. 130th Inf., I. N. G., and was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

Claimant received no injuries in the accident. His regular business at the time of the accident was operating a radio service shop. Claimant was not working for wages but testified that during the three days he worked at the armory between the fire and the time he left for Camp Grant he lost the benefit of sales and service charges to the amount of Twenty-five Dollars ($25.00). No allowance can be made for probable profits, but claimant should be compensated for the three days spent in the service of the State between the time of the bus-fire and leaving for Camp Grant. Ordinarily he would receive regular military pay but we believe that because of the circumstances, it should be increased to the equivalent amounts under the Compensation Act, and an award is therefore made in claimant's favor in the sum of Ten Dollars ($10.00).

(No. 2464—Claimant awarded $90.00.)

FLOYD STOCKTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

FLOYD STOCKTON, claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case* vs. *State*, 2469, *ante*, and the opinion therein is applicable here.

MR. JUSTICE YANTIS delivered the opinion of the court:

Floyd Stockton was a corporal in the Howitzer Co. 130th Inf., I. N. G., and was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

Claimant testified herein that his occupation prior to the accident was that of a barber; that as a result of the accident he could not work at his trade for about six weeks, because of stiffness in his thumb and finger. He further testified that such condition still interferes in his speed as a barber. Claimant also testified that because of such slowness he now averages in earnings about Seven or Eight Dollars per week less than he formerly earned; his previous earnings having averaged around Thirty-five Dollars ($35.00) per week.

A Military Medical Board which convened on August 8, 1934, made a physical examination of Corporal Stockton and found that he had no visible scars and no disability.

Under the authority granted the court under the Military Code to adjust the claim as the merits of same seem to demand, an allowance in compensation of the time lost by claimant will be made and an award is hereby entered in his favor in the sum of Ninety Dollars ($90.00).

(No. 1894—Claim denied.)

WILLIAM J. SWIFT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

BOWE & BOWE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PLEADING—*rules of court.* Where declaration fails to set forth matters required by rules of court a motion to dismiss will be sustained.

WORKMEN'S COMPENSATION ACT—applicable to employees only. The provisions of the Workmen's Compensation Act are only applicable to employees of the State engaged in hazardous occupation and not to officials thereof.

SAME—*official.* A major in the Illinois National Guard is an official of the State and not an employee.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The declaration in this case charges that on the 13th day of August, 1931, the claimant was injured by reason of an accident arising out of and the course of his employment. The claim was filed on April 19, 1932. The claim set forth is in accordance with the regular forms used by the Industrial Commission of the State of Illinois, and alleges that William J. Swift was a major in the Illinois National Guard and that he tripped on a sapling while at Camp McCoy, Wisconsin, and requests that he be allowed the sum of $275.00 on account of medical care and attendance; $15.00 per week for ten weeks temporary total disability; $15.00 per week for 190 weeks loss or loss of use of leg under Paragraph (e) of Section 8.

This case is pending upon a motion to dismiss.

Major Swift was the senior Medical Officer of his outfit, and over his own signature in his annual physical report he stated that he had received a fracture of the left tibia in 1931 and had a complete recovery.

The rules of this court require that the declaration show whether or not the claim has been presented to any department, etc., and, if so, the action, if any, taken thereon. There is no allegation in the declaration showing that the claimant complied with this rule.

The Military Code of this State provides for adequate relief to officers and enlisted men injured in line of duty.

This claim is made on the theory that the Workmen's Compensation Act applies. Claimant is in error in this. An exception is made in the case of an official of the State. We hold that Major Swift was an official within Section 5 of the Compensation Act.

The motion to dismiss will, therefore, be sustained. Case dismissed.

(No. 2458—Claimant awarded $10.00.)

TIMMIE D. TOLBERT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

TIMMIE D. TOLBERT, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* An award may be made for personal injuries sustained by member of Illinois National Guard, while in the performance of his duties as such, under authority of Section 11 of Article 16 of Military and Naval Code.

MR. JUSTICE YANTIS delivered the opinion of the court:

See *Case* vs. *State*, C. of C. No. 2469.

Timmie D. Tolbert, a member of the Howitzer Co. of the 130th Inf., I. N. G., injured in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933, testifies herein that he received a scar on his left leg and that both arms were skinned and his hair was scorched when he jumped out the window of the bus to escape the fire. A Military Medical Board convened on August 8, 1934, and certified that there is no permanent disability or disfigurement except a small superficial scar on the left thigh. Medical fees have been paid or assumed by the State in the sum of Three Dollars ($3.00).

Claimant continued to draw wages after the accident, and agrees with the medical board's finding that he suffered no permanent disability.

Upon the evidence herein and under authority of the Military and Naval Code a nominal allowance seems justified and an award is therefore made in the sum of Ten Dollars ($10.00).

(No. 2445—Claim denied.)

CECIL TROUT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing denied March 14, 1935.

CECIL TROUT, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard when award denied.* Where the evidence shows that claimant suffered no disability of any kind and was able to perform all of his regular duties, an award for personal injuries alleged to have been sustained while in the performance of his duties as a member of the Illinois National Guard will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Cecil Trout, a member of the Howitzer Co. 130th Inf., I. N. G., was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933.

Plaintiff in his claim asks reimbursement for loss of employment for four days. A Military Medical Board examined claimant on August 8, 1934, while at Camp Grant and found that there were no signs of disability of any kind. In his testimony Private Trout stated he agreed with this report.

Two days intervened between the bus-fire accident and the time Private Trout went to Camp Grant. He testified that he was able to perform all of his regular duties. Apparently he did not lose any wages and was fortunate in apparently not receiving any serious injuries. Under the conditions of the record there is apparently no basis for making any award and no recommendation for an award is therefore made. Claim dismissed.

(No. 2465—Claimant awarded $30.00.)

HARRY B. WARNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

HARRY B. WARNER, claimant, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim filed and award made in case of *Case* vs. *State*, 2469, ante, and is controlled by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Harry B. Warner, a member of the Howitzer Co. 130th Inf., I. N. G., was in the military bus-fire accident which occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

Claimant received burns on his hands and elbow and his left leg was injured and he testified that his back was sprained; also that after he returned from Camp Grant, where he went following the accident, there were frequent times when he was unable to perform his farm duties because of pains in his back and that he got a boy to work in his place for two weeks after he returned home.

A Military Medical Board at Camp Grant on August 8, 1934, found that claimant had a small scar on his left elbow, also on the third and fourth fingers and thumb of the left hand; a scar on the thumb of the right hand; that none of them caused any disability or disfigurement; further, that there was no evidence of any injury to the back or disability resulting from the accident. Because of the time lost an award of Thirty Dollars ($30.00) in favor of the claimant is hereby made, under authority of the Military Code.

(No. 2449—Claimant awarded $45.00.)

JOHN W. YEAGER, A MINOR BY ADOLPH YEAGER, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

JOHN W. YEAGER, A MINOR BY ADOLPH YEAGER, HIS NEXT FRIEND, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, ante, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

John W. Yeager, a member of the Howitzer Co. 130th Inf., I. N. G., was in the military bus-fire accident that occurred near Pana, Ill., on July 26, 1933. (See *Case* vs. *State*, C. of C. No. 2469.)

A Military Medical Board made a physical examination of claimant on August 8, 1934, at Camp Grant, and found that there is no permanent disability or evidence of scars. Claimant in his testimony agreed with this report but stated that he received temporary injuries to his right elbow and right

hand; that he was employed at Goin's Swimming Pool near Mt. Vernon, Illinois, and that after he returned from Camp Grant he was unable to perform some of the duties of his employment and that such partial disability extended over a period of six weeks. His wages, according to his claim, were $25.00 per week. What percentage of his labors he was unable to perform or what actual partial loss of wages he sustained is not fully disclosed, but under all the facts shown in the record, an allowance under the provisions of the Workmen's Compensation Act at $7.50 per week seems merited and an award is therefore allowed in favor of claimant in the sum of Forty-five Dollars, under authority of the Military Code.

(No. 2470—Claimant awarded $7.50.)

EUGENE YOUNG, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.
Rehearing denied May 14, 1935.

EUGENE YOUNG, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for, under Military and Naval Code.* This claim arose out of occurrence for which claim was filed and award made in case of *Case* vs. *State*, No. 2469, ante, and is governed by opinion therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Eugene Young was a member of the Howitzer Co. 130th Inf., I. N. G., and was in the military bus-fire accident that occurred near Pana, Illinois, on July 26, 1933. (See *Case* vs. *State*, C. of C. 2469.)

Examination of claimant by a Military Medical Board on July 26, 1933, disclosed a bruise on his left knee with a finding that probably it would require treatment for two weeks. The report of the Military Medical Board at Camp Grant, on August 8, 1934, shows no permanent disability. In the claim which plaintiff has filed herein no specific damages are alleged, but he asks such award as the merits of his claim may demand. Under the authority of the Military Code and on the basis of the military board's reports, a minimum award for one week's disability at $7.50 is allowed.

(No. 1832—Claim denied.)

JOHN WALEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ISAAC O. GOLDSTINE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY, SUSTAINED ON PUBLIC HIGHWAY—*when State not liable for.* Where complaint and evidence in support thereof, in claim for damages for personal injuries sustained on public highway shows that injuries complained of were due to the negligence of servants or agents of the State in failing to maintain highway in safe condition the State is not liable and an award will be denied.

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

NEGLIGENCE—*respondeat superior.* The State is never liable for the negligence of its servants or agents, unless there is a Statute making it so liable and in this State there is no such Statute.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant in this case charges that on the 11th day of August, 1931, he was the owner of an automobile and driving the same over a road under the jurisdiction and control of the State of Illinois, in Cook County, known as Archer Road, at about 11:30 p. m.; that the State was repairing a part of this road and that it had excavated a large portion to a depth of approximately one and one-half feet; and at the end of a day's work, the State failed to barricade the opening and to place lighted lanterns at or near the excavation, and while the claimant was proceeding in the exercise of due care and caution for his own safety and the safety of others, he was unable to see or ascertain the condition of the highway at the point of the repairs, and as the result of said excavation being left unguarded and unlighted he ran his automobile into the excavation and the car turned and fell into the opening; that on the 24th day of August, he gave notice to the Highway Department.

It was further alleged that the automobile was greatly damaged and broken, and the claimant was deprived of the

use of the automobile for a long period of time and suffered damages in the sum of Three Hundred Dollars ($300.00).

Claimant filed a Bill of Particulars showing the cost of the repairs of Two Hundred Fifty-one Dollars and Forty Cents ($251.40).

Claimant testified that on the night in question, he was driving on the road about thirty-five miles per hour, at about 11:30 o'clock; that he hit a hole and turned over. On cross examination he stated that there was a detour sign up ahead, but that the part he was on was not blocked off. Claimant was not sure whether the accident happened on the 4th day of August or on the 11th. He further testified that he had been over the road three or four days before the accident and that it was under repair at that time.

The State demurred to this petition. The watchman for the State, E. W. Lundin, a conductor for the Chicago, Joliet Railway Company, who passed over this road every fifteen minutes, A. P. Doenitz and D. Kinnamon, 5332 S. Mobile Avenue, Chicago, all claimed they passed once sometime before the accident and said there were lights at the proper places. The watchman claimed that the claimant knocked over two of the three lights that had been placed there.

In the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a Statute creating such liability. Such has been the settled decision of this court for many years.

The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or maintenance of a public road and this court has no power to make an award for such damages in the absence of such a Statute.

> *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Bucholz* vs. *State*, 7 C. C. R. 243; *Derby* vs. *State*, 7 C. C. R. 145; *Chumbler, Admrx.* vs. *State*, 6 C. C. R. 138.

It appearing that there was no wilful or wanton negligence on behalf of the State, the claim, therefore, will be denied. Case dismissed.

(No. 2143—Claim denied.)

C. D. WOOD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935.

ARTHUR ROE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee laying tile on farm not entitled to benefits of.* Laying tile on farm is farm work and one employed as a special laborer to assist or superintendent the installation of drainage tile at the Illinois State Farm at Vandalia is not entitled to receive compensation under the Workmen's Compensation Act for injuries sustained while so doing, same coming within that part of the Act exempting farm labor.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, C. D. Wood, filed his claim in this court on the 5th day of April, 1933, and alleges that he is a resident of Fayette County, Illinois, and that sometime prior to the year 1930 he was employed as a special laborer in assisting or superintending the putting in of drainage tile at the Illinois State Farm at Vandalia, and that on or about August 1, 1930, while he was so working as a special laborer in and about putting in drainage tile and working along the tile ditch one Kenneth Peterson, an inmate of the Vandalia institution, was working in the ditch and assisting in placing tile therein, and while the claimant was walking along the edge of the ditch he stooped over looking down to inspect the work and some of the dirt that had been thrown out of the ditch rolled back on Peterson and Peterson became suddenly frightened and threw a shovel which he had in his hands over his shoulder and struck the claimant in the eye with the shovel, which caused the eye to become inflamed and very sore.

The claimant reported the accident to C. J. Metzger, who at the time was superintendent of the State farm, and within a few days thereafter Dr. Mark Greer, who was the physician and surgeon for the State farm, treated his eye, but the eye became worse and that on or about the first day of January, 1931, he completely lost the use of that eye and has no vision in said eye. The petitioner alleges further that he reported this accident to Metzger, the then superintendent of the farm, and asked him in regard to filing claim or being paid for the loss of said eye; that the said Metzger told him that if he filed

a claim or made any application for compensation or damages he would lose his job. It is also averred that later on the said Metzger, so the claimant is informed and believes, did take up the matter with the Superintendent of Prisons and kept promising claimant that he would see about it, and the said Metzger failed and neglected to do so, and this it is averred is the reason why there is a delay in filing the petition, and damages in the sum of Three Thousand Dollars ($3,000.00) is claimed.

An amendment of the declaration was filed on November 2, 1933, and alleges that the cause of the accident was that Peterson, the man in the ditch, "threw his hands over his head and struck your petitioner in the eye with his thumb nail," and also amends the declaration so as to read that the vision of the eye was completely lost in January, 1932.

The evidence shows that the claimant was an employee of the State on June 9, 1930, to February 16, 1931; that he went back to work on September 29, 1931, and worked until the last day of February, 1933. Claimant was not quite sure what date he received the injury but thinks that it was about the first day of August, 1930; that at that time they were laying an eighteen inch tile in a nine foot ditch; that the ditch had been caving in and as the claimant was walking along the ditch he came up by some men and dropped down on his knee on the dirt that was thrown out and looked down and as he dropped down he knocked a clod down and it fell and hit this man along on the hip and when it did he jumped and threw up his arms and hit the claimant in the left eye with his thumb nail on his left hand. Claimant testified that he went to the emergency hospital and an inmate there in charge put some medicine in his eye, and he "made inquiry for an accident blank" which the institution did not have. The eye caused considerable pain and the next morning he went to the doctor of the institution and he put some medicine in the eye and treated it a couple or three times.

Claimant further testified that when he found that the "eye was out" he went to Metzger and told him to do something for him and was sent to Dr. Greer and Dr. Greer recommended that he be sent to a specialist. Nothing was done and the claimant went back to Dr. Greer. He states that he went back to the office a little later and saw a letter lying on Dr. Greer's desk concerning his eye from the Board of Claims,

which read: "We will settle any reasonable amount of claim for the eye." Claimant also testified that Dr. Greer did not say anything to him about the letter; that claimant went to the doctor and kept dragging it along, and in the course of six months he saw Dr. Greer four times, and finally he told Mr. Metzger that if nothing was done for him, he would file a claim, and Metzger said: "If you file a claim you have got to quit your job." That was in December, 1932.

Claimant also testified that he saw a letter apparently from Colonel Whipp, telling Mr. Metzger "to do something for that man" concerning claimant's eye. That was sometime in December, 1932. Claimant also testified that a few days after that he was sent to Dr. Greer by Metzger.

Claimant testified that he was being paid $125.00 per month and maintenance, which included board, room and washing. On cross examination he testified that he was a married man and had a wife and one child; that they had been separated about three years; that while he was employed by the State, he was giving his wife and child $40.00 per month.

Dr. Greer recommended that the claimant be sent to an eye specialist for treatment and the doctor confirmed the testimony of the claimant that the claimant had lost the vision of the left eye.

Under the Workmen's Compensation Act it is provided that the provisions of this Act shall apply automatically and without election to the State * * * and to all employers and all of their employees engaged in any department of the following enterprises or businesses which are declared to be extra-hazardous. (Then follows a list of the various enterprises or businesses which are declared by law to be extra-hazardous.) Sub-paragraph 8 of this section provides: * * * Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tilling of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Item 6 of Section 6 of the Court of Claims Act authorizes the Court of Claims to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination

to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act."

The Supreme Court of this State in the case of *Norerio* vs. *Industrial Commission*, 348 Illinois, 137, held:

An employer whose business consists of laying tile on farms is not liable for an injury received by one of his employees as the Compensation Act expressly exempts by its provisions any work done on a farm or country place. No work could be more fundamentally a part of farming than drainage to put the soil in shape for cultivation. That it was being done by one not engaged in general farming himself is immaterial.

With this view of the law, it will be unnecessary to discuss the facts of this case with regard to Section 24 of the Compensation Act, even though we may be perplexed as to how a man standing in a ditch nine feet deep could strike another man on his knees on the top of the ditch with his thumb nail.

We must decide these cases in accordance with the provisions of the Workmen's Compensation Act. The claimant clearly comes within the provisions of that part of the Act exempting farm labor. The claim for compensation must, therefore, be denied. Case dismissed.

(No. 2527—Claim denied.)

THE ARUNDEL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

KNAPP, TUCKER & THOMAS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*voluntarily paid cannot be recovered.* Taxes voluntarily paid cannot be recovered unless there is a Statute authorizing such recovery.

SAME—*paid under law declared unconstitutional.* Fact that law under which was levied or paid is decided unconstitutional does not authorize court to make an award for recovery of same.

SAME—*paid under mistake of law.* Money voluntarily paid under mistake of law cannot be recovered.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff is a Maryland corporation, duly authorized to do business in the State of Illinois. On or about June 12, 1933, it received an annual franchise tax statement from the Secretary of State of Illinois in the sum of Two Hundred Dollars ($200.00), which it paid on or about June 22, 1933. The complaint avers that the tax was assessed under a Statute then in force and that the Statute was thereafter declared to be unconstitutional and void by the Supreme Court of the State of Illinois; that notwithstanding the rule of law which prevents the recovery of money paid under a mistake of law, plaintiff now seeks a refund of said sum of Two Hundred Dollars ($200.00) under a general claim of equity and good conscience.

Under a stipulation of facts it is agreed that the minimum franchise tax on foreign corporations as fixed by Section 107 of the General Corporation Act of Illinois, under which the said tax of Two Hundred Dollars ($200.00) was assessed, was declared unconstitutional.

While the correct amount which claimant would have been compelled to pay was only Seventy-seven and 49/100 Dollars ($77.49), if it had availed itself of its statutory rights, this court is not in a position to allow an award, when plaintiff has failed to exercise such rights. This claim falls clearly within the rule as to refunds under unconstitutional Statutes. The same section involved here, i. e., 107 of the General Corporation Act was under consideration in the case of *Marx and Haas* vs. *State*, 7 C. C. R. 140 in which an award was denied.

"It is well settled in this State that a tax voluntarily paid cannot be recovered back in the absence of a Statute providing for such a recovery. It is also well settled that the fact that the Statute under which the tax was levied and collected was unconstitutional will not authorize an action for its recovery by the party paying it. (*Oppenheimer & Co.* vs. *State*, 6 Ct. Cl. 465; *Board of Education* vs. *Toennigs*, 297 Ill. 469.) The fact that the Secretary of State had no legal right to demand the tax and claimant was under no legal obligation to pay it is of no consequence unless the payment was compulsory in the sense of depriving claimant of its free will. (*Ill. Glass Co.* vs. *Chicago Tel. Co.*, 234 Ill. 535; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Western Electric Co.* vs. *State*, 6 Ct. Cl. 414.)"

Wm. Wrigley, Jr. Co. vs. *State*, 7 C. C. R. 153.
Yates vs. *Royal Ins. Co.*, 200 Ill. 202.

Under the existing authority the claim is denied.
Case dismissed.

(No. 2553—Claim denied.)

J. E. BANGS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.
Rehearing denied September 11, 1935.

GEORGE C. DIXON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

LOSS OF PROPERTY—*negligence of employee of charitable institution—acts of inmates—State not liable for.* In the conduct of the Dixon State Hospital, a charitable institution, the State acts in a governmental capacity and is not liable to respond in damages for the negligence of its officers, agents or employees, nor for the acts of inmates thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff seeks an award for the loss of a watch, fountain pen and various articles of clothing of the alleged value of $139.70, that are claimed, on information and belief, to have been stolen by escaped inmates of the Dixon State Hospital.

The claim is based upon the fact that the State of Illinois was on the day in question, i. e., February 14, 1934, operating a State colony for the care and treatment of those suffering from epilepsy, etc.; that such institution is under the direction of the Department of Public Welfare of the State of Illinois; that on the said day several inmates or patients escaped from the institution and that a theft of the chattels in question occurred from the premises of plaintiff, at the hands of some persons unknown to petitioner.

The Attorney General has filed a motion to dismiss said claim and contends that, even though the complaint alleged and the facts proved that the theft in question was perpetrated by inmates of said institution who had escaped therefrom, there would still be no basis upon which this court could legally grant an award against the State.

The Dixon State Colony or Hospital, is one of the State charitable institutions, and in maintaining it, the State is exercising its governmental functions. It has been held repeatedly that in the conduct of its charitable and penal institutions, neither the State nor any of its agencies are liable for damages caused by the acts of those in charge of or employed in such institutions, even though such employees may have been guilty of negligence in the manner complained of. The

institution is maintained solely for the benefit of the public and the agency maintaining it incurs no liability for the negligence of its officers, servants or employees.

Johnston vs. *City of Chicago*, 258 Ill. 494;
Pelka vs. *State*, 6 C. of C. 390.

Counsel for plaintiff has argued that the theft in question occurred because of the negligence of the State employees to sufficiently guard and restrain the activities of the inmates of the Dixon Colony; that as a result of insufficient enclosures and control, the inmates escaped and the thefts occurred. If counsel's theory were approved, the State would be responsible for every theft or crime committed by an inmate of any institution who escaped therefrom. There is no provision of law upon which this court could base such award and the decisions, as above suggested, are contrary thereto.

The motion by respondent to dismiss the complaint is allowed. Case dismissed.

(No. 2521—Claimant awarded $3,532.48.)

ALVINA BARTH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

FREDERICK L. HABBEGGER AND SPRINGER & SPRINGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it is undisputed that State employee sustained accidental injuries, causing his death, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation may be made to his dependents under provisions of the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 21st day of July, A. D. 1934, one Louis Barth was employed by the respondent in the maintenance and repair of S. B. I. Route No. 11, in Madison County, Illinois. On the last mentioned date, while working on said road, he was struck by an automobile and thereby sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same date.

Said decedent left him surviving the claimant, his widow, but left no child or children.

Notice of the accident was given and claim for compensation made according to law. Said employee had been in the service of the respondent less than a year, and the average annual earnings of persons in the same class in the same employment and location was Nine Hundred Sixty Dollars ($960.00), per year.

Under the provisions of Section 7-a of the Workmen's Compensation Act, the claimant, as widow of said decedent, is entitled to compensation in the total amount of Thirty-eight Hundred Forty Dollars ($3,840.00), which compensation is payable in weekly installments of Nine Dollars and Twenty-three Cents ($9.23), commencing on July 22, 1934. Payment by the respondent in weekly installments, however, is not practicable under existing laws, and it is to the best interests of all parties concerned that the compensation to be paid as aforesaid be commuted to an equivalent lump sum in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

As we compute it, the total amount of compensation to be paid as aforesaid, after commutation to an equivalent lump sum, is Thirty-five Hnudred Thirty-two Dollars and Forty-eight Cents ($3,532.48).

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant, Alvina Barth, for the sum of Thirty-five Hundred Thirty-two Dollars and Forty-eights Cents ($3,532.48).

(No. 2150—Claim denied.)

DEALERS' TRANSPORT COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

BERNARD YEDOR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MOTOR VEHICLES—*claim for refund of license fees, for time not used when denied.* Where claimant procured licenses to operate motor vehicles, fees for which were based on gross weights of vehicles and loads, and at

the time there was in existence separate Statute, limiting length of vehicles and trailers, but having no connection with issuance of licenses, enforcement of which had been stayed by temporary injunction, he will not be entitled to a refund, upon surrender of license plates, for the time between such surrender and expiration of period for which licenses were issued where such temporary injunction is dissolved.

SAME—*law limiting length—effect on license to operate.* The rights of one obtaining a license to operate a motor vehicle are fixed and determined at the time of the payment of the fees therefor, and where fees are based on gross weights of vehicles and trailers, there is no limitation or revocation of such rights to operate same, where there is a separate Statute, having no connection with issuance of licenses, but limiting the length of vehicles and trailers.

LICENSE FEES—*when payment deemed voluntary—award for refund denied.* Where the record fails to show that law under which license fees were collected was invalid, or that fees were paid involuntarily, under protest or threat of arrest, payment will be deemed voluntary and claim for refund denied.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

From the stipulation of facts herein it appears that prior to and on the 1st day of January, A. D. 1931, the claimant was engaged in the business of transporting motor vehicles by truck from factory to dealer; that its tractors and semi-trailers were sixty (60) feet in length; that on said date the law permitted the use of motor vehicles and trailers not to exceed sixty-five (65) feet in length; that the Legislature by an enactment adopted July 1, 1931, approved July 8, 1931, amended Section three (3) of the Motor Vehicle Act so as to provide that the length of any single vehicle, or combination of tractor and semi-trailer shall not exceed thirty-five (35) feet; that on the 21st day of July, 1931, an injunction was issued out of the United States District Court for the Eastern District of Illinois restraining the enforcement of said amendment; that the Legislature by an enactment adopted July 8, 1931, effective January 1, 1932, amended Section nine (9) of the Motor Vehicle Act so as to provide that vehicles and tractors with one semi-trailer each, having a gross weight of more than 16,000 pounds and not more than 20,000 pounds, including the weight of the vehicles and maximum load, shall pay a license fee of One Hundred Ten Dollars ($110.00); that claimant applied for two (2) sets of license plates on April 16, 1932; two (2) sets on April 26,

1932; and two (2) sets on May 9, 1932, in all six (6) sets, and paid therefor the sum of $110.00 per set, to-wit, a total of Six Hundred Sixty Dollars ($660.00); that on July 1, 1932, the aforementioned injunction was dissolved; that upon the dissolution of such injunction, claimant withdrew its said vehicles from the highway and did not thereafter use the same; that on November 22, 1932, claimant returned the aforementioned six sets of license plates to the Secretary of State.

Claimant asks for a refund of $330.00, being that portion of the license fees paid by it for the period from July 1, 1932, to December 31, 1932, together with interest on such amount from July 1, 1932, at five per cent (5%) and bases its right to an award upon the following propositions advanced by it:

1) "The unearned portion of the money paid for a license may be recovered by the licensee, where the license has become inoperative by acts or circumstances over which he has no control and without his volition as where he is deprived of his license by a Statute or ordinance which prohibits the occupation for which the license was obtained."

2) "Where a license fee or tax illegally or unlawfully assessed has been involuntarily paid, the illegal or unlawful excess may be recovered. License taxes are not voluntarily paid within the rule that precludes a recovery even if illegally exacted where the failure to pay is a penal offense and payment is made to avoid proceedings to enforce the penalty."

3) "The Court of Claims has power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should, in equity and good conscience discharge and pay."

In support of its first proposition claimant has cited a large number of cases from other states, all of which are cases in which licenses were issued for the sale of intoxicating liquor, and in which the licensee's right to operate under such license was thereafter terminated through no act or fault on his part; as the result of which he was deprived of the unearned portion of the license fee. All of such cases are readily distinguishable on the facts from the present case.

In this case the license fees in question were paid in April and May, 1932, and were for the use of the public highways of this State during the calendar year 1932 by three tractors and semi-trailers, each having a gross weight of more than 16,000 pounds and not more than 20,000 pounds.

It must be borne in mind that the licenses in question were for the operation of vehicles of certain gross weights;

that the license fee was fixed by the gross weight of the vehicle and load; and that the length of the vehicle had no bearing whatsoever on the amount of the license fee or upon the issuance of the license. The length of the vehicle was limited by another statutory provision, which, however, had no connection with the issuance of the license, or the license fee, such fee being based entirely upon the gross weight of the vehicle and load.

There was nothing done by the respondent after the issuance of such licenses which limited in any way the right of the claimant thereunder. Its rights were fixed and determined at the time it paid such license fees, and there was no revocation or limitation of such rights thereafter. Under such licenses claimant retained the right, at all times during the year 1932, to use the public highways for three vehicles consisting of a tractor and semi-trailer having a gross weight of more than 16,000 pounds and not more than 20,000 pounds.

Claimant seems to assume that prior to the dissolution of the injunction on July 1, 1932, it had a *right* to operate vehicles sixty (60) feet in length, and that such *right* was taken away by the dissolution of the injunction. Claimant's *rights* were determined by the law adopted July 8, 1931, effective January 1, 1932; and such *rights* were the same prior to the dissolution of the injunction as they were thereafter. The ability of the State to enforce such law and collect the penalties provided for the violation thereof, was suspended during the pendency of the injunction proceedings, but the *rights* of the claimant thereunder remained the same at all times after the law became effective.

There is no analogy whatsoever between this case and the cases cited by claimant in which a license was issued to the licensee for the purpose of engaging in the liquor business within a certain territory and where the licensee was thereafter forced to discontinue his business on account of some act on the part of the licensing authorities, or an account of the fact that the territory thereafter became "dry" territory.

As to claimant's second contention that the license fee was illegal or unlawfully assessed and has been involuntarily paid and that he is therefore entitled to recover the same,

we are forced to the conclusion that the fee was neither illegal nor unlawfully assessed, nor was it involuntarily paid.

The Statute fixing the amount of the tax was adopted on July 1, 1931, and became effective on January 1, 1932. Claimant and others who obtained the restraining order from the District Court of the United States apparently contended in that court that the law was unconstitutional, but the action of the District Court in subsequently dissolving the injunction disposes of that contention.

On the question as to whether the tax was paid voluntarily or under compulsion or duress, claimant takes the position that the payment was made for the purpose of avoiding a penalty to which it would otherwise be subject and must therefore be considered involuntary. In support of this contention claimant has cited the following cases from Illinois, to-wit: *City of Chicago* vs. *Klinkert,* 94 Ill. App. 524; *City of Chicago* vs. *Waukesha Brewing Co.,* 97 Ill. App. 553; *City of Chicago* vs. *Northwestern Mutual Ins. Co.,* 218 Ill. 40; *Cook County* vs. *Fairbank,* 222 Ill. 578.

The Klinkert case was a suit in assumpsit to recover amounts paid for a brewery license under an ordinance which was conceded to be invalid. In that case the evidence showed that the several payments were made *under protest* and because a police officer threatened the licensee with arrest if license fee were not paid. Under such facts the verdict of the jury finding that the payment was not voluntarily made was upheld.

The Waukesha Brewing Co. case was another suit to recover money paid for a brewery license under an ordinance which was conceded to be invalid. The evidence disclosed that the license fee was paid under a demand by police and collection officers sent out by the city to the licensee's place of business, and that threats were made by such officers that unless the fees demanded were paid, the licensee would be prosecuted, and its drivers arrested; that the licensee paid the sum demanded under the influence of such threats and to prevent its employees from being arrested. In that case the court in holding that the payment was involuntarily made, said:

"In this State, when a man carrying on a lawful business in a lawful manner is obliged, in order to prevent the forcible interruption of the same

by governmental authority to submit to the unlawful demand of such government, whatever under such circumstances he so pays is not paid voluntarily and may be recovered in an appropriate action."

The Mutual Insurance Company case was an action in assumpsit to recover certain water charges paid by the plaintiff under protest. In that case the plaintiff obtained title to certain property, and the City of Chicago sought to charge it with back water rates, for water supplied to former owners or tenants, which said former owners or tenants had failed to pay. The purchaser refused to pay the charges for back water rates, but was informed by the City of Chicago that unless such bills were paid, it would proceed at once to shut off the water from the premises and it did in fact shut off the water from certain premises. Thereafter the plaintiff paid the back water rates by check enclosed in a letter stating that payment was made under protest, and for the sole reason that appellant had threatened to shut off or had shut off the supply of water from the premises. Under such state of facts the court held that the payment was made under protest and was not voluntarily made, and in the course of its opinion said:

"It is the well settled rule of this State that where one is compelled to make payment of money which the party demanding has no right to receive, in order to prevent injury to his person, business or property, such payment is, in law, made under duress and may be recovered from the party receiving it; and it makes no difference that the demand was made with full knowledge of all the facts provided it was made under duress. Appellee at the time of the payment, expressly stated that it was made under protest and to avoid trouble and damage to his property. The payment was illegally exacted and appellee had the right to recover in an action of assumpsit."

The Fairbank case was an action in assumpsit to recover the sum of $1,250.00 docket fees paid to the clerk of the Probate Court of Cook County under protest, pursuant to a law which required the payment of docket fees based upon the size of the estate. The clerk refused to issue letters testamentary unless the plaintiff paid him, as a condition precedent to the delivery of such letters, a docket fee of $1,250.00 which had been taxed by him against said estate. The plaintiff protested in writing against the payment of the docket fee on the ground that the Statute requiring the same was unconstitutional and void, but the clerk still persisted in his refusal; whereupon plaintiff made payment thereof, and com-

menced proceedings to recover the same. The Supreme Court held that the Statute in question authorizing the collection of such docket fee was unconstitutional and void and quoted with approval the foregoing extract from the case of *City of Chicago* vs. *Northwestern Mutual Insurance Co.*

It is important to note that in the Klinkert case and in the Waukesha Brewing Co. case, the payments were made under ordinances which were admitted to be illegal, and that such payments were made under protest and for the purpose of avoiding a threatened arrest; that in the Northwestern Mutual Insurance Co. case payment was made under protest and to prevent a threatened and unlawful shut-off of the water supply; that in the Fairbank case payment was made under protest and for the purpose of obtaining letters of administration which it was necessary for the plaintiff to have, and which he could not obtain unless the docket fees were paid as a condition precedent thereto. Such cases are authority for the proposition that where license fees are illegally or unlawfully exacted, and payment thereof has been made under protest, such payment is considered involuntary, and may be recovered back. In order to warrant a recovery under the rule laid down in such cases, two things must co-exist, first, there must be an invalid law or ordinance, or an unlawful exaction; second, payment must have been made under such circumstances to make the same involuntary.

All of such cases, however, differ materially on the facts from this case. In this case the law under which the license fees were paid was passed on July 1, 1931, and was effective January 1, 1932. Claimant paid its license fees on April 16th, April 26th and May 9, 1932. There is nothing whatsoever in the record to indicate that the amendment effective January 1, 1932, was illegal or invalid in any respect; consequently any payments made pursuant thereto cannot be said to have been illegally or unlawfully exacted. Nor is there anything in the record to show that the payments were paid involuntarily, under protest, or under threat of arrest. Hence the cases cited by claimant have no application to this case.

As to claimant's contention that it is entitled to an award on the ground of equity and good conscience, what we have heretofore said disposes of that contention. Furthermore,

this court as now constituted, has repeatedly held that we have no authority to allow an award solely on the ground of equity and good conscience, unless there would be a legal liability on the part of the State to make payment if the State were suable. *Crabtree* vs. *State*, 7 C. C. R. 207; *Morrissey* vs. *State*, No. 2233, decided at the January, 1934, term of this court; *Van DerLaan* vs. *State*, No. 2324, decided at the October 1934, term of this court.

There being no such liability on the part of the State, award must be denied. Award denied. Claim dismissed.

(No. 2064—Claim denied.)

DUNGEY AND COCHRAN CONSTRUCTION COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

DUNGEY AND COCHRAN CONSTRUCTION COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*obligations under.* The general rule of law is that where parties, *sui juris*, by their own contract and positive undertaking create a duty or charge upon themselves, they must abide by the contract and either render performance or pay the damages.

SAME—*award of by State—performance refused—claim for incidental expenses incurred thereunder—when denied.* Where claimant was awarded contract for construction of road and incurred expenses thereunder, but advised State that it could not perform and requested a release therefrom which the State granted without any penalty or charge, no award will be made for such expenses.

SAME—*same.* The State in entering upon contracts does not insure those making proposals that no unforeseen difficulties will arise, such as strikes, walkouts, unfavorable weather, etc. and a party who desires to protect himself against such contingencies must stipulate against same in his contract.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a claim for freight charges incurred by claimant in shipping contractor's equipment from Carondelet, Missouri to the site of the proposed road project at Stubblefield, Illinois; for expense incurred in loading and unloading such equipment and for overhead expense in connection therewith,

consisting of telephone tolls, food and lodging. Also included in said claim is an item of $320.00 salary of the claimants, president and secretary-treasurer, at $10.00 per day each for eight days, all as appearing in the Bill of Particulars filed in said cause. Plaintiffs filed their claim herein on January 11, 1933. Motion to dismiss same was filed by the State, and on August 1, 1934, plaintiffs filed their amended complaint with the clerk of this court. The case is submitted on stipulation of facts. From same it appears that claimant was awarded a certain contract by the Department of Public Works and Buildings, Division of Highways, State of Illinois on State Bond Issue Route No. 11, near Stubblefield, Bond County, Illinois, on a bid of Two Hundred Two Thousand Four Hundred Twenty-five and 40/100 Dollars ($202,425.40) and claimant was so advised by the department under date of June 28, 1932.

The facts are not in dispute. The claimant immediately upon receiving notice of the award proceeded to arrange for said work and shipped certain machinery and supplies to Stubblefield, Illinois, for such construction work; that on July 6, 1932, when actual work was about to start, a large crowd of men appeared and by threats and intimidations stopped the work; that the same thing happened on July 8th and July 12th; that because of said conditions, the claimant could not proceed with the work. A formal contract had not been executed, nor a bond given to guarantee the fulfillment of said contract. The claimant, on the 13th day of July, 1932, made application to the Highway Department to cancel the award previously made to claimant and at the same time waived any and all claims for damages resulting from delay or from cancellation of the award, but reserved the right to present, at the proper time, their itemized claim for incidental expense incurred in moving equipment to said project. The Highway Department thereupon annulled the award and waived a forfeiture of the proposal guarantee. Thereupon, on January 11, 1933, a claim was filed in the Court of Claims for the sum of Seventeen Hundred Fifty-two and 50/100 Dollars ($1,752.50).

The claimants in this cause, according to the affidavit filed by them with the Highway Department on July 13, 1932, state that prior to submitting their bid on the project in ques-

tion, they made a personal investigation as to the local conditions existing at that time, and with the information so obtained submitted their bid to the Highway Department, and presumably the contract in question was a favorable one for the respondent. If respondent had refused to withdraw the award upon the request of claimant and had insisted that the claimant solve its labor troubles and proceed with the work, the claimant would have had to so do or upon its failure, the respondent would have had a right of action against claimant on the proposal bond given by the claimant with its bid.

The general doctrine is that where parties by their own contract and positive undertaking create a duty or charge upon themselves, they must abide by the contract and either render performance or pay the damages. *McWilliams* vs. *Eldrid Dist.*, 229 Ill. App. 91-94 (cases cited). The State, in entering upon contracts of this nature, does not insure those making proposal bids that no labor trouble or unforeseen difficulties will arise. A person making the contract to do such work may stipulate against strikes, walk-outs, unfavorable weather, etc., and in that way insure himself against loss from such causes. The claimant was released from its bid. There is no legal right existing against the State for damages or reimbursement by claimant, and even under the often abused extension of the rule of equity and good conscience, it appears that the State in releasing claimant under the award and waiving any forfeiture thereunder has acted in a fair spirit and should not now assume the burden of such incidental expense as was incurred by claimant in connection with its bid.

Motion to dismiss claim is allowed. Case dismissed.

(No. 2061—Claim denied.)

FRED L. HANSEN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

FRANK J. BURNS AND JAMES T. BURNS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PATENTS—*invention by State employee, while employed and paid by it—claim for infringement or royalty.* Where employee of State Highway Depart-

ment, at request of his superior and while employed by and paid by State invents a road marking machine and secures patent thereon, which the State makes and uses in the construction and maintenance of highways, does not render State liable to inventor for damages for infringement nor for payment of royalties.

SAME—*license to use.* Where servant during employment by master and while being paid for services by him, invents improvement and secures patent thereon, master as a matter of equity is entitled to license to use and make such improvement and no action for infringement or for royalties will lie.

SAME—*claim for infringement.* A suit for an infringement may be barred for laches, as where there has been long delay in bringing suit without a valid and sufficient excuse therefor, or unreasonable delay, or delay accompanied by circumstances amounting to an estoppel.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed January 25, 1933, for an allowance of Ten Thousand Dollars ($10,000.00), for the use of road marking machines, for the basic principle or design of which plaintiff claims to hold patent rights.

The evidence discloses that plaintiff, at the time of the hearing of this case on August 23, 1933, and other dates prior thereto, was an employee of the State Highway Department; that he had been employed by such department in 1921-22-23 and 1924 and more or less continuously for a period of thirteen years; that in 1921 and 1922 the State Highway Department was confronted with the problem of marking a traffic line down the center of the paved highways of the State; that various employees of the State Highway Department were instructed to apply themselves to the task of making a machine or plans for a machine that would serve this purpose. Albert H. Elmore, now a farmer of Mason City, Illinois, was one of the men thus employed. He testified that he built a three-wheeled machine in 1922; that he later made a four-wheeled machine at the request of his superiors, Messrs. Todd and Tarrant. In October, 1922, that machine was improved with a fire box for heating asphalt and a sand box. Elmore testified that seven machines of that type and one of the three-wheeled type were made in the summer and fall of 1922 and were shipped to various parts of the State for use under the direction of the State Highway Department. Various changes were made in the details of construction, including a patented nozzle or asphalt spreader, shown to have been manufactured by the Weaver Manufacturing Company of Springfield, Illinois.

Other machines for the same purpose were built by Harry Whipperman and Virgil Patch. These machines were used, according to the evidence (Record P. 85), for about ten years. One of these machines known as the "Dixon Hand Machine," was sent to the Elgin district, where plaintiff was then employed.

Plaintiff herein, as one of the employees of the Highway Department, was asked by C. R. French, one of his superior officers, if he could build such a machine. Thereafter it appears that plaintiff, while employed by the State and working in the State garage, and with State tools and supplies, and during a part at least of his regular working hours, devoted his mind and energy toward designing and building a machine for the purpose stated. During a part of this time he was foreman of one of the State garages and foreman of mechanics and devoted a part of his leisure hours to further developing a road marking machine. The patents held by plaintiff include a design for a rotary brush, adjustably secured for the purpose of cleaning the road as the marking thereof progressed; one patent being for a circular brush and the other for a cylinder or barrel type brush.

J. L. Todd testified that a rotary broom was designed and manufactured in the Springfield garage and used on the machines built there by the State in June, 1923. These machines also had the Weaver adjustable nozzle, controlling the flow of asphalt.

C. W. Ross testified that the first machine built in the Dixon office was in August, 1922; that it used asphalt and had a sand box and was pushed by hand; that this machine was loaned to the Elgin district (where Hansen was employed); that the plans for this machine came from the Springfield office of the Highway Department. C. I. Burggraf and J. G. Hagenbacher of the East St. Louis State Highway office received the machine from the Springfield garage in 1922; used it two years and thereafter built two additional ones at the East St. Louis garage.

A large amount of evidence appears in the record concerning plaintiff's priority rights to a patent for road marking machinery, and to show that an effort was made by Fred Tarrant and L. H. Hendrick of the State Highway Department to also obtain patents on machines designed for such purpose. A great deal of testimony, to which objections were properly

made, appears; but this opinion will not be encumbered by specific rulings upon these many objections.

Plaintiff's claim is, in effect, a demand for damages for the infringement of a patent; the specific claim being "That the State of Illinois through its officers, agents and employees had been using plaintiff's inventions without authority of plaintiff and without having paid to him any compensation for the use of said inventions," by reason of which plaintiff claims damages in the sum of $10,000.00. His Bill of Particulars limits his complaint to the use of such machinery from and after September 1, 1926.

The negotiations between plaintiff, Tarrant and Hendrick relative to the proposed building of road marking machinery by the Austin Manufacturing Company under plaintiff's patents evidences the amount that plaintiff was willing to receive as royalty for each traffic line-laying machine that was manufactured from his patents by said company. Under the terms of an agreement which plaintiff signed on January 24, 1924, and submitted to Messrs. Tarrant and Hendrick, plaintiff offered to accept Twenty-five Dollars ($25.00) for each machine so manufactured; Messrs. Tarrant and Hendrick were to have the machines manufactured by the Austin Manufacturing Company and were to pay plaintiff his royalty each six months, and were also to reimburse plaintiff for "Three-fourths of the sum not more than $200.00 for the securing of patents on said traffic line-laying machine." The title to his patents were to remain in the name and possession of plaintiff, but the other parties were to have exclusive right to the use of same in the manufacture and sale of machines. (Claimant's Exhibit 17.)

Plaintiff testified that he had no objection to the State using the machine patented by him, when it was first built, but that in January, 1926, he protested to C. R. Miller, Director of Public Works, against the construction or use of any second or subsequent machines without compensation to him. Plaintiff also testified that he knew in the fall of 1923 that other similar machines were being used in all parts of Illinois.

The conclusion that must be drawn from a careful study of the entire record, is that in 1921 and 1922 the officers and employees of the State Highway Department became convinced that some system for marking a traffic line on the paved highways was necessary; that the foremen and mechan-

ies at different State highway shops were given instructions to attempt to design and build machines for such purpose; that plaintiff was merely one of several employees to whom such request was made and who responded thereto. The record shows that other machines having the basic principles of the one later patented by plaintiff were in use before he built his first machine. The fact that he was the first one to apply for a patent does not in itself give him any standing in this court in attempting to obtain from the State special compensation for the use of machines which the State has built and paid for, and which according to the evidence, are based upon many of the same basic principles appearing in the machines built by other employees of the State before, or independent of, any machine that was designed or built by plaintiff. As above stated, the negotiations between Messrs. Tarrant and Hendrick, and plaintiff, and the contentions between them as to priority rights to a patent for road line-laying machinery, indicate plaintiff's opinion in 1924 as to the amount which he should be paid for the use of each machine manufactured from his plans, i. e., Twenty-five Dollars ($25.00) per machine. There is no evidence as to how many road marking machines have been manufactured by the State since the objection date fixed by plaintiff in his Bill of Complaint, i. e., September 1, 1926, but he testified that throughout the years he has seen several, "As many as twelve or fifteen," in operation. At Twenty-five Dollars ($25.00) each, claimant's royalties would have amounted to Three Hundred Seventy-five Dollars ($375.00). However, plaintiff does not appear to be entitled to an award in any amount.

This claim does not in any way involve the question of the title to the patents and it is immaterial whether claimant, Tarrant, Hendrick or some other employee of the State originated the idea of the line-laying machine. The only question is whether there is existing authority under which the State should pay claimant for the use of the machines built by itself or at its cost from designs developed by the various State employees, including plaintiff, while such employees were working for and paid by the State, with a part of their specific duties at the time, being to develop and help construct a machine for the purpose stated.

"One who has conceived the general principle or plan of an invention is not to be deprived of the right to be regarded as the inventor of the

method or device embodying his conception by the fact that other persons employed by him for the purpose reduced or assisted in reducing his conception to practice; * * *. If co-employees bear to each other the relation of principal and assistant the rule applicable to employer and employee applies. * * * If the generic invention was communicated to the employee the employer is not deprived of the right to obtain a patent for the specific method or device produced by the employee by the fact that a slightly different embodiment was disclosed to the employee.

"Where the relation of employer and employee is established a presumption arises that the employer is the inventor of the thing produced by their joint effort."

48 *C. J.* 121 (Sec. 136).

"A suit for an infringement or by way of injunction may be barred by laches as where there has been long delay in bringing suit without a valid and sufficient excuse therefor or unreasonable delay or delay accompanied by circumstances amounting to an estoppel."

48 *C. J.* 331 (Secs. 532-533).

"The general rule is that where a mechanic in laboring for an employer in the construction of a machine invents a valuable improvement the invention is the property of the inventor and not that of the employer. The circumstances set up may render the machine actually made the property of the employer and in equity may really amount to a license to the employer to use the machine made, and possibly to a license to make and use other machines. But that would not give the employer the title to the patent."

Joliet Mfg. Co. vs. *Dice*, 105 Ill. 649.

Plaintiff in his reply brief takes no issue with the above propositions of law but contends that he conceived the idea of such a machine as the one in question before he was ever instructed by the Highway office to devote any time and effort to the designing or building thereof. Regardless of this, the fact remains that plaintiff was employed by the State and was paid Two Hundred Dollars ($200.00) per month for his services and that he was specifically directed as a part of his labor to help work out a device for marking highways; that thereafter, using the employer's shop, tools, material and time, with some additional work in his leisure hours, plaintiff designed and built a machine which he later patented and royalty for which is now demanded from such employer. Under the circumstances, under the law and as a matter of equity, the State has a right and license to use the machine made and to make and use other similar machines. The evidence shows that the State has never manufactured any line-laying ma-

chine for commercial use or sales purposes and there is considerable doubt from the record whether the machine it is now using for marking the highways has been built from ideas and plans developed independently of plaintiff's work or whether such machines follow the designs produced by him. According to plaintiff's testimony the State is *not now* using any machine having a rotary broom or cylinder rotary broom attachment; the testimony further showing that the machines now in use incorporate and use the same basic and fundamental principles set forth in the early machines built in the Springfield district and the same basic and fundamental principles that appear in plaintiff's patents. If the State is using a machine that it is building or having built from ideas developed by plaintiff as heretofore set forth, the State of Illinois, as his employer, will be entitled as licensee to so do.

An award is therefore denied and the claim is hereby dismissed.

(No. 2483—Claimant awarded $932.09.)

ROBERT D. HUNT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

GALE & WEST, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award be made under.* Where claimant sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made on compliance with the requirements of the Act, in accordance with the provisions thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 29th day of September, A. D. 1933, claimant was employed by respondent in the Division of Highways, and worked with a concrete replacement crew on S. B. I. Route 9. On the last mentioned date, while cutting concrete with a cold cut and sledge hammer, a piece of steel from the cold cut flew into his eye, producing a traumatic cataract. Claimant submitted to several operations and remained under

the care of a specialist until July 20, 1934. The facts in the case are stipulated, and from such stipulation it appears:

1. That at the time of the accident in question both claimant and respondent were operating under the provisions of the Workmen's Compensation Act.

2. That on the 29th day of September, 1933, the claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given and claim for compensation made within the time required by law.

4. That claimant was not in the employ of the respondent continuously during the year next preceding the injury; that the annual earnings of persons of the same class in the same employment and location were $982.80, being $18.90 per week.

5. That claimant at the time of the injury was 51 years of age, and had one child under the age of 16 years at that time.

6. That all necessary first aid, medical, surgical and hospital services were provided by the respondent.

7. That compensation has been paid by respondent to claimant for all temporary total disability sustained by him.

8. That at the time claimant was discharged by his doctor, to-wit: on July 20th, 1934, he had sustained the permanent and complete loss of 75 per cent of the use of his right eye.

We therefore find that claimant is entitled to have and recover from the respondent the sum of Ten Dollars and Forty Cents ($10.40) per week for a period of ninety (90) weeks for the permanent and complete loss of 75 per cent of the use of his right eye; that such compensation is payable in weekly installments commencing on July 20, 1934.

Payment by the respondent in weekly installments, however, is not practicable under existing laws. Under all of the circumstances, it appears to be to the best interests of all parties concerned that the compensation to be paid as aforesaid be commuted to an equivalent lump sum, in accordance with the provisions of Section nine (9) of the Compensation Act.

The total amount of compensation to be paid as aforesaid, after commutation to an equivalent lump sum, is $932.09.

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant, Robert D. Hunt, for the sum of Nine Hundred Thirty-two Dollars and Nine Cents ($932.09).

(No. 2398—Claimant awarded $544.00.)

A. E. KERGER, AS CORONER OF KANKAKEE COUNTY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

FRANK J. BURNS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FEES—*coroner—inquest, death of inmate of charitable institution.* The facts in this case are identical to those in *Taylor* vs. *State*, No. 2142, ante, and the opinion of the court in said case is controlling herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff, as Coroner of Kankakee County, conducted inquests on thirty-four cases of deaths of inmates of the Kankakee State Hospital and Manteno State Hospital, for which he seeks allowance in the sum of Sixteen Dollars ($16.00) for each case from the State. Twenty-four of the cases were from Cook County and the balance from other counties of the State but none from Kankakee County. The proof shows that claimant made inquiry to determine whether his fees could be collected out of the estates of the various deceased persons and found that no collections could be made from any of the estates set forth in his Bill of Particulars.

Chapter 53, Section 26, of the Fees and Salaries Act provides as follows:

"For holding an inquest over a dead body when required by law in counties of the first and second class, $15.00 * * *.

"For summoning the jury, $1.00.

"All of which fees shall be certified by the court and when the same cannot be collected out of the estate of the deceased, paid out of the county treasury, or in the case of inmates of any State charitable or penal institution, by the Department of Public Welfare out of the State treasury."

The Department of Public Welfare declined payment because of no appropriation.

The claim being supported by the evidence and the law, an award is hereby made in favor of plaintiff in the sum of Five Hundred Forty-four Dollars ($544.00).

(No. 2346—Claimant awarded $628.52.)

JOSEPH KIEGEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

MILLER & THOMAS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award justified under.* Where it is undisputed that claimant is an employee of the State, that he sustained accidental personal injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award will be made for compensation in accordance with the provisions of the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim is submitted on a stipulation of facts under which it appears that plaintiff was employed on May 29, 1933, in the State Highway Department; his duties consisting of patrolling the concrete highways, and making repairs thereon; that on the day in question while engaged in the performance of his regular duties on the concrete highway between Rockford and Shirland, Illinois, he was struck by an automobile and both his legs were fractured just below the knees. He was confined in the hospital for five weeks under the care of Dr. T. H. Culhane and plaintiff was totally disabled from the date of the accident to December 16, 1933, inclusive. His average weekly earnings amounted to $14.85 and on the date of the injury and at the time of the hearing he was married and the father of three children under the age of sixteen years.

The State has settled the bill of St. Anthony's Hospital of Rockford, Illinois, in the sum of One Hundred Twenty-five and 75/100 Dollars ($125.75) and has paid Dr. Culhane the sum of Twenty-two Dollars ($22.00) and there remains due the latter the sum of One Hundred Two Dollars ($102.00). The State has also paid plaintiff compensation in the sum of Two Hundred Fifteen and 35/100 Dollars, $(215.35). Notice of the accident was duly given and claim was filed within the time prescribed by the Workmen's Compensation Act and plaintiff seeks an award for further temporary total disability and for fifteen per cent (15%) of the total loss of the

permanent use of both legs, including a lifetime pension under Par. F of Section 8 of the Act.

The proof supports an award for part of the items claimed. The period of temporary total disability was 28-4/7 weeks, for which the minimum of Seven and 50/100 Dollars ($7.50) per week is increased to Thirteen Dollars ($13.00) per week by reason of the three children under sixteen years of age. The amount of temporary total disability would therefore be Three Hundred Seventy-one and 43/100 Dollars ($371.43); of which latter sum Two Hundred Fifteen and 35/100 Dollars ($215.35) has been paid, leaving a balance due for temporary disability of One Hundred Fifty-six and 08/100 Dollars ($156.08). As to the permanent disability the record discloses that one leg is one-half inch shorter than the other, and a permanent disability of fifteen per cent (15%) has been estimated. We cannot say that a fifteen per cent (15%) disability is also due for the other leg from the fact that it necessarily is therefore one-half inch longer than its mate. The Statute provides:

"For the loss of a leg, or the permanent and complete loss of its use, 50% of the average weekly wage during 190 weeks."

On the basis of Thirteen Dollars ($13.00) per week a total loss would be Two Thousand Four Hundred Seventy Dollars ($2,470.00), fifteen per cent (15%) thereof is Three Hundred Seventy and 50/100 Dollars ($370.50), being the amount of partial permanent disability due for the fifteen per cent (15%) loss of use of plaintiff's leg. To these items should be added the further sum of One Hundred Two Dollars ($102.00) due plaintiff for the use of Dr. T. H. Culhane, making a total of Six Hundred Twenty-eight and 58/100 Dollars, ($628.58).

An award is hereby allowed in favor of plaintiff for the several items last above mentioned in the total sum of Six Hundred Twenty-eight and 58/100 Dollars ($628.58), of which the sum of One Hundred Two Dollars ($102.00) is for the use of Dr. Culhane.

(No. 1821—Claimant awarded $37.50.)

LESTER CHARLES LANDRETH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

ROBERT E. HARMON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *when award will be made.* Where a State employee sustains accidental injuries arising out of and in course of employment while engaged in extra-hazardous occupation an award will be made under provisions of Workmen's Compensation Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

For some time prior to June 17, 1931, claimant was employed by respondent as an attendant for insane patients at the Jacksonville State Hospital, and was paid Fifty Dollars ($50.00) per month for his services. On the last mentioned date he was in charge of a number of patients who were engaged in baling hay on a farm near Jacksonville. In the course of the day's work, one of the patients assaulted claimant with a pitchfork, breaking the little finger of his right, hand and inflicting numerous bruises upon his face and body. He remained under the care of a doctor for thirty-five (35) days, and received his regular wages during all of the time he lost by reason of his injuries. The evidence discloses that claimant has sustained the loss of twenty-five per cent (25%) of the use of the little finger of the right hand, and he claims compensation therefor under the provisions of Section 8-e-5 of the Workmen's Compensation Act of this State.

It is conceded that at the time of the accident both claimant and respondent were operating under the terms and provisions of the Workmen's Compensation Act. Complaint was filed herein within six months after the date of the accident, to-wit, on October 26, 1931; and no question is raised as to the giving of notice of the accident.

Under the admitted facts claimant is entitled to compensation for five (5) weeks for the loss of twenty-five per cent (25%) of the use of such little finger, at the minimum rate, to-wit, Seven Dollars and Fifty Cents ($7.50) per week.

Award is therefore entered in favor of claimant for the sum of Thirty-seven Dollars and Fifty Cents ($37.50).

(No. 1631—Claimant awarded $600.00.)

HARRY MANASTER & BRO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

HENRY J. AND CHARLES AARON, for Claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

TAX, MOTOR VEHICLE LICENSE—*over payment under mistake of fact may be recovered.* Where it appears that motor truck license fees, in excess of amount due were made through mutual mistake of fact, an award for refund of such overpayments may be made.

SAME—*limitations.* Claimant's right to recover amounts for motor license fee in excess of amount due, paid under mistake of fact will be limited to payments made during the period of five years prior to the date of filing its claim.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On July 26th, 1930 claimant filed its complaint herein for the recovery of Nine Hundred Dollars ($900.00) which it claims to have paid for motor truck license fees for the years 1924 to 1929, inclusive, in excess of the amount which it was legally required to pay; and for the recovery of interest on such overpayment at the rate of five per cent (5%) per annum from the date of payment.

It appears from the record that for some years prior to 1924 claimant owned three five-ton Pierce Arrow motor trucks upon which it paid license fees of One Hundred Dollars ($100.00) per annum on each truck, based upon a gross weight for truck and load of less than 20,000 pounds and more than 16,000 pounds; that such trucks were of the same make and size, and similar in every particular; and that each of said trucks consisted of a Pierce Arrow chassis and an open Packard express body, constructed and placed on the chassis by an independent body builder.

In making out the applications for license in 1924, the agent of the claimant having charge thereof, did not have

access to copies of his previous applications, and telephoned the Pierce Arrow Company for the purpose of ascertaining the weight of such trucks. He was advised that such weight was 10,600 pounds, and therefore prepared and filed his applications, giving a total weight of 20,600 pounds for truck and load, being 10,600 for truck and 10,000 for load. The license fee for such classification was One Hundred Fifty Dollars ($150.00) per annum for each such truck, which was duly paid by claimant.

The empty trucks were not actually weighed for the purpose of ascertaining the weight thereof until 1930, when it was ascertained that the correct weight was 9,940 pounds. In 1935 two of the trucks were weighed, one weighing 9,900 pounds, and the other, which had just come from the paint shop, weighing 9,950 pounds. If the total weight of the truck and load was less than 20,000 pounds and over 16,000 pounds, the license fee should have been $100.00 per annum instead of $150.00 per annum, as paid by claimant.

From all of the evidence in the record, it appears that the correct weight of the trucks, exclusive of the load, was less than 10,000 pounds, and for each of the years 1924 to 1929, inclusive, claimant paid a license fee of $150.00 for each truck, while as a matter of fact, it should have paid but $100.00. Claimant's agent took for granted the statement made by the representative of the Pierce-Arrow Company to the effect that the weight of the empty truck was 10,600 pounds, and based its applications upon such statement. Such representative apparently was not aware of the fact that the trucks in question were equipped with special bodies and not with the regular Pierce-Arrow bodies. Under the facts in evidence it appears that the overpayments in question were made under a mistake of fact.

The rule governing payments made under a mistake of fact is set forth in 48 Corpus Juris 759, as follows:

"As a general rule, a payment made under a mistake of fact, and which the payee was under no legal obligation to make, may be recovered back, even though made during the pendency of a suit on the demand. The right of recovery under such circumstances is known to the civil and Roman law, as well as to the common law, and is bottomed upon the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to repay.

The rule applies to payments made to or by public and governmental agencies as well as private persons;" also on page 765, as follows:

"Where one by mistake of fact pays more than is due upon a debt or obligation, he may recover the overpayment."

Substantially the same rule is announced in 21 R. C. L., p. 164; R. C. L. Supp., p. 5027; 87 A. L. R. 649. Numerous cases are cited in each of the above authorities in support of the law as above set forth.

Such rule has been recognized by this court in numerous cases. *Moorman Mfg. Co.* vs. *State,* No. 1886, decided at the May, 1934, term; *Rossia Insurance Company of America* vs. *State,* No. 1540, decided at the September, 1934, term; *Black Star Coal Company* vs. *State,* 6 C. C. R. 379; *The Importers' etc. Insurance Co.* vs. *State,* 5 C. C. R. 1; *Firemen's Insurance Co.* vs. *State,* 2 C. C. R. 220.

However, under Section 10 of the Court of Claims Act, claimant's right to recover is limited to payments made during the period of five years prior to the date of filing of its claim, to-wit, July 26th, 1930. The only overpayments made by claimant during such period were for the years 1926, 1927, 1928 and 1929, totaling the sum of Six Hundred Dollars ($600.00).

As to the item of interest claimed, such item apparently is based upon the provisions of our Statute relating to interest, which provide for the payment of interest where money has been "withheld by an unreasonable and vexatious delay of payment." It appears, however, that no demand was made by claimant for the overpayments made by it, until about six months before the filing of the claim herein, and there is nothing in the evidence which warrants an award for such item.

Furthermore, the law appears to be that interest cannot be recovered against the State, except upon special statutory authorization. *McNutt* vs. *City of Los Angeles,* 187 Cal. 245; *Philadelphia County* vs. *Commonwealth,* 276 Pa. 12; *Flint & P. M. R. Co.* vs. *Board of State Auditors,* 102 Mich. 500.

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant for the sum of Six Hundred Dollars ($600.00).

(No. 2530—Claimant awarded $1,250.00.)

OLE NELSON AND JOSEPHINE NELSON, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

WILLIAM GREENE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it is conceded that State employee sustained accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made to his dependents in accordance with the provisions of the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants ask for compensation "In accordance with Section 7 of the Illinois Workmen's Compensation Act" for the death of their son, Harry Nelson, through accidental injuries sustained while the latter was an employee of the State of Illinois.

Said employee was working as an Assistant Engineer and in attempting to loosen a stake used in grade work on a paving project he injured his foot and ankle from which an infection developed, and as a result thereof and from pneumonia incident thereto, he died on July 11, 1934. The record discloses that Harry Nelson was unmarried and left surviving him his father, Ole Nelson, and his mother, Josephine Nelson; also three unmarried sisters. The father had been a structural iron worker but had been able to obtain only a small amount of work for two or three years before the death of the son. The record further shows that the three unmarried daughters were all working and contributed approximately two-thirds of the income received by the father and mother, and the son contributed approximately one-third of such income; the mother testifying "My income was around $1,500.00 * * * the son averaging around $500.00 or a little better." (Record page 23.)

The earnings of the deceased son were One Thousand Eight Hundred Dollars ($1,800.00) per year.

Section 7 of the Workmen's Compensation Act provides that the amount of compensation payable for injury resulting in the death of an employee shall be as follows:

"(c) If no amount is payable under Paragraph (a) or (b) of this section and the employee leaves any parent or parents—who at the time of the injury were partially dependent upon the earnings of the employee, then such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less in any event than $1,000.00 and not more in any event than $3,750.00."

In his Statement, Brief and Argument, counsel for plaintiffs contends that under the foregoing state of proof, claimants are entitled to an award of One Thousand Two Hundred Fifty Dollars ($1,250.00) that being on the basis of one-third of the maximum amount provided by the Workmen's Compensation Act. Counsel for respondent concedes that such amount is due and the record supports the claim.

An award is therefore made in favor of Ole Nelson and Josephine Nelson jointly in the sum of One Thousand Two Hundred Fifty Dollars ($1,250.00.)

(No. 2496—Claim denied.)

JOHN H. PARKS AND BERTHA PARKS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

EVAN L. SEARCY, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*negligence of employee of penal institution—State not liable for.* State is not liable to respond in damages for death of inmate of penal institution caused by assault of fellow inmate, as in the conduct of its penal institutions it exercises a governmental function and is not liable for the negligence of its servants and agents nor for the acts of the inmates of such institutions.

SAME—*same—award on equity and good conscience denied.* Under the facts in this case an award on the grounds of equity and good conscience is not justified.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On August 28, 1934 claimants filed their complaint herein seeking to recover from the respondent the sum of Ten Thousand Dollars ($10,000.00) as damages for the death of their son, John Parks. The complaint alleges in substance that said John Parks, on April 4, 1926, being then nineteen

(19) years of age, was found guilty of murder and sentenced to imprisonment for the term of twenty (20) years. He was confined in the Southern Illinois Penitentiary at Menard, and on August 14, 1932, while a prisoner at such penitentiary, was stabbed by another prisoner by the name of Garrett, and sustained injuries from which he died the same day. Claimants base their right to recover upon the averments of the complaint to the effect that the respondent "was grossly negligent in allowing the said Garrett to be at large with the other prisoners"; and was also "grossly negligent in the care and treatment of Parks after he was stabbed by Garrett."

The Attorney General has moved to dismiss the claim on the following grounds:

"1. There is no liability on the part of the State under the facts set up in the complaint.

"2. The claim is barred by the Statute of Limitations, complaint not having been filed within one year after the death of decedent."

In the conduct of its penal institutions, the State acts in a governmental capacity, and it is the well-established law of this and other States that the State, in the exercise of its governmental functions, is not liable for the negligence of its servants and agents. *Hollenbeck, Admx.* vs. *Winnebago County*, 95 Ill. 148; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Tollefson* vs. *City of Ottawa*, 228 Ill. 134; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; 25 R. C. L. p. 407, sec. 43; 13 R. C. L. p. 944, sec. 8; 8 R. C. L. Supp. p. 5580, sec. 43.

There being no liability on the part of the respondent, it is unnecessary to consider the second point urged by the Attorney General.

Claimants suggest that even though the court finds that there is no legal liability on the part of the Sate, yet an award should be made "in the interest of equity and social justice."

We are aware of the fact that previous courts have allowed awards on the grounds of what was termed equity and social justice or equity and good conscience in certain cases which appealed to the sympathies of the Court. The jurisdiction of this court to allow an award in any case solely on the grounds of equity and good conscience, or equity and

social justice, was exhaustively considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207. In that case, after a full consideration of previous authorities on the question, we reached the following conclusion:

"That the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The decision in the Crabtree case has been followed in numerous cases since that time, and we are not disposed to depart from such holdings. There being no liability on the part of the State in this case, we have no authority to allow an award, and the claim must be dismissed. Claim dismissed.

(Nos. 2591, 2592, 2593, 2594, 2595, consolidated—Claimants awarded $200.00.)

ALBERT PARSONS, No. 2591, JAMES KANE, No. 2592, HARVEY CREGIER, No. 2593, JOHN HOWALCZYK, No. 2594, ROBERT SCOTT, No. 2595, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

Claimants, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICES — *mine rescue team — when award may be made for.* Where claimants, members of mine rescue team, at request of State department, rendered valuable services in an attempt to save human life at time of mine disaster, an award may be made for the reasonable value of such services, where owner of mine where disaster occurs is insolvent.

MR. JUSTICE YANTIS delivered the opinion of the court:

The above claims were all filed as individual claims, pro se. As they arise out of the same transaction all will be disposed of in this one opinion.

Plaintiffs seek payment for services as members of the Mine Rescue Team at LaSalle, Illinois for rescue work per-

formed at the Moweaqua, Illinois, Mine Disaster on December 24, 1932. It appears the claimants, as members of said Mine Rescue Team, went to Momeaqua at the request of John Millhouse, then Director of the Department of Mines and Minerals, to assist in the work made necessary by the explosion. Claimants engaged in the rescue work for five days and were each entitled to the sum of Eighty-five Dollars ($85.00), including expenses; that they agreed to accept Eighty Dollars, ($80.00) and were paid Forty Dollars ($40.00) each; that there still remains due each the sum of Forty Dollars ($40.00). The claims were filed February 6, 1935 and in a report dated February 18, 1935 from James McSherry, Director of the Department of Mines and Minerals, it is stated, "The claims are just and I would recommend their payment."

It further appears that an appropriation for the ordinary and contingent expenses of the Department of Mines and Minerals for the biennium (Session Laws 1931, Pages 79-80) include the following items:

For extra helmet men as emergency substitutes and necessary assistants at mine disasters....$6,000.00 per annum
For contingencies ..... 5,000.00 per annum

It further appears that where the owner of a mine, when a disaster occurs, is solvent, he is required to pay for the services of the Mine Rescue Team called out at the disaster. Because of the financial condition of the Moweaqua Coal Company, no collection of the amount claimed by the several parties can be made therefrom. The Moweaqua Mine Disaster was one of the worst in the annals of Illinois mines and the record discloses that the claimants rendered valuable service in accordance with the request of the Department of Mines and Minerals, and that there is proper justification for an allowance of the amounts due them:

An award is therefore made as follows:

To:	Albert Parsons	$40.00
	James Kane	40.00
	Harvey Cregler	40.00
	John Howalczyk	40.00
	Robert Scott	40.00

(No. 1815—Claim denied.)

SILVER-BURDETT AND COMPANY, A NEW JERSEY CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

DEFREES, BUCKINGHAM, JONES & HOFFMAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS—*franchise tax—when claim for refund of amount, claimed to have been paid in error will be denied.* Where through error an overpayment of franchise tax of corporation is made and Statute affords payee a remedy whereby such overpayment might be corrected, recourse to said remedy must be had, and if payee fails to do so within the time prescribed therein, no relief can be had in the Court of Claims.

SAME—*same—Court of Claims—jurisdiction.* Where Statute provides remedy and fixes time within which same must be availed of, Court of Claims has no jurisdiction to extend such time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case was submitted on a stipulation of fact.

On October 9, 1931, the claimant filed its petition with the clerk of this court for a refund of the franchise tax paid to the State of Illinois for the fiscal year July 1, 1931—July 1, 1932.

The claimant is a New Jersey Corporation and has for many years been lawfully doing business in the State of Illinois. It maintains a branch office in the City of Chicago.

On February 26, 1931, the claimant prepared and filed with the Secretary of State of the State of Illinois, its annual report for the year 1931-1932, as required by Statute. Upon receipt of this annual report, the Secretary of State assessed a franchise tax in the sum of $200.00 in accordance with the provisions of the Statute then in force; and a further tax of $12.98 as initial fees in accordance with the provisions of Sections 96 and 101 of the then Incorporation Act. This assessment was based upon a total capitalization of claimant in the sum of $1,275,000.00, as set forth in its annual report for the year 1931-1932. On May 1, 1931, the Secretary of State duly mailed an assessment notice of the franchise and initial tax fees totaling $212.98 to the Chicago office of the claimant; that on June 15, 1931, the claimant advised the

Secretary of State that it had not received a notice of assessment, whereupon the Secretary of State forwarded to the New Jersey office of the claimant a copy of the notice that he had formerly mailed to this corporation with a letter under date of June 18, 1931.

On June 24, 1931, the Secretary of State received a letter from the Assistant Treasurer of the claimant corporation, enclosing a check in the amount of $212.98, in full payment of corporate tax for the ensuing year. In this last mentioned communication, a copy of which is attached to the stipulation, the claimant corporation called attention to the fact that a typographical error had been made in their annual report, (which is a part of the file) in stating and listing their issued preferred stock at $950,000.00, whereas, it should have correctly been listed at $650,000.00.

In a letter under date of June 24, 1931, the claimant corporation protested payment and requested to be fully advised as to what procedure was necessary to secure a refund of the excess payment made through the above typographical error. In reply, the Secretary of State wrote the claimant corporation under date of June 29, 1931 advising it that unless restrained from doing so he was compelled to turn over the fees collected to the State Treasurer at the end of thirty days' time.

Additional communications were had between the Secretary of State and the claimant corporation between July 1, 1931 and October 9, 1931, the date of the filing of the present claim.

No question arises as to the facts and the Attorney General moves to dismiss upon the following grounds:

1. The declaration does not show there was a mutual mistake of fact.

2. The declaration does not show why claimant did not object to the franchise tax and request a hearing on such objection as provided by Section 112 of the Corporation Act.

3. The declaration does not show what portion of its capital stock is represented by business transacted and property located in this State.

From the files it would appear that the correct amount of the tax should have been $117.56, and that there was in fact an over-payment of $95.42.

In claimant's letter under date of June 24, 1931, it forwarded a check for the full amount for the sum of $212.98, with the statement that the same was paid under protest, and asked the Secretary to advise what procedure was necessary to file a corrected return and secure a refund of the tax as assessed by the Secretary. In reply to that letter under date of June 29, 1931, the Secretary of State advised that the fee of $212.98 which appeared to be due, must be, under the law, turned over to the State Treasury within thirty days from the date of payment, unless he, the Secretary had been restrained from doing so by a court of competent jurisdiction.

In a letter dated July 13, 1932 from the Secretary of State to the Attorney General attention was directed to a letter dated October 17, 1931 wherein the Secretary stated: "You will observe that the statement enclosed calls the corporation's attention to the fact that if a hearing is wished on this assessment it should be requested within ten days."

The records do not disclose that claimant ever requested hearing; neither does it appear that the Secretary's attention was called to any error or discrepancy until June 24, 1931, at which time the fee was paid under protest. The Secretary had mailed a franchise tax statement on May 1, 1931, and the taxes were paid on the following June 24th. A total of fifty-three days elapsed, which would have given claimant ample time to call the attention of the Secretary to the error, and file a supplemental report as provided by Section 112 of the general Corporation Act. The Statute has provided a way in which such matters may be corrected, but it must be done pursuant to the terms and provisions of the Statute and within the time fixed by Statute. Claimant could have fully protected itself because it appears that at the time the tax was paid, it was aware of the overpayment. Such matters can only be corrected in accordance with the provisions of the Statute applying thereto. Section 112 of the act then in force provided that the Secretary of State should mail a notice in writing to each corporation of the amount of tax assessed against it and that objections, if any, will be heard by him on request on a day not later than June 25. The law does not authorize the Court of Claims to extend time for hearing in matters of this kind, and it is no part of the duty of the Secretary of State to

advise anyone what his or her legal rights are under the Corporation Act.

Manifestly, any State department or any private business of the magnitude of that of the Corporation Department in the Secretary of State's Office, must transact its business with dispatch.

There is another matter of great importance in this case. The declaration filed by claimant did not allege the amount of business transacted or the amount of property located in Illinois, and such information does not otherwise appear from the record and even though we felt that we had jurisdiction in the matter, it would be necessary to deny a recovery in this case because of a lack of information upon which the amount of tax could be properly computed.

The claim will, therefore, be denied and case dismissed.

(No. 2425—Claimant awarded $464.00.)

LEE STICE, AS ASSESSOR AND TREASURER OF MORGAN COUNTY, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.
Rehearing granted May 14, 1935.
Opinion on rehearing filed May 14, 1935.

REIMBURSEMENT—*moneys advanced for coroner's fees, etc.—when award may be made for.* Where claimant, as county treasurer advanced moneys for coroner's and jurors' fees, and costs of lawful inquests on bodies of deceased inmates of State charitable institution, and it appears that same could not be collected from the estates of such deceased, an award for same may be made.

REHEARING — *when may be granted.* Where court overlooks material portion of stipulation entered into and filed by the parties, and which is necessary to a proper consideration of the case, a rehearing may be granted.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff filed his claim on June 30, 1934 as County Treasurer of Morgan County, seeking reimbursement for money advanced and paid out by him to others for the payment of coroner's fees, jurors' fees and stenographers' fees for inquests for persons who died while patients at the Illinois State Hospital for the Insane at Jacksonville.

A typical item in the Bill of Particulars is as follows:

1931		
Sept. 26.	For Frank Fish, coroner's fees for holding inquest.	$16.00
	Fees of jury	6.00
	Witness fee	.70
	Stenographer's fee	3.00
		$25.70

Included in the Bill of Particulars are four items of Five Dollars ($5.00) each for "Coroner's Fee for inquiry." This doubtless refers to the preliminary investigation provided for in Section 10 of Chapter 31, Illinois Revised Statutes.

Any allowance made herein would be based upon the provision of Section 26, Chapter 53 of the Illinois Revised Statutes which provides as follows:

"For holding an inquest over a dead body when required by law in counties of the first and second class, $15.00 * * *

"For summoning the jury, $1.00.

"All of which fees shall be certified by the court and when the same cannot be collected out of the estate of the deceased, paid out of the county treasury, or in the case of inmates of any State charitable or penal institution, by the Department of Public Welfare out of the State treasury."

Section 45 of said chapter provides as follows:

"The fees of each juror attending an inquest held over a dead body shall be $1.00 per day, payable out of the county treasury, upon the certificate of the coroner or acting coroner of the county wherein the inquest was held."

Section 27 of Chapter 85 of the Illinois Revised Statutes also provides as follows:

"That in case where the dead patient was an inmate of any State charitable or penal institution, and the fees for holding such inquest cannot be collected out of the estate of such deceased inmate, such fees shall be paid by the Department of Public Welfare out of the State treasury."

As there is no showing in the record of any effort having been made by the coroner to collect his fees out of the estates of the various deceased persons, there is no justification at law for the allowance of an award out of the State Treasury. In view of the above we only call attention, in passing, to the fact that the hospital records at Jacksonville do not show the presence of one alleged inmate, Billie Spowecki; further that a charge of $2.50 appears in the Bill of Particulars for stenographic service in many instances, whereas the record discloses that a fee of only $1.50 was in fact paid. Neither

would an award be allowable to reimburse the County Treasury for jurors' fees, which the Statute expressly provides shall be paid out of such County Treasury. An award is denied and the claim is dismissed.

OPINION ON REHEARING.

This matter again coming on to be heard upon Claimant's Petition for a Rehearing, and it appearing that the court had heretofore overlooked a portion of the stipulation entered into between claimant and respondent whereby it was agreed that the State would waive proof by complainant of the efforts made to collect the fees advanced from the estates of the several deceased inmates for whom inquests were held; and that it was therein agreed that the averment of such fact in the complaint might be considered as proof thereof. And it further appearing that in fact such effort was duly made; and that claimant is in fact entitled under the law to reimbursement in the sum of Four Hundred Sixty-four Dollars ($464.00) by reason of the matters and things in said original complaint appearing.

THEREFORE SAID PETITION FOR A REHEARING is hereby granted, without further hearing, and upon the record now appearing in said cause the original opinion herein is modified, and an award is hereby recommended in favor of claimant in the sum of Four Hundred Sixty-four Dollars ($464.00.)

(No. 2549—Claimant awarded $25.80.)

H. E. VOGHT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

H. E. VOGHT, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FEES—*sheriff for conveying prisoners to State penitentiary—when award may be made for.* Where sheriff conveyed prisoners to State penitentiary in compliance with valid judgment of conviction, and vouchers for fees allowed by law therefor were not presented for payment before lapse of appropriation out of which they could be made, an award for amount thereof will be made.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant is the sheriff of Marion County, and filed his claim herein in the amount of $25.80 for his fees in conveying three prisoners to the Southern Illinois Penitentiary at Menard, and one prisoner to the Chester State Hospital at Chester. All of such prisoners were convicted at the April, 1933 term of the Circuit Court of Marion County, and ordered committed as above. The fees charged by claimant are the fees allowed by law, and claim therefor was duly filed with and approved by the Department of Public Welfare, and forwarded to the Department of Finance. The vouchers were returned by the Department of Finance for the reason that they should have been paid from the previous biennium.

There is no dispute as to the amount of the claim, and no question is raised as to the right of the claimant to recover the same.

This court has held in numerous cases that where services are rendered for which the State is liable, and the bill is not vouchered before the lapse of the appropriation out of which payment could have been made, an award will be entered, provided claimant has not unreasonably delayed in presenting his claim. There is nothing in this case to indicate an unreasonable delay, and an award is therefore entered in favor of the claimant for the sum of Twenty-five Dollars and Eighty Cents ($25.80).

(No. 2220—Claimant awarded $506.25.)

ANNA WILSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1935.

JEROME R. FINKLE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made.* Where claimant is an employee of the State, is accidentally injured while engaged in and in the course of her employment, and such injury and employment is within the purview of the Workmen's Compensation Act, an award will be made for such injuries in accordance with the provisions of said Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff was employed as an attendant at the Lincoln State School and Colony, an institution maintained by the State of Illinois at Lincoln, Illinois for the treatment and care of feeble-minded persons. Her complaint alleges that on the 27th day of October, 1932, while she was attending one of the patients a struggle ensued, during which plaintiff fell, striking her elbow on the floor; that the accident resulted in the left arm being broken, the bone splintered and injuries to the left shoulder. She was attended by Dr. Comstock, a resident physician in the school, and was treated in the hospital of the institution, where she remained for a period of five weeks. During this time Dr. R. E. Holben, a resident managing officer, also attended her. Medical reports by the latter show that the claimant suffered a backward dislocation of the left elbow and a complete fracture of the head of the left radius with a forward dislocation. Claimant's income at the time of the injury was Fifty-four Dollars ($54.00) per month with full maintenance, such maintenance being figured by the Department of Public Welfare on a basis of Twenty-four Dollars ($24.00) per month, or a total compensation of Seventy-eight Dollars ($78.00) per month.

Plaintiff claims damages in the sum of Three Thousand Dollars ($3,000.00).

A claim was filed on July 22, 1933. A stipulation as to facts was entered into between the parties on the 9th day of November, 1934. The last examination of plaintiff by Dr. Holben, according to the record, was made on October 18, 1934. At the time of this examination Dr. Holben in answer to the question, "Is there a permanent disability?"; answered "Yes" and in answer to question "If so, what per cent?": answered "I would say 25%." In a report, however, dated May 24, 1934, which is also made a part of the evidence by stipulation of counsel, Dr. Holben stated "There was no pathology in the left shoulder, although the patient hasn't more than fifty per cent (50%) usage of shoulder. She cannot supinate the left forearm but pronation is nominal." The court is necessarily governed by the physical condition of the injured employee as disclosed by the last physical examination. This is especially true where the different examinations have been conducted by the same doctor.

Sub-section 13 of Section 8 (e) of the Workmen's Compensation Act provides:

"For the loss of an arm, or the permanent and complete loss of its use fifty per centum of the average weekly wage during 225 weeks."

Plaintiff would therefore be entitled, on the basis of a partial permanent disability of twenty-five per cent (25%) loss of use of her arm, to the sum of Five Hundred Six and 25 100 Dollars ($506.25) in payments of Nine Dollars ($9.00) per week for 56¼ weeks. As the entire period during which such payments have accrued has passed, no commutation is proper. An award is therefore entered in favor of Anna Wilson in the sum of Five Hundred Six and 25/100 Dollars ($506.25.)

(No. 2551—Claimant awarded $48.75.)

BROWN SHOE COMPANY, A CORPORATION. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

C. VICTOR CARDOSE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where it appears that State received merchandise, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein alleges that claimant on July 12, 1933 at the request of Florence Monohan, Managing Officer of the State Training School for Girls at Geneva, Illinois, sold to said school twenty-five pairs of shoes at One and 95/100 Dollars ($1.95) per pair or a total value of Forty-eight and 75 100 Dollars ($48.75); that the shoes were shipped in accordance with the order received by the institution. No reason for non-payment in regular course appears in the complaint but the record discloses that in some way the bill or unpaid invoice was misplaced; that the shoes were received in satisfactory condition and used by the institution.

The facts being undisputed that the State received the supplies pursuant to order in regular course of administration of the institution and no objection being raised by the respondent, the claim is allowed.

An award is therefore recommended in favor of plaintiff in the sum of Forty-eight and 75 100 Dollars ($48.75).

(No. 2315—Claimant awarded $315.75.)

I. L. ELMENDORF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim for necessary first aid medical and surgical services—limitations.* Payment of necessary first aid medical and surgical services is not payment of compensation under Workmen's Compensation Act, therefore claim for same is not required to be filed within the six months or one year period fixed in Section 21 of the Act, but may be filed within period of five year limitation Statute of the Court of Claims.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks a general award as compensation for injuries received while an employee of the State of Illinois. In his complaint he recites that on March 22, 1931, while driving his motorcycle as a Highway Maintenance Policeman while in the discharge of his duties, he had an accident in which he suffered a compound fracture of the right leg, scalp lacerations and other injuries incident thereto; that he was temporarily totally disabled and incurred partial permanent loss of use of his right leg; that his medical and hospital bills amounted to Three Hundred Fifteen and 75 100 Dollars ($315.75) which have not been paid by the State nor any other party. Attached to the original complaint appears a bill of E. W. Telford of DeKalb, Illinois showing the reduction of the fracture on March 22, 1931, and one month's after care - $100.00; also $25.00 for an anesthetic; $13.00 for removing cast on May 4, 1931 and $93.00 for thirty-one office visits from May 8th to September 19th, 1931, inclusive, at $3.00 each, making a total bill of $231.00. This bill bears the Highway

Police Stamp and O. K. and is marked and receipted by Dr. E. W. Telford as having been paid on November 17, 1931.

Also attached to the claim is a bill for $84.75 by the DeKalb Public Hospital for services rendered I. L. Elmendorf. This bill also bears the highway police officer's stamp and O. K. and is marked and receipted by the DeKalb Public Hospital as paid on November 17, 1931.

The claim was filed on January 16, 1934 and the Attorney General has filed a motion to dismiss the claim because it does not show that any claim for compensation was made within six months from the date of the injury or that any claim for compensation was filed within one year from such date, or from the date of the last payment of compensation, as required by Section 24 of the Workmen's Compensation Act.

Counsel for claimant contends that, even though no compensation for injuries is allowed, claimant is nevertheless entitled to an award in the sum of Three Hundred Fifteen and 75/100 Dollars ($315.75) for medical bills incurred by plaintiff as a result of this accident. Plaintiff contends that a claim for the allowance of these bills can be filed at any time within the period of the Court of Claims Five-year Limitation Statute, and that the six months and one year limitations fixed by Section 24 of the Workmen's Compensation Act do not apply to claims for medical and hospital services.

Counsel cites the case of *Newman* vs. *Industrial Commission* 353 Ill. at page 196. Although in that case the court inadvertently quoted the law as it previously existed and said that the furnishing of medical and hospital services must be regarded as the payment of compensation under the Act, it is clearly the law and so accepted that the furnishing of such service is not an admission of liability, upon which a future claim for compensation can be based. Counsel states that "The only reason for filing the medical and hospital bills by claimant was because they were so numerous that it would have been useless for each individual to file for the small amount each would have been entitled to." This is not supported by the record, as there are only two bills and both of them appear to have been paid within eight months after the accident.

No compliance having been made with Section 24 of the Workmen's Compensation Act there can be no award for dis-

ability compensation. No authority is cited, however, by the Attorney General in support of the contention that the limitations of time contained in Section 24 shall apply to claims for payment of necessary first-aid medical and surgical services, the furnishing of which under Section 8-A of the Workmen's Compensation Act is specifically provided "shall not be construed as the payment of compensation."

The proof supports an award in reimbursement of the amount expended for medical and hospital bills as set forth in the bill of particulars herein, and an award is accordingly allowed in favor of I. L. Elmendorf in the sum of Three Hundred Fifteen and 75/100 Dollars ($315.75) in full payment of medical and hospital services rendered to plaintiff for the accident in question.

(No. 2542—Claimant awarded $1,512.66.)

BIRDIE QUINNELLY FERGUSON, WIDOW, AND FRANCES ROBB FERGUSON AND GEORGE SENDORF FERGUSON, CHILDREN OF LACASSE COTE FERGUSON, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

J. E. ETHERTON AND CHARLES E. FEIRICH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *when award may be made under.* Where State employee sustains accidental injuries, causing his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation will be made to his legal dependents, on compliance with the requirements of the Act and in accordance with the provisions thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff seeks an award under the provisions of the Workmen's Compensation Act, for the death of her husband, Lacasse C. Ferguson. The record discloses no disagreement as to the facts or law involved. The employee in question, i. e. Lacasse C. Ferguson, was employed by the State of Illinois as Assistant Engineer in the Division of Highways at a salary of Two Hundred Twenty Dollars ($220.00) per month. On October 30, 1934 in response to directions from

his superior he was engaged in inspection work at various points in the Carbondale district. On the evening of that day he inspected Section No. 133 of S. B. I. Route No. 150 and about 9:00 o'clock and immediately after leaving said Section No. 133 and while driving on said Route No. 150 a collision occurred between the automobile which he was driving and another automobile then and there being driven by one Clyde Lovell; the accident occurring about three-quarters of a mile north of the north end of said Section No. 133. The proof shows that in the course of his general duties in addition to office work, he had immediate supervision over highway construction work, erection of steel bridges, and that in the course of his employment he personally set and exploded dynamite charges, worked on and about motor-driven machinery, concerning which there were municipal and State safe-guards and that his hours of duty when in the field continued until he returned to the district office at Carbondale; that from the evidence there is no probable legal liability on the part of the driver or occupants of the other car to respond in damages for the death of Mr. Ferguson.

The latter left surviving him his widow, Birdie Quinnelly Ferguson and Francis R. Ferguson, aged 10 years on May 4, 1934 and George S. Ferguson, aged one year on August 3, 1934, his children. His wages at the time and for more than a year prior thereto were Two Hundred Twenty Dollars ($220.00) per month. An award is asked in behalf of the surviving widow and two children in the sum of Four Thousand Eight Hundred Dollars ($4,800.00). No contention as to the rights of recovery are raised by respondent, either as to law or facts.

Under the provisions of Paragraph A and H of Section 7 of the Workmen's Compensation Act claimants would be entitled to an allowance of Four Thousand Eight Hundred Dollars ($4,800.00); Eight Hundred Dollars ($800.00) of which is due by reason of the existence of the two children. In the award hereinafter made therefor the amount of Seven Hundred Fifty-two and 11/100 Dollars ($752.11) included therein is allowed for the specific use of said children, Francis Robb Ferguson and George Sendorf Ferguson and will be paid to the said Birdie Q. Ferguson for their use. This award should be payable in monthly payments at the rate of

Sixteen Dollars ($16.00) per week, but as no satisfactory method exists by which payments can be so made the allowance will be commuted to a lump-sum award. As so commuted an award is hereby made in the lump sum of Four Thousand Five Hundred Twelve and 66/100 Dollars ($4,512.66).

(No. 2523—Claimant awarded $3,855.74.)

DORA V. JAHNKE, ADMRX. OF THE ESTATE OF FRIEBERT F. JAHNKE, DECD. AND DORA V. JAHNKE, IN HER OWN RIGHT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

F. A. ORTMAN AND STEVENS & HERNDON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where State employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in an extra-hazardous employment, an award for compensation will be made to his dependents in accordance with the provisions of the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award individually and or as Administratrix of the Estate of Friebert F. Jahnke, deceased, for the sum of Ten Thousand Dollars ($10,000.00).

It appears that Friebert F. Jahnke, was, on October 23, 1933 and for about eleven years prior thereto, employed as a guard at the Illinois State Reformatory at Pontiac; that on said date while attempting to apprehend an escaped inmate on U. S. Route 66 he was struck by an automobile driven by one John C. Danforth and received injuries from which he died. Other employees and officers of the reformatory were present at the time of the accident and the State had immediate knowledge and notice thereof. Deceased left surviving him Dora V. Jahnke, his widow; and Harry J. Jahnke, his son; and Velma M. Jahnke, his daughter, both of legal age. The widow has been appointed administratrix and files her claim under the provisions of the Workmen's Compen-

sation Act. The claim properly comes within the terms and provisions of that Act, and under the evidence in the record, plaintiff is entitled to an award as the surviving widow of the injured employee. A suit for damages was unsuccessfully prosecuted against the driver of the automobile which struck the deceased and no question of subrogation at this time exists.

The earnings of the deceased employee for the year preceding his death were One Thousand One Hundred Eighty-eight Dollars ($1,188.00). Under Section 7-A of the Workmen's Compensation Act the award should be a sum equal to four times the average annual earnings of the employee but not less than Two Thousand Five Hundred Dollars ($2,500.00) nor more than Four Thousand Dollars ($4,000.00). The only issue raised by respondent is upon the question of whether a claim for compensation was made within six months after the accident. The record discloses that four days after the death of Friebert F. Jahnke, plaintiff and her son inquired of the assistant superintendent of the reformatory whether the State would pay compensation for the death of Mr. Jahnke and they were told by him that he thought it would—"That the State would take care of it." Later Captain Davenport, an official of the Institution, called plaintiff and assured her that he thought the State would take care of her claim. Captain Davenport testified that he reported to his superior officer, Mr. Twiford, that Mrs. Jahnke had requested compensation for her husband's death. We are of the opinion that the record discloses sufficient evidence as to a claim for compensation within the six months to comply with the requirements of the Act. The courts have held that notice of the accident given to the immediate superior of the injured employee is sufficient. We believe the notice of the claim given in this instance is also sufficient.

As no adequate provision exists by which such award can be made in monthly payments, same will be commuted under the rules of the Compensation Act. As computed under such commutation the amount of $3,855.74 is due as a lump sum award.

An award is therefore made in the sum of $3,855.74.

(No. 2625—Claimant awarded $176.64.)

BERTHA LIVINGSTON ET AL., Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

BERTHA LIVINGSTON et al., pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are identical with those in *Brown Shoe Company* vs. *State*, No. 2551, *ante*, and the opinion therein applies here.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants herein are engaged in a general merchandising business in Bloomington, Illinois operating in the name of Mayer Livingston & Company and have filed their claim for One Hundred Seventy-six and 64/100 Dollars ($176.64) for merchandise alleged to have been sold in regular course to the Illinois Soldiers and Sailors Children's School at Normal, Illinois from July 22, 1932 to May 12, 1933. Plaintiffs allege that although bills were prepared and duly presented, no payment has been made; the reason therefor being to plaintiffs unknown.

In a report dated March 14, 1935 J. H. Russell, acting managing officer of the said Institution states, "In my opinion this is a just claim and should be paid."

"Where it clearly appears that materials have been sold, delivered to and used by a State department and have not been paid for, because of the lapse of the appropriation out of which payment could have been made, an award for the amount due will be made by the Court of Claims."

* *Shell Petroleum Corp.* vs. *State*, 7 C. C. R. 224.

As the appropriation out of which this bill could have been paid has lapsed and the account is a due and proper one, an award is therefore made in favor of plaintiffs in the sum of One Hundred Seventy-six and 64/100 Dollars ($176.64).

(No. 2622—Claim denied.)

GEORGE FRED MILLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1935.

A. J. B. SHOWALTER AND FRANCIS C. BLAIR, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*limitations—when claim barred.* When a claim is not filed within five years after it first accrues, plea of Statute of Limitations will be sustained and case dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff herein seeks an award from the State for injuries alleged to have been suffered by him while serving as a private in Troop E, 106th Cavalry of the Illinois National Guard. The complaint alleges that on August 2, 1926 a horse that plaintiff was riding while engaged in his military duties became unmanageable and fell, with its full weight upon claimant's right foot and leg, causing injuries to the bone of the leg and foot; that he learned on November 26, 1929 that the injury to his foot and leg was or might be of a permanent nature. Plaintiff states that on December 25, 1929 he was advised by his uncle, D. T. McNish, a past officer of the American Legion that if he had a permanent injury he should make a claim with the State of Illinois for compensation; that on March 7, 1930 he wrote to the Hon. Carlos E. Black, Adjutant General of the State of Illinois, setting forth the nature of his permanent injuries and asked what should be done to obtain compensation; that on March 11, 1930 the Adjutant General wrote instructing him to obtain the services of an attorney and present his claim for compensation to the Court of Claims, Springfield, Illinois; that on said date of March 11, 1930 plaintiff moved from his home at Champaign, Illinois to Mansfield, Illinois, where he resided for approximately five months, and for which change of address no forwarding instructions were given to the Champaign Post Office for several days subsequent to March 11th.

The instructions contained in the Adjutant General's letter finally came to plaintiff's attention however according to his complaint, for in September, 1931 he talked with Capt. Gehr and was then advised by the latter that it would be

necessary for him to obtain the services of an attorney to present his claim to the Court of Claims, and was then shown a copy of the Adjutant General's letter of March 11, 1930.

Plaintiff states that in July 1934 he secured the services of an attorney for the purpose of presenting his claim to the Court of Claims and again talked with Capt. Gehr about the matter; that correspondence was again had with the Adjutant General's Office and the instructions contained in the latter's letter of March 11, 1930 were communicated anew to claimant; said communication being turned over to plaintiff by his attorney.

Eventually on *March 1, 1935* this claim was filed.

Respondent has filed a motion to dismiss the claim under the provisions of Section 10 of the Act creating the Court of Claims which provides:

"Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues."

Plaintiff was fully advised and had ample opportunity to file his claim within the time-limit provided by law. Having failed to do so and not coming within any exception to the provisions of said limitation, the motion by respondent is allowed and the claim is dismissed.

(No. 2638—Claim denied.)

ANDREW REHMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1935.

PAUL G. WEISENHORN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*property damage—negligence of employees of State.* The rule is universal that the State is never liable for the negligence of its agents and employees, unless there is a Statute making it so liable, and in this State there is no such Statute.

SAME—*same—claim on grounds of equity and good conscience denied.* Under the facts in this case and the authority of *Crabtree* vs. *State*, 7 Court of Claims Reports, Page 207, an award on the grounds of equity and good conscience must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Five Hundred Dollars ($500.00) and alleges that on May 30, 1934 there existed a certain State S. B. I. Route No. 96 which extends from the City of Quincy, Ill. to a junction with Route No. 24, commonly known as the "Five Mile Turn"; that said State Highway was then and there owned, controlled, maintained and used by the public; that it extended over a creek approximately one-half mile north of said intersection and was a durable hard-surfaced highway; that contrary to the law in such case made and provided said highway was less than fifteen feet in width; said Statute containing the following provision:

"All hard-surfaced parts of State bond issue routes shall be constructed of sufficient widths to meet the requirements of the reasonably expected traffic thereon, such widths to be not less than eighteen feet."

The complaint further avers that claimant was driving north on said highway and approached said bridge, unaware of the fact that the bridge and roadway over same were not of the width required by law; that at the same time another motor vehicle was being driven south on said highway, the driver thereof being in the exercise of ordinary care, etc; that claimant, in order to avoid a collision with the other car collided with the stone-approach wall and guardrail of said bridge, said collision being due to the narrowness of the roadway; that as a proximate result of the negligence of respondent, claimant's automobile was damaged, resulting in an estimated cost of repairs of Two Hundred Twenty-eight Dollars ($228.00) and claimant was deprived of its use and enjoyment for a long period of time and claimant was bruised and suffered nervous and mental shock and pain and was compelled to lay out and expend medical and hospital fees in the amount of Five Hundred Dollars ($500.00); that he was hindered and prevented from attending to his usual work and was deprived of large earnings that otherwise would have accrued to him, all to a total damage of Five Hundred Dollars ($500.00).

Respondent has filed a motion to dismiss the claim. Claimant in a reply to said motion contends that an award should be allowed on the theory of EQUITY AND GOOD CONSCIENCE and that the motion to dismiss should not be allowed but that claimant should be given a hearing on the merits.

Under the statement contained in the complaint no award could be granted claimant and the motion to dismiss should be allowed. The Attorney General has cited the law applicable thereto:

"In the construction and maintenance of roads the State acts in its governmental capacity,—it is exercising its sovereign powers—and it does not permit these powers to be questioned by any tribunal. It can only act through its officers and employees, and if these officers perform their duties in a negligent manner the negligence is the negligence of the officers and not of the State. These well known principles of law are so thoroughly established that citation of authorities seems unnecessary. In *Kinnare* vs. *City of Chicago*, 171 Ill. 332, the rule is announced in the following language at Page 335: 'The State acts in its sovereign capacity, and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents, and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself, unless such liability is expressly provided by the Statute creating such agency' ".

Chumbler vs. *State of Illinois*, Vol. 6, C. C. R. Page 138.

Derby vs. *State of Illinois*, Vol. 7, C. C. R. Page 145.

The construction placed upon the application of the terms EQUITY AND GOOD CONSCIENCE are fully set forth in the case of *Crabtree* vs. *State* 7 C .C. R. 207. As therein stated—

"Before a claimant can have an award against the State he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award he cannot invoke the principle of equity to secure same. Where there is no legal liability, equity cannot create one."

The motion to dismiss the claim is allowed and the claim is dismissed accordingly.

(No. 2087—Claimant awarded $1,148.93.)

V. O. CONNOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

ALBERT E. ISLEY, for claimant.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

CONTRACTS—*specifications—damages.* Where claimant in performance of contract for construction of bridge follows specifications, embraced therein and mixes concrete, as directed by State engineer in charge of such construction, having no power or authority to deviate therefrom, he is not liable if concrete so mixed is defective or unsuitable to prevailing weather conditions, and if work in which same is used is found defective and replaced by him on order of State, he will be entitled to an award for the reasonable cost of such replacement.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On April 28, 1930 claimant entered into a contract with the respondent for the construction of an R. C. Girder Bridge, consisting of one steel span and four approach spans on S. B. I. Route No. 104, Section 143-b, in Christian County.

The proposal which was made a part of the contract, among other things provided as follows:

"The plans for the proposed work are those prepared by the Chief Highway Engineer and approved by the Director of the Department of Public Works and Buildings on July 11, 1930, which plans are designated as State Bond Issue, Route 104, Section 143B, Christian County and which cover the work described in Paragraph 1 in this proposal.

"The specifications are those prepared by the Department of Public Works and Buildings and designated as standard specifications for road and bridge construction adopted February 1, 1930."

Article 42.8, page 186, of the Standard Specifications for road and bridge construction adopted February 1, 1930 is in part as follows:

"The proportion of cement, fine aggregate, coarse aggregate, and water will be determined by the Engineer before the work begins so as to produce a workable plastic concrete having a compressive strength of not less than 3,500 lbs. per square inch, and a modulus of rupture of not less than 650 lbs. per square inch at the age of fourteen days when tested by standard methods. This determination shall be based upon tests of the aggregates selected by the contractor for use in the work. The quantities of aggregates for each batch of concrete shall be measured by weight.

"The Engineer will furnish to prospective bidders, upon request, the approximate proportions by weight necessary to produce concrete having the required workability and strength using aggregates from any established and available commercial source designated by the bidder, it being expressly understood that this information is only for the convenience of the bidder.

"The Engineer reserves the right to determine as the work progresses and as the aggregates are delivered at the site of the work the proportions of cement, water and the aggregates actually furnished which will produce workable plastic concrete having the strength specified herein."

Work under the contract was commenced about September 1, 1930, and the piers and abutments were poured during that Fall. Approach Span No. 1 was poured December 21, 1930; Span No. 2 on January 4, 1931, and Spans Nos. 3 and 4 were poured and the work completed during the summer of 1931. The contract price was $47,069.55 and was paid in full by the respondent.

The claim here involved grows out of the replacement of Span No. 1 which was rejected as defective, and which was thereafter removed by claimant and replaced by another span, pursuant to the order of the respondent. The cost of removal was $589.90 and the cost of replacement (exclusive of the cost of cement furnished by respondent) was $559.33, making a total of $1,148.93, which was paid and advanced by claimant, and which he seeks to recover in this proceeding.

No question is raised as to the cost of such removal and replacement, and it is stipulated herein between counsel for claimant and respondent that if the respondent is liable to the claimant because of the matters alleged in the declaration, the amount of damages to be allowed shall be $1,148.93, which stipulation is approved by the Engineer of Construction of the respondent.

As to Span No. 1 it appears that prior to the commencement of the work, the engineer of the respondent in charge of the work determined the proportions of sand and gravel to be used, to-wit, 328 pounds of gravel and 233 pounds of sand for each bag of cement, and set the scales accordingly. The weather at the time the span was poured, was very bad, the temperature ranging from 36 degrees to 17 degrees Fahrenheit. When the form was removed it was determined that the span was badly honeycombed and the engineer in charge ordered that it be removed and replaced. Claimant contends that the honeycombed condition of the span resulted from an improper mix given by the respondent and that the same was not the result of any fault on his part.

Respondent contends that there were other factors which caused or which contributed to or combined with the improper mix to cause the defective span. Respondent also contends that claimant's foreman in charge of the work was incompetent; that some of the workmen were local men and not familiar with work of that type; that the mix was not properly

spaded; that the weather was too cold; and there is some evidence in the record in support of such contentions.

It appears from the testimony of the witnesses for the respondent, that the mix in question would be suitable when all conditions were *ideal*. Conditions, however, and particularly the weather, were far from ideal, the temperature being well below the freezing point a large part of the time. The water had to be heated, and the work was not completed until about seven o'clock p. m.

Claimant testified that he spoke to Mr. Pennington, the resident engineer, about the time the work was commenced, and objected to the mix, but that nothing was done about it at that time. Mr. Pennington had no recollection of such objection, but would not say that it had not been made. It is undisputed, however, that after it was found that the first span was defective, the mix was changed for the other spans; that the mixtures used were more or less experimental; and that the mixture in question was an unusual and a hard working combination.

Mr. L. A. Lush, District Construction Engineer of the Department of Highways, testified that he had recommended that claimant be at least partially recompensed for his expense in tearing out and replacing this span.

Under the terms of the specifications, the proportions of cement, fine aggregate, coarse aggregate, and water were required to be determined by the engineer. The contractor had no right to change them. He had the right to object to them, but had no authority to make any changes therein. Claimant testified that he objected to the mix, and his testimony was not denied.

Upon consideration of all of the evidence in the record, it appears that the defective condition of the span resulted from the use of an improper mix under the prevailing weather and local conditions. Respondent's engineer was on the job and if the mix was not proper under the conditions then prevailing, he had the right to change it, but the contractor had no such right. As a matter of fact, neither party knew that the mix in question was improper until the forms were removed from the *span, and the honeycombed* condition thereof was apparent.

Under the circumstances the contractor was required to accept the proportions fixed by the respondent. If such pro-

portions were not proper under the conditions then prevailing, it was no fault of the claimant and he should not be required to pay the expense connected with the removal and replacement of the defective span.

Upon the facts in the record claimant is entitled to an award, and inasmuch as the parties have heretofore stipulated that if claimant is entitled to an award, the amount of his recovery shall be Eleven Hundred Forty-eight Dollars and Ninety-three Cents ($1,148.93), an award is entered in favor of claimant for the sum of Eleven Hundred Forty-eight Dollars and Ninety-three Cents ($1,148.93).

(No. 2430—Claimant awarded $513.87.)

GEORGE CUMMINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

JAMES N. CUMMINGS, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where State highway maintenance employee sustains accidental injuries, arising out of and in the course of his employment, an award for compensation will be made where justified, under provisions of the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

By his claim plaintiff seeks an award of One Thousand Six Hundred Three and 30/100 Dollars for injuries received while engaged by the State in highway maintenance work, on the 26th day of July, 1933.

The record discloses that on said date while employed on Route No. 76 near Kewanee, Illinois, claimant stepped out from behind a State highway truck and was struck by a passing automobile driven by one J. B. Moorhouse of Pekin, Illinois, receiving three fractures to the left leg, also injuries to the right side of his head. He was taken to the St. Francis Hospital at Kewanee, Illinois where he was treated by Dr. Warren T. Heaps. He was thereafter treated by Dr. H. E. Cooper of Peoria, Illinois. The former's bill, stated in the complaint to have been $494.00—the hospital bill of $283.00 and Dr. Cooper's bill to the date of the hearing, i. e. February 20, 1935 in the amount of approximately $148.00 have all been paid by the State.

A report by Dr. Cooper of an examination made of claimant on September 12, 1934 appearing by stipulation in the record is as follows:

"The above man who had a delayed union in a fracture of both bones of the left leg has finally obtained a solid bony union. The X-ray taken yesterday shows, without question, a firm union. The man still has some loss of dorsal flexion of the foot, in other words, his heel cord is still somewhat short. He is still wearing a brace which will have to be worn for another few weeks.

"At present he has about 50% loss of function in the leg. It would be unwise to close this case at present as I believe the leg will improve rather rapidly in the next two months and that his disability will be considerably decreased."

Claimant was examined by Dr. H. B. Knowles on December 28, 1934 and the latter's report thereof states that a permanent disability of the left leg of 25 to 30 per cent exists. It further appears by said stipulation that claimant has been paid Five Hundred Seventy-five Dollars ($575.00) as compensation. Claimant's wages were Eighteen and 90/100 Dollars ($18.90) per week. Claimant contends for temporary total disability from July 26, 1933 for a total period of seventy-four (74) weeks and for permanent partial disability of "25 or 30 per cent of full compensation for one hundred sixteen (116) weeks."

Plaintiff's employment and injuries as disclosed by the record entitle him to compensation, but not on the basis applied for in the complaint, or as contended for in counsel's Statement, Brief and Argument.

Under Section 8 (e) of the Workmen's Compensation Act the employee is entitled to compensation for the period of temporary total incapacity for work resulting from his injuries—for a period not to exceed sixty-four (64) weeks, and in addition thereto specific compensation under Section 8 (e) 15-17 for the permanent partial loss of use of said left leg of from 25 to 30 per cent thereof.

AN AWARD IS THEREFORE ALLOWED as follows:

For 64 weeks total temporary disability at 50% of the average weekly wage, i. e. one-half (½) of $18.90 or $9.45.....	$604.80
Less amount heretofore paid.....	575.00
Balance due for temporary disability.....	$ 29.80
Allowance of 27½% for permanent loss of use of leg.....	493.76
Total	$523.56

As there is no feasible way in which such award can be made payable in future weekly or monthly payments and the entire amount will necessarily be paid in a lump sum, same is therefore commuted under the Commutation Tables of the Workmen's Compensation Act and an award is hereby recommended, as so commuted, in the sum of Five Hundred Thirteen and 87/100 Dollars ($513.87).

(No. 1947—Claim denied.)

J. W. JONES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

VICTOR HEMPHILL, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE, CAUSED BY FIRE STARTED BY HIGHWAY MAINTENANCE POLICEMAN BURNING GRASS ALONG HIGHWAY—*State not liable for.* The precise question involved in the claim herein was decided by this court in the cases of *Unverfehrt* vs. *State*, No. 1945, *post*, and *Loges* vs. *State*, 1946, *ante*, and those decisions are controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant herein filed his claim with the clerk of this court on July 15, 1932, claiming the sum of $71.50 as damages caused by a fire started by employees of the State of Illinois on State Bond Issue Route No. 108, Section No. 107, Macoupin County, on July 6, 1931. At the time aforesaid the State Highway Maintenance Patrolman was burning weeds and grass which had been mowed and raked on the State right-of-way, and the fire got beyond his control and spread into a timothy field adjacent to the State right-of-way and burned an area of five acres. It is claimed that five acres of timothy and hay were burned and the yield per acre was 1¼ tons, which would average 5 2/3 bushels of seed per acre or 28½ bushels all told; that the hay was worth $3.00 per ton and the seed was worth $2.00 per bushel, or a total loss of $71.50, no allowance having been made for the cost of labor and threshing, etc.

Claims founded upon similar principles have heretofore been filed in this court, and a well considered case is that of

Lewis McGarrah, et al. vs. *State,* 6 C. C. R. 468. It was there held that the State in the construction of the state-wide system of durable hard surfaced roads exercises a governmental function and is not liable for the torts or negligence of its agents, and the same would be true where the State was maintaining the highway by cutting and burning grass and weeds that grew along said highway.

This case reversed a prior holding of this court, in the case of *A. N. Pierce, et al.* vs. *The State of Illinois,* decided January 15, 1930. In the latter case it was held that for any loss of crops resulting by fire from an asphalt tank furnace used upon a State highway spreading upon claimant's land, an award would be made, but no authorities were cited and no attempt was made to reason the liability of the State from established law.

In *Kinnare* vs. *City of Chicago,* 171 Ill. 332, cited in the McGarrah case, the Supreme Court of this State said: "When the State acts in its sovereign capacity, it does not submit its actions to the judgments of courts, and is not liable for the torts or negligence of its agents."

In view of the holding of this court in the McGarrah case and the decision of the Supreme Court just cited, we must hold that the State in the instant case is not liable.

The claim, therefore, will be denied.

(No. 2630—Claimant awarded $300.00.)

CATHERINE KNARR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

CATHERINE KNARR, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SOLDIERS' BONUS — *when award for will be made.* Where claim for Soldiers' Bonus was filed and approved and warrant issued for same, but soldier died before receiving it and same is returned and cancelled and no one has received the compensation awarded soldier, an award may be made for amount thereof to one lawfully entitled thereto.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant files her claim pro se, upon the following recital of facts:

Frank W. Knarr was a Private in the Army Signal Corps No. 45, being inducted into the Army, October 2, 1917 at Greenville, Illinois. His Army Serial Number was 1,986,240. He served overseas from September 18, 1918 until July 5, 1919, was honorably discharged July 14, 1919 at Camp Grant, Illinois and returned to his home at Smithboro, Illinois. On January 20, 1923 he filed an application for the Illinois Bonus and was assigned No. 99,241. His claim was approved and vouchered for payment on September 17, 1923. State warrant No. 160,054 for Three Hundred Dollars ($300.00) was mailed to him at his home address. Between the time of his application and the mailing of the warrant Frank W. Knarr died. The warrant was mislaid and was later returned to the Treasurer of the State of Illinois and was cancelled by order of the State Auditor on July 16, 1934 and the money reverted to the Soldiers' Compensation Fund. The warrant was never cashed and no one has ever received the compensation which the State awarded to Frank W. Knarr as payment of his Bonus claim.

Section 2, House Bill No. 127 (The original Bonus Act) approved May 3, 1921, states that the beneficiaries are:

"The husband or wife (if not re-married), child or children, mother, father, brother or sister in the order named."

On March 8, 1935 the mother, Mrs. Catherine Knarr, Box 28, Smithboro, Illinois was duly identified and proven to be the beneficiary entitled to said Bonus.

In 1927 the Legislature passed an Act entitled:

"An Act terminating the service recognition board, and making provision for the payment of certain claims for compensation."

(Cahill's Ill. Statute Chap. 129 P. 2675).

Under the terms of the latter Act it is provided:

"In all cases where claims for compensation have been heretofore or are hereafter allowed by the service recognition board but payment of compensation has not been made either because the claimant or his heirs have not been found, or any other reason, it is the duty of the Adjutant General, as soon as satisfactory proof is furnished to him, locating or identifying the claimant or his heirs or as soon as the disability preventing payment is removed, to certify such fact to the State Treasurer, who shall make payment from the soldiers' compensation fund, in the sum allowed by the service recognition board to the person entitled thereto."

The above Act carried an appropriation of $140,647.50 for the payment of claims arising by virtue thereof.

House Bill No. 474, approved June 14, 1929, appropriated the balance of this fund ($101,804.00) to the Department of Public Welfare for the relief of indigent widows and children of deceased World War veterans. This action left no funds from which a Bonus Claim could be paid.

The Adjutant General's office has certified that satisfactory proof has been furnished to him locating and identifying claimant as the one to whom compensation is payable, but there is no existing appropriation out of which the Bonus payment can be made, and the claim properly comes before this court.

AN AWARD IS THEREFORE ALLOWED in favor of claimant in the sum of Three Hundred Dollars ($300.00).

(Nos. 1951 and 1952, consolidated—Claims denied.)

JAMES LAHEY, JR., No. 1951, P. J. O'REILLEY, No. 1952, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

Claimants, pro se.

OTTO KERNER, Attorney General, JOHN KASSERMAN, Assistant Attorney General, for respondent.

PLEADING — *property damage — when declaration insufficient.* Where declaration in claim for property damage fails to set forth sufficient facts upon which liability could be found, motion to dismiss will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The declarations do not contain the names of counsel in either of the above cases.

Both claims arise from the same state of facts and on motion of the Attorney General were consolidated.

These claims were filed on July 18, 1932 and allege that on April 17, 1932, the plaintiff in No. 1951, James Lahey, Jr., was rightfully in possession of a 1930 Model A Ford Coupe automobile which was being driven by him in a southerly direction on Illinois State Highway Number 111, Macoupin County; that the State owned and by its duly authorized agent operated and propelled a certain automobile truck in a south-

erly direction on the same highway, without lights thereon, and carelessly and negligently stopped the truck directly in front of the automobile being driven by Lahey, without warning and the claimant was unable to avoid striking the respondent's truck because of cars coming along on Route 111 in the opposite direction, and by reason of the negligence of the respondent, the claimant was injured and was caused to expend $119.43 for hospital services, drugs, etc., and $72.00 for medical services, and was forced to remain idle and away from his work for a period of two months, and claims a total damage of $311.43.

In No. 1952, P. J. O'Reilley charges that on the 17th day of April, 1932 in the evening after dark, one James Lahey, Jr., was rightfully in possession of this Ford Coupe, and that he, P. J. O'Reilley was the owner thereof. Similar facts are alleged as to the cause of the accident, and it is alleged that the accident caused the automobile to become afire and burn. The insurance company settled for and paid the claimant the sum of Two Hundred Dollars ($200.00) to cover the damage to the automobile by fire, but there was a further damage of Eighty-five Dollars ($85.00) caused by the collision.

The Attorney General has filed a motion to dismiss both of these cases on the ground that it is sought to recover for injuries and damages caused by a collision of the automobile owned by claimant in No. 1951 with a truck owned by the State, it being alleged the collision was caused by the carelessness and negligence of an agent of the State.

The declaration is drawn on the theory that the State is liable for injuries caused by the negligent conduct of its employees, although there is no direct averment in the declaration that the driver of the truck in question was an employee of the State. It is alleged that the driver of the truck was the duly authorized agent of the State, but the name of the driver of the truck is not averred. In both declarations there are other averments which constitute conclusions of law. Neither is it shown why the claimant, O'Reilley, did not collect full damages from the insurance company, nor what the damage to the truck was in addition to the fire.

We therefore sustain the motion to dismiss, in each case.

(No. 1936—Claimant awarded $47.00.)

DR. G. B. LUTYENS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

JOHN M. PFEIFER, for claimant.

OTTO KERNER, Attorney General, JOHN KASSERMAN, Assistant Attorney General, for respondent.

MEDICAL SERVICES RENDERED TO MEMBER OF ILLINOIS NATIONAL GUARD—*when award may be made for.* Where claimant rendered medical services to member of Illinois National Guard, bill for which is certified by Adjutant General as being correct an award may be made for same.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim filed for medical services rendered to one Everett Poff, a private in Machine Gun Troop, 106th Cavalry, Illinois National Guard, on or about February, 1931, who, while a private in said Machine Gun Troop, was suffering from an injury to the periosteum of the os calcis, and a tenesynovitis.

This claimant is a physician and surgeon and was called to treat private Everett Poff by one Mark Plaisted, Jr., Troop Commander of this Machine Gun Troop.

This claim is for thirteen office calls of $2.00 each, and seven hospital and residence calls of $3.00 each, or a total of $47.00

In a letter dated July 7, 1932 from the Adjutant General it is stated that the statement from the doctor is correct, but that the bill was not submitted until February 9, 1932. Owing to the fact that appropriations are made for biennial periods, the appropriation for the two year period, which included the time during which this service was rendered, expired June 30, 1931 and lapsed as of September 30, 1931. Claims of one biennial period cannot be paid from funds of another period.

It has been held that an award will be made for medical services furnished to a member of the Illinois National Guard while on duty.

Meyer vs. *State*, 5 C. C. R. 330.

While the declaration does not aver that this private was on duty at the time of the injury, nor does it aver the circumstances under which the injury was sustained, the Adju-

tant General certifies that the statement of the claimant is correct.

We, therefore, recommend an award in the sum of Forty-seven Dollars ($47.00), payable to Dr. G. B. Lutyens.

(No. 2044—Claimant awarded $75.32.)

JOHN MARA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

JOHN MARA, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICES AND EXPENSES—*when award may be made for.* Where satisfactory service has been rendered to the State and expenses incurred thereunder, at its request, an award is justified upon the recommendation of the head of the department for which service was rendered and expense incurred.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant petitions for an award of Seventy-five and 32/100 Dollars ($75.32) and contends that he was employed by E. F. Throgmorton, then Fiscal Supervisor of the Department of Public Walfare, to purchase horses and mules to be used at the State Training School for Girls and the Lincoln State School and Colony. The proof shows that both of said Institutions were in need of mules and horses and that claimant, who was an experienced judge of animals, was requested by Throgmorton to secure such animals; that a Requisition was duly issued from the Department for such purchase; that claimant rendered the services necessary, selected and bought the animals desired and has never been compensated for services and transportation expenses incurred by him. In a report dated March 15, 1935 A. L. Bowen, Director of the Department of Public Welfare states:

"Mr. Throgmorton was Fiscal Supervisor of the Department of Public Welfare at the time—Mr. Throgmorton possessed this authority at the time."

When satisfactory service has been rendered to the State, the expense whereof has been legally incurred but not paid, an award is justified upon the recommendation of the head of the Department for which the service was rendered. The record indicates a lawful and legal claim and an award is hereby

allowed in favor of claimant in the sum of Seventy-five and 32/100 Dollars, ($75.32).

(No. 2561—Claimant awarded $9.00.)

McKESSON AND ROBBINS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

McKESSON AND ROBBINS, pro se.

OTTO KERNER, Attorney General, JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are similar to those in *Brown Shoe Company* vs. *State*, No. 2551, *ante*, and the opinion therein applies here.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On May 25, 1933, pursuant to proper requisition, claimant shipped to the State Training School for Girls at Geneva merchandise for the use of such institution of the value of $9.00. Claimant billed the respondent therefor on the same day, but apparently the bill was overlooked. Duplicate bill was sent on December 15, 1933 and another on February 19, 1934.

On October 25, 1934 claimants were advised by John C. Weigel, fiscal supervisor of respondent, that on account of the fact that the invoice antedates the current biennium, the same would have to be presented to this court.

The merchandise in question was ordered by respondent and was duly received by it, together with the bill therefor. The failure of claimant to receive payment therefor resulted from no fault on its part, and it is entitled to an award for the amount claimed.

Award is therefore entered in favor of the claimant for the sum of Nine Dollars ($9.00).

(No. 2419—Claimant awarded $8.33.)

A. E. NICOL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

A. E. NICOL, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

LICENSE FEE—*when award for refund will be made.* Where claimant applied for license to sell malt and vinous beverages at retail and paid fee for entire year, and license could not at the time of payment be issued for full year, an award will be made for refund of difference between amount paid and that legally due for period for which license is issued.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On July 10, 1933 claimant made application for a license to sell malt and vinous beverages at retail, and remitted with his application a money order for $50.00, being the license fee for a full year. However, a license could not be issued for a period beyond the end of the license year, to-wit, April 30, 1934, and license was therefore duly issued for the period ending April 30, 1934 and forwarded to claimant. The $50.00 remitted by claimant was deposited in the State Treasury, notwithstanding the fact that the amount of the license fee from the first day of the month in which application was made, to the end of the license year was $41.67, and no return was made to claimant on account of the overpayment made by him as aforesaid. Claimant is therefore entitled to the return of the amount so overpaid by him as aforesaid, to-wit, $8.33.

Award is therefore entered in favor of the claimant for the sum of Eight Dollars and Thirty-three Cents ($8.33).

(No. 2156—Claim denied.)

NED ODUM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

JEROME R. FINKLE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*pleading—what must be shown.* Before a claimant is entitled to an award for compensation he must show, among other things that he is engaged in some department of an enterprise which is extra-hazardous in fact or which is so declared by the Act, and, if no compensation has been received for the injury claimed, that he made claim for same within the time provided by the Act and if complaint fails to contain such allegations claim must be dismissed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Prior to and on the 16th day of October, A. D. 1932 claimant was employed by respondent as a poultryman at the Lincoln State School and Colony at Lincoln, Illinois. On the last mentioned date he sustained accidental injuries which he claims arose out of and in the course of his duties, and which he claims resulted in the permanent loss of 35% of the use of the right ankle or foot. Claim is made for compensation under the terms and provisions of the Workmen's Compensation Act.

Before a claimant is entitled to an award under such Act, he must show, among other things, that he is engaged in some department of an enterprise or business which is extra-hazardous in fact, or which is declared to be extra-hazardous by the provisions of Section 3 of the Workmen's Compensation Act, and must also show a compliance with the requirements of Section 24 of such Act relative to making claim for compensation within six months after the accident.

The complaint filed by the claimant does not contain any allegations with reference to such matters, and there is no proof in the record concerning the same.

Under the present state of the record, the case must be dismissed.

(Nos. 2616, 2617, 2618, 2619, 2620, consolidated—Claimants awarded $375.00.)

PAUL REED, No. 2616, WILLIAM BISCONTINE, No. 2617, CHRISTIAN WIELAND, No. 2618, HENRY FULGENZI, No. 2619, GEORGE BRYANT, No. 2620, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

CLAIMANTS, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICES—*mine rescue team—when award may be made for.* The facts in this case are the same and arose out of occurrence upon which claim was filed and an award made in *Parsons et al.* vs. *State*, Nos. 2591 to 2595, consolidated, *ante*, and the opinion in that case applies herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The above claims were filed pro se as individual claims but because they all grow out of the same transaction and are

identical in character, they are being disposed of in one opinion.

The claims were all filed February 25, 1935, each for Seventy Five Dollars ($75.00.) Plaintiffs respectively aver that they were members of the Springfield, Illinois, Mine Rescue Team; that on December 24, 1932 there was an explosion at the mine of the Moweaqua Coal company; that on said date the respective claimants, at the request of John G. Millhouse, the Director of the Department of Mines and Minerals, went to Moweaqua to assist in the rescue work made necessary by the explosion; that they each continued in such work for a total period of six days. They presented their bill for services to the Moweaqua Coal Company, but received no payment therefrom because the latter was hopelessly insolvent. They were thereupon paid Sixty Dollars ($60.00) each by the State. The Seventy Five Dollars ($75.00) now requested is for Five Dollars ($5.00) each, transportation charges to and from Moweaqua and Seventy Dollars ($70.00) each, additional compensation for services rendered.

No averment appears and no showing is made as to why only a part of the amount due claimants was paid them heretofore, but in a statement from James McSherry, Director of the Department of Mines and Minerals, it is stated among other things:

"The Springfield team's bill for the service they performed is necessarily much higher than the bill of any of the other teams for the reason that the Springfield team was on duty a greater portion of the time than any other team at the scene of the disaster * * * my personal opinion is that the bill is not at all excessive * * *"

Again in a report dated March 7, 1935 Director McSherry states:

"As originally submitted to the department the bills for services in this case (The Moweaqua Mine Disaster) were based on a lower rate than it had been the custom to charge for such work for a number of years."

In other claims for Mine Rescue Team work, filed in this court in connection with the Moweaqua mine disaster, proof has been made and awards allowed on the basis of a daily allowance of Sixteen Dollars ($16.00) per day. So far as its province permits, the court believes that awards made by it should be on a uniform scale.

Each of the claims filed herein is as follows:

Services, wearing a breathing machine (apparatus) 30 hours at $3.00 per hour	$90.00
40 hours at $1.00 per hour	40.00
Transportation to and from Moweaqua	5.00
Total	$135.00
Credit on above	60.00
Balance due	$75.00

These claims are supported by the record, and the merits thereof admitted.

Awards are therefore made as follows:

Paul Reed	$75.00
William Biscontine	75.00
Christian Wieland	75.00
Henry Fulgenzi	75.00
George Bryant	75.00

(No. 2524—Claimant awarded $2,662.56.)

MINNIE THOMPSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

JOHN T. ELLIFF, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where State employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made to his dependents in accordance with the provisions of the Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On September 27, 1934, Arthur Thompson, husband of the claimant, Minnie Thompson, was employed by the Division of Highways of the State of Illinois, as an extra laborer on S. B. I. Route No. 9, near Morton, Illinois, and was earning $3.60 per day. The crew with which he was working was engaged in replacing pavement, and near the end of the day's work on said 27th day of September, said Arthur Thompson

was requested to help two other men who were setting out warning lights along the road where repair work was being done. In the course of such work said Arthur Thompson slipped or fell from the truck on which he was riding, and sustained injuries which resulted in his death on the same night. He left him surviving the claimant, Minnie Thompson, his widow, but left no child or children.

Notice of the accident was given and claim for compensation made in accordance with the requirements of Section 24 of the Workmen's Compensation Act. Said employee had been in the services of the respondent less than a year immediately preceding the accident, and was engaged in an employment in which it is the custom to operate for a part of the whole number of working days in each year. The evidence does not disclose the actual number of working days per year in such employment, and consequently the minimum of two hundred days must be used as the basis for the year's work, in accordance with the provisions of Section 10 of the Workmen's Compensation Act. Thompson's average annual wages, therefore, must be regarded as Seven Hundred Twenty Dollars ($720.00).

Under the provisions of Section 7a of the Workmen's Compensation Act, the claimant, as widow of said decedent, is entitled to compensation in the total amount of $2,880.00, which compensation is payable in weekly installments of $7.50 commencing on September 28, 1934.

Payment by the respondent in weekly installments, however, is not practicable under existing laws. Under all of the circumstances it appears to be to the best interests of all parties concerned, that the compensation to be paid as aforesaid be commuted to an equivalent lump sum in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

The total amount of compensation to be paid as aforesaid, after a commutation to an equivalent lump sum, is $2,648.06. Claimant is also entitled to be reimbursed in the amount of $14.50 for medical and hospital expenses paid by her as shown by the record.

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant, Minnie Thompson, for the sum of Twenty Six Hundred Sixty-two Dollars and Fifty-six Cents ($2,662.56).

(No. 1945—Claim denied.)

OSCAR UNVERFEHRT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

PAUL J. CARTER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—*cutting and burning grass along is maintaining.* The cutting and burning of grass and weeds that grow along a State highway is maintaining same and is a governmental function.

PROPERTY DAMAGE—*caused by fire started by highway maintenance policeman burning grass growing along highway — State not liable for.* In the maintenance of public highways the State exercises a governmental function and is not liable for damages caused by the negligence of its servants or agents employed to maintain same.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On July 15, 1932, the claimant filed his claim for damages caused by a fire originally started by The State Highway Maintenance Patrolman, who was burning weeds and grass which had been mowed and raked on State Bond Issue Route No. 153, Section No. 101, Washington County, on June 18, 1931. The fire spread from the State Highway and burned an area of 2.1 acres sowed with wheat, and it was estimated that there was 78½ bushels destroyed at $0.55 per bushel. The burned area had also been sown with sweet clover, about ten pounds of clover seed having been sown at $0.08 per pound. Damages are asked in the total amount of $44.85.

Claims founded upon similar principles have heretofore been filed in this court, and a well considered case is that of *Lewis McGarrah, et al.* vs. *State*, 6 C. C. R. 468. It was there held that the State in the construction of the state-wide system of durable hard surfaced roads exercises a governmental function and is not liable for the torts or negligence of its agents, and the same would be true where the State was maintaining the highway by cutting and burning grass and weeds that grew along said highway.

This case reversed a prior holding of this court in the case of *A. N. Pierce, et al.* vs. *The State of Illinois*, decided January 15, 1930. In the latter case it was held that for any loss of crops resulting by fire from an asphalt tank furnace used upon

a State highway spreading upon claimant's land, an award would be made, but no authorities were cited and no attempt was made to reason the liability of the State from established law.

In *Kinnare* vs. *City of Chicago*, 171 Ill. 332, cited in the McGarrah case, the Supreme Court of this State said: "When the State acts in its sovereign capacity it does not submit its actions to the judgments of courts, and is not liable for the torts or negligence of its agents."

In view of the holding of this court in the McGarrah case and the decision of the Supreme Court just cited, we must hold that the State in the instant case is not liable.

The claim, therefore, will be denied.

(No. 2566—Claim denied.)

BEECHER WILLIAMS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.

BEECHER WILLIAMS, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE — *negligence of State highway employees — State not liable for.* In the construction and maintenance of public highways, the State exercises a governmental function and is not liable for damages caused by either a defect in the construction or failure to maintain them in a safe condition for travel.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On November 7, 1934 claimant was driving his truck on S. B. I Route No. 34 south of Rudemont, Illinois. He turned off on an approach and attempted to cross a wooden culvert which was being maintained by the respondent, and which appeared to him to be substantial. The culvert collapsed on account of the decayed condition of the sills thereof, and the truck was thereby damaged to the extent of Twenty-eight Dollars and Ninety-five Cents ($28.95).

Claimant filed his claim hereon on January 7, 1935, apparently basing the same upon the negligence of the servants and agents of the respondent in failing to keep such culvert in a proper state of repair.

The Attorney General has filed a motion to dismiss the claim for the reason that the State, in the maintenance of its public highways, is engaged in a governmental function, and is not liable for the negligence of its servants and agents in the exercise of such functions, in the absence of a statute making it so liable. The contention of the Attorney General is in accordance with the previous decision of this court and the well established law of this State. *Tuttle* vs. *State*, 5 C. C. R. 3; *Braun* vs. *State*, 6 C. C. R. 104; *Derby* vs. *State*, 7 C. C. R. 145; *Bucholz* vs. *State*, 7 C. C. R. 241; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

The motion of the Attorney General must therefore be sustained, and the claim dismissed.

Claim dismissed.

(No. 1581—Claimants awarded $145.00.)

W. C. ARMBRUSTER AND RAYNA MITCHELL, A PARTNERSHIP DOING BUSINESS UNDER THE NAME OF THE R. H. ARMBRUSTER MFG. CO., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

THE R. H. ARMBRUSTER MFG. COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due may be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimants, a partnership, consisting of W. C. Armbruster and Rayna Mitchell, a partnership doing business under the name of The R. H. Armbruster Mfg. Co. were engaged in manufacturing and selling tents, awnings and canvas goods products.

They alleged that the State of Illinois, through the Department of Purchases and Construction, bought from them under date of May 3, 1928, three pull awnings, which were to be installed, for the sum of $81.00, and on June 7, 1929,

bought from them two pull awnings and removed, stored and erected three awnings, all of the value of $64.00, and an itemized statement is attached to the bill, claiming the State of Illinois is indebted to them in the sum of $145.00.

From the record appears a stipulation to the effect that the claimant had sold and supplied awnings and similar merchandise to various departments for many years; that in the fall of 1927, the claimants removed and stored for the winter months, certain awnings located on the south side, first floor of the Capitol Building and used by the Department of Purchases and Supplies of the State of Illinois; that in April, 1928, the claimants advised L. H. Becherer, State Purchasing Agent, that new awnings were needed for certain windows and received an oral order from the said L. H. Becherer, State Purchasing Agent, for the purchase of three pull awnings for said windows. It was further stipulated that on May 2, 1928, pursuant to this order, three new pull awnings were properly installed with the understanding and expectation that a requisition for the purchase of said awnings would be issued in the customary way; that these awnings so installed have been and still are in use by the State of Illinois. It was further stipulated that bills were presented to the Department of Purchases and Supplies on or about June 1, 1928, and every thirty days thereafter for more than one year, these bills being in the amount of $81.00 which was the purchase price for said awnings but that the Department of Purchases and Supplies never issued requisition for the awnings and that payment therefor was never made by the State of Illinois.

The claimants filed their claim pro se on March 20, 1930, for $145.00.

In the report dated March 28, 1930, from Henry H. Kohn, Director, Department of Purchases and Construction, it is stated:

"We are returning herewith statement of claim entitled as above and beg to report as follows:

"The State Purchasing Agent, of the Division of Purchases and Supplies, states his records fail to disclose an order was given for the item May 3, 1928, 3 pull awnings, $81.00; therefore, payment is not recommended.

"The item June 7, 1929, 2 pull awnings, $55.00, removal, storing and erection of three awnings, $9.00, total $64.00, is correct and approved for payment."

This court has held that where facts are undisputed and the State received supplies as ordered by it and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could be paid, an award for the amount due will be made.

While it may be true that Director Kohn, or those under him, did not directly order the three pull awnings valued at $81.00, from the stipulation it appears that in April, 1928, the claimants advised the State Purchasing Agent that new awnings were needed for certain windows, and did receive an oral order for the same, and that these three new pull awnings were actually installed in a proper manner, and the State has received the use and benefit of these awnings since that time, and this claim having been filed within the Statute of Limitations, we feel that the whole bill should be paid.

It being agreed that the balance of the bill amounting to $64.00 is correct and for the reasons herein stated, we recommend that an appropriation be made for the sum of $145.00, payable to W. C. Armbruster and Rayna Mitchell, a partnership doing business under the firm name and style of The R. H. Armbruster Mfg. Co.

(No. 2627—Claimant awarded $3,966.16.)

THE CARSON-PAYSON COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

R. M. SHAW AND STEELY & STEELY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*damages caused by act of State—when award may be made for.* Where no contention as to law or fact is raised by the State and it clearly appears that claimant fully performed its contract and that it sustained damages, through no fault on its part, but occasioned solely by the acts of the State, in changing plans and specifications, delay in furnishing revised ones and rejection of materials furnished by it, by reason of which claimant was delayed in the performance of its contract, entailing payment of wages while awaiting plans and replacement of materials, and proper State department reports that amount of damages sustained are correctly and justly stated, an award may be made for the amount thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was originally filed March 5, 1933, for redress in the sum of Seven Thousand Three Hundred Fifteen and 82 100 Dollars ($7,315.82) by reason of delay and expense caused to claimant as a contractor, through poor material and delayed shipments by the State. The original claim was dismissed however and the claim in its present form was filed March 6, 1935, for Three Thousand Nine Hundred Sixty-six and 16 100 Dollars ($3,966.16).

Claimant is an Illinois Corporation located at Danville and engaged as contractors in plumbing, heating and ventilation construction work. A contract for this character of work was awarded claimant on December 9, 1931, in the sum of Twenty Three Thousand Twenty-five Dollars ($23,025.00) in connection with the erection of the Medium Security Building at the State Reformatory for Women at Dwight, Illinois. The general contractor on this project was the Willadson Construction Company. The stone for the building was manufactured and furnished by the State and the latter furnished its own inspectors to inspect the material that was furnished and to see that the plans and specifications were strictly followed. Claimant's damages are alleged to have resulted from delays caused by rejection of a large amount of stone work, some of which was ordered taken down after having been once placed by the masons; also further damage because of delay resulting from changes in the plans amounting to approximately one-fourth of the amount of the original contract, such changes having been made after construction was well under way. Claimant contends that as a result of these delays and intermittent changes, claimant's men were forced to sit idly by causing an increased cost of labor to claimant. Plaintiff also complains that the general contractor failed to keep water pumped out of the basement and that plaintiff was forced to have his own employees remove the water at least ten times in order to be able to continue their work. Claimant was notified on June 4, 1932, that revised architectural plans would be forwarded in the near future and claimant was thereafter compelled to await preparation of these plans from day to day, and to remain in readiness to proceed any time same were delivered; that the authorized changes and enlarged plans were not received by claimant

until September 16, 1932; that due to these delays between May 10th and September 16th a total loss of Three Thousand Nine Hundred Sixty-six and 16/100 Dollars ($3,966.16) represents a conservative total of the damage to claimant. No contention as to law or fact is raised by the State. The record shows that claimant did all of the installation work required of it as quickly as the construction of the building would permit; that during all of the delays claimant was required to maintain a superintendent and a certain force of workmen and foremen and equipment of supplies on the job; that at no time were the delays caused by claimant or its workmen, and that the delays caused claimant unjust losses. As these delays were largely caused by material changes and alterations in plans, it is legal and just that claimant should be paid therefor. The Architectural Department in a report dated March 21, 1935, states that the claim as now submitted has been thoroughly checked over by that Department and that the damages stated are justly and correctly computed.

AN AWARD IS THEREFOR ALLOWED in favor of claimant in the sum of Three Thousand Nine Hundred Sixty-six and 16/100 Dollars ($3,966.16).

(No. 1866—Claim denied.)

CHICAGO PRINTERS, INC., A CORPORATION (WM. L. O'CONNELL, RECEIVER, CONGRESS TRUST & SAVINGS BANK), Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

DUNNE & CORBOY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS — *when State not bound by contract made by State officer.* Under Section 30 of the Act in relation to State finance no officer has the right to contract any indebtedness on behalf of the State in excess of the amount of money appropriated for particular purpose.

SAME—*expenses of government—Constitution requires General Assembly to make.* Section 18, Article IV of the Constitution of Illinois requires the General Assembly to make appropriation for the ordinary and contingent expenses of the Government and it only determines what is a reasonable and proper amount to be expended by each department and makes appropriations therefor.

SAME—*contracts for expenditures in excess of appropriation.* Any contract made by an officer of the State purporting to bind the State for an expenditure in excess of the amount appropriated for specific purpose is illegal and not binding on the State, and if contract is made without specifying cost, payment would only be legally authorized up to the amount appropriated therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was originally filed by Chicago Printers, Inc. The Declaration alleges that claimant was formerly the Chicago Railway Printing Company, an Illinois corporation. By motion, Wm. L. O'Connell, Receiver of the Congress Trust and Savings Bank, was substituted as Party Plaintiff, for the reason that the claim in question had been assigned by the Chicago Printers, Inc. to the Congress Trust and Savings Bank, and thereafter came into the hands of Wm. L. O'Connell as Receiver of said bank.

Claimant alleges that on April 26, 1929, the respondent caused to be mailed to plaintiff an order or requisition to publish and print two thousand (2,000) copies of approximately six hundred (600) pages Roster of the Illinois National Guard and Naval Battalion as called by the President for "World War" service, for which respondent promised to pay what said Roster was reasonably worth; that said two thousand (2,000) copies were duly published and delivered to the State and that the publishing and printing thereof was reasonably worth the sum of Five Thousand Three Hundred Ninety-two and 66/100 Dollars ($5,392.66).

That on the 28th day of June, 1929, respondent mailed to the plaintiff a requisition to publish and print Three Thousand (3,000) copies of the Honor Roll, Vol. 1; that Plaintiff printed and delivered said Three Thousand (3,000) copies as provided in the terms of said requisition, for which the respondent promised to pay plaintiff what same was reasonably worth, and that the reasonable worth thereof was Ten Thousand Six Hundred Eighty-five and 93/100 Dollars ($10,685.93).

That about March 1, 1930, plaintiff presented a statement to the Department of Purchases and Construction, Division of Printing, for Ten Thousand Six Hundred Eighty-five and 93/100 Dollars ($10,685.93); that defendant paid plaintiff Six Thousand Seven Hundred Seventy-four and 80/100 Dollars ($6,774.80) on October 3, 1929, and Four Thousand Five Hun-

dred Fourteen and 81/100 Dollars ($4,514.81) on November 18, 1930, leaving a balance due plaintiff in the sum of Four Thousand Seven Hundred Eighty-eight and 98/100 Dollars ($4,788.98).

By an amendment to the Declaration filed September 24, 1934, plaintiff avers that the claims set forth in the Declaration come within one or more of the several appropriations made by the Legislature of Illinois prior to the date of the execution of said work, as set forth in said amendment.

The Attorney General has filed a motion to dismiss the claim on the ground that the Declaration contains no allegation that any appropriation was made for the purpose of printing and purchasing the books mentioned in the Declaration; that in the absence of an allegation that there was such an appropriation in an amount sufficient to cover the alleged requisition, no recovery can be had. It appears that an appropriation of Five Thousand Five Hundred Dollars ($5,500.00) was made by the General Assembly for printing the Roster of the National Guard and Naval Militia as called for "World War" service; and that an appropriation of Seven Thousand Five Hundred Dollars ($7,500.00) was made by the General Assembly for Volume 1 of the "Roll of Honor."

Any contract made by the Division of Printing in excess of the amount appropriated for that specific purpose is not legal, and if any order was placed for the work in question without specifying the cost thereof payment would only be legally authorized for same up to the amount appropriated therefor.

Section 18, Article IV of the Constitution of Illinois requires the General Assembly to make appropriation for the ordinary and contingent expenses of the government. The General Assembly determines what is a reasonable and proper amount to be expended by each Department of the State Government and makes appropriations therefor. For the two items in question the General Assembly made appropriations of not to exceed Five Thousand Five Hundred Dollars ($5,500.00) and Seven Thousand Five Hundred Dollars ($7,500.00) respectively.

Section 30 of the Act in relation to State finance provides that no officer, institution, department, board or com-

mission shall contract any indebtedness on behalf of the State nor assume to bind the State in any amount in excess of the amount appropriated for such purpose. These provisions of the law are clear and under them the Superintendent of Printing had no power to contract for the work in question in excess of the appropriation made therefor.

It was clearly the intention of the 55th General Assembly in making the appropriation of Seven Thousand Five Hundred Dollars, ($7,500.00) "For Publishing and Distributing a Record of Burial Places in Illinois of Soldiers, Sailors, Marines and Army Nurses of the United States," that said appropriation cover the full cost thereof. The full amount of both appropriations, i. e. Five Thousand Five Hundred Dollars ($5,500.00) and Seven Thousand Five Hundred Dollars, ($7,500.00) were expended for the purposes stated, the Chicago Printers, Inc., having received Eleven Thousand Two Hundred Eighty-nine and 61/100 Dollars ($11,289.61) of the Thirteen Thousand Dollars ($13,000.00) so appropriated, the balance having been expended for incidental items in connection with the publishing, printing and distribution of said volumes. Plaintiff contends that a further appropriation of Ten Thousand Dollars ($10,000.00) or so much thereof as may be necessary appropriated by the General Assembly under House Bill 375, Session Laws, 1929, Page 20, for preparing, compiling and printing a Roster of Persons who were in the military and naval service of the United States during the "World War," could be considered as a proper appropriation upon which to base the contract in question. The Ten Thousand Dollar ($10,000.00) appropriation in question was for War Service Record Cards, being a specific record distinguished from the volumes in question and in the opinion of the court could not have been available for the payment of this claim and can therefore not be considered as a basis upon which an award might now be predicated.

As the Superintendent of the Division of Printing was without power or authority to contract for work in excess of the amount appropriated by the Legislature, the contract so far as it applies to such excess is void and no award can be made by this court for the payment thereof.

The entire amount of the claim herein being in excess of the amounts appropriated for the work in question, the mo-

tion therefore of the Attorney General to dismiss is allowed and the claim dismissed.

(No. 1907—Claim denied.)

GEORGE LEON DAVIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

GEORGE LEON DAVIS, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY—*when award for denied.* Where it appears a keeper at Stateville is injured as a result of a fight with an inmate and that he received full compensation while incapacitated therefrom and that his earning capacity has not been decreased and there is no serious disfigurement, no award will be made, even though claim is treated as coming under Workmen's Compensation Act.

SAME—*pleading—evidence.* Claimant must prove by a preponderance of the evidence that injuries for which award is sought were the result of cause alleged in complaint.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that on September 13, 1931, George Leon Davis was employed as keeper at Stateville, and is still in the employ of the State; that on Sunday morning, September 13, 1931 about eight o'clock, while engaged in his official duties, he was letting certain inmates out of their cells who wished to attend Mass; that one inmate, McGuire, did not return to his cell, and claimant called Captain Taylor Davis to assist in removing this inmate from the cell. A general fight ensued between three inmates, Taylor Davis and the claimant, and during the fight the claimant was cut below the right eye extending from the nose to the level outer edge of the eye. There was a cut three quarters of an inch long on the upper lip on the right side; an upper tooth was knocked out; six teeth were loosened; his nose was fractured, besides other severe and serious injuries. Claimant also claims to have lost a gold watch and chain, and an Eagle Fob, valued at $65.00.

It appears from the record that claimant received hospital bills and doctor bills, and he claims an injury to his eye and one testicle.

A demurrer was filed to the petition and we have considered the demurrer along with the merits of the claim.

From the evidence taken, it appears that the claimant was receiving the sum of $125.00 per month; that he was incapacitated for about thirty days but all doctor bills and hospital bills have been paid; that he had been employed as a keeper for a couple of years; that prior to that time he was a coal miner and earned in that business approximately $1600.00 per year.

He claims a permanent disability on account of facial scars, injury to the right eye and some permanent injury to one testicle.

From the testimony of Dr. Raymond Brown, an eye specialist, it appears that his vision shows, right eye 20-20 and his left eye 20-25, and he would advise the wearing of glasses, but this doctor testified: "Since he is nearly forty years old, the need of plus lenses might not be due in any way to the injury." The doctor testified that the injury to his eye could have arisen from the injury received in the fight with the convicts.

This claim is made on the theory that the claimant is under the Compensation Act. On no other theory would the State be liable in any manner whatsoever and treating the claim as if it did come under the Compensation Act, without deciding that point, we hold that he is not entitled to recover for the reason that his earning capacity has not been decreased; that he has received full compensation for all the time that he was incapacitated and it does not appear that his eye trouble was due to the injury received, and that he is now earning as much as he did before the accident and there is no serious disfigurement to his hand, head or face.

The burden is upon the claimant to show by proper evidence what his injuries were and that they did arise out of and in the course of his employment and he must prove by a greater weight of the evidence that his alleged injuries were a result of the fight.

While he may have some disability to a testicle, we are of the opinion that the evidence does not disclose such an injury as to require a removal of a testicle; and that his eye trouble is not necessarily a result of his injuries. It being incumbent upon the claimant to establish these facts, and he

having failed to do so, we must hold that he is not entitled to recover.

(No. 2185—Claimant awarded $1,958.00.)

CHARLES R. FERGUSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made under.* Where State highway maintenance policeman sustains accidental personal injuries arising out of, and in the course of his employment, an award will be made for compensation under provisions of Act.

SAME—*claim for penalty under Paragraph K of Section 19 of — will not be considered.* It was not the intention of the Legislature, in the creation of the Court of Claims, to authorize it to make awards for allowance of interest or penalties in connection with any award justified by law and recommended by it and no claim for same will be considered.

MR. JUSTICE YANTIS delivered the opinion of the court:

In a claim filed May 31, 1933, claimant seeks an award of Two Thousand One Hundred Seventy Seven and 50/100 Dollars ($2177.50) for balance due on temporary total disability and for partial permanent loss of the use of his right leg and for medical and ambulance service in connection therewith.

Claimant served as a Highway Maintenance Policeman for the State of Illinois from March 13, 1931 to August 19, 1932 at a salary of One Hundred Seventy Five Dollars ($175.00) per month. It was stipulated between the parties hereto that on the 19th day of August, 1932 while riding a motorcycle enroute from his home in Sumner, Illinois to Springfield, Illinois he struck some loose gravel that had been dragged on to the State hard road, thereby throwing him from his motorcycle into the guard rail; that he had been ordered to do police duty at the State Fairgrounds at Springfield and was enroute thereto at the time; that as a result of said accident he has lost the feeling in his fourth or little finger and his third or ring finger of the right hand; and that he also received a comminuted multiple fracture of the right Femur; that actual notice of the accident was given to the Chief of

the State Highway Police within thirty days and that demand for compensation was made within six months after the accident; that as a result of the injuries received claimant was in the Olney Sanitarium for a stated period and that the charges for the medical attention there received are fair and reasonable; that the ambulance bills necessarily incurred were reasonable and necessary and that the total amount of all such services is Three Hundred Seventy Two and 50/100 Dollars ($372.50) now due and unpaid to the respective persons furnishing such service, as per original Exhibits attached.

It is further stipulated that claimant received his salary of One Hundred Seventy Five Dollars ($175.00) per month through January, 1933 and was paid One Hundred Fifty Dollars ($150.00) per month for February and also for March, 1933, and that he was discharged from the service of the State effective as of April 1, 1933.

It further appears from the record that claimant, at the time of the accident, had three children, two of whom were under the age of sixteen years, to-wit: a boy, born June 7, 1918 and a daughter, born November 18, 1931. In a Medical report, dated May 25, 1933, by Dr. James A. Weber, claimant was reported to have a permanent disability of fifty per cent (50%) because of the fracture of the right femur. In the same report the doctor states that there is a loss of sixty per cent (60%) in the motion of the right knee and that the angulation and stiffness of the knee will be permanent and will disable claimant for the remainder of his life. In a later report of an examination on June 26, 1934 Dr. Weber states that the partial permanent disability to claimant is sixty per cent (60%) by reason of the facture of said leg and states that there is a shortening of approximately one and one-half inches (1½").

Claimant contends that "under *Paragraph 'K' of Section 19 of the Workmen's Compensation Act* he would be entitled to a fifty per cent (50%) penalty from February 10, 1934, to August 1, 1935, i. e. a penalty on seventy-six (76) weeks on the compensation due him for that period."

In providing a forum, i. e. the Court of Claims, in which demands against the State might be considered, and if justified by law, allowed, we have repeatedly held that it was not the intention of the Legislature to authorize charging the State with interest or penalties in connection with any award

recommended by this court and this contention of claimant meets with no favor.

Compensation to be allowed herein will be by virtue of *Section 8 and Section 8 Sub-sections (b)—(e)—15—(h)—(j) and 17 of the Workmen's Compensation Act;* and as computed thereunder, claimant would be entitled to temporary total disability from August 19, 1932 to February 1, 1934, or seventy-six (76) weeks, subject to the minimum provision of sixty-four (64) weeks contained in Sub-Section (8e). This compensation would be on the basis of Sixteen Dollars ($16.00) per week or One Thousand Twenty Four Dollars ($1,024.00). He was paid from the time of his injury until the date of his discharge on April 1, 1933 the sum of One Thousand Two Hundred Thirty Five Dollars ($1,235.00), or an overpayment of Two Hundred Eleven Dollars ($211.00). The Compensation Act provides for fifty per cent (50%) of the average weekly wage for one hundred ninety (190) weeks for the permanent and complete loss of the use of a leg, which percentage is increased under Section 8(j) to sixty per cent (60%) because of the two children under sixteen years of age at the time of the injury. For the same reason the amount of weekly compensation applicable is Sixteen Dollars ($16.00). Under these provisions claimant is entitled to receive One Thousand Eight Hundred Twenty Four Dollars, ($1,824.00) for specific partial permanent disability of the left leg, from which should be deducted the excess payment of Two Hundred Eleven Dollars ($211.00) heretofore paid him. He would also receive the sum of Three Hundred Forty Five Dollars, ($345.00) with which to pay medical, hospital and ambulance expenses incurred by him, making a total allowance in the sum of One Thousand Nine Hundred Fifty Eight Dollars ($1,958.00).

An award is therefore entered in favor of claimant in the total sum of $1,958.00.

(No. 2508—Claimant awarded $752.65.)

MIKE HANNON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

JOE CRAIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where claimant sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award will be made in accordance with the provisions of the Act.

SAME—*loss of leg—loss of foot.* Under the Workmen's Compensation Act the leg is not divided up for the purpose of determining partial loss. There is a provision for the loss of a foot and a different one for the loss of a leg, but there are no intermediate provisions and where permanent condition causing partial loss of use of leg and foot is localized in ankle joint, award must be founded upon basis of total loss of use of foot and not on total loss of use of leg.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Two Thousand Five Hundred Ninety One and 50/100 Dollars ($2,591.50) for permanent disability and medical expenses under the terms of the Workmen's Compensation Act, for accidental injuries arising out of an accident in the course of his employment as Highway Maintenance Workman.

From a stipulation of facts it appears that claimant on April 7, 1934 was riding a road drag while engaged in dirt work on S. B. I. Route 147; that a hitch-chain broke, throwing claimant under the drag, breaking his left ankle and throwing his left knee out of joint. Claimant's foreman took him to a doctor and the accident was duly reported.

A report of the doctor under date of January 7, 1935 states:

"A fragment was broken off the lower end of claimant's left fibula with marked deposit of calcium around the lower end of the tibia and fibula with existent swelling of the left ankle. Foot slightly out of alignment."

In his report of January 7, 1935 Dr. C. D. Nobles states:

"There is a loss of function at the present time of about 33 1/3%."

In a supplemental statement dated January 29, 1935 Dr. Nobles also states:

"We only had reference to the 33 1/3 degree loss of the function of the left ankle * * *"

Claimant was earning Three and 15 100 Dollars ($3.15) per day or Eighteen and 90/100 Dollars ($18.90) per week. At the time of the accident he was the head of a family with three children under the age of sixteen years. He stipulates that he has received from the State of Illinois all expenses on account of medical care and attention and has also received

the sum of One Hundred Five and 33/100 Dollars ($105.35) as compensation. Claimant contends that the permanent injury amounts to 33-1/3% of the loss of the use of the left leg; that he was temporarily totally incapacitated for twenty-one (21) weeks, from April 7, 1934 to September 1, 1934; that he is entitled to:

$13.00 per week for the 21 weeks	$273.00
Less $105.35 heretofore received	105.35
Balance	$167.65

that he is entitled to specific permanent disability allowance under *Paragraphs 15 and 17 Sub-section "E" of Section 8 of the Workmen's Compensation Act* as follows:

1/3 of 190 weeks, or 63 1/3 weeks at $13.00 per week	$823.33

Under the Workmen's Compensation Act the leg is not divided up for the purpose of determining partial loss. There is a provision for the loss of a foot and a different provision for the loss of a leg, but there are no intermediate provisions. In the case of a total loss of a foot by amputation at or immediately above the ankle, we believe the loss should be construed as a loss of the foot and not a loss of the leg. In the present case the facts show that the existing permanent injury is in the ankle at the lower end of the Tibia and Fibula bones of the left leg. The award therefore must be predicated upon *Section 8 (e)—14 of the Workmen's Compensation Act* whereby the total loss of a foot is compensated for at the rate of fifty per cent (50%) of the average weekly wage during 135 weeks. The proof herein shows a 33-1/3% loss of use of the foot and shows three children under the age of sixteen years. The weekly minimum of Seven and 50/100 Dollars ($7.50) is increased to Thirteen Dollars ($13.00) and claimant is entitled to an allowance of Thirteen Dollars ($13.00) per week for forty-five (45) weeks or Five Hundred Eighty-five Dollars ($585.00) for specific permanent disability. To this last sum should be added the balance due for temporary total disability of One Hundred Sixty-seven and 65/100 Dollars ($167.65) making a total of Seven Hundred Fifty-two and 65/100 Dollars ($752.65).

An award is therefore entered in favor of claimant in the sum of Seven Hundred Fifty-two and 65/100 Dollars ($752.65).

(No. 2601—Claimants awarded $5,120.50.)

LILLIAN HESLER, CONRAD HESLER, KENNETH HESLER, FRANK HESLER, JR., GEORGE WILLIAM HESLER, ROSEMARY HESLER AND WANDA JEAN HESLER, MINORS, BY LILLIAN HESLER, THEIR MOTHER AND NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

JOHN W. FRIBLEY AND WILTON A. CARR, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *injury followed by death of employee with pre-existing disease—when deemed accidental.* Where State employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, and at the time and prior thereto, was suffering from a disease, and death results therefrom, such death results from injury by accident, if such disease is aggravated or accelerated by such injury and death is hastened or accelerated by reason thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants seek an award of Five Thousand Five Hundred Dollars ($5,500.00) under the terms of the Workmen's Compensation Act by reason of the death of Frank Hesler, the husband of claimant, Lillian Hesler.

A Stipulation of Facts has been filed herein showing that Frank Hesler was employed in the Division of Highways as a maintenance foreman at a salary of One Hundred Forty-five Dollars ($145.00) per month; that while engaged in such highway work on November 15, 1934, he was struck on the right leg below the knee by a wheel of a road grader. The injury did not seem serious at the time and he continued to work for several days thereafter; he was then advised to have medical attention for same and was treated by Dr. Louis H. Miller of Pana and by Dr. N. J. Haughton of Greenup. The latter made an X-ray of the injured leg and testified that it did not affect the bone in any way. The stipulation further states that Frank Hesler died on December 16, 1934, and that the doctor's death certificate stated that death was due to heart trouble with the injury to the right leg being a contributory cause. It further appears that deceased was the father of six children under the age of sixteen years and that the

claimants and deceased were living together as a family at the time of the accident, being supported by him.

Dr. Haughton testified that he had been the family physician of the Heslers for four or five years prior to Mr. Hesler's death and had treated him for heart trouble since 1931 or 1932; that he had pneumonia at that time and was very sick for about three weeks; that deceased called on him on November 26, 1934, and that he examined his leg at that time; that the skin was not broken but that the leg showed it had been severely bruised; that the leg condition improved prior to Mr. Hesler's death but that the heart trouble became acute about the 15th of December, 1934. Dr. Haughton testified that the real cause of death was Myocarditis or heart trouble. He further testified that the heart trouble could have possibly been accelerated by reason of the injury to the leg; that while the injury to the leg was not directly the cause of the death, that it made the heart condition worse because it confined him to the bed and the pain kept him from resting.

Dr. Miller testified that he saw deceased on November 16, 1934, and that the latter was suffering pain and swelling in his limb and that there was a slight abrasion on the outer side of the right leg, about the middle third. Dr. Miller further testified that the pain and swelling in the leg would cause increased pressure on the circulation and would indirectly cause an increased load on the heart. In answer to the specific question "Do you recall whether the injury to his leg resulted in an open break in the skin?" Dr. Miller answering "Nothing more than an abrasion and I think it healed."

As shown by the proof the accident that Frank Hesler had in his employment on November 15, 1934, did not at the time apparently appeal to him as of a serious nature, for he continued to work for several days thereafter. According to Dr. Haughton, however, when he first saw Mr. Hesler on November 26, 1934, the leg was paining so severely that Mr. Hesler could not walk on it; that he was able to be up but was complaining then of shortness of breath; that there did not seem to be much change in his condition until after December 8, 1934; that the next time he saw him on December 15th the pain in the leg had become less but the heart condition was worse. The deceased had suffered from heart trouble since 1931 and the cause of his death is definitely established as

Myocarditis. The only question is whether the accident suffered by deceased on November 15, 1934, contributed sufficiently to the cause of death to authorize an award under the terms of the Workmen's Compensation Act.

It has been established by the decisions of our courts that:

"When a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which are said to be accidental, his death results from injuries by accident."

American Steel Foundries vs. *Industrial Com.*, 327 Ill. 615;
Valier Coal Co. vs. *Industrial Com.*, 339 Ill. 458;
Cameron Joyce & Co. vs. *Industrial Com.*, 324 Ill. 497.

In the case at bar Dr. Haughton was asked the question "Was the diseased condition of the heart aggravated or accelerated by the injury which he received?" and he answered "I think it was. There was a direct casual connection between his death and the injury received."

Dr. Miller testified that in his opinion the death was hastened and accelerated by the injury in question.

Under the testimony appearing in the record and the law applicable thereto the court is of the opinion that claimants are entitled to an award. The amount of compensation under Section 7 of the Workmen's Compensation Act would be a sum equal to four times the average annual earnings of the employee but not less in any event than Two Thousand Five Hundred Dollars ($2,500.00) and not more than Four Thousand Dollars ($4,000.00). Section 7 (h)-3 provides that such maximum shall be increased to the amount of Five Thousand Five Hundred Dollars ($5,500.00) in case of three or more children under the age of sixteen years at the time of the death of the employee.

The average annual earnings of Frank Hesler were One Thousand Seven Hundred Forty Dollars ($1,740.00). The maximum award would therefore be Five Thousand Five Hundred Dollars ($5,500.00); Four Thousand Dollars ($4,000.00) being for the widow in her own right and One Thousand Five Hundred Dollars ($1,500.00) on account of the children. Under the rules of the Workmen's Compensation Act such award should be made payable in weekly in

stallments at the rate of Sixteen and 73/100 Dollars ($16.73) per week, but as payment in such manner is not feasible under existing conditions of State appropriations the award will be commuted under the rules pertaining to lump-sum awards and as so commuted an award is hereby made in favor of claimants in the sum of Five Thousand One Hundred Twenty and 50/100 Dollars, ($5,120.50), Three Thousand Seven Hundred Twenty-four Dollars ($3,724.00) of which is awarded to claimant, Lillian Hesler, in her own right and One Thousand Three Hundred Ninety-six and 50/100 Dollars ($1,396.50) thereof being awarded to Lillian Hesler as next friend for the use of Conrad Hesler, Kenneth Hesler, Frank Hesler, Jr., George William Hesler, Rosemary Hesler and Wanda Jean Hesler.

(No. 2615—Claimant awarded $12.32.)

ILLINOIS POWER & LIGHT CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

ILLINOIS POWER & LIGHT CORPORATION, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICE—*when award may be made for.* Where it is undisputed that claimant furnished service to State at its request, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, award for same may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant asks payment for a balance due of Twelve Dollars and Thirty-two Cents ($12.32) for electrical current furnished to the Eldorado Mine Rescue Station at Eldorado, Illinois. Service was furnished at the regular established rate at the request of the Department of Mines and Minerals and the latter in a statement under date of March 6, 1935 by James McSherry, Director, states that the claim is just and is unpaid because of the appropriation having lapsed before the proper presentation of the bill.

"Where the facts are undisputed that the State received supplies as ordered by it and that the bill therefor was not presented for payment before

the lapse of the appropriation out of which payment could have been made, an award for the amount due will be made."

Shell Petroleum Corp. vs. *State* 7 C. C. R. 224.

An award is therefore made in favor of claimant in the sum of Twelve Dollars and Thirty-two Cents ($12.32).

(No. 2661—Claimant awarded $10.40.)

W. H. PESTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

W. H. PESTER, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICES—*when award made for.* Where it appears that claimant rendered services at the request of State officer, which were accepted by the State, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for the amount due may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant operates a blacksmith shop at Grays Lake, Illinois. The claim herein filed is for Ten and 40/100 Dollars ($10.40) for work done by him in 1931 and 1932 at the request of State Highway Maintenance men working under the direction of the Elgin office. C. W. Ross, Assistant Engineer of Maintenance, in a report dated May 7, 1935 states:

"The items listed in this declaration were incurred by maintenance patrolmen who were replaced in February, 1933. We had no knowledge of these bills until after the close of the biennium ending June 30, 1933—it is our opinion the claim should be paid."

"Where the facts are undisputed that the State received supplies or labor—legally ordered by it and the bill therefor has not been presented for payment until after the lapse of the appropriation out of which such payment could have been made, an award for the amount due is proper."

Shell Petroleum Corp. vs. *State* 7 C. C. R. 224.

An award is hereby allowed in favor of claimant in the sum of Ten and 40 100 Dollars ($10.40).

(No. 2533—Claimant awarded $2,675.00.)

VERLIE N. ROBERTS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

TOLIVER & MONSON AND NELSON & KIDDER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *when award may be made under.* Where claimant sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made on compliance with the requirements of the Act and in accordance with the provisions thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant entered the employ of respondent on April 9, 1924 and on November 30, 1933 was engaged in active service as foreman on the construction work building an earth grade on S. B. I. Route 155 about three miles east of Prairie Du Rocher. Claimant and two others were operating two Baker Maney Road scrapers, same being pulled back of the tractor. While endeavoring to trip the dump lever claimant's feet slipped out from under him and the right front wheel of the rear road scraper caught his left foot, and the front and rear right wheels of the road scraper passed over his foot, left leg, back and right shoulder, crushing and bruising him and inflicting alleged permanent and serious bodily injuries. The injured man was given immediate attention by Dr. John T. Finley at the latter's office and was then taken to the Fehrenbacker Hospital at Flora where he remained for three weeks. An X-ray examination disclosed four broken bones in the left foot, four broken ribs, the right shoulder blade crushed, the right collar bone broken and three cracks in the ball and socket joint of the right shoulder; also bruises to claimant's left leg and back.

The claim was filed herein on October 1, 1934, asking an award of Twelve Thousand Dollars ($12,000.00) for partial permanent disability. All hospital and doctor bills have been paid by respondent and eleven (11) weeks compensation was paid to claimant at the rate of Fifteen Dollars ($15.00) per week.

The proof shows that the bones in the arch of claimant's left foot have healed in a malformed condition which results

in an absence of elasticity in the instep with resultant pain when claimant walks for any extended time upon that foot; that the bones of his right shoulder have healed in such a manner that he cannot raise his hand and forearm above his wristline; that the malformation in both instances is such that no further surgical care will relieve the condition.

At the time of the injury claimant was receiving wages in the sum of Forty-three and 75/100 Dollars ($43.75) per week. The chief attending physician, Dr. Fehrenbacker, testified that all of the bones of the foot had healed properly except the one, and that it had resulted in a little deformity and a limp that will be permanent and would limit the use of his foot; that the injury to his arm and shoulder blade would affect only the arm and would have no effect upon any other portion of the body; that all of the permanent injuries suffered by Mr. Roberts are limited to the right arm and the left leg; that Mr. Roberts, in his opinion, will never be able to raise his arm above the shoulder level.

Dr. H. B. Dillman of Louisville, Illinois testified that he examined claimant on January 5, 1935; that his opinion from such examination and X-ray pictures is in line with the other medical testimony. Claimant is now engaged in farm work operating a farm of sixty-seven (67) acres, twenty-seven (27) acres being owned by him and the balance leased land. Dr. Dillman was asked if he had any opinion as to the percentage of limitation in the doing of ordinary farm work that would result from the injury described, and he replied that claimant would possibly be disabled from ordinary farm work to the extent of possibly or at least 50%; that he will never be able to perform labor that requires very much walking or the full use of his right arm. In their closing statement counsel for claimant asked that an award be made to claimant as compensation for the partial permanent injury to his left foot, right shoulder and arm, in the total sum of Eight Thousand Eight Hundred Twenty Dollars ($8,820.00), under the provisions of Section 8-D of the Workmen's Compensation Act.

Respondent has made formal objection that no claim for compensation was made within six months after the accident. We do not believe the record supports this contention; nor does the record in our opinion support an award

under Section 8-D for Eight Thousand Eight Hundred Twenty Dollars ($8,820.00) as contended for by claimant.

From a consideration of the entire record one reaches the conclusion that the partial permanent disability in this case is to the left foot and right arm and shoulder of claimant; further that the extent of disability therefrom is 50% of the total use thereof.

Under Section 8 (e)-14 claimant would be entitled to the maximum wage of Fifteen Dollars ($15.00) per week for sixty-seven and one-half weeks (67½) for fifty per cent (50%) loss of use of his foot and the maximum wage of Fifteen Dollars ($15.00) per week for one hundred twelve and one-half (112½) weeks for fifty per cent (50%) loss of use of the right arm, under Section 8(e)-13, making a combined total of Two Thousand Six Hundred Ninety-nine Dollars, ($2,699.00). Of this amount One Thousand Five Hundred Sixty Dollars ($1,560.00) will have been earned by July 30, 1935, and would be due and payable at that time, and the balance in payments of Fifteen Dollars ($15.00) per month. As monthly payments are not feasible, such balance will be commuted and a lump-sum award for the entire amount due will be made. *An award* is accordingly made in favor of claimant in the sum of Two Thousand Six Hundred Seventy-five Dollars, *($2,675.00)*.

(No. 2284—Claimant awarded $76.50.)

SCRUGGS-VANDERVOORT-BARNEY D. G. CO., A CORPORATION, Claimant.
vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

SCRUGGS-VANDERVOORT-BARNEY CO., pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES — *when award made for.* Where it appears that there was legal authority for purchase of supplies and that same were delivered to and received by State, an award will be made for amount due therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed December 5, 1933 and claimant alleges that during the five years prior thereto it had sold

various articles of merchandise to the Southern Illinois Penitentiary at Menard, Illinois, for all of which it had been paid except the items making up this claim; that on or about December 30, 1932 claimant, at the request of Mrs. Edna Tindall, matron of the penitentiary, sold and delivered to that Institution merchandise, as per Bill of Particulars attached, to the value of Seventy-six and 50/100 Dollars ($76.50); that the claim was approved by the warden but was not approved by the Department of Finance, the latter stating that the prices charged for certain items in the bill were excessive; whereupon, at the suggestion of the present Warden, Joseph E. Ragen, the claim was filed herein, although the items in question were purchased before Mr. Ragen became warden.

No contention of law or fact is raised by respondent. There was legal authority for the purchase, and the merchandise was duly delivered. The court is of the opinion the claim should be allowed.

AN AWARD IS THEREFORE MADE in favor of claimant in the sum of Seventy-six and 50/100 Dollars ($76.50).

(No. 2649—Claim denied.)

WILLIAM D. SHIELDS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

JOE FRANK ALLEN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PERSONAL INJURY — *member of Illinois National Guard — amount recommended by Military Medical Board paid—further award denied.* Where it appears that member of Illinois National Guard has been paid the amount recommended by Military Medical Board as compensation for personal injuries and there is no evidence of permanent disability a further award will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was one of the members of the Mt. Vernon Howitzer Company, 130th Inf. I. N. G. who was in the motor-bus-fire that occurred on July 26, 1933 near Pana, Illinois. The general facts in connection with the claims growing out of said accident appear in the matter of Marlow Case No. 2469.

By a Stipulation of Counsel this claim is submitted for decision upon the claim and the report of a Military Medical Board that convened in Mt. Vernon, January 14, 1934.

The claim recites that in said accident claimant suffered severe burns about the body, face, hands and legs and injuries to the eyes and lungs which are permanent in character, for which he has been paid the sum of Three Hundred Eleven and 95/100 Dollars, ($311.95), and for which he now seeks a further award of Five Thousand Dollars ($5,000.00).

The report of January 14, 1934 of the Military Medical Board (Approved January 22, 1934 by the Adjutant General) makes the following findings:

"The board is of the opinion that this man has had quite a severe contusion of the chest and shoulder, which does not constitute a permanent disability and at this time considers his conditions are fairly well healed. The board recommends that there is no need for further hospitalization or treatments and that his disability will be terminated February 26, 1934, and recommend that he be given pay to that date, and also emergency allowances of $50.00 per month to February 26, 1934—in accordance with Article XVI, Sections 10 and 11, M. & N. Code of Illinois."

There being nothing in the record upon which the court could base an award for permanent disability, and it appearing that the amounts recommended by the Military Medical Board have heretofore been paid in full, the claim for a further award is hereby denied and the claim dismissed.

(No. 2356—Claimant awarded $423.00.)

DR. H. O. TAYLOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

D. B. REID, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FEES—*coroner—inquest, death of inmate of State charitable institution.* The facts in this case are identical to those in case of *Taylor* vs. *State*, No. 2142, *ante*, and the opinion of the court in said case is controlling herein.

MR. JUSTICE YANTIS *delivered the opinion of the court:*

This claim is filed for the allowance of coroner's fees, claimed to be due under Section 27, Chapter 85 of the Revised

Statutes of Illinois for inquests held by claimant at the death of inmates of the Anna State Hospital for the Insane. The claim as originally filed was for Two Hundred Twenty-six Dollars ($226.00). The amended claim listing additional inquests was filed April 25, 1933, making a total claim of Four Hundred Twenty-three Dollars ($423.00).

No contention of law or fact is raised by respondent. The Anna State Hospital for the Insane is located in Union County. Claimant, as shown by the record, is coroner of that county. The Managing Officer of the Institution under date of April 16, 1934 reported that the claim was correct as to all items appearing therein. The record also includes a report in each instance showing the insolvency of the estate of the patient in question.

Section 26, Chapter 53 of the Fees and Salaries Act provides as follows:

"For holding an inquest over a dead body when required by law in counties of the first and second class Fifteen Dollars ($15.00). * * * All of which fees shall be certified by the court *and when the same cannot be collected out of the estate of the deceased, paid out of the county treasury,* or in case of inmates of any State charitable or penal institution, by the Department of Public Welfare out of the State treasury."

It was apparently the intent of the Legislature that no county should be burdened, just because it had a State Institution, with the costs of inquests over inmates sent to said institutions.

An award is hereby allowed to claimant for the amount of the claim, to-wit: Four Hundred Twenty-three Dollars ($423.00).

(No. 2102—Claimant awarded $6,500.00.)

H. C. WILLADSEN, OPERATING UNDER THE NAME OF H. C. WILLADSEN CONSTRUCTION CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.

ALPHON L. ANDERSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CONTRACTS—*damages resulting from change of plans and specifications.* Where claimant sustains damages under contract for construction of building, through no fault of his own, but occasioned solely by State, through a

change of plans and specifications by it, an award may be made for such damages.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was originally filed for the recovery of Thirty Thousand Dollars ($30,000.00). Under an amended Bill of Particulars and statement of claim filed April 3, 1935 plaintiff reduces his claim to Six Thousand Five Hundred Dollars ($6,500.00). The purported damages are alleged to have been occasioned through changes made by the State in a contract previously awarded plaintiff for the construction of the Medium Security Building at the State Reformatory for Women at Dwight, Illinois. The record discloses that on December 9, 1931 plaintiff's proposal and bid for the construction in question was accepted in the sum of Ninety-one Thousand Five Hundred Dollars ($91,500.00) based upon plans and specifications prepared by respondent; that plaintiff entered upon the construction work incident to said contract and that in the course thereof changes were made in the plans and specifications which necessitated a loss of time and delay in the construction work with consequent damages and expense to claimant.

The record discloses that prior to the changes, an estimate of the cost thereof was obtained by respondent from plaintiff. The record further discloses that a careful checkup of the items upon which the claim is based has been made by the Division of Architecture and Engineering of the State and the report thereof appears under date of April 15, 1935 from that office. That department states that claimant was put to additional costs and to additional overhead due to delays beyond claimant's control and from that report and a consideration of the entire record it appears that claimant is entitled to a payment of Six Thousand Five Hundred Dollars ($6,500.00) in full and final settlement of all its claims in connection with said contract and construction work; said allowance including an item of Six Hundred Dollars ($600.00) for Pierre Turck, his sub-contractor for painting under agreement with plaintiff. By his amended Bill of Particulars and statement of claim plaintiff has reduced his claim to the said amount of Six Thousand Five Hundred Dollars ($6,500.00); such action having been taken after numerous conferences between plaintiff and representatives of respond-

ent. This claim presents similar questions to those presented in the claim of Carson-Payson Co. Court of Claims No. 2627 now under consideration in this court, in connection with other contracts incident to the construction of said building.

"Where claimant sustains a loss under his contract with the State, through no fault of his own but occasioned solely by the State, through a change of plans, an award will be made."

Herdman vs. *State*, 7 C. C. R. 257.
Thornton Cartage Co. vs. *State*, 7 C. C. R. 245.

The claim of plaintiff is allowed in the sum of Six Thousand Five Hundred Dollars ($6,500.00) and an award is hereby made in his favor for that amount.

(No. 2520—Claimant awarded $599.21.)

ARMOUR & COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

T. C. TORRENCE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where State receives supplies as ordered by it, and bill therefor is not presented before lapse of appropriation out of which same could be paid, an award for amount due may be made on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant alleges that on April 27, 1933 it sold to the Illinois State Reformatory at Pontiac, Illinois, 19 pieces of hind quarter of beef, weight 2501 lbs. at $9.10 per hundred weight, totalling the sum of $227.59, and 42 pieces of forequarter of beef, weight 6636 lbs. at $5.60 per hundred-weight, totalling $371.62, or a total bill of $599.21. It appears from the record that these items were duly received, and the total price of $599.21 is due the claimant. Some mistake had been made in the billing of this amount. It appears from a letter from O. H. Lewis, General Superintendent, under date of November 1, 1934, that the sum of $599.21 is correct. Where the facts are undisputed that the State has received supplies

as ordered by it and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could have been paid, an award for the amount will be made. This has been held in the case of *Shell Petroleum Corp. vs. State*, 7 C. C. R. 224 and other cases.

We, therefore, make an award in favor of the claimant in the amount of $599.21.

(No. 2234—Claimant awarded $740.80.)

W. STUART ATTEBERRY, Claimant *v.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

JACK MCDONALD AND LEIGH M. KAGY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award made.* Where claimant sustains injuries arising out of and in the course of employment, while engaged in extra-hazardous employment, an award for compensation will be made under Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed his complaint herein on August 16, 1933 and seeks to recover compensation for injuries sustained by him on August 27, 1931 while in the employ of the Division of Highways of the respondent. It appears that on the last mentioned date claimant was doing some work in connection with the building of a bridge about one and one-half miles south of Waverly, in Morgan County; that in the course of his work he stepped on a nail which punctured the sole of his shoe and penetrated the ball of his foot; that notice of the accident was given and claim for compensation made within the time required by law; that claimant was treated by several different physicians and remained under the care of some one of them from the time of the accident until the 1st day of January, A. D. 1933, on which date he was discharged by Dr. A. D. Wilson of Carrollton, Illinois, as ready to return to work.

During the time that he remained under the care of the doctors, two operations were performed on his foot. All

medical and hospital bills have been paid by the respondent except a bill of Dr. Wilson in the sum of $86.00 which remains unpaid.

The evidence does not disclose the amount of the earnings of the claimant during the period of one year prior to the accident. His daily wages, however, were $4.00 and under Section 10-d of the Compensation Act, his average annual earnings must therefore be regarded as $1,200.00, being $23.08 per week.

Claimant admits that he worked three or four days after the accident and was paid therefor, and that he has received the total sum of $169.00 from the respondent, which included his pay for the three or four days which he worked and compensation for the injuries received. Deducting from said sum of $169.00 the sum of $16.00 for four days' work, leaves a balance of $153.00 which apparently was paid to him as compensation, and which should be deducted from any award of compensation made.

Under the evidence complainant is entitled to receive compensation for temporary total incapacity for seventy (70) weeks at $11.54 per week, to-wit: $807.80. Deducting therefrom the sum of $153.00 heretofore paid as aforesaid, leaves a balance of $654.80, which is the balance of compensation to which the claimant is entitled as aforesaid. In addition to such amount, claimant is also entitled to recover the sum of $86.00 for the doctor bill of Dr. A. D. Wilson as aforesaid, making a total of $740.80.

Award is therefore entered in favor of the claimant for the sum of Seven Hundred Forty Dollars and Eighty Cents ($740.80).

(No. 2166—Claimant awarded $31.50.)

CITY OF BLUE ISLAND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1933.

ROY MASSENA, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

REIMBURSEMENT—*feeding prisoners arrested by State police—when award will be made for.* Where claimant fed and housed prisoners arrested by

State highway police, and cost thereof is admitted by State officer to be a just and necessary expense, an award will be made for the same.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed its claim herein on May 4, 1933 and seeks to recover the sum of $31.50 for feeding and housing prisoners arrested by the State highway police and brought by them to the calaboose in the city of Blue Island. An itemized statement showing the names of the several prisoners housed and fed, the respective dates, and the amount charged in each case, is attached to the complaint.

The claim was investigated at the instance of Mr. L. M. Taylor, then Assistant Superintendent of State Police, who reported as follows:

"We have investigated this claim and find that it covers charges for cases which our State officers had taken to the jail and found necessary to hold over. In my opinion this is a just claim."

It appears from the evidence that the amount claimed is justly due and owing by the respondent to the claimant, and IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant for the sum of Thirty-one Dollars and Fifty Cents ($31.50).

(No. 1933—Claimant awarded $2,000.00.)

BOARD OF EDUCATION, SCHOOL DISTRICT 86, TAZEWELL COUNTY, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

BEN L. SMITH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE — *construction of public improvement — measure of.* Where private property is not taken for public use, but is damaged by reason of construction of public improvement, the proper measure of damages is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it.

SAME—*same—improper elements of.* In a claim by board of education for damages to its property, used for school purposes, not taken for public

use, by construction of approach to bridge, the additional hazard to school children in going to or returning from school, additional responsibility on part of teachers in caring for children, while in school, and disturbance in their work by passing traffic, decreasing their efficiency, are not proper elements which can be taken into consideration in estimating the damages to such property, as it must be shown that the damage claimed is a damage to property and not mere personal inconvenience or discomfort to occupants, not affecting its value.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

This case is one of a group of cases known as the East Peoria Bridge cases, all of which arose by reason of the construction of the east approach to the Illinois River bridge known as the Cedar Street Bridge, which connects the cities of Peoria and East Peoria. The approach in question constitutes a part of S. B. I. Route No. 121, and the traveled portion thereof consists of a four-lane hard-surfaced highway.

The facts so far as they apply to all of this group of cases are fully set forth in the opinions heretofore filed in the following cases, to-wit:

George Treharne, et al. vs. *State*, No. 1934;
Albert J. Moore, et al. vs. *State*, No. 1975; and
Mamie Umdenstock, et al. vs. *State*, No. 1915;

all of which were decided at the present term of this court; to which cases reference is made for such facts.

The facts so far as they apply particularly to this case, are as follows:

The Board of Trustees of Fondulac Township, Tazewell County, Illinois, holds the legal title to Lots 595, 596, 597, 598, and 599 in Richland Place Addition to the City of East Peoria, which property is in the possession of the claimant and is used for the purposes of a grade school, the claimant having constructed thereon a modern eight-room brick-and-stone school building facing Globe Street, at a cost of approximately $93,000.00. The west or front portion of the building is two stories in height, has no basement, and is three feet ten inches above grade. The east or rear portion of the building is one story in height and is occupied as a gymnasium and boiler room. The top of the sill of that portion of the building is three to five inches above the level of the ground.

The premises in question are bounded as follows:—on the west by Globe Street, on which it has a frontage of two hundred (200) feet; on the south by Maple Street, on which it has a frontage of 136.2 feet; on the north by a fifteen-foot alley extending in an easterly and westerly direction, on which it has a frontage of two hundred seventy (270) feet; and on the east by the property of the Caterpillar Tractor Co.

Prior to the construction of the approach in question, Lots 557 to 564, both inclusive, in said Richland Place Addition bordered on the north side of the aforementioned alley, and were directly north of the aforementioned school property, being located between said school property and Roosevelt Street. The approach in question is constructed on said Lots 557 to 564 inclusive, and covers practically all of such lots except a small portion of the north end thereof;—the south right-of-way line of said S. B. I. Route 121 being approximately fifty-five (55) feet north of the north line of the school building. The grade or fill of such approach at the east line of the school property is approximately six feet four inches above the level of the ground there, and the grade or fill of such approach at the west line of said school property is approximately seven feet one inch above the level of the ground there. The grade or fill of the Globe Street approach to said S. B. I. Route 121 commences at the south line of Lot 595 and increases in height to three feet three inches at the north line of said lot.

Prior to the construction of the approach in question, claimant had constructed a tile drain which drained the toilets and lavatories of said school building and connected with a drainage ditch in that vicinity. In the work of constructing said approach, said tile drain was damaged and the claimant was required to rebuild 1,300 feet thereof, at a cost of $1,375.00.

Claimant produced, among others, a number of witnesses who were principally teachers and others connected with the school and who testified in substance that on account of the heavy traffic on the roadway, there is an additional hazard to the school children in going to and returning from school; that there is an added responsibility on the part of the teachers in caring for the children while at school; that there is an increased patrol duty; that the children are distracted

from their work by the passing traffic; that the noise of the traffic interferes with the regular conduct of the lessons, and requires greater effort on the part of the teachers; that the fumes of passing automobiles interferes with the work of the school; that the efficiency of the school has been impaired, and that as the result thereof, the property has been damaged for school purposes.

Claimant also contends that its property has been damaged by interference with the access thereto; by interference with the natural drainage thereof; by dust blowing over the property in summer; by the noise of and fumes from passing vehicles; and by interference with the free circulation of air across said property.

Claimant's witnesses estimated the damages to the property for school purposes, based on some or all of the aforementioned elements of damage, at various percentages, ranging from twenty-five (25) to seventy-five per cent (75%) of the cost of the building and grounds.

Respondent produced two witnesses on the question of damages, both of whom testified that in their opinion the value of the school property had not been affected as the result of the construction of the approach in question.

Claimant lays great stress on its claim that six of the eight rooms in the school building have a direct view of the hard road from where the children sit in their seats; that there is a large amount of traffic over such road, and that inasmuch as such traffic is within the view of the pupils in their seats, the proper operation and management of the school has been materially interfered with.

Claimant originally asked for damages in the sum of Ten Thousand Dollars ($10,000.00), but thereafter increased the amount demanded to Twenty Thousand Dollars ($20,000.00).

In ordinary cases, where private property is not taken, but is damaged, for public use, the proper measure of damages is the difference between the fair cash market value of the property unaffected by the improvement, and its fair cash market value as affected by it. *Department of Public Works* vs. *McBride*, 338 Ill. 347; *Department of Public Works* vs. *Caldwell*, 301 Ill. 242; *Brand* vs. *Union Elevated Co.*, 258 Ill. 133.

However, as stated by our Supreme Court in the case of *City of Chicago* vs. *Farwell*, 286 Ill. 415, "There are a few exceptional cases in which market value cannot be the legal standard because the property is of such nature and applied to such special use that it cannot have a market value, such as a church, college, cemetery, clubhouse or terminal of a railroad. * * * * * * As to such property, the law permits a resort to any evidence available to prove value, such as the amount of business done or the use made of the property, and the like."

The only case in this State which has come to our attention involving a similar claim for damages to school property is the case of *Illinois Central R. R. Co.* vs. *Trustees of Schools*, 212 Ill. 406. In that case the declaration averred that the defendant constructed its railroad track near plaintiff's two-story brick schoolhouse, and that in passing, the locomotives emitted, discharged and threw out and stirred up great volumes of smoke, cinders, ashes and dust, and cast the same over, upon and into said premises, and that the trains caused loud and ominous noises and made the ground tremble, vibrate and shake, causing the school in said premises to be disturbed and frequently to suspend. In considering the right of plaintiff to recover in such case the Supreme Court said:

"There are certain injuries to property for which the owner may recover damages although no part of the property itself is actually taken for the public use. While there is but little difficulty in laying down general rules concerning the nature of such injuries, there is sometimes much difficulty in applying them to particular cases and drawing a definite line between injuries for which the law allows a recovery and those for which it affords no remedy. The provision of the constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement. There are certain injuries incident to ownership of property in towns or cities which directly impair its value, for which the law does not afford, and never has afforded, any relief. (*Rigney* vs. *City of Chicago*, 102 Ill. 64.) Those injuries are compensated for by the conveniences and advantages of civilization, and both injuries and benefits are common and public."

The court there also quoted with approval from the case of *Rigney* vs. *City of Chicago*, 102 Ill. 64, and then said:

"The important question is to determine what is a special damage and injury, within the meaning of that and other cases. One thing that is clear is, that the damage must be a damage to property and not a mere personal inconvenience or injury, such as a damage to trade or business. (*Hohmann* vs. *City of Chicago*, 140 Ill. 226.) If a right of action is merely personal,

without reference to property, the constitution does not guarantee compensation. If the injury amounts only to an inconvenience or discomfort to the occupants of property, which would authorize a personal action but not affecting the value of the property, it is not within the provision. The injury must also be actual, susceptible of proof and capable of being approximately measured. It must not be merely speculative, remote, prospective or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special because a considerable number are affected in the same way."

From a consideration of such case we are of the opinion that the additional hazard to the school children in going to or returning from school; the additional responsibility on the part of the teachers in caring for the children while at school; the increased patrol duty; the fact that the children are disturbed in their work by passing traffic; and that the noise of the traffic and the fumes from passing automobiles interfere to some extent with the schoolwork, and decrease the efficiency thereof, are elments which cannot be taken into consideration in estimating the damages which the claimant is entitled to recover in this case.

A review of the authorities on the legal questions involved in this claim, and a consideration of the several elements which may be taken into account in determining the damages to which claimant is entitled, are contained in the aforementioned case of *Albert J. Moore, et al.* vs. *State*, No. 975, and there is no necessity for a repetition thereof in this case.

Upon a consideration of all of the evidence bearing upon the elements of damage which may properly be taken into consideration, as well as the view of the premises had by the court, we feel that the sum of Two Thousand Dollars ($2,000.00) is adequate compensation for the damages sustained, and an award is therefore hereby entered in favor of the claimant for such amount.

(Nos. 2021, 2022, consolidated—Claimant in No. 2022 awarded $2,876.83.)

DORA BRITTIN, ADMINISTRATRIX, No. 2021; EVA BOLIN, No. 2022, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

RICHARD F. DUNN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for death of State employee may be made under.* Where State highway employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, an award may be made to his widow, under the provisions of the Workmen's Compensation Act.

SAME—*items not allowed in claim for death under.* Where an award is made to widow of State employee for compensation under Workmen's Compensation Act, an award for burial clothes and funeral expenses cannot be allowed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

In the first case No. 2021, counsel has declared it common law that Bleve Bolin was on the 28th day of May, 1932 employed by the State of Illinois in McLean County in the maintenance of a hard road and was then struck by an automobile and died from the injury sustained on the evening of the same day, and alleges damage in the sum of Five Hundred Forty Dollars ($540.00), and No. 2022, the suit is commenced by Eva Bolin, a widow of the decedent, and was declared at common law. The Attorney General and this court elected to consider these claims under the Compensation Act, enough having been set forth in them to justify that action.

They were both filed November 26, 1932; case No. 2021 includes items for which there can be no recovery. In this suit they are claiming $25.00 for burial suit, $12.00 for digging the grave, $50.00 for Dr. O. H. Ball, $15.00 for St. Joseph's Hospital, $6.00 for nurse, and $432.00 funeral expenses.

Unquestionably this case is under the Workmen's Compensation Act and the injury received by the deceased arose out of and in the course of his employment. He had only worked three days and received forty cents an hour and worked nine hours a day and six days a week. He had been cutting weeds for the State along the highway and it was only customary for men who worked at this employment to work about six months of the year.

Pursuant to item "E" of Section 9 of the Workmen's Compensation Act, we must figure his earnings as two hundred times his daily wage; that would be $720.00 per annum, and under the terms of Section "A" of paragraph 7, his widow would be entitled to four times that amount or the sum of $2,880.00. He was approximately seventy-seven years of age and his wife was sixty-eight years old at the time of his death, but he was in good health. They had no children.

The time elapsing from the date of the death of the deceased until July 1, 1935, when it will be assumed that payments will be made to the claimant, will be three years, one month and three days. She has not received any payments and on this July 1st next, she will be entitled to the sum of $1,811.80 which leaves a balance of $1,068.20. This sum must be commuted pursuant to the Compensation Act on the basis of three percent with annual rests. Under the Compensation Act she is entitled to payments at the rate of $11.30 per week or the sum of $1,034.03, that being the cash value as of July 1, 1935.

In addition to this she is entitled to the sum of $1,811.80 being the amount of the accumulated weekly payments or the sum of $2,845.83.

The decedent died the same day he received the injury and he was beyond medical care or attention at the time the doctor saw him. The claim of $50.00 is made for doctor's services. We think $10.00 to be a reasonable fee. St. Joseph's Hospital in Bloomington has a charge of $15.00 and the nurse a charge of $6.00 and we add $31.00 to the above and disallow the claim for burial clothes and funeral expenses.

Therefore, we recommend that the widow claimant, Eva Bolin, be awarded the sum of $2,876.83.

(Nos. 2105 to 2138, inclusive, and No. 2174—Claimants awarded $44,500.00.)

CHICAGO TITLE & TRUST COMPANY, ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

MURPHY & ANDERSON AND BARR & BARR, for claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

The facts in this case are similar to those in *Glenbard Gold Club, Inc., et al. vs. State*, Nos. 1825, 1997, 2000, 2061, 2111, *post*, and the opinion of the court therein is applicable here.

PROPERTY DAMAGE—*construction of public highway causing — what must be proven* Where compensation is sought for damages to private property, not taken for public use, but alleged to have been caused by construction of public highway, it must be shown that there was a direct physical injury or

disturbance of a right which the owner enjoys in connection with such property, causing damage in excess of that sustained by the public generally.

SAME — *same — necessitating change of grade of street causing obstruction to ingress and egress of private property.* A change in the grade of a street, by which ingress or egress from the private property of an owner is obstructed, amounts to damaging the property for public use within the meaning of the constitution, and the measure of damages is the difference in value of such property, just before and just after the improvement.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The above claims, numbering 35 in all, arise out of the same general transaction and have been consolidated, by agreement of counsel, in order to facilitate their orderly presentation and consideration. The claimants seek to recover total damages of $157,000.00 against the respondent, the State of Illinois, for damages sustained to real estate and business, by reason of the construction by the State of Illinois, through its proper department, of an overpass on Ogden Avenue, on S. B. I. Rt. No. 18 across what is now S. B. I. Rt. No. 53, and by reason of the change in grade of what is known as the Old Joliet Road through Lisle, in the County of DuPage. This involves damages to property not taken or condemned. This highway improvement project was commenced December 31, 1931 and completed December 1, 1932.

In Claim No. 2174, some additional drainage damage is sought, which it is alleged arises from a change in grade on the old Joliet Road near the intersection of Ogden Avenue, when it was paved in the year 1932. All of the property involved fronts and abuts on Ogden Avenue, which is also known as S. B. I. No. 18.

The damage to all of the properties and business was occasioned by the construction of the over-pass or viaduct mentioned, with the exception that the damage to one piece of property was occasioned as aforesaid.

Route No. 18 has for a number of years been a State Highway in the system of hard roads constructed by the State of Illinois, and runs from the City of Chicago in a generally western direction to the city of Princeton. It is a principal arterial highway and is much used. Prior to the construction of the improvement involved in this case, it was improved with a hard surfaced slab 20 feet in width, and at Lisle was on the same grade as the abutting property.

During the construction of this improvement, which lasted approximately one year, the State constructed along Route No. 18 a long, high and wide overhead pass, whereby it crossed Lincoln Avenue, and which had then been designated by the State as Route No. 53, with long and gradual approaches thereto. This viaduct or overhead pass was constructed with a height at the intersection of Route No. 53 of 18½ feet, and descended with a 4% grade in an easterly and westerly direction, going east approximately 507 feet from this intersection, and going west approximately 623 feet from this intersection.

The properties involved in this case all abut on this overhead pass or viaduct, in whole or in part, with the exception of Lot 6 in Block 45, in Arthur T. McIntosh & Company's Lisle Development No. 4, and Lots 1, 2 and 3 in the same subdivision. These latter lots, together with Lot 4, are all owned by the same individuals, and are used as one unit.

At the time of the building of the overhead pass or viaduct, the paved portion of Route No. 18 was widened to 40 feet for the purpose of providing access to and from Route No. 53, which extends easterly and westerly under the central part of the overhead pass or viaduct. To provide some access to the properties involved on account of Ogden Avenue or Route No. 18, a concrete slab 20 feet in width was laid on the north and south sides of the overhead pass or viaduct, with the exception at the east end of the viaduct on the north side there is no slab or any access to the same from the east on the north side. The distance from the north and south lines of the overhead pass or viaduct to the property lines is approximately 27 feet. For about the east 180 feet, the distance is some 6 or 8 feet. The pavement along the sides of the viaduct, which is also known as a ramp, goes within 2 feet of the viaduct and leaves only about 5 feet both on the north and south between the property line and the line of the pavement, leaving insufficient room for a sidewalk or ornamental trees.

The old Joliet road, which extends northerly and southerly approximately 162 feet east of the east end of the viaduct or overhead pass, was improved by the construction thereon of a concrete slab 20 feet in width, in the Fall of 1932. Prior thereto, the Joliet road was on the same grade

as the abutting property. In the making of the improvement, for a distance of about 200 feet, the grade was raised 4 or 5 feet above the grade of the abutting property.

It is claimed by the claimants that the building of the viaduct or overhead pass has had the effect of almost destroying the value of the abutting properties.

It is also claimed that the raising of the grade on the old Joliet road has so interfered with the drainage on the property involved as to require the expenditure of a large amount of money to correct the same and to fill in the property to the level of the road; and destroyed a large amount of peonies, as is hereinafter set out.

Prior to 1926, the territory surrounding Lisle was mostly farm land. At that time there were only some 15 houses and a few stores located there. In 1928, Arthur T. McIntosh and Company laid out subdivisions at the site of Lisle. Streets were graded; water, gas and electricity were put in in substantially all of the property in the subdivisions. It was contended at the time the evidence was taken that 95% of all the lots in that subdivision had been sold.

Lisle is located about 30 miles from Chicago, about 3½ or 4 miles west of Naperville, and there has been much building from Chicago to Naperville. Lisle is also served by the Chicago & Burlington Railroad, which at the time of the hearing operated 12 or 14 trains daily to and from Chicago.

Generally speaking, the purchasers of these lots were working people in the factories on the west and southwest sides of Chicago. The character of the buildings ranged from modest 2, 3 and 4-room garage type homes to better 5, 6 and 7-room modern homes, including modern improvements.

In the laying out of the subdivisions at Lisle, a building line restriction of 40 feet was placed on all the properties with the exception of those fronting on Joliet Road, Ogden Avenue and Railroad Avenue. The properties sold along Ogden Avenue were all sold and purchased as present or future business properties, and a number of business establishments prior to the building of the overhead pass or viaduct had been commenced and were operating.

During the planning and laying out of the subdivision, no one knew or had any reason to know anything about the overhead pass being constructed, and when it was learned the

State proposed it, an effort was made by some of the owners, or at least one owner, to induce the State to construct this overhead pass at another location, but without any success.

Prior to the laying out of the subdivision now known as Lisle, much of this territory west of Chicago and between Lisle and west of Lisle, had been developed for home and business purposes, and there were a number of small communities, cities and villages in that general territory. It is also served by a bus line in addition to the railroad, with four trips daily. It is shown that Downers Grove is 4 miles east and increased in population in the last ten years from 4,500 to 12,000. Glen Ellyn is 5 miles north of Lisle on Route 53 and Roosevelt Road, and it has very materially increased its population in the past ten years. The same is true of Wheaton, Western Springs, Westmont and other communities.

In addition to the owners of the respective properties, the claimants called seven witnesses, all men of vast experience in the development of real estate in these communities and the value thereof, and the State called three witnesses, all men of equal or similar experiences, and in each instance there was a vast divergence of opinion as to damages done. The claimants' expert witnesses, with the exception as to the Haunesser property, fix the damages at from $52,237.00 to $77,655.00, while the State's witnesses fix the same damages from $24,700.00 to $29,682.00. The claimants' witnesses as to the Haunesser property fixed the damages to his property affected by the viaduct at $9,465.00, while the State's witnesses fixed the same, varying from $2,000.00 to $3,170.00.

The evidence was quite thoroughly presented from both sides. Photographs and plats are in the record, which clearly show the situation, and the court viewed the property involved. Needless to say, the court has had much difficulty in arriving at damages that would be fair to the owners and the State in each instance. Generally speaking, the facts are not in dispute except as to values. The issue in these claims is principally whether the properties involved have been actually damaged by the improvement and the extent of such damage.

Section 13, Article II, Constitution of 1870, provides that private property shall not be taken or damaged for public use without just compensation. Such compensation, when not

made by the State, shall be ascertained by a jury, as shall be prescribed by law.

No effort was made by the State to settle damages before the making of the improvements in question.

The Court of Claims has made awards to property owners for direct physical injury and damage to real estate incurred by reason of hard road construction of State Bond Issue road system.

Schoenholz vs. *State*, 6 C. C. R. 123;
Rudd vs. *State*, 6 C. C. R. 132;
Soland, et al. vs. *State*, 6 C. C. R. 147;
Hoffman vs. *State*, 6 C. C. R. 154;
Niestadt et al. vs. *State*, 6 C. C. R. 476;
Kennedy vs. *State*, 6 C. C. R. 522;
Edwards et al. vs. *State*, 6 C. C. R. 530;
Kramer vs. *State*, 6 C. C. R. 531;
Dhermy vs. *State*, 6 C. C. R. 531.

And this court as now constituted, also awarded damages arising from the change of grade in streets which have been improved by State highways. (See the case of Glenbard Golf Club, Inc. No. 1997 against the State of Illinois, and the other cases consolidated with that one, recently decided by this court).

This court takes the view that the injury or damages to property not taken in the construction of these improvements, for which compensation is to be made, must be a direct physical injury or a disturbance of a right which the owner enjoys in connection with the property, and causing damage in excess of that sustained by the public generally.

The Supreme Court of this State has in numerous instances held that any change in the grade of a street, by which ingress or egress from the private property of an owner is obstructed, amounts to damaging the property for public use within the meaning of Article II, Section 13, of the Constitution of 1870, providing that private property shall not be taken or damaged for public use without just compensation, and this court has construed the measure of damages in these cases to be the difference in value before and after the improvement.

We will consider each case by title and number.

IN RE: No. 2105—CHICAGO TITLE & TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS—Lot 6 in Block 48, Development Unit No. 4:

This lot is unimproved; faces north on Ogden Avenue, the east line of which is approximately 60 feet west of the east end of the viaduct or overhead pass, and fronts approximately 60 feet on Ogden Avenue and Route 18 and is 200 feet deep along Garfield Avenue. Some of the claimant's witnesses place the value of this property before the improvement at $3,885.00, and after the improvement at $350.00, or a damage of $3,535.00. Other witnesses for the claimant place the damage at $2,690.00, $1,650.00, $2,200.00 and $2,200.00. The witnesses for the State fix the damage at $1,000.00. After consideration of all the evidence, and after viewing the premises, we are of the opinion that the sum of $1,400.00 would be a reasonable sum as damage in this case, and we recommend an award in the sum of $1,400.00.

IN RE: No. 2106—SARAH CASEY AND CHICAGO TITLE AND TRUSS COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 5 in Block 48 of Unit No. 4:

This lot was sold June 15, 1928, for the sum of $2,850.00. It fronts on Ogden Avenue or Route 18, the east line of the same being approximately 10 feet west of the east line of the east approach of the overhead pass. Its frontage is 50 feet and it is 36 feet wide at the rear and is about 94 feet deep, and unimproved. The witness for the claimant has placed the value of this lot before the improvement at $1,995.00, and immediately after the improvement at $200.00, or a damage of $1,795.00. Other witnesses for claimant fix the damage at $1,050.00, $2,240.00 and $1,650.00. The witnesses for the respondent fix the damage at $600.00. After consideration of all the evidence, and a view of the premises, we fix the damage at $900.00, and recommend an award in the sum of $900.00.

IN RE: No. 2107—GEORGE KOSTOPOULAS AND SYLVIA KOSTOPOULAS AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lots 1, 2, 3 and 4 in Block 48, Unit 4:

These lots front north approximately 200 feet on Ogden Avenue, or Route 18, and Lot No. 1 approximately 108 feet

on Joliet Road, and are all approximately 100 feet deep. The evidence shows a building was erected, and the cost of material for said building was $4,500.00. The owners of the lot furnished the labor themselves, such as interior finish, ceilings and partitions. The improvements consist of a one-story frame building 36x58, the front part being used as a lunchroom and barbecue stand, which is 17x36. The rear of the building was formerly used as a dance hall and is now used as a dining room and is 40x36 in size. There is also a gasoline filling station on the property with a gravel driveway. There is a small building in the rear which is 10x10, and six pumps and three tanks on the property, and the building was erected in 1927. At the time this improvement was made, the property was on the grade with Ogden Avenue or Route 18, which was then improved with a 20-foot slab of concrete. The claimants state that prior to this improvement, they did a much larger business than they do now. Claimants' witnesses fix the value of this property before the improvement at figures from $19,600.00 and afterwards at $7,500.00, or a damage of $12,000.00. Other of claimants' witnesses fix the damage at $4,813.00, $11,600.00 and $8,000.00. State witnesses fix the damage to this property after the improvement as low as $300.00 and others at $1,000.00, and we are of the opinion that a fair amount of damages sustained in this instance would be $2,500.00, and we, therefore, recommend an award in this case of the sum of $2,500.00.

IN RE: No. 2108—MELVIN F. JONES AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 6 in Block 47, Unit No. 4:

The owner purchased this lot in 1927 and paid $3,950.00 therefor. The lot faces north on Ogden Avenue just about the center of the viaduct, and is approximately 50 feet wide and 200 feet deep, and is on the corner of the new Joliet Road or Route 53. It is vacant and unimproved. Damage in this case is fixed by the claimants' witnesses at various sums as in other cases. Some fix the damage at $2,365.00, one at $1,750.00, one at $2,690.00 and one at $2,150.00. Respondent's witnesses fix the damage at $750.00. After a careful consideration of the testimony, plats and pictures of the property, and our own view of the premises, we are of the opinion that the damage

in this case should be $1,250.00, and, therefore, we recommend an award in this case of the sum of $1,250.00.

IN RE: No. 2109—JOSEPH CERNY AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 5 in Block 47, in Unit No. 4:

This lot fronts on Ogden Avenue, north, and is 50 feet wide and 200 feet deep, and is approximately 50 feet east of the center of the overhead pass. The owner claims to have paid $2,300.00 for it in 1929 and claims he purchased the same for business purposes. Witnesses for claimant fix the damage in this case at $1,435.00, $1,250.00, $1,750.00 and $1,500.00. Respondent's witnesses fix the damage at $625.00 and after viewing the premises and giving full consideration to the testimony, we are of the opinion that in this case the damages should be $900.00, and, therefore, we recommend an award in the sum of $900.00 in this case.

IN RE: No. 2110—ESTHER FREEMAN AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 4 in Block 47, Unit No. 4:

This lot faces north on Ogden Avenue and is 50 feet wide and 200 feet deep, and is improved with a 5-room, one-story frame house. The west line of the lot is located about 100 feet east of the center of the viaduct, and originally cost the owner $2,000.00. The evidence shows that the improvement cost $2,000.00, and the owner claims that after this overhead pass was built, she did not get any renters for anything like an adequate consideration. At the time of her testimony she was getting $10.00 a month. Unquestionably, general conditions have affected this rental value considerably. Claimant's witnesses fix the damage in this case at $1,790.00, $1,550.00 and $1,900.00. Witnesses for the State fix the damage, one at $1,225.00 and the other at $1,400.00. After viewing the premises and considering the evidence, we are of the opinion that in this case the damages should be fixed at $1,400.00, and we therefore recommend an award in the sum of $1,400.00 in this case.

IN RE: No. 2111—REGINALD L. HAMILTON AND CHICAGO TITLE AND TRUST COMPANY, *vs.* STATE OF ILLINOIS, Lot 3 in Block 47, Unit No. 4:

This lot faces north on Ogden Avenue with a frontage of 50 feet, and is approximately 200 feet deep. Its west line is approximately 150 feet east of the center of the viaduct. It is improved with a one and a half story frame building 20x44 feet. Some of claimant's witnesses fix the damages in this case as high as $2,300.00, and the lot was entirely paid for, the property having cost $6,300.00. Respondent's witnesses fix the damage at $1,625.00 and $1,400.00 respectively. After viewing the property and considering the evidence, both documentary and oral, we are of the opinion that an award in the sum of $1,600.00 would be fair and reasonable, and therefore we are recommending an award in the sum of $1,600.00 in this case.

IN RE: No. 2112—M. J. RUSECKAS *vs.* STATE OF ILLINOIS, Lot 2 in Block 47, Unit No. 4:

The property in this case fronts north on Ogden Avenue, and is 50 feet wide and 200 feet deep. Claimant's witnesses fix the damage in this case at $1,575.00, $1,875.00, $1,100.00 and $1,500.00, while witnesses for the State fix the damage at $625.00 and $800.00. After looking at the premises and considering all the evidence, we are of the opinion that damages of $800.00 should be awarded in this case, and we, therefore, recommend an award of $800.00 in this case.

IN RE: No. 2113—JOSEPH SITARSKI AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 1 in Block 47, Unit No. 4:

This property is on the corner of Ogden and Garfield Avenues and fronts north on Ogden, is approximately 50 feet wide and 200 feet deep, and its east line is about 180 feet west of the east end of the viaduct, and is unimproved. Witness Elmore for the claimant fixed the damage here at $2,965.00. Witness Miller for the claimant fixed the damage at $1,650.00. Witness Matter for the claimant fixed the damage at $3,975.00 and witness Chalberg fixed the damage at $2,900.00. The

State's witnesses, Farnsworth and Crist, place the damage to the property at $1,125.00 and witness Adams, for the State, fixed the damage at $920.00. After viewing the premises and considering all of the evidence, we are of the opinion in this case that the sum of $1,400.00 would be a fair and reasonable value, and we recommend an award in the sum of $1,400.00 in this case.

IN RE: No. 2114—ANTONIE SEVCIK *vs.* STATE OF ILLINOIS, Lot 6 in Block 46, Unit No. 4:

This property fronts north on Ogden Avenue, and is approximately 250 feet west of the center of the viaduct, and is 50 feet wide and 200 feet deep, along McKinley Avenue. Claimant is a widow and her witnesses fixed the damage to this property at $1,725.00, $1,200.00, $2,050.00, $1,450.00, and the State's witnesses, two of them, fix the damage at $625.00 and one at $800.00. After a view of the premises, and consideration of all the evidence, we are of the opinion that the sum of $900.00 would be a reasonable award in this case, and, therefore, recommend an award in the sum of $900.00 in this case.

IN RE: No. 2115—CHARLES A. SEVCIK *vs.* STATE OF ILLINOIS, Lot 5 in Block 46, Unit No. 4:

This lot fronts 50 feet on Ogden Avenue and is 200 feet deep, and the east line of said lot is about 200 feet west of the center of the viaduct. It is vacant and unimproved. His mother was Antonie Sevcik mentioned above. Witnesses for claimant fix the damages at $1,040.00, $1,000.00, $1,075.00 and $1,300.00. Respondent's witnesses fix a damage of $500.00 and $675.00. From a consideration of all of the testimony, and after viewing the premises, we are of the opinion that these premises have been damaged to the extent of $750.00, and we recommend an award in the sum of $750.00 in this case.

IN RE: No. 2116—GAETANO SICILIANO *vs.* STATE OF ILLINOIS, Lot 4 in Block 46, Unit No. 4:

This property fronts on Ogden Avenue and is unimproved. Its east line is about 150 feet west of the center of the viaduct. The property was bought for business purposes.

Claimant's witness Elmore places the damage at $1,110.00. Witness Miller and two members of the DuPage County Real Estate Committee place the amount of damage at $935.00. Claimant's witness, Matter, placed the damages at $1,200.00, and claimant's witness, Chalberg, fixed the damage in the sum of $1,000.00. Two of the State's witnesses fixed the damage at $500.00 and one at $675.00. From a consideration of all of the evidence in this case, and after viewing the premises, we are of the opinion that an award in the sum of $750.00 is fair and reasonable, and we recommend an award in the sum of $750.00 in this case.

IN RE: No. 2117—MAUD FABBIS AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 3 in Block 46, Unit No. 4:

This property fronts 50 feet north on Ogden Avenue and is 200 feet deep. The premises are unimproved. The damage in this case as testified to by the witnesses for the claimant is $1,180.00, $935.00, $1,250.00 and $1,200.00. Two witnesses for the State fix the damages in the sum of $500.00, while one witness places it at $625.00. After a view of the premises, and in consideration of all of the evidence in this case, we are of the opinion that the sum of $750.00 would be a fair and reasonable amount, and we therefore recommend an award in the sum of $750.00 in this case.

IN RE: No. 2118—FRANK PELKA *vs.* STATE OF ILLINOIS, Lot 2 in Block 46, Unit No. 4:

This property fronts 50 feet north on Ogden Avenue and is 200 feet deep, and is unimproved. The owner paid the sum of $2,000.00 cash for this lot on August 4, 1926. Claimant's witnesses claim damage to this property by reason of the construction of this improvement in the sum of $1,250.00, $1,325.00 and $1,300.00. Two witnesses for the State fix the damage at $500.00 and one at $800.00. This court is of the opinion that the damage to the property in this case sustained by the owner is the sum of $900.00, and we recommend an award in this case of the sum of $900.00.

IN RE: No. 2119—LOUIS ZAGATA *vs.* STATE OF ILLINOIS, Lot 1 in Block 48, Unit No. 4:

The property in question is on the corner of Ogden Avenue and Route 53, approximately 50 feet wide and 200 feet deep, fronting on Ogden Avenue. The property was purchased on October 15, 1926, for $3,950.00, and is unimproved. The purchase price, however, of these premises is not considered by the court as competent evidence, but is merely mentioned here to show what was considered as values on the date of the purchase and not at the time of the construction of the improvement. He paid cash for the premises. The damages in this instance are fixed by claimant's witnesses as follows: Elmore, $2,365.00; Miller, $1,750.00; Matter, $2,690.00; Chalberg, $2,150.00; and for the State, by the witnesses Farnsworth and Crist, at $750.00 and by witness Adams, the amount of $750.00. We are of the opinion that in this instance the damage sustained by the owner is the sum of $1,250.00, and we recommend an award in this case in the amount of $1,250.00.

IN RE: No. 2120—MICHELE DICINTIO AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 6 in Block 45, Unit No. 4:

The property in question is on the corner of Dumoulin Avenue and Ogden Avenue, fronting 50 feet on Ogden Avenue and 200 feet on Dumoulin. The east end of the lot is at the end of the west aproach to the bridge. It is vacant and unimproved. On July 1, 1926, claimant agreed to pay $1,650.00 for same. Claimant's witness Elmore fixed the damages to this lot in the sum of $655.00; witness Miller in the sum of $950.00; witness Matter in the sum of $700.00, and witness Chalberg the sum of $1,000.00, sustained by this property on account of the improvement. The State's witnesses fixed the damages at nothing, being the same value after the construction of the improvement as before. It is the opinion of this court that the amount of damages in this case is $500.00, and we are, therefore, recommending an award in this instance in the sum of $500.00.

IN RE: No. 2121—ROMAN KIESZKOWSKI *vs.* STATE OF ILLINOIS, Lot 5, in Block 45, Unit No. 4:

The property in question fronts on Ogden Avenue. It is 50 feet wide and 200 feet deep. The west line of the lot is at the west end of the approach to the overhead pass. It was purchased July 26, 1926, for $1,250.00, and is unimproved. The claimant paid cash for the lot. Claimant's witnesses place the damage to this lot on account of the improvement, one at $1,100.00, one at $625.00, one at $900.00, and two of respondent's witnesses place the damage at $400.00 and one of respondent's witnesses thought the property was worth as much after the improvement as before. Considering our view of the property and all the evidence, we have the opinion that this property has been damaged to the extent of $600.00, and recommend an award in the sum of $600.00 in this case.

IN RE: No. 2122—EDWARD VANA AND CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lots 3 and 4 in Block 45, Unit No. 4:

The lots in question are each 50 feet wide and 200 feet deep. The west line of lot 4 is 50 feet east of the west end of the bridge. The lots were purchased in August, 1926, for the sum of $2,500.00, and improved by a residence at a cost of $4,800.00. There is a balance due on the lots and building of $4,500.00. The house is a one-story and basement frame building with five rooms, also a frame garage 14x18. The property is landscaped. It also has a small building used as a chicken house and all fenced in. The house was built in 1929. Claimant's witnesses fix the damage in this case at different sums. One witness testified the damage was $2,410.00. Another witness fixed the damage at $2,815.00, one at $2,425.00 and another at $3,750.00. Two of respondent's witnesses fixed the damage at $1,825.00 and one at $1,250.00. We are of the opinion that the damages sustained in these premises are the sum of $2,300.00, and we recommend an award in this case in the sum of $2,300.00.

IN RE: No. 2123—LADDY VASATKO *vs.* STATE OF ILLINOIS, Lot 2 in Block 45, Unit No. 4:

This property fronts north on Ogden Avenue, is 50 feet wide and 200 feet deep. It was purchased August 20, 1926,

for $1,450.00 cash. It is vacant and unimproved. One of claimant's witnesses places the damage in this case at $865.00, another at $900.00, another at $1,100.00, and another at $900.00. Two of respondent's witnesses fixed the damage at $500.00 and one at $630.00. Considering our view of the premises and all the facts in the case, we are of the opinion that this property has been damaged to the extent of $700.00, and we recommend an award in this case in the sum of $700.00.

IN RE: No. 2124—CHICAGO TITLE AND TRUST COMPANY, AS TRUSTEE, *vs.* STATE OF ILLINOIS, Lot 1 in Block 45, Unit No. 4:

This property is at the corner of Ogden and McKinley Avenues, fronting 50 feet on Ogden Avenue and 200 feet on McKinley Avenue. The west line of the lot is approximately 200 feet east of the west end of the overhead pass, and the property is unimproved. One of claimant's witnesses fixed the damage to these premises at $1,675.00, another at $1,200.00 and another at $2,050.00, and another at $1,450.00. The respondent's witnesses fixed the damage to these premises, two at $625.00, and one at $800.00. After considering all of the facts in the case, we are of the opinion that the sum of $900.00 would be fair and reasonable damages sustained. We, therefore, recommend an award in the sum of $900.00 in this case.

IN RE: No. 2125—LEO J. ZITZMAN, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lot 24 in Block 19, Unit No. 1:

This property is located on the corner of Ogden Avenue and Route 53. It faces south on Ogden Avenue 50 feet, and 170 feet on Route 53. It is vacant and unimproved. It was sold on January 2, 1930, for $3,950.00. Route 53 is the approximate center of the viaduct, and it was for the crossing of this highway that the overhead pass was built. One of claimant's witnesses fixed the damages in this case at $2,415.00, another at $1,680.00, another at $2,900.00 and still another witness for claimant fixed the damages at $2,000.00. Two of respondent's witnesses fixed the damages in this case at $750.00 and one at $700.00. We are of the opinion, after

consideration of all of the facts before us, that the reasonable damages sustained by this property are in the sum of $1,200.00 and we therefore recommend an award in this case in the sum of $1,200.00.

IN RE: NO. 2126 — MARGARET BEAZLEY, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lot 23 in Block 19, Unit No. 1:

This property fronts south on Ogden Avenue and its east line is 50 feet west of the center of the viaduct. It is vacant and unimproved. It was purchased July 9, 1926, for $2,000.00, of which $1,500.00 has been paid by Mrs. Beazley. It was bought as commercial property. One of claimant's witnesses fixed the damage in this case at $1,275.00, another at $1,020.00, another at $1,475.00, another at $1,170.00. Two of respondent's witnesses fixed the value of the damages to this lot at $450.00, and another one at $787.00. In view of all of the facts before us, we are of the opinion that these premises have sustained damages in the sum of $750.00, and we therefore recommend an award in the sum of $750.00.

IN RE: No. 2127—PATRICK CREAGH, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lots 21 and 22 in Block 19, Unit No. 1:

These lots are each 50 feet wide and 170 feet deep, fronting south on Ogden Avenue, the east line of Lot 22 being about 100 feet west of the center of the overhead pass. The lots were purchased September 20, 1926, for $3,700.00, and are unimproved. One of claimant's witnesses fixed the damage here at $2,340.00, another at $1,670.00 and another at $2,725.00 and still another at $2,200.00. Witnesses for the State, two of them fixed the damage at $900.00, and one at $1,125.00. In view of all the facts and circumstances, we are of the opinion that the damage sustained on account of the improvement in this case is $1,250.00, and we therefore recommend an award in this case in the sum of $1,250.00.

IN RE: No. 2128—FRANK W. STACH *vs.* STATE OF ILLINOIS, Lots 19 and 20 in Block 19, Unit No. 1:

This property fronts south on Ogden Avenue. The lots are each 50 feet wide and 170 feet deep and are unimproved. The lots were purchased about 9 years ago for $3,420.00. The east line of Lot 20 is about 200 feet west of the center of the overhead pass. One of claimant's witnesses fixed the damage to these lots at $2,144.00, another at $1,670.00, another at $2,545.00, another at $2,200.00. Two witnesses for the State fixed damages at $900.00 and another at $1,125.00. After a careful consideration of all the facts before us, we have decided that the reasonable amount of damage sustained by these lots is in the amount of $1,250.00, and we therefore recommend an award in this case in the sum of $1,250.00.

IN RE: No. 2129—WILLIAM D. HURRY, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lot 18 in Block 19, Unit No. 1:

This property fronts south on Ogden Avenue. Its west line is about 250 feet east of the west end of the viaduct. It is also 170 feet deep, and was purchased September 15, 1926, for $1,950.00. It is vacant, unoccupied and unimproved. One of claimant's witnesses fixed the damage in this case at $1,225.00, another at $1,000.00, another at $1,410.00, and another at $1,320.00. Two of respondent's witnesses fixed the damages at $450.00, and one at $540.00. After consideration of all of the facts in this case, we are of the opinion that the damages sustained in this case are in the sum of $750.00, and we therefore recommend an award in this case in the sum of $750.00.

IN RE: No. 2130—SAM MONTORI, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lot 17 in Block 19, Unit No. 1:

This lot fronts south on Ogden Avenue, and is 50 feet wide and 170 feet deep. The west line of the lot is about 200 feet east of the west end of the viaduct, and it was purchased

February 25, 1931, for $1,200.00. It is vacant and unimproved. One of claimant's witnesses fixed the damage in this case at $715.00, another at $835.00, another at $800.00 and another at $1,100.00. Two of the State's witnesses fixed the damage to this property at $450.00, and one at $540.00. We are of the opinion that the damage sustained by these premises is the sum of $650.00, and we are, therefore, recommending an award in the sum of $650.00.

IN RE: No. 2131—FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE AND CHARLES ALBERS, RECEIVER OF FOREMAN-STATE TRUST & SAVINGS BANK, *vs.* STATE OF ILLINOIS, Lot 16 in Block 19, Unit No. 1:

This lot fronts 50 feet on Ogden Avenue, is on the north side of the highway and is 170 feet deep. It is vacant and unimproved. It was purchased in 1928 for the sum of $1,600.00. One of claimant's witnesses fixed the damage in this case at $995.00, another at $835.00, one at $1,175.00, and another at $1,100.00. Two of the witnesses for the State fixed the amount of damages at $450.00 and one at $540.00. We are of the opinion from the evidence in this case that the reasonable value of damages sustained by the premises would be the sum of $650.00, and we therefore recommend an award in this case in the sum of $650.00.

IN RE: No. 2132—FRED J. BUDOVEC, ADMINISTRATOR OF THE ESTATE OF ANNA BUDOVEC, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF SAID BANK, *vs.* STATE OF ILLINOIS, Lot 15 in Block 19, Unit No. 1:

This lot fronts south on Ogden Avenue, is 50 feet wide and 170 feet deep, and was purchased August 4, 1926, for $1,600.00. It is vacant and unimproved. The west line is about 100 feet east of the west end of the overhead pass. It was paid for in cash. One of claimant's witnesses fixed the damages here at $995.00, another at $835.00, another at $1,150.00, and another at $1,100.00. Two of the witnesses for the State fixed the damages at $450.00 and one in the sum of $540.00. After consideration of all of the facts and the circumstances before us, we are of the opinion that the damages sustained are in

the sum of $650.00, and we are therefore recommending an award in this case in the sum of $650.00.

IN RE: No. 2133 — ANDREW WORZEKEN, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF SAID BANK, *vs.* STATE OF ILLINOIS, Lot 14 in Block 19, Unit No. 1:

This lot fronts south on Ogden Avenue and is 50 feet wide and 170 feet deep. The west line of the lot is a little over 50 feet east of the end of the viaduct. The lot was purchased October 4, 1926, for $1,750.00. One of the claimant's witnesses fixed the damage at $1,075.00, another at $835.00, another at $1,275.00 and another at $1,100.00. Two of the State's witnesses fix the damages here at $450.00 and one at $540.00. After consideration of all the testimony in this case, we are of the opinion that the damages sustained are in the sum of $650.00, and we are, therefore, recommending an award for damages in this case in the sum of $650.00.

IN RE: No. 2134—JOHN HUTTER, FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF SAID BANK, *vs.* STATE OF ILLINOIS, Lots 12 and 13 in Block 19, Unit No. 1:

These lots are adjacent to each other and each fronts 50 feet south on Ogden Avenue, and is 170 feet deep. Lot 12 extends along Dumoulin Avenue, the east line of which is approximately 10 feet east of the west end of the viaduct. They were purchased August 30, 1926, for $4,200.00, and both are unimproved. Claimant owes a balance of $950.00 on the premises. One of claimant's witnesses fixed the damages here at $2,290.00, another at $1,500.00, another at $3,150.00, and another at $1,900.00. All of the State's witnesses testified that there were no damages to the property in question. However, after consideration of all the facts and circumstances in the case, we are of the opinion that the claimants actually suffered damages of $800.00 to these premises, and we are, therefore, recommending an award in the sum of $800.00 in this case.

IN RE: No. 2135—H. M. CHASE AND NORTHERN ILLINOIS REAL ESTATE IMPROVEMENT CORPORATION *vs.* STATE OF ILLINOIS, Lot 17, in Block 13, Unit No. 1:

This lot is on the north side of Ogden Avenue, and is about 61 feet wide and 170 feet deep, purchased January 15, 1929, for $2,600.00. This lot is located a little over 180 feet west of the east line of the viaduct with no access from the east owing to the fact, as hereinbefore stated, the roadway on the grade on the north side of the viaduct was never opened through. The premises are improved by a 20x64 combination store and residence quarters in the rear. The store is 20x32, and the living quarters consist of 6 rooms and bath. He is occupying these premises as a residence and grocery and meat market. The cost of the building was $3,800.00 and as we understand the record, the claimant is in debt for these premises in the sum of $5,700.00. A witness for the claimant testified the damages sustained by reason of this improvement was the sum of $3,070.00, another at $2,550.00, another at $3,230.00 and another at $4,150.00. Two of the State's witnesses fixed the damages at $2,000.00 and a third State's witness fixed the damages at $2,520.00. After consideration of all the facts and circumstances before us, we are of the opinion that the claimant has actually suffered damages in the sum of $2,400.00, and we are, therefore, recommending an award in this case in the sum of $2,400.00.

IN RE: No. 2136—FOREMAN-STATE TRUST & SAVINGS BANK, AS TRUSTEE, AND CHARLES ALBERS, RECEIVER OF SAID BANK, *vs.* STATE OF ILLINOIS, Lot 16 in Block 13, Unit No. 1:

This property fronts south on Ogden Avenue and is immediately west of the Chase property. It is 50 feet in width and 170 feet deep, and is in the tier of lots that are dead-ended towards the east end of the viaduct. The property was purchased in 1928 for $2,400.00, and is unimproved. One of claimant's witnesses fixed the damages to these premises in the sum of $1,555.00, another at $1,000.00, another at $1,975.00 and another in the sum of $1,500.00. Two of the State's witnesses fixed the damage at $500.00 and a third State's witness fixed the damage at $900.00. After a careful consideration of all the facts and circumstances in this case, we are of the

opinion that a reasonable amount of damages sustained would be the sum of $850.00, and we are, therefore, recommending an award in this case in the sum of $850.00.

IN RE: No. 2137—SAM DOSICK AND ARTHUR T. MCINTOSH *vs.* STATE OF ILLINOIS, Lots 14 and 15 in Block 13, Unit No. 1:

This property is unimproved, and the east line of Lot 14 is approximately 100 feet east of the center of the viaduct. The lots are each 50 feet in width and 170 feet deep. They were sold in 1926 for $3,800.00. One of claimant's witnesses fixed the amount of damages to this property at $2,410.00, another at $2,060.00, another at $2,900.00 and another at $3,050.00. Two of the State's witnesses fix the amount of damages in this case at $1,000.00 and a third State's witness fixed the damage at $1,800.00. After a careful consideration of all of the facts before us, and after viewing the premises, we are of the opinion that these lots have sustained a damage in the sum of $1,750.00, and we are, therefore, recommending an award in this case in the sum of $1,750.00.

IN RE: No. 2138—ZYGMUNT DOBKOWSKI AND FILIP DOBKOWSKI *vs.* STATE OF ILLINOIS, Lot 13 in Block 13, Unit No. 1:

This property was purchased on April 4, 1929, for $3,950.00, all of which was paid. The lot fronts 50 feet on Ogden Avenue and is 170 feet deep, running along Route 53, and is at the center of the viaduct. The premises are improved with a one-story frame building of 4 rooms for a residence. They also put in a gas station 14x16 feet with a canopy roof, concrete drive, and a roof above the concrete. They also made further improvements by a cesspool and toilet facilities. The cost of the improvement is claimed to be a little over $5,000.00. One of claimant's witnesses testified that the damage in this case was in the sum of $2,960.00, another at $4,350.00, another at $3,500.00 and another at $3,200.00. Two of the State's witnesses fixed the damage at $1,350.00 and one at $2,300.00. After viewing the premises and carefully considering all of the evidence in this case, we are of the opinion that the damages reasonably sustained by the claimants amount to $3,200.00, and we are, therefore, recommending an award in this case in the sum of $3,200.00.

IN RE: NO. 2174 — FRANK A. HAUMESSER AND MARGARET HAUMESSER *vs.* STATE OF ILLINOIS:

There are two pieces of property involved in this claim. One is on the northwest corner at the intersection of Ogden Avenue and the old Joliet Road, and is occupied as a residence by the claimants. They have lived there for many years, and it was acquired by descent from his parents. It contains approximately two acres, and fronts on Ogden Avenue and Joliet Road. It is improved with a brick veneer house which is about six years old, with all modern conveniences, and consists of 7 rooms and basement. The house is approximately 30x40 feet in area and 2 stories high. There is a greenhouse on the property 33x19 with a small workhouse in the back of it, which is about 12x19. It is improved also with a brick garage which is 30x20 feet. The house cost approximately $15,000 to build, and the garage cost $750.00. The west 180 feet of this property at the northwest corner of Ogden Avenue and the Joliet Road has been entirely cut off from access to Ogden Avenue by the construction of this overhead pass. It is only about 6 or 8 feet from the north wall of the overhead pass to the property line. The concrete slab or ramp that was built on the north of the viaduct starts at Route 53 and dead-ends at the west end of the property herein mentioned. Prior to the building of the overhead pass, the premises were level with the surrounding land and were improved with a 20 foot slab of concrete for roadway purposes. There is also involved in the claim about 5 acres over by the Haumesser's on the southeast corner of Ogden Avenue and Joliet Road. It is claimed in this instance that damages have been sustained by reason of the change in the drainage system, and that a half acre of peonies was destroyed, which was worth about $1,000.00. The claimants place a value of $40,000.00 on this property before the improvement, and $30,000.00 after the improvement. Two of the witnesses for the claimants testified that the damages sustained amounted to $9,465.00, and two of the witnesses for the State fixed the damages at $2,000.00. Another witness for the State fixed the damages at the sum of $3,170.00. After careful consideration of all the facts in the premises, we are of the opinion, after viewing the property, that claimants have sustained damages to the premises

by reason of the construction of this improvement in the sum of $5,250.00, and we are, therefore, recommending an award in this case of $5,250.00.

(No. 2547—Claimant awarded $41.16.)

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

GEORGE B. GILLESPIE AND ROLLA BABCOCK, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

STORAGE CHARGES—*when award for may be made.* Where it appears that State is justly indebted for storage charges on materials ordered and received by it, and proper State department recommends payment, an award may be made for the amount thereof.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant herein seeks to recover an award in the amount of $41.16 for storage charges on twenty drums of asphalt liquid shipped by Lincoln Oil Refining Co. on May 28, 1933, from Wood River, Illinois to Illinois Division of Highways, care of S. F. Wilson, District Engineer, at Litchfield, Illinois.

It appears that the shipper did not notify the District Highway Office of the respondent, nor the highway patrolman of that district, of the fact of shipment, as it had been requested to do, and that as the result of such failure, the shipment in question was not secured by the consignee until after it had been in storage for a period of eight days.

Claimant originally submitted a storage bill in the amount of $5.88, which was paid. Thereafter and on July 10, 1933, claimant notified the District Highway Office of the respondent that a mistake had been made in the bill for storage; that it had been ascertained that the shipment in question was inflammable material, and that therefore there was an additional charge of $41.16 for storage thereon.

It appears that the correct amount of the storage charge, in accordance with the legally filed tariffs, is $47.04. Re-

spondent having paid $5.88, there is a balance remaining due in the amount of $41.16, and the Highway Department has recommended the payment thereof. The amount claimed is justly due and owing by the respondent to the claimant and should be paid.

Award is therefore hereby entered in favor of the claimant for the sum of Forty-one Dollars and Sixteen Cents ($41.16).

(No. 1932—Claimant awarded $3,578.51.)

JOSEPH CRAWFORD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

JOHN A. MAYHEW, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where employee, engaged to do odd jobs in State institution, comprising many buildings containing motor-driven machinery, fire escapes, boiler plant, etc., sustains accidental injuries while driving wagon carrying bricks for use in making road on its grounds, consisting of fractures of bones and abrasions of the skin, and infection follows contributing to general disability, it may be assumed, there being no evidence to the contrary, and no evidence of infection prior thereto that infection resulted from said abrasions, and an award for compensation may be made for such injuries and disability resulting therefrom.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Under date of December 29, 1931, the claimant was working at a State hospital located at Manteno, Illinois, and had been employed continuously there since October 20, 1931. He had been employed at odd jobs and on the said 29th day of December, 1931, he was engaged in hauling brick-bats for the purpose of building hard roads on the grounds of the Manteno State Hospital, which roads connected the different buildings. On the day in question, he was driving a team and the brick-bats were hauled some four or five miles. The team ran away; his left leg was broken in three places and his right leg was broken in two places. It is charged that his left side of his face became paralyzed, causing the loss of his left eye, and almost a total loss of the hearing of his left ear, and he claims total incapacity.

Claimant's wife was also employed at the same hospital; and there were no children under sixteen years of age; that he was 61 years old at the time of the accident and received $55.00 per month and his board and room. The value of his board and room was fixed at $24.00 per month. He received one month's pay after the injury and his hospital and doctor's bills.

At the hospital, they have about twenty-two complete buildings. Some of the buildings have fire escapes and are heated from a central power plant, which contains, boilers, pumps, hot water heaters, and all necessary equipment for boiler plant; they also use electric motors. There is a deep well which furnishes all water for the institution, and is operated by a 75 horse power motor. They also operate a laundry at the institution. The washing machine is motor driven, and considering the nature of the work being done at the time the claimant received his injury and the nature of the plant, we are of the opinion that this employment comes under the Compensation Act, and we are further of the opinion that the injury arose out of and in the course of the employment.

At the time of the injury, claimant was driving a team hauling brick-bats and the team ran away.

Claimant was discharged from the hospital in April, 1932.

When he first went to the hospital he had blood poisoning in his leg and was in the hospital all told 15 weeks on account of the blood poisoning and the fracture sustained. He was treated by Dr. Golmar at Manteno and was then taken to the hospital at Kankakee and was seen there by doctors Madden, Hawthorne & Morrow. He had been employed in various State institutions about three years and had been employed as a hard road inspector in Massac County and was an auctioneer by occupation.

Dr. E. C. Wilson, a physician and surgeon testified that he found that claimant had some edema of the feet and legs, some inflammatory condition of his kidneys; high blood pressure; a dilated heart; difficulty in breathing; a hernia; was a little hard of hearing at times; a tremor,—shakiness of his hands,—and X-ray pictures show a fracture of the left tibia at the ankle. The left tibia is the large bone that goes from

the knee to the ankle. The X-rays also show a fracture of the first and third metatarsal bones of the right foot, and also a fracture of the left fibula, about the middle third—that is a small bone of the leg—from the knee to the ankle. He obtained good results from the healing of the fractures. He has a dilated heart and what doctors call myocarditis, an inflammation of the heart and muscles, and this is a permanent condition. This causes his feet to swell. Claimant was also suffering from Parkinson's disease, and prior to the time of his injury, he was healthy and doing hard work, and his present condition developed since his injury. He was also suffering from a kidney ailment, brought about according to Dr. Wilson, from his heart condition. At the time that claimant sustained his injury, he had a skin abrasion and infection developed there.

Claimant had never suffered an injury before and testified that he had taken out life insurance about six months prior to that time in the Illinois Bankers Life Insurance Company, and received a thorough medical examination at that time.

The first question presented is whether from the setting in of infection, with nothing definite to show to what the infection is due or when or where it started, the injury could be considered as having been caused by an accident in the sense contemplated by the Workmen's Compensation Act; whether the circumstances are such that the injury can be traced to a definite time, place and cause, as was held necessary in *Matthiessen & Hegeler Zinc Co.* vs. *Industrial Board*, 284 Ill. 378.

In the present case the claimant received definite injuries consisting of several fractures and an abrasion of the skin, but for the abrasion of the skin there would have been no means of access by the infectious germs to the blood. We are of the opinion that the particular work gave rise to the occasion or opportunity for exposure to the infection. There was no attempt in the record to trace the source of the germs, to show whether the actual infection took place at the time of the accident. The history of this case is one where the claimant had good health and did hard labor prior to the accident. It could be considered a reasonable inference that infectious germs are so prevalent as to justify the assumption

that the infection took place at the time of the injury and the germs entered the skin through the abrasion shown by the evidence.

We are of the opinion that it is entirely possible for the infection to have resulted from the accident and the evidence supports this finding. This decision may be justified upon the ground that there had been a definite accident originally which reasonably could have caused the infection in or near the skin abrasion.

The earnings of the claimant were $948.00 per year, and the average weekly wage was $18.23 per week; the claimant at the time of the injury was 61 years of age and had no children under sixteen years of age, and we find that the claimant is wholly incapable of work. An award is, therefore, recommended.

If the appropriation is made by the Legislature, three years and six months will have elapsed before these payments are available on July 1, 1935. The total award he is entitled to is the sum of $3,792.00. One-half of his weekly wage of $18.23 per week is $9.12 per week. One-half of his weekly payments, therefore, have accumulated for three years and six months, or 182 weeks, since the time of the injury, but he was paid for one month, or $79.00, which leaves the amount accumulated as $1,580.84, and the balance should be paid to him weekly but because that it not practical with the Legislature meeting only every two years, we recommend a lump sum settlement and commute the said balance to an equivalent lump sum, which commutation shall be an amount which will equal the total sum of the probable future payments capitalized at their present value upon the basis of interest calculated at three per centum per annum with annual rests. This equals the sum of $1,997.67. This amount added to the sum of $1,580.84, which will be due as of July 1 of this year, makes a total of $3,578.51, which is the sum that we recommend that the Legislature appropriate to Joseph Crawford. The court continues the case on its own motion for such further orders as it may deem necessary under the Workmen's Compensation Law.

(No. 2311—Claimant awarded $187.50.)

BETTY CROWDER, EXECUTRIX OF ESTATE OF HENRY CARTWRIGHT, Dec'd., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 4, 1935.

DAVID J. MADDOX, for claimant.

OTTO KERNER, Attorney General, for respondent.

SOLDIERS' BONUS—*death of applicant for—when payable to next of kin.* Under the law of Illinois, where application by soldier for Illinois bonus, based on military service is approved and warrant drawn for amount due, but before receiving same applicant dies, such amount is payable to next of kin of said applicant and not to personal representative of deceased applicant.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim for the Service Recognition of Henry Cartwright, for Illinois bonus based on Service. He filed his application during his lifetime on the 26th day of January, 1923, and this was approved by the Service Recognition Board, and an award in the amount of $187.50 was drawn and forwarded to him in October, 1923, but before receiving the same, applicant died.

The claim is Number 122,410 and several applications have been made to the Military and Naval Department of the State of Illinois, at Springfield, Illinois, but under the circumstances they could not act upon it because the necessary and proper papers had not been made out and signed showing who the heirs-at-law are. This cause shows the heirs at law to be:

Bettie Crowder, 5350 Indiana Ave., Chicago, Illinois;
Katie Whitson, 5350 Indiana Ave., Chicago, Illinois;
Carrie Nelson, 351 East 54th St., Chicago, Illinois;
Sam Cartwright, 219 Channing Ave., St. Louis, Missouri;
Lulu Jackson, 717 Decatur St., Memphis, Tennessee;
Annie Bess, 652 Adams St., Memphis, Tennessee;
Jime Cartwright, Box No. 35, Macon, Tennessee;
Anthony Cartwright, Box No. 35, Macon, Tennessee;
Isom Cartwright, 717 Decatur St., Memphis, Tennessee;
Walter Cartwright, 4752 Forestville Ave., Chicago, Illinois.

The amount of the claim was $187.50.

Henry Cartwright, the decedent, was a World War veteran. His application for Service Recognition bonus had been

approved by the Service Recognition Board. He died in the National Soldiers Home, Milwaukee, Wisconsin, in November, 1923. This bonus was returned to the department.

He left a last will and testament, naming Mrs. Betty Crowder sole executrix, and leaving all his property, both personal and real, to five nephews and one niece.

As we construe the law, this should be equally divided among the next of kin of the deceased veteran.

We, therefore, recommend an award in the sum of $18.75 to each of the following named next of kin, to-wit: Bettie Crowder, Katie Whitson, Carrie Nelson, Sam Cartwright, Lulu Jackson, Annie Bess, Jime Cartwright, Anthony Cartwright, Isom Cartwright and Walter Cartwright.

(No. 2180—Claimants awarded $352.30.)

DR. E. L. DAMRON AND ST. ANTHONY'S HOSPITAL OF EFFINGHAM, ILLINOIS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

E. L. DAMRON, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employer liable for medical services and hospital services furnished employee, injured while working under.* When a State employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment and requires and is given medical treatment and hospital care, as a result thereof, at the request of representative of State, the State is liable for the reasonable value thereof.

MEDICAL SERVICES AND HOSPITAL CARE — *when award may be made for.* When it is unquestioned that necessary medical services and hospital care were furnished to State employee for accidental injuries, within the purview of the Workmen's Compensation Act, charge for which is reasonable and just, and payment for which is consented to by Attorney General, an award may be made therefor.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a joint claim filed by E. L. Damron, a physician and surgeon, and St. Anthony's Hospital of Effingham, Illinois, arising out of professional services rendered to one Carl Little, an employee of the State. A part of the claim had been paid. The balance of the claim for medical and surgical serv-

ices, $369.00, is due and owing to Dr. E. L. Damron, and the sum of $83.50 is due and owing to St. Anthony's Hospital, Effingham, Illinois. Itemized statements of both accounts were duly made.

Carl Little was injured while unloading machinery from a State truck near Effingham, Illinois. He was rendered unconscious and removed to St. Anthony's Hospital, Effingham. X-ray pictures were taken which showed a fracture involving the first and second lumbar vertebrae. He was unconscious for a period of about one hour, and upon regaining consciousness there was a complete paralysis of the lower extremities. There was a loss of kidney and bowel function which continued through a period of about thirty days. He was placed in a plaster cast and remained in the hospital until April 18, 1931. The physician then made resident calls, which would seem to have been necessary on account of loss of function of the kidneys and for observation of the injured spine.

Claim was filed May 25, 1933, no question arising in the record as to the necessity of the surgical care and the hospital care given Little, and the attorneys for Carl Little stated that no objections will be made to the payment of these bills.

Section 8 of the Workmen's Compensation Act, in part, provides that the employer shall provide the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services. At the time Little received his injuries, they appeared to be very serious, and in fact were quite serious, and a representative of the State called Dr. Damron to look after the injured man, and the Attorney General has consented to payment of these bills.

An award, therefore, is made to E. L. Damron, physician and surgeon, for the sum of $369.00, and the St. Anthony's Hospital of Effingham, Illinois, for the sum of $83.50.

(No. 2386—Claimant awarded $1,239.60.)

HOWARD ENDRES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

MILLER & SHAPIRO, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made in accordance with the provisions of the Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant was employed at the Kankakee State Hospital as a carpenter on a three day a week schedule at $8.40 per day, or $25.20 per week.

On September 22, 1933, while preparing some lumber strips for use in the hospital, the left hand and thumb of the claimant came in contact with the rip saw and three-quarters of the thumb of his left hand became severed, and the second finger of the same hand was badly injured, and it is alleged that he lost practically the permanent, complete use of the finger. The second finger had the flesh cut to the bone, and was so injured that it can't be straightened out without help.

The case comes under the Workmen's Compensation Act, and claimant was disabled from the date of the accident to December 1, 1933, during which time he returned to work. During that time there was paid him the sum of $205.80. He was treated by physicians at the Institution, and the only question to be determined is the amount of compensation for the permanent disability.

The thumb was amputated below the joint, and under the Compensation Act he is entitled to recover for a complete loss of the thumb, which is 50 per cent of the average weekly wage during 70 weeks.

The evidence shows he has lost the permanent complete loss of the use of the second or middle finger of his left hand. His testimony is that the rip saw cut the bone about 4 inches and severed the muscles on the top or the back of his hand at a point about ⅜ inch below the joint. He cannot open his finger. It is extended toward the inside of the hand at about a 45 degree angle, and it cannot be straightened without applying force to it. He has no control of the muscles in the finger except where the finger joins the hand. The evidence of the doctors shows an inability on the part of claimant to extend the phalange because of the injury, and it would seem he would have better use of the hand if this finger had been amputated at the middle joint. We feel that he has suffered the complete loss of the second finger.

Under the Statute, for the permanent and complete loss of the use of the second finger of his left hand, he would be entitled to fifty per cent of his average weekly wage during 35 weeks. He is, therefore, entitled for the loss of his second finger and thumb to 105 weeks at $12.60 per week, or the total sum of $1,323.00. He has been overpaid the sum of $83.40 by the State, and that sum should be deducted from the sum of $1,323.00.

We, therefore, make an award in favor of claimant for the sum of $1,239.60.

(No. 2390—Claimant awarded $3,805.76.)

LENORA E. FINCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

DOYLE, SAMPSON & GIFFIN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where State employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation will be made to his dependents under the provisions of the Act.

SAME—*pension not treated as earnings under.* Pension received from United States is not earnings and cannot be used as basis in determining amount of compensation on claim for death.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed June 1, 1934 and alleges that Gelon L. Finch, the husband of the claimant, was, on the 14th day of March, 1934, employed by the State of Illinois as a janitor in the engine room in the Power Plant owned, maintained and operated by the State of Illinois on Monroe Street in Springfield, Illinois, and while in the performance of his duties he was engaged in the maintenance of a structure and was engaged in an enterprise wherein machinery, appliances were placed, used and operated, and an enterprise on which statutory and municipal ordinance regulations were imposed for the regulating, guarding, placing and use of machinery or appliances, or for the protection and safeguarding of employees or the public therein.

It is further alleged that on the 14th day of March, 1934 at about ten o'clock A. M. the husband of the claimant was engaged in his usual, customary course of employment and was cleaning and washing certain walls in the engine room in the Plant aforesaid, and while so engaged, fell from a ladder upon which he was working, and as a direct and proximate result thereof on the said 14th day of March, 1934, sustained injuries from which he died on said date.

The claim further alleges that the deceased left him surviving his widow, whom he was under obligation to support, and who was wholly dependent upon him, and damages in the sum of Sixty-one Hundred Twenty-eight Dollars ($6,128.00) were asked. No compensation was paid to the claimant and no salary received on behalf of the deceased since the date of injury, and the sum of Eight Dollars ($8.00) was paid for surgical attention by the claimant.

It appears from the evidence that on the date of the injury the State received notice thereof and the decedent was taken to St. John's Hospital at Springfield, and he either died on the way to the hospital or immediately after arriving there.

The average annual earnings of the deceased at the time of the injury was the sum of Fifteen Hundred Thirty Dollars ($1,530.00) consisting of a yearly salary of Thirteen Hundred Fifty Dollars ($1,350.00) payable monthly, and a pension from the United States Government of Fifteen Dollars ($15.00) per month.

He left his widow but no children under sixteen years of age. No question arises as to notice and it appears that the decedent met his death while in the employment of the State and the cause of his death arose out of and in the course of his employment. He had fallen from a six foot ladder which he had supported from a place above the engine room switch-board. His injuries were serious and he was removed to St. John's Hospital in an ambulance and a doctor called.

Louis Jetter, a fellow employee, went to the hospital in the ambulance. Finch died before medical attention could be given, of a skull fracture. John Hill was employed in the State Power Plant as engineer and was present when the accident occurred. Decedent was, at the time he received the injury from which he died, cleaning the tile walls of the en-

gine room of the Power Plant and was using a step ladder from which he fell to the tile floor of the engine room. He struck upon his head and shoulders. Hill could not reach him in time to prevent the accident, but when he did reach him, the blood was gushing from his nose and mouth. They immediately called the Superintendent of the Power Plant and he called an ambulance and the deceased was removed to St. John's Hospital.

This case comes clearly within the Compensation Act which Act provides that if the employee leaves him surviving any widow, child or children whom he is under obligation to support at the time of his injury, he should be paid a sum equal to four times the average annual earnings of the employee, but not less in any event than Twenty-five Hundred Dollars ($2,500.00), and not more in any event than Four Thousand Dollars ($4,000.00).

His annual earnings being Thirteen Hundred Fifty Dollars ($1,350.00), the claimant is entitled to compensation in the maximum amount provided by the Workmen's Compensation Act or $4,000.00.

We cannot treat a pension granted by the United States as earnings under the Compensation Act or use it as a basis for figuring the amount due on a death claim for one reason at least, because the Compensation Act fixes the maximum amount as being four times the annual earnings, and considers the earnings as wages, and "earnings" in this case would not include a pension from the United States.

The widow of the deceased also paid a doctor's bill amounting to $8.00.

The deceased was paid $1,350.00 annually or $25.98 per week. Under the Compensation Act, his widow is entitled to $4,000.00 plus the doctor's bill, this to be paid weekly at the rate of $12.98. The deceased died on March 14, 1934. Assuming that the Legislature will make this appropriation, before any money can be paid to her, it will be at least July 1, 1935, or one year and 15 3/7 weeks will have elapsed. Therefore, by July 1, 1935, the accumulated payments will amount to 67 3/7 weeks at $12.98 per week, or $875.22.

Claimant has filed a petition for a lump sum settlement, and under the showing made, we believe that it will be to her advantage that a lump sum settlement be made.

The difference between the sum of $4,000.00 and $875.22, is the sum of $3,124.78. The value of the last mentioned sum as of July 1st of this year, figured according to the value of tables, amounts to $2,922.54. Adding together the $8.00 doctor bill, $875.22, the accumulated payments as of July 1, 1935, and the sum of $2,922.54, makes a total sum of $3,805.76.

We, therefore, recommend an award in the sum of $3,805.76.

(No. 2331—Claimant awarded $75.00.)

WALTER L. FRANK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

WALTER L. FRANK, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*when award may be made for.* Where facts are undisputed that claimant, a licensed physician and surgeon, rendered necessary surgical services to inmate of State institution, at request of officer in charge thereof, and charge therefor is reasonable and just, an award may be made for payment of same.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Walter L. Frank is a duly licensed physician and surgeon, and has specialized on the eye, ear, nose and throat. On February 9, 1933 he was called by Dr. F. R. Pollock, who was in charge of the Jacksonville State Hospital at Jacksonville, Illinois, to perform a mastoid operation on one Priscilla McCombs, an inmate of the Jacksonville State Hospital. He successfully performed this operation and charged therefor the sum of $75.00. No contest arises from the facts. Dr. C. St. Clair Drake, Managing Officer of the hospital, states that this bill is correct for the services performed.

From the evidence it appears that the services of Dr. Frank were requested by the proper State officer; that the operation was necessary, and the patient would probably have died without the operation. The evidence also shows that Dr. Frank's efforts were successful.

We have heretofore held that "Where the evidence is uncontroverted that claimant rendered medical services at the request of the proper officer and the amount claimed is

reasonable and undisputed, an award will be made on the recommendation of the proper authority.

Marquis vs. *State*, 7 C. C. R. 88;

St. Margaret's Hospital of Spring Valley and Dr. Charles J. Green vs. *State*, 7 C. C. R. 222.

The Attorney General takes no exception.

We, therefore, make an award in favor of the claimant in the amount of $75.00.

(Nos. 1825, 1997, 2000, 2001, 2011, consolidated—No. 1825, claim denied; No. 1997, Claimant awarded, $11,000.00; No. 2000, Claimant awarded $5,000.00; No. 2001, Claimant awarded $7,000.00; No. 2011, Claimant awarded $4,000.00.)

GLENBARD GOLF CLUB, INC., Nos. 1825, 1997, MARGARET Y. NEWMAN, No. 2000, ROBERT A. MARSH, ET AL., No. 2001, BRIDGET MORRIS, No. 2011, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

HADLEY, WEAVER & WOODWARD AND MARKMAN, DONOVAN & SULLIVAN, for claimant, Glenbard Golf Club, Inc., CHARLES W. HADLEY AND THOMAS C. DONOVAN, of counsel, CHILDS, BOBB & WESTCOTT, for other claimants.

OTTO KERNER, Attorney General; CARL DIETZ, Assistant Attorney General, for respondent.

COURT OF CLAIMS—*jurisdiction.* By virtue of Section 13 of Article 2 of the Constitution of Illinois and the Statute creating the Court of Claims, said court has jurisdiction to hear and determine actions for damages to land, not taken for public use, by reason of construction of public highway.

PROPERTY DAMAGE—*construction of public highway causing—measure of.* Where private property is not taken for public use but is damaged by reason of the construction of a public highway, the proper measure of damages is the difference between the fair cash market value of the property, unaffected by the improvement and its fair cash market value as affected by it.

SAME—*same—proper element of.* Where grade of road upon which private property abuts is changed in the construction of a public highway, causing interference with right of access to said property, and resulting in a depreciation in the value thereof, such interference is a proper element of damages.

SAME—*same—improper element of.* Inconvenience to or loss of business suffered by owners of abutting property during the progress of work in the construction of a public highway, do not constitute damage to property within the meaning of the constitution and no compensation can be had therefor.

SAME — *property on intersecting streets.* Where private property, not taken for public use is located at the intersection of two streets, upon which there is being constructed public improvements, each of which it is claimed caused damage to said property, the court will not treat them as separate cases, nor permit if recovery is justified double damages.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a proceeding by the claimants to recover damages alleged to have been caused to the premises owned by them by the State of Illinois because of a change in the grade of State Routes No. 6 and No. 53. State Route No. 6 is also known as the Roosevelt Road.

Roosevelt Road extends in an easterly and westerly direction from Geneva, Illinois to Chicago, Illinois, and passes along the boundary of the premises of the claimants, Glenbard Golf Club, Inc., Margaret Y. Newman, Robert A. Marsh and Dagmar Marsh and Bridget Morris, in the outskirts of the village of Glen Ellyn, DuPage County. Prior to September 1, 1931, this portion of Roosevelt Road had been improved by the State of Illinois for two lanes of traffic, and on or about the date just mentioned, the State of Illinois changed the grade of this highway along and in front of a portion of the premises of the Glenbard Golf Club, Inc., and widened the highway by making four lanes of traffic rather than two. This is a durable, hard-surfaced road made of concrete.

The Glenbard Golf Club, Inc. purchased the premises consisting of one hundred twenty-nine (129) acres, sometime in 1930 for a total alleged price of Eighty-five Thousand Dollars ($85,000) or about Six Hundred Fifty Dollars ($650) per acre, and improved it as a golf course and expended almost an equal amount in improvements. The State of Illinois in making the improvements in September, 1931 changed the grade of the Roosevelt Road, and there is between the eastern and western boundaries of the golf course, a hollow through which the Little DuPage River runs. When the Roosevelt Road was first improved there was some filling in in the lowest places and the grade was changed at that time and again in September of 1931 this second grade was changed.

The golf course lies on the south side of the road and it is claimed that for a distance of 1,090 feet along the Roosevelt Road, the golf course frontage was damaged by an elevation of the highway. At some places the grade was changed as

much as 5.55 feet. This was down close to the Little DuPage River.

In changing the Roosevelt Road the State built a retaining wall along the southerly side of the road known as a rip rap wall. It is not a perpendicular wall but is sloped so that it will stand by gravity with a fill behind it. This wall stands some little distance from the north property line.

On the northwesterly side of the golf course, the State constructed in the year of 1932, State Route No. 53, and this is sometimes referred to as Bryant Avenue within the village limits of Glen Ellyn. Route No. 53 was excavated to a depth of 18 feet at the northwest corner of the premises and was excavated on a gradual slope from that point to a point 470 feet south, where it again reached the grade of the surrounding lands and it is charged by changing the grades in these two roads, the owners of the golf course have been greatly damaged for the reason that they do not have the same ingress to and egress from said premises as they had at the time they purchased the golf course sometime in the year 1930. The owners of the golf course by reason of these changes in grades aforesaid, are claiming damages to the extent of $150,000.00.

It was stipulated that the Roosevelt Road and Route No. 53 intersect at a point within the southern boundary of the village of Glen Ellyn, Illinois, and that these two highways have been owned, operated and controlled by the State of Illinois, through its Division of Highways, Department of Public Works and Buildings, for the past several years, and that Route No. 53 at that time of the taking of the testimony was under construction, but when completed would be improved with concrete, and it was then contemplated by the Division of Highways to eventually complete an underpass on Route No. 53 where the same crosses Route No. 6 which required a lowering of the grade of Route No. 53 to effectuate that purpose.

From the south line of Route No. 6 there is a concrete retaining wall on either side of the excavation of Route No. 53 which has a height of 18 feet at the southerly limits of Roosevelt Road and extends south from that for a distance of 470 feet before it reaches grade, and it is 9 feet on either side from the retaining wall to the property line, and that on the north side of Roosevelt Road there is a wall on either side of

Route No. 53 of the same height and extends from the north approximately the same distance and is of equal distance from the property line.

The Newman property, claim No. 2000, consisted of:

Lots 9 and 10 in Block 24 First Addition to Roosevelt Garden Homesites, a subdivision of part of the West half of Section 13, Township 39, North, Range 10, East of the Third Principal Meridian,

and lies immediately east of said Route No. 53 and immediately north of the Roosevelt Road and was purchased in 1929. Margaret Y. Newman claims damages in the sum of $20,000.00 by reason of the change of the grade.

Robert A. Marsh and Dagmar Marsh are the claimants in cause No. 2001 and claim to be lawfully possessed of:

Lots 20 and 21 in Block 19 in Roosevelt Garden Homesites, a Subdivision in the South East Quarter of Section 14, Township 39 North, Range 10 East of the 3rd Principal Meridian, as per plat recorded May 5, 1921, in Book 9 of Plats, Page 61, Document No. 148152, situated in the Village of Glen Ellyn, in DuPage County, Illinois.

The premises are immediately west of Route No. 53 and immediately north of the Roosevelt Road extending north along Route No. 53, 150 feet and west along Route No. 6, 100 feet, and claimants claim damages in the sum of $25,000.00 by reason of the change of the grade.

Claim No. 2011 is the claim of Bridget Morris, who is the purchaser under a contract for deed of:

Lots 1, 2, 3 and 4 in Block 1 in Roosevelt Hills Addition to Glen Ellyn, Illinois, in Section 23, Township 39 North, Range 10, East of the Third Principal Meridian, situated in the Village of Glen Ellyn, DuPage County, Illinois.

These premises lie immediately west of and adjoining said Route No. 53, and her premises extend 117 feet along said Route No. 53 from the Roosevelt Road. Claimant claims damages in the sum of $30,000.00 by reason of the change of the grade.

These cases have been well prepared at no small cost by exceedingly able and efficient counsel.

The Attorney General has made a motion to dismiss. The purpose was to raise the question as to the jurisdiction of the Court of Claims to hear and determine actions for damages to lands not taken but damaged by reason of hard road construction. It has been held by this court that in the build-

ing and maintenance of highway and hard surfaced roads, the State is exercising a governmental function and acting in its sovereign capacity, and, therefore, there can be no liability.

This court has in other cases made awards under similar conditions. Section 13 of Article 2 of the Constitution provided as follows:

"Private property shall not be taken or damaged for public use, without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law."

We regard this provision of the Constitution as being the fundamental law of this State and outweighing in importance and principle the general rule that the State, in building and maintaining of highway and hard surfaced roads, is exercising a governmental function and acting in its sovereign capacity, and therefore not liable.

By reference to the constitutional debates it will be seen that this provision of the Constitution was given very serious consideration, and Section 26 of Article IV of the Constitution provides: "The State of Illinois shall never be made defendant in any court of law or equity." During the discussions at the Constitutional Convention the question was asked: "If it was designed that the State may take private property without paying for it, or may take it without a jury any more than anybody else." While the convention was of the opinion that the State should not be sued, reference to other parts of the constitutional debates were to the effect that the State could do no harm, the State being the people, and it would fairly recompense any citizen for damage to his property.

Under the Legislative Act creating this court, and under the Constitution, this court takes the position that it has jurisdiction to fairly determine what damage, if any, these claimants have suffered and the motion to dismiss is accordingly overruled.

The statute creating the Court of Claims makes the court the judges of the law and the facts. In other words, we are to determine what the law is and what the facts are. We are, therefore, to consider the facts in this case as nearly as possible the same as a jury at the trial of a common law case would consider them and apply the same rules of law as nearly as possible as the Supreme Court would apply them were the case before that branch of the government.

In examining the testimony of witnesses concerning damages suffered by the claimants, we think that they are greatly in error in fixing the amount of the damages that these claimants are entitled to. It does not appear that these witnesses have given much consideration, if any, to the depreciation in value that all real estate throughout the entire country has suffered during the last five years, and in fixing damages for property located at the intersection of two streets, each of which are alleged to have damaged the private property. This court will not treat them as separate cases and the owners be entitled to double damages for the reason that that would manifestly be improper.

It is not contended by either of the claimants that either improvements took any of their private property, but they are asking only consequential damages on account of the change in the grade.

Injury or damage to property not taken in the construction of an improvement for which compensation is to be made must be a direct physical injury or disturbance of a right which the owner enjoys in connection with the property and causing damage in excess of that sustained by the public generally, and it is improper to treat that portion of the property which may be injured as a distinct and separate tract from such portions as may be benefitted. If the inconvenience of the road to a certain selected part of the tract will be outweighed by the additional convenience of the road to the residue of the tract, the tract will not be damaged by the inconvenience of the road. A partial effect only is not to be considered, but the whole effect; or in other words, the damage to the whole tract can only be considered, and it has been held that this is not deducting benefits or advantages from damages, but is merely ascertaining whether there be damages or not.

The burden is upon the petitioner to show the fair cash market value of the property and alleged injury must be based upon lawful and proper elements of damage and not upon conjecture of speculation.

One of these claimants has put in proof showing loss of profits while the improvements upon both of these roads were under construction. The State had the right to change the grades of these roads, and there is no complaint that the

action of the State was illegal or wrongful, that the work was unskillfully done or that there was any unreasonable delay in its execution. There was no physical taking of the claimants' property, but it is claimed that there was a diminution of the value of their property.

It is well settled that inconvenience, expense or loss of business occasioned to abutting owners by the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the constitution.

Chicago Flour Co. vs. *Chicago*, 243 Ill. 268 and cases therein cited.

Much testimony that is incompetent was offered by claimants and apparently was given at a time before the improvement on Bryant Avenue was completed and was given with reference to conditions existing at the time the witnesses testified, and it would seem that the witnesses had not considered their testimony with reference to a completed improvement. Depreciation of the value of property was apparently by one witness based upon the fact that the Village ordinance provided that a building at that particular location, that is at either one of these corners, all four corners being within the village limits of the village of Glen Ellyn be required to be set back fifty feet from the center of the road "however the Highway Department says they must be back one hundred feet from the middle of the road". This same witness testified to values based upon trades of property in that vicinity and also as to hearsay testimony: as to business of an oil station some distance away. He had been informed that such oil station sold 10,000 gallons of gas per month at a profit of $0.04 per gallon and 200 gallons of oil at a profit of $.50 per gallon, making a gross profit of $500.00. By no stretch of the imagination could this be considered as proper evidence.

The main frontage of all this property of the claimants is on Roosevelt Road, and it is true that the evidence shows a marked depreciation in valuation and the court cannot over-

look the fact that that same condition prevailed in regard to other property not touched by an improvement consisting of a forty foot concrete road which is entirely paid for by the State and to which the claimants have not contributed one cent directly and only an infinitesimal small sum indirectly. To say that all of this improvement has not been of a material benefit to the Glenbard Golf Club, Inc. would be such a gross mistake of fact as to be positively unfair to the taxpayers of Illinois.

Some of the values are based upon tables used by real estate men which tables were consulted by the witnesses in arriving at their conclusions as to values. Our attention has not been directed to any rules of law wherein such tables have been recognized by the courts as being competent in such cases, and we are of the opinion that there is no such rule of law for the reasons that the conditions determining values are too unstable and uncertain to even permit such a rule to be remotely helpful in such cases.

Under our view of the case, we will consider what damages have been done to the tract of 129 acres owned by the Glenbard Golf Club, Inc. It was stipulated that a traffic count was made of the east and west bound traffic on Roosevelt Road at the intersection of State Route No. 53 on October 1, 1932 and ending October 7, of the same year from six in the morning until six at night on each date; that 11,124 cars passed these corners going east and 12,614 were west bound. We cannot overlook the fact that beyond question this traffic was the result of a large expenditure of public funds in creating the improvement on Roosevelt Road, and we are at a loss to determine why this would not be beneficial to business property. The Golf Club Company purchased the 129 acres upon which the golf course is located in 1930. The property consists of 129 and a fraction acres, and the purchase price is alleged to have been $85,000.00, or approximately $650.00 per acre. The next year the golf company expended the sum of $70,000.00 on this property to make it a golf course, and this did not include the sum spent for the erection of the building on the northwest corner of the property.

In ascertaining compensation to the owner of property appropriated for public use, he is entitled to its value, for

most profitable use for which it is available, but such availability does not refer to future possibility, but to present capacity which may be anticipated with reasonable certainty.

On principle, this rule would apply to the damaging of property which has not been taken and from the evidence, we are of the opinion that the property owned by the golf company has its greatest value as a golf course. Only about two years elapsed from the time the property was bought for a golf course, and less than two years after the property was completed as a golf course to when the claim was filed in this court, and that was during a period of the greatest depression that this country has ever witnessed.

The respondent admits that as to the Newman, Marsh and Morris lots or tracts appreciable damage has resulted chiefly by reason of complete loss of direct ingress and egress from Bryant Avenue. These are small tracts consisting of from two to four lots with approximately equal frontage of about 100 feet on Roosevelt Road and possessing a depth of 116 to 150 feet. These lots are all portions of sub-divided property within the village of Glen Ellyn, located about one and one-half miles distant from the business section of the village. The Newman property, unimproved, is located in a subdivision known as the First Addition to Roosevelt Garden Home Sites, consisting of 285 lots. This subdivision has been open for a period of twelve years and only 8 lots are improved. The Marsh property, improved by a small frame building, forms a part of a subdivision known as Roosevelt Garden Home Sites, consisting of 557 lots. This subdivision has also been open for a period of twelve years with only 8 lots improved. The Morris property is unimproved and forms a part of a subdivision known as Roosevelt Hills Addition consisting of 298 lots. This subdivision has been open for development for ten years but the record does not disclose that any of the lots are improved. Accordingly, it would seem that all of these subdivisions were of premature development. Combined they consist of 1,130 lots in three subdivisions and only 16 lots are improved, two of these being the Marsh lots. The State argues that when these facts are taken into consideration with the general economic conditions that have prevailed for several years last past, that the real estate experts called by the claimants have greatly

overestimated the fair cash market values of these properties, and that the values fixed on these properties were no doubt based upon inflated values common in subdivisions generally until 1930, and we cannot ignore the State's contention in this regard.

The contention is made by claimants in all of the claims that by reason of the bridge constructed on Roosevelt Road where the same crosses Bryant Avenue, traffic is prevented from driving upon the properties as easily as before, and it is contended that since all the tracts possess a frontage of 100 feet or more on Roosevelt Road such damage or enconvenience is inconsequential.

From the evidence in this case, we are of the opinion, that the value of all of these tracts arise principally from the fact that they front on Roosevelt Road.

In considering the evidence pertaining to the value of the Newman property as of January 1, 1932, having a frontage of 108 feet on Roosevelt Road, at $100.00 per front foot or a total value of $10,800.00, and that after the improvement this property had a value of about $8,640.00, the difference being $2,160.00 or $20.00 per front foot, we are of the opinion that that represents the damage to this property.

The State's witnesses put a value on the Marsh property as of January 1, 1932, prior to the improvement, which property consisted of 100 feet on Roosevelt Road, of the same relative value as the Newman property or $10,000.00, and that this property suffered the same proportionate loss from right of access owing to the lowering of the grade in Bryant Avenue, and that the damage to the fair cash market value of these two lots with a total frontage of 100 feet on Roosevelt Road attributable to the road improvement on Bryant Avenue was the sum of Two Thousand Dollars ($2,000.00). The value of the buildings upon the Marsh property is admitted to have been $1,500.00 prior to the improvement, and the evidence shows that the buildings were worth $1,000.00 after the improvement, the difference of $500.00 representing a reasonable estimate of the cost for moving these buildings back from the front of the lots, and the State recommends an award to this property in the sum of $2,500.00.

In considering the Morris property, the evidence shows and it is admitted by the State that the fair cash market

value of these four lots possessing a total frontage of 105 feet to be $100.00 per front foot or a total value of $10,500.00 as of January 1, 1932, unaffected by the improvement; that one year later it possessed a value of $9,450.00. The damage to these lots directly attributable to the road improvement therefore is $1,050.00. This property was not damaged as greatly as the Marsh and Newman properties by reason of the road improvement because of the fact that these lots are more shallow in depth and because of the existence of a 24 foot strip lying between the east line of the property and the concrete wall on Bryant Avenue.

Claimant's witnesses in fixing the value of the golf club property based their estimate of damage by arbitrarily taking out of the whole tract of 129.5 acres, two tracts, one of which has a corner frontage of 100 feet on Roosevelt Road with a depth of 150 feet along Bryant Avenue, and the other lying immediately to the south, having a frontage of 330 feet on Bryant Avenue and a depth of 100 feet. These tracts apparently have been considered by claimants' witnesses as subdivided property although it does not appear that any part of this 129 acre tract has ever been subdivided. The claimants' witnesses were of the opinion that the highest and best use for this tract is for subdivision purposes and the State contends that its highest and best use was for golf club purposes, and that the estimate of damages should be based upon the damage which might have resulted to the tract as a whole. In this regard we agree that damages, if any, must be estimated to the whole tract. Some witnesses for the claimants estimated the fair cash market value of the golf tract as of January 1, 1932, prior to the improvement as $900.00 per acre, although only a short time prior to that time it appears that $650.00 per acre was paid for this property, and they also placed the value of this property as of January 1, 1933, after the improvement, as $876.84 per acre, or a total of $113,550.00, there being a difference of about $3,000.00 representing the damage to the golf club tract due to the road improvement on Bryant Avenue, and this would be ample to take care of the cost of constructing a service driveway upon the golf club grounds so as to secure direct access to Bryant Avenue, and it was admitted by all that a new 20 foot concrete pavement on Bryant Avenue, or what

is known as Route No. 53, with the full frontage of the golf course on Route No. 53, which replaced a previous dirt and gravel road, was of direct benefit to the golf course.

Considering the testimony of all the witnesses and the personal inspection of all of this property by the court, and harmonizing this evidence as much as possible, we recommend that the sum of $11,000.00 be paid to Glenbard Golf Club, Inc., Claim No. 1997; the sum of $5,000.00 to Margaret Y. Newman; the sum of $7,000.00 to Robert A. and Dagmar Marsh; and the sum of $4,000.00 to Bridget Morris. An award will be denied in Claim No. 1825.

(No. 2003—Claimant awarded $1,363.35.)

WILLIAM GRADY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

A. M. FITZGERALD, H. C. MOORE AND GILLESPIE, BURKE & GILLESPIE, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where employee of State sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation may be made therefor, under provisions of the Act.

SAME—*filing of amended claim under.* Where claim for compensation is filed in apt time, filing of amended claim, after expiration of time fixed in Act does not constitute filing of new claim.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

William Grady, the claimant, 68 years old, has been in the employ of the State at its power plant as a fireman, at Springfield for 21 years. On May 20, 1932, he had been assigned to the duty of operating the coal and ash conveyor equipment, and in the performance of these duties, he noticed an irregularity of operation, and proceeded to the boiler room to give notice. The room where he was walking was not well lighted and he stepped into a boiler blow-off basin, the inspection cover of which had been removed by some other employees who were cleaning sediment from this basin.

The space underneath what appears to be a sewer, had been filled with boiling water that morning and the water was still very hot when Grady met with the accident.

He was taken to St. John's Hospital and Dr. C. S. Mayes was called. Claimant had a third degree burn on one of his legs, that is, a burn which involves the tissues beneath the skin and the muscles. The burn extended from three inches below the knee down the entire leg, except the toes. Either the same day he was taken to the hospital or the next day, he expressed a desire to go home, and was taken there and was treated by Dr. Mayes, daily, sometimes several times a day, and sometimes it was necessary to treat him at night time in order to relieve his pain and suffering. The doctor testified that he was of the opinion that the burns received by claimant would have a permanent effect. A third degree burn, according to the doctor's testimony, is of such nature as nearly always involves the circulation. The scar tissues in the process of healing will include a number of blood vessels, and will draw up the muscles in the heel, and make it shorter and interfere with the motion of the limb, and will cause a leg swelling because of poor circulation, due to the scar tissue flesh.

Dr. Mayes bill was $496.00 and Grady paid this.

Claimant first filed his claim in October, 1932. On January 8, 1934, and before the hearing, he filed an amended bill. Objection is made to this for the reason that it states another and different claim. We cannot agree with this. We hold that his claim was filed in apt time.

Dr. Mayes contends that claimant has been permanently injured and has suffered a 75% loss of the use of his right leg. There is also evidence in the record which shows that his specific loss amounts to 25% of the use of the leg. From the evidence it appears that he walks around and gets around considerably, and we think that the evidence showed an approximate loss of 50% of the use of the leg.

From the time of the injury up until March 1, 1933, he was receiving $150.00 per month as his wages. On March 1, 1933, his wages were cut 10%, and thereafter, he received $135.00 per month. He was only entitled to compensation on the basis of $15.00 per week. There was therefore an overpayment of $557.65. He was also entitled to $496.00 on account of his doctor bills. There is evidence in the record

to sustain a finding of 50% loss of the use of the right leg. Item 15 of Par. D of Section 8 of the Compensation Act provides compensation for the permanent complete loss of the use of a leg 50% of the average weekly wage during 190 weeks. There are other provisions of the Compensation Act, which in this instance fix the weekly wage at $15.00 per week. He, therefore, would be entitled to ½ of the sum fixed by Statute for the complete loss of the use of the leg. That would be the sum of $1,425.00. He has been overpaid the sum of $557.65, but he is entitled to the sum of $496.00 as his doctor bill. After deducting the overpayment and adding the doctor bills, we find he is entitled to an award in the sum of $1,363.35, and that sum is recommended.

(No. 2219—Claimant awarded $4,093.56.)

FREELY GRAEFF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

ISAAC K. LEVY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where facts are undisputed that claimant sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award may be made, justified by the evidence, in accordance with the provisions of the Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Freely Graeff, the claimant, was employed by the State of Illinois in its Department of Public Works and Buildings, Division of Highways, and was on the 12th day of January, 1933, engaged in the work of maintaining a hard-surfaced public road known as State Bond Issue No. 13 between Carbondale and Vergennes, and was known as a maintenance helper. At or near Carbondale, at that time, the State maintained a Highway Department Garage, in which various road making and road repairing equipment were stored when not in use, and on the date hereinabove mentioned, the claimant was riding on a road grader which was being pulled by an auto truck, and after doing certain work on said Route 13,

this grader was being taken to the garage by the claimant and another employee. The blade of the grader came in contact with a part of a railroad crossing of the Illinois Central Railroad Company, which railroad crosses Route No. 2, a short distance south of the garage. The jerk occasioned by the blade coming in contact with some object on the railroad crossing, caused the claimant to be violently thrown to the ground and severely injured his back and spine and apparently he will be crippled for life.

Claimant had been paid at the rate of forty cents per hour or $21.60 per week, and had been earning that wage for the year preceding his injuries; he is forty-six years old; married and has a wife and one child under sixteen years of age with whom he resides and who are dependent upon him for support. Medical, surgical and hospital treatment were furnished him by the State prior to April 15, 1933, but no medical and surgical treatment has been furnished him since that time. He has received all told, the sum of $126.22.

The Attorney General says that there is no dispute as to the facts, the only dispute being as to the extent of the permanent disability.

On July 9, 1934, Dr. R. S. Sabine found that the claimant, in his then condition would not be able to perform manual labor that would require movement of the back and bending. On the same date, Dr. E. K. Ellis stated that in his opinion the claimant was not physically able to perform manual labor and did not think that he would be able to do any physical exertion in the future that would require the use of his back. Dr. B. F. Craine of Carbondale testified that he had seen the claimant right after the injury and that he was suffering from a bruised place and cut on the back of his head and his back was bruised, and that he had been taken to the Holden Hospital. After ten days or two weeks he went to Craine's office and Dr. Craine sent him to Dr. Ellis at Murphysboro, because it was more convenient for the claimant to go to Murphysboro than Carbondale. He found that the claimant had a chronic arthritis, kind of lipping over the processes.

There is ample testimony in the record to show that claimant is permanently injured and unable to do any work, and the claimant himself testified on July 17, 1934 that he observed no change whatever in his physical condition; that he has pains in the back and it hurts him to lean forward;

that if it was necessary for him to get anything off the floor, he would have to get down on his knees and then have something to pull himself up by; that he cannot stand but a few minutes on his feet and then he commences to tremble; that he suffers pain when he walks and when he lies down; that he cannot sleep on his side; that he cannot lie in one position very long; that he rests pretty good one or two nights a week; that he has a feeling like cold water running over his legs, starting about his hips; that he had not done a thing since the day he was injured; that he had had no trouble prior to his injury with his back and was able to do a full day's work of manual labor.

Dr. C. D. Nobles, Acting Assistant Managing Officer for the Anna State Hospital, made a report and stated that considering claimant's occupation, it appeared that he had a permanent disability; that the claimant could perform no duty which would require much walking, bending, or sitting long at a time; that the injury was questionable as to being total but was probable, but the partial disability will be continuous, and gave as his judgment that he was suffering a 60 to 70 per cent total disability, and that mental conditions may follow; that the claimant impressed him as being honest and fair.

From an examination of the record we conclude that claimant has been totally disabled; that under the Compensation Act he is entitled to $4,450.00, and a pension for life as provided by Statute. In a private employment, under the law, he would be entitled to 416 weeks on an average of $10.70 per week. From the time of the injury until August 2, 1935, if an appropriation is made pursuant to our recommendation, he will have coming to him $1,423.10 for 133 weeks, plus $9.50 for a part of a week, making a total of $1,432.60, leaving 282 weeks to be computed pursuant to law. This makes the sum of $2,787.18. This must be done because there is no way that weekly payments can be made owing to the fact that appropriations would lapse before entirely paid out. Deducting the sum of $126.22 which had been paid to him from the $1,432.60 which will be due as of August 2, 1935, when we estimate the appropriation, if made, will be paid to the claimant, leaves the sum of $1,306.38. Adding this to the sum computed, makes the sum of $4,093.56, which award we made and recommend that the Legislature make an appro-

priation for that sum payable to Freely Graeff; but we will continue this case on our docket for future consideration as to the pension in accordance with law.

(No. 2037—Claimant awarded $560.00.)

GEORGE F. GRAESCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

BEN H. TOWNSEND, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made to State Highway Policeman under.* Where State Highway Policeman sustained accidental injuries resulting in loss of first phalange of his thumb, while adjusting and cleaning motorcycle furnished him by State for use in the performance of his duties as such policeman, an award for same will be made in accordance with the provisions of the Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on December 29, 1932, for the sum of $560.00 and alleges that on June 26, 1932, claimant was in the employ of the State of Illinois as a State Highway Policeman and while on duty it became necessary for him to adjust and clean the driving chain of the motorcycle furnished him by the State, and while so adjusting and cleaning the driving chain, his thumb caught between the driving chain and the sproket wheel, and was so injured that amputation of the first phalange of the thumb became necessary.

Proper report was immediately made and he was off duty two days, but for several weeks it was necessary for a doctor to dress his injured thumb daily, from June 26th to July 21, 1931.

Claimant received $175.00 per month, and was married and had two children under sixteen years of age.

For the loss of a thumb or the permanent use thereof, under the Compensation Act, he would be entitled to 50% of the average wage during 70 weeks, but not less than $7.50 per week, or more than $15.00 per week, except where the maximum of $15.00 per week is provided, such maximum shall be increased in case of two children under sixteen years of age, to $16.00 per week, and the loss of the first phalange

of the thumb is considered to be equal to the loss of one-half of the thumb, and compensation shall be one-half of the amount above specified.

He is, therefore, entitled to the sum of $560.00 and an award in that amount is recommended.

(No. 2517—Claim denied.)

GRAYSLAKE GELATINE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

MOSES, KENNEDY, STEIN & BACHRACH, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

FRANCHISE TAX—*when award for return of denied.* Where it clearly appears that amount paid by claimant was correct under the law an award will be denied and case dismissed.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

It appears from the stipulation of facts herein that claimant is an Illinois corporation; that on January 23, 1934, it filed its annual report in the office of the Secretary of State, in which report the outstanding capital stock of the corporation was set forth at $320,000.00; that on May 15, 1934 the Secretary of State assessed a franchise tax on said capital stock for the year commencing July 1, 1934, according to law, in the amount of $160.00; that on June 26, 1934 the claimant paid the amount so assessed against it; that thereafter and prior to July 1, 1934, claimant reduced its capital stock from $320,000.00 to $160,000.00; and that the correct amount of the franchise tax on a capital stock of $160,000.00 is $80.00.

Claimant filed its complaint herein on October 16, 1934, and seeks to recover the sum of $80.00 which it claims to have paid in excess of the amount which it was legally required to pay on its decreased capital stock as aforesaid.

The provisions of Section 132 of The Business Corporation Act of this State, in force July 13, 1933, relative to the basis for the annual franchise tax of domestic corporations are as follows:

"The basis for the annual franchise tax payable by a domestic corporation shall be the amount represented in this State, determined in accordance with the provisions of this Section, of the sum of its stated capital and paid-in surplus on the thirty-first day of December of the preceding calendar year as disclosed by its last annual report, or, in case no annual report has been filed, as disclosed by any other report or document filed by it with the Secretary of State."

However, such paragraph was modified by an amendment approved and in force May 8, 1934, and now provides as follows:

"The basis for the annual franchise tax payable by a domestic corporation shall be the amount represented in this State, determined in accordance with the provisions of this Section, of the sum of its stated capital and paid-in surplus on the thirty-first day of December of the preceding calendar year, minus the amount by which the sum of the stated capital and paid-in surplus may have been reduced after the thirty-first day of December of the preceding calendar year and prior to the twenty-fifth day of June of the current calendar year, as disclosed by any report or document filed by it with the Secretary of State."

Inasmuch as claimant's capital stock was not reduced until after the 25th day of June, A. D. 1934, the franchise tax in question was properly based upon "the sum of its stated capital and paid-in surplus on the 31st day of December of the preceding calendar year", to-wit, $320,000.00.

Claimant therefore paid the amount which it was legally required to pay.

Award must therefore be denied.

Award denied. Case dismissed.

(No. 2039—Claimant awarded $168.50.)

AUGUST W. GRUNZ, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

AUGUST W. GRUNZ, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for medical expenses may be made under.* Where the facts are undisputed and the evidence fully sustains the claim, an award may be made for moneys expended by State employee for medical services rendered him on account of personal injuries sustained while in performance of his duties in an occupation within the Workmen's Compensation Act when no objection is made to such allowance.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant makes claim for the sum of $168.50 that he paid to Dr. H. B. Warren for treating claimant for injuries received on the 10th day of May, 1931, while he was acting as a Highway Maintenance Policeman for the State of Illinois, in an automobile accident on Route No. 12.

The evidence fully sustains the claim and there is no dispute as to the facts. At the time of the injury the claimant was under the Compensation Act and the Attorney General states that he has no objection to an award being made for the sum of $168.50, being the full amount of the claim.

We, therefore, recommend that an appropriation be made to August W. Grunz, for the sum of $168.50.

(No. 2609—Claimant awarded $32.00.)

ERNEST W. GUTZMER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

ERNEST W. GUTZMER, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*State liable for medical treatment furnished employee injured while working under.* When a State employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment and requires and is given medical treatment as a result thereof, the State becomes liable for the reasonable value thereof.

MEDICAL SERVICES—*when award may be made for.* Where it clearly appears that duly licensed physician and surgeon rendered necessary medical services to State employee for accidental injuries, within the purview of the Workmen's Compensation Act, charge for which is reasonable and no objection is made to claim for same, an award may be made therefor.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant is a licensed physician and surgeon. On June 23, 1933 he was called to take care of Robert Dunham, who was an employee of the State of Illinois, working on S. B. I. Route No. 54, at or near Elmhurst. Dunham was injured by a hit and run automobile driver. Dunham sustained these injuries while in the course of his employment.

It appears from the testimony that the claim of the claimant, for the sum of $32.00, is reasonable for the services rendered. We have heretofore held that:

"Where a State employee, employed in a hazardous employment, is injured in line of duty and requires medical treatment which is given, the State becomes liable under the Workmen's Compensation Act."

Marquis vs. *State*, 7 C. C. R. 88.

There is no objection on the part of the Attorney General to the allowance of this claim.

We, therefore, make an award in the sum of $32.00 in this case.

(No. 2026—Claimant awarded $2,846.91.)

SAMUEL J. HOWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

FRED B. HERBERT, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award will be made under.* Where claimant sustains accidental injuries, arising out of and in the course of his employment, while engaged in employment declared to be extra-hazardous, an award will be made under the provisions of the Workmen's Compensation Act.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

On the 17th day of August, A. D. 1932, and for some time prior thereto, claimant was in the employ of the respondent as a carpenter in erecting forms for the rock crushing plant then being built by the State of Illinois at the Southern Illinois Penitentiary at Menard, and was being paid the sum of $168.00 per month, with one-fourth maintenance which is equivalent to $6.00 per month. Prior to the time of his employment by the State he had been engaged in work as a carpenter and contractor for a number of years.

On the date above mentioned, while in the performance of his duties in connection with the erection of said rock crushing plant, claimant sustained a fracture of the left arm, between the wrist and the elbow, as the result of being struck

by falling timber. He was taken to the prison hospital but apparently the only person there who could give him medical attention was a medical student by the name of Weatherby who was working in the prison hospital. Claimant refused to permit Weatherby to set his arm and was then taken to St. Andrews' Hospital at Murphysboro where he was attended by Dr. Hrabik. X-ray and fluoroscope examination disclosed a fracture of both bones of the forearm. An attempt was made to reduce the fracture and a wooden splint was applied. Upon X-ray examination after the reduction it was found that the splint was not holding the bones in proper position, so the patient was put to bed and a Thomas splint applied to the arm for a period of six days. At the end of that time the fracture was reduced and the arm placed in a cast and kept in such cast for a period of about six weeks. Thereafter it was carried in a splint for four weeks longer, with instructions to remove the same daily and massage the forearm. After that there was some treatment by way of massage as well as heat and electrical treatment. It appears that there is a nerve involvement with resulting disability.

Claimant submitted to examination by Dr. Ralph May and Dr. A. F. Barnett, the prison physicians at Illinois State Prison at Menard. From the report of the examination made by such doctors, as well as the report made by Dr. Hrabik, the physician who treated the claimant at the time of the accident, it appears that he has sustained a permanent and complete loss of seventy-five per cent of the use of his left arm.

Claimant paid the hospital bill of St. Andrew's Hospital in the amount of $68.50. The bill of Dr. Hrabik in the amount of $79.50 remains unpaid.

Notice of the accident was given and claim for compensation made, in accordance with the requirements of Section 24 of the Act.

Claimant was paid his regular salary during the time that he was off work on account of the injury, and makes no claim for temporary total disability.

At the time of the accident he was a married man and had two children under sixteen years of age, and therefore under the provisions of Section 8-d-4 claimant is entitled to recover compensation for a period of 168¾ weeks for the permanent and complete loss of seventy-five per cent of the

use of his left arm, payable in weekly installments of $16.00 per week commencing on the 18th day of August, A. D. 1932.

Payment of compensation in weekly installments, however, is not practicable under existing laws.

It is therefore to the best interests of all parties concerned that the unearned compensation be commuted to an equivalent lump sum in accordance with the provisions of Section 9 of the Workmen's Compensation Act.

The total amount of the compensation to be paid after commutation of the unearned portion thereof to an equivalent lump sum as aforesaid, is $2,698.91. Claimant is entitled to an award for that amount and in addition thereto the sum of $148.00 for hospital bills paid and medical bills incurred by him as aforesaid, making a total of $2,846.91.

Award is therefore hereby entered in favor of the claimant for the sum of Twenty-eight Hundred Forty-six Dollars and Ninety-one Cents ($2,846.91).

(No. 2350—Claimant awarded $608.74.)

JOURNAL PRINTING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

JOURNAL PRINTING COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SERVICES RENDERED AND SUPPLIES FURNISHED—*when award may be made*. Where it is conceded that claimant rendered services and furnished supplies to State, and has not been paid therefor, because of lapse of appropriation for the purpose, and amount is unquestioned, an award will be made for such services and supplies.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The Journal Printing Company, a corporation, doing business at Springfield, Illinois, is engaged in the business of printing and bookbinding.

It alleges that on or about the 3rd day of June, 1933, the State of Illinois, through its Division of Printing, gave the Journal Printing Company an order to print and bind 1,000 copies of the 32nd Annual Report of the Illinois State Bee-

keepers Association, and pursuant to that order, the Journal Printing Company made delivery on September 23, 1933 to E. J. McCormick, Secretary, Illinois State Beekeepers Association, and presented a bill for the cost of said printing and binding to the State Superintendent of Printing on September 19, 1933, and was advised that the appropriation from which payment for this work should have been made had lapsed, and that no funds were available to make payment of this claim amounting to $608.74.

No question arises about the facts. The voucher in payment of this account was issued September 23, 1933 by the Illinois State Beekeepers Association and transmitted to the Department of Finance. Somehow, the voucher was lost in the Department of Finance and did not clear before the appropriation lapsed. Consequently, payment was not made.

It has been the holding of this court where services were rendered and supplies furnished to the respondent, for which an appropriation had been made, but for which payment was not made before such appropriation lapsed, an award will be made for the amount upon the recommendation of the department receiving same. In a letter dated March 27, 1934, from E. T. Rank, Superintendent of Printing, it was recommended that the claim be allowed, and the Attorney General in his brief states that in his opinion, this is a claim which the State should pay.

Therefore, an award is made in favor of claimant in the sum of $608.74.

(No. 2548—Claimant awarded $14.35.)

DOROTHY L. KAY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1934.

DOROTHY L. KAY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

TRAVELING EXPENSES—*when award may be made for.* Where State employee is obliged to travel, and is allowed expenses therefor, necessarily incurred in the performance of her duties, but bill for same is not presented before lapse of appropriation out of which they could be paid, an award may be made where proper State department certifies amount as correct and claim is filed within reasonable time.

Mr. Justice Linscott delivered the opinion of the court:

During the month of April, 1933, the claimant was employed as Assistant Director of the Department of Public Welfare, State of Illinois; that she was appointed to accompany an eastern group of patients for deportation and deliver Nick Dotsonlis from the Kankakee State Hospital to Hartford, Conn.

In the performance of such duties, her traveling expenses are allowed. No question arises on whether the duty was performed, and she has filed an itemized statement of her expenditures in the sum of $44.35. The Director of the Department of Public Welfare states in his opinion it is a just claim and should be allowed, and would have been allowed had it been presented in time to be paid out of the appropriations of the last biennium, but it was not presented before the appropriations lapsed. "In such cases, this court has repeatedly made awards."

(*Ruediger* vs. *State*, 7 C. C. R. 11;
Miller vs. *State*, 7 C. C. R. 251.)

We, therefore, make an award in the sum of $44.35 for the claimant.

(No. 1827—Claimant awarded $760.00.)

McIlvaine Burner Corporation, Claimant, *vs.* State of Illinois, Respondent.

Opinion filed May 31, 1935.

Wilson & McIlvaine, for claimant.

Otto Kerner, Attorney General; John Kasserman, Assistant Attorney General, for respondent.

Franchise tax—*excess amount paid under mistake of fact—may be recovered.* Where franchise tax, in amount of that lawfully due, is paid under mutual mistake of fact, an award for refund of such excess amount may be made.

Mr. Justice Linscott delivered the opinion of the court:

This claim was filed on November 7, 1931, and it was based upon the fact that the McIlvaine Burner Corporation had paid franchise taxes to the State of Illinois in an amount in excess of the amount required to be paid by the claimant

under the terms and provisions of Section 105, Chapter 32, Cahill's Revised Statutes of the State of Illinois.

It appears that the authorized and issued capital stock of claimant is and has been, since the incorporation of said claimant, 5,000 shares, having no par value, and the amount of consideration received by said corporation for each share of stock was $5.00.

For each of the years 1925 and 1926, the claimant paid the State of Illinois $250.00 as a franchise tax assessed against its capital stock, and it is admitted that the franchise tax so assessed was properly assessed under the terms and provisions of the Statute then in force.

For the year 1927, claimant paid the State of Illinois the sum of $275.00 franchise tax, for the year of 1928 the sum of $250.00, for the year 1929 the sum of $12.50, for the year 1930 the sum of $275.00 and for the year 1931 the sum of $12.50, making a total of $825.00. Both the $275.00 payments were payments of franchise taxes plus a 10 per cent penalty, or $25.00 in each instance. The claimant states that a claim in the sum of $760.00 was properly presented to the Secretary of State, and that he refused payment. Under the terms of Statute then in force, each corporation organized under the laws of the State of Illinois, having stock of no par value, was required to pay an annual franchise tax of five cents on each $100.00 received by such corporation for its shares of stock of no par value. This corporation had 5,000 shares of no par value stock, but it only received $5.00 per share. It would, therefore, be required to pay an annual franchise tax of 5c on each $100.00 of the $25,000 received by it as the consideration for the issuance of its 5,000 shares of no par value stock, or an annual franchise tax of $12.50, and a 10 per cent penalty for failure to file its annual report in each instance would be $1.25. Payment under a mistake of fact is generally held to be recoverable, at least where a mistake on the part of the tax officer is made. (87 Minn. 243; 91 Northwestern 890.) The mistake in this instance appears to have been made because of a mutual mistake of fact, and it is the judgment of this court that the claimant be allowed the sum of $760.00 for such mistake.

(No. 2382—Claimant awarded $159.01.)

CHARLES E. McMORRIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

EUGENE L. DAVISON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

EXPENSES INCURRED ON BEHALF OF STATE—*when award may be made for.* Where an employee or officer of the State incurs necessary expenses in the performance of his duties, for which the State is liable, and payment for same is not made because bill is not presented until the lapse of the appropriation out of which same could be paid, an award for amount thereof will be made on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Charles E. McMorris, was a member of the Board, Division of Normal Schools, Department of Registration and Education, and was acting without compensation other than expenses incurred in the performance of his duties.

It is charged that the claimant had expended the sum of $159.01 during the months of April, May and June, 1933, for traveling and personal expenses incurred while acting in an official capacity as a member as aforesaid. He has tendered an itemized statement of his traveling expenses, together with detailed memorandum for the months above mentioned, for the said sum of $159.01 to the proper department, but the same was returned to him. It appears these expenses were itemized on the dates they were incurred, and it appears from the files of the Director of the Department of Education and Registration that the expense accounts were properly filed in his office. These accounts were approved by the proper officers. This is commonplace of the various Normal School Board of Trustees matter which provide that the trustees shall receive their personal and traveling expenses and the auditor is authorized to issue warrants quarterly upon taking the affidavit as to the actual time employed and their personal and traveling expenses. No dispute arises in this instance as to the facts, and it appears that the only reason the amount was not paid is because the claimant did not present his statement for approval before the appropriation lapsed.

The Attorney General makes no objection, and it has been held by this court that:

"Where an employee or officer of the State incurs expenses for which the State is liable and payment is not made because the statement for same is not presented until the appropriation has lapsed, an award for same will be made."

Ruediger vs. *State*, 7 C. C. R. 11;
Miller vs. *State*, 7 C. C. R. 251.

We, therefore, recommend an award in the sum of $159.01 in favor of the claimant.

(No. 2256—Claimant awarded $1,440.00.)

MOLINE-ROCK ISLAND MANUFACTURING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

THOS. P. SINNETT AND J. HAYS BRITTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS—*repeal of law under which organized—franchise tax.* Where corporation is organized under law which is thereafter repealed, with proviso that such repeal shall not affect any right accrued or established under law of organization, prior to such repeal, method of computation of amount of its franchise tax, time when, and period for which paid, are subject to and governed by law under which organized.

SAME—*same—same.* Where under law in effect, franchise tax of corporation is assessed and paid on basis of amount of its authorized capital stock, and thereafter, before commencement of period for which paid, and before effective date of repeal of said law, said capital stock is reduced in accordance with provisions thereof, resulting in decrease of amount of franchise tax due, an award may be made for difference between amount paid and that due on basis of reduced amount of capital stock.

SAME—*reduction of capital stock creating surplus—franchise tax based on.* Where law under which corporation is organized permits reduction of stated capital, is repealed by subsequent law, providing that surplus created by decrease of stated capital is to be regarded as paid-in surplus, and that franchise tax shall be based upon stated capital and paid-in surplus, without providing any means for collection of franchise tax on such capital surplus, there is no authority for payment of franchise tax thereon.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed its complaint herein on November 1, 1933 and seeks to recover the sum of $1,440.00 which it claims to

have paid as a franchise tax for the year beginning July 1, 1933 and ending June 30, 1934, in excess of the amount which it was legally required to pay under the terms and provisions of The General Corporation Act of 1919, as amended.

It appears that on February 27, 1933 the claimant, in accordance with the law then in force, filed its annual report with the Secretary of State, in which it stated that the issued capital stock of the Company was $2,900,000.00. Based upon such statement, the amount of the franchise tax due from the claimant under the then existing law was $1,450.00. Notice of the amount of such tax was forwarded by the Secretary of State to claimant under date of May 15, 1933, and was received by it on June 15, 1933. Shortly thereafter claimant issued its check, payable to the Secretary of State, for the sum of $1,450.00 in full payment of the tax as so assessed. Such check was received by the Secretary of State on June 20, 1933, was endorsed by him to the State Treasurer on June 26, 1933, and subsequently cashed.

On June 17, 1933 a meeting of the stockholders of claimant corporation was held, and a resolution adopted decreasing the amount of the issued capital stock from 29,000 shares of the par value of $100.00 each, to 100 shares of the par value of $100.00 each;—such decrease being effected in the following manner, to-wit:—by the surrender of the 29,000 issued shares of capital stock, by the holders thereof, and the issue to them in lieu thereof of 100 shares of the par value of $100.00 each, so that each holder received 1/290 of a share of stock for each share previously held; and by the creation of a capital surplus of $2,890,000.00.

Pursuant to such resolution claimant made application in regular form to the Secretary of State for a reduction of its capital stock, and on June 29, 1933 the Secretary of State issued his certificate under the seal of the State, setting forth that the claimant had legally decreased its stock as set forth in the aforementioned resolution.

On the same date the Secretary of State also issued and subsequently mailed to the claimant a corrected statement showing a franchise tax due and owing from claimant in the amount of $10.00 on all of its issued capitalization of $10,000.00. Sometime during the early part of July, 1933 claimant received this corrected statement and on July 20,

1933 issued its check in payment therefor. Thereafter and on the 22nd of July, 1933, the Secretary of State wrote claimant in part as follows:

"As it would appear that above company paid franchise tax under date of June 20, I am returning check for $10.00."

However, the check was not enclosed in the letter and is still outstanding.

Thereafter some correspondence was had between the claimant and its attorneys on the one hand, and the Secretary of State on the other, relative to the matter, and on August 1, 1933 the Secretary of State advised the attorneys for the claimant in part as follows:

"The practice has obtained in this office where a decrease is made on or before June 30 that the company is assessed on the new capital stock for the year following.

"Since, however, these fees were paid before the companies decreased their capital stock and have been turned into the State treasury it would appear that the only way they could be recovered at this time would be by filing a bill in the Court of Claims."

The Business Corporation Act of this State became effective on July 13, 1933, the date on which it was filed with the Secretary of State by the Governor without his signature. The last mentioned law expressly repealed the previous General Corporation Act entitled "An Act in Relation to Corporations for Pecuniary Profit," approved June 28, 1919, in force July 1, 1919, as amended.

Section 163 of The Business Corporation Act provides as follows:

"The repeal of a law by this Act shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such law, prior to the repeal thereof."

Inasmuch as the Business Corporation Act was not effective until July 13, 1933, and the franchise tax involved in this case was due and payable on July 1, 1933, the rights of the parties hereto must be determined in accordance with the provisions of the aforementioned General Corporation Act of 1919 as amended, which Act continued in force until the time of its repeal by the Business Corporation Act as aforesaid.

It therefore becomes necessary to determine what rights, if any, claimant had acquired under the provisions of The General Corporation Act of 1919, as amended.

The provisions of such Act which are particularly involved in this proceeding are Sections 34, 59, 105, 108, and 109.

Section 34 provided for a reduction of the capital stock by amendment of the charter, and required the amended charter to show the total amount of the stock already authorized and issued, the amount of reduction and the manner in which it should be effected, and also provided:

"* * * The capital stock may be reduced by the surrender by every stockholder of his shares and the issue to him in lieu thereof of a proportional decreased number of shares, if the assets are not reduced thereby, without creating any liability of the stockholders of such corporation in case of the subsequent bankruptcy of such corporation."

Section 59 provided that when the Board of Directors desired to amend the Article of Incorporation by increasing or decreasing the capital stock, they should give notice of such desire in the notice of the annual meeting of stockholders, or they might call a special meeting of the stockholders of such corporation for the purpose of submitting such amendment to a vote of such stockholders.

Section 105 provided that "each corporation for profit * * * shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock * * * * * * represented by business transacted and property located in this State", etc.

Section 108 provided that "the franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of July in which it is due and ending on the 30th day of June next thereafter."

Section 109 provided as follows:

"The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed, against each *corporation* required herein to make an annual report," etc.

The provisions of The General Corporation Act of 1919 hereinbefore referred to contain ample authority for the de-

crease in the capital stock in the manner adopted by claimant, but make no reference to the effect of such decrease, if any, on the amount of the franchise tax, where the result of the decrease is to create a capital surplus.

In the case of *Interstate Iron and Steel Co.* vs. *Stratton*, *310 Ill. 122*, it was held that no additional franchise tax was payable under Section 105 of the 1919 Act, when a corporation changed each of its common shares of $100 par value into five shares of no par value, although at the time of the change the corporation had a large surplus. The same conclusion was reached in the case of a split-up of shares of no par value. *O'Gara Coal Co.* vs. *Emmerson*, 326 Ill. 18; *The Fleschman Co.* vs. *Emmerson*, 326 Ill. 40.

The case of *The People* vs. *Emmerson*, *305 Ill. 348*, involved the question as to the amount of the annual franchise tax which a certain corporation was required to pay. In considering that question, the court said:

"The tax required by Section 105 above quoted, to be paid by corporations doing business in this State is a tax on the authorized capital stock of such corporations. It is not a property tax and so the value of the corporate assets does not in any way measure the amount of the tax to be paid. In construing Section 105 it is necessary to keep in mind the distinction between capital stock and capital. The capital stock of a corporation is the sum total fixed by the charter or articles of incorporation as the amount paid in or to be paid in as the capital upon which the corporation is to do business. The capital may be increased by surplus profits or diminished by losses, but this does not increase or diminish the amount of capital stock. The funds or capital of the company may fluctuate; its capital stock remains invariable until changed by authority of the State."

The case of *Majestic Utilities Corporation* vs. *Stratton*, *353 Ill. 86*, involved the franchise tax of a corporation which had transferred all of its assets to another corporation in exchange for shares in the latter. Most of these shares had been distributed to shareholders of the former corporation upon a surrender of their shares. The shares so surrendered were actually cancelled and retired pursuant to resolutions adopted by the directors and more than two-thirds of the shareholders, and such cancellation and retirement was stated in the annual report, although no steps were taken to reduce the capital stock under Section 34 or 59 of the 1919 Act. The court held that the franchise tax should be computed only with respect to the shares not so cancelled and retired.

In the consideration of that case the court, on page 93, said:

"Whatever doubt or uncertainty there might be in this regard, it is a fundamental rule of statutory construction that taxing statutes must be construed strictly. (*People* vs. *Chicago and Eastern Illinois Railway Co.*, 314 Ill. 596). In interpreting statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. (*Gould* vs. *Gould*, 245 U. S. 151; *Bowers* vs. *New York and Albany Lighterage Co.*, 273 id. 346.)"

In the case of *Armstrong* vs. *Emmerson, 300 Ill. 54*, the court, in considering the meaning of the words "capital stock" in connection with the franchise tax required to be paid thereon under the Act of 1919, said:

"It is this invariable sum fixed by the charter as the amount to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of the corporate creditors which is ordinarily understood by the term 'capital stock' unless the context indicates a different meaning. The capital stock is not the same thing as the capital of the corporation or its actual property, the value of which may fluctuate from time to time. However much the value of the property of the corporation may increase in the prosecution of a successful enterprise or may be diminished by losses incurred, the capital stock remains unchanged. The fees and franchise taxes which every corporation must pay under the General Corporation Act are fixed by Sections 96 to 107, inclusive, of that Act."

We do not find any case in which the question here involved has been squarely placed before our Supreme Court. The Opinions of the Attorney General for 1933, page 239, indicate, however, that this precise question was presented to the Attorney General by the Secretary of State in February, 1933. In replying to the inquiry of the Secretary of State with reference thereto, the Attorney General there said:

"I do not find any provision in the Corporation Act which would prevent a corporation from decreasing its capital stock in such a way as to create a surplus, which could then be distributed to its stockholders, as provided by the certificate of decrease submitted to you by the above named corporation, and therefore I am of the opinion that you should accept this amendment and file it in your office.

"Neither do I find any provision in the Corporation Act which would prevent a corporation from issuing its capital stock at a price which would create a surplus above the amount of the capital stock, which surplus might

be used for the purpose of carrying on the business of the corporation. Such a surplus would provide greater security for the creditors of the corporation and therefore could not be detrimental to them or the public generally.

"While the creation of a surplus by the methods suggested would reduce the amount of capital stock and thereby reduce the franchise tax to be paid, I am of the opinion that such a surplus may be provided by the corporation and used in its business or distributed to its stockholders, without liability for the payment of a franchise tax on such surplus, under the present provisions of our Corporation Act."

The question as to the right of a corporation to a refund of franchise tax paid, where there was a decrease of the capital stock, has heretofore been considered by this court in the following cases, to-wit: *Interstate Iron & Steel Co.* vs. *State*, *4 C. C. R. 218; Big Four Wilmington Coal Co.* vs. *State*, *4 C. C. R. 279; Perfection Stove Co.* vs. ***State, 5 C. C. R. 268.***

In the ***Interstate Iron and Steel Co.*** case, claimant originally had a capital stock of $7,000,000.00 and paid a franchise tax of $3,500.00 thereon for the year commencing July 1, 1920. On April 26, 1920 it filed in the office of the Secretary of State a certificate decreasing its stock to $6,801,900.00, pursuant to which its franchise tax should have been $3,400.95. Claimant therefore overpaid the sum of $99.05 and an award was entered for that amount.

In *The Big Four Wilmington Coal Co.* case, the corporation had a capital stock of $650,000.00. For some time prior to March 1, 1922 it had not been actively engaged in business but was liquidating its assets which did not exceed $13,000.00 on said first day of March, 1922. On March 6, 1922 the capital stock of the corporation was reduced from $650,000.00 to $13,000.00, and a certificate of reduction was duly filed in the office of the Secretary of State. Thereupon all shares of stock issued by the corporation were surrendered, and in lieu thereof shares were issued to the stockholders in the proportion of the reduced capital stock to the original capitalization of the Company. A franchise tax in the amount of $325.00 for the year beginning July 1, 1922 was assessed against the Company on the total capital stock of $625,000.00 whereas the amount of such tax based upon a capital stock of $13,000.00 should have been $10.00. Award was entered allowing the claimant the amount of the overpayment, to-wit, $315.00.

In *The Perfection Stove Company* case the claimant was an Ohio corporation authorized to do business in this State and having a capital stock of $10,000,000.00. On February 2, 1924 it filed a certificate of increase of capital stock from $10,000,000.00 to $15,000,000.00 and on June 2, 1924 filed a certificate of decrease of capital stock from $15,000,000.00 to $10,000,000.00. Franchise tax for the year commencing July 1, 1924 and ending June 30, 1925 was assessed on the capital stock of $15,000,000.00, to-wit, a tax of $1,000.00, whereas the tax on the capital stock as it existed on July 1, 1924, to-wit, $10,000,000.00, would have been $443.75. In this case award was entered for the amount of the overpayment, to-wit, $556.25.

It appears therefore, that before a corporation can be required to pay a franchise tax, it is necessary that there be some statutory provision subjecting it to such tax, and such statutory provision, under the decisions of the courts, must be strictly construed. Under the statutes in force at that time, the claimant had the right to decrease its capital stock by the method and in the manner which it pursued. There was nothing in the law which prevented it from making such decrease in capital stock and thereby increasing its capital assets. The mere fact that the effect of such decrease in the capital stock would enable the claimant to avoid the payment of practically all of its franchise tax, does not deprive it of its legal rights in the matter. The effect of such decrease was a matter for the Legislature, and if the Legislature did not see fit to provide for such contingency, we have no authority to do so.

In this connection it is worthy of note that the Legislature in enacting The Business Corporation Act, provided therein that a surplus created by a decrease in stated capital is to be regarded as paid-in surplus, and that the franchise tax is based upon the stated capital and paid-in surplus.

The Legislature having authorized the claimant to make a reduction in its capital stock and thereby increase its capital surplus, without providing any means for the collection of a franchise tax on such capital surplus, we have *no authority* to say that the claimant should be required to pay a franchise tax thereon.

Under the law in force on July 1, 1933, the date on which the tax was payable, the franchise tax which claimant was required to pay was $10.00. It had previously paid a franchise tax of $1,450.00, being the amount properly assessed against it by the Secretary of State upon its capital stock as it existed at the time of the making of its capital stock tax return, and at the time of such assessment.

Having overpaid the sum of $1,440.00, without any fault on its part, claimant is entitled to a return thereof.

Award is therefore entered in favor of the claimant for the sum of Fourteen Hundred Forty Dollars ($1,440.00).

(Nos. 1957 to 1964, both inclusive, and No. 1974, consolidated—No. 1957, Claimant awarded $450.00; No. 1958, Claimant awarded $900.00; No. 1959, Claimant awarded $350.00; No. 1960, Claimant awarded $275.00; No. 1961, Claimant awarded $450.00; No. 1962, Claimant awarded $300.00; No. 1963, Claimant awarded $50.00; No. 1964, Claimant awarded $400.00; No. 1974, Claimant awarded $75.00.)

BELLE MOORE, Nos. 1957, 1958, 1959, [illegible] MIKE PELALLIS AND ADELE PELALLIS, No. 1961, GEORGE W. PEMBLE AND HANNAH PEMBLE, No. 1962, JESS M. HERNANDEZ AND ELSIE HERNANDEZ, No. 1963, WILLIAM ENGLAND AND KATHERINE ENGLAND, No. 1964, WILLIAM M. EASTON AND NORMAN W. GEBHARDT, No. 1974, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

WILKINS & BRECHER, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*construction of public improvement causing—what constitutes.* Where private property is not taken for public use but it is claimed that same is damaged by reason of construction of public improvement, it is not essential to right of recovery that there should be proof of a direct physical injury to the corpus or subject of the property, but it is sufficient under the present Constitution of the State of Illinois, if it be proven that there is a direct physical obstruction or injury to the right of user, or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally.

SAME—*same—measure of.* Where private property is not taken for public use, but is damaged by reason of the construction of a public improvement, the proper measure of damages is the difference between the fair cash

market value of the property unaffected by the improvement and its fair cash market value, as affected by it.

SAME—*same—interference with natural drainage and with access to property—proper elements of.* Where construction of public improvement interferes with natural drainage of property not taken for public use and with access to same, such interference is a proper element of damages where value of such property is depreciated as a result thereof.

SAME—*same—obstruction in street interfering with access to private property—what constitutes.* An obstruction or interference with a public street, affecting access to property, need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner.

SAME—*same—dust blowing from roadway constructed and fumes from passing automobiles thereon—not proper elements of.* No recovery can be had by owner of property, not taken for public use, abutting on public highway, for damages claimed to have been sustained to such property, by reason of the construction of such highway, resulting in dust blowing from same and fumes from automobiles passing thereon, as such damages are not special damages with respect to his property, different from and in excess of that sustained by the public generally, but are of the same kind and character as those sustained by the public generally.

SAME—*same—burden of proof.* Where damages are claimed to property, not taken for public use, alleged to have been caused by construction of public improvement, the burden of proof is upon the property owner to prove the damages claimed.

Per Curiam:

All of the above claims, as well as certain other claims now pending in this court, arise by reason of the construction by the respondent of the approach to the Cedar Street bridge in the city of East Peoria, all of which cases are known as East Peoria bridge cases.

All of the claimants herein are represented by the same counsel, and inasmuch as all of the cases grow out of the same transaction and involve the same questions, it has been agreed by counsel for the respective parties, that the cases be consolidated for the purpose of this hearing.

The facts as to local conditions at and during the time involved in these cases, as well as the facts which apply generally to all of such cases, have been fully set forth in the consolidated cases of *George Treharne and Rosie Treharne* vs. *State of Illinois*, No. 1934, and *Russell Youngman and Laura M. Youngman* vs. *State of Illinois*, No. 1935, to which reference is made therefor.

The following facts with reference to drainage facilities prior to and subsequent to the construction of the improvement in question have special reference to the cases other than the Treharne and Youngman cases:

Richland Place Addition prior to the construction of the improvement, was level, flat land with but little natural drainage. The drainage facilities consisted entirely of open ditches, there being no drain tiles whatsoever.

The improvement as originally contemplated provided for no surface drainage except by means of two 18-inch culverts, one beneath the fill on Clark Street and one beneath the fill on Sanford Street. However, after the completion of the improvement, and after the filing of some of the claims herein, a system of tile drains was installed by the State at a cost of approximately $6,000.00, in order to more adequately take care of the surface water. Such system consisted of approximately 3,730 feet of vitrified tile, with joints sealed with oakem grout laid as follows: a 10-inch tile along the south line of S. B. I. Route 121, commencing at Washington Street and extending to the intersection thereof with Monson Street; then a 12-inch tile from the last named point to the north and south alley between Clark and Monson Streets where it emptied into a large catch basin. There was also a stretch of 10-inch tile coming from the west entering into such catch basin. From such catch basin an 18-inch tile was extended south, to the east and west alley north of Maple Street; thence along said alley to the east line of Sanford Street, thence south on Sanford Street to connect with the drainage district ditch. There were numerous catch basins installed along the line of the fill to take care of the surface water which might flow north toward the fill or south from the side of the embankment.

There is a sharp conflict in the evidence as to the natural fall of the land and as to drainage conditions both before and after the construction of the improvement in question. The witnesses for claimants testified that prior to the construction of S. B. I. Route 121, the natural drainage was toward the north to Roosevelt Street, then westerly along the south side of Roosevelt Street to the drainage district ditch. Witnesses for the respondent testified that the natural drainage in a general way was to the west and southwest; that the high point in the addition was a line running east and west about

eighty feet south of the south line of the alley which parallels S. B. I. Route 121; that this line formed a sort of watershed and that the lots north of said line drained naturally toward Roosevelt Street and those south of such line drained to the south and west.

The witnesses for the State maintain that the surface drainage is much better now than it was at any time prior to the construction of the improvement; that the sewer system in question is properly constructed; that there is ample fall for the same; that it is maintained by the State and is under the supervision of local highway officers; that the inlets are kept free from debris; and that all surface water properly drains off within a short time after a rain.

The witnesses for the claimants, however, state that the drainage system is improperly constructed, that it does not properly carry off the water, that the inlets or openings thereto are a substantial distance above the level of the ground and therefore do not afford proper drainage for the surface water; also that the drainage system is not properly maintained; that the openings become clogged with weeds and dirt, and that as a result thereof water stands upon claimants' property for a considerable time after a heavy rain. Claimants whose houses have basements state that after a heavy rainfall their basements remain wet and damp for a considerable length of time, whereas such conditions never existed prior to the construction of the improvement in question.

Witnesses for the respondent contend that if there is any failure of the surface water to properly drain off, it results from the failure of the property owners to properly connect their open ditches with the sewer system installed by the State, and from the failure to keep such open ditches free from obstruction.

The facts which apply particularly to the several cases under consideration herein, to-wit, the facts as to the location of the several properties, and the character of the improvements thereon, if any, are as follows, to-wit:

. . . . .

No. 1957.

ALBERT J. MOORE AND BELLE MOORE.

Claimants, Albert J. Moore and Belle Moore, filed their claim herein as owners in joint tenancy of Lot No. 582.

Since the filing of such claim Albert J. Moore died, and Belle Moore thereby became the sole owner of said lot. Upon her motion it has heretofore been ordered that the cause proceed in her name as sole claimant.

Said Lot No. 582 is located on the west side of Monson Street between S. B. I. Route 121 and Maple Street, being approximately ninety-five (95) feet south of said S. B. I. Route No. 121, and eighty (80) feet north of Maple Street;—and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is six hundred (600) feet east of the Sanford Street fill.

This lot is improved by a six-room frame bungalow with two porches. There is a concrete block foundation, and a basement under the entire house; also an extra room for bath but bath fixtures have not been installed. The building is equipped for electricity but not for gas. There is no furnace, no sewer connection, no cesspool, and no plumbing fixtures. There is an outside toilet. The exterior side walls are of wood, and the roof is of asbestos shingles. The floors are of hardwood and the interior walls are of plasterboard construction.

The south end of the fill on the Monson Street approach to S. B. I. Route 121 is a short distance north of the north line of claimant's lot. The surface of the lot is level with the adjoining street, and there is no direct interference with ingress or egress over Monson Street as the result of the construction of the improvement in question.

No. 1958.

ALBERT J. MOORE AND BELLE MOORE.

Claimants, Albert J. Moore and Belle Moore, filed their claim herein as owners in joint tenancy of Lot No. 590. Since the filing of such claim Albert J. Moore died, and Belle Moore thereby became the sole owner of said lot. Upon her motion it has heretofore been ordered that the cause proceed in her name as sole claimant.

Said Lot No. 590 is located on the west side of Globe Street between S. B. I. Route 121 and Maple Street, being approximately fifteen (15) feet south of said S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street.

The lot has a frontage of forty (40) feet on Globe Street and a depth of one hundred twenty-seven and one-half (127½) feet. It is bounded on the north by the alley which is just south of and parallel with S. B. I. Route 121 at that point. The east or front line of the lot is nine hundred thirty (930) feet east of the Sanford Street fill.

The property is improved by a two-story five-room frame dwelling with a bath and enclosed porch. There is a concrete block foundation and a basement under the entire house. The building is equipped for electricity and gas, has a furnace, hot water heater, and bath and plumbing fixtures. There is a cesspool, but no sewer connections.

The exterior side walls are of siding, and the roof is of wood shingles. The floors and interior trim are of pine and the walls of plaster. There is a two-car garage at the rear of the home.

The Monson Street fill which constitutes the approach to S. B. I. Route 121 commences at or just south of the south line of claimant's lot and increases to a height of three (3) feet three (3) inches at the north end of the lot and thereby constitutes a material and substantial interference with ingress and egress over Monson Street.

No. 1959.

ALBERT J. MOORE AND BELLE MOORE.

Claimants, Albert J. Moore and Belle Moore, filed their claim herein as owners in joint tenancy of Lot No. 592. Since the filing of such claim Albert J. Moore died, and Belle Moore thereby became the sole owner of said lot. Upon her motion it has heretofore been ordered that the cause proceed in her name as sole claimant.

Said Lot No. 592 is located on the west side of Globe Street between S. B. I. Route 121 and Maple Street, being approximately ninety-five (95) feet south of said S. B. I. Route 121, and eighty (80) feet north of Maple Street;—and has a frontage on Globe Street of forty (40) feet and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is nine hundred thirty (930) feet east of the Sanford Street fill.

The lot is improved by a one-story frame four-room dwelling, with concrete block foundation, and has a basement

under the kitchen. The building is equipped for electricity but not for gas, and has a cesspool but no sewer connections. There is no furnace, no bath, and no plumbing fixtures.

The exterior side walls are of siding and the roof is of rubberoid construction. The floors and trim are of pine and the interior walls are of plaster. There is a small one-car garage and a shed near the rear of the lot. The building is in poor condition and in need of repairs.

The north line of this lot is approximately forty (40) feet south of the south end of the Globe Street fill which constitutes the approach of S. B. I. Route 121. The surface of the lot is level with the adjoining street, and there is no interference with ingress or egress over said Globe Street on account of the construction of the improvement in question.

No. 1960.

ALBERT J. MOORE AND BELLE MOORE.

Claimants, Albert J. Moore and Belle Moore, filed their claims herein as owners in joint tenancy of Lot No. 594. Since the filing of such claim Albert J. Moore died, and Belle Moore thereby became the sole owner of said lot. Upon her motion it has heretofore been ordered that the cause proceed in her name as sole claimant.

Said Lot No. 594 is located on the west side of Globe Street between S. B. I. Route 121 and Maple Street, being approximately one hundred seventy-five (175) feet south of said S. B. I. Route 121, and immediately adjoining the north line of Maple Street. This lot lies at the northwest corner of the intersection of Globe and Maple Streets and has a frontage of forty (40) feet on Globe Street and a depth of one hundred twenty-seven and one-half (127½) feet on Maple Street. The east or front line of the lot is nine hundred thirty (930) feet east of the Sanford Street fill.

The property is improved by a five-room frame cottage, in good condition, with concrete block foundation, and has no basement. The building is equipped for electricity and gas, has a bathroom, city water supply, and some plumbing fixtures. There is a cesspool, but no sewer connections, and no furnace.

The exterior side walls are of siding, and the roof is constructed of asbestos shingles. The floors and interior trim

are of pine, and the interior walls are of plasterboard, papered. There is a two-car garage at the rear of the house.

The north line of the lot is approximately one hundred twenty (120) feet south of the south end of the Globe Street approach to S. B. I. Route 121. The surface of the lot is level with the adjoining streets and there is no interference with ingress or egress over either of said streets on account of the construction of the improvement in question.

No. 1961.

MIKE PELALLIS AND ADELE PELALLIS.

Claimants are the owners of Lot No. 583 which is located on the west side of Monson Street between S. B. I. Route 121 and Maple Street, being approximately one hundred thirty-five (135) feet south of said S. B. I. Route 121, and forty (40) feet north of Maple Street; and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is six hundred (600) feet east of the Sanford Street fill.

The property is improved by a six-room bungalow with concrete block foundation and basement. The building is in good condition, is equipped for electricity and gas, is heated by hot water furnace (oil burner), has hot water heater, bathroom and fair plumbing fixtures. There is a cesspool but no sewer connections.

The exterior side walls are of siding, painted, and the roof is of asbestos shingle construction. The floors and interior trim are of pine, and the interior walls are of plasterboard.

The north end of this lot is approximately fifty (50) feet south of the south end of the Monson Street fill which constitutes the approach to S. B. I. Route 121. The surface of the lot is level with the adjoining street, and there is no interference with ingress or egress over Monson Street as the result of the construction of the improvement in question.

No. 1962.

GEORGE W. PEMBLE AND HANNAH PEMBLE.

Claimants are the owners of Lot No. 593 which is located on the west side of Globe Street between S. B. I. Route 121

and Maple Street, being approximately one hundred thirty-five (135) feet south of said S. B. I. Route 121, and forty (40) feet north of Maple Street; and having a frontage of forty (40) feet on Globe Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is nine hundred thirty (930) feet east of the Sanford Street fill.

The property is improved by a one-story five-room modern frame dwelling with concrete block foundation and a basement under the entire house. The building is equipped for electricity and gas, is supplied with city water, has a bathroom and kitchenette, with the usual plumbing fixtures. There is a cesspool, but no sewer connections, and no furnace. The exterior side walls are of asbestos shingles, painted, and the roof is of the same construction. The floors and interior trim are of pine and the interior walls are of plaster. There is a four-car tile garage near the rear of the lot.

The north line of this lot is approximately eighty (80) feet south of the south end of the aforementioned Globe Street fill. The surface of the lot is level with the adjoining street and there is no interference with ingress or egress over said Globe Street as the result of the construction of the improvement in question.

No. 1963.

JESS M. HERNANDEZ AND ELSIE HERNANDEZ.

Claimants are the owners of Lot No. 577 which is a vacant lot located on the east side of Clark Street between S. B. I. Route 121, and Maple Street, being approximately one hundred twenty-five (125) feet south of said S. B. I. Route 121, and eighty (80) feet north of Maple Street; and has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is three hundred thirty (330) feet east of the Sanford Street fill.

The south end of the Clark Street fill which constitutes the approach to S. B. I. Route 121 is approximately forty (40) feet north of the north line of this lot. The surface of the lot is level with the adjoining street and there is no material interference with ingress or egress over said Clark Street as the result of the construction of the improvement in question.

No. 1964.

WILLIAM ENGLAND AND KATHERINE ENGLAND.

Claimants are the owners of Lot No. 591 which is located on the west side of Globe Street between S. B. I. Route 121 and Maple Street, being approximately fifty-five (55) feet south of said S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street; and has a frontage of forty (40) feet on Globe Street, and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is nine hundred thirty (930) feet east of the Sanford Street fill.

The property is improved by a three-room frame dwelling with two porches, and a large pantry. There is a concrete block foundation and a basement under the entire house. The building is heated by furnace, but has no bath or sewer connections and no plumbing fixtures. There is an outside toilet but no cesspool. The exterior side walls are of three-inch siding, painted, and the roof is of rubberoid construction. The floors and interior trim are of pine and the interior walls are of plasterboard.

The south end of the fill on Globe Street, which constitutes the approach to S. B. I. Route 121, is approximately on a line with the north line of this lot. The surface of the lot is level with the adjoining street and there is no material interference with ingress or egress over said Globe Street as the result of the construction of the improvement in question.

No. 1974.

WILLIAM M. EASTON AND NORMAN W. GEBHARDT.

Claimants are the owners of Lot No. 573 which is situated on the west side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately one hundred eighty-five (185) feet south of said S. B. I. Route 121, and forty (40) feet north of Maple Street; and has a frontage of forty (40) feet on Clark Street, and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is two hundred seventy (270) feet east of the Sanford Street fill.

The property is improved by a one-story three-room dwelling house with concrete block foundation, and no base-

ment. The building is of very cheap construction, and is in a poor state of repair. The exterior side walls are of stained shingles and the roof is of rubberoid construction. The floors and interior trim are of pine and the interior walls are of plasterboard. The building is equipped for electricity but not for gas; has no sewer connections, no cesspool, no bathroom, no furnace, and no plumbing fixtures. There is a small shed, and an outside toilet.

The north line of this lot is approximately eighty (80) feet south of the south end of the aforementioned Clark Street fill. The surface of the lot is level with the adjoining street and there is no interference with ingress or egress over said Clark Street as the result of the construction of the improvement in question.

Claimants contend that their several properties have been depreciated in value as the result of the construction of the improvement in question, and base their claims upon the following elements of damage, to-wit:

1. Dust blowing from the roadway.
2. Fumes from, and noise of passing automobiles.
3. Interference with the circulation of air over said properties.
4. Interference with their right of access.
5. Interference with the natural drainage, and failure on the part of the respondent to provide proper drainage.

A brief review of the authorities on the legal questions involved in claimants' contentions is necessary for a proper determination of the issues in all of these cases.

Where private property is not taken, but is damaged for public use, the property owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such case is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it.

Dept. of Public Works vs. *McBride*, 338 Ill. 347.
Dept. of Public Works vs. *Caldwell*, 301 Ill. 242.
Brand vs. *Union Elevated Co.*, 258 Ill. 133.

Benefits to land not taken may be set off against damages to land not taken. Damages must be direct and proximate, and not such as are merely speculative and remotely contingent.

Dept. of Public Works vs. *McBride*, 338 Ill. 347.

Depreciation in market value will not sustain a claim for damages to land not taken, unless it is from a cause which the law regards as a basis for damages.

Illinois Power & Light Corporation vs. *Talbott*, 321 Ill. 538.

Rockford Electric Co. vs. *Browman*, 339 Ill. 212.

What elements of damage, then, may be taken into consideration in determining whether there has been a depreciation in the value of claimants' property for which compensation must be made?

The Constitution of 1848 provided that private property should not be taken for public use without just compensation. No provision was made for property damaged, but not taken, and numerous cases arose in which a decided hardship was worked upon certain property owners whose property was seriously damaged but not taken, and who were therefore denied any compensation therefor. To remedy this situation, a change was made in the Constitution of 1870, and Section 13 of Article Two of such Constitution now provides that "Private property shall not be taken or damaged for public use without just compensation." The difference, in effect, between the two constitutional provisions is clearly set forth in the case of *Rigney* vs. *City of Chicago*, 102 Ill. 64 in which the Supreme Court, on page 78, said:

"Under the Constitution of 1848 it was essential to a right of recovery, * * * that there should be a direct physical injury to the corpus or subject of the property, such as overflowing it, casting sparks or cinders upon it, and the like; but under the present Constitution it is sufficient if there is a *direct physical obstruction or injury to the right of user, or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action.*"

In the case of *Otis Elevator Co.* vs. *City of Chicago*, 263 Ill. 419, the court said, "The doctrine of the Rigney case has not been modified, limited, extended or departed from in any degree";—and such doctrine has been strictly adhered to and followed in many cases since the Otis Elevator case.

In the case of *Illinois Power and Light Corporation* vs. *Talbott*, 321 Ill. 538, the Supreme Court quoted with approval from the case of *Otis Elevator Co.* vs. *City of Chicago*, 263 Ill. 419, and also said:

"It was expressly or by necessary implication held in the Loeb case, the Aldis case and the Otis Elevator Co. case, that the measure of damages and the rules of evidence are the same in an action at law as in a condemnation proceeding, and it is repeatedly said that it is clear that the provision in *the Constitution of 1870 was not intended to reach every possible injury that might be occasioned by a public improvement, and that to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. The physical disturbance need not be a physical disturbance or direct injury of the tangible object of property rights, but must be a disturbance of a right which the owner enjoys in connection with his ownership of the tangible object.*"

The foregoing statement of the law has been approved in numerous cases since decided. *Illinois Power Co.* vs. *Wieland*, 324 Ill. 411; *Illinois Power and Light Corporation* vs. *Barnett*, 338 Ill. 499; *Rockford Electric Co.* vs. *Browman*, 339 Ill. 212.

In the *City of Winchester* vs. *Ring*, 312 Ill. 544, in considering a similar question, the court said:

"The provision of the Constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement. If an obstruction or improvement does not practically affect the enjoyment or use of property not taken, and thereby impair its value, no action will lie. To sustain an action for such damages the damage must be to property and not a mere personal inconvenience or injury, such as damage to trade or business. If the injury amounts only to an inconvenience or discomfort to the occupants of the property but does not affect the value of the property, it is not within the provision of the Constitution even though a personal action would lie therefor. The injury complained of must also be actual, susceptible of proof and capable of being approximately measured, and must not be speculative, remote, prospective or contingent. *To warrant a recovery the damage must be different in kind from that sustained by the people of the whole neighborhood. If it differs only in degree from that suffered in common by the people of the neighborhood the injury is not within the provision of the Constitution. Illinois Central Railroad Co.* vs. *Trustees of Schools*, 212 Ill. 406; *Hohmann* vs. *City of Chicago*, 140 id. 226."

That an abutting property owner may not be deprived without compensation, of the right to have light and air from the public highway, unobstructed by any encroachment on the street has been held in numerous cases. *Field, et al.* vs. *Barling*, 149 Ill. 556; *Barnard* vs. *City of Chicago*, 270 Ill. 27; *Gerstley* vs. *Globe Werneke Co.*, 340 Ill. 270.

(No. 2494—Claimant awarded $318.00.)

MORTON SALT COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

STEARNS & JONES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are almost identical with those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant charges that on March 15, 1933, the State mailed to it, and generally published, a notice and request that it would, on April 6, 1933, at 2 o'clock P. M. at the office of the Division of Purchases and Supplies of the Department of Purchases and Construction, State House, Springfield, Illinois, receive proposals and bids for furnishing 50 tons of crushed rock salt, to be used at the Manteno State Hospital, Manteno, Illinois, and the specifications were also included in the advertisement.

Pursuant to that notice, claimant submitted a bid to furnish the salt at the rate of $6.36 a net ton, or the sum of $318.00 for the 50 tons. In response to that bid, the proper State officials mailed to claimant on April 27, 1933, a purchase order, known as No. D-58734, and being requisition No. Q.64, accepting said bid of claimant, and requested that the salt be shipped to the hospital aforesaid. On May 4, 1933, claimant shipped 50 tons of salt and it was duly received at the Manteno State Hospital on or about May 6, 1933. Some delay occurred, and invoice was not received in time to be paid from the then current appropriation.

No question arises about the facts, and claimant should be paid. We, therefore, make an award in the sum of $318.00 in favor of claimant.

on the ground that in each of those cases there was a direct physical disturbance of a public right which the plaintiff enjoyed in connection with his property, which gave to it an additional value, and that he sustained special damages with respect to his property, different from and in excess of that sustained by the public generally;—and in discussing the question said:

"The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road. Noise, the obstruction of light and of view, are necessary incidents to the construction and operation of such roads and if every property owner could recover in all such cases, the making of public improvements would become practically impossible. * * * Whatever damage plaintiff may have suffered in depreciation of the value of her property was of the same kind and character as that suffered by the public generally, and common to the owners of property in a large city where noise, confusion and the disturbance of quiet appear to be the necessary results of the activities of city life."

The last mentioned case has never in any way been modified or overruled.

The cases cited by claimants involving claims for damages on account of dust, smoke, noise, etc. are all cases in which either steam or electric railways were involved. Our attention has not been called to any case in which damages have been allowed to an adjoining or nearby property owner as the result of noise, dust, or fumes arising from automobile traffic on a public highway.

It has been repeatedly held by our Supreme Court that inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement, do not constitute damage to property not taken, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made, and therefore give no cause of action against a municipality therefor. *Osgood* vs. *City of Chicago*, 154 Ill. 194; *Lefkovitz* vs. *City of Chicago*, 238 Ill. 23; *Chicago Flour Co.* vs. *City of Chicago*, 243 Ill. 218: *Peck* vs. *Chicago Railways Co.*, 270 Ill. 35, 40.

The Supreme Court of this State has held in numerous cases that where a property owner's right of access to his

property has been destroyed or interfered with, he is entitled to compensation for the damages sustained. *Rigney* vs. *City of Chicago*, 102 Ill. 64; *Barnard* vs. *City of Chicago*, 270 Ill. 27; *Lydy* vs. *City of Chicago*, 356 Ill. 230. As said in the case of *C. Hacker Co.* vs. *City of Joliet, et al.*, 196 Ill. App. 415:

"The difficulty lies in exactly defining this right of access; that it cannot be confined to the immediate access from street on which the premises abut is clear on the authority of *Rigney* vs. *City of Chicago*, 102 Ill. 64. * * * That it cannot be extended to interference with an abutting owner's access to his property by vacating or obstructing a street two or three blocks away is equally clear from the authority of *City of Chicago* vs. *Union Bldg. Assn.*, 102 Ill. 379."

In the Rigney case, the City of Chicago constructed a viaduct along Halsted Street and across Kinzie Street. Rigney was the owner of certain property located on Kinzie Street about 220 feet east of the viaduct and claimed that it cut off his communication with Halsted Street except by way of a stairs. It was held in that case that he was entitled to recover damages for an interference with his right of access.

In the case of *City of Chicago* vs. *Union Bldg. Assn.*, 102 Ill. 379, it was held that the closing of LaSalle Street in Chicago by the Board of Trade Building three and one-half blocks from the owner's abutting property did not have a right of action because the owner was not specifically or particularly injured.

In Elliott on Roads and Street, 3d edition, Volume 2, Section 1181, the rule is set forth as follows:

"Owners of land abutting upon neighboring streets or upon other parts of the same street, at least when beyond the next cross street, are not, however, entitled to damages, notwithstanding the value of their lands may be lessened by its vacation or discontinuance."

In Lewis on Eminent Domain, 2d edition, Volume 1, Section 227, the author, after commenting on the Rigney case and other cases to the same effect, says (page 537):

"These cases settle the doctrine that an obstruction or interference with a public street or way, need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner."

In the case of *Gibbons* vs. *Paducah & Ill. R. R. Co.*, 284 Ill. 559, the Supreme Court, on page 563, said:

"Appellant's contention that to authorize a recovery in such a case as this the property, or some part of it, must abut on a street at the point vacated or obstructed is untenable. If the right to use the streets as a means of passing to and from his property is prevented or interfered with, it is a special damage to the property owner. It would seem absurd to say if obstructions had that effect still there could be no recovery unless the property abutted or bordered the street at the place of the obstruction. The mere right to pass to the property from a part of the street upon which the property abutted, and from the property to the street, when but a short distance from the property the street was so obstructed that no passageway was afforded beyond the obstruction, would be attended with the same character of injury as if the property abutted the obstruction."

While a city may change the grade of a street at its own pleasure, yet, when the grade is changed and sewers or drains are constructed in an imperfect manner, or where the inlets are negligently permitted to become obstructed, so that surface water cannot be carried off, and an adjoining property owner is damaged thereby, the city is liable for such damage.

Nevins vs. *City of Peoria*, 41 Ill. 502.
City of Elgin vs. *Kimball*, 90 Ill. 358.
Bouillon vs. *City of Greenville*, 233 Ill. App. 500.

In cases involving damage to land not taken, the burden of proof is upon the property owner to prove the damages claimed.

Illinois Power and Light Corp. vs. *Barnett*, 338 Ill. 499.
East St. Louis Light Co. vs. *Cohen*, 333 Ill. 218.
Illinois Power and Light Corp. vs. *Talbott*, 321 Ill. 538.

To set forth herein the application of the principles of law above set forth to the facts in each particular case, would extend this opinion to undue length. Suffice it to say that upon consideration of all of the evidence, so far as the same aplies to the several claims, and the view of the several properties as taken by the court, and upon consideration of the law, as the same applies to the facts in each case, we have reached the following conclusions, to-wit:

1. As to the claims for damages on account of dust blowing from the roadway, fumes from passing automobiles, and interference with the circulation of air over the premises of

the several claimants;—none of the claimants have shown any depreciation in the value of their respective properties, for which they are entitled to damages.

2. As to claims for damages on account of interference with the natural drainage, etc., Lots 577, 582, 590, 591 and 592 have each been depreciated in value to some extent, as the result of the construction of the improvement in question, the amount of depreciation in each case varying with the particular lot. Future damages can be obviated in each case by connecting the open ditches or other means of drainage of such lots with the sewer system installed by the respondent.

3. As to claims for damage on account of interference with the right of access, each and all of the lots involved in this proceeding have been depreciated in value to some extent as the result of the construction of the improvement in question, the amount of such depreciation in each case varying with the particular lot.

4. The total depreciation in value of each and all of the lots involved in this proceeding, as hereinbefore set forth, as the result of the construction of the improvement in question is as follows:

Lot 582—Albert J. Moore and Belle Moore	$450.00
Lot 590—Albert J. Moore and Belle Moore	900.00
Lot 592—Albert J. Moore and Belle Moore	350.00
Lot 594—Albert J. Moore and Belle Moore	275.00
Lot 583—Mike Pelallis and Adele Pelallis	450.00
Lot 593—George W. Pemble and Hannah Pemble	300.00
Lot 577—Jess M. Hernandez and Elsie Hernandez	50.00
Lot 591—William England and Katherine England	400.00
Lot 573—William M. Easton and Norman W. Gebhardt	75.00

IT IS THEREFORE ORDERED that awards be and the same are hereby entered in favor of the several claimants herein as follows, to-wit:

No. 1957—Belle Moore, owner of Lot 582, Four Hundred Fifty Dollars ($450.00).

No. 1958—Belle Moore, owner of Lot 590, Nine Hundred Dollars ($900.00).

No. 1959—Belle Moore, owner of Lot 592, Three Hundred Fifty Dollars ($350.00).

No. 1960—Belle Moore, owner of Lot 594, Two Hundred Seventy-five Dollars ($275.00).

No. 1961—Mike Pelallis and Adele Pelallis, owners of Lot 583, Four Hundred Fifty Dollars ($450.00).

No. 1962—George W. Pemble and Hannah Pemble, owners of Lot 593, Three Hundred Dollars ($300.00).

No. 1963—Jess M. Hernandez and Elsie Hernandez, owners of Lot 577, Fifty Dollars ($50.00).

No. 1964—William England and Katherine England, owners of Lot 591, Four Hundred Dollars ($400.00).

No. 1974—William M. Easton and Norman W. Gebhardt, owners of Lot 573, Seventy-five Dollars ($75.00).

(No. 2364—Claimant awarded $68.16.)

WILLIAM MOORE, SADIE MOORE AND HARRY STRETCH, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

CLAIMANTS, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are similar to those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable here.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed April 18, 1934, for the sum of $68.16 and arises from groceries and foods furnished by the claimants during the months of February and June, 1933, to the Illinois Soldiers and Sailors Children's Home. Itemized statements of the account were filed and audited by the proper department, and it is stated that the account is true and just, and that for some unknown reason, either oversight or negligence, a former chief clerk in that institution neglected to voucher these bills when due, and allowed them to lapse and become delinquent. We have formerly held that where facts are undisputed, that the State received supplies as ordered by it, and that the bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for the amount due will be made.

The Attorney General states that this case comes clearly within that rule, and he has no objection to an award being made for the amount of that claim, namely $68.16.

Therefore, an award is made in this case in the amount of $68.16 in favor of the claimants.

(No. 2494—Claimant awarded $318.00.)

MORTON SALT COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

STEARNS & JONES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are almost identical with those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant charges that on March 15, 1933, the State mailed to it, and generally published, a notice and request that it would, on April 6, 1933, at 2 o'clock P. M. at the office of the Division of Purchases and Supplies of the Department of Purchases and Construction, State House, Springfield, Illinois, receive proposals and bids for furnishing 50 tons of crushed rock salt, to be used at the Manteno State Hospital, Manteno, Illinois, and the specifications were also included in the advertisement.

Pursuant to that notice, claimant submitted a bid to furnish the salt at the rate of $6.36 a net ton, or the sum of $318.00 for the 50 tons. In response to that bid, the proper State officials mailed to claimant on April 27, 1933, a purchase order, known as No. D-58734, and being requisition No. Q.64, accepting said bid of claimant, and requested that the salt be shipped to the hospital aforesaid. On May 4, 1933, claimant shipped 50 tons of salt and it was duly received at the Manteno State Hospital on or about May 6, 1933. Some delay occurred, and invoice was not received in time to be paid from the then current appropriation.

No question arises about the facts, and claimant should be paid. We, therefore, make an award in the sum of $318.00 in favor of claimant.

(Nos. 2012, 2013, 2014, 2015, 2322, consolidated—No. 2012, Claimant awarded $250.00; No. 2013, Claimant awarded $850.00; No. 2014, Claimant awarded $250.00, No. 2015, Claimant awarded $400.00; No. 2322, Claimant awarded $30 .00.)

EDWARD NANCE, ADMINISTRATOR OF THE ESTATE OF WESLEY NANCE, DECEASED, ET AL., No. 2012, CLYDE E. HOWE, No. 2013, BERT NICHOLS AND WILLIAM NICHOLS, No. 2014, BERT KING, No. 2015, STEWARDSON HOMESTEAD AND LOAN ASSOCIATION, A CORPORATION, No. 2322, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

GUY L. SMITH AND JOHN W. FRIBLEY, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*construction of public improvement causing measure of—interference with access causing depreciation in value—proper element of damages—improper elements.* The facts in this case are similar to those in *Moore et al. vs. State*, Nos. 1957 to 1964 and 1974, consolidated, *ante*, and the opinion in that case is applicable herein.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

All of the above claims arise by reason of the construction by the respondent of S. B. I. Route 128 on Main Street in the Village of Cowden. All of such cases involve the same subject matter and all of the claimants are represented by the same counsel, and by agreement of all parties concerned, the cases have been consolidated for the purpose of this hearing.

The Village of Cowden is situated in Shelby County, and had a population of 600 by the last census. The main street of the village extends in a northerly and southerly direction, and is intersected at grade, in the center thereof, by the tracks of the Nickel Plate and the B. & O. Railroads, which also intersect each other at that point. The Nickel Plate Railroad extends in an easterly and westerly direction, and the B. & O. Railroad extends in a northwesterly and southeasterly direction. The tracks of said railroads, at the point of the intersection thereof, were originally on the same level as Main Street, but were elevated many times over a course of years, so that at the time of the construction of S. B. I. Route 128, said tracks at the point aforementioned, were approximately two (2) feet above the level of the surrounding ground. When

S. B. I. Route 128 was constructed, a gradual grade was established on said Main Street to meet the intersection of said railroad tracks, which resulted in a gradual rise from a point 327 feet north of the center of the Nickel Plate track to the intersection, and a gradual descent from that point to the south for a distance of 330 feet.

The concrete slab on S. B. I. Route 128 is in the center of Main Street, and varies in width, being widened out as it approaches the intersection so as to provide a safety island in the center for railroad traffic signal devices. The property of the claimant Howe is situated south of the Nickel Plate Railroad, on the west side of Main Street. The property of the other claimants is situated north of the Nickel Plate Railroad, on the east side of Main Street.

As a result of the construction of such highway as aforesaid, the grade of Main Street was raised in front of the properties of the several claimants, such grade north of the Nickel Plate Railroad ranging from zero to one foot, nine inches. Concrete retaining walls were erected along the side of the highway in front of the properties of the respective claimants, such retaining walls on the east side of Main Street, north of the Nickel Plate Railroad, being approximately ten (10) inches or one (1) foot above the level of the present roadway. The shoulder on the roadway between the concrete slab and the retaining wall is level and is surfaced with crushed rock. Prior to the construction of S. B. I. Route 128, Main Street was an ordinary dirt road.

As is usual in cases of this kind, there was considerable discrepancy in the testimony of the various witnesses, and it will serve no useful purpose to set the same forth at length herein. We will therefore refer but briefly thereto.

No. 2012.

EDWARD NANCE, ADMR., ET AL.

Proceeding in a northerly direction from the Nickel Plate track, on the east side of Main Street, the first property on the right is the Nance property. The title to this property was in Wesley Nance at the time of his death. Wesley Nance died on September 8, 1930, leaving him surviving Julia Nance, his widow; Nora Nicholas, Frances Sanford, Stuart Nance, Edward Nance, Agnes Lockard, and Gussie Swallow, his

children; Vera Fogel, Winnie Lance, Louis Nance, and Grace Frye, his grandchildren, being the children of Logan Nance, a deceased son of said Wesley Nance; and Catherine McDaniel and Edward George, his great-grandchildren, being the children of Vica George, a deceased granddaughter of said Wesley Nance; as his heirs.

This claim has been filed in the name of the administrator and heirs-at-law for the recovery of the damages which they claim their property has sustained by reason of interference with the access thereto as the result of the construction of the improvement in question.

This property has a frontage of eighteen (18) feet on the street. At the time the construction of the improvement commenced, such property was improved by a one-story frame business building which was in very poor condition and repair and was thereafter destroyed by fire. Near the south property line there are three steps leading from the concrete sidewalk to the roadway.

The concrete retaining wall is two feet eight inches above the level of the sidewalk at the north property line, and two feet nine inches above the level of the sidewalk at the south property line.

No. 2015.

BERT KING.

The next property north of the Nance property is that of Bert King, which property has a frontage of thirty and one-half (30½) feet on the street and is improved by two dilapidated frame structures, each being one-story in height, one having a frontage of eighteen and one-half (18½) feet and the other of twelve (12) feet.

The concrete retaining wall is two feet five inches above the level of the sidewalk at the north property line, and two feet eight inches above the level of the sidewalk at the south property line.

Claimant contends that that his property has been depreciated in value as the result of the construction of the improvement in question by interference with the access thereto, and also claims that he is entitled to damages which he has sustained by interference with his restaurant business during the time the improvement was under construction.

No. 2322.

STEWARDSON HOMESTEAD AND LOAN ASSOCIATION.

The next property north of the King property is the Stewardson Homestead and Loan Association property which has a frontage of twenty (20) feet upon the street and is improved by a two-story brick building in poor condition and repair.

The concrete retaining wall is two feet above the level of the sidewalk at the north property line, and two feet five inches above the level of the sidewalk at the south property line.

Claimant contends that its property has been depreciated in value as the result of the construction of the improvement in question by reason of the interference with its right of access thereto.

No. 2014.

BERT NICHOLS AND WILLIAM NICHOLS.

The next property north of the Stewardson Homestead and Loan Association property is the property of Bert Nichols and William Nichols, and is improved by a two-story brick building in fair condition.

The concrete retaining wall is one foot one inch above the level of the sidewalk at the north property line, and two feet above the level of the sidewalk at the south property line.

Claimant contends that his property has been depreciated in value as the result of the construction of the improvement in question by interference with his right of access thereto.

No. 2013.

CLYDE E. HOWE.

This property is located on the west side of Main Street, just south of the Nickel Plate Railroad right-of-way, and has a frontage of 100 feet on Main Street. The grade of the railroad track is about two feet higher that claimant's lot. The property is improved by a two-story frame building which is occupied as a hotel on the first floor and as living quarters by the owner on the second floor; also by a one-story tile moving picture theatre building just south of the hotel building. These

buildings have a total frontage of 50 feet on the street and the remaining 50 feet of the property is vacant. This property was never rented for moving picture purposes, but was used by the owner for that purpose for a total period of approximately two years during the ten years since the building was erected.

The concrete retaining wall along the west side of Main Street commenced at the south railroad right-of-way line and extends in a southerly direction for a distance of approximately seventy-five feet.

The concrete sidewalk in front of the property slopes to the south, and as a result, the retaining wall, which is two feet eight inches above the level of the sidewalk at the north line of the buildings, is three feet five inches above the level of the sidewalk at the south line of such buildings, and then gradually descends to the level of the ground about twenty-five feet north of the south property line.

Claimant contends that his property has been depreciated in value as the result of the construction of the improvement in question by reason of the interference with his right of access, and also claims that he has sustained damages as the result of the interference with his business during the time the improvement was under construction.

There is no evidence to the effect that there was any unreasonable delay in the construction of the improvement in question.

It has been repeatedly held by our Supreme Court that inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement, do not constitute damage to property not taken, within the meaning of the Constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made, and therefore give no cause of action therefor. *Osgood* vs. *City of Chicago*, 154 Ill. 194; *Lefkovitz* vs. *City of Chicago*, 238 Ill. 23; *Chicago Flour Co.* vs. *City of Chicago*, 243 Ill. 218; *Peck* vs. *Chicago Railways Co.*, 270 Ill. 35, 40.

The above rule has been applied by this court in a number of cases which have recently come before it. *Grassle* vs. *State*, No. 2339, decided at the June, 1934, term; *Samuel Stein, et al.* vs. *State*, No. 2373, decided at the November, 1934, term.

It is also the well settled law of this State that where a property owner's right of access to his property has been destroyed or interfered with, he is entitled to compensation for the damages sustained. *Rigney* vs. *City of Chicago*, 102 Ill. 64; *Barnard* vs. *City of Chicago*, 270 Ill. 27; *Lydy* vs. *City of Chicago*, 356 Ill. 230.

The proper measure of damages where property is not taken but is damaged for public use, is the difference between the fair cash market value of the property prior to the construction of the improvement and unaffected by it, and its fair cash market value after the construction of the improvement and as affected by it. *Dept. of Public Works* vs. *McBride*, 338 Ill. 347; *Dept. of Public Works* vs. *Caldwell*, 301 Ill. 342; *Brand* vs. *Union Elevated Co.*, 258 Ill. 133.

It must also be remembered that benefits to lands not taken may be set off against damages to land not taken, and that the damages to be allowed must be direct and proximate, and not such as are merely speculative and remotely contingent. *Dept. of Public Works* vs. *McBride*, 338 Ill. 347.

Depreciation in the market value of property will not sustain a claim of damages to land not taken unless such depreciation results from a cause which the law regards as a basis for damages. *Illinois Power and Light Corporation* vs. *Talbott*, 321 Ill. 538; *Rockford Electric Co.* vs. *Browman*, 339 Ill. 212.

The principles of law governing the proper measure of damages, and the elements which may be taken into consideration in determining such damages, were exhaustively considered by this court in the case of *Albert J. Moore and Belle Moore* vs. *State*, No. 1957, decided at the present term of court, and no good purpose will be accomplished by a repetition thereof in this case.

This court viewed the premises in question, and considering the evidence submitted, the view of the court, and the principles of law hereinbefore set forth, as well as the principles enunciated in the aforementioned case of *Albert J. Moore, et al.* vs. *State*, No. 1957, we find that the property of each and all of the claimants herein has been depreciated in value as the result of the construction of the improvement in question by reason of interference with the property owners' right of access to the street.

We further find that the depreciation in value of each of said several properties, for which the owners are entitled to compensation, is as follows:

Edward Nance, Administrator of the Estate of Wesley Nance, deceased, et al	Claim No. 2012	$250.00
Clyde E. Howe	Claim No. 2013	850.00
Bert Nichols and William Nichols	Claim No. 2014	250.00
Bert King	Claim No. 2015	400.00
Stewardson Homestead and Loan Association	Claim No. 2322	300.00

IT IS THEREFORE ORDERED that awards be and the same are hereby entered in favor of the several claimants herein in the following amounts, to-wit:

Edward Nance, Administrator of the Estate of Wesley Nance, deceased; Julia Nance; Nora Nicholas, Frances Sanford, Stuart Nance, Edward Nance; Agnes Lockard; Gussie Swallow; Vera Fogel, Winnie Lance, Louis Nonce, and Grace Frye; Catherine McDaniel and Edward George; Two Hundred Fifty Dollars ($250.00).

Clyde E. Howe, Eight Hundred Fifty Dollars ($850.00).

Bert Nichols and William Nichols, Two Hundred Fifty Dollars ($250.00).

Bert King, Four Hundred Dollars ($400.00).

Stewardson Homestead and Loan Association, Three Hundred Dollars ($300.00).

(No. 2427—Claimant awarded $538.04.)

NATIONAL FIREPROOFING CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

NATIONAL FIREPROOFING CORPORATION, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where State receives supplies as ordered by it, and bill therefor is not presented before lapse of appropriation out of which it could be paid, an award for amount due may be made on claim filed within a reasonable time.

SAME—*when award for interest on claim for will be denied.* Mere delay of payment or defense of suit does not authorize an allowance of interest where award is made, as Section 2 of the Interest Statute only provides for allowance of interest on money withheld by any unreasonable and vexatious delay of payment.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim is for the sum of $538.04, and was for goods purchased for the use of the new Illinois State Penitentiary,

at Stateville, Illinois. An itemized statement appears in the record. Claimant also asks the sum of $22.51 as interest because of deferred payment. The claim was filed July 6, 1934. The goods were received by the State with invoices that were not received within time to be paid out of the then biennium appropriation.

"Where the facts are undisputed that the State received supplies as ordered by it and that the bill was not presented for payment before the lapse of the appropriation out of which it could be paid, an award for the amount due will be made."

Shell Petroleum Corp. vs. *State*, 7 C. C. R., 224.

The claim for interest, however, in the amount of $22.51 will be denied for the reason that mere delay of payment or the defense of a suit does not authorize interest to be allowed under Section 2 of our Interest Statute, providing for interest on money withheld by any unreasonable and vexatious delay of payment.

An award in the sum of $538.04 is hereby made in favor of claimant.

(No. 2563—Claimant awarded $41.19.)

W. Q. O'NEALL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

W. Q. O'NEALL COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where facts are undisputed that State received supplies, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due may be made, on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on December 31, 1934, for the sum of $41.19, and was for material purchased by Division of Highways, purchase order D-36550 and requisition MG-163. The department advises this is a just claim, and the goods were received.

We have heretofore held that where the facts were undisputed, that the State received supplies as ordered by it and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could be paid, an award for the amount due will be made.

The Attorney General states that this falls within that rule and he makes no objection to payment.

We, therefore, make an award in the sum of $41.19 for the claimant.

(No. 2304—Claimant awarded $3,235.67.)

PEABODY COAL COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

M. J. CHERRY, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where facts are undisputed that State received supplies, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim filed by the Peabody Coal Company on December 20, 1933, and contains common counts and also a special count, and alleges that on the 9th day of March, 1932, after a bid regularly made, the State, through its Division of Purchases and Supplies, by purchase order D-27044, signed by A. W. Daily, State Purchasing Agent, a copy of which is attached to the declaration, ordered shipped to the Kankakee State Hospital, Kankakee, Illinois, five thousand (5,000) tons No. 3 Nut or Chestnut coal at a price per ton of Three and 86/100 ($3.86) Dollars. This price was later reduced to Three and 81/100 ($3.81) Dollars per ton, delivered at the institution grounds; that thereafter shipments were made by the coal company as requested and required by the Kankakee State Hospital up to and including the 6th day of April, 1933, and this constituted an overshipment of 1,276.75 tons more than the contract called for; that thereafter, the State paid the Pea-

body Coal Company for 427.5 tons of the overshipment leaving the State indebted to the Peabody Coal Company for $849.25 tons of coal, as shown by the statement contained in a Bill of Particulars which was filed with the case.

On the 26th day of August, 1933, the coal company presented its claim to J. J. Rice, Director of Department of Finance, who advised that the claim be taken up with the Managing Officer of the Kankakee State Hospital, Kankakee, Illinois; that on August 29, 1933, this matter was taken up with A. W. Daily, State Purchasing Agent, who advised that this matter be presented to the Chief Clerk of the Kankakee State Hospital, a Mr. Kruger, who upon request was furnished an itemized statement of account showing car numbers, weights and amount due; that on the 27th day of September, 1933, Mr. Kruger, Chief Clerk of the Kankakee State Hospital, advised the Peabody Coal Company that previous thereto, on to-wit: the 5th day of May, 1933, he furnished requisition number 469 to Springfield; that upon receipt of that advice the matter was taken up with J. J. Rice, Director of Department of Finance, A. W. Daily, State Purchasing Agent, and A. L. Bowen, Director of Department of Public Welfare, and up to this date, claimant has not received payment of this claim for the reason, as it has been advised, that appropriations made by the General Assembly have been exhausted and no funds were available to pay said claim.

From the stipulation in the file, it appears that all the averments in the declaration are true. This stipulation was filed by the Peabody Coal Company and by the State Department of Public Welfare, by A. L. Bowen and the stipulation is approved as to form by the Attorney General. In the stipulation, it is admitted that there is due and owning the Peabody Coal Company the sum of Three Thousand Two Hundred Thirty-five and 67/100 ($3,235.67) Dollars for 849.25 tons of Chestnut coal at Three and 81/100 ($3.81) Dollars per ton delivered to the Kankakee State Hospital.

It is further stipulated that the claim is a just one and should be allowed.

Some contention arose as to the payment of this claim because of an overshipment; that is, because more coal was shipped than was in the original contract of 5,000 tons, but

it appears from the evidence that this coal was actually ordered by the proper department.

It appearing that the State did receive this coal; that proper officers knew that the claimant was shipping more than provided in the contract, and that they had requested shipment of this coal, and the State having received the use and benefit from the shipments, the claim should be allowed, and the Attorney General recognizes that fact and says that he makes no objection to an award being recommended by this court for the amount of the claim, namely: Three Thousand Two Hundred Thirty-five and 67/100 ($3,235.67) Dollars.

An award, therefore, in favor of the Peabody Coal Company against the State of Illinois is hereby recommended for the sum of Three Thousand Two Hundred Thirty-five and 67/100 ($3,235.67) Dollars.

(No. 2335—Claimant awarded $1,105.00.)

A. W. POTTS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

JONAS & BRANSON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in employment within the purview of the Act, an award for compensation will be made in accordance with the provisions thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, A. W. Potts, was employed as a Guard at the Southern Illinois Penitentiary, and worked in what is known as the Convicts Barber Shop.

On February 7, 1933, while on duty, he had occasion to go through the main entrance door, the floor of which on the outside was sloping and covered with ice, and he fell. While on duty he is required to carry a "gas-billy", which contained a gas shell which was subject to discharge from a jar when dropped, and in trying to prevent the discharge of this gas shell, his right arm was doubled under his body, re-

sulting in a compound fracture at the end of the radius bone and also a serious dislocation of the right wrist.

He was a licensed barber, and by reason of his injury, his right wrist and fingers are stiff. He was cared for by the prison physicians and drew his salary while he was unable to work, and then went back to work at what is known as the Visiting Table, his duty being to see that visitors did not give any forbidden articles at the penitentiary or violated any of the rules of the prison pertaining to visitors. He worked there until October 15th when he was returned to the barber shop, remaining there until February 9, 1934.

It appears from the testimony that the claimant suffered an injury which arose out of and in the course of his employment. He was later transferred to Pontiac and then again transferred to Joliet Penitentiary.

It is the evidence of the physicians that he has suffered a 35 per cent loss of his arm. Dr. Copple was of the opinion that he has suffered a 75 per cent total disability on account of his injury to his arm. Dr. E. Ralph May, Prison Physician, was of the opinion that his arm had suffered 100 per cent disability for barber work. Dr. A. F. Barnett was of the same opinion. Dr. C. J. Carlin, physician of the new prison hospital at Joliet, was of the opinion that his arm was disabled 35 per cent, and another physician was of the opinion that his arm had suffered a 75 per cent disability.

Unquestionably, the evidence pertaining to the 100 per cent disability had limited the use of the hand and arm for barber work.

After a careful consideration of all the evidence, we are of the opinion that he suffered a 50 per cent loss of the use of the hand. He is entitled to be paid $13.00 per week for 85 weeks according to the statute, or the sum of $1,105.00.

We, therefore, recommend an award in the sum of $1,105.00.

(No. 2550—Claimant awarded $10.00.)

J. A. REECE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

J. A. REECE, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*when award may be made for.* Where facts are undisputed that claimant rendered necessary medical services at request of State officer, to State employee injured while in the performance of his duties, charge for which is reasonable, an award for payment may be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed pro se December 7, 1934. Claimant states he was employed by the State as Superintendent of Quarries at the Southern Illinois Penitentiary, and that his employment required him to be subject to call at any hour of the 24 hours of the day.

It appears that on June 6, 1933 he suffered a fracture of the right fibula two inches above the ankle; that at that time the Southern Illinois Penitentiary did not have an X-ray machine. The Institution doctor was called to reduce the fracture, and he recommended an X-ray be taken. Claimant was conveyed to the office of Dr. B. E. Gilster at Chester, where an X-ray was taken. An effort was made to reimburse the doctor. The facts are undisputed.

We, therefore, make an award in the sum of $10.00 in favor of claimant.

(No. 2502—Claimant awarded $65.80.)

RELIABLE PACKING COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

EDWARD J. WARREN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are almost identical with those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

It appears that on or about February 27, 1933, in accordance with respondent's Order D-51292, claimant sold to respondent, for the Kankakee State Hospital, Kankakee, Illinois, the goods set forth in the Bill of Particulars attached. It also appears that claimant has repeatedly demanded payment. The goods purchased by the State were

for the use of the Kankakee State Hospital, and consisted of 1400 lbs. of frankfurters. An invoice was either mislaid or lost, but it appears from the report of Robert R. Smith, Managing Officer of that Institution, that the claim is a just one but was not received in time to pay out of the appropriation then at hand. This case follows a large number of cases that have come before this court, where we have held that "Where the facts are undisputed that the State has received supplies as ordered by it, and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could have been paid, an award for the amount due will be made.

We, therefore, make an award in the sum of $65.80 in favor of the claimant.

(No. 2337—Claimant awarded $44.28.)

THE SCUDDER-GALE GROCERY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

CLAIMANT, *pro se.*

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

TAX—*paid under mutual mistake of fact—may be recovered.* Where it is conceded that tax, in excess of that lawfully due, is paid under mutual mistake of fact, an award for refund of such excess may be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed March 3, 1934 for the sum of $44.28, and alleges that due to an error in bringing forth the amount of beer on hand as of October 1, 1933, the amount was shown as 3,210½ gallons instead of the correct amount, of 752 gallons. Consequently, the claimant overpaid taxes on the same in the amount of $48.78. It appears that this amount was later audited by the Department of Finance, and the amount found due was $44.28. Claimant is no longer an importer of beer.

This court has held that "where it appears from undisputed facts that tax, in excess of amount due was made through mutual mistake of fact, and the Attorney General

concedes that claimant is entitled to an award for such excess, an award will be made."

Commercial Nat. Bank & Trust Co. vs. *State*, 7 C. C. R. 122;
Bates Valve Bag Corp. vs. *State*, 7 C. C. R. 64;
Cairo Water Co. vs. *State*, 7 C. C. R. 6.

We, therefore, make an award and recommend payment of same in the sum of $44.28.

(No. 2254—Claimant awarded $60.52.)

SHELL PETROLEUM CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

W. W. YEAGER, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where it is stipulated and *agreed by and* between counsel for State and claimant that there is due claimant a certain amount for goods sold and delivered to State on its order, and claim and amount thereof appear to be just and equitable, an award may be made in accordance with such stipulation.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed October 23, 1933 for the sum of $60.52 for kerosene and gasoline sold to the Anna State Hospital.

It appears that there was a running account with this Institution. In the files there is a stipulation between counsel for both sides, and the amount due the claimant has been agreed upon, which is the sum of $60.52.

No objection being made on the part of the Attorney General, and it appearing to the court that this claim is just and equitable, and should be paid, we make an award for the amount due, which is the amount of $60.52.

(No. 2405—Claimant awarded $49.00.)

SPELLMAN & COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

SPELLMAN & COMPANY, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case are almost identical with those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This was a claim filed by Spellman & Company for 28 squares of 2-ply roll roofing at $1.75 per square, furnished at the request of proper authorities of the Lincoln State School and Colony Farm at Lincoln, Illinois. This material was furnished January 23, 1933, and the entire bill amounts to the sum of $49.00. The bill was sent to the Institution and no action taken thereon.

In a report dated August 7, 1934, from John C. Weigel, Fiscal Supervisor, it is stated:

"The original contractor that put up these buildings refused to make certain repairs in January, 1933, and to prevent water coming into the buildings, the institution ordered Spellman & Company to furnish 28 squares of two ply roll roofing at $1.75 per square, amounting to $49.00.

"The then Chief Clerk, Mr. Wertheim, apparently 'lost' this bill and the institution did not follow it up until the 57th biennial appropriation had lapsed."

The facts are undisputed and the State Institution did receive the supplies ordered by it. The bill was not presented for payment before the lapse of the appropriation out of which it could have been paid. We have frequently held under such circumstances that an award should be made, and the Attorney General states he has no objection to the payment of this claim.

An award, therefore, in the sum of $49.00 is made in favor of the claimant.

(No. 2327—Claimant awarded $69.30.)

SUTCLIFF & CASE CO., INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

CARL BEHRMAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SUPPLIES — *when award may be made for.* The facts in this case are similar to those in *Armour & Company* vs. *State*, No. 2520, *ante*, and the opinion in that case is applicable here.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed its claim with the Clerk of this Court on February 15, 1934 for the sum of $69.30, and alleges that on December 19, 1930, the State became indebted to it in the sum just mentioned, and claimant filed a Bill of Particulars showing goods purchased from it, and avers that it never paid for the same, and that the goods furnished were hospital supplies that were furnished to the Anna State Hospital.

No question arises as to the facts, and we have heretofore held that "where the facts are undisputed, that the State received supplies as ordered by it and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could be paid, an award for the amount due will be made."

Shell Petroleum Co. vs. *State*, 7 C. C. R. 224.
Franklin County Coal Co. vs. *State*, 7 C. C. R. 114.
H. Channon Co. vs. *State*, 7 C. C. R. 97.

We, therefore, make an award in the sum of $69.30 in full payment of the above claim.

(No. 2391—Claimant awarded $53.40.)

T. C. TAYLOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

T. C. TAYLOR, pro se.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SHERIFF FEES — *when award may be made for.* Where Statute provides that sheriff shall be entitled to fees, to be paid out of State treasury, for conveying prisoners to penal institutions in compliance with valid order of court, and bill therefor is not presented before lapse of appropriation out of which same could be made, an award for said fees in the amount fixed by Statute may be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant is Sheriff of Johnson County, Illinois, and during the month of March 1933, upon the order of the Circuit Court of that County, he conveyed Oneal Wood, Herbert Allen, Ray Beggs and Carlos Green to the Southern Illinois Penitentiary at Menard. He has never been paid for such services.

The claim was filed June 1, 1934 for the sum of $53.40. The claimant filed a claim with the Department of Public Welfare, but this claim has not been paid because the appropriation covering the 57th biennium lapsed September 30, 1933. In a report dated June 28, 1934 from A. L. Bowen, Director of the Department of Public Welfare, it is stated that the Department would have passed the voucher for payment had it been presented at the proper time, and no objection is made to the allowance of same. It is admitted that all of these prisoners were delivered to the Penitentiary at Menard.

Section 19 of the Fee and Salaries Act provides that its Sheriffs, for conveying prisoners to the Penitentiary or Reform School of any County, should be paid fees out of the State Treasury. Where only one convict is conveyed at and after the rate of twenty-five cents for each and every mile necessarily traveled in going to the penitentiary or reform school from the place of conviction. Where more than two are conveyed, he shall be allowed twenty-five cents per mile for the first, fifteen cents per mile for the second, and ten cents per mile for each of the others.

There is no question but that the claimant earned and was entitled to the fees for which claim was filed, and that same would have been paid if the bill therefor had been presented before the appropriation lapsed.

We, therefore, make an award in favor of the claimant in the sum of $53.40.

(Nos. 1934, 1935, consolidated—Claimants awarded $2,600.00.)

GEORGE TREHARNE AND ROSIE TREHARNE, No. 1934, RUSSELL YOUNGMAN AND LAURA M. YOUNGMAN, No. 1935, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

HERGET & HOFFMAN, for claimants.

CHESTER H. BARNET, Corporation Counsel, for City of Peoria.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*construction of public improvement—measure of.* Where private property is not taken for public use, but is damaged by reason of construction of public improvement, the owner is entitled to recover the damages which his property has sustained by reason thereof, and the proper measure of such damages is the difference between the fair cash market value of the property just prior to the time the making of the improvement commenced, and its fair cash market value just after the improvement is completed.

SAME—*same—what constitutes.* Where construction of public improvement on public street on which abutting property fronts, which is not taken for public use, entirely blocks ingress to and egress from same, except by means of alley at the rear thereof, said property is damaged by reason of such construction and compensation for such damages may be recovered.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The above claims arise as the result of the construction of the east approach to the Cedar Street Bridge on S. B. I. Route No. 121 in the City of East Peoria;—and by agreement of all parties interested, have been consolidated for the purpose of this hearing.

These cases, together with 28 similar cases, are known as "East Peoria Bridge Cases", and inasmuch as all of such cases grow out of the same transaction and involve the same subject matter, the facts, so far as they apply generally to all of such cases are set forth herein, in order to avoid the repetition thereof in each of such cases.

The aforementioned Cedar Street Bridge crosses the Illinois River and connects the cities of Peoria and East Peoria. The construction of such bridge was originally undertaken by the City of Peoria, but when it was about two-thirds com-

pleted, the money appropriated for the purpose became exhausted, and no further construction work was done for several years.

Prior to the construction of the approach, no attempt was made to secure the consent of the claimants therefor, nor was any attempt made to agree with them as to the damages they would sustain by reason of the making of the contemplated improvement.

Thereafter the respondent, through the Division of Highways, undertook the completion of such bridge and the east approach thereto, pursuant to an agreement between the City of Peoria and the respondent.

In pursuance of such agreement, the City Council of the City of Peoria on the 15th day of September, 1931, adopted an ordinance authorizing and directing the Mayor of said City to make application to the United States Fidelity and Guaranty Company for a surety company bond in the sum of $30,000.00, to indemnify the State against all lawful claims which should be established in the Court of Claims by property owners along and in the vicinity of the Cedar Street Bridge; and also authorizing the Mayor, City Clerk and Comptroller to execute the bond in question on behalf of the City and deliver said bond, when executed by all parties thereto, to the Department of Public Works and Buildings of the State of Illinois. Such application was duly made, and the bond was thereafter executed by the aforementioned officers of the City of Peoria and by the United States Fidelity and Guaranty Company, and delivered to the Department of Public Works and Buildings of the State of Illinois.

All of the property involved in the East Peoria Bridge cases is located in Richland Place Addition to the City of East Peoria, and lies just south of S. B. I. Route 121 as now constructed.

In traveling east from the bridge on said S. B. I. Route, the first public highway to the right is Sanford Street which forms the western boundary of Richland Place Addition. Continuing in an easterly direction, the streets in said Addition which intersect S. B. I. Route No. 121 in their proper order are as follows: Clark Street; Monson Street; Globe Street; and Franklin Street. Maple Street is an east and west street, 60 feet in width, which parallels S. B. I. Route No. 121, being about 200 feet south thereof. Elm Street is

an east and west street 15 feet in width which parallels Maple Street, being about 365 feet south thereof, and being the south boundary line of Richland Place. Lots numbered 533, 543 and 535, and part of Lots 536 to 543 inclusive, immediately adjoin the south right-of-way line of S. B. I. Route No. 121 and have a 15-foot alley at the rear. All other lots in said Addition (except those parts of lots hereinafter referred to, which lie north of S. B. I. Route 121) front on the north and south streets. Lots 565 to 569, both inclusive, front on the east line of Sanford Street; Lots 570 to 574, both inclusive, front on the west line of Clark Street; Lots 575 to 579, both inclusive, front on the east line of Clark Street; Lots 580 to 584, both inclusive, front on the west line of Monson Street; Lots 585 to 589, both inclusive, front on the east line of Monson Street; Lots 590 to 594, both inclusive, front on the west line of Globe Street; Lots 595 to 599, both inclusive, front on the east line of Globe Street;—and all of such lots (except Lots 595 to 599 inclusive) have a 15-foot alley at the rear thereof.

Prior to the construction of the approach in question, Roosevelt Street extended in a westerly direction from Washington Street to and beyond Sanford Street, and formed the north boundary line of Lots 533 to 564. The right-of-way for such approach was procured by the City of Peoria, and the approach itself, that is to say, S. B. I. Route No. 121, is just south of Roosevelt Street and extends over part of Lots 536 to 564 inclusive, to wit, over and across the north portion of Lots 536 to 540; over and across all of Lots 541, 542 and 543, except the south end thereof; over and across all of Lots 544 to 548 inclusive, except the north end thereof; over and across all of Lots 549 to 564, inclusive, except the north one-quarter thereof. A portion of Lots 544 to 564, inclusive, still remains between the south boundary line of Roosevelt Street and the north right-of-way line of S. B. I. Route 121. For all practical purposes Roosevelt Street has been abandoned for use as a highway as it is considerably lower than S. B. I. Route 121. As one of the witnesses for the Respondent stated, it exists only on paper. The western portion of S. B. I. Route 121, to wit, commencing at the western line of Monson Street and extending westward, curves to the north, and extends along and across Roosevelt Street to the bridge proper. S. B. I. Route 121 is approximately sixty feet in width at the top

of the fill;—the concrete roadway being forty feet in width. The base of the fill is approximately ninety feet in width, except at the east and west ends, where it is wider.

Claimants George Treharne and Rosie Treharne own Lot No. 534, and claimants Russell Youngman and Laura M. Youngman own the adjoining lot to the east, to wit, Lot No. 535. Each of such lots has a frontage of 33 feet on what is now S. B. I. Route No. 121, and what was formerly Roosevelt Street in the City of East Peoria, and each lot is 125 feet deep.

The grade or fill at the junction of S. B. I. Route No. 121 and Sanford Street is approximately 20 or 21 feet above the level of the ground there, and descends gradually to the East, being about 16 feet 2 inches high at the east line of the Treharne lot and 14 feet 5 inches high at the east line of the Youngman lot. The fill on S. B. I. Route 121 at the point where it intersects the west line of Clark Street is eleven feet four inches above the level of the ground; at the point where it intersects the west line of Monson Street is eight feet above the level of the ground; at the point where it intersects the west line of Globe Street is seven feet four inches above the level of the ground; and at the point where it intersects the east line of Franklin Street is six feet two inches above the level of the ground.

The grade on Sanford Street is to the south and the elevation of the fill on such Street descends from twenty or twenty-one feet at the Y to nine feet at the south end of the Treharne lot, and reaches the ground level at the north line of Maple Street, a distance of approximately 340 feet from the junction.

The Treharne and Youngman lots are both located in the Y formed by the junction of S. B. I. Route 121 and Sanford Street.

The base of the fill on Route 121 is from twenty-seven and one-half feet to forty-one feet north of the north line of the Treharne lot, and from ten feet to thirty feet north of the north line of the Youngman lot. The Treharne and the Youngman houses are each twenty feet south of the north property line.

The Treharne property is improved by a one-story frame dwelling about fifteen feet in height, with stained shingle siding and rubberoid roof. The kitchen and dining room have

modified lean-to roofs. The house has an area of 6,087 cubic feet, rests on a cement block foundation, is without basement, is equipped for electricity, but has no plumbing and no sewer or gas connection. The floors and trim are of pine, and the inside walls of plasterboard construction. There is an outdoor toilet and storm cellar, but no walks or curbs.

The dwelling now on the Youngman property is about fifteen feet in height, is similar in construction to the Treharne dwelling, but consists of two rooms with an area of 3,438 cubic feet; there is also an outdoor toilet, a shed and a well, but no walks or curbs, and no sewer or gas connection. The building which was on the property at the time of the construction of the approach was burned in the Spring of 1932, and the present building was constructed shortly thereafter.

The contract for the grading in connection with the construction of the approach was let November 20, 1931, work was commenced shortly thereafter, and the grading was completed June 23, 1932. The entire improvement was completed and opened for traffic on January 6, 1933.

Complaints were filed in this court on June 24, 1932, claimants George Treharne and Rosie Treharne claiming the sum of $3,500.00, and claimants Russell Youngman and Laura M. Youngman claiming the sum of $2,000.00.

The records of the City Clerk of the City of Peoria show that claimants George Treharne and Rosie Treharne filed a claim with the City Clerk of that City claiming damages to their property in the amount of $3,000.00. No payment was made by the City of Peoria, but the City Attorney of the City recommended that they be paid $2,000.00 and retain title to the property, or that they be paid $2,200.00 and convey title to the City of Peoria. Claimants refused the recommendation of the City Attorney and no further action was taken on such claim. Subsequently said George Treharne and Rosie Treharne, in their stipulation filed herein, agreed to accept $2,000.00 in full of their damages.

The records of the city clerk of the city of Peoria show that claimants Russell Youngman and Laura M. Youngman filed a claim with the city clerk of the city claiming damage to their property in the amount of $2,700.00. No action was taken by the city of Peoria on such claim. Subsequently Russell Youngman and Laura M. Youngman in their stipuation

filed in this cause, agreed to accept $900.00 in full of their damages.

It is not disputed that the embankments on S. B. I. Route 121 and on Sanford Street entirely block ingress to and egress from claimants' lots except by means of the aforementioned alley at the rear of said lots. Claimants contend that said embankments also interfere with the circulation of air around said lots, deprive them of their natural light, and leave them without proper drainage.

Where private property is not taken, but is damaged for public use, the property owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such case is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it. *Dept. of Public Works* vs. *McBride*, 338 Ill. 347; *Dept. of Public Works* vs. *Caldwell*, 301 Ill. 242; *Brand* vs. *Union Elevated Co.*, 258 Ill. 133.

In condemnation proceedings, the land is regarded as taken or damaged, as of the date of the filing of the petition, and the value of the land must be fixed as of that date. *Public Service Co.* vs. *Leatherbee*, 311 Ill. 505; *City of Chicago* vs. *Collin*, 302 Ill. 270; *Chicago and State Line Ry. Co. vs. Mines*, 221 Ill. 448.

Where, however, the taking or damaging does not arise by virtue of condemnation proceedings, the damage is determined by the difference between the fair cash market value of the property just prior to the time the making of the improvement commenced, and its fair cash market value just after the improvement is completed. *Ross* vs. *City of Chicago*, 91 Ill. App. 416.

The experts called by the respondent testified that as the result of the construction of the approach in question, the Treharne and Youngman properties have practically been destroyed from the standpoint of fair cash market value, but state that each property still possesses a small rental value.

The Attorney General suggests that inasmuch as the properties have practically been destroyed from the standpoint of fair cash market value, the respondent should request the claimants to execute and deliver to the Director of the Department of Public Works and Buildings of the State

of Illinois proper deeds of dedication to their several lots. Claimants are unwilling to make such deeds of conveyance, and as we view the matter, we have no right to make the execution and delivery of such deeds a condition of an award.

J. H. Finnegan, an expert called by respondent, testified that the value of the Treharne lot as of November 1, 1931 was $1,500.00; that the value of the property was entirely wiped out by the construction of the embankment; that the damages to Treharne by reason of the construction of the embankment was $1,500.00.

Roy C. Montgomery, an expert called by respondent, testified that the value of the Treharne lot as of November 1, 1931 was $1,700.00; that as of January 1, 1933 the property had no value; that the damages to Treharne by reason of the construction of the improvement was $1,700.00.

Donald B. Walker, Assistant Highway Engineer, called by respondent testified that the value of the Treharne lot as of January 20, 1931 was $2,000.00; that the value of the property as of September 21, 1932, considered as if the embankment had not been built, was $1,500.00, on account of declining market value. The value on September 21, 1932, however, is immaterial, as the proper measure of damages is the difference between the fair cash market value of the property just before the making of the improvement commenced, to-wit, about November 1, 1931, and its fair cash market value just after the improvement was completed, to-wit, about January 1, 1933. *Ross* vs. *City of Chicago*, 91 Ill. App. 416.

Mr. Finnegan and Mr. Montgomery also testified on behalf of the respondent relative to the Youngman property, and both fixed the damages at $1,150.00. However, Youngmans, by their stipulation, agreed to accept $900.00 in full settlement of their damages, and consequently they are limited in their claim to such amount.

Upon consideration of all of the evidence in the record, we find that the claimants, George Treharne and Rosie Treharne, have sustained damages in the amount of $1,700.00 as the result of the construction of the improvement in question; and the claimants Russell Youngman and Laura M. Youngman have sustained damages in the amount of $900.00 as the result of the construction of such improvement.

An award is therefore entered in favor of the claimants George Treharne and Rosie Treharne, for the sum of Seventeen Hundred Dollars ($1,700.00); and

An award is also entered in favor of the claimants, Russell Youngman and Laura M. Youngman, for the sum of Nine Hundred Dollars ($900.00).

(No. 2257—Claimant awarded $1,737.50.)

TRI-CITY RAILWAY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

THOS. P. SINNETT AND J. HAYS BRITTON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

CORPORATIONS—*franchise tax.* The facts in this case are the same as those in *Moline-Rock Island Manufacturing Company* vs. *State*, No. 2256, *ante*, and the opinion therein applies with equal force here.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

Claimant filed its complaint herein on November 1, 1933, and seeks to recover the sum of $1,737.50 which it claims to have paid as a franchise tax for the year beginning July 1, 1933 and ending June 30, 1934, in excess of the amount which it was legally required to pay under the terms and provisions of The General Corporation Act of 1919, as amended.

It appears that on February 27, 1933 the claimant, in accordance with the law then in force, filed its annual report with the Secretary of State, in which it stated that the issued capital stock of the Company was $3,495,000.00. Based upon such statement, the amount of the franchise tax due from the claimant under the then existing law was $1,747.50. Notice of the amount of such tax was forwarded by the Secretary of State to claimant under date of May 15, 1933, and was received by it on June 15, 1933. Shortly thereafter claimant issued its check, payable to the Secretary of State, for the sum of $1,747.50 in full payment of the tax as so assessed. Such check was received by the Secretary of State on June 22, 1933, and subsequently cashed.

On June 16, 1933 a meeting of the stockholders of claimant corporation was held, and a resolution adopted decreasing the amount of the issued capital stock from 34,950 shares of the par value of $100.00 each, to 100 shares of the par value of $100.00 each;—such decrease being effected in the following manner, to-wit:—by the surrender of the 34,950 issued shares of capital stock, by the holders thereof, and the issue to them in lieu thereof of 100 shares of the par value of $100.00 each, so that each holder received 10 3495ths of a share of stock for each share previously held; and by the creation of a capital surplus of $3,485,000.00.

Pursuant to such resolution claimant made application in regular form to the Secretary of State for a reduction of its capital stock, and on June 29, 1933 the Secretary of State issued his certificate under the seal of the State, setting forth that the claimant had legally decreased its stock as set forth in the aforementioned resolution.

On the same date the Secretary of State also issued and subsequently mailed to the claimant a corrected statement showing a franchise tax due and owing from claimant in the amount of $10.00 on all of its issued capitalization of $10,000.00. Sometime during the early part of July, 1933 claimant received this corrected statement and on July 20, 1933 issued its check in payment therefor. Thereafter and on the 22nd day of July, 1933, the Secretary of State wrote claimant in part as follows:

"As it would appear that above company paid franchise tax under date of June 22, I am returning check for $10.00."

Thereafter some correspondence was had between the claimant and its attorneys on the one hand, and the Secretary of State on the other, relative to the matter, and on August 1, 1933 the Secretary of State advised the attorneys for the claimant in part as follows:

"The practice has obtained in this office where a decrease is made on or before June 30 that the company is assessed on the new capital stock for the year following.

"Since, however, these fees were paid before the companies decreased their capital stock and have been turned into the State treasury it would appear that the only way they could be recovered at this time would be by filing a bill in the Court of Claims."

The legal principles involved in this case are fully set forth and discussed in the case of *Moline-Rock Island Mfg.*

Co. vs. *State*, No. 2256, in which case the facts are almost identical with the present case, and the law as there laid down applies with equal force to this case.

In that case we held that the claimant was entitled to an award for the amount of the franchise tax overpaid by it; and for the reasons there set forth we hold that the claimant in this case is entitled to an award for the amount so overpaid by it.

Award is therefore entered in favor of the claimant for the sum of Seventeen Hundred Thirty-seven Dollars and Fifty Cents ($1,737.50).

(2415—Claimant awarded $129.55.)

RUSSELL ULERY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

FRANK R. EAGLETON, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — *medical services rendered injured employee under—liability of employer for.* Where employee of State is injured in an accident arising out of and in the course of his employment, while engaged in extra-hazardous employment, the State is liable for necessary first aid medical and surgical services and all necessary medical and hospital services thereafter, reasonably necessary to cure or relieve the effects of such injury, and an award may be made for the cost thereof, when same is reasonable and just.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed June 21, 1934 for $129.55 to cover doctor bills incurred by reason of an accident received on October 7, 1932 while claimant was employed by the Division of Highways, his duties being to drill test cores from concrete pavement by means of a power drill. It appears from the evidence that the services were rendered by the doctor and same were to have been paid for. He does not seek to recover compensation, but asks that his medical bills be paid.

Paragraph (a) of Section 8 of the Workmen's Compensation Act provides that the employer shall provide the necessary first aid medical and surgical services and all necessary medical and hospital services thereafter. In a letter from

Ernest Lieberman, Chief Highway Engineer, it is, among other things, stated:

"From personal knowledge of this case and from my observation of Mr. Ulery's condition, I feel that the claim is a just one and that the amount of $129.55, which represents the doctor's bill, should not be contested."

This being a claim which the Statute contemplates should be paid by the employer, we order the sum of $129.55 to be paid to claimant for the payment of his doctor bills.

(Nos. 1915 to 1930, both inclusive, and Nos. 2276, 2277, consolidated.

No. 1915. Claimant awarded $100.00; No. 1916. Claimant awarded $900.00.
No. 1917. Claimant awarded $400.00; No. 1918. Claimant awarded $200.00.
No. 1919. Claimant awarded $550.00; No. 1920. Claimant awarded $900.00;
No. 1921. Claimant awarded $500.00; No. 1922. Claimant awarded $350.00;
No. 1923. Claimant awarded $400.00; No. 1924. Claimant awarded $100.00;
No. 1925. Claimant awarded $200.00; No. 1926. Claimant awarded $75.00;
No. 1927. Claimant awarded $100.00; No. 1928. Claimant awarded $175.00;
No. 1929. Claimant awarded $200.00; No. 1930. Claimant awarded $75.00;
No. 2276. Claimant awarded $100.00; No. 2277. Claimant awarded $100.00).

MAMIE UMDENSTOCK, Nos. 1915, 1930; EDWIN JONES AND DOROTHY P. JONES, Nos. 1916, 1924; NORMAN W. GEBHARDT, Nos. 1917, 1929; ANNA B. SKINNER, No. 1918; WILLIAM M. HARRIS, Nos. 1919, 1926; MIKE COURI, Nos. 1920, 1925; L. V. TAYLOR AND EMMA TAYLOR, No. 1921; HENRY E. HANSHAW AND STELLA HANSHAW, No. 1922; FRED DENNY AND FRANCES DENNEY, No. 1923; ELMER KISSINGER, No. 1927; BESSIE BALL, No. 1928; ED. POLLITT, No. 2277; DALLAS R. SWEENEY AND GRACE E. SWEENEY, No. 2276, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1937.

POTTS & ALLISON AND WALTER G. CUNNINGHAM, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*construction of public improvement—proper measure of—proper elements of—when award may be made.* The facts in this case are similar to those in *Treharne* vs. *State*, No. 1934, *ante*, *Youngman* vs. *State*, No. 1935, *post*, and *Moore et al.* vs. *State*, Nos. 1957 to 1961 and 1974, consolidated, *ante*, and what was said in those cases applies herein

Per Curiam:

All of the above claims, as well as certain other claims now pending in this court, arise by reason of the construction by the respondent of the approach to the Cedar Street Bridge in the city of East Peoria, all of which cases are known as East Peoria Bridge cases.

All of the claimants herein are represented by the same counsel, and inasmuch as all of the cases grew out of the same transaction and involve the same questions, it has been agreed by counsel for the respective parties, that the cases be consolidated for the purpose of this hearing.

The facts as to local conditions at and during the time involved in these cases, as well as the facts which apply generally to all of such cases, have been fully set forth in the consolidated cases of *George Treharne and Rosie Treharne* vs. *State of Illinois*, No. 1934, and *Russell Youngman and Laura H. Youngman* vs. *State of Illinois*, No. 1935, and in the consolidated cases of *Albert J. Moore et al.* vs. *The State of Illinois*, Nos. 1957 to 1964, and No. 1974, to which reference is made therefor.

The facts which apply particularly to the several cases under consideration herein, to-wit, the facts as to the location of the several properties and the character of the improvements thereon, if any, are as follows, to-wit:

No. 1915.

MAMIE UMDENSTOCK.

Claimant is the owner of Lot No. 571 which is located on the west side of Clark Street, between S. B. I. Route 121 and Maple Street, being approximately one hundred five (105) feet south of said S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street;—and has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is two hundred seventy (270) feet east of the Sanford Street fill.

This lot is improved by a one-story five-room frame dwelling with concrete block foundation and no basement. The building is equipped for electricity and gas, but has no furnace, no bath, no plumbing fixtures, no cesspool and no sewer connections.

The exterior side walls are of stained shingle, and the building has a shingle roof. The floors and trim are of pine and the interior walls are of plaster. There is a small one-car garage, together with a shed and toilet, at the rear of the lot.

The fill on the Clark Street approach to S. B. I. Route 121 commences at or near the north line of claimant's lot. The surface of the lot is level with the adjoining street and there is no direct interference with ingress or egress over said street as the result of the construction of the improvement in question.

No. 1916.

EDWIN JONES AND DOROTHY P. JONES.

Claimants are the owners of Lot No. 585 which is located on the east side of Monson Street, between S. B. I. Route 121 and Maple Street, being approximately fifteen (15) feet south of said S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street. The north boundary of such lot immediately adjoins the east and west alley which is just south of and parallel with S. B. I. Route 121 at that point. The lot has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is six hundred sixty (660) feet east of the Sanford Street fill.

This lot is improved by a one-and-one-half-story five-room frame dwelling with gable roof of rubberoid roofing, and has a concrete block foundation and a five-foot basement. The building is equipped for electricity but not for gas, and has no cesspool, no furnace, no plumbing fixtures and no sewer connection. The exterior side walls are of stained shingle, and the interior walls are of plaster. The floors and trim are of pine.

There is a small one-car garage located on the northwest corner of the lot, and an outside toilet.

The fill on the Monson Street approach to S. B. I. Route 121 ranges from one foot six inches in height at the south lot line to five feet in height at the north lot line, and interferes materially with ingress and egress over said Monson Street.

No. 1917.

NORMAN W. GEBHARDT.

Claimant is the owner of Lot No. 569, which is a corner lot located at the northeast corner of the intersection of Sanford and Maple Streets, and is approximately three hundred (300) feet south of S. B. I. Route 121. This lot has a frontage of forty (40) feet on Sanford Street and a depth of one hundred twenty-seven and one-half (127½) feet.

The lot in question is improved by a one-story four-room frame dwelling, with stained shingle side walls and rubberoid roof, and has a basement the full length of the building. The floors and trim are of pine and the interior walls are of plasterboard.

The building is equipped for lighting but not for gas; has a furnace but no bath, and no plumbing fixtures or sewer connection. There is a one-car garage at the rear of the lot, also a well and an outside toilet.

The Sanford Street fill which constitutes the approach to S. B. I. Route 121, commences just south of the south line of claimant's lot, and rises gradually to an elevation of two feet and three inches at the north line of the lot, as the result of which there is some material interference with ingress and egress over Sanford Street, as the result of the construction of the improvement in question.

No. 1918.

ANNA B. SKINNER.

Claimant is the owner of Lot No. 578 which is located on the east side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately 1663 feet south of said S. B. I. Route 121, and forty (40) north of Maple Street. This property has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is three hundred thirty (330) feet east of the Sanford Street fill.

This lot is improved by a one-story five-room frame dwelling with two porches, and has rubberoid roofing, a concrete block foundation, but no basement. The building is equipped for electricity but not for gas; has no furnace, no

bath, no plumbing fixtures, no cesspool, and no sewer connections. The exterior walls are of siding. The floors and trim are of pine and the interior walls are of plasterboard. The property is in poor physical condition and badly in need of repairs. There is a three-car garage, a well, and an outside toilet at the rear of the lot.

The south end of the fill on the Clark Street approach to S. B. I. Route 121, is approximately eighty (80) feet north of the north line of claimant's property. The surface of the lot is level with the adjoining street, and there is no interference with ingress or egress over said Clark Street as the result of the construction of the improvement in question.

No. 1919.

WILLIAM M. HARRIS.

Claimant is the owner of Lot No. 575 which is located on the east side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately forty-five (45) feet south of S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street;—and has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of such lot is three hundred thirty (330) feet east of the Sanford Street fill.

The lot is improved by a one-story five-room frame dwelling house of very cheap construction, which is equipped for electricity but not for gas. The building has a concrete foundation, but no basement. The exterior walls and roof are of rubberoid construction, and the interior walls are of plasterboard. The floors and trim are of pine. There is no furnace, no bathroom and no plumbing fixtures. There is a small garage and an outside toilet at the rear end of the lot.

The north line of this lot adjoins the alley which is immediately south of S. B. I. Route 121. The fill on the Clark Street approach to S. B. I. Route 121 commences just south of the south line of claimant's lot, and rises gradually to a height of 1.5 feet at the north line of the lot, as a result of which there is some material interference with ingress and egress over said Clark Street as the result of the construction of the improvement in question.

No. 1920.

MIKE COURI.

Claimant is the owner of Lot No. 565 which is located on the east side of Sanford Street between S. B. I. Route 121 and Maple Street, being approximately one hundred forty (140) feet south of said S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street;—and has a frontage of forty (40) feet on Sanford Street and a depth of one hundred twenty-seven and one-half (127½) feet.

The lot is improved by a four-room bungalow of cheap construction, having an asbestos shingle roof, a concrete block foundation, but no basement. The exterior side walls are of siding, painted. The floors and trim are of pine, and the interior walls are of plaster. The building is wired for electricity but has no gas or sewer connections, no bathroom, no furnace, and no plumbing fixtures. There is a small garage and an outside toilet.

The north line of this lot borders on an east and west alley, and the west lot line immediately adjoins Sanford Street. The fill on the Sanford Street approach to said S. B. I. Route 121 is six feet six inches high at the south line of claimant's property and increases gradually to eight feet three inches at the north line of such property, as the result of which, access to the property from Sanford Street is practically destroyed.

No. 1921.

L. V. TAYLOR AND EMMA TAYLOR.

Claimants are the owners of Lot No. 570 which is located on the west side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately sixty-five feet south of said S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street; and has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The north line of this lot borders on an east and west alley, and the east or front lot line is approximately two hundred seventy (270) feet east of the Sanford Street fill.

The lot is improved by a four-room cottage with concrete block foundation, but no basement. The exterior walls are

of stained shingles, and the roof of asbestos shingles. The floors and the interior trim are of pine and the interior walls of plaster. The building is equipped for electricity and gas but has no bathroom, no furnace, no sewer connections and no plumbing fixtures. There is a garage and a shed at the rear of the lot, as well as an outside toilet.

The fill on the Clark Street approach to said S. B. I. Route 121 commences at a point just south of the south line of this lot and increases in height to 1.5 feet at the north end of the lot, as a result of which there is some interference with ingress and egress over said Clark Street.

No. 1922.

HENRY E. HANSHAW AND STELLA HANSHAW.

Claimants are the owners of Lot No. 587 which is located on the east side of Monson Street between S. B. I. Route 121 and Maple Street, being approximately ninety-five (95) feet south of said S. B. I. Route 121, and eighty (80) feet north of Maple Street;—and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is six hundred sixty (660) feet east of the Sanford Street fill.

The lot is improved by a five-room frame dwelling house with composition roof, and concrete block foundation, but no basement. The exterior walls are of siding, painted. The floors and trim are of pine and the interior walls are of plaster. The building is equipped for electricity and gas, but has no sewer connections, no cesspool, no furnace, and no plumbing fixtures. There is a one-car garage, a shed and outdoor toilet at the rear of the lot.

The Monson Street approach to S. B. I. Route 121 commences a short distance north of the north line of this lot. The lot is level with the adjoining street and there is no interference with ingress or egress over Monson Street as the result of the construction of the improvement in question.

No. 1923.

FRED DENNEY AND FRANCES DENNEY.

Claimants are the owners of Lot No. 580 which is located on the west side of Monson Street between S. B. I. Route 121

and Maple Street, being approximately fifteen (15) feet south of said S. B. I. Route 121, and one hundred sixty (160) feet north of Maple Street. This lot lies just south of the alley which at this point, parallels said Route 121 on the south;—has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is six hundred (600) feet east of the Sanford Street fill.

The property is improved by a one-story two-room frame dwelling house of cheap construction, with concrete foundation, but no basement. The exterior side walls and roof are of rubberoid shingle construction. The building is in poor condition, is equipped for electricity and gas, but has no sewer connections, no cesspool, no furnace, and no plumbing fixtures. There is a one-car garage, a coal shed and outdoor toilet at the rear of the lot.

The fill on the Monson Street approach to S. B. I. Route 121 has an elevation of 1.5 feet at the south line of this lot and increases gradually to five feet at the north line of the lot as the result of which access to said property from Monson Street is practically destroyed.

No. 1924.

EDWIN JONES AND DOROTHY P. JONES.

Claimants are the owners of Lot No. 586 which is a vacant lot located on the east side of Monson Street, between S. B. I. Route 121 and Maple Street, being approximately fifty-five (55) feet south of S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street;—and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is six hundred sixty (660) feet east of the Sanford Street fill.

The fill on the Monson Street approach to S. B. I. Route 121 commences a short distance north of the south line of this lot, and rises gradually to an elevation of one and one-half feet at the north line of the lot, and consequently there is some interference with ingress and egress over Monson Street as the result of the construction of the improvement in question.

No. 1925.

MIKE COURI.

Claimant is the owner of Lot No. 566 which is a vacant lot located on the east side of Sanford Street between S. B. I. Route 121 and Maple Street, being approximately one hundred eighty (180) feet south of S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street;—and has a frontage of forty (40) feet on Sanford Street and a depth of one hundred twenty-seven and one-half (127½) feet.

The Sanford Street fill is four feet seven inches in height at the south line of this property, and increases gradually to a height of six feet six inches at the north property line, as the result of which, access to the property from Sanford Street is practically destroyed.

No. 1926.

WILLIAM M. HARRIS.

Claimant is the owner of Lot No. 576 which is a vacant lot located on the east side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately sixty-five (65) feet south of S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street;—and has a frontage of forty (40) feet on Maple Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is three hundred thirty (330) feet east of the Sanford Street fill.

The fill on the Clark Street approach to S. B. I. Route 121 commences near the north line of this lot. The surface of the lot is level with the adjoining street and there is no interference with ingress or egress over Clark Street as the result of the construction of the improvement in question.

No. 1927.

ELMER KINSINGER.

Claimant is the owner of Lot No. 574 which is located on the west side of Clark Street between S. B. I. Route 121 and Maple Street, being just north of said Maple Street and two hundred twenty-five (225) feet south of S. B. I. Route 121;—and has a frontage of forty (40)) feet on Clark Street and a

depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the lot is two hundred seventy (270) feet east of the Sanford Street fill.

The property is improved by a one-story three-room frame dwelling house of very cheap construction, without foundation or basement. The exterior walls are of stained shingle, and the roof of rubberoid construction. The floors and trim are of pine and the interior walls are of plasterboard. The building is equipped for electricity but not for gas. There is no sewer connection, no cesspool, no furnace, and no plumbing fixtures. There is a one-car garage and an outside toilet. The dwelling is located at the rear of the lot adjoining the alley.

The south end of the fill on the Clark Street approach to S. B. I. Route 121 is approximately one hundred twenty (120) feet north of the north line of this lot. The surface of the lot is level with both Maple and Clark Streets, and there is no interference with ingress or egress over either of said streets as the result of the construction of the improvement in question.

No. 1928.

BESSIE BALL.

Claimant is the owner of Lot No. 589 which is located on the east side of Monson Street between S. B. I. Route 121 and Maple Street, being just north of Maple Street and approximately one hundred seventy-five (175) feet south of S. B. I. Route 121;—and has a frontage of forty (40) feet on Monson Street, and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of the lot is six hundred sixty (660) feet east of the Sanford Street fill.

The property is improved by a four-room dwelling house of cheap construction, and has a concrete foundation, but no basement. The exterior side walls are of siding, and the roof is of rubberoid construction. The floors and trim are of pine and the interior walls are of plasterboard. The building is equipped for electricity but not for gas, and has no sewer, no cesspool, no bathroom, no furnace and no plumbing fixtures. There is a shed and outdoor toilet at the rear of the lot.

The north line of this lot is over eighty (80) feet south of the south end of the fill on the Monson Street approach to

S. B. I. Route 121. The surface of the lot is on the same level as the adjoining streets, to wit, Monson and Maple Streets, and there is no interference with ingress or egress over either of said streets as the result of the construction of the improvement in question.

No. 1929.

NORMAN W. GEBHARDT.

Claimant is the owner of Lot No. 568 which is located on the east side of Sanford Street, between S. B. I. Route 121 and Maple Street, being approximately two hundred sixty (260) feet south of S. B. I. Route 121, and forty (40) feet north of Maple Street;—and has a frontage of forty (40) feet on Sanford Street and a depth of one hundred twenty-seven and one-half (127½) feet.

The only improvement on this property is a small building with rubberoid covering, located on the rear of the lot, occupied by claimant as his residence, and which he testified was worth about one hundred dollars ($100.00) at the time the work on S. B. I. Route 121 was commenced.

The Sanford Street fill which immediately adjoins this property on the west, ranges in height from two feet three inches at the south line to three feet five inches at the north line of said lot; as the result of which access to said property from Sanford Street is practically destroyed.

No. 1930.

MAMIE UMDENSTOCK.

Claimant is the owner of Lot No. 572 which is a vacant lot located on the west side of Clark Street between S. B. I. Route 121 and Maple Street, being approximately one hundred forty-five (145) feet south of said S. B. I. Route 121, and eighty (80) feet north of Maple Street;—and has a frontage of forty (40) feet on Clark Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of said lot is two hundred seventy (270) feet east of the Sanford Street fill.

The fill on the Clark Street approach to said S. B. I. Route 121 commences about forty (40) feet north of the north line of this lot. The surface of the lot is level with

the adjoining street and there is no interference with ingress or egress over said street as the result of the construction of the improvement in question.

No. 2276.

DALLAS R. SWEENEY AND GRACE E. SWEENEY.

Claimants are the owners of Lot No. 581 which is a vacant lot located on the west side of Monson Street between S. B. I. Route 121 and Maple Street, being approximately fifty-five (55) feet south of S. B. I. Route 121, and one hundred twenty (120) feet north of Maple Street;—and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The east or front line of the Lot is six hundred (600) feet east of the Sanford Street fill.

The fill on Monson Street which constitutes the approach to S. B. I. Route 121, commences at a point a short distance north of the south line of this lot and reaches an elevation of 1.5 feet at the north line of the lot, as the result of which there is some interference with ingress and egress over Monson Street as the result of the construction of the improvement in question.

No. 2277.

ED POLLITT.

Claimant is the owner of Lot No. 588 which is located on the east side of Monson Street between S. B. I. Route 121 and Maple Street, being approximately one hundred thirty-five (135) feet south of said S. B. I. Route 121, and forty (40) feet north of Maple Street; and has a frontage of forty (40) feet on Monson Street and a depth of one hundred twenty-seven and one-half (127½) feet. The west or front line of such lot is six hundred sixty (660) feet east of the Sanford Street fill.

The property is improved by a one-story four-room frame dwelling with brick foundation, but no basement. The exterior side walls are of siding, and the roof is of rubberoid construction. The floors and trim are of pine, and the interior walls are of plaster. The building is not equipped for electricity or gas, has no sewer connections, no cesspool, no furnace, and no plumbing fixtures.

The south end of the fill on the Monson Street aproach to S. B. I. Route 121 is approximately fifty (50) feet north of the north line of this property. The surface of the lot is level with the adjoining street, and there is no interference with ingress or egress over said Street as the result of the construction of the improvement in question.

Claimants contend that their several properties have been depreciated in value as the result of the construction of the improvement in question, and base their claims upon the following elements of damage, to wit:

1. Dust blowing from the roadway.
2. Fumes from, and noise of passing automobiles.
3. Interference with the circulation of air over said properties.
4. Interference with their right of access.
5. Interference with the natural drainage, and failure on the part of the Respondent to provide proper drainage.

A review of the authorities on the legal questions involved in claimants' contentions is fully set forth in the consolidated cases of *Albert J. Moore, et al.* vs. *The State*, Nos. 1957 to 1964, inclusive, and No. 1974, to which reference is made therefor.

As in the consolidated cases of Albert J. Moore, et al, hereinbefore referred to, and in order that this opinion may not be unduly extended, we will not attempt to set forth herein the application of the principles of law involved, to the facts in each particular case but will recite briefly the conclusions at which we have arrived.

Upon consideration of all of the evidence, so far as the same applies to the several claimants, and the view of the several properties as taken by the court, and upon consideration of the law as the same applies to the facts in each case, we have concluded as follows, to wit:

1. As to the claims for damages on account of dust blowing from the roadway, fumes from passing automobiles, and interference with the circulation of air over the premises of the several claimants;—none of the claimants have shown any depreciation in the value of their respective properties, for which they are entitled to damages.

2. As to claims for damages on account of interference with the natural drainage, etc., Lots 565, 566, 570, 571, 575, 576, 580, 581, 585, and 586 have each been depreciated in

value to some extent, as the result of the construction of the improvement in question, the amount of depreciation in each case varying with the particular lot. Future damages can be obviated in each case by connecting the open ditches or other means of drainage of such lots with the sewer system installed by the Respondent.

3. As to claims for damage on account of interference with the right of access, each and all of the lots involved in this proceeding have been depreciated in value to some extent as the result of the construction of the improvement in question, the amount of such depreciation in each case varying with the particular lot.

4. The total depreciation in value of each and all of the lots involved in this proceeding, as hereinbefore set forth, as the result of the construction of the improvement in question is as follows:

Lot 571—Mamie Umdenstock	$400.00
Lot 585—Edwin Jones and Dorothy P. Jones	900.00
Lot 569—Norman W. Gebhardt	400.00
Lot 578—Anna B. Skinner	200.00
Lot 575—William M. Harris	550.00
Lot 565—Mike Couri	900.00
Lot 570—L. V. Taylor and Emma Taylor	500.00
Lot 587—Henry E. Hanshaw and Stella Hanshaw	350.00
Lot 580—Fred Denney and Frances Denney	400.00
Lot 586—Edwin Jones and Dorothy P. Jones	100.00
Lot 566—Mike Couri	200.00
Lot 576—William M. Harris	75.00
Lot 574—Elmer Kinsinger	100.00
Lot 589—Bessie Ball	175.00
Lot 568—Norman W. Gebhardt	200.00
Lot 572—Mamie Umdenstock	75.00
Lot 588—Ed Pollitt	100.00
Lot 581—Dallas R. Sweeney and Grace E. Sweeney	100.00

IT IS THEREFORE ORDERED that awards be and the same are hereby entered in favor of the several claimants herein as follows, to wit:

No. 1915—Mamie Umdenstock, owner of Lot 571, Four Hundred Dollars ($400.00).

No. 1916—Edwin Jones and Dorothy P. Jones, owners of Lot 585, Nine Hundred Dollars ($900.00).

No. 1917—Norman W. Gebhardt, owner of Lot 569, Four Hundred Dollars ($400.00).

No. 1918—Anna B. Skinner, owner of Lot 578, Two Hundred Dollars ($200.00).

No. 1919—William M. Harris, owner of Lot 575, Five Hundred Fifty Dollars ($550.00).

No. 1920—Mike Courl, owner of Lot 565, Nine Hundred Dollars ($900.00).

No. 1921—L. V. Taylor and Emma Taylor, owners of Lot 570, Five Hundred Dollars ($500.00).

No. 1922—Henry E. Hanshaw and Stella Hanshaw, owners of Lot 587, Three Hundred Fifty Dollars ($350.00).

No. 1923—Fred Denney and Frances Denney, owners of Lot 580, Four Hundred Dollars ($400.00).

No. 1924—Edwin Jones and Dorothy P. Jones, owners of Lot 586, One Hundred Dollars ($100.00).

No. 1925—Mike Courl, owner of Lot 566, Two Hundred Dollars ($200.00).

No. 1926—William M. Harris, owner of Lot 576, Seventy-five Dollars ($75.00).

No. 1927—Elmer Kinsinger, owner of Lot 574, One Hundred Dollars ($100.00).

No. 1928—Bessie Ball, owner of Lot 589, One Hundred Seventy-five Dollars ($175.00).

No. 1929—Norman W. Gebhardt, owner of Lot 568, Two Hundred Dollars ($200.00).

No. 1930—Mamie Umdenstock, owner of Lot 572, Seventy-five Dollars ($75.00).

No. 2277—Ed Pollitt, owner of Lot 588, One Hundred Dollars ($100.00).

No. 2276—Dallas R. Sweeney and Grace E. Sweeney, owners of Lot 581, One Hundred Dollars ($100.00).

(Nos. 1948, 1950, consolidated—Claimant awarded $2,371.70 in No. 1948.)

ROY O. YENERICH AND WESLEY YENERICH, LESTER YENERICH AND VERDA YENERICH, MINORS, BY ROY O. YENERICH, GUARDIAN AND NEXT FRIEND, No. 1948, GEORGE BEETZ, No. 1950, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 1, 1935.

JONES & HEFLIN, for claimants.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

PROPERTY TAKEN FOR PUBLIC USE—*property damage—construction of public improvement—compensation for and measure of damages.* Where private property is taken for public use in the construction of a public highway an award for the reasonable value thereof will be made, and where claim is also made for damages to property not taken, consisting of breakage of drainage tile and interference with drainage, the proper measure of such damages is the difference between the fair cash market value of the property prior to the construction of the improvement and unaffected by it, and the fair cash market value of the property after the improvement and as affected by

it, and not the cost of replacement and repairs to tile and drainage system.

PROPERTY DAMAGE—*construction of public improvement—must be special and result of.* Even though there is evidence of a depreciation in the value in the vicinity of and after construction of a public improvement, no recovery can be had for damages to such property in the absence of proof of special damages and that such depreciation in value is the result of such construction.

MR. *CHIEF JUSTICE* HOLLERICH delivered the opinion of the court:

The above named claimants have filed their respective claims herein for the recovery of damages which they claim to have sustained as the result of the construction by the respondent of S. B. I. Route 70 along the west side of certain land owned by the claimants Roy O. Yenerich, Wesley Yenerich, Lester Yenerich, and Verda Yenerich. All claimants are represented by the same counsel, and by agreement of all parties concerned, the cases have been consolidated for the purpose of this hearing.

The claimants in No. 1948, Roy O. Yenerich, Wesley Yenerich, Lester Yenerich, and Verda Yenerich, are the owners in fee of the West Half (W½) of the Southwest Quarter (SW¼) of Section Nine (9), Township Thirty-six (36) North Range One (1) East of the Third (3d) Principal Meridian, in LaSalle County, Illinois.

Claimant in No. 1950, George Beetz, is the owner of the East Half (E½) of the Southwest Quarter (SW¼) of said Section Nine (9), being an eighty-acre tract lying adjacent to and immediately east of the Yenerich tract.

Prior to the 13th day of April, A. D. 1928, the physical conditions surrounding the aforementioned tracts of land, briefly stated, were as follows:

An unpaved public highway extended in a northerly and southerly direction along the west side of the Yenerich tract, and an unpaved public highway extended in an easterly and westerly direction along the south side of both tracts.

There was an open ditch on the east side of the public highway just west of the west fence line of the Yenerich tract, which ditch turned to the east at the southwest corner of said tract and extended in an easterly direction along the north side of the aforementioned east and west road, about two hundred fifty (250) feet, thence southerly across such east and west road, thence in a southerly and southwesterly di-

rection through the land known as the Hagerty farm, and on to the land known as the Guilfoyle farm.

The surface of both of the aforementioned tracts was low and quite level, but there was a slight fall to the west and southwest. The natural drainage was to the open ditch on the west side of the Yenerich tract. Both of above tracts were tile-drained;—the Beetz tract drained into and connected with the tiles on the Yenerich tract, which tiles extended in a westerly or southwesterly direction to, and (with the exception of the west two or three strings) drained into, the aforementioned open ditch on the west side of the Yenerich tract.

The drainage by way of the aforementioned open ditch on the west side of the Yenerich tract was supplemented by a 24-inch tile commencing at the southwest corner of the Yenerich tract and extending southerly under the east and west road, along the east side of the north and south road for a distance of about nine hundred (900) feet, thence southwesterly across said east and west road, and joined the natural ditch previously referred to, on the Guilfoyle farm. Such line of 24-inch tile was approximately 1,224 feet in length and was constructed some thirty or thirty-five years ago by the township and a previous owner, for the purpose of draining a sort of slough that existed there. There was a drop box or catch basin at the inlet of said 24-inch tile, and the mouth of the tile was covered by a steel grating. Concrete retaining walls were constructed around the mouth of the tile and extended therefrom both in an easterly and in a westerly direction.

The tile drainage on the Yenerich tract consisted of a string of 10-inch tile at the north end of said tract, and about eight strings of 6-inch tile at varying distances between the 10-inch tile and the south boundary line of the tract. Two or three of the most southerly lines of 6-inch tile drained into the drop box or catch basin at the intake of the 24-inch tile, and the remainder of the 6-inch tile as well as the 10-inch tile, drained into the open ditch along the west side of the Yenerich tract.

In 1928 S. B. I. Route 70 was constructed from Mendota to Rochelle, over the right-of-way of the aforementioned public highway extending northerly and southerly along the west line of the Yenerich tract. Construction work on such route

was commenced on April 13th, 1928 and the same was completed and accepted by the Division of Highways on April 25, 1929. In the construction of said S. B. I. Route 70, a tract of land approximately forty-six feet in width and 1,200 feet in length along the west side of the Yenerich tract, containing approximately 1.77 acres, was taken and used by the respondent as a borrow pit from which soil was removed for use in making fills. The bottom of this borrow pit was about a foot lower than the open ditch it replaced, and in the removal of soil from said borrow pit, each and every string of tile which drained into the former open ditch or into the catch basin was dug up.

The owners of the Yenerich tract contend that they are entitled to be compensated for 1.77 acres of land taken for a borrow pit; also for the value of a fence which was in existence along the west line of the property prior to the construction of S. B. I. Route 70 and which was not there after the improvement was completed; also that they are entitled to damages for depreciation in value of their lands which they claim has resulted from interference with the drainage system by reason of the construction of the improvement in question.

The owners of the Beetz tract contend that their property has depreciated in value as the result of the construction of S. B. I. Route 70, by reason of the interference with the drainage tile on the Yenerich tract, and that they are entitled to be compensated for the damages so sustained.

There is considerable discrepancy in the testimony as to the comparative efficiency of the tile system prior to and since the construction of S. B. I. Route 70, as well as to the extent to which such drainage system was interfered with, by the construction of such highway.

Claimants produced testimony to show that prior to the construction of S. B. I. Route 70 the field tile were in good working order, the water drained off properly, and the land raised good crops; that the 24-inch tile was in satisfactory working order and functioned properly; that the respondent in driving its heavy machinery over the 24-inch tile in the work of constructing S. B. I. Route 70, broke a number of such tile; that large sink holes afterwards appeared at the places where such breaks occurred, and that such tile thereby became obstructed; that respondent removed the steel grat-

ing from the mouth of such 24-inch tile; that as the result thereof weeds and other debris were carried into such tile and helped to obstruct the same; that the obstruction of the 24-inch tile also interfered with the efficient operation of the smaller tile; also that the respondent damaged a large number of the smaller tile by driving its tractors over them; interfered with the entire drainage system by the construction of the borrow pit and the removal of all drain tile therefrom; that by reason of such interference water does not run off the premises as it previously did; that the outlets of the tile which drained into the borrow pit, as well as the outlet of the 24-inch tile are now clogged up, and that the land has become sour and does not raise as large crops as it previously did.

The respondent produced testimony to show that some of the 24-inch tile were broken before the work of construction of S. B. I. Route 70 was commenced; that sink holes then existed above such tile; that the broken tile were removed and replaced by new 24-inch tile and the sink holes filled by the respondent before the work of construction commenced; also that other broken 24-inch tile were removed and replaced by respondent during the progress of the work or after the completion thereof; that in replacing such 24-inch tile it was noticed that the same was disintegrating and that said string of tile was practically obsolete; that the inlet to said 24-inch tile was obstructed by debris before the work of construction commenced, and that the outlet was approximately two feet below the normal stream bed on the Guilfoyle farm.

No attempt was made to agree with the owners of the Yenerich tract as to the value of the land taken for the purpose of a borrow pit, nor were any condemnation proceedings commenced in connection therewith, nor was any attempt made to agree with any of the claimants herein as to the damages, if any, to the property not taken.

Testimony was introduced by the claimant as to the cost of cleaning the tile which were obstructed, replacing those which were broken, and making such repairs as claimants considered necessary to place the drainage system in as good condition as it was prior to the time of the construction of S. B. I. Route 70. Testimony was also introduced by the respondent as to the cost of such repairs or replacements

as it considered necessary to put the several outlets of the tile on the Yenerich tract in good working condition. The estimated cost of such replacements and repairs, as made by the claimants, was $3,045.00, while the estimated cost of the repairs suggested by the respondent was $300.00.

The cost of such replacements and repairs, however, is not the proper measure of damages in this case. The proper measure of damages for land taken for public use, is the fair cash market value of the land at the time of the taking; and the proper measure of damages for land not taken but damaged for public use, is the difference between the fair cash market value of the property prior to the construction of the improvement and unaffected by it, and the fair cash market value of the property after the improvement and as affected by it. *Dept. of Public Works* vs. *McBride*, 338 Ill. 347; *Dept. of Public Works* vs. *Caldwell*, 301 Ill. 242; *Brand* vs. *Union Elevated Co.*, 258 Ill. 133.

Upon consideration of all of the evidence as to the Yenerich tract, we find as follows:

1. That the respondent has taken 1.77 acres of land off of the west side of such tract.

2. That the fair cash market value of the remainder of such tract has been depreciated as the result of the interference with the drainage thereof by the construction of S. B. I. Route 70.

3. That the owners of such tract, to-wit, Roy O. Yenerich, Wesley Yenerich, Lester Yenerich and Verda Yenerich, are entitled to compensation for the land taken, to-wit, 1.77 acres, at the rate of $210.00 per acre, to-wit, $371.70.

4. That the owners of such tract are entitled to damages for depreciation in the fair cash market value of their land as the result of the construction of S. B. I. Route 70, as aforesaid, in the sum of $2,000.00.

5. That the total of such awards is payable as follows: To Roy O. Yenerich, one-third thereof; to Wesley Yenerich, Lester Yenerich and Verda Yenerich, each two-ninths thereof. Wesley Yenerich, Lester Yenerich and Verda Yenerich being minors, their respective shares will therefore be paid to Roy O. Yenerich who is their legal guardian pursuant to appointment by the Probate Court of LaSalle County, Illinois.

Upon consideration of all of the evidence as to the Beetz tract, we find as follows:

There is no material or substantial evidence as to any damage to such tract resulting from the constructing of the improvement in question. No part of such tract is within a quarter of a mile of the center of S. B. I. Route 70. There is some evidence of a depreciation in the value of the property, but nothing to connect such depreciation with the construction of the highway in question.

As to Claim No. 1950, George Beetz, IT IS THEREFORE ORDERED that award be denied and the case dismissed.

As to Claim No. 1948, IT IS THEREFORE ORDERED that an award be entered in favor of the aforementioned owners of the Yenerich tract in the total sum of Twenty-three Hundred Seventy-one Dollars and Seventy Cents ($2,371.70), and that the same be paid as follows:

To Roy O. Yenerich, the sum of Seven Hundred Ninety Dollars and Fifty-five Cents ($790.55).

To Roy O. Yenerich, as guardian of Wesley Yenerich, the sum of Five Hundred Twenty-seven Dollars and Five Cents ($527.05).

To Roy O. Yenerich, as guardian of Lester Yenerich, the sum of Five Hundred Twenty-seven Dollars and Five Cents ($527.05).

To Roy O. Yenerich, as guardian of Verda Yenerich, the sum of Five Hundred Twenty-seven Dollars and Five Cents ($527.05).

IT IS FURTHER ORDERED that the payment of said awards be conditioned upon the execution and delivery by said claimants to the proper officers of the respondent of a deed of conveyance, conveying to the respondent the aforementioned tract of 1.77 acres so taken by the respondent for the purpose of a borrow pit as aforesaid.

(No. 2577—Claimant awarded $4,000.00.)

SUSIE CASEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1935.

HARRIS B. GAINES, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS NATIONAL GUARD—*injury to member of—when award may be made.* Where it clearly appears that member of Illinois National Guard contracted disease while in the performance of his duties, resulting in his death, an award may be made to his dependent under the provisions of the Military and Naval Code.

MR. CHIEF JUSTICE HOLLERICH delivered the opinion of the court:

The claimant, Susie Casey, is the widow of Sergeant Jesse Casey who, at the time of his death, was a member of Company F, Eighth Infantry, Illinois National Guard. Said Jesse Casey enlisted in said Company F on November 18, 1931, and continued to be a member thereof until the time of his death as hereinafter set forth.

In the performance of his duties as a member of said Company F, said Jesse Casey was attending the annual tour of Field Training at Camp Grant, Illinois which commenced on August 4, 1934 and continued to August 18, 1934. About midnight on the night of August 9, 1934, while Casey was asleep in his tent, it was blown down by a violent rainstorm. Casey was unclothed at the time, and on account of his exposure to the inclement weather, became ill. On August 14th he presented himself to the Regimental Dispensary and complained of headache, backache, and general soreness of limbs. He was running a temperature of 101.4, and his condition was diagnosed as acute influenza. He was taken to the Base Hospital and, his condition becoming worse, was removed to St. Anthony's Hospital at Rockford, where he died on August 20, 1934.

Adjutant General Black in a report on the case, said:

"The record further indicates that the disease was contracted in line of duty."

Section Eleven (11) of Article Sixteen (16) of The Military Code of Illinois provides as follows:

"In every case where an officer or enlisted man of the 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 or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand," etc.

Under this provision of the statute, and the facts hereinbefore set forth, (which facts are not disputed) the claimant is clearly entitled to an award for financial help or assistance as provided by the statute.

The evidence shows that Casey had been regularly employed by Swift and Company at the Union Stock Yards, Chicago, for more than fifteen years just prior to his death; that his average annual wages were Eighteen Hundred Dollars ($1,800.00); that he was an able-bodied and healthy man, and the sole support of the claimant.

If the provisions of the Workmen's Compensation Act were followed in fixing the amount of the award, claimant would be entitled to the sum of Four Thousand Dollars ($4,000.00). In making awards under the Military and Naval Code, we are not bound by the provisions of the Workmen's Compensation Act, but in certain cases in which the provisions of such Act seemed to provide a just compensation, we have been guided thereby. In this case we are of the opinion that an award of Four Thousand Dollars ($4,000.00) is fair and reasonable and warranted by the evidence.

Award is therefore entered in favor of the claimant, Susie Casey, for the sum of Four Thousand Dollars ($4,000.-00).

GENERAL OPINION, IN RE: UNIVERSITY OF ILLINOIS

Opinion submitted March 14, 1935.

In compliance with the request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, for an informal opinion by this court as to the right of various employees at the University of Illinois to an award for medical or/and hospital attention furnished such employees, by virtue of any liability under the Illinois Workmen's Compensation Act, the court renders its opinion in the several matters, as follows:

WORKMEN'S COMPENSATION ACT—*University of Illinois employer under.* The University of Illinois is an employer within the meaning of the Workmen's Compensation Act.

SAME—*employees of University of Illinois.* All employees of the University of Illinois are employees within the meaning of the Workmen's Compensation Act.

SAME—*word, enterprise therein applicable to University of Illinois.* The University of Illinois is engaged in an enterprise within the meaning of the Workmen's Compensation Act.

SAME—*University of Illinois—each department or school of complete in itself considered separate enterprise—test of liability of University.* The University of Illinois consists of a number of different departments or schools which are practically complete in themselves and is in the same position as an individual or corporation which is engaged in several different businesses or enterprises, some of which may be extra-hazardous and some not; therefore each such department or school must be considered as a separate business or enterprise and the liability of the University in each case depends upon whether that particular school or department comes within any of the provisions of Section 3 of the Workmen's Compensation Act, or is engaged in a business or enterprise which is extra-hazardous in fact.

SAME—*same—business or enterprise not engaged in.* The University of Illinois is not engaged in any business or enterprise which comes within the provisions of Paragraphs 1, 2, 3, 4, 5, 9 or 10 of Section 3 of the Workmen's Compensation Act.

SAME—*same—whether engaged in other business or enterprise question of fact.* The business or enterprise in which the University of Illinois or the several schools or departments thereof is engaged may come within the provisions of Paragraphs 6, 7, 7½ or 8 of Section 3 and the question as to whether the University does come within the provisions of any of such paragraphs is a question of fact to be determined by the evidence in each particular case.

SAME—*farm work excepted from provisions of.* All farm work done by farmers and others engaged in farming, tillage of the soil or stock raising, and all work done which is in its nature a part of farming, and which is done on a farm or country place, is excepted from the provisions of the Workmen's Compensation Act.

Per Curiam:

In compliance with the request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, for an informal opinion by this court as to the right of various employees at the University of Illinois to an award for medical or and hospital attention furnished such employees, by virtue of any liability under the Illinois "Workmen's Compensation Act", the court renders its opinion in the several matters, as follows:

In determining whether the respective claims should be allowed we are mindful of the fact that such claims are not awards in the usual sense in which awards by this court are made and are not payable by appropriation in due course, but that such opinions are for the guidance of the University authorities, and that such claims, if paid, will be paid by the University authorities from funds at the disposal of the University.

Cases of the character here involved are not without their difficulties, and in these particular cases, decisions are made more difficult by reason of the very meager statement of facts submitted to us. In some of the cases submitted, it is necessary to supplement the given facts with the personal knowledge of the court as to the activities of the University and the several departments thereof in order to arrive at a conclusion. Ordinarily this would not be permissible, but inasmuch as this opinion is merely for the guidance of the University authorities, and does not constitute an award, we feel that such action is justified.

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Although the several statements of facts do not so allege, we are advised that the University is an Illinois corporation, incorporated under a special charter in 1867, under the name of Illinois Industrial University;—the name being changed to University of Illinois in 1885. The several statements contain no information as to the charter powers of the corporation, but the case of *North* vs. *Board of Education*, 201 Ill. App. 449, hereinafter referred to, states that the Uni-

versity was chartered "to furnish instruction to students in various branches of learning." Considering the several statements of fact as a whole, it appears that the University consists of a number of schools or departments which are practically complete in themselves.

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Before setting forth the conclusions at which we have arrived, we will refer briefly to the principles of law involved, as set forth in the statutes and the decisions of the courts.

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With reference to the manner in which the Workmen's Compensation Act should be construed, the Supreme Court, in the case of *Chicago Cleaning Co.* vs. *Ind. Board, 283 Ill. 177-181,* said:

"The Act is commendable legislation and should be liberally construed in order to give effect to the purpose and object in adopting such Act."

In the case of *Newman* vs. *Ind. Com., 353 Ill. 190-193,* the court said:

"The Workmen's Compensation Act is a humane law, of remedial nature, and wherever construction is permissible, its language should be liberally construed.

In the very recent case of *Raymond* vs. *Ind. Com., 354 Ill. 586-591,* the court approved the decisions in the Chicago Cleaning Co. case, and said:

"The Compensation Act is remedial in its nature and has always been liberally construed by this court for the purpose of effecting the intended benefits to the employee and of paicing upon the industries affected thereby the burdens incident to such employment."

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Section Three (3) of the Workmen's Compensation Act provides:

"The provisions of this Act hereinafter following, shall apply automatically and without election * * * to all employers and all their employees engaged in any department of the following enterprises or businesses which are hereby declared to be extra-hazardous, to-wit:

1. The erection, maintaining, removing, remodeling, altering or demolishing of any structure, except as provided in sub-paragraph 8 of this section.

2. Construction, excavating or electrical work, except as provided in sub-paragraph 8 of this section.

3. Carriage by land, water or aerial service and loading or unloading in connection therewith, including the distribution of any commodity by horse-drawn or motor driven vehicle where the employer employs more than two employees in the enterprise or business, except as provided in sub-paragraph 8 of this section.

4. The operation of any warehouse or general or terminal storehouses.

5. Mining, surface mining or quarrying.

6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities.

7½. Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery, except as provided in sub-paragraph 8 of this section.

8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous: *Provided*, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to anyone in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered.

9. Any enterprise, business or work in connection with the laying out or improvement of subdivisions of tracts of land.

10. Any enterprise for the treatment of cross-ties, switch-ties, telegraph poles, timber or other wood with creosote or other preservatives. (Amended by Act approved June 10, 1929.)

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Section Four (4) of the Act defines how the term "employer" shall be construed, and inasmuch as it covers every "public or private corporation", the University is clearly an employer within the meaning of the Act.

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Section Five (5) defines how the term "employee" shall be construed, and under the second paragraph of said section, the several claimants in question are clearly employees within the meaning of the Act.

The University being an employer, and the several claimants being employees within the meaning of the Compensation Act, the question then arises as to whether the University at the time of the several accidents in question was engaged in any of the enterprises or businesses declared to be extra-hazardous, by such Act.

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The question as to what constitutes an enterprise or business has frequently been considered by the Supreme Court. One of the earlier and leading cases upon the question is the case of *Uphoff* vs. *Ind. Com., 271 Ill. 312*, which arose under the Act of 1913. In that case the employer was a farmer who constructed a broom-corn shed and the claimant was injured while employed in that work. The court held that the building of such a structure did not constitute an enterprise or business within the meaning of Section Three (3) of the Act, and said:

"An enterprise is an undertaking of hazard; an arduous attempt. Lexicographers define an enterprise as 'an undertaking; something projected and attempted; an attempt or project, particularly an undertaking of some importance or one requiring boldness, energy or perseverance; an arduous or hazardous attempt, as, a warlike enterprise'. The building of this shed might be classed under the head of something projected or attempted, but hardly as an important undertaking requiring courage or energy or one that was arduous or hazardous."

In *Walsh* vs. *Ind. Com., 345 Ill. 366-369*, the Supreme Court said:

"The term 'business' in common parlance, means an employment which occupies a substantial portion of the time and attention of the one engaged in it."

We appreciate that the Appellate Court in the case of *North* vs. *Board of Trustees, 204 Ill. App. 447*, held that the University is not an "enterprise or business" within the meaning of those words as used in the Compensation Act. However, the Supreme Court, in the case of *Board of Education* vs. *Ind. Com., 301 Ill. 611*, held that a high school with a manual training department connected therewith was an enterprise within the meaning of the Compensation Act. In that case it was contended that a high school could not be regarded as an enterprise within the meaning of the Work-

men's Compensation Act, but the Supreme Court there held to the contrary and brought the case within the rule laid down in the Uphoff case, in the following language:

"The business in which the High School District was engaged was the conducting of a high school, including, among others, a manual training department. It is not unreasonable to regard such an enterprise as a work of some importance, which might even be regarded as arduous."

Surely, if a high school with a manual training department connected therewith is an "enterprise", a State University, as well as the several schools and departments included therein, must also be considered as "enterprises".

Mr. Angerstein, in his work "THE EMPLOYER AND THE WORKMEN'S COMPENSATION ACT", 1930 edition, (hereinafter referred to as "Angerstein") on page 33 sums up the rule as to what constitutes an enterprise or business, in the following language:

"It therefore seems clear that in order to constitute engaging in an enterprise or business within the provisions of Section 3 of the Act so that one engaging therein may be said to be within the provisions of the Act, the work being done must in fact be a business or enterprise, as such, an undertaking as a business for profit and not something merely incidental, occasional or merely temporary. Building a broom-corn shed by a farmer as a mere incident of farming was not within Section 3 but obviously if one engaged in the business of erecting such sheds generally for others for profit, it would be a business or enterprise. One having a private residence built or repaired would not be engaged in a business or enterprise, although one engaged in constructing homes for others would be in that business or enterprise. So also, if one was having a business building or apartment building constructed or repaired, and it was intended to rent it out or a part was rented for profit, the owner would be engaged in a business or enterprise. So also the owner of a factory or building used exclusively for his own purposes, would not be engaged in the business or enterprise of erection, maintaining, etc., of a structure."

From a consideration of these and other authorities bearing upon the question, it appears that the University is engaged in an enterprise within the meaning of the Workmen's Compensation Act;—that is to say, it is engaged through its various schools and departments, in the business or enterprise of furnishing instruction to students in various branches of learning.

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Attention is directed to the fact that the provisions of the *present* Workmen's Compensation Act, embrace *all* em-

ployees engaged in any department of the various businesses or enterprises declared extra-hazardous by Section Three (3) of the Act, regardless of whether the duties of the injured employee are hazardous or not.

With reference to this question, Angerstein, on page thirty-four (34), Section seventeen (17), says:

"If an employer is engaged in an enterprise or business within Section 3 of the Act, then all his employees engaged in any department of such enterprise or business are under the Act. Such employees, as well as such employers, have no right of election and no agreement that such employer and employee might enter into could take any such employee from under the Act.

Prior to amendment of Section 3, effective July 1, 1917, it was held in a number of cases that even though the employer was engaged in such extra-hazardous enterprise or business, yet an employee was not under the Act unless his actual duties were in the extra-hazardous part of the employer's business, or brought him in contact with such hazard, except in cases where the employer had affirmatively elected to come under the Act. However, subsequent to such amendment, and under the Act as now in force, the law is clear that if the employer is engaged in any enterprise or business within the provisions of Section 3, then all his employees in any department of such business or enterprise, are under the Act even though their duties involve no hazards and do not bring them in contract with any of the hazardous parts of any such enterprise or business."

The rule above set forth is announced in the case of *Illinois Printing and Publishing Co.* vs. *Ind. Com. 299 Ill. 189.* and *McNaught* vs. *Hines, 300 Ill. 167.*

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Attention is also directed to that class of cases where an employer is engaged in two separate businesses, one within the Act, and the other not within the Act. In cases of that kind the provisions of the Act apply to all employees engaged in any department of the business of the employer which is within the Act, but have no application to the employees engaged in the business not within the Act, unless, as to them, the employer has elected to come within the Act.

In the case of *Peterson* vs. *Ind. Com., 315 Ill. 199-202*, the employer was engaged in farming, and also operated a sawmill on the same tract of land. The employee was injured while working in the sawmill, and the court held that although the employer was not under the Act as to the work on the farm, yet the operation of the sawmill was an independent enterprise of a hazardous nature, and as to such

enterprise the employer was under the Act. In that case the Court said:

"It is not required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated in the Act to make him liable for compensation. A man may engage in two kinds of business, one not within the Workmen's Compensation Act and the other may be within the Act because it is extra-hazardous. (*Vaughn's Seed Store* vs. *Simonini*, 275 Ill. 477; *Davis* vs. *Ind. Com.*, 297 Ill. 29). * * * * * * We are of the opinion that plaintiff in error and the deceased at the time of the accident were both under the provisions of the Workmen's Compensation Act."

The same conclusion was reached in the case of *Davis* vs. *Ind. Com., 297 Ill. 29,* where the employer owned a hardware business and also owned an apartment building which he rented at a profit; also in the case of *Walsh* vs. *Ind. Com.*, 345 Ill. 366, where the employer was in the small loan business, and also owned eight (8) or ten (10) houses which he kept in repair.

Angerstein, on page thirty-nine (39), sets forth the rule as follows:

"The business itself is the determining factor. For illustration, an employer might own a factory containing power-driven machinery, etc., which automatically would bring it under the Act. All the employees of such factory would be under the Act regardless of what their duties were, just so long as were engaged in any department of the business, and this would include stenographers, salesmen, clerical help, etc. The same employer might own and operate a clothing store entirely separate and apart from the factory, in which store there were no appliances or machinery of any description. This clothing store, therefore, would not come under the Act automatically, and the employees, therefore, would not be under the Act unless and until the employer had filed his written acceptance of the Act with the "Industrial Commission."

The question as to whether a business which is extra-hazardous in fact, but not specifically enumerated in Section Three (3) of the Act, comes within the provisions thereof, is also an important question in this connection. The case of *Cinofsky* vs. *Ind. Com., 290 Ill. 522,* arose prior to the time Section 7½ was added to the Act. The employer was engaged in operating a junk yard which, at that time, was not one of the extra-hazardous businesses enumerated in Section Three (3). The Court in that case, page 523, said:

"Counsel for plaintiffs in error argues that the business or enterprise in which plaintiffs in error were engaged did not bring it within the classification set forth in Section 3 of the Workmen's Compensation Act as extra-hazardous, and that as they had not elected to come under the Act they could not be held liable thereunder, unless it is shown, as a matter of fact, that the business was extra-hazardous. (*Hahnemann Hospital* vs. *Industrial Board*, 282 Ill. 316.) This court held in this last case that a hospital conducted under certain conditions might be a hazardous business while it would not be so under others. The mere receiving or buying of junk of a certain character might not be extra-hazardous, but that was not the whole of plaintiffs in error's business. The evidence shows that they were operating a junk yard,—that is, they were collecting, sorting and preparing junk and metals for market, and that in this work they were sometimes required to use shears driven by electric motor and an acetylene torch. There can be no question that the preparation of this junk for sale was a necessary part of the business and that the work was of such a nature as to bring it within the rule of being extra-hazardous in fact; that plaintiffs in error should be held within the Act on that account under the reasoning of this court in *Friebel* vs. *Chicago City Railway Co.*, 289 Ill. 76."

In two cases before the Industrial Commission, both of which involved employees of a detective agency, one acting as watchman of a building and the other assisting in patrol work, it was contended by the Respondent that the Industrial Commission had no jurisdiction to enter an award, because detective agencies are not enumerated in Section Three (3) of the Act. In each case the Industrial Commission awarded compensation, and the Circuit Court affirmed the award of the Commission. Petition for writ of error was filed in the Supreme Court in each case, and *in each case it was denied.* The result of such denial was to affirm the findings of the Industrial Commission, and to hold inferentially that if a business is extra-hazardous in fact, it comes within the provisions of the Act, although not specifically mentioned therein.

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The furnishing of instruction to students is not one of the enterprises or businesses which are enumerated as extra-hazardous in Section Three (3) of the Compensation Act, and before any employee of the University is entitled to recover compensation under the Act, he must show that the University, or if he is engaged in an independent department, then the department in which he is working, is engaged in a business or enterprise which comes within some one of the

paragraphs of Section Three (3) of the Act, or that such business or enterprise is extra-hazardous in fact.

A brief consideration of the several paragraphs of Section Three (3) of the Act may help to clarify the situation:

Paragraph 1. *The erection, maintaining, removing, remodeling, altering or demolishing of any structure*, etc. From what has heretofore been said, it follows that the University is not engaged in the *business* of erecting, maintaining, removing, remodeling, altering or demolishing of any structure. It may be engaged *in the doing of such work* from time to time, but if so, such work is merely incidental to the general work of the University, and is not *the business* in which the University is engaged.

In the case of *Jacobi* vs. *Ind. Com., 342 Ill. 210*, the Supreme Court, in passing upon this question, said:

"Where the building is maintained, occupied and used by its owner in conducting a business in which he is engaged, as an incident or adjunct to the business, the relation of his business to the Workmen's Compensation Act and his relation to his employees is to be determined by the business and not by the maintenance of the building."

In the case of *Walsh* vs. *Ind. Com.*, 345 Ill. 366-370, the Supreme Court said:

"The line of demarcation between maintaining a structure as an incident rather than as a business, and the business of *maintaining a structure*, is not readily defined, but we are of the opinion that a safe rule is, that where one maintains buildings or structures for profit, whether that profit be as compensation for his services or by way of rentals received, and such maintenance requires a substantial portion of his time and attention, he must be said to be engaged in the business of maintaining a structure within the contemplation of the Workmen's Compensation Act."

Consequently any employee of the University who sustains an injury while engaged in the erection, removal, remodeling, altering or demolishing of any structure, is not by virtue of paragraph One (1) of Section Three (3) brought under the Compensation Act.

Paragraph 2. The same rule applies to construction, excavating or electrical work as provided in paragraph Two (2) of Section Three (3) of the Act.

Paragraphs 3, 4, 5, 9, and 10. The same may be said of paragraph Three (3) with reference to carriage by land,

water or aerial service, etc.; paragraph Four (4) with reference to the operation of any warehouse, etc.; paragraph Five (5) with reference to mining, surface mining or quarrying; paragraph Nine (9) with reference to the laying out or improvement of subdivisions, etc.; and paragraph Ten (10) with reference to the treatment of cross-ties, etc.

Paragraphs Six (6), Seven (7), Seven and one-half (7½) and Eight (8) are somewhat different, however. Such paragraphs provide as follows:

"6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities.

7½. Any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery, except as provided in sub-paragraph 8 of this section.

8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein: each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous: *Provided*, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Paragraph 6. If, in the course of the performance of its regular business, or the exercise of its charter powers, any school or department of the University manufacturers, handles or uses explosive materials in dangerous quantities, then such school or department is automatically brought under the Act, and every employee of such department, regardless of his or her duties, is entitled to compensation under the Act for any accidental injury sustained by such employe, which arises out of and in the course of his or her employment.

Paragraph 7. If, in the course of its regular business, or the exercise of its charter powers, any school or department of the University *manufactures, uses, generates,* stores or conveys any molten metal, or explosive or injurious gases or vapors, or inflammable vapors or fluids, or corrosive acids in dangerous quantities, then such school or department is

automatically brought under the Act, and every employe of such department, regardless of his or her duties, is entitled to compensation under the Act for any accidental injury sustained by such employe, which arises out of and in the course of his or her employment.

Paragraph 7½. If, in the course of its regular business, or the exercise of its charter powers, any school or department of the University uses sharp-edged cutting tools, grinders, or implements, then such school or department is automatically brought under the Act, and every employe of such department, regardless of his or her duties, is entitled to compensation under the Act for any accidental injury sustained by such employe, which arises out of and in the course of his or her employment.

In this connection it might be well to consider the following quotation from Angerstein, appearing on page Fifty-three (53):

"The mere occasional or incidental use of a sharp-edged cutting tool, grinder or implement, should not be sufficient to bring an enterprise or business, not otherwise under the Act, within the provisions of paragraph 7½, but if such tools, even though hand tools, were customarily or regularly used and there was any hazard or danger in connection with their use, it would constitute an enterprise within the provisions of that paragraph."

The foregoing quotation is supported by the opinion of the Supreme Court in the case of *Garren* vs. *Ind. Com., 310 Ill. 95.*

In the case of *Therien* vs. *Ind. Com., 351 Ill. 166,* the employer was conducting a nursing home consisting of about forty (40) rooms and having two steam heating plants. It was contended, among other things, that the employer came within the provisions of paragraph 7½ of Section Three (3). The Supreme Court, in disposing of that contention said:

"The only sharp edged cutting tools were those knives used for the purpose of cutting roasts which are ordinarily found in a private home. Such tools do not come within the purview of Section Three (3) as sharp edged cutting tools, grinders or implements * * *. No other appliances of the character described in the Act were used in the nursing home."

The court held in that case that the employer did not come within the provisions of paragraph 7½.

Paragraph 8. By virtue of paragraph eight (8) of Section Three (3), all employers and all their employees en-

gaged in any department of any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein, come within the Act. Angerstein, in speaking of this paragraph, on page fifty-four (54), says:

"The provisions of this paragraph bring within the provisions of the Act, many enterprises or businesses of many kinds or descriptions. Apparently it was intended as a general provision to bring under the Act practically every business or enterprise of an extra-hazardous nature that might not have been enumerated in the preceding paragraphs of Section 3. Generally speaking, it brings under the Act every enterprise or business concerning which there are statutory provisions or municipal regulations for the safeguarding of employees or the public against accidental injuries or death. The one definite limitation upon the provisions of this paragraph is that only a statutory or municipal regulation for the protection and safeguarding of the employees or of the public therein against accidental injury or death is sufficient to bring a business or enterprise within the provisions of said Paragraph 8. A statutory or municipal regulation applying to a business or enterprise is not sufficient unless it directly relates to the safeguarding against accidental injury or death of the employees therein or of the public in connection therewith."

In *Dietrich* vs. *Ind. Com., 286 Ill. 50,* the employer was conducting a retail grocery store and butcher shop with no power-driven machinery. It was contended that the business was brought within the provisions of the Compensation Act by virtue of the Child Labor Law, the Women's Ten Hour Law, the Health, Safety and Comfort Act, and also by a municipal ordinance requiring meat markets to be licensed.

In that case the Supreme Court, on page fifty-two (52), said:

"These statutory and municipal regulations are not of the character referred to in Clause 8 of Section 3 of the Workmen's Compensation Act. The title of that Act is "An Act to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State", etc. Compensation for accidental injuries or death is the subject of the Act and its language must be construed with reference to that subject. When it is said that it shall apply in any enterprise in which statutory or municipal ordinance regulations are imposed for the protection and safeguarding of the employee or the public therein, it refers to such regulation for the protection and safeguarding of employees or the public against accidental injuries or death. The ordinance and the statutes upon which the plaintiff in error relies are

not imposed upon the business in which the defendant in error was engaged for such purposes."

In the case of *Bowman Dairy Co.* vs. *Ind. Com.*, *292 Ill. 284*, the employee was a milk wagon driver, and it was contended, among other things, that the employer was under the Act by virtue of an ordinance regulating the width of stalls and stables in which horses were kept and the width of passageways and footways between the stalls. The court, following the Dietrich case, held that the ordinance was not of a character to bring the business under the Compensation Act.

In *City of Rock Island* vs. *Ind. Com.*, *287 Ill. 76*, the employee was working as a street sweeper and it was sought to bring the employer under the Act by reason of certain speed and traffic ordinances, but the Supreme Court held that such ordinances were not of the character contemplated by paragraph eight (8) and that the employer was not under the Act by virtue thereof.

In *East St. Louis Board of Education* vs. *Ind. Com.*, *295 Ill. 61*, the employee was working as a janitor in a two-story school building with a basement containing a steam boiler for heating purposes, and was injured while washing windows on the second floor of said building. The boiler was subject to city inspection and it was contended that the employer was thereby brought under the Compensation Act. The Supreme Court, in upholding such contention, said:

"It seems self-evident that the inspecting of a boiler in the basement of a schoolhouse containing many children is certainly the guarding of appliances for their protection, the same as would be true in the requirement of fire escapes. * * * It would seem necessarily to follow by the working of Sub-section 8 of Section 3 of the Workmen's Compensation Act that this statute and the municipal regulations brought this building under the provisions of said section of the Act."

In *Hahnemann Hospital* vs. *Ind. Com.*, 282 Ill. 316, the evidence showed that the hospital building was a seven-story structure with two power-driven elevators, and was equipped with engines and high-pressure boilers, and a system of electric wiring and apparatus for signals throughout the building. There were city ordinances requiring elevators in such buildings, also with reference to fire escapes, the inspection of boilers, and the installation of electric wiring and appara-

tus. The Supreme Court, in holding that such regulations brought the employer under the Act, said:

"The ordinance regulations of Chicago heretofore set forth as applying to buildings of the class to which appellee's building belong, and to the machinery, equipment and appliances therein and requiring inspection of the same, were unquestionably imposed for the protection and safeguarding of the employees and the public, and bring the business or enterprise in which appellee was engaged within the terms of Clause 8 above set forth."

In *Ascher Bros. Amusement Enterprises* vs. *Ind. Com.*, 311 Ill. 258, the employee was working as an usher in a moving picture theatre in which the projecting machine was installed in a fireproof booth. The city ordinances required the booth to be constructed according to certain specifications, and provided for the inspection thereof by the fire marshal;—and the court held that such ordinance was enacted for the safeguarding of the employees and the public and brought the employer within the provisions of Paragraph eight (8).

Some of the statutory regulations which seem to be included within the terms of the classification of Paragraph eight (8) are the following:

The Health, Safety and Comfort Act, Cahill's Statutes, 1933, Chapter 48, Paragraph 143.

The Building Construction Act, Cahill's Statutes, 1933, Chapter 48, Paragraph 123.

The Blower Act, Cahill's Statutes, 1933, Chapter 48, Paragraph 133.

The Fire Escape Act, Cahill's Statutes, 1933, Chapter 38, Paragraph 248.

In speaking of the Fire Escape Act, Harper, in his "Workmen's Compensation," Page ninety-four (94), says:

"This Act requires fire escapes of a specified design, on all buildings four or more stories in height. It is believed that this Act would not operate to bring within the classification of the Compensation Act, any employers except those engaged in the "occupation, enterprise or business," of operating or conducting a building, to which the regulations of the Fire Escape Act are applicable. The compensation law was obviously not intended to apply to mere owners of buildings or to lessees thereof, and unless there is conducted in the building some industry covered by the classification of Section 3 of the Act, or unless the building is subject to the provisions of the fire escape law and is being conducted by the employer (either as owner or lessee) as an "occupation, enterprise or business" it could not be properly included within the classification of hazardous enterprises, to which alone the provisions of Section 3 are applicable."

With reference to the exception in Sub-paragraph eight (8), as to work done by farmers and others engaged in farming, tillage of the soil or stock raising, or to any work done on a farm, the opinion of the court is fully set forth in the case of *S. E. Bunting, University of Illinois No. 611*, and under the very broad terms of the Illinois Compensation Act, any person engaged in farming, tillage of the soil or stock raising, or in the doing of any kind of work which is in its nature a part of farming, on a farm or country place, does not come within the provisions of the Act.

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CONCLUSION.

From a consideration of the foregoing authorities, it seems that the following conclusions logically follow:

1. That the University is an employer within the meaning of the Act.

2. That all employees of the University are employees within the meaning of the Act.

3. That the University is engaged in an "enterprise" within the meaning of the Act.

4. That the University consists of a number of different departments or schools which are practically complete in themselves; that therefore it is in the same position as an individual or corporation which is engaged in several different businesses or enterprises, some of which may be extra-hazardous and some not; that each department or school must therefore be considered a separate business or enterprise, and the liability of the University in each case depends upon whether that particular school or department comes within any of the provisions of Section three (3) of the Act, or is engaged in a business or enterprise which is extra-hazardous in fact.

5. That the University is not engaged in any business or enterprise which comes within the provisions of Paragraphs one (1), two (2), three (3), four (4), five (5), nine (9), or ten (10) of Section three (3) of the Act.

6. That the business or enterprise in which the University, or the several schools or departments thereof, is engaged, may come within the provisions of Paragraphs six (6), seven (7), seven and one-half (7½), or eight (8); that

the question as to whether the University does come within the provisions of any of such paragraphs is a question of fact to be determined by the evidence submitted in each particular case.

7. That under the very broad terms of the Illinois Workmen's Compensation Act, all farm work done by farmers and others engaged in farming, tillage of the soil or stock raising, and all work which is in its nature a part of farming, and which is done on a farm or country place, is excepted from the provisions of the Workmen's Compensation Act.

UNIVERSITY OF ILLINOIS, No. 608—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

O. M. Brewer, $2.00.

NATURE OF EMPLOYMENT.

Employed for the purpose of cleaning the buildings and equipment of the university. Work includes handling of lye needed in mopping floors. Mixing solution of lye and washing powder in mop bucket.

NATURE AND DATE OF INJURY.

Burn of inner lobe of right ear and face in region of mouth on July 29, 1933.

BY THE COURT.

Because the business of the University of Illinois is not the business of maintaining and operating buildings, it seems that the janitor service performed at the University buildings is not within the Workmen's Compensation Act. The case of *Thorien* vs. *Industrial Commission*, 351 Ill. 166, seems directly in point upon the facts submitted. No award is recommended.

UNIVERSITY OF ILLINOIS, No. 603—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Elizabeth Bruner, $2.00.

NATURE OF EMPLOYMENT.

Cook in Women's Residential Hall, a women's dormitory conducted and maintained by the U. of I.

NATURE AND DATE OF INJURY.

Scalded or burned on top of foot while removing potatoes from a steamer on June 18, 1933.

BY THE COURT.

In operating a kitchen in the Women's Residential Hall, the State does not appear to be engaged in one of the enterprises or businesses designated as extra-hazardous by Section 3 of the Workmen's Compensation Act. The injury in question does not appear to have been occasioned by the operation of any machinery, and upon the facts submitted and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should not be held applicable to the above named employee with reference to said injury.

UNIVERSITY OF ILLINOIS, No. 611—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

S. E. Bunting, $158.45.

NATURE OF EMPLOYMENT.

Laborer in Animal Husbandry Department, including all kinds of work connected with the operation of farms of the Agricultural Experimental Station. When this accident occurred he was engaged in feeding the silage cutter, which was one of the duties to which he was assigned.

NATURE AND DATE OF INJURY.

Thumb caught in feed table of gear when turning off water and thumb torn off. September 18, 1933.

BY THE COURT.

A decision authorizing an award cannot be justified on this claim.

Sub-section 8 of Section 3 of the Workmen's Compensation Act provides in part as follows:

"Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purpose, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

It was the intention of the Legislature that the Workmen's Compensation Act should not apply in any sense or under any conditions to those engaged in farming, tillage of the soil or stock raising or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered. The fact that the University operates its farm land for the purpose of education and not for profit can not justify an exception being made of employees of the University who are injured while being engaged in any manner in the agricultural work excepted under the Act. No reason appears why an employee of the State should be placed in any other or different or better position than an employee of the individual farmer, if the work is in fact done on the farm land. The fact that the University operates its farms as experimental stations does not make a change in the fact that the work done is in fact work done on a farm.

"A farm means any tract of land used for raising crops or rearing animals."

257 Southwestern, 220.

"A farm within the meaning of a statute giving the landlord a lien for rent, in standard and common acceptation, means a body of land usually

under one ownership, devoted to agriculture, either to raising crops or pasture or both."

158 Pacific, 608.
People vs. *Caldwell*, 142 Ill. 434.
Williams vs. *C. & N. W. Ry.*, 228 Ill. 596.

In passing upon a statutory provision similar to that in Illinois, but not so broad in its phrasings, the following was held in Indiana:

"An employee of the State Girls School, whose duties were limited to work on a farm operated in connection with the school held to be a farm employee within the Workmen's Compensation Act."

Dowery vs. *State*, 149 N. E. 922.

An examination of Section 3 of the Illinois Compensation Act discloses that Sub-sections 1, 2, 3 and 7½ all contain the following words "Except as provided in sub-paragraph 8 of this section."

Consequently, even if the University was engaged in any business or enterprise within the sub-sections 1, 2, 3, 7½ or 8, an injury sustained in any such business or enterprise would not be compensable if the work done came within the exception set forth in Sub-paragraph 8.

In a Michigan case it appeared that a corporation, organized for the manufacture and sale of chemicals and pharmaceuticals, maintained a farm where it raised hay, rye and other farm products, the principal use, however, of the farm being in connection with the laboratory of the corporation, animals (from guinea pigs to horses) being kept on the farm for experimental purposes.

Held: The growing of grain and care of stock are the ordinary uses to which a farm is put, and any man employed to work on a farm and do the work ordinarily done there, regardless of the purpose, is a farm laborer.

Shaeffer vs. *Parke Davis & Co.*, 159 N. W. (Mich.) 304.

The provisions of the Illinois Statute are more comprehensive than any other State to which the attention of the court has been called. In Nebraska the exception relative to farm work covers "employers of farm laborers." In Iowa the excluding words are "farm or other laborer engaged in agricultural pursuits." In Minnesota the words used are "farm laborers," in Utah "agricultural laborers," in Idaho

"agricultural pursuits," in Michigan "farm laborers," in Indiana "farm or agricultural laborers and employers of such persons," in New York "farm laborers." In Illinois the exclusion under Sub-section 8 covers not only the employer but the employee, and also any work done, etc. It therefore seems that where the facts show that the work was done on a farm or country place then the injury is not compensable.

Under the provisions of Sub-section 8 of Section 3 of the Act, and upon the facts submitted and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should not be held applicable to the above named employee with reference to said injury and that under same no award can be properly made.

UNIVERSITY OF ILLINOIS, No. 612—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Eugene B. Corbin, $3.00.

NATURE OF EMPLOYMENT.

Employed as mechanician, Department of Mechanical Engineering.

NATURE AND DATE OF INJURY.

Injured by a particle of aluminum dust lodging in right eye. October 27, 1933.

BY THE COURT.

Claimant, at the time of the injury, was working on a metal pattern and in so doing got a particle of aluminum dust in his right eye. His occupation was that of mechanician, and if the machinery used in said department is power driven or subject to the regulations contemplated by Sub-section 8 of Section 3 of the Workmen's Compensation Act, then the general duties incident to such work would be within the scope of

the Act. Under the facts submitted and the foregoing assumption, and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended under the provisions of Sub-section 8 of Section 3 of the Act.

UNIVERSITY OF ILLINOIS, No. 616—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

E. D. Farley, $4.00.

NATURE OF EMPLOYMENT.

Employed as assistant in Chemistry Department, employed in manufacture of special chemicals and handled explosives and inflammable materials. Claimant was engaged in transferring powdered sodium from one flask to another at the time of the accident.

NATURE AND DATE OF INJURY.

Eyes burned and injured by flying particles of glass and chemical. February 3, 1933.

BY THE COURT.

Under Sub-section 6 of Section 3 of the Workmen's Compensation Act, and upon the above facts submitted and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended.

UNIVERSITY OF ILLINOIS, No. 595—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

F. A. Ferris, $15.50.

NATURE OF EMPLOYMENT.

Machinist at machine shop, Physical Plant. Does machine work on tools and other metals in the machine shop of the physical plant.

NATURE AND DATE OF INJURY.

Was assisting in lifting framework of iron. Bar slipped, causing frame to fall from horses upon which it rested, crushing toe. Fracture of the fourth toe of the left foot. March 13, 1933.

BY THE COURT.

An injury sustained by one while employed as a machinist in a machine shop, where sharp edged cutting tools, grinders and implements are used as per Sub-section 7½ of Section 3 would come within the Workmen's Compensation Act, and upon the facts submitted, and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended.

UNIVERSITY OF ILLINOIS, No. 600—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished an employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

C. F. Gibbs, $223.42.

NATURE OF EMPLOYMENT.

Employed as assistant in chemistry department.

NATURE AND DATE OF INJURY.

Tendon of little finger severed, necessitating an operation. Was teaching class of students in chemistry which included use of dangerous chemicals and acids. Carried on research in chemistry in laboratory work. May 15, 1933.

BY THE COURT.

Under Sub-section 6 of Section 3 of the Workmen's Compensation Act, and upon the foregoing facts submitted and from additional facts applying to the employment herein, as evidenced by the Farley claim, No. 616, and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended. In making this recommendation attention is called to Section 8-19-1-2 of the Act, relative to compensation claims.

UNIVERSITY OF ILLINOIS, No. 594—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

W. E. Hanford, $5.00.

NATURE OF EMPLOYMENT.

Assistant in Chemistry Department.

NATURE AND DATE OF INJURY.

Was teaching class of students in chemistry which included use of dangerous chemicals and acids. Carried on research in chemistry in laboratory work. Received burns on face and left arm by acid. February 3, 1933.

BY THE COURT.

Under Sub-section 6 of Section 3 of the Act, and from the foregoing facts and from additional facts stated in the Farley Claim No. 616, and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended.

UNIVERSITY OF ILLINOIS, No. 605—AWARD NOT RECOMMENDED

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Carl Mattingly, $6.00.

NATURE OF EMPLOYMENT.

Employed as brick layer in masonry repairs on the University buildings.

NATURE AND DATE OF INJURY.

Sprain of right wrist. June 15, 1933.

BY THE COURT.

Because the business of the University of Illinois is not that of maintaining and operating buildings, it seems that the service of a brick-layer regularly employed in the maintenance and repair of brick work in the buildings on the University is not within Sub-sections 1 or 2 of Section 3 of the Workmen's Compensation Act. The case of *Therien* vs. *Industrial Commission*, 351, Ill. 166, seems directly in point. No award is recommended.

UNIVERSITY OF ILLINOIS, NO. 610—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

J. M. McCloskey, $3.00.

NATURE OF EMPLOYMENT.

Laborer employed in Department of Horticulture; required to do all kinds of work connected with the activities of that department, such as planting trees and other plants, working on soil, spraying, laying walks through gardens and plantations. In connection with the latter work he works with concrete equipment and materials and this was the work in which he was engaged at the time of the accident. The Horticultural Department has charge of the aboretum and the gardens in which the president's house is located.

NATURE AND DATE OF INJURY.

Was working on new walks and was cut in left cheek by being struck in the face by a crank on a cement mixer while working in the grounds of the president. August 7, 1933.

BY THE COURT.

From the facts stated, it does not appear that the work of a laborer engaged in the Department of Horticulture in the activities stated comes within any of the Sub-sections of Section 3 of the Act, nor that such work is in fact extra-hazardous and that the University could in any sense be said to be "engaged in such business." From a consideration of the cases heretofore cited and the facts stated, the court is of the opinion that no award should be made on this claim.

UNIVERSITY OF ILLINOIS, NO. 607—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

William Meek, $4.00.

NATURE OF EMPLOYMENT.

Laborer in Animal Husbandry Department, doing general work in the Horse Division of the Agricultural Experimental Station. Work includes supervision and handling of horses, handling of feed and doing general farm work. Work involves use of tools and machinery.

NATURE AND DATE OF INJURY.

Was lifting baled hay up over a four foot wall in barn mow letting it fall down to a truck below, causing pain and soreness in left side. July 7, 1933.

BY THE COURT.

The suggestions made under claim for S. E. Bunting, No. 611, are applicable to this claim. Under Sub-section 8 of Section 3 of the Workmen's Compensation Act, no award should be made, as the facts show that the work in which the claimant was engaged was that of general farm work in the Department of Animal Husbandry. No award is recommended.

UNIVERSITY OF ILLINOIS, NO. 602—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Jesse Meyers, $5.00.

NATURE OF EMPLOYMENT.

Works as a plumber in the maintenance and repair of plumbing in all buildings of the University of Illinois.

NATURE AND DATE OF INJURY.

Was driving sleeve for still cock through wall for outlet in north end of basement of new Agricultural Building and a piece of steel lodged in the left eyeball. June 21, 1933.

BY THE COURT.

Because the business of the University of Illinois is not that of maintaining and operating buildings, as construed by the courts, it seems that the service of a plumber regularly employed in the maintenance and repair of plumbing work in the buildings of the University is not within the Workmen's Compensation Act. The case of *Therien* vs. *Industrial Commission*, 351 Ill. 166 seems directly in point upon the facts stated. No award is recommended: See *Lombard College* vs. *Industrial Commission*, 294 Ill. 548.

UNIVERSITY OF ILLINOIS, No. 619—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

D. V. Nalley, $10.00.

NATURE OF EMPLOYMENT.

Work involves loading and unloading of heavy materials and carrying same in and out of University buildings.

NATURE AND DATE OF INJURY.

Formation of large blood blister, bruise of flesh and fracture of first joint of third finger while loading pipe which was to be transported to men's new gymnasium. November 17, 1933.

BY THE COURT.

Apparently employee Nalley was employed as a general laborer in maintenance work about the buildings of the University. As heretofore stated in the case of Meyers, No. 602, and under the authorities heretofore cited, and the facts herein submitted, no award should be made.

UNIVERSITY OF ILLINOIS, No. 599—AWARD NOT RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

C. A. Reynolds, $11.00.

NATURE OF EMPLOYMENT.

Does general work in the beef cattle division of the Agricultural Experimental Station. Work includes supervision and handling of cattle, handling of food and doing general farm work. Work involves use of tools and machinery.

NATURE AND DATE OF INJURY.

Jabbed end of baling wire in back of hand while feeding baled hay to cows. March 26, 1933.

BY THE COURT.

Under the facts submitted, it appears that the claimant was engaged in doing general farm work for the Agricultural Experimental Station of the University, and under Subsection 8 of Section 3 of the Workmen's Compensation Act, no award could be justified. See suggestions under claim of S. E. Bunting No. 611. An award is not recommended.

UNIVERSITY OF ILLINOIS, No. 597—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Waldo Shumway, $5.00.

NATURE OF EMPLOYMENT.

Employed as professor in zoology. Work includes handling of chemicals, animals and apparatus including sharp instruments.

NATURE AND DATE OF INJURY.

Injured by drawing thumb across microtome blade, necessitating two stitches. March 28, 1933.

BY THE COURT.

Under Sub-section 7½ of Section 3 of the Compensation Act, claimant would appear to be entitled to an award. Upon the above facts submitted and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended.

UNIVERSITY OF ILLINOIS. No. 614—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of State for medical attention furnished employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Morse Singer, Jr., $2.00.

NATURE OF EMPLOYMENT.

Employed as mechanician, Department of Mechanical Engineering.

NATURE AND DATE OF INJURY.

Piece of cast iron became embedded in eyeball. July 19, 1933.

BY THE COURT.

The claimant, from the above facts, seems to have been employed as a mechanician in the Engineering Shop of the University. Assuming that the machinery used in said shop is power driven, where he does machine work, or subject to the regulations contemplated by Sub-section 8 of Section 3 of the Workmen's Compensation Act, and under the facts submitted for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University

of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended under the provisions of Sub-section 8 of Section 3 of the Act.

UNIVERSITY OF ILLINOIS, No. 601—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

E. W. Wharton, $3.00.

NATURE OF EMPLOYMENT.

Laborer in power plant of the University of Illinois. Work includes handling of coal, cleaning out of boilers and smoke stacks and assisting with machinery.

NATURE AND DATE OF INJURY.

Was assisting in cleaning soot from old smoke stack at the University power plant and some foreign particle lodged in right eyeball. May 18, 1933.

BY THE COURT.

If the operation of the power plant involves the use of power-driven machinery, an employee therein would seem to come within Paragraph 8 of Section 3 of the Workmen's Compensation Act—(see *Board of Education* vs. *Industrial Commission*, 301 Ill. 611)—and an award is recommended, in this case, upon the facts submitted.

UNIVERSITY OF ILLINOIS, No. 604—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

W. M. Wilson, $86.75.

NATURE OF EMPLOYMENT.

Research professor in civil engineering. Carries on research in engineering materials, including concrete arches, etc. Work involves supervision and the building of test structure of concrete and other materials.

NATURE AND DATE OF INJURY.

Was engaged in wrecking auxiliary structure used in connection with tests of reinforced concrete arches when he suffered compound fracture of fourth left metatarsal bone, June 14, 1933.

BY THE COURT.

This work is a part of the educational work of the University and is an item in its main business. Under Sub-section 2 of Section 3 and upon the above facts, this case would seem to be analygous to the manual training teacher's work in *Board of Education* vs. *Industrial Commission*, 301 Ill. 611, and an award is recommended.

UNIVERSITY OF ILLINOIS, NO. 598—AWARD RECOMMENDED.

Opinion submitted March 14, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, University of Illinois.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

A. E. Wood, $9.00.

NATURE OF EMPLOYMENT.

Employed to do machine work in Department of Chemistry, including the building and repair of mechanical and scientific apparatus and involves the use of lathes and other machines and sharp tools.

NATURE AND DATE OF INJURY.

One of the bones in his finger was broken by use of machine lathe April 6, 1933.

BY THE COURT.

From the foregoing statement it would appear that claimant would come within the Sub-section 7½ or 8 or both of Section 3 of the Workmen's Compensation Act, and upon the above facts submitted and for the sole purpose of arriving at a conclusion for the guidance and action of the officials of the University of Illinois, the Court of Claims is of the opinion that the Workmen's Compensation Act should be held applicable to the above named employee with reference to said injury. An award is recommended.

UNIVERSITY OF ILLINOIS, NO. 624—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Howard Canady, $10.00.

NATURE OF EMPLOYMENT.

Employed as laborer in maintaining the physical plant. Works as tinner's apprentice.

NATURE AND DATE OF INJURY.

Injured February 5, 1934, cornea of left eyeball injured by particle of metal while drilling holes in metal vent pipe at "The old boiler house."

BY THE COURT.

As the business of the University of Illinois is not that of maintaining and operating buildings, as construed by the courts, the service of a mechanic regularly employed in the maintenance and repair of the buildings would not bring such employment within the Workmen's Compensation Act. Upon the facts stated, (see *Lombard College vs. Industrial Commission*, 294 Ill. 548). No award is recommended.

UNIVERSITY OF ILLINOIS, No. 628—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

W. S. Freeman, $13.50.

NATURE OF EMPLOYMENT.

Farm laborer in Agronomy Department.

NATURE AND DATE OF INJURY.

While hauling straw from stack for spreading on wheat field on February 5, 1934, injured as result of strain or an attack of appendicitis.

BY THE COURT.

As this claim is for an employee who was engaged as a farm laborer, the employment is directly within the proviso of Sub-section 8 of Section 3 of the Workmen's Compensation Act, which expressly excepts any work done on a farm or country place, and no award can be recommended. (See *Bunting* vs. *the State*, U. of I. No. 611. C. of C. Reports.)

UNIVERSITY OF ILLINOIS, No. 622—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

P. A. Johnson, $3.00.

NATURE OF EMPLOYMENT.

A welder using electric and acetylene torch in maintenance and repairs. Employed in the physical plant of the university.

NATURE AND DATE OF INJURY.

Bruises of the right eyeball and surrounding area on January 4, 1934, while putting an angle iron on one of the large sliding doors of garage in order to brace and straighten frame.

BY THE COURT.

As the business of the University of Illinois is not that of maintaining and operating buildings, as construed by the courts, the service of a mechanic regularly employed in the maintenance and repair of the buildings would not bring such employment within the Workmen's Compensation Act. Upon the facts stated, no award is recommended. (See *Lombard College* vs. *Industrial Commission*, 294 Ill. 548.)

UNIVERSITY OF ILLINOIS, NO. 618—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Raymond A. Kirkpatrick, $4.50.

NATURE OF EMPLOYMENT.

Laborer: Dairy Department in University Dairy Creamery: handles milk and other creamery products, ice and icing equipment incident to the operation of the creamery.

NATURE AND DATE OF INJURY.

On November 26, 1933, was chipping ice at the time of the accident in question; blunt end of ice pick penetrated the hand.

BY THE COURT.

Presumably the University Dairy Creamery and the University Pasteurization Plant are one and the same.

In its general opinion relative to the University of Illinois matters, filed in 1934, this court referred to the opinion of the Attorney General rendered March 27, 1928, in file

matter No. 1400, wherein the Attorney General rendered an opinion that the University is conducting its pasteurization plant in the College of Agriculture not as a business, but as a method of teaching the ways and means for proper pasteurization of milk. Being therefore a part of the general educational scheme and the educational work being the business or enterprise in which the University is engaged, and that enterprise being one in which State and municipal regulations are imposed, as stated in Sub-section 8 of Section 3 of the Workmen's Compensation Act, an employee therein would be within the provisions of said Act.

However, if the work of such employee came within the further proviso of Sub-section 8 which excepts from the Act employees who perform "any work done on a farm or country place," such proviso would control and no award should be made. As the facts in the immediate matter do not fully apear, the recommendation for an allowance of the claim is made dependent upon the actual employment not being within the exception against work done on a farm or country place. (See *Bunting* vs. *State*, No. 611.)

UNIVERSITY OF ILLINOIS, No. 617—AWARD RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

Paul D. Lytle, $5.00.

NATURE OF EMPLOYMENT.

Laborer in the power plant. Duties consist of handling coal, care and repair of machinery and labor incident to re building equipment.

NATURE AND DATE OF INJURY.

Injured October 17, 1933, while helping dismantle and scrap a coal tank in the boiler room preparatory to installation of a new tank. Bone and muscle of left chin bone bruised.

BY THE COURT.

If the operation of the power plant involved the use of power driven machinery, an employee therein would seem to come within the Sub-section 8 of Section 3 of the Workmen's Compensation Act. (See *Board of Education* vs. *Industrial Commission*, 301 Ill. 611.) And as the facts herein stated show that a part of the duties of the injured employee included the repair of machinery in the power plant, an award is recommended.

UNIVERSITY OF ILLINOIS, No. 627—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

John Mumaw, $5.00.

NATURE OF EMPLOYMENT.

Employed as a carpenter in the Physical Plant of the University. Performs usual work incident to taking care of floors and wood work.

NATURE AND DATE OF INJURY.

Was sanding floors in the Engineering Hall. Piece of flint struck the cornea of the right eye on February 7, 1934.

BY THE COURT.

As the business of the University of Illinois is not that of maintaining and operating buildings, as construed by the courts, the service of a carpenter regularly employed in the maintenance and repair of the buildings would not bring such employment within the Workmen's Compensation Act. Upon the facts stated, no award is recommended. (See *Lombard College* vs. *The Industrial Commission*, 294 Ill. 548.)

UNIVERSITY OF ILLINOIS, No. 623—AWARD NOT RECOMMENDED.

Opinion submitted April 26, 1934.

Informal opinion on request of Hon. Sveinbjorn Johnson, Counsel for the University of Illinois, as to liability of the State for medical attention furnished an employee, U. of I.

NAME OF EMPLOYEE AND AMOUNT OF CLAIM.

C. A. Stanley, $4.00.

NATURE OF EMPLOYMENT.

Employed as janitor.

NATURE AND DATE OF INJURY.

Using an oil mop in the Chemistry Annex Building on February 1st, 1934; ran a large sliver in the left index finger.

BY THE COURT.

As the business of the University of Illinois is not that of maintaining and operating buildings, as construed by the courts, the service of a janitor employed regularly in the maintenance and repair of the buildings would not bring such employment within the Workmen's Compensation Act. The case of *Therien* vs. *Industrial Commission*, 351 Ill. 166, seems directly in point upon the facts stated. (See *Lombard College* vs. *Industrial Commission*, 294 Ill. 548.) No award is recommended.

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