CASES

DECIDED IN

THE COURT OF CLAIMS

OF THE

STATE OF ILLINOIS

REPORTED BY

FELIX J. STREYCKMANS

AND

MASON H. NEWELL

ATTORNEYS AT LAW

ILLINOIS STATE LIBRARY

SPRINGFIELD, ILL.
1905

CONTENTS.

1. Judges and Officers of the Court.
2. Legislation Relating to the Court.
3. Rules of the Court.
4. Table of Cases.
5. Opinions of the Court.
6. Index.

PREFACE.

In accordance with the provisions of an Act of the General Assembly, Session Laws 1883, p. 81, providing for the printing and distribution of the opinions of the Court of Claims, this volume has been published under the direction and supervision of Hon. Luther M. Dearborn, Presiding Judge, Hon. James M. Lee and Hon. Charles J. Searle, Judges, constituting said Court of Claims.

During the period beginning with the organization of the Commission of Claims up to the year 1889, no written opinions were filed by the Commission, hence none appear in this report.

No report has heretofore been made of the opinions of the Commission of Claims, the practice having been to file the opinion with the papers in each case. The opinions on file in the Auditor's office are here reproduced without change.

Felix J. Streyckmans.

COMMISSIONERS AND OFFICERS

OF

The Commission of Claims.

1878.

Under Act of 1877.

A. M. Craig.....Judge of the Supreme Court
H. M. Vandiveer.....Judge of the Circuit Court
F. Goodspeed.....Judge of the Circuit Court

James K. Edsall.....Attorney General
Thomas B. Needles.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1880.

John M. Scott.....Judge of the Supreme Court
F. Goodspeed.....Judge of the Circuit Court
J. J. Phillips.....Judge of the Circuit Court

James K. Edsall.....Attorney General
Thomas B. Needles.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1882.

T. Lyle Dickey.....Justice of the Supreme Court
Chauncey Higbee.....Judge of the Circuit Court
Josiah McRoberts.....Judge of the Circuit Court

James McCartney.....Attorney General
Charles P. Swigert.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1889.

Under Act of 1889.

E. D. Blinn.....President
R. D. Adams.....Commissioner
W. S. Kay.....Commissioner

George Hunt.....Attorney General
Charles W. Pavey.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1893.

Wm. H. Dowdy.....President
H. G. Reeves.....Commissioner
Samuel Alschuler.....Commissioner

M. F. Moloney.....Attorney General
David Gore.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1897.

Walter S. Louden.....President
W. C. Jones.....Commissioner
J. C. McKenzie.....Commissioner

Edward C. Akin.....Attorney General
James S. McCullough.....Auditor of Public Accounts
Ex-officio Clerk of Commission

1901.

[1]Douglas W. Helm.....President
Luther M. Dearborn.....Commissioner
[2]C. H. Payson.....Commissioner
[3]H. D. L. Grigsby.....Commissioner
[4]James M. Lee.....Commissioner

1. Resigned Jan. 16, 1903. 2. Resigned Aug. 14, 1901. 3. Vice Payson. 4. Vice Helm.

1903.

Under Act of 1903.

Luther M. Dearborn.....Presiding Judge
James M. Lee.....Judge
[1]James E. McClure.....Judge
[2]Charles J. Searle.....Judge

1. Vice Grigsby, deceased. 2. Vice McClure, resigned.

H. J. Hamlin.....Attorney General
J. S. McCullough.....Auditor of Public Accounts
Ex-officio Clerk of Commission

LEGISLATION RELATING TO THE COURT.

Act of 1877.

AN ACT to create a Commission of Claims, and to prescribe its powers and duties. Approved May 29, 1877. in force July 1, 1877.

Section 1. (Commission of Claims Created.) *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That there shall be, and hereby is created and constituted a commission to be called the "Commission of Claims," which shall be composed of one of the Judges of the Supreme Court, who shall be President of said Commission, and two Judges of the Circuit Courts of this State. Said Judges shall be specially assigned to duty on said Commission by the Chief Justice of the Supreme Court. Said Commission shall hold a session at the Capital of this State on the second Monday of August, A. D. 1878, and every two years thereafter, and shall continue their session until the business before them shall be disposed of.

§ 2. (Duty of Commission—Claims—Award.) It shall be the duty of said Commission to hear and determine all unadjusted claims of all persons, against the State of Illinois, and said Commission shall hear and determine such claims according to the principles of equity and justice, except as otherwise provided in the laws of this State, and in case said Commission shall allow any such claim, they shall make an award in favor of the claimant, finding the amount due to such claimant, and naming the claimant, which said award shall be filed and recorded in the office of the Auditor of Public Accounts, in a book to be kept by him for that purpose.

§ 3. (Auditor Ex-Officio Clerk.) The Auditor of Public Accounts shall be ex-officio Clerk of said Commission and shall be custodian of all records, books, files and papers belonging or appertaining to said commission.

§ 4. (Claims—Filing Statement—Hearing.) All persons having any such claims against this State, shall file the same with the Auditor of Public Accounts, at least three months before the day fixed by this act for the sessions of said Commission, and shall file with such claim a statement in writing, under oath, of the facts upon which such claim is based, setting forth the time when and the place where the same accrued, and if such claim accrued by virtue of a contract, a copy of such contract, and the name and present residence, if known, of the officer or agent with whom such contract was made, and in all cases, the amount of such claim, and all other facts necessary to a full understanding of such claims; and upon the filing of the same as aforesaid, it shall be the duty of the Auditor to immediately notify the Attorney-General thereof, and it shall be his duty to represent the State in all such claims. All evidence in support of, or against such claims shall be taken in writing in the same manner in which depositions in cases in chancery are usually taken, and, together with all documentary or other evidence, shall be filed with the Auditor of Public Accounts, prior to the day fixed for the sitting of said Commission, and no other evidence shall be received by said Commission on the hearing of any such claim.

§ 5. (Report to Governor, Etc.) The Auditor shall in his biennial report to the Governor, include a detailed statement of all such awards, and said statement shall be laid before the two Houses of the General Assembly at its session held next after the filing of said awards.

§ 6. (Compensation.) Neither the Auditor or any of said Judges shall receive any additional pay or com-

pensation by the reason of any service rendered under the provisions of this act.

§ 7. (Effect of Rejecting Claims.) In case said Commission shall reject any claim, so filed as aforesaid, upon the hearing thereof, such rejection shall conclude all parties thereto, unless said Commission shall in their award thereon, otherwise direct.

§ 8. (Jurisdiction.) The jurisdiction conferred upon said Commission by this act, shall be, and is hereby declared to be exclusive.

Approved May 29, 1877.

ACT OF 1881.

AN ACT in regard to the jurisdiction of the Commission of Claims.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the Commission of Claims is hereby given jurisdiction in all cases of claims against the State for the taking or damaging of private property by the State, for public purposes, in the construction or for the use of any State institution, river, canal, or other public improvement. Nothing in this act shall be so construed as to remove or repeal the bar of any statute of limitations against any such claim, nor shall the same be so construed as to give the Commission jurisdiction of any claim growing out of the construction of the dam across the Illinois river, at Henry, Illinois, or the dam across the Little Wabash river, at New Haven, Illinois, nor to any claim heretofore passed upon by said Commission or the General Assembly.

§ 2. Said Commission may go upon the premises alleged to have been taken or damaged, or may appoint a competent surveyor to go upon such lands and report such notes and profiles to said Commission as the Commission may direct. Said Commission may award such surveyor a reasonable compensation for such services

Approved May 30, 1881.

ACT OF 1889.

AN ACT to amend section one, two and six, of an act entitled "An Act to create a Commission of Claims and to prescribe its powers and duties," approved May 29, 1877, in force July 1, 1877, and to repeal the act of May 30, 1881, amendatory thereof.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That section one, section two and section six, of an act entitled, "An Act to create a Commission of Claims and to prescribe its powers and duties," approved May 29, 1877, in force July 1, 1877, be, and the same are, hereby amended to read as follows:

Section 1. The commission of claims established by the act of the General Assembly, approved May 29, 1877, entitled, "An Act to create a Commission of Claims, and to prescribe its powers and duties," shall be continued. It shall consist of three persons, not more than two of whom shall belong to the same political party, learned in the law and experienced in its practice, appointed by the Governor, by and with the advice and consent of the Senate, who shall hold their offices, for the term of four years, from the time of their appointment and until their successors or the successor of either of them shall be appointed. One of the said persons shall be designated in his appointment as president of the Commission of Claims, and each of the others as Commissioner of Claims. Said Commission shall hold a session at the Capitol of this State on the first Monday of August, A. D. 1889, and every year thereafter, in a room provided by the Secretary of State, and shall continue their session until the business before them shall be disposed of for such session. The Commission of Claims may appoint a bailiff and a messenger to attend its sittings.

§ 2. The Commission of Claims shall have power to make such rules, not inconsistent with or contrary to law, for the government of proceedings before it, as it

may deem proper, and shall have the same power to enforce such rules, and to preserve order and decorum in its presence, as is vested by common law or statute of this State in any court of general jurisdiction. And it shall be the duty of said Commission to hear and determine the following matters:

First. All unadjusted claims founded upon any law of this State, or upon any contract expressed or implied with the government of this State, and all claims which may be referred to it by either house of the General Assembly.

Second. All claims against the State for the taking or damaging of private property by the State for public purposes in the construction, or for the use of any State institution, river, canal or other public improvement, which have not been already barred by any statute or law of limitations, or heretofore heard and determined by said Commission.

Third. All unadjusted and controverted claims against the board of trustees, or board of directors of any of the public educational, charitable, penal or reformatory institutions of the State, canal commissioners, commissioners for the construction of the State Capitol building, State Board of Education, the military power of the State when called into action for the preservation of the public peace or order, or for instruction in camp, arising out of any contract expressed or implied, or any tort, or for any damages, whether liquidated, or unliquidated, or any other claim or demand whatsoever.

Fourth. All other unadjusted claims of whatsoever nature or character against the State of Illinois.

Fifth. All set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the State of Illinois, or any board of trustees, directors, or commissioners, or military authority against whom any such claim shall have been presented to such Commission. And such

Commission shall hear such claims according to its rules and established practice, and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State, and shall file with the records of each claim determined a brief written statement of the reason of the determination, and in case such Commission shall allow all or any part of such claim they shall make an award in favor of the claimant, finding the amount due to each claimant, which said award shall be filed and recorded in the office of the Auditor of Public Accounts in a book to be by him kept for that purpose.

§ 6. The commissioners shall receive a salary of fifteen dollars, the bailiff a salary of three dollars, and the messenger a salary of two dollars a day for the number of days actually occupied in the business of the Commission; *Provided,* that in no case shall their session continue longer than ninety days in any one year, to be certified by the president of the Commission to the Auditor of Public Accounts, and to be audited and paid in the same manner as other public moneys. The Auditor of Public Accounts shall receive no additional compensation for services in claims allowed and recorded, but the commissioners may make such orders as they may deem proper for securing the payment of costs in claims not allowed; *Provided,* no security for costs shall be required in any claim referred to said Commission by either house of the General Assembly.

§ 2. An Act in regard to the jurisdiction of the Commissioners of Claims, approved May 30, 1881, in force July 1, 1881, is hereby repealed.

Approved June 8, 1889.

Act of 1903.

AN ACT to create the Court of Claims and to prescribe its powers and duties. Approved May 16, 1903, in force July 1, 1903.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the name of the Commission of Claims as heretofore existing in the State of Illinois, be, and the same is hereby changed to the Court of Claims, and said Court of Claims shall be the successor of the Commission of Claims established by the act of the General Assembly, approved May 20, 1877, entitled "An Act to create a Commission of Claims and to prescribe its powers and duties" as amended by act approved June 3, 1889. Said Court of Claims shall exercise all the jurisdiction, rights, powers and duties which are now conferred on the Commission of Claims, and all causes now pending before the Commission of Claims, shall be considered as pending before the Court of Claims the same as if originally filed therein.

§ 2. The Court of Claims shall consist of three persons, not more than two of whom shall belong to the same political party; learned in the law, and experienced in its practice appointed by the Governor, by and with the advice and consent of the Senate, who shall hold their office for the term of four years, from the time of their appointment and until their successors or successor of either of them shall be appointed. One of the said persons shall be designated in his appointment as presiding judge of the Court of Claims and each of the others as judge of the Court of Claims. Said court shall hold a session at the capitol of the State on the first Monday of October, A. D. 1903, and every year thereafter, in a room provided by the Secretary of State, and shall continue its session until the business before it shall be disposed of for such session.

§ 3. The Court of Claims shall have power to make such rules, not inconsistent with or contrary to law, for the government of proceedings before it as it may deem proper, and shall have the same power to enforce such rules, and to preserve order and decorum in its presence, as is vested by common law or statute of this State in

any court of general jurisdiction. And it shall be the duty of said court to hear and determine the following matters:

First—All unadjusted claims founded upon any law of the State or upon any contract, express or implied, with the government of the State, and all claims which may be referred to it by either House of the General Assembly.

Second—All claims against the State for the taking or damaging of private property by the State for public purposes in the construction or for the use of any State institution, river, canal, or other public improvements, which have not been already barred by any statute or law of limitations, or heretofore heard and determined by said Commission.

Third—All unadjusted and controverted claims against the board of trustees, or board of directors of any of the public educational, charitable, penal or reformatory institutions of the State, canal commissioners, commissioners for the construction of the State capitol building, State board of education, the military power of the State when called into action for the preservation of the public peace or order, or for instruction in camp, arising out of any contract expressed or implied, or in tort, or for any damages, whether liquidated, or unliquidated, or any other claim or demand whatsoever.

Fourth—All other unadjusted claims of whatsoever nature or character against the State of Illinois.

Fifth—All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the State of Illinois, or any board of trustees, directors or commissioners, or military authority against whom any such claims shall have been presented to such court. And such court shall hear such claims according to its rules and established practice, and determine the same according to the

principles of equity and justice, except as otherwise provided in the laws of this State, and shall file with the records of each claim determined, a brief written statement of the reason of the determination, and in case such court shall allow all or any part of such claim, they shall make an award in favor of the claimant, finding the amount due to each claimant, which said award shall be filed and recorded in the office of the Auditor of Public Accounts in a book to be kept by him for that purpose.

§ 4. The Auditor of Public Accounts shall be ex-officio clerk of said court, and shall be custodian of all records, books, files and paper belonging or appertaining to said court.

§ 5. All persons having any such claims against the State, shall file the same with the Auditor of Public Accounts on or before the first day of May next preceding the day fixed by this act for the session of said court, and shall file with such claims, statement in writing, under oath, of the fact upon which such claim is based, setting forth the time when and the place where the same accrued, and if any such claim accrued by virtue of a contract, a copy of such contract, and the name and present address, known, of the officer or agent with whom such contract was made, and in all cases, the amount of such claim, and all other facts necessary to a full understanding of such claim; and upon the filing of the same as aforesaid it shall be the duty of the Auditor of Public Accounts to immediately notify the Attorney General thereof, and it shall be his duty to represent the State in all such claims. All evidence in support of, or against such claims, shall be taken in writing in the same manner in which depositions in chancery are usually taken, and all evidence for claimant shall be filed with the Auditor of Public Accounts on or before the first day of August prior to the day fixed for the sitting of the said court, and all evidence, for defendant

shall be filed on or before the day for the sitting of said court, and no other evidence shall be received by said court on the hearing of any such claim.

§ 6. The judges of the Court of Claims shall each receive a salary of fifteen hundred dollars per annum. The presiding judge of said court shall appoint a bailiff who shall receive a salary of three dollars per day for the number of days actually occupied in the business of the court, to be paid by the Auditor of Public Accounts upon the certificate of the presiding judge. The Auditor of Public Accounts shall receive no additional compensation for services in claims allowed and recorded, but the court may make such orders as they deem proper for securing the payment of costs in claims not allowed: *Provided*, no security for costs shall be required in any claim referred to said court by either House of the General Assembly.

§ 7. In case said court shall reject any claim, so filed as aforesaid upon the hearing thereof, such rejection shall conclude the claimant unless the said court shall otherwise direct.

§ 8. The Auditor shall, in his biennial report to the Governor, include a detailed statement of all such awards, and said statement shall be laid before the two Houses of the General Assembly at its session held next after the filing of such award.

§ 9. The jurisdiction conferred upon said court by this act shall be, and is hereby declared to be exclusive.

§ 10. At the close of each session, the Auditor of Public Accounts shall compile and publish the opinions of the court filed during the session.

§11. An Act to create a Commission of Claims and to prescribe its powers and duties, approved May 29, 1877, in force July 1, 1877, as amended by act of June 3, 1889, in force July 1, 1889, is hereby repealed.

Approved May 16, 1903.

STATUTE OF LIMITATIONS.

AN ACT to limit the time for persons to bring claims against the State of Illinois. (Approved March 1, 1847. Laws 1847, p. 32.)

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all persons having unliquidated claims against the State of Illinois, from any cause whatever, shall make out all the vouchers and present the claims, together with his own affidavit of the correctness of the same, previous to the first day of January, eighteen hundred and forty-nine, and have the same filed in the office of the Secretary of State, so that future Legislatures may know what unliquidated claims do exist against the State and the grounds upon which they are founded.

§ 2. The unliquidated claims arising from the canal shall all be proved up by witnesses before the State trustee on said canal, which shall embrace all the testimony relating to said unliquidated claims, and no further testimony shall be allowed to be brought in to substantiate said unliquidated claims after they are once filed as above.

§ 3. All unliquidated claims arising from the internal improvement system shall be proved up the same as before mentioned, before the Auditor of Public Accounts, and filed the same as above; and any persons having unliquidated claims shall prove the same before the Auditor and file the claim and proof in like manner.

§ 4. Any persons having unliquidated claims against the State, who do not prove the same up and file them as above, shall not be entitled to have them considered after that date; and hereafter all unliquidated claims against the state shall be proved up and filed as above, within two years from the time such claim may have arisen; and any claim not presented and proved up as above and filed shall be forever barred from payment by the State.

§ 5. The person hereby empowered to hear testimony shall certify all proceedings had before him, under his hand, shall administer oaths to witnesses, who shall testify the truth in all cases; and for a violation, or for false swearing in reference to any claim, the person so swearing shall be punished according to the law in such cases.

§ 6. This act to be in force from and after its passage.

Approved March 1, 1847.

RULES OF THE COMMISSION OF CLAIMS

of the

STATE OF ILLINOIS.

Adopted at August Session, 1880.

It is ordered by the commission that the following rules be and they are hereby adopted as the *Rules for the government of proceedings before the Commission of Claims*, and that they be spread upon the record by the Clerk and be printed in pamphlet form for the convenient use of parties interested.

Rule 1. The Clerk shall procure and keep suitable books as follows:

A "Docket," properly indexed in which shall be entered the number of the claim, the name of the claimant —denoting the papers filed, and the orders made, and the proceedings had therein,—and the date of the filing of pleadings.

A "Clerk's Docket," in which shall be entered the daily proceedings of the Commission.

A "Record Book," in which shall be entered a record of any award made by the Commission, or showing the final disposition of the claims, and such other books as may be necessary for the transaction of the business of the Commission.

Rule 2. At the session of the Commission to be held on the first Monday of August in each year the calendar will be called in its order and any claim in which no appearance shall be made for the claimant may in the discretion of the Commission be dismissed for want of prosecution.

Rule 3. In cases of substitution of attorney for claimant, written notice of substitution shall be filed with the Auditor of the State of Illinois, and notice thereof served on the Attorney General, and the Clerk shall make the necessary entry thereof.

Rule 4. Every claimant shall file a written or printed claim with the Auditor, which shall be entitled substantially:

IN COMMISSION OF CLAIMS,

A. B. CLAIMANT

AGAINST

THE STATE OF ILLINOIS.

Shall state in brief and concise manner the facts constituting the claim, the time and the place where the claim arose, and shall annex thereto and as a part thereof, a bill of particulars stating in detail each and every item claimed and the amount of such item; and if such claim accrued by virtue of a contract a copy of such contract and the name and present residence, if known, of the officer or agent with whom such contract was made, and all other facts necessary to a full understanding of such claim.

If the claim is for lands permanently or temporarily appropriated or damaged by the State, a specific description of the land, showing its location and amount of land. Every claim shall state that the claim has never before been presented to any department or officer of the State, or if it has been shall state when, and to what department or officer, and with what results, and what action has been had thereon. Every claim shall state that said claim has not been assigned, or if assigned, when and to whom, and shall state the name and residence of every person interested in the claim, and that no other person has any interest therein, or if any other person has any interest therein, shall state specifically what interest. The claim and the bill of particulars shall be signed by the claimant and by his attorney, and shall be verified under oath, and the claimant and his attorney shall endorse on said claim their post office address.

Rule. 5. No claim shall be filed by the clerk unless verified as required by these rules.

Rule 6. Claims on the part of the state to be used as counter claims, shall be verified by the Attorney General or by the Assistant Attorney General and shall be governed by the same rules as to claims against the State, and shall be filed one month before the first Monday of August in each year.

Rule 7. All evidence in support of or against claims shall be taken in writing in the same manner in which depositions in chancery are usually taken, and together with all documentary or other evidence shall be filed with the Auditor of Public Accounts prior to the day fixed for the sitting of the Commission, and no other evidence shall be received by the Commission on the hearing of any such claim.

Rule 8. Amendments to the petition and other pleadings in a claim, and new pleas, may be allowed and filed in the discretion of the Commission at any time during its sessions and before final hearing of the claim.

Rule 9. On the hearing of any claim oral arguments will be heard from attorneys representing claimants and from the Attorney General or his assistants. Five (5) printed or typewritten briefs or arguments shall be filed by each party before the hearing of the claim.

Rule 10. The Attorney General may move to dismiss a claim on the ground that the facts stated in the petition or amendments do not constitute a legal or equitable claim against the State. Such motion shall be in writing and shall state the grounds of the motion.

Rule 11. There shall be filed with the clerk prior to the hearing of each claim by the claimant, not less than five either printed or typewritten abstracts of the evidence taken by the claimant, and the same number of abstracts by the Attorney General of the evidence taken on behalf of the State.

These rules shall apply to all claims brought before this Commission, except the claims to be tried at the present session thereof.

* *Rule 12.* All cases on the docket will be called on the first day of the session and the cases will be set down for hearing on some day then to be named.

* *Rule 13.* On the second day of the session the cases set on that day will be called for hearing and either tried, continued or in some manner disposed of, continuing each day the hearing of cases set for that day.

RULES OF THE COMMISSION OF CLAIMS.

Adopted at the August Session, A. D. 1897.

Rule 1. The clerk of the commission shall at least ten days prior to the August session docket all claims filed, together with the date of their filing, the name of the claimant, the number of the claim and all orders and pleadings filed therein. The clerk shall also keep a record book in which he shall record all orders of the Commission and the final disposition of all claims.

Rule 2. The calendar will be called in its order on the first Monday of August in each year, and causes disposed of that may be ready for hearing.

Rule 3. In case no appearance shall be made for the claimant, any claim may be dismissed for want of prosecution on motion of the Attorney General, in the discretion of the Commission.

Rule 4. Every claimant shall file a written or printed declaration with the Auditor, containing a statement of his or her claim, which declarations shall be substantially as follows:

STATE OF ILLINOIS, }
SANGAMON COUNTY. } ss.

A. B. CLAIMANT,

AGAINST

THE STATE OF ILLINOIS.

In the Commission of Claims to the August Term A. D. 18...

The declaration shall state concisely the facts constituting the claim, the time when and the place where

* Adopted August Session, 1900.

the claim arose, the amount claimed; and if such claim accrued by virtue of a contract, a copy of such contract shall be filed with the declaration, together with the name and present residence, if known, of the officer or agent with whom the contract was made.

A bill of particulars stating in detail each item claimed and the amount shall be attached and made a part of each declaration.

If the claim is for lands permanently or temporarily, appropriated or damaged by the State the declaration shall contain the amount and location of the land, together with a specific description thereof.

Every claimant shall state that his or her claim has not been assigned, or if assigned, to whom and when such assignment was made, and the names of all other persons, if any, interested therein.

Every claimant shall state that the claim has never before been presented to any department or officer of the State, or, if it has been shall state when and to what department or officer, and what action has been had thereon.

Rule 5. No claim shall be filed by the clerk unless verified under oath by claimant.

Rule 6. Counter claims on the part of the State shall be verified by the Attorney General, or by his assistant, and shall be filed one month before the first Monday in August in each year.

Rule 7. All evidence in support of or against claims shall be taken in writing in the same manner in which depositions in cases in chancery are usually taken, and together with all documentary or other evidence, shall be filed with the Auditor of Public Accounts prior to the day fixed for the sitting of the Commission, and no other evidence shall be received by the Commission on the hearing of any such claim.

Rule 8. Pleadings and practice at common law may be used in the adjudication of claims before the Commission.

Rule 9. Amendments to the declaration and other pleadings in a claim and new pleas may be allowed and filed in the discretion of the Commission at any time during its session and before final hearing of the claim.

Rule 10. All motions shall be in writing and shall specially state the grounds of the motion.

Rule 11. There shall be filed with the clerk prior to the hearing of each claim, by the claimant, not less than five either printed or typewritten abstracts by the Attorney General of the evidence taken on behalf of the State.

Rule 12. On the hearing of any claim oral arguments will be heard from attorneys representing claimants and from the Attorney General or his assistants. Five printed or typewritten briefs or arguments shall be filed by each party before the hearing of the claim.

Springfield, Ill., June 18, 1898.

RULES OF THE COURT OF CLAIMS

of the

STATE OF ILLINOIS.

Adopted at the October Term, A. D. 1904.

Rule 1. The clerk of the Court shall at least ten days prior to the October term docket all claims filed, together with the date of their filing, the name of the claimant, the number of the claim and all orders and pleadings filed therein. The clerk shall also keep a record book in which he shall record all orders of the Court and the final disposition of all claims.

Rule 2. The calendar will be called in its order on the first Monday of October in each year, and causes disposed of that may be ready for hearing.

Rule 3. In case no appearance shall be made for the claimant, any claim may be dismissed for want of prosecution on motion of the Attorney General, in the discretion of the Court.

Rule 4. Every claimant shall file a written or printed declaration with the Auditor, containing a statement of his or her claim, which declaration shall be substantially as follows:

STATE OF ILLINOIS, SANGAMON COUNTY. } ss.

A. B., Claimant
Against
The State of Illinois.

In the Court of Claims
to the October Term, A. D. 19

The declaration shall state concisely the facts constituting the claim, the time when and the place where the claim arose, the amount claimed; and all facts necessary to a full understanding of such claim; and if such claim accrued by virtue of a contract, a copy of such contract shall be filed with the declaration, together with the name and present residence, if known, of the officer or agent with whom the contract was made.

A bill of particulars stating in detail each item claimed and the amount shall be attached and made a part of each declaration.

If the claim is for lands permanently or temporarily appropriated or damaged by the State the declaration shall contain the amount and location of the land, together with a specific description thereof.

Every claimant shall state that his or her claim has not been assigned, or if assigned, to whom and when such assignment was made, and the names of all other persons, if any, interested therein.

Every claimant shall state that the claim has never before been presented to any department or officer of the State, or, if it has been shall state when and to what department or officer, and what action has been had thereon.

Rule 5. No claim shall be filed by the clerk unless verified under oath by claimant.

Rule 6. Counter claims on the part of the State shall be verified by the Attorney General, or by his assistant,

and shall be filed one month before the first Monday in October in each year.

Rule 7. All evidence in support of or against claims shall be taken in writing in the same manner in which depositions in cases in chancery are usually taken, and together with all documentary or other evidence, shall be filed with the Auditor of Public Accounts prior to the day fixed for the sitting of the Court, and no other evidence shall be received by the Court on the hearing of any such claim.

Rule 8. Pleadings and practice at common law may be used in the adjudicature of claims before the Court.

Rule 9. Amendments to the declaration and other pleadings in a claim and new pleas may be allowed and filed in the discretion of the Court at any time during its session and before final hearing of the claim.

Rule 10. All motions shall be in writing and shall specifically state the grounds of the motion.

Rule 11. There shall be filed with the clerk prior to the hearing of each claim, by the claimant, not less than five either printed or typewritten abstracts of the evidence taken by claimant, and the same number of abstracts by the Attorney General of the evidence taken on behalf of the State.

Rule 12. On the hearing of any claim oral arguments will be heard from attorneys representing claimants and from the Attorney General or his assistants. Five printed or typewritten briefs or arguments shall be filed by each party before the hearing of the claim.

SPRINGFIELD, ILL., August 15, 1905.

These rules are subject to changes by the Court at any time.

Copies of rules embodying change that may hereafter be made, can be had upon application to the State Auditor, Springfield, Ill.

TABLE OF CASES.

A

PAGE.

Alexander, Oscar D., v. State..... 214
Arms Palace & Stock Car Co., v. State..... 169

B

Babb, v. State..... 96
Baker v. State..... 6
Baisley v. State..... 295
Bannon v. State..... 121
Barton, Lemuel T., v. State..... 27
Barton, Wm. C. H., v. State..... 44
Belt v. State..... 266
Bickerman v. State..... 96
Biedleman, et al. v. State..... 71
Birket v. State..... 29
Brewster v. State..... 215
Budd v. State..... 35

C

Carey, Susan C., v. State..... 37
Carpenter v. State..... 167
Carr v. State..... 156
Carson Co. v. State..... 135
Cary, Horatio G., v. State..... 39
Chicago League Ball Club v. State..... 291
Claury, et al. v. State..... 177
Clauson v. State..... 364
Cody v. State..... 32
Combs v. State..... 89
Continental Investment & Loan Society v. State..... 205
Craine, heirs of, v. State..... 81
Crawford v. State..... 91
Crissey v. State..... 366
Cutting v. State..... 185

D

Darst v. State..... 33
Downey v. State..... 155

E

PAGE.
Ettner v. State 364

F

Fairbanks v. State..... 1
Fisher, Henry, v. State..... 18
Fisher, Lucius O., v. State..... 270
Fogarty v. State..... 211
Fort, heirs of, v. State..... 62
Frantzon Co. v. State..... 274

G

Gleason & Son v. State..... 233
Grajewski v. State..... 181
Green v. State..... 173
Guibert, Elizabeth, v. State..... 87
Guibert, Louis A., v. State..... 85

H

Hamline v. State 178
Hammett v. State..... 10
Harper v. State..... 332
Hatfield v. State..... 221, 223
Henderson v. State 149
Herr v. State 217
Herring v. State 228
Hickox v. State..... 81
Hicks v. State..... 97
Hingston v. State..... 148
Hitt, et al., v. State..... 182, 187, 190
Holson v. State 158
Hoge v. State..... 118
Holmes v. State..... 324
Hosher v. State..... 57
Hunter v. State..... 46

J

Jenkins v. State..... 129
Johnson, Alexander, v. State..... 145
Johnson, Charles P., v. State..... 1..
Johnson, Sidney N., v. State..... 208
Jones, Cyrus A., v. State..... 220
Jones, Jacob, v. State..... 98
Jones, heirs of, v. State..... 112

K

PAGE.
Klein, heirs of, v. State 59
Kjor v. State 131
Krueger v. State 336

M

Martin v. State 179, 284
McLaughlin, et al. v. State 114
Merdian v. State 17
Morgenstein v. State 31
Mulford v. State 204
Munroe v. State 170
Myers v. State 51

N

Neal v. State 41
Neuhalfen v. State 13

O

O'Connor v. State 160
O'Donnell, admr., v. State 255
Oliver v. State 218
Oviatt v. State 30

P

Palmer v. State 343
Partello v. State 309
Peterson v. State 334
Phillips, Ezekiel v. State 139
Phillips, Eugene B., v. State 339

R

Ratto v. State 338
Reeves, et al. v. State 340
Reinwalt v. State 74
Rhodes, et al. v. State 212
Rickey v. State 55, 69
Robinson v. State 42
Rogers v. State 133
Rokker v. State 141, 301
Ross v. State 175
Rupert v. State 300
Ryan v. State 146

S

PAGE.
Scanlan v. State 128
Schmidt v. State 76
Schultz, Henrietta, v. State 19
Schultz, John, v. State 203
Seward, heirs of, v. State 100
Shafer v. State 15
Shepherd v. State 34
Sherman v. State 168
Smith v. State 172
Snyder v. State 222
Sprague v. State 147
State Bank of Chicago, admr., v. State 1
Stephens v. State 299
Stitt v. State 26
Stow, estate of, v. State 255

T

Taemmins v. State 21
Tedens & Dystrup v. State 258
Toufel v. State 33
Tierney v. State 279
Trickle v. State 103
Turkington v. State 113

W

Wallace v. State 268
Walsh v. State 217
Weir, Daniel B., v. State 32
Wier, Henry E., v. State 24
Witte v. State 249

Zeigler v. State 74

no difference whether his grantor sued for the same or not." The court refused the proposition and an appeal was taken to the Supreme Court. It was argued in that case that the construction of the railroad was lawful, and produced no damage but that the operation of the railroad was the sole cause of the injury, and that in such case where the structure in itself does not cause damage, but its use, then the damage arising from its use is the cause of action. In deciding the case the court says: "We think it to be within the true intent and meaning of this provision (referring to the provision of the constitution under eminent domain) as to damage that there should be but one proceeding for recovery of damage, in which there should be recovery for the entire damage, past, present and future; that it should be similarly regarded, in this respect, as the provision in regard to taking of property where there is but one proceeding and an assessment of compensation and damage once for all." "The just compensation to be made for damage to land, was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages, recoverable as they may afterward be suffered, but for all damage the land owner may suffer from all the future consequences of the careful and prudent operation of a railroad, it being the immediate damage done to the land owners' estate by changing its permanent condition and impairing its present value."

The court then decided, as the former owner could have sued and recovered for the depreciation in value of the property caused by the railroad the right of action was in him for a recovery of all damages that were or might be caused in the operation of the railroad and that there was no cause for action in his grantee.

In the cases of the Ottawa Gas Co. v. Graham, 28 Ill., 73; The Illinois Central Ry. Co. v. Grabill, 50 Ill., 241; Cooper v. Randall, 59 Ill., 317; Decatur Gas Co. v. Howell, 92 Ill., 19; Chicago & Alton R. R. Co. v. Maher, 91 Ill., 312, it was held that in an action brought for deterioration in value of real estate from a nuisance of

a permanent character all damages for past and future injury to the property may be recovered and that a recovery is a bar to all future actions.

Mills on Eminent Domain, Sec. 216, says: "The appraisement embraces all past, present and future damages which the improvement may thereafter reasonably produce."

In the case of Fowle v. The N. H. & N. R. R. Co., 112 Mass., 334, where the action was for damages caused by the building of a railroad in such a manner that at times the current of a stream would be thrown upon plaintiff's land the court say: "And if injury results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

To apply the principle of these cases to the case under consideration; when this permanent obstruction was placed in the river so as to dam or raise the level of the water opposite claimant's land, if no injury, it was a permanent injury and damage to the value of his land for future use. His right to claim damage at once accrued. In the language of the statute, the cause of action had arisen and had he in three days afterward conveyed the land, under the authority of the case in the 118th Illinois above quoted, his grantee would not have had the right to bring a claim for damages; for the reason that the grantor would have sustained the damage by the permanent injury to his land as soon as the permanent obstruction was placed in the river and before the execution of his deed.

If it is true that as soon as the dam was built the future use of the land was permanently injured and the present value diminished so that a claim could at once be presented and claimant entitled to an award for both present and future damages, then the position taken by claimant's counsel, that although the dam was completed in the fall of 1877 because the crops were not destroyed until the summer of 1878, therefore the cause

of the action did not accrue until that time, would not seem to be well taken. The destruction of the crop in 1878 was the direct result of the permanent injury inflicted to the land by the building of the dam in the fall of 1877 and furnished the only proof of the extent of the injury or damage sustained. That is, whenever the flow of the water was obstructed and the level of the water raised then the damage to the land was sustained and the cause of the action had arisen.

If by reason of the level of the water in the river being raised damage results to lands adjoining, it relates back to the time when the obstruction was placed there or whatever it may have been that caused the raising of the level of the water.

This is sustained by the case of Thornton v. Turner, 11 Minnesota, 336.

The evidence shows that the level of the water in the river was permanently raised about three feet adjoining the land of claimant caused by the construction of the dam at Copperas Creek.

The time when this occurred is ascertained definitely by the report of Daniel C. Jenne, Chief Engineer who superintended the construction of this dam, published in Vol. 1 of Reports to the General Assembly of Illinois for 1870. He says that the dam was closed at 3 o'clock P. M. of the 21st day of October, 1877, and the water ran over the dam at 10 o'clock P. M. of the 22d, so that the level of the water must have been at the latter date, raised permanently. This in our opinion would relate back to the time when the dam was closed and fixes the date when the cause of action accrued.

The act providing for a forum to try this class of cases was passed and in force in July, 1877, before that date. Claimant was bound to file his claim within the two years or it would become barred by the statute.

Our conclusion is that this claim not having been filed until May of 1880—more than two years after the cause of action arose, it is barred by the statute of limitations and should be, for that reason, rejected.

CHAUNCY BAKER

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1892.

WATERS—*particular facts not showing damage by construction of dam.* Court reviews evidence and holds that construction of dam in the Illinois river by the State of Illinois has not affected claimant's lands and claim is rejected.

In this case the petitioner filed his complaint with the Auditor of the State of Illinois on the 20th day of October, A. D. 1879. The petition sets forth that the claimant is the legal owner of the east half of the southeast quarter of section three, township eight, north of range three west; that in October A. D. 1877, a dam was constructed across the Illinois river at or near Copperas Creek by virtue of the authority of the State of Illinois; that the construction of said dam has caused claimant's lands to become water soaked and soft to such an extent that they no longer bear animals with safety and have become unproductive, liable to frequent destructive overflows and thereby rendered almost worthless. That claimant's damages to said lands are $650.00.

The Attorney General denies that claimant has been damaged and insists that claimant's petition was not filed with the Auditor of the State of Illinois within two years and is therefore barred by the statute of limitations.

The conclusion arrived at by the Commission in this case renders it unnecessary to discuss the question as to whether the State is liable in this class of cases or not.

The dam at Copperas Creek was closed on the 21st day of October, A. D. 1877, and the petition in this case was filed with the Auditor of State on the 20th day of October, A. D. 1879, within two years from the completion of the dam. The witnesses produced on the part of the claimant all agree that between sixty and sixty-five acres of the claimant's lands were subject to overflow

during summer freshets before the construction of the dam; that some fifteen acres of said tract have always been above high water mark. That crops were grown on said lands and harvested both before and since the construction of said dam. That since the construction of said dam no greater number of acres of this land are subject to overflow than prior to the construction of said dam.

The Commission under authority vested in them by the Legislature appointed one Robert Wilson, a surveyor, to go upon such lands and report such notes and profiles to said Commission as the Commission may direct; see Starr & Curtis Statutes, volume 1, page 741. After being first sworn as such surveyor said Wilson did go upon said lands and under the direction of the Commission did report his findings together with notes and profiles.

In his special report in this case Mr. Wilson says: "The lowest on the line run was 12.5 plus L. W. in river opposite. A slough on the west of the line. The highest on the line is a quagmire full as bad as the lowest—springy." This line run was centrally through the claimant's land and over its entire length. In Mr. Wilson's supplemental report—after having made a careful examination of the condition of the lands along the river from the dam at Henry to Copperas Creek dam and the effect of these dams on the river and the river on the lands states: "That in fact as to stage of water above six feet plus low water the dam at Copperas Creek has little or no effect on the rise of the water in the river, and that its effect is only noticeable when the stage of water is less than six feet above original low water." These lands by actual measurements are at their lowest points found to be more than twelve feet plus low water mark. At a time when Copperas Creek dam ceases to have an effect on the water in the river the water is then six feet or more below claimant's land. Six feet above that point when the dam is found to have no effect quagmires and spring soil are found.

ILLINOIS STATE LIBRARY

These lands are between two and three miles from the river and so far above that point where the dam has any effect on the river that we are unable to see that the building of the Copperas Creek dam has affected claimant's land, and have therefore rejected this claim.

J. S. & C. E. HAMMETT

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

1. WATERS—*damages caused by erection of dam by State.* Erection of dam by State resulting in overflow of river and consequent injury to claimant's lands will entitle claimant to an award for the actual damage received.

2. PRACTICE—*claim not barred by statute of limitations.* Above claim being filed within two years after the closing of the dam in question is not barred by statute of limitations.

The petition filed in this case alleges, that the claimants are the legal owners of the following described real estate to-wit: The east fractional half of the northeast quarter of section three (3) township eleven (11) north, range nine (9) east of the 4th P. M., containing thirty-two (32) acres all damaged, $7.00 per acre, and the southeast quarter of section thirty-four (34) township twelve (12) north, range nine (9) east of the 4th P. M. containing 146 70-100 acres of which fifty (50) acres are damaged $7.00 per acre.

The petition charged that the damages were caused by the construction of the dam by the State of Illinois across the Illinois river at or near Copperas Creek, that said dam was constructed in the month of October A. D. 1877, that said dam left the water at said dam six and one-half feet at the point where said dam was constructed and in the river opposite said lands from two (2) to three (3) feet higher than it would be, but for said dam, that thereby said lands have become water soaked and soft to such an extent that they no longer bear animals with safety, and have become unproductive

ILLINOIS STATE LIBRARY

and liable to frequent destructive overflows and are worthless and will remain so forever; that claimant is damaged thereby to the amount of $584.00.

The Attorney General in his answer denies claimants' legal right to recover upon the facts stated, and that claimants failed to file their claim within two (2) years and that their claim is therefore barred by the statute of limitations. The Commission is empowered among other things to hear and determine all claims against the State for the taking or damaging of private property by the State for public purposes, in the construction or for the use of any State institution, river, canal or other public improvement which have not already been barred by any statute or law of limitation. (Laws of 1889, page 90). The claim in this case is for damaging the private property of the claimants in the construction of the Copperas Creek dam by backing the water upon the lands described in the petition and rendering said lands unproductive and liable to frequent destructive overflows; that said lands have thereby become water soaked and entirely worthless, which condition is the result of the construction and maintaining said dam at Copperas Creek. The Copperas Creek dam was completed and was closed on the 21st day of October, A. D. 1877, and claimants' petition was filed with the Auditor on the 20th day of October, A. D. 1879, within two (2) years from the closing of said dam; the claim is therefore not barred by the statute of limitations.

The claimants' as the only heirs of James Hammett, who was the patentee of said lands, appear to be the legal owners of said lands. The evidence in this case is conflicting as to the amount of damages sustained but that these lands have to some extent been damaged we have no doubt. The witnesses produced on the part of the claimants state that 80 acres of said lands have been damaged, that between twenty-three (23) and thirty (30) acres had for about thirty (30) years prior to the construction of the dam been successfully cultivated and that some ten (10) acres had annually

produced from twelve (12) to fifteen (15) tons of hay. The balance of the eighty claimed to be damaged is and has always been timbered land, and the witnesses do not attempt to explain in what way this timbered land is damaged.

Claimants' witnesses estimate the damage at from $7.00 to $10.00 per acre to the entire tract.

Robert Wilson, the surveyor appointed by the Claims Commission under a law then in force, to go on said lands and make a survey and report such notes and profiles to said Commission as the Commission may direct, (see Starr and Curtis' statute, volume 1, page 741) after being first sworn as such surveyor did go upon said lands and after making his survey, etc., in his special report as to claimants lands, says, speaking of the tract in section three (3) "this tract embraces a strip of land along the river bank, some of it once cultivated; it is about nine (9) feet elevation; I don't think it seriously damaged." As to the tract in section thirty-four (34) he says "the lands in this tract are all more than nine (9) feet plus L. W. do not consider them seriously damaged." As a result of his observations Mr. Wilson states that the lowest lands cultivated at any time along the river were found to be nine (9) feet above low water mark at the river opposite the lands. Thirty (30) years before the construction of the dam and up to the time said dam is closed these lands are regularly farmed with good results. The dam was constructed in1877; in 1878 no crops were raised; in 1879 an inferior crop was produced and when Mr. Wilson comes to examine these tracts in 1882 he finds that the lands as he says were or had been once cultivated.

From the evidence in this case we are of the opinion that claimants' lands for farming purposes have been damaged; that said damage was caused by the construction of Copperas Creek dam and that so far as their usefulness for cultivation is concerned the damage is permanent. These lands may be and doubtless are valu-

able for pasturage during at least part of the year. We have fixed the damage sustained by this claimant at three hundred and fifty dollars ($350.00.)

WILLIAM NEUHALFEN
v.
THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

1. STATUTE OF LIMITATIONS—*unliquidated claims must be filed within two years.* Unless an unliquidated claim for damages is filed within two years after the cause of action accrues, it is barred by the statute of limitations.

2. ACCRUAL—*damages through construction of dam; when action accrues.* Cause of action for overflow of lands caused by erection of dam across river accrues at the time of completion of the dam.

Fairbanks v. the State, ante page 1 followed.

The claimant in this case filed his claim against the State of Illinois, October 30, 1879, with the Auditor of Public Accounts.

The petition filed with this claim states in substance that on October 20, 1877, and before and since that time he was the owner of the southeast fractional quarter of section 20, in township 13, north of range 10, east of the 4th P. M., in Marshall county, Illinois, containing one hundred and twenty-one acres, and that the land was situated in the bottoms and low lands bordering upon the Illinois river, subject to inundation from floods and high water in said river; that during the months of May to October inclusive in each year said river is usually at or near "low water mark," and the land described left dry yielding crops of grass valuable for pasture and hay and when under cultivation, profitable crops of grain being raised. That in the month of October, 1877, a dam was constructed across the Illinois river near Copperas Creek under and by virtue of the authority of the State of Illinois, raising the water at said dam about six feet making the low water mark at said dam some six feet higher than before the construc-

tion of the dam and in the river opposite the lands of the claimant two or three feet higher than it would have been but for said dam; that before the building of said dam a raise in the water by summer rains was harmless to said land but since the building of the same, raising the water from four and one-half to six feet, causing the land of claimant to become water soaked, soft and spongy, and making his land liable to frequent overflows and unproductive.

The Attorney General has filed a plea of the statute of limitations in answer to said claimant's petition.

We have had occasion in the case of William R. Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois, to pass upon the question of the statute of limitations as applied to this class of cases where the claims were unliquidated and decided in that case that unless the claim was filed with the Auditor within two years from the time the cause of action accrued that under the statute of limitations of 1847, the claim would be barred. We also decided in that case that the cause of action accrued from the time the dam of Copperas Creek was completed which caused the level of the water to be permanently raised in the Illinois river so as to damage the lands adjoining, which was not later than October 22, 1877. This claim was not filed until October 30, 1879—more than two years after the cause of action had accrued. We do not see anything that excepts this case from the law as applied in that case. While it may seem a hardship to this claimant, the merits of whose case we have not examined, we have no discretion under the law as we understand it, and are compelled to hold that his claim is barred by the statute of limitations.

Our conclusion is that this claim is barred by the statute of limitations above referred to and for that reason should be rejected.

FRANK D. SHAFER

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1880.

WATERS—*damages to land by construction of dam by State.* In order to entitle a claimant to an award against the State for damages to land caused by the construction of a dam by the State, the proof should be clear and unequivocal as to the damage sustained and what appears to be merely speculative should be rejected.

The claimant in this case filed his claim against the State of Illinois with the Auditor of Public Accounts on the 20th day of October, A. D. 1879.

The petition filed with his claim states in substance that on the 20th day of October, A. D. 1877, and before and since that time he was the owner of lot one of fractional south half of section thirteen in township thirty, north of range three, west of the 3d P. M., in Marshall County, Illinois, containing 85 and 64-100 acres.

That said land is situated in the bottoms and low lands bordering upon the Illinois river, subject to inundation from floods and high water in said river; that during the months of May to October inclusive of each year, said river is usually at or near "low water mark" and the lands above described left dry yielding crops of grass for hay and pasturage and when under cultivation, crops of corn.

That in the month of October, 1877, a dam was constructed across the Illinois river near Copperas Creek by virtue of the authority of the State of Illinois; that the dam raises the water at Copperas Creek six and one-half feet thereby raising the level of the water in the river opposite claimant's land between two and three feet higher than it would be but for said dam. That the summer freshets which only raised the river two or three feet which did not affect his land, since building said dam, raised the water four and one-half to six feet; thereby the land of claimant became water

soaked, soft and spongy and rendered the same unproductive, liable to frequent destructive overflows and will so remain forever; that this land has been damaged two hundred and fifty dollars.

The proof taken shows that prior to October, 1877, the State of Illinois had constructed a dam substantially as stated in the petition, that was finally closed on the 21st day of October, 1877, causing a raise in the level of the water in the river adjoining claimant's land between two and three feet, which always continues; this is shown not only by the evidence taken by the claimant but by the report of Robert Wilson a civil engineer appointed by the Commission of Claims in 1882 to specially examine these lands and to ascertain the effect of the building of this dam, upon the lands of various claimants.

It appears from the evidence that nearly, or quite, one-third of the tract described is "up-land" above high water mark; at the foot of these high lands where the same joins the bottom or low lands, the ground was naturally wet and boggy; the remainder of the land could not have ever been very good land; yet the evidence tends to prove that by the construction of this dam and the raising of the level of the water in the river, a part of this land has been to some extent injured and damaged. The exact amount of damages sustained is not readily ascertainable from this evidence. While the State had an undoubted right to make the improvement by constructing a dam in a stream like the Illinois river, if in so doing the lands of persons adjoining the river, were permanently injured, the State ought, at least, in equity, to make such compensation as the proof shows clearly to have been sustained.

We think in this class of cases that in order to entitle the claimant to an award against the State the proof ought to be clear and unequivocal as to the damage sustained and what appears to be merely speculative ought to be rejected.

Our conclusion is that the land of claimant described has been damaged one hundred dollars ($100.00) and that he is entitled to an award against the State for that amount.

JOHN J. MERDIAN

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

STATUTE OF LIMITATIONS—*When claim is barred by.* When damage is alleged to have been caused by the construction of a dam which was completed Oct. 21, 1877, and claim is not filed within two years from that date, it is barred.

The petition in this case alleges that the claimant is the legal owner of the northwest quarter section 29, the southwest quarter (fractional) 20, the southeast quarter section 30, and eighteen acres off the east side of the southwest quarter section 30, all in township thirteen, north of range ten, east of the 4th P. M., in Marshall county, Illinois.

That in the month of October, A. D. 1877, by authority of the State of Illinois a dam was constructed across the Illinois river at or near Copperas Creek; that by means of the construction of said dam the water in the river has been made to overflow said lands, which have thereby become water soaked and soft and unproductive and almost worthless and that thereby claimant has been damaged to the amount of $880.

The Attorney General on behalf of the State, answering says the facts stated as the basis of said claim are insufficient to entitle the claimant to the allowance sought. That said claim was not filed with the Auditor of State within two years as required by the statute in such cases provided and that therefore said claim is barred by the statute of limitations, etc.

The Copperas Creek dam was completed on the 21st day of October, A. D. 1877. The claim in this case was

not filed as the law provides within two years after the construction and completion of said dam, and is therefore barred by the statute of limitation.

For further reasons see opinion filed in the case of Wm. R. Fairbanks, for use of &c., against the State of Illinois.

HENRY FISHER

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1880.

WATERS—*damages caused by construction of State Dam.* The Commission reviews the evidence and finds that the claimant is entitled to an award for damages caused to his land by reason of the construction by the State of a dam in the Illinois river.

This claim was filed with the Auditor of Public Accounts of the State of Illinois on the 20th day of October, A. D. 1879, for the sum of $203, and at this August session of the Commission of Claims was awarded the full amount claimed.

Claimant's demand is for injury to lands owned by him along the Illinois river above the Copperas Creek dam, which was built by the State and completed on the 21st day of October, A. D. 1877. The claim was therefore filed within two years from the time the cause of action arose, and is not therefore barred by any statute of limitation within the knowledge of this Commission.

Upon the consideration of the evidence on file with the claim and after hearing and duly considering the arguments on behalf of the claimant and of the State by the respective counsel for the same, the Commission were fully convinced that the claim was just to the amount awarded.

HENRIETTA SCHULTZ

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

1. PRACTICE—*change of claimant's name.* Change of given name of claimant after claim filed does not change cause of action.

2. STATUTE OF LIMITATIONS—*when claim is not barred by.* Claim filed April 20, 1880, for injuries to land caused by dam erected by State October 21, 1877, is barred by statute of limitations.

This claim was filed by John G. Schultz, of Marshall county, Illinois, with the Auditor of Public Accounts of the State of Illinois, on the 20th day of April, A. D. 1880. The Attorney General of the State was notified and the claimant took and filed his proofs in July of the same year.

At the present session of the Commission, Fred S. Potter, who appeared as attorney for the original claimant, John G. Schultz, filed his motion asking leave to amend the original petition so as to substitute the name of "Henrietta" instead of "John, G.", wherever the name "John G." appears, and supported said motion by affidavit, suggesting that the claim had been filed in the name of John G. through mistake. Leave was given pursuant to the motion and the claim amended accordingly.

It is not considered by the Commission that said amendment makes the claim a new one in the sense that it should be considered as having been filed as an original claim at this session, but that the cause of action, as now presented is identical in substance with the one originally filed. And the Commission now takes and considers this claim in the name of Henrietta Schultz the same as if originally filed in her name.

The claim is for damage averred to have been sustained to her land, caused by and incident to the construction of a dam near Copperas Creek, in the Illinois river, by and under the authority of the State of Illinois; that claimant was the owner of the southwest quarter

of the southwest quarter of section four (4) in township thirty (30) north of range two (2) west of the 3d P. M., in Marshall county, Illinois, on the 20th day of October, A. D. 1877; that said land was bottom or low land lying along or near the Illinois river, and that said dam at Copperas Creek was constructed by the State in the month of October, A. D. 1877.

To this claim the Attorney General of the State filed a plea on the 10th day of August, 1880, among other things insisting upon the two years limitation law requiring the claim to be filed with the Auditor and proved up within two years from the time such claim may have arisen.

The Commission finds from the evidence on file and from the public records of the State that said dam was completed about the 21st of October, 1877, and as matter of law that said claim arose at the completion of said dam, and that said claim is barred by the act of March 1, 1847, session laws of 1847, page 32. The same act may also be found in a compilation of the Statutes by Scates, Treat and Blackwell at page 1170, and published in 1858 by authority of the State. For more particular reasons and discussion as to the applicability of the said act to this case reference may be had to the claim of William R. Fairbanks for use of the First National Bank of Lacon v. The State of Illinois, being number one of the claims determined at this session.

This claim is therefore rejected and no award made to the claimant for the above reasons.

PETER TABMMES

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

WATERS—*damage caused by construction of dam.* Commission reviews evidence and holds that in consequence of the building of a dam by the State of Illinois across the Illinois river, claimant's lands were damaged by said dam causing the water to overflow claimant's land.

This claim was filed by the claimant with the Auditor of Public Accounts of the State of Illinois on the 20th day of October, A. D. 1879, for injury said to have accrued to claimant consequent upon the building by the State of a dam across the Illinois river near Copperas Creek, said dam causing the water to stand at a height opposite claimant's lands lying along and near the river above said dam.

The claim was heard upon the evidence on file and argued on behalf of claimant by his attorney, Fred S. Potter, and on behalf of the State by Hon. George Hunt, Attorney General, and due consideration given the same, and claimant was awarded the full amount of his claim, $1,000.

The Commission were fully satisfied from the evidence that claimant owned the premises at the time said dam was completed, October 21, 1877, and that his claim was filed and proven up according to law and in time to prevent the bar of any statute of limitation in matters of claims against the State; and that in consequence of the building of said dam and its effect upon the river and the river upon said land in rendering it less suitable for cultivation, the value of said land was lessened to the full extent and amount of $1,000.

DANIEL B. WEIR
v.
THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

WATERS—*damage to lands by construction of State dam.* Where State constructs a dam in a stream like the Illinois river and lands adjoining are permanently injured for future use, the State ought in equity to make such compensation as would pay the owner for the actual damage shown to have been sustained.

The claimant in this case, filed his claim against the State of Illinois with the Auditor of Public Accounts on the 20th day of October, 1879.

The petition filed with his claim states in substance that on the 20th day of October, 1877, and before that time claimant was, and had been, the owner of the west one-half (W. ½) of the southeast quarter (S. E. ¼) of section thirty-five in township thirty, north of range three west of the 3d P. M., in Marshall county, Illinois, containing eighty acres; that all of said land is situated in the bottoms and low lands bordering upon the Illinois river, subject to inundation from floods and high water in said river; that during the months of May to October, inclusive, said river is usually at or near "low water mark" and the lands of claimant dry, producing grass for hay and pasture under cultivation, crops of corn and other grain; that in the month of October, 1877, a dam was constructed across the Illinois river at Copperas Creek under and by virtue of the authority of the State of Illinois, that raised the water at the dam some six and one-half feet and raising the water opposite the lands of claimant from two to three feet more than it would have been but for said dam; that the summer rains raising the water in the river two to three feet, were harmless to said land but with said dam make a raise in the water of four and one-half to six feet, by means thereof causing the lands of claimant to become flooded, soft and spongy, liable to frequent over-flows

and rendering the land unproductive for any purpose, damaging the land as it is claimed three hundred and fifty dollars.

The evidence in this case tends to support the allegations in the petition showing that of the eighty acres of land owned by claimant about sixty acres had been to some extent damaged. It appears from the evidence that this land was quite low; most of it sparsely covered with trees; hay had been cut on about 20 acres, the rest was used for pasture; no part of it ever cultivated or attempt made to raise grain.

By the construction of this dam the level of the water in the river was raised causing permanent injury and damage to the land for the purpose for which it had been used. The right of the State to construct a dam in a stream like the Illinois river, is clear; yet, where the lands adjoining are permanently injured for future use the State ought, in equity, to make such compensation as would pay the owner for the actual damage shown to have been sustained.

We think the proof in this case tends to show that the lands of claimant have been permanently damaged two hundred and twenty dollars ($220.00) and that he is entitled to an award against the State for that amount.

HENRY E. WIER

v.

THE STATE OF ILLINOIS.

Opinion filed September 10, 1889.

DAMAGES—*overflow of lands through construction of dam.* Court reviews evidence and holds claimant is entitled to recover.

This claim was filed on the 20th of October, A. D. 1877, with the Auditor of Public Accounts of the State of Illinois, for damages to lands owned by claimant lying along the Illinois river in the bottoms above Copperas Creek dam built by the State and completed October 21, 1877.

The claim was proven up according to law, due notice having been given the Attorney General as required by law. Upon hearing the arguments of counsel on behalf of claimant and of the Attorney General on behalf of the State, and upon due consideration thereof and of the evidence on file it was considered by the Commission that claimant had sustained his demand to the extent of $150.

It was determined and found by the Commission that claimant only owned at the time of the completion of said dam about 62 acres of the west side of the fractional northwest quarter of section two (2) in township 29 north of range 3 west of the 3d P. M., and that it was not damaged to exceed the sum awarded.

The evidence in the case is conflicting, and the Commission found it impossible to reconcile all the various statements of the witnesses on the part of the complainant with themselves nor with the views and report of the engineer appointed by a former Commission under the Act of the General Assembly, in force July 1, 1881; but upon the whole were satisfied that claimant had sustained damage to some extent and that he was justly entitled to the amount awarded and no more.

LEMUEL T. BARTON
v.
THE STATE OF ILLINOIS.

Opinion filed January 7, 1898.

1. COMMISSION OF CLAIMS—*what conferred upon by statute creating.* The statute creating the Commissioners of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction of or for the use of any State institution, river, canal, or other public improvements which have not been already barred by any statute of laws of limitations.

2. STATUTE OF LIMITATIONS—*provision of act of 1847.* An act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claim may have arisen, and any claim not presented and proved up as above and filed shall be forever barred from payment by the State.

Petitions v. the State; date page 1 followed.

The petition filed in the above case alleges that the claimant, Lemuel T. Barton, is the legal owner of the lands described in the petition, to-wit: The west half (W. ½) of the northeast quarter (N. E. ¼) of section thirty-six (36) in township eight (8), north range seven (7), east of the 4th P. M.

That for years prior to the erection of the Copperas Creek dam these lands had been farmed and cultivated; that only a part of said lands were subject to overflow before said dam was built and then only at times of extreme high water. That the overflow prior to the erection of the dam did not in any way prevent the cultivation of said land. That by reason of the erection of the Copperas Creek dam the water from the Illinois river has so overflowed the said land as to render said land entirely worthless.

The Attorney General on behalf of the State files his plea setting up as a defense the statute of limitations.

The statute creating the Commission of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction or for the use of any State institution, river, canal, or other public improvements which have not been already barred by any statute or law of limitations.

An Act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claim may have arisen, and any claim not presented and proved up as above and filed shall be forever barred from payment by the State.

The petition was filed in this case April 16, 1880, more than two years after the erection of Copperas Creek dam, said dam having been completed October 21, 1877; and the only claim for damages in this case is the construction of said dam. The claim not having been filed with the Auditor of Public Accounts as required by the statute of 1847, is now barred by the statute of limitations, and for that reason is rejected. For further particulars reference is had to the opinion filed in the case of Wm. R. Fairbanks for use of First National Bank of Lacon against the State of Illinois.

ARTHUR BIRKET

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*Damages to property caused by erection of dam by authority of State and consequent overflow of Illinois river.* Held that claim filed two years from date of opening of dam is barred by statute of limitations.

This cause was submitted on plaintiff's original and amended petition; said original petition filed in the office of the Auditor of State of the State of Illinois the 16th day of April, 1880, and on the plea of the statute of limitations thereto filed in said Auditor's office, August 10, 1880, and the testimony contained in the depositions on the part of the claimant and documentary evidence on the part of the State as to the time of the completion of the lock and dam on the Illinois river at or near Copperas Creek in said State.

Petitioner claims for injury done to certain lands owned by him at and before the completion of said lock and dam and which are particularly described in his petition, which said damages are alleged to have been caused by raising the level of the water in the Illinois river opposite said lands, subjecting them to overflow and to so remain at times when they would not have been but for the effect of said dam on said river, and also causing said lands to become soaked with water and to remain so at such times and for such lengths of time as to impair their value and use for agricultural purposes.

The Commission finds that said dam was erected by authority of the State of Illinois and that it was completed on or about the 31st day of October, 1877, and that it did cause a rise in the water level of said river opposite petitioner's lands but whether they were injured thereby no opinion is expressed. The Commission further finds that said claimant's cause of action, if any he has or had, arose and was complete when said dam

was finished, and therefore that said claim was not filed within two years from the time it arose.

The Commission further finds as matter of law that said claim was and is barred by the statute of limitations applicable in such cases.

We therefore find the issues in favor of the State and against the petitioner and award him nothing.

Reference may be had to the case of Fairbanks v. The State, decided at this term, for a discussion of the applicability of the statute of limitations to this claim and as to when the cause of action arose.

FRANK J. OVIATT

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim must be filed within two years from time cause of action accrues.* Claim for injuries to land by reason of construction of dam by the State and consequent overflow of river is barred by statute of limitations, if not filed within two years after the closing of dam.

The claimant filed a petition in this case on the 1st day of May, 1880, with the Auditor of Public Accounts. The petition avers, among other things, that the claimant is the owner of the west half (W. ½) of fractional section 26 and the southwest quarter (S. W. ¼) of section 23, township 7 north, range 7 east of the 4th P. M., containing 382 acres; that a dam had been built by the authority of the State of Illinois, in the Illinois river at Copperas Creek which had permanently raised the water in said river, thereby damaging 264 acres of land above described.

We have not investigated the merits of this claim for the reason that, in our opinion, the same is barred by the statute of limitations.

The dam built in the Illinois river, which it is alleged caused the damage complained of, was closed in October, 1877. As we have before decided in the case of William

R. Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois, the cause of action accrued at that time and the claim not having been filed within two years after the cause of action had accrued it is barred by the statute of limitations.

Our conclusion is that the claim being barred by the statute of limitations for that reason it is rejected.

JACOB MORGENSTEIN

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1880.

STATUTE OF LIMITATIONS—*claim not filed within two years is barred.* A claim filed October 30, 1879, for damages caused by a dam erected by the State October 21, 1877, is barred by the statute of limitations.

The petition in this case was filed with the Auditor of Public Accounts on the 30th day of October, 1879. The petition avers among other things, that claimant is the owner of the south half (S. ½) of the southeast quarter (S. E. ¼) of section 7, township 30, north range two west of the 3d P. M., containing 80 acres; and also the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section 8, township 30, north, range 2 west of the 3d P. M., containing 40 acres. That a dam had been constructed in the said river near Copperas Creek by authority of the State of Illinois which had caused the water in said river to be raised permanently so as to damage a portion of this land in the sum of $1,550.

It appears from the proof that the dam was completed and closed on the 21st day of October, 1877. This claim not having been filed within two years from the time the cause of action accrued, would be barred by the statute of limitations as we have before decided in the case of William R. Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois. We have not investigated the merits of this claim. Our conclusion is that the claim is barred by the statute of limitations, and, for that reason, is rejected.

JOSEPH CODY
v.
THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim barred by.* Claim filed April 16, 1880, for damages to land arising from construction of dam on the Illinois river by authority of the State which dam was completed and closed in October, 1877, is barred by the statute of limitations.

The claimant in this case filed his petition with the Auditor of Public Accounts on the 16th day of April, 1880. The petitioner, among other things, states that the claimant was the owner of the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section 30, township 8, north, range 8 east of the 4th P. M., containing 40 acres. That by reason of the construction of the dam in the Illinois river near Copperas Creek by the authority of the State of Illinois the water in said river has been permanently raised so as to damage claimant's land to the sum of $400.00. It appears from the proof that the dam in the river was completed and closed in October, 1877. As we have before decided in the case of William R. Fairbanks, for the use of the First National Bank of Lacon v. The State of Illinois, this would fix the time when the cause of action accrued.

This claim not having been filed within two years from that time, it would in our opinion be barred by the statute of limitations. We have not investigated the merits of this claim. Our conclusion is that the claim is barred by the statute of limitations, and is, for that reason, rejected.

CHRISTIAN TEUFEL

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim must be filed within two years.* A claim for injuries caused by the overflow of a river upon claimant's land, said overflow being caused by the construction of a dam by the State, must be filed within two years after the cause of action accrues.

This case was heard at the August term of this Commission, A. D. 1889, on claimant's petition filed May 1, 1880, and his amendment thereto and the plea of the State of Illinois filed by the Attorney General of said State, August 10, 1880, and the testimony taken in said cause on the part of the petitioner and documentary evidence on the part of the State as to the time of the completion of the Copperas Creek lock and dam on the Illinois river.

Petitioner claims damages for injuries to lands owned by him in County of Peoria and State of Illinois consequent upon the erection and completion of said lock and dam in the year 1877. The lands so claimed to have been injured and damaged are particularly described in the claimant's said petition—being a part of the northwest quarter (N. W. ¼) of fractional section 20, township 8, range 8 east, 12.36 acres; and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) section 30, same town and range, 40 acres.

The defense of the State to said claim is the statute of limitations of two years; that said claim was not filed in the office of the Secretary of State nor proven up within two years from the time such claim arose.

The Commission finds as a matter of fact that said Copperas Creek lock and dam were completed on or about the 21st day of October, 1877, and as a matter of law that claimant's cause of action arose and was perfect at the completion of said dam. Said claim was not filed

with the Auditor of Public Accounts within two years from the time said cause of action arose.

For the reasons upon which this conclusion of law is based reference is had to the case of Wm. R. Fairbanks for use, etc., decided at this term.

Wherefore without reference to the merits of said claim about which no opinion is expressed the issues are found for the State and against the claimant, and we therefore award him nothing. Claim rejected.

JOHN SHEPHERD

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*petition must be filed within two years.* A petition not having been filed within two years after cause of action accrued, is barred by statute of limitations.

The claimant in this case filed his petition with the Auditor of Public Accounts on the 1st day of May, 1880. Petition avers among other things that the petitioner is the owner of the northwest quarter (N. W. ¼) of the southeast quarter (S. E. ¼) of section 30, township 8, north, range 8 east of the 4th P. M., containing 40 acres; that by reason of the construction of the dam in the Illinois river near Copperas Creek by the authority of the State of Illinois, the water in said river has been permanently raised, thereby damaging claimant's land to the sum of $600.

We have not investigated the merits of this claim for the reason that in our opinion the claim is barred by the statute of limitations. The dam in the river was closed in October, 1877, which would fix the time when the cause of action accrued as we have before decided in the case of William R. Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois.

This petition not having been filed within two years

after the cause of action accrued, would be barred by the statute of limitations.

Our conclusion is that the claim is barred by the statute of limitations and is, for that reason, rejected.

AARON R. BUDD

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

WAIVER—*statute of limitations; when cause of action accrues for damages arising from the construction of a dam.* A cause of action for damages to land by flooding, arising from the construction of a dam accrues and is perfect at the completion of such dam, and claimant's petition must be filed within two years from that time or it is barred by the statute of limitations.

This cause was submitted at this term on the petition of claimant filed in the Auditor's office of the State of Illinois, April 28th, 1880, and his amendment thereto under date of October 31, A. D. 1882, the plea of the State of Illinois in defense of the said petition filed in said office by the Attorney General of said State of Illinois, and the evidence documentary and by depositions.

By his petition claimant, A. R. Budd, claims damages for injury to part of the south half of fractional section twenty-nine (29) in township eight (8) north, range eight (8) east of the 4th P. M., in the County of Peoria and State of Illinois, and described as follows: Beginning at the southwest corner of said half section and running thence north along its west line to the northwest corner thereof, thence east along the north line of said half section sixty-four rods, thence in a straight line in a southwesterly direction to the place of beginning, said to contain thirty-two acres.

Petitioner alleges his damages to have arisen in consequence of a raise in the water level of the Illinois river opposite his said land caused by the erection by authority of the State of Illinois of a lock or dam across the Illinois river at or near Copperas Creek in said State and

known as Copperas Creek Lock and Dam. The petition does not state when said lock and dam were erected or completed, nor does it give any specific date as to when petitioner's said damages arose, nor can it be ascertained from petitioner's testimony, except by inference, when his cause of action did arise. By his amended petition claimant alleges that his damages are continuing and permanent in their nature and that his claim therefor "was filed within two years from the time said claim may have arisen."

The defense of the State in its plea to said claim, among other things states that the facts stated as the basis of said claim are insufficient to entitle the claimant to the allowance sought and that said claim was neither proved up nor filed in the office of the Secretary of State previous to the first day of January, 1840, nor within two years from the time such claim may have arisen as required by the statute in that behalf; and that therefore said claim is barred by the statute of limitations.

From the documentary evidence before us we find that said lock and dam were completed on or about the twenty-first day of October, A. D. 1877. We further find as matter of law that petitioner's cause of action arose and was perfect at the completion of said dam and that therefore his said claim for damages was not filed with the Auditor of Public Accounts within two years from the time his said cause of action arose and that his said claim for damages is therefore barred by the statute of limitations applicable to claims against the State of Illinois. For more particular reasons for so holding reference is made to the case of William R. Fairbanks for use of First National Bank of Lacon v. The State, decided at this term. Therefore, without regard to the merits, as to which we express no opinion, we find the issue for the State, and award the claimant nothing.

Claim rejected.

SUSAN C. CAREY

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim must be filed within two years.* Where a dam is constructed by authority of the State and closed in October, 1877, claim for damages resulting from construction of such dam filed April 28, 1880, is barred by statute of limitations.

The petition in this case was filed on the 28th day of April, 1880, and avers among other things, that the claimant was the owner of the northwest fractional quarter (N. W. ¼) of section 13, township 7, north, range 7 east of the 4th P. M., containing 28 acres; also that part of the southeast quarter (S. E. ¼) of section 14 in township 7, north range 7, east of the 4th P. M., lying east and northeast of the track of the Peoria, Pekin & Jacksonville Railroad, containing 38 acres. That by the construction of a dam in the Illinois river near Copperas Creek by the authority of the State of Illinois the water in said river had been permanently raised so as to damage claimant's land to the sum of $360.00. It appears in proof that the dam was constructed and closed in October, 1877. We think the cause of action accrued at that time as decided in the case of William R. Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois. This claim not having been filed within two years from that date it is in our opinion barred by the statute of limitations.

We have not investigated the merits of this claim. Our conclusion is that the claim is barred by the statute of limitations, and for that reason, is rejected.

JACOB DARST

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim must be filed within two years.* A claim filed April 28, 1880, when the cause of action accrued October 21, 1877, is barred by the statute of limitations.

The claimant in his petition alleges that he is the owner of 850 58-100 acres of lands in the County of Peoria, nearly all of which was in 1877 and prior to that time susceptible of cultivation and was in fact cultivated by petitioner; that said lands lay along the banks of the Illinois river; that by authority of the State of Illinois a lock and dam was erected in the year 1877 across the said river at or near Copperas Creek; that the erection of said dam has raised the water in said river so that petitioner's lands have become submerged and a greater part of the year remain under water so that said lands are rendered almost worthless for the purpose for which they were formerly used.

It is claimed that of the 850 58-100 acres, 797 74-100 are so damaged and the amount of damages claimed is $10,343.00.

To this petition the Attorney General on the part of the State files his plea interposing the statute of limitations as a defense.

There is a very large amount of testimony taken in this case in support of the petition. The Commission have however examined this case only so far as to enable them to determine the rights of the parties under the state of pleadings as above stated.

The statute creating the Commission of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction or for the use of any State institution, river, canal or other public improvement which have not been already barred by any statute or law of limitation.

An act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claims have arisen and any claim not presented and proved up as above and filed shall be forever barred from payment by the State.

The Copperas Creek dam was completed October 21, 1877, and the construction of this dam is the only cause of complaint set out or claimed in the petition. The petition was filed with the Auditor of Public Accounts on the 28th day of April, 1880, more than two years after the construction of said dam. Not having been filed within two years from the time such claim arose such claim is barred by the statute of limitations, and is rejected for that reason. For further particulars reference is had to the opinion filed in the case of Wm. R. Fairbanks for the use of First National Bank of Lucon.

HORATIO G. CARY

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim barred because not filed within two years.* Claim for injuries to land by reason of construction of dam by the State and consequent overflow of river is barred by statute of limitations if not filed within two years after closing of dam.

The petitioner filed in the office of the Auditor of the State of Illinois on April 16, A. D. 1880, his claim for damages to the northeast quarter of section twenty-three (23) in township seven (7) north range seven (7) east of the 4th P. M., Peoria county, State of Illinois, claiming damages to the extent of one thousand and six hundred dollars, or at the rate of ten dollars per acre on

one hundred and sixty acres; and that said injury arose from the construction by the State of what is known as the Copperas Creek Lock and Dam across the Illinois river.

There is no certain date alleged either in the original or amended petition as to when said lock and dam were built, or as to when the damages complained of accrued, except that it manifested itself in the fall of A. D. 1877, as stated in the petitioner's evidence.

On August 10, A. D. 1880, the Attorney General of the State of Illinois filed the defense of the State to said claim, which among other things is that the petitioner's claim was neither proved up nor filed in the office of the Secretary of State previous to the first day of January, 1840, nor within two years from the time such claim may have arisen as required by the statute of the State in that behalf, and that for that reason said claim was barred by the statute of limitations.

This cause was submitted at this term on the pleadings and proofs on file. We think the evidence and the allegations of the petition in this case show that the damages sustained by the petitioner, if any, arose in the fall of the year A. D. 1877, and therefore more than two years before the filing of said claim, and is therefore barred by the statute of limitation of A. D. 1847, following the decision in the case of Fairbanks for the use of the First National Bank of Lacon v. The State of Illinois decided at this term.

Therefore, without regard to any merits we might otherwise have thought there were in the claim, and as to which we express no opinion, we find the issues against the complainant and award him nothing, and the claim is rejected.

SAMUEL C. NEAL

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim must be filed within two years.* Unless claim for damages for overflow of land alleged to have been caused by erection of dam by the State, is filed within two years after cause of action accrues, same is barred by statute of limitations.

This cause was submitted upon claimant's petition filed April 20, 1880, and his amendment thereto and the plea of the State of Illinois thereto and the depositions in said cause on the part of the claimant and the documentary evidence on the part of the State.

Petitioner claims damages to certain real estate owned by him in the county of Peoria in the State of Illinois, in sections 23, 26 and 35, in township 20 north range 8 east of the 4th P. M., being the east one-half of the southeast quarter and the southwest quarter of the southeast quarter of section 23; part of the southwest quarter of section 26 and the northwest fractional quarter of section 35, in all 260 acres, of which 175 acres are said to have been damaged consequent upon the erection of the lock and dam at Copperas Creek on the Illinois river, built by authority of the State of Illinois.

It is not stated either in the petition or in the evidence on the part of the claimant when said lock and dam were completed or the cause of action arose except that it is stated in his amended petition that the cause of action arose within two years of the time of the filing of said petition.

The State alleges by way of defense that said claim was not filed according to law within two years from the time the cause of action arose nor was it proven up within that time and that the claim is barred by the statute of limitations applicable in such cases.

The Commissoin finds on examination of the testimony

that said lock and dam were completed on or about the 21st day of October, 1877, and as matter of law that said claimant's cause of action arose at that time, if any he had, (as to the merits of which we express no opinion,) and that therefore said claim was not filed within two years from the time it arose and is barred by the statute of limitations.

We therefore find the issues for the State and against the claimant and award him nothing. For more specific reasons for holding this claim barred see opinion in Fairbanks v. The State, decided at this term.

Claim rejected.

ALVIRA ROBINSON

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

STATUTE OF LIMITATIONS—*claim for damages caused by construction of dam must be prosecuted within two years.* A claimant for damages to land caused by the construction of a dam by the State must file his petition within two years after the date of the closing of the dam or his claim will be barred by the statute of limitations.

The petition in this case is filed by Alvira Robinson for the use of the executors of the last will of Washington E. Cook, deceased.

The petition charges that claimant is now in possession of said lands described in the petition under contract for a deed from Washington E. Cook, deceased, and was so in possession before and since the 20th day of October, A. D. 1877; that by authority of the State of Illinois a dam was constructed across the Illinois river near Copperas Creek in October, 1877; that said dam lifts the water at said Copperas Creek six and one-half feet, making the lowest possible low water mark at said dam six and one-half feet higher than before said dam was constructed; that by reason of the erection of said dam claimants' lands have become water soaked,

the water backing up over said lands, rendering said lands almost worthless and will so remain forever. The damage claimed is $675.00. The Attorney General files a plea setting up the statute of limitations as a defense to said claim.

The statute creating this Commission of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction or for the use of any public improvement which have not already been barred by any statute of limitations; see session laws of 1889, page 90.

An Act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claim may have arisen, and any claim not presented and proven up as above and filed shall be forever barred from payment by the State.

The petition in this case was filed in the Auditor's office October 30, 1879, more than two years after the construction of the dam at Copperas Creek, which dam was constructed October 21, 1877.

The claim not having been filed with the Auditor of Public Accounts within two years as required by the statute of 1847, the said claim is now barred by the statute of limitations and is therefore rejected for that reason.

For further particulars reference is had to the opinion filed in the case of Wm. R. Fairbanks, use of the First National Bank, etc., v. The State of Illinois. (See page, *ante*.)

WM. C. H. BARTON

v.

THE STATE OF ILLINOIS.

Opinion filed January 7, 1890.

1. COMMISSION OF CLAIMS—*what powers are conferred upon it by statute.* The statute creating this Commission of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction or for the use of any State institution, river, canal or other public improvement, which have not been already barred by any statute or law of limitation.

2. STATUTE OF LIMITATIONS—*provisions of act of 1847.* An act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claims may have arisen and any claim not proved up as above and filed shall be forever barred from any payment by the State.

3. SAME—*damages arising from the construction of dam.* A cause of action for damages arising from the construction of a dam accrues at the date when the dam is closed and claimant's petition must be filed within two years from that time.

Fairbanks v. State, ante page 1 followed.

The petition filed in this case alleges that claimant was the legal owner of 461.64 acres of land in Peoria county, Illinois, at the time and from the construction of the Copperas Creek dam across the Illinois river by authority of the State of Illinois; that before said dam was erected nearly all of said lands had for years prior to building said dam been cultivated by claimant; that the construction of said dam caused the water to back up to such an extent as to overflow nearly all of said lands and to hold the water on said lands so long that for the purpose of cultivation said lands were worthless; that the crop for the year 1878 was entirely destroyed and the crop of 1879 nearly all lost by reason of such high water. The amount of damages claimed is $5,231.00.

To this petition the Attorney General on behalf of the

State files a plea that said claim is barred by the statute of limitations.

The statute creating this Commission of Claims provides that the Commission shall have power to hear and determine all claims against the State for taking or damaging private property by the State for public purposes in the construction or for the use of any State institution, river, canal or other public improvement, which have not been already barred by any statute or law of limitation.

An Act of the General Assembly of the State of Illinois to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, provides that all unliquidated claims against the State shall be proved up and filed with the Auditor of Public Accounts within two years from the time such claims may have arisen, and any claim not proved up as above and filed shall be forever barred from any payment by the State.

The Copperas Creek dam was completed October 21, 1877. The construction of this dam is the only cause of complaint set out or claimed in this petition. The petition was filed with the Auditor of Public Accounts April 28, 1880, more than two years after the construction of said dam. The statute of 1847 above referred to is still in force, and the petition in this case not having been filed within two years from the construction of said dam, the claim is barred by the statute of limitations above referred to, and is therefore rejected. For further particulars reference is had to the opinion filed in the case of Wm. R. Fairbanks for use First National Bank of Lacon.

WILLIAM HUNTER
v.
THE STATE OF ILLINOIS.

Opinion filed May 10, 1899.

1. PLEADING—*must show what part of lands are injured.* Where damages are claimed for injuries to land caused by overflow of river consequent upon building of dam by the State, claimant in his petition must describe what parts, if not the whole of his lands, are thus injured.

2. STATUTE OF LIMITATIONS—*when claim is not barred.* If claim is filed for damages caused by overflow of river caused by construction of dam by the State within two years after opening of such dam such claim will not be barred by statute of limitations.

Dissenting opinion by E. D. Blinn, President of the Commission.

On the 20th of October, 1879, the claimant filed with the Auditor of Public Accounts of the State of Illinois, his claim against the State for damage to his land and property caused by and incident to the construction of a dam near Copperas Creek in the Illinois river by the State of Illinois, and in which he says the land and property damaged is the east half (E. ½) of the southwest quarter (S. W. ¼) of section sixteen (16), and one hundred and eighty acres out of the center of the north half (N. ½) of Section fifteen and the west half (W. ½) of the southeast quarter (S. E. ¼), and thirty acres off the east side of the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) of said section fifteen, all in town twenty-eight north of range three west of the 3rd P. M., in Woodford county, in the State of Illinois.

Section four of the statute under which the Commission is constituted, in force July 1, 1877, and continued by the act approved June 1, 1889, prescribes that "All persons having claims against the State shall file the same with the Auditor of Public Accounts * * * * and shall file with such claim a statement in writing under oath of the facts upon which such claim is based, setting forth the time when and the place where the

same accrued, * * * * and in all cases the amount of such claim and all other facts necessary to a full understanding of such claim."

A statement in writing signed by said claimant and under oath was filed with said claim and to which said claim was attached.

In this sworn statement the claimant describes all the lands as in said claim heretofore described except that he omits therefrom the east half of the southwest quarter of said section sixteen and omits to state that the one hundred and eighty-nine acres are in the centre of the north half of said section fifteen and describing them only as "one hundred and eighty-nine acres out of the north half of said section fifteen."

The claimant further represents in his said sworn statement that before and since the 20th of October, 1877, he was and has been the undisputed owner of the lands and property fully and particularly described in his claim attached to his written statement; that said lands are situated in the bottoms and low lands bordering upon the Illinois river, and subject to inundation at high water in said river; that of the lands described in said claim attached, two hundred and seventy-five acres, had been farmed to corn and the remainder used for meadow and pasture; that in October, 1877, a dam was constructed across said river near Copperas Creek under the authority of the State, lifting the water in the river opposite said lands from two to three feet; that said river is subject to summer freshets raising the water therein from two to three feet which since said dam was constructed is equivalent to a raise of from four and one half to six feet, and that by reason thereof much of the claimant's lands have become water soaked and soft to such an extent that they no longer bear animals with safety and have become unproductive and liable to frequent destructive overflows and are almost worthless, whereby he had sustained damage to the amount of thirty-nine hundred and forty dollars.

Where damages are claimed for injuries to land

caused by the increased overflow consequent upon the building of said dam we think the claimant in his sworn statement ought to describe what parts, if not the whole, of his lands are thus injured and their height above the original low water mark in said river and that the lands injured should be so described as that they might be identified and their exact boundaries known, and that the proofs should be restricted to the lands described in the claimant's sworn statement and to the manner or cause of injury therein alleged. If this rule were to be followed then we should not consider the lands in section sixteen because the claimant does not include them in his sworn statement, and the one hundred and eighty-nine acres in the north half of section fifteen should not be considered because from the statement of claimant while it is confined to the centre of the north half, its boundaries cannot be ascertained. It might be a strip of land extending east and west through the middle of said north half and wide enough to include one hundred and eighty-nine acres or it might extend north and south through the center of said half section and wide enough to contain one hundred and eighty-nine acres, and it would not necessarily have to be bounded by straight lines, its boundary might be a circle. The description is no better in the sworn statement. It does not require the land to be in any particular part of the said half section. Of the one hundred and ten acres described as lying in the south half of said section fifteen, the claimant claims that thirty acres have been damaged but does not specify in what part of the one hundred and ten acres it is to be found.

The Commission finds from the evidence that the Copperas Creek dam was completed and closed on the 21st day of October, 1877, and that plaintiff's cause of action, if any he has, then accrued, and consequently this claim was filed in apt time. On August the 9th, 1880, the Attorney General filed in the Auditor's office a statement of his defense, one of which is, that the facts stated as the basis of said claim are insufficient to entitle

the claimant to the allowance sought. On the 7th of August, 1880, the claimant filed depositions in support of his claim and on the second of August, 1880, claimant filed additional depositions. Depositions taken on the 20th of March, 1890, on behalf of the State, were also filed and by consent of claimant and the Attorney General, read on behalf of the State.

The reports of Robert Wilson, a surveyer appointed by authority of the act in force July 1, 1881, were also considered.

The evidence is voluminous and in many respects conflicting. As we understand the claimant's evidence he attempts to show that while his lands do not lie so low as to be materially injured by the increased overflow consequent upon the building of said dam yet his said lands are injured by said dam backing the water up the mouths of certain creeks flowing from the bluffs through the bottom lands to the river and in their course passing near to or through said lands, claiming that said back water has caused the channels of these creeks to fill up so that the waters coming down overflow their banks and spread over the adjacent lands; and further that the filling up of said creeks has stopped underground drainage which used to flow into them and pass away into the river but which since the filling up of said creeks now break out and flow over the surface of the lands and make it miry, wet and cold and unproductive. It is contended by the claimant that these creeks only began to fill up after said dam was constructed and that there has been an increased and continuous filling up ever since, yet the claimant insists that his crops were greatly injured in the years 1878 and 1879 consequent upon the construction of said dam. We are satisfied from the whole of the evidence that the claimant is mistaken, the evidence satisfying us that said creeks began to fill up many years before said dam was built, and that its filling up in after years has neither been caused or accelerated by said dam; but that its filling up was caused by drift wood lodging and forming drifts and

obstructions to the flow of the water and trees being cut down and falling into the stream and being allowed to remain, and also from timber being allowed to grow in the stream as it filled, thus obstructing the channel and forming barriers to whatever might be flowing down; and we are also satisfied that the improvement of the country drained by these creeks by being plowed and ditched caused a greatly increased amount of dirt and sediment to be brought down with the high water after heavy rains which settled along the creeks and was held back by the obstructions spoken of. From the evidence these streams must have had a fall of from sixteen to twenty odd feet from the bluffs to their junction with the river, and we do not believe nor can we understand how a permanent raise in the river of from three to four feet at the mouths of these streams could cause them to fill up a distance of two or three miles back to the bluffs.

There is considerable evidence tending to show that these creeks are yet open and of their usual depth at and near to their mouths.

The evidence furnished by the report of the surveyor shows that a line run from east to west through the center of the east half of the southeast quarter of section 10 is fifteen and one-half feet higher than the original low water mark at the river and that there is a great quantity of water discharged from the east over a part of this tract of land, the land lying from one to two miles east of the river.

A line was run east and west through the center of the north half of section fifteen which shows the land to be over twenty feet above the original low water mark, in the lowest place being a little over seventeen feet. The lowest point found on the west half of the southeast quarter had a sag in it, the bottom of which was firm land and nearly sixteen feet higher than the original low water mark; the east thirty acres of the northeast quarter of the southwest quarter of said section fifteen is reported by said surveyor to be nearly all

dry land and fifteen feet above low water mark, and it is on this thirty acres that the claimant in his testimony insists he has been damaged to the extent of fifteen dollars per acre.

After a conscientious consideration of the whole case we are constrained to hold that the claimant is not entitled to any award, and this claim is rejected.

W. S. KAY, Com.
R. D. ADAMS, Com.

I do not concur in the conclusion arrived at in this case by my associates. I think the proofs show that the claimant is entitled to an award as to a part of his land for damages sustained.

E. D. BLINN, Pres. Com.

NANCY MYERS

v.

THE STATE OF ILLINOIS.

Opinion filed May 10, 1880.

1. WATERS—*claim not barred when filed within two years after cause of action accrues.* Claim for damages to lands by overflow of river caused by construction of dam by the State of Illinois is not barred by statute of limitations if filed within two years after cause of action accrues.

2. DAMAGES—*to land by construction of State dam.* Court reviews evidence and finds construction of Copperas Creek dam in the Illinois river has damaged claimant's land by overflow of river and determines amount of award

3. SAME—*no damages allowed on lands purchased after cause of action accrued.* The Commission in its award does not consider damages accruing to that part of the land purchased after cause of action originally accrued.

Claimant in this case filed her petition, in which it is charged that on the 20th day of October, A. D. 1877, and before and since that time claimant was the owner in fee of the west half (W. ½) of the northeast quarter (N. E. ¼) and the southeast quarter (S. E. ¼) of section fifteen (15) and the northeast quarter (N. E. ¼) of sec-

tion twenty-two (22) all in township twenty-nine (29) north of range three (3) west of the 3d P. M.

That by authority of the State of Illinois a dam was constructed across the Illinois river at or near Copperas Creek and that by reason of the construction thereof the water in said river has raised from two to three feet higher opposite to said lands than it was prior to the construction of said dam and that by reason thereof and on account of the construction of said dam the lands of claimant above described have become flooded, water soaked, and soft to such an extent that they will no longer bear animals safely and are unproductive, subject to frequent disastrous overflows, and are almost worthless and will so remain forever.

By reason of which facts claimant says she has been damaged to the amount of one thousand six hundred and eighty dollars ($1,680.00) for which she asks judgment.

To this petition the Attorney General on behalf of the State files his plea interposing the statute of limitations and also a general denial amounting in effect to the general issue and upon the petition, pleas and depositions on file this cause is heard.

The petition was filed on the 20th day of October, A. D. 1870, less than two years after the construction of the dam at Copperas Creek and for that reason the claim is not barred by the statute of limitations.

Claimant says in her petition that her damages are $1,680.00 and in her deposition fixes her loss at $5,760.00.

Henry E. Wier, when examined on the part of the claimant, places her damages at $4,000; W. H. Cassell at $5,200 and Daniel Jones at $2,640.

The witnesses for the State who testify with reference to this point speak of the damage to claimant's lands as being slight. Henry E. Wier when re-called and examined on the part of the State says he knows of the building of the Copperas Creek dam and that lands about six feet above low water mark were injured very much and that lands above that point were not injured any; that the building of the dam did not affect the Nancy

Myers land mty; that part of those lands were high and dry and part swampy.

James B. Martin a witness on the part of the State speaking of the Nancy Myers land, says: "I think the land was damaged by the building of the Copperas Creek dam. The west half (W. ½) of the southeast quarter (S. E. ¼) of section fifteen (15) and the west half (W. ½) of the northeast quarter (N. E. ¼) of section fifteen (15) sold for $12.50 per acre. They are not worth near so much. They sold for more than they were worth."

John Wier, also a witness on the part of the State, says he does not believe that Claimant's lands were damaged by the building of the dam.

Mr. Wilson who surveyed these lands says in his report filed in this case: "The west half of the northeast quarter of section fifteen on the east side is fifteen feet above low water mark and descends to about nine feet at the southwest corner." As to the southeast quarter of section fifteen, he says: A line was run south along the east side of this tract; on this line the land was from thirteen to nineteen feet plus low water mark and some of this tract is now cultivated on the east side. "This tract he further says descends to the west and a large part is wet and uncultivated. As to the northeast quarter of section twenty-two he continues: "A line was extended south on the east side of this tract about 1,200 feet to a slough. This is about twelve feet plus low water; is impassible."

The east half of the southeast quarter of section fifteen was purchased by claimant February 25, 1878, after the construction of the dam. Whatever right accrued for damages to this tract by reason of the construction of the dam aforesaid accrued before claimant purchased this land and hence such damages, if any there were, are not considered in the award in this case.

The northeast quarter of section twenty-two is found by measurement to be twelve feet above low water mark. None of this tract has ever been cultivated so far as the evidence shows. Nine feet above the present low water

mark an impassible slough is found and no effort has been made on the part of claimant to explain this condition of things. We cannot say from the evidence that the Copperas Creek dam is the immediate or remote cause of this slough being found upon the land or the occasion of its boggy condition. If we compare the price paid for this tract with that expended for contiguous tracts on the north we are forced to the conclusion that it (the northeast quarter of section twenty-two) was at the time of its purchase by claimant (and that was before the building of the dam) for some reason less valuable than the other tracts and the reason therefor seems to us to be found in the fact that there existed upon it at the time of purchase an impassible slough.

The evidence shows that claimant paid for this land less than seven dollars per acre while for the east half southeast quarter of section fifteen adjacent to it on the north she paid $28.50 per acre and for the west half of the southeast quarter of section fifteen also adjoining the tract in question on the north she paid $12.50 per acre.

We are of the opinion that the west half (W. ½) of the northeast quarter (N. E. ¼) and the west half (W. ½) of the southeast quarter (S. E. ¼) of section fifteen (15) aforesaid are damaged by the water from the river causing a portion of these tracts to become so water-soaked as to impair their productiveness and that such damage is directly traceable to the construction of the Copperas Creek dam as its cause. The damage to these tracts of claimant's land we fix at six hundred dollars ($600.00) and in our view this amount is all to which she is legally entitled in this case.

CHARLES E. RICKEY

v.

THE STATE OF ILLINOIS.

Opinion filed May 10, 1890.

1. WATERS—*damage to lands by backing of water caused by construction of dam.* Where lands are damaged by reason of the backing of water onto the claimant's property, caused by the raising of the river level by the construction of a dam, the direct cause of the injury is the construction of the dam and the petition must be filed within two years from the date of the closing of the dam or it will be barred by the statute of limitations.

2. STATUTE OF LIMITATIONS—*how two years time is to be computed.* In computing the two years time within which claims shall be filed, the first day is to be excluded and the last day included unless the last day be Sunday, and then it also shall be excluded.

This claim was filed on the 23d of October, 1879. The petition filed recites that claimant was and is the owner of the southwest quarter of section eleven; also the northwest quarter of section fourteen and the east half of the northeast quarter of section fifteen, all in township twenty-nine, north of range three, east of the 3d P. M., Marshall county, Illinois. That said lands are situated in the bottoms of the Illinois river and subject to floods and inundation from high water in said river; that during the months from and including May to October in each year, the river is usually at low water mark and the lands of claimant left dry and productive.

Petition further avers that in October, 1877, there was constructed in the Illinois river by the authority of the State of Illinois, a dam near Copperas Creek which caused the level of the water in the river to be permanently raised about three feet above where it would have been had it not been for the dam in the river, thereby injuring the land of the claimant and its productive qualities.

To this petition the Attorney General has filed a plea of the statute of limitations; that the claim had not

been filed within two years after the cause of action had accrued.

We have held in quite a number of cases that this statute of limitations was in full force and applied directly to this class of cases.

But it has been insisted by claimant that this case ought not to be barred by the statute of limitations for the reason that the thing complained of is the backing of water on the lands of claimant and through the outlets which had drained his land. That it was not the building of the dam nor its effect upon the river, but the effects of the river on the land that is the matter complained of.

It seems to us this reasoning is fallacious, if, as contended, the damage complained of is the effect of the river on the land, affecting the land in a different manner from what it did. But what made the river affect the land differently? All agree it was the effect of the dam permanently raising the level of the water in the river, which made the river have an injurious effect upon the lands of the claimant. The extent that the land was injured from this cause would be the measure of the damage sustained. The right to maintain this claim, is, that the State had injured claimant's land by placing this obstruction in the river, that raised the level of the water and thereby causing the river to injure the productive qualities of claimant's land. So that the thing which caused the river to damage the land was the building of the dam. When it was completed and closed its immediate effect was to permanently raise the level of the water in the river. That fixes the time when the cause of action arose.

We do not see any sufficient reason for changing the position taken in the case of Fairbanks, for the use, etc., before decided.

The report of the engineer showing when the dam was closed was considered in evidence by agreement of the parties without being formally read. This report fixes the time when the dam was closed as the 21st day of

October, 1877, and the time the water flowed over the dam, as the 22d of October, 1877.

It is urged that inasmuch as this claim was filed on the 23d of October, 1879, it is within the two years, and our attention had been called to Section 1, Chapter 131, of the Revised Statutes which provides as follows: "The time in which any act provided by law is to be done, shall be computed by excluding the first day and including the last (unless the last day be Sunday, and then it shall also be excluded.)"

It is claimed that under this statute excluding the 22d, the two years would end on the 23d, that being the day the claim was filed. If you exclude the 22d, and include the last day, which we think should be done, the two years would expire at 12 o'clock on the night of the 22d, unless that day was Sunday, which upon examination we find it was not.

This claim not having been filed within the two years our conclusion is that the claim is barred by the statute of limitations and is, for that reason, rejected.

MATTHIAS HOSHER

v.

THE STATE OF ILLINOIS.

Opinion filed May 10, 1880.

WATERS—*claimant entitled to damages for land flooded by construction of State dam.* Where a dam constructed by authority of the State results in raising a river and thus damaging lands of claimant and rendering them less valuable for purposes of cultivation claimant is entitled to damages actually received.

The claimant in this case filed his petition on the 20th day of October, 1870. He avers in his petition that he is the owner of the southeast quarter of the northeast quarter of section twenty-one in township twenty-eight, north of range three west of the 3d P. M., in Woodford county, Illinois, containing eighty acres. That said lands are situated in the bottoms of the Illinois river

and are subject to an inundation from floods in the Illinois river. That during and including the months from May to October in each year said river is usually near low water mark and the land of claimant left dry so that crops of grain could be profitably raised. That in October of 1877, there was constructed in the Illinois river, by the authority of the State of Illinois, a dam which permanently raised the level of the water in the river about three feet. That the drains to his land, by the backing up of the water, had been rendered incapable of properly draining his land.

There has been considerable proof taken tending to sustain the claim, and also proof tending to show that claimant had not sustained much, if any, damage. After a careful examination of all the evidence, we think it is reasonably clear that claimant has sustained some damage by the construction of this dam. The amount of such damages is not readily ascertained. The proof shows that the land is at an elevation of from about fourteen feet to nine feet above original low water mark. The report of a civil engineer appointed by a former Commission, reports that the larger proportion of this land had been in cultivation before the building of the dam. We think the evidence shows that but very little of this land could be cultivated since the construction of this dam, so that claimant has undoubtedly sustained considerable damage.

Our conclusion is that claimant is entitled to an award of three hundred and fifty dollars ($350.)

CHARLES E. RICKEY

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

STATUTE OF LIMITATIONS—*claim barred because not filed within two years.* The Commission after a hearing on a motion for a rehearing in this case affirms its former opinion.

This cause was heard at the August term, A. D. 1889, and upon hearing the petition was dismissed because of a failure on the part of claimant to file his petition within two years.

On the 20th day of August, 1890, a motion for a new hearing is filed on the part of the claimant. After hearing arguments of counsel upon said motion and on due consideration thereof the motion for a new hearing is denied, and the opinion heretofore filed herein is reaffirmed.

THE HEIRS OF WILLIAM KLEIN

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damage caused by construction of a dam by the State.* The court reviews the evidence and finds that the claimant's lands have been damaged by the overflowing of the Illinois river caused by the construction of a dam across the said river by the State of Illinois.

In his lifetime and on the 20th of October, 1879, William Klein filed his sworn statement in this case in the Auditor's office of the State of Illinois wherein he claimed damages to the amount of $3,018.00 to the northeast fractional quarter of section 31 in township 13 north of range 10, east of the 4th P. M., containing 123 6-10 acres and to the northeast quarter; the northwest quarter and the southwest quarter of section 1 in township

12 north of range 9, east of the 4th P. M., containing 480 acres, all in Marshall county, Illinois.

That said damages were caused by the erection of a dam across the Illinois river near Copperas Creek by the authority of the State of Illinois in the month of October, 1877, and that claimant was then and ever after continued to be the owner of said lands.

That the dam caused the water in the river opposite said lands to rise from two to three feet higher than it would but for said dam.

That said lands were situated in the bottoms and low lands bordering upon said river and were subject to floods from said river. That the river was usually at low water mark in May, June, July, August, September and October of each year when said lands were left dry and yielded large crops of grass valuable for hay and pasture, and when under cultivation yielded profitable crops of corn and other grains. That by reason of the water being held higher opposite said lands they became water soaked and soft to such an extent that they will no longer bear animals with safety, and have become unproductive and nearly worthless and will so remain forever.

Most of the claims, and they are quite numerous, which have been filed on account of damages said to have occurred on account of the building of said dam are upon a printed blank and the averments with reference to the cause of damage, the manner of its affecting the land and the kind of crops for which the land was suitable are in most cases precisely the same.

In this case the depositions filed on the part of the complainant show the lands to have cost previous to the construction of the dam about $15.00 an acre and that they were suitable for cultivation. The testimony on the part of the State found in the reports of the civil engineer who was appointed under the law for the purpose of taking levels in the case shows that the northeast quarter of section 1 is a wet tract; that a line was run north and south through it midway be-

tween two lakes called Wise and Goose lakes and that the surface of the water in the lake is higher than the water in the river, and his conclusion was that this tract was caused to be wet by the lakes and that the water in the lakes was not raised by the dam; that a strip of land had been cultivated on the north side of the northwest quarter of section one and that the land descends south towards Goose lake when it is nearly on a level with the lake, the lake covering part of the tract and that the wetness of the land was caused by the lake; that a large part of the southwest quarter of said section one is covered by this same lake and that the south line of this tract is no higher than the lake.

After a careful consideration of all the evidence the Commissioners conclude that the northeast fractional quarter of said section 31 has not been damaged at all on account of the construction of said dam and that claimants' land in said section 1 have sustained some damage.

It is thought that previous to the construction of said dam the lakes mentioned might have been more effectually and easily drained, although it was never done. We have fixed the amount of damage sustained upon the several tracts in said section 1 at $300.00.

We find since the filing of said claim said William Klein departed this life intestate and that the damages allowed should be paid to the heirs of the said William Klein, who have been substituted as claimants on the records of this Commission, but not by their respective names.

We therefore award to the heirs of the said William Klein the aforesaid sum of $300.00 as and for the damage sustained as claimed.

We further find that said claim was filed within two years from the time of the completion of the said Copperas Creek dam and that said claim is not barred by the two years statute of limitations applicable to claims of this nature.

THE HEIRS OF GREENBURRY L. FORT
v.
THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

PRACTICE—*where testimony is conflicting; when statement of reasons for court's decision is unnecessary.* Where testimony introduced by claimant and the State is conflicting and where the Court finds much of it that does not produce in the mind of the Court a conviction that it is reasonable or true, the law under which the Court acts, which requires the Court to file with the record of each claim determined, a brief written statement of the reasons of the Court's determination, may be dispensed with and the conclusions only of the Court may be given in an opinion rendered.

Greenburry L. Fort, in his life time, filed his claim in the Auditor's office of the State of Illinois on the 20th of October, A. D. 1870, stating he was a resident of Lacon in Marshall county, in the State of Illinois, claiming damage to his land situated in the bottoms and low lands bordering upon the Illinois river and that said damages were caused by a dam constructed by the State of Illinois across the Illinois river near Copperas Creek in October, 1877.

The lands claimed to have been injured and the amount of damages claimed are as follows, to-wit:

"Fractional southeast quarter of section twenty-three (23) township 12 north of range 9 east of the 4th P. M., containing one hundred and thirteen acres, all of which is damaged to the extent of five dollars per acre."

"The north half of the fractional east half of the southwest quarter of section 35 in township 30 north of range 3 west of the 3d P. M., containing twenty-six (26) acres, all of which is damaged to the extent of five dollars per acre."

"Outlot three in the city of Lacon and being part of section 35 last above mentioned and containing ten acres of which five acres are damaged to the extent of five dollars per acre."

"Outlot four in the city of Lacon and being a part of

section thirty-five last above mentioned and containing thirty-one acres of which twenty (20) acres are damaged to the extent of five dollars per acre."

"All that part of the northwest quarter of section two in township twenty-nine north of range three west of the 3d P. M., which lies west of the channel of the slough and containing forty-one acres, all of which is damaged to the extent of five dollars per acre."

"All of the southwest quarter of said section two in the township and range last above mentioned except six acres off of the east end of the south half of the same, containing one hundred and fifty-four acres, all of which is damaged to the extent of five dollars per acre."

"Fractional section three in the township and range last above mentioned containing sixteen acres, all of which is damaged to the extent of five dollars per acre."

"Sixty-nine acres off of the north part of the northeast fractional quarter of section ten in the township and range last above mentioned of which fifty acres are damaged to the extent of five dollars per acre."

"The southwest fractional quarter of section fifteen in township twenty-nine north of range three west of the 3d P. M., aforesaid, containing one hundred and forty-three acres, of which one hundred and twenty-three acres are damaged to the extent of five dollars per acre."

"The fractional west half of section twenty-two in the township and range last above mentioned, containing two hundred and eighty-one acres, of which two hundred and forty acres are damaged to the extent of three dollars per acre."

"The west half of section twenty-seven."

"The southwest quarter of the northeast quarter of the same section twenty-seven."

"The north half of the southeast quarter of the same section twenty-seven, all in the township and range last above mentioned, and containing in three pieces four hundred and forty acres, of which four hundred and ten

acres are damaged to the extent of three dollars per acre."

"Fractional section twenty-eight in township twenty-nine north of range three west of the 3d P. M., containing one hundred and sixty-eight acres of which one hundred and twenty-eight acres are damaged to the extent of three dollars per acre."

"The southwest quarter of section thirty-four."

"The southwest quarter of the northwest quarter of the same section thirty-four."

"The east half of the northwest quarter of the same section thirty-four."

"The northwest quarter of the northeast quarter of the same section thirty-four, all of said four pieces being in the township and range last above mentioned and containing together three hundred and twenty acres, all of which is damaged to the extent of three dollars per acre."

Claimant says his lands were subject to inundation from floods and high water in the Illinois river; that the river was usually at or near low water mark in May, June, July, August, September and October; during which months said lands were left dry, yielding crops of grass valuable for hay and pasture and when under cultivation yielding profitable crops of corn and other grain; that of the whole amount of lands for which damages were claimed about 150 acres had been farmed to corn and the remainder used for meadow and pasture; and that the dam caused the water to rise in the river opposite said lands from two to three feet higher than before the dam was erected so that a freshet of from two to three feet before the dam was built would now cause a rise in the river opposite said lands of from four and one-half to six feet causing claimant's lands to become flooded, water soaked and soft to an extent that they would no longer bear animals with safety, had become unproductive, liable to frequent over-flows and were worthless and would remain so forever; placing his damages in the aggregate at $6,094.00.

A great deal of testimony was taken by the claimant in his life-time and filed with the Auditor. There has also been a large amount of testimony introduced on the part of the State. The Commissioners find it in many respects very conflicting. We also find much of it that does not produce in our minds a conviction that it is reasonable or true. Much of it consists in the expression of the opinions of witnesses, the foundation for which opinions has seemed to us insufficient, and while the law under which we act requires us to file with the records of each claim determined a brief written statement of the reasons of our determination, yet we do not understand it as requiring us to enter into a dissertation upon a large mass of testimony with a view of making it clear upon the record that our conclusion was the only one that could be arrived at in the given case. Suffice it to say that we carefully considered all the testimony offered and read with a determination to allow the claimants all that we felt convinced they were entitled to and in so doing arrived at the following conclusion:

That for the fractional southeast quarter (S. E. ¼) of section twenty-three (23) in township twelve (12) north range nine (9) east of the 4th P. M., containing one hundred and thirteen acres we fix the damage at two hundred dollars and find the property was of little value at and previous to the completion of said dam.

To the north half (N. ½) of the fractional east half (E. ½) of the southwest quarter (S. W. ¼) of section thirty-five (35) in township thirty (30) north range three (3) west of the 3d P. M., containing twenty-six (26) acres we find the damage to be seventy-five dollars ($75.00.)

To outlot three (3) in the city of Lacon, containing ten (10) acres and to outlot four (4) in said city containing thirty-one acres, all in said section 35, we find the damage to be $75.00.

To all that part of the northwest quarter (N. W. ¼) section 2, in township 29, north range 3, west of the 3d P. M., which lies west of the channel of the slough, con-

taining forty-one (41) acres, we find the damages to be seventy-five dollars ($75.00.)

To all that part of southwest quarter (S. W. ¼) of section 2, in township 20, north range 3, west of the 3d P. M., except six acres off of the east end of its south half, we find the damages to be three hundred dollars ($300.00.)

To fractional section 3, in township 20, north range 3, west of the 3d P. M., containing sixteen (16) acres we find the damages to be twenty-five dollars ($25.00.)

To sixty-nine acres off of the north part of the northeast fractional one quarter of section 10, township and range last above mentioned we find the damages to be one hundred dollars ($100.00.)

To the southwest fractional quarter of section 15, in township 20, north range 3, west of the 3d P. M., containing one hundred forty-three acres (143) we find the damages to be three hundred eighty-five dollars ($385.)

To the fractional west one-half of section 22, township 20, north range 3, west 3d P. M., containing two hundred eighty-one (281) acres we find the damages to be four hundred twenty-five dollars ($425.00.)

To the west one-half and the southwest quarter of the northeast quarter and the north one-half of the southeast quarter of section 27, township 20, north range 3, west of the 3d P. M., containing four hundred forty (440) acres we find the damages to be four hundred seventy-five dollars ($475.00.)

To fractional section 28 in township 20, north of range 3, west of the 3d P. M., containing one hundred sixty-eight (168) acres we find the damages to be one hundred ninety-six dollars ($196.00.)

To the southwest quarter and the south west quarter of the northwest quarter and the east one-half of the northwest quarter and the northwest quarter of the northeast quarter all in section 34, township 20, north range 3, west of the 3d P. M., containing three hundred twenty (320) acres we find the damages to be one hundred thirty-five dollars ($135.00.)

All of which sums for damages so allowed and assessed in the aggregate amount to $2,466.00 and we hereby award to the heirs of the said Greenburry L. Fort the sum of $2,466.00 as and for the damages by them sustained on account of the said claim so filed by their ancestor the said Greenburry L. Fort as above stated; they having been substituted as claimants since the death of the said Greenburry L. Fort whose death was suggested and sufficiently and satisfactorily made to appear.

MRS. SOPHIA L. HICKS

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damage to mill by removal of dams.* A mill-owner who has a mill site near a State dam but has no contract with the State giving the right to use the water power has no claim against the State because of its removal of the dam.

Claimant filed her petition in this case on the 15th day of August, 1889. Petition recites in substance that the State of Illinois had heretofore constructed across the Little Wabash river a dam at or near the town of New Haven and for the purpose of aiding navigation put in a lock by reason of which there existed water power which was useful and valuable in operating machinery. That in 1869 the Board of Canal Commissioners of the State of Illinois under and by authority of the State leased the entire water power at said lock and dam situated at the town of New Haven on the Little Wabash river in the County of Gallatin together with certain adjacent lands to James Ford and A. O. Hess for the period of fifty years to begin on the 1st day of July, 1870, and was to receive as yearly rent the sum of $330 for each of the years mentioned in said lease. And that by the terms of said lease the State of Illinois was to keep said lock and dam in good repair. The said sum of $330 was to be paid for the period of ten years or

until the 1st day of July, 1880, and upon the first days of July in 1880, 1890, 1900 and 1910 the water power was to be appraised by the proper authorities of the State of Illinois and the party of the second part was to pay the appraised valuation with six per cent interest to be paid quarterly.

The petition further recites that by virtue of a mortgage given by Ford and Hess and their assigns, claimant became by certain proceedings had in the circuit court of Gallatin county the owner of the lease, rights and privileges conferred therein. That afterwards in 1887 by virtue of an act of the Legislature, the State of Illinois caused said dam to be removed so that the water power to run the mill of the claimant was entirely destroyed, whereby it is said the claimant has been damaged the sum of $12,000.

It appears from the proof that in October, 1882, the claimant had failed to pay the annual rent and that she was then owing the Canal Commissioners as back rents the sum of $405. On the 18th day of September, 1882, the treasurer of the Canal Commissioners addressed to claimant a letter in which the Canal Commissioners made the following proposition:

"If you will pay up the back water rent and release the State from the lease made with you to give you the water power free of expense to you, you to pay for any repairs on the lock and dam that may be necessary to be made."

The evidence does not disclose what the answer of Mrs. Hicks was to this letter. But on the 2d day of October it appears she sent a draft for the sum of $405, and thereupon there was drawn up and executed by the President, Secretary and Treasurer of the Board of Canal Commissioners of the State of Illinois on behalf of the State and Mrs. Hicks in her own behalf the following agreement, which is attached to the original lease under their respective seals:

"Whereas, It appears by the deed of the court of County of Gallatin and State of Illinois that Mrs. Sophia L.

Hicks became the owner of all the right, title and interest and possession of James Ford and A. G. Hess by lease to them from the Canal Commissioners dated the 21 day of December, 1869, to the premises therein described. Now, therefore, in consideration of the sum of $495 for the rent due on said lease to July 1, 1882, paid to the Canal Commissioners of the State of Illinois, they hereby release, cancel and declare null and void the lease hereinbefore mentioned to the property, rights and privileges therein granted. The said Sophia L. Hicks hereby releases the Canal Commissioners and the State of Illinois and the said Canal Commissioners hereby releases the said Sophia L. Hicks from all liability therein. This release sealed and signed in duplicate this 20th day of November, 1882."

In the testimony of Martin Kingman who was then Treasurer of the Canal Commissioners whose testimony was taken on behalf of the claimant he was asked this question: "Was it not your understanding that Mrs. Hicks was to have the dam free for the remaining time of the lease, was not that the understanding between you and the Canal Commissioners and her?" The witness answered: "As to that this agreement explains the exact understanding, that is Exhibit T." Exhibit "T" being the paper called the release before quoted. Mrs. Hicks has not been produced as a witness and there is no evidence by which it appears that a new lease was made between her and the State of Illinois. On the contrary the only evidence there is is that the contract between the claimant and the Canal Commissioners was the one before quoted. The legal effect of this contract was that claimant was released from all liability under the original lease and the State was also released; it being a cancellation of the lease and the annulling of all the rights and privileges therein granted. It further appears from the proof that in the summer of 1887 the dam was removed by authority of the State so that the water power was entirely destroyed. But it is stipulated that prior to that time the mill had been burned down

and never re-built. Claimant has utterly failed to prove that she had any lease or other contract with the State of Illinois from the time the original lease was cancelled by the agreement of date the 20th day of November, 1882. So that if the mill had not been destroyed we cannot understand upon what authority a claim against the State of Illinois can be made. If claimant had any right to use the water power it must have been by virtue of some contract with the State. So far as it appears by the proof there was no contract and the proposition that was made to permit her to have the use of the water power by keeping the dam in repair never was accepted.

Before we would feel authorized to find an award in favor of the claimant it must be shown by the proof that she had some lawful right in the use of the power which it is claimed that the State took away. So far as this claimant is concerned from anything made to appear in evidence the State had a perfect right to take away the dam and destroy the water power. And it is very clear that claimant's mill having been destroyed that she was in no way damaged, and for these reasons her claim is rejected.

THOMAS N. BIEDLEMAN, SUSAN S. VARNELL AND J. O. TATE

v.

THE STATE OF ILLINOIS.

Opinion filed December 19, 1890.

WATERS—*State may abandon locks and dams without liability to those using the water privileges.* Under Sec. 8, Chap. 19, R. S. entitled, "Canals and Improvement of Illinois and Little Wabash Rivers," which provides that the Canal Commissioners may wholly abandon or destroy the work by the construction of which the water privilege shall have been created whenever, in the opinion of the legislature, such work shall cease to be advantageous to the State, the State may at any time abandon locks and dams without being liable to those who have been availing themselves of the water privilege afforded by them.

The claimants filed their petition with the Auditor of Public Accounts on the 22d day of July, A. D. 1889, in which they claim damages to the amount of $16,700.00.

It appears from claimant's petition that previous to July 1, 1887, they had purchased a mill site at Canal on the Little Wabash river in White county, Illinois, and had improved said mill at a cost of several thousand dollars; that said mill was constructed for the purpose of sawing logs into lumber and that there was an abundance of timber on both sides of the river below Canal and above New Haven in Gallatin county accessible to said mill by said river.

Claimants show by their petition that they had in the spring and summer of 1887 a large amount of timber cut into logs and banked on the margin of the stream ready for transportation to their said mill. That on account of the water being let out of the dam at New Haven they were prevented from getting their logs to said mill and that they thereby met with great loss, with other particulars relative to their losses not deemed material to mention.

Claimants allege that many years ago the State of Illinois constructed a dam across the Little Wabash

river at New Haven thereby effecting slack water navigation between that point and Carmi; and that at the session of the Legislature in 1887, by an act approved April 1, 1887, and in force July 1, 1887, the Canal Commissioners of the State of Illinois were authorized within six months after the act should become a law to remove or cause to be removed the said dam at New Haven and that said dam was so removed in pursuance of said act; that their damages were consequent upon such removal and that the State is liable therefor. No authority has been cited sustaining this view and we do not think it can be sustained. By a reference to chap. 19 of the Revised Statutes, entitled "Canals and Improvement of Illinois and Little Wabash rivers" in the fifth clause of the 8th section, which has been in force since July 1, 1874, we find that the Canal Commissioners were authorized "wholly to abandon or destroy the work by the construction of which the water privilege shall have been created whenever, in the opinion of the Legislature, such work shall cease to be advantageous to the State."

This being a public law of the State the claimants must be conclusively presumed to have put themselves in the condition they describe with a full knowledge of the law.

The Canal Commissioners' Report to the General Assembly of December 1, 1878, approves the report of the superintendent of canals in which he reports having visited the Little Wabash river improvements to make such examination as would assist the Commissioners in determining what should be done with that property in which he states that said improvements are worthless except for the water power and recommends that nothing further be done until the leases should expire at which time in his opinion it would be for the interest of the State to abandon the improvement altogether.

Again the Canal Commissioners in their report of December 1, 1880, referring to the Little Wabash river improvement, say that it is worthless, except for water power and the amount necessary to be expended to keep

the lock and dam in order will be much larger than the sum to be received from its rental for water power and recommend that the improvement be abandoned on the part of the State.

Again said Canal Commissioners in their report of December 1, 1882, say that they have cancelled the leases between the State and other parties granting water power privileges "thereby relieving the State from making further expenditures for the maintenance of this lock and dam," and showing that the amount on hand for this improvement had been credited to the general fund of the Illinois and Michigan canal and Illinois river improvements, thus showing an intention on the part of the State to abandon said improvement.

The same recommendation was made by the Canal Commissioners to the General Assembly which passed the Act of 1887.

We cannot see how under these circumstances there can be any legal liability upon the part of the State. Nor can we see that the claimants were misled by any act of the State or its agents into making the improvements for which they claim damages. This claim is therefore wholly rejected.

GEORGE C. ZEIGLER AND JOHN D. REINWALT

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*parties damaged by the removal of a State dam in river not entitled to damages from State.* Where the law authorizing public improvements provides that the State may abandon them at any time when it may seem expedient, parties who have availed themselves of the water privileges to erect and operate a mill must take notice from the law of the State, that said improvement is liable to be abandoned at any time by the State, and are not entitled to damages in case it is discontinued.

Claimants filed their petition in the office of the Auditor of Public Accounts of the State of Illinois, July 25, 1889, and due notice was given the Attorney General and his answer thereto on behalf of the State of Illinois, was filed August 4, 1890.

Petitioners in substance complain that the State of Illinois had constructed a dam across the Little Wabash river at New Haven in Gallatin county in said State, thereby furnishing slack water navigation the year around between New Haven aforesaid and Carmi in White county in said State. That after the construction of said dam said petitioners became the owners of and constructed a mill for the manufacture of lumber and timber on the bank of the river at the said city of Carmi and that said mill with its appurtenances was of the value of $10,000 and that they depended upon the slack water navigation which said river afforded to supply their said mill with timber for manufacturing purposes. That they owned large and valuable amounts of timber situated so as to be suitable and convenient for transportation to their said mill by way of the river aforesaid.

That after said petitioners had made their said improvements and had purchased timber for the use of said mill and while the same was in operation and while

said petitioners were deriving large profits therefrom the State of Illinois by an act of its Legislature which became a law July 1, A. D. 1887, authorized the removal of the said dam at New Haven and that the same pursuant to said act was removed on the 15th day of July, A. D. 1887, and that in consequence the water in said river receded until it became so low that it was impossible to float their logs in said river or to handle them at their said mill and that petitioners for that reason could not supply said mill with logs and the logs heretofore banked on said stream were damaged from decay and depreciated in value so that said petitioners, suffered, in the aggregate a loss of $10,500. Said petition was duly verified and proof taken and filed in support thereof according to law.

We have considered the testimony and find that it tends to support the allegations in the petition but do not find that it differs in principle from the case of Beldleman, Varnell & Tate v. The State of Illinois heretofore considered and passed upon at this session.

Petitioners have not cited any authority nor produced any argument from which we are led to conclude that there is any liability on the part of the State to said petitioners on account of the premises.

It does not appear to us that there were any contractual relations existing between the petitioners and the State on account of the improvement of said river by the construction of the dam at New Haven. We do not see wherein the discontinuance of said dam differs in principle from the removal of a county or state capital which often reduces largely the value of the real estate of the place from whence it was removed. In neither of these cases can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public.

> Cooley's Constitutional Limitations—4th Edition, p. 481.

The petitioners here like those in the case before referred to, were bound to take notice from the law of the

State, that said improvement was liable to be abandoned at any time by the State.

This claim for the reasons aforesaid is rejected and no award will be made.

JACOB SCHMIDT

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

1. RESPONDEAT SUPERIOR—*State not liable for negligence of employes.* A state or other involuntary municipal corporation cannot be held liable for the tort or negligence of any of its employes unless such liability is created by statute.

2. COMMISSION OF CLAIMS—*purpose of statute creating.* The law creating this commission does not undertake to create a new liability against the State but provides a method by which claims against the State may be heard before this commission, and the claim rejected or an award made in favor of the claimant.

3. SAME—*claimant must present a legal or equitable claim against State.* The Commission of Claims has no power to make an award in any case unless the facts show a legal or equitable claim against the State. It was not 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.

4. PRACTICE—*as to conclusiveness of decision.* Section 10 of the act creating this commission provides as follows: "In case said commission shall reject any claim so filed as aforesaid upon the hearing thereof, such rejection shall conclude all parties thereto, unless said commission shall in their award thereon otherwise direct."

The claimant's petition was filed with the Auditor of Public Accounts on the 15th day of November, 1889. Petition alleges on the 10th day of December 1887, and prior thereto claimant was engaged in the service of the State of Illinois as employee in the Southern Illinois Penitentiary at Chester; that the particular position in which he was employed, was the position known to prison rules as "cell house keeper" and the duties of such position were to have charge of the cell house during the day while the convicts confined in said prison, were at

work; to scrub out cells; scrub the floors and make beds and to do such other work as might be required in such capacity in order to keep the cells comfortable and cleanly, and that, he at all times, worked under the direction of superior officers. On the day aforesaid while petitioner was so engaged in the discharge of his duty as cell house keeper, and without any fault or negligence or omission of duty on his part, one George Dawson, a colored convict, confined in said prison, wilfully and maliciously attacked claimant with a sharp stick, or broom handle, which he drove into one of claimant's eyes, tearing the eye from the socket and wholly destroying the use and sight thereof; so that since said injury claimant had been unfitted and incapacitated for any kind of business. That his mind had been so affected so that he was unable to perform any services requiring any thought or operation of mind. That as keeper of cell house it was claimant's duty to care for certain classes of convicts who were allowed to remain in their cells during working hours; that is, convicts who were unable from infirmities of age, and those who were sick and unable to work. That said convict Dawson did not belong to those classes of convicts nor was he sick or otherwise incapacitated for work and was not, under the rules of said prison, entitled to remain in said cell house during working hours. That said Dawson was an unruly and dangerous convict and was disliked and feared by the guards and officers of the prison as well as by his fellow convicts, to such an extent that the other convicts feared him and desired and requested that they be not required to work in the company or presence of said Dawson. That it was the duty of the officers of said prison who were the superior officers of said claimant to see that said Dawson was placed at hard labor, or that he was confined in the solitary; that said superior officers wholly omitted and neglected their duty and did not require said Dawson to be placed at hard labor or confined in the solitary but allowed him to remain in said cell house in violation of

the known rules of said prison and their well known duty in that behalf. Said convict Dawson had been sentenced to prison for life for the crime of murder committed on his own child—a little girl about 12 years old. That immediately after the attack upon claimant by said Dawson, said Dawson was immediately locked up in the solitary where he has ever since remained, and by reason of the injuries alleged in the petition, claimant asks damages and for an award against the State for the sum of $5,000.00.

The proof in this case shows that the duties of claimant were substantially as alleged in his petition. On the 10th day of December 1887 claimant was sent to the cell where said Dawson was confined for the purpose of cleaning out the cell. That claimant asked said Dawson to step outside so as to enable him to clean out the cell. That said Dawson seized a stool and a broom stick and ordered him to shut the door. Claimant observing the dangerous mood that Dawson was in thought it best to let him alone until another time and shut the door and locked it and was in the act of turning to move away when said Dawson thrust the broom stick through the bars and into claimant's right eye as averred in petition.

By a stipulation of the counsel for claimant and the Attorney General, it appears that neither party was able to ascertain in what manner this convict Dawson obtained the broom stick which he used as a weapon in the injuries inflicted upon claimant; but claimant testifies that up to the time of finding it in his possession as described, he did not know that he had anything of the kind or how he obtained it and that he did not obtain it from the claimant. As far as it appears from the evidence in this case there is nothing to show in what manner he obtained this stick. But it is said in testimony of claimant that convicts were not allowed to have brooms or sticks of that kind in their cells. Attached to the evidence in this case are the printed rules for the government of convicts in the penetentiary at Chester. These rules do not disclose anything upon the subject as to

whether they were allowed to have brooms in their cells or not. The only printed rule we find having any bearing on the question is rule 10 which provides: "That convicts must not carry knives, tools, of any kind; pencils, paper or any material whatever from the shop to the cell, without permission in writing from the warden or deputy." But it clearly appears from the evidence of the warden and other employees that this convict Dawson was known and recognized as a very vicious and dangerous man and was supposed to be more or less insane. If it be conceded, which the proof leaves in some doubt, that this convict obtained the stick used by him in the attack upon claimant, through the negligence or carelessness of some employee, then the rule of law seems to be firmly settled that a State or other involuntary municipal corporation, cannot be held liable for the tort or negligence of any of its employees unless such liability is created by statute. See following cases where this has been so held: Murdock Parlor Grate Co. vs. Commonwealth, 24 N. E. Rep., 855; Hill vs. Boston, 122 Mass. 344; Curran vs. Boston, 151 Mass., 505; Gibbons vs. U. S., 8 Wall, 269; U. S. vs. Kirkpatrick 9 Wheaton 720; Lewis vs. State of New York 96 N. Y. 71; Sipple vs. State, 99 N. Y. 284; Splittorf, 108 N. Y. 205; 2nd. Dillon on Municipal Corporations, Sec. 761-762. Cooly's Constitutional Limitations, 240, 247; Hedges vs. County of Madison 1 Gil. 567; Town of Waltham vs. Kemper, 55 Ills. 346; David Elmore vs. Drainage Commissioners decided by Supreme Court of Illinois; not published.

The law creating this commission does not undertake to create a new liability against the State but provides a method by which claims against the State may be heard before this commission, and the claim rejected or an award made in favor of the claimant. The statute creating this Commission, after reciting the various classes of claims of which the Commission might have jurisdiction, among which may be said to be included claim of this petitioner, provides: "And such commis-

sion shall hear such claims according to its rules and established practice and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State; and shall file with the records of each claim determined, a brief, written statement of the reason of the determination."

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

We are of the opinion further, that it would be an exceedingly dangerous precedent to hold that the Commission had any such discretion. While it is true and we have endeavored in this case to find some principle upon which we might make an award in favor of this claimant, that his health and usefulness has been practically destroyed, recognizing that it is one of those cases appealing strongly to the sympathy of those who have heard this evidence, or are familiar with the facts of the case and we cannot but believe that if the facts of this

case are presented to the legislature of this State that some relief will be granted to this unfortunate claimant; 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.

Section 10 of the act creating this Commission provides as follows: "In case said Commission shall reject any claim so filed as aforesaid upon the hearing thereof, such rejection shall conclude all parties thereto, unless said Commission shall in their award thereon otherwise direct." In order that claimant may present his claim to the legislature we expressly direct, that under the power conferred upon us by the above section, that claimant shall not be concluded by the finding above rejecting his claim.

LEE HICKOX

v.

THE STATE OF ILLINOIS.

Opinion filed December 19, 1899.

RESPONDEAT SUPERIOR—*State is liable for damages caused by bullets used by militia in target practice.* The damaging of property by bullets during target practice by the State Militia is not merely the act of a servant in which the servant could exercise a choice or make use of his judgment; it is the military acting in strict subordination to the civil power, and the State is liable.

The petition in this case was filed on the 28th day of April, A. D. 1890, alleging that claimant is the legal owner in fee of the lands described in the petition, consisting of 240 acres occupied by claimant and used by him for agricultural purposes; that the State of Illinois owns and controls certain real estate described in the petition which is used by the State as a permanent camp ground known as Camp Lincoln; that a part of said real estate so owned and controlled by the State of Illinois is used by and under the authority of the State at stated times during each year for active drill in camp including rifle practice as required by law.

That leaden balls fired by the members of the National Guard while at rifle practice at said camp pass over and upon petitioner's lands with such great frequency as to greatly endanger the lives of your petitioner, his family and servants as well as all domestic animals, and such acts have greatly depreciated the value of claimant's lands and the valuable improvements thereon; that prior to the use of said lands so owned and controlled by the State as a rifle range claimant's lands were worth $100 per acre and that now they are worth not more than $20 per acre.

Petition further charges that during the year 1889 a part of said real estate so owned by claimant contained a valuable crop of hay of the value of $500, and that because of the danger from the frequent discharge of such leaden balls from Camp Lincoln upon and over said lands it became so dangerous to the lives of petitioner and his servants that said crops could not be gathered and necessitated the abandonment and consequent loss of said crop.

Petition also claims $15.00 damages for loss of services of one H. W. Crawford, a servant of claimant, who was on the 15th day of July, 1889, seriously injured while in claimant's service on said farm by a rifle ball fired by a member of said Illinois National Guard while at rifle practice at said camp.

The evidence in this case very clearly shows that during the months of July and August of the year 1889, regiments of the Illinois National Guard were encamped at Camp Lincoln and that while so encamped said Guards were required by the State to perform target practice, and for that purpose twenty targets were placed at the foot of a natural hill on or near the north line of the camp; the hill was fifty feet or more in height; the target practice was carried on at a distance ranging from two hundred to one thousand yards distant from said targets, and was kept up from day to day during the encampment. In this target practice the Springfield rifle is used carrying a 45 calibre ball; these

rifles will carry a ball the distance of one mile. The evidence is to the effect—that during the rifle practice as above stated those 45 calibre balls were thrown over the hill and with great frequency thrown upon the farm of claimant—at one time striking and seriously wounding a farm hand of claimant's; at other times falling about the dwelling occupied by claimant and passing through his barns, orchards and upon the fields where corn and other crops were grown, with such frequency as to render it extremely dangerous to the lives of the occupants. Claimant was prevented from harvesting a very heavy crop of hay and clover grown upon the north part of said farm in the summer of 1889, and has been put to great inconvenience and placed in great danger by reason of such target practice.

The legislature has appropriated the sum of eighty-five thousand dollars for the procurement of permanent camp and rifle range and for other purposes and authorized the Auditor of the State to draw his warrant on the State Treasurer for said sum upon the voucher of the Adjutant General, approved by the Governor. Session laws of 1885, page 216.

On the 1st day of May, 1886, the Governor appointed a Commission to locate and purchase a suitable site for a permanent camp and rifle range as provided for as above; special order No. 29, special order book of 1886, page 506, in Adjutant General's office.

This Commission reports the purchase of Camp Lincoln for the sum of $15,000; Adjutant General's report of December 31, 1886, page 209. For this sum and in full payment for the lands on which Camp Lincoln is situated the Adjutant General drew his voucher as provided in the session laws above referred to. The voucher is dated May 5, 1886, No. 5,720; was approved by R. J. Oglesby, the then Governor, and together with the receipts for that sum by the then owners of this tract of land is on file in the Auditor's office. The deed to this tract of land is duly entered of record in the recorder's office of Sangamon county.

Article 4, chapter 129 of our revised statutes provides that the Illinois National Guard shall parade for drill not less than three nor more than four days annually. It provides also that during the encampment the Guards shall engage in target practice. The constitution of the State of Illinois provides that the military shall be in strict subordination to the civil power and that private property shall not be taken or damaged for public use without just compensation.

While we conclude as is claimed by the Attorney General that the State is not liable for the torts of its servants we hold that the authorities above referred to show that the National Guards were acting under direct authority of the laws of the State. The State had purchased the camp ground, had expended its money in preparing the ground for a camp, had provided and set up the targets, had purchased the ammunition and the rifles, had prescribed the time and place for this practice. It was not the exercise of the judgment of a servant—it was the strict compliance of the military to the civil power. The act complained of here is not merely the act of a servant in which the servant could exercise a choice or make use of his judgment; it is the military acting in strict subordination to the civil power. This is something more than mere negligence of a servant. The act complained of here as shown by the evidence is kindred to the damaging of private property for public use for the time being. And while we are of the opinion that the lands have not been damaged by the act complained of yet for the loss of crops and the other circumstances shown in this case as sustained by the claimant, we are of the opinion that the State is liable and we have fixed the liability at the sum of four hundred and fifty dollars and the award will be for that sum.

whether they were allowed to have brooms in their cells or not. The only printed rule we find having any bearing on the question is rule 10 which provides: "That convicts must not carry knives, tools, of any kind; pencils, paper or any material whatever from the shop to the cell, without permission in writing from the warden or deputy." But it clearly appears from the evidence of the warden and other employees that this convict Dawson was known and recognized as a very vicious and dangerous man and was supposed to be more or less insane. If it be conceded, which the proof leaves in some doubt, that this convict obtained the stick used by him in the attack upon claimant, through the negligence or carelessness of some employee, then the rule of law seems to be firmly settled that a State or other involuntary municipal corporation, cannot be held liable for the tort or negligence of any of its employees unless such liability is created by statute. See following cases where this has been so held: Murdock Parlor Grate Co. vs. Commonwealth, 24 N. E. Rep., 855; Hill vs. Boston, 122 Mass. 344; Curran vs. Boston, 151 Mass., 505; Gibbons vs. U. S., 8 Wall; 269; U. S. vs. Kirkpatrick 9 Wheaton 720; Lewis vs. State of New York 96 N. Y. 71; Sipple vs. State, 99 N. Y. 284; Splittorf, 108 N. Y. 205; 2nd. Dillon on Municipal Corporations, Sec. 761-762. Cooly's Constitutional Limitations, 240, 247; Hedges vs. County of Madison 1 Gil. 567; Town of Waltham vs. Kemper, 55 Ills. 346; David Elmore vs. Drainage Commissioners decided by Supreme Court of Illinois; not published.

The law creating this commission does not undertake to create a new liability against the State but provides a method by which claims against the State may be heard before this commission, and the claim rejected or an award made in favor of the claimant. The statute creating this Commission, after reciting the various classes of claims of which the Commission might have jurisdiction, among which may be said to be included claim of this petitioner, provides: "And such commis-

sion shall hear such claims according to its rules and established practice and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State; and shall file with the records of each claim determined, a brief, written statement of the reason of the determination."

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

We are of the opinion further, that it would be an exceedingly dangerous precedent to hold that the Commission had any such discretion. While it is true and we have endeavored in this case to find some principle upon which we might make an award in favor of this claimant, that his health and usefulness has been practically destroyed, recognizing that it is one of those cases appealing strongly to the sympathy of those who have heard this evidence, or are familiar with the facts of the case and we cannot but believe that if the facts of this

case are presented to the legislature of this State that some relief will be granted to this unfortunate claimant; 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.

Section 10 of the act creating this Commission provides as follows: "In case said Commission shall reject any claim so filed as aforesaid upon the hearing thereof, such rejection shall conclude all parties thereto, unless said Commission shall in their award thereon otherwise direct." In order that claimant may present his claim to the legislature we expressly direct, that under the power conferred upon us by the above section, that claimant shall not be concluded by the finding above rejecting his claim.

LEE HICKOX

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

JURISDICTION SUPREME—*State is liable for damages caused by bullets used by militia in target practice.* The damaging of property by bullets during target practice by the State Militia is not merely the act of a servant in which the servant could exercise a choice or make use of his judgment: it is the military acting in strict subordination to the civil power, and the State is liable.

The petition in this case was filed on the 28th day of April, A. D. 1890, alleging that claimant is the legal owner in fee of the lands described in the petition, consisting of 240 acres occupied by claimant and used by him for agricultural purposes; that the State of Illinois owns and controls certain real estate described in the petition which is used by the State as a permanent camp ground known as Camp Lincoln; that a part of said real estate so owned and controlled by the State of Illinois is used by and under the authority of the State at stated times during each year for active drill in camp including rifle practice as required by law.

That leaden balls fired by the members of the National Guard while at rifle practice at said camp pass over and upon petitioner's lands with such great frequency as to greatly endanger the lives of your petitioner, his family and servants as well as all domestic animals, and such acts have greatly depreciated the value of claimant's lands and the valuable improvements thereon; that prior to the use of said lands so owned and controlled by the State as a rifle range claimant's lands were worth $100 per acre and that now they are worth not more than $20 per acre.

Petition further charges that during the year 1889 a part of said real estate so owned by claimant contained a valuable crop of hay of the value of $560, and that because of the danger from the frequent discharge of such leaden balls from Camp Lincoln upon and over said lands it became so dangerous to the lives of petitioner and his servants that said crops could not be gathered and necessitated the abandonment and consequent loss of said crop.

Petition also claims $15.00 damages for loss of services of one H. W. Crawford, a servant of claimant, who was on the 15th day of July, 1889, seriously injured while in claimant's service on said farm by a rifle ball fired by a member of said Illinois National Guard while at rifle practice at said camp.

The evidence in this case very clearly shows that during the months of July and August of the year 1889, regiments of the Illinois National Guard were encamped at Camp Lincoln and that while so encamped said Guards were required by the State to perform target practice, and for that purpose twenty targets were placed at the foot of a natural hill on or near the north line of the camp; the hill was fifty feet or more in height; the target practice was carried on at a distance ranging from two hundred to one thousand yards distant from said targets, and was kept up from day to day during the encampment. In this target practice the Springfield rifle is used carrying a 45 calibre ball; these

rifles will carry a ball the distance of one mile. The evidence is to the effect—that during the rifle practice as above stated those 45 calibre balls were thrown over the hill and with great frequency thrown upon the farm of claimant—at one time striking and seriously wounding a farm hand of claimant's; at other times falling about the dwelling occupied by claimant and passing through his barns, orchards and upon the fields where corn and other crops were grown, with such frequency as to render it extremely dangerous to the lives of the occupants. Claimant was prevented from harvesting a very heavy crop of hay and clover grown upon the north part of said farm in the summer of 1889, and has been put to great inconvenience and placed in great danger by reason of such target practice.

The legislature has appropriated the sum of eighty-five thousand dollars for the procurement of permanent camp and rifle range and for other purposes and authorized the Auditor of the State to draw his warrant on the State Treasurer for said sum upon the voucher of the Adjutant General, approved by the Governor. Session laws of 1885, page 216.

On the 1st day of May, 1886, the Governor appointed a Commission to locate and purchase a suitable site for a permanent camp and rifle range as provided for as above; special order No. 29, special order book of 1886, page 506, in Adjutant General's office.

This Commission reports the purchase of Camp Lincoln for the sum of $15,000; Adjutant General's report of December 31, 1886, page 209. For this sum and in full payment for the lands on which Camp Lincoln is situated the Adjutant General drew his voucher as provided in the session laws above referred to. The voucher is dated May 5, 1886, No. 9,720; was approved by R. J. Oglesby, the then Governor, and together with the receipts for that sum by the then owners of this tract of land is on file in the Auditor's office. The deed to this tract of land is duly entered of record in the recorder's office of Sangamon county.

Article 4, chapter 129 of our revised statutes provides that the Illinois National Guard shall parade for drill not less than three nor more than four days annually. It provides also that during the encampment the Guards shall engage in target practice. The constitution of the State of Illinois provides that the military shall be in strict subordination to the civil power and that private property shall not be taken or damaged for public use without just compensation.

While we conclude as is claimed by the Attorney General that the State is not liable for the torts of its servants we hold that the authorities above referred to show that the National Guards were acting under direct authority of the laws of the State. The State had purchased the camp ground, had expended its money in preparing the ground for a camp, had provided and set up the targets, had purchased the ammunition and the rifles, had prescribed the time and place for this practice. It was not the exercise of the judgment of a servant—it was the strict compliance of the military to the civil power. The act complained of here is not merely the act of a servant in which the servant could exercise a choice or make use of his judgment; it is the military acting in strict subordination to the civil power. This is something more than mere negligence of a servant. The act complained of here as shown by the evidence is kindred to the damaging of private property for public use for the time being. And while we are of the opinion that the lands have not been damaged by the act complained of yet for the loss of crops and the other circumstances shown in this case as sustained by the claimant, we are of the opinion that the State is liable and we have fixed the liability at the sum of four hundred and fifty dollars and the award will be for that sum.

LOUIS A. GUIBERT

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*claim for injury to lands caused by construction of dam by the State of Illinois.* Court reviews evidence and holds that petitioner's claim is not supported by the evidence and claim is rejected.

The claimant in this case filed his petition on the 20th day of October, A. D. 1879, in which it is charged that the claimant is the legal owner of the lands described in the petition, one hundred and eighty to one hundred and ninety acres of which it is charged are damaged by the backing of the water of the Illinois river over said lands.

That in the month of October, A. D. 1877, a dam was constructed across said river near Copperas Creek under and by virtue of the authority of the State of Illinois. That said dam lifts the water at or opposite the lands of the petitioner two to three feet higher than it would be but for said dam and at Copperas Creek six and one-half feet higher than it was prior to the construction of said dam. That said river is subject to summer freshets raising said river two to three feet which without said dam were harmless to said lands but with said dam makes what before said dam was constructed would have been a freshet of from two to three feet now from four and one-half to six feet. The increase being wholly caused by the construction of said dam which filling the river backs the water over said lands which have thereby become water soaked and soft to such an extent that said lands will not bear animals and are well nigh worthless and the claimant demands $1,700.00 damages for the injury.

To this petition the Attorney General on behalf of the State of Illinois interposes three pleas:

1st. That the facts are insufficient to entitle the claimant to the relief sought.

2d. That said claim is barred by the statute of limitations.

3d. The general issue.

The Copperas Creek dam was constructed and was closed on the 22d day of October, A. D. 1877, and the petition in this case was filed with the Auditor on the 20th day of October, A. D. 1879, within two years after the completion of said dam. If there is any damage accruing to plaintiff on account of the construction of this dam such claim is not barred by the statute of limitations. But while we have no doubt that the claimant's lands are wet and incapable of producing such crops as do other lands more favorably situated we cannot see how the wet and boggy condition of these lands can be the result of the building of the Copperas Creek dam. The evidence is to the effect that these lands are one and one-half miles from the river and their wet and boggy condition is caused by the springs near the hills eighteen to twenty-four feet above low water mark. We are of the opinion from a careful examination of all the evidence that claimant's lands have not been damaged by the back water from the river and we have therefore rejected this claim.

ELIZABETH GILBERT

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damages caused by construction of dam.* The court reviews evidence and finds that claimant's lands are not damaged by construction of dam in Illinois river by the State of Illinois.

The claimant filed her petition on the 20th day of October, 1879, setting forth that by authority of the State of Illinois a dam was constructed across the Illinois river at or near Copperas Creek; that the erection of said dam caused the water in the river opposite claimant's land to back up over her land and thereby to render it almost worthless, and that said lands will remain water soaked and almost worthless forever. The damage claimed is $880.

To this petition the statute of limitations and the general issue is interposed as a defense; and upon the petition, pleas, depositions and report of the surveyor, this cause is heard.

The evidence discloses the fact that on one tract of claimant's lands there is a creek running entirely through the tract; the head of the creek is found to be fifteen feet above the river at low water mark. The banks of this creek are low, and from this creek and not from the river the water spreads out over the claimant's land. The land is found by actual measurement to be from seventeen to twenty feet above old low water mark. We have no doubt but what these lands are becoming more thoroughly water soaked than they were in former years. Undoubtedly this condition would have existed had the dam never been erected. At all events the claimant's lands are found to be from ten to fourteen feet above that point where the dam ceases to have any effect on the river; and in the judgment of the Commission the claimant's lands are not damaged by the construction of the dam, and have therefore rejected this claim.

HEIRS OF H. L. CRAINE, DECEASED,

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damages caused by construction of State dam.* Court reviews evidence and finds that claimant's lands have been damaged by overflowing of the Illinois river caused by construction of a dam across said river by the State of Illinois.

Petition in the above cause was filed October 20, 1879. Claimant states in his petition that he is the owner in fee of the southwest fractional quarter of section ten (10) containing seventeen acres; also the northwest fractional quarter of section fifteen (15) containing ninety-five acres, both of said tracts of land being in township twenty-nine (29), north range 3, west of the 3d P. M. That said lands are situated on what is known as the bottom lands on the Illinois river, and subject to overflow; that prior to the acts complained of by petitioner crops of grain could have been successfully raised on said lands; that the State of Illinois in October, 1877, caused to be erected a dam across the Illinois river at Copperas Creek which caused a permanent raise of the level of the water in the river of between three and four feet thereby causing the lands to become wet, spongy and unproductive, causing as claimant charges damages to the amount of $500.

The proof tends to establish the allegations in the petition. While we think the land of the claimant has been to some extent damaged, from all the evidence the land does not appear to have been of great value before the construction of the dam at Copperas Creek; but it has been fairly proven that the land is less productive and has been damaged. We think claimant has been damaged in the sum of one hundred and thirty-three dollars, and our conclusion is that he would have been, if living entitled to an award in his favor against the State of Illinois for that sum.

The proof shows that since the filing of the claim said Henry L. Craine died, leaving heirs as follows: Julia M. Craine, Sarah E. Dean, Charles W. Craine, Maggie Richereau, George Craine, Greenbury L. Craine and Rattie Pellett; that W. W. Dean was the administrator of this estate. The death of claimant having been suggested and the heirs and administrator made parties claimants, the award is made in favor of above named heirs of Henry L. Craine for the sum of one hundred and thirty-three dollars.

WARNER COMBS

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damage caused by construction of State dam.* The Commission *refuses the evidence and finds claimant is entitled to* an award for damages caused to his land by the construction by the State of Copperas Creek dam on the Illinois river.

The claimant filed his petition in this case on October 20, 1877, with the Auditor of Public Accounts as required by the statute; the petition recites that claimant is the owner in fee of the following described lands: The northeast quarter of section twelve containing 160 acres. The southeast quarter of the southwest quarter of section twenty (20) containing 40 acres; also the north seven-eighths of the east half of the northwest quarter of section 26, containing 70 acres; also the northeast of the southeast sectional quarter of section 26, containing 80 acres, all in township twelve (12) north range nine east of the 4th P. M., Marshall county, Illinois.

The petition charges that the State of Illinois in October, 1877, constructed a dam in the Illinois river near Copperas Creek which caused the permanent level of the water in the Illinois river to be raised between three and four feet; that the lands of claimant bordering along the Illinois river were subject to overflow in periods of very

high water in the river but that in most years claimant could successfully cultivate most of his land, raising crops of grain and obtaining satisfactory results from farming his land; that since the construction of the dam aforesaid and consequent permanent raising of the level of the water his lands have become wet, springy, unproductive and subject to more frequent overflows, thereby greatly damaging claimant's land.

The proof in this case sustains nearly every allegation in the petition as to the fact that by the construction of the dam in the Illinois river by the State claimant has been severely damaged. We are satisfied from the proof that the land of claimant was fairly good land for lands so situated along the Illinois river. The evidence seems very positive and conclusive that the value of the land has been materially injured by the construction of this dam and that the State should make good to him the actual damages sustained.

We think claimant has filed his claim in time so that it is not barred by any statute of limitation and is entitled to an amount against the State. The amount of the actual damages sustained by claimant after a careful consideration is the sum of eight hundred dollars, and he is entitled to an award for that amount.

HUSTON W. CRAWFORD

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

MILITIA—*member entitled to relief when injured by discharge of rifle; under what circumstances.* Where a section of the statute provides for target practice at the annual parades and encampments of the National Guard and a person is injured by the discharge of a rifle in the hands of a member of the National Guard under orders in camp, at target practice, under such statute and a statute providing for annual encampments, the injury received is the direct result of an act authorized by the State. It is something more than the mere negligence of a servant or agent and claimant is entitled to recover damages.

The petition in this case alleges that on the 15th day of July, A. D. 1889, a regiment of the Illinois National Guard were encamped at Camp Lincoln near the city of Springfield, and that while said regiment was doing duty as required by the statute of the State of Illinois some member of said regiment while in the line of duty at rifle practice, fired a forty-five calibre rifle ball by the direction and authority of the officers of said regiment which struck petitioner.

That said ball struck and perforated the ankle bone of claimant's left limb, fracturing the bone at that point and causing great pain and suffering. That claimant is a farm hand, and said injury has permanently disabled him from pursuing his vocation.

The evidence in this case is to the effect that on the 15th day of July, A. D. 1889, a regiment of the Illinois National Guard was encamped at Camp Lincoln and on that day companies of said regiment were engaged in rifle practice. The targets were stationed at the foot of a natural hill or bluff, the rise being abrupt and terraced and the hill fifty feet high. The companies engaged in practice were stationed nine hundred or one thousand yards distant from the targets.

The claimant herein was a farm hand and was at the

time engaged in the pursuit of his business as a farm hand or laborer about one-half mile in the rear of the targets and while so engaged received the injury complained of for which five thousand dollars damages are claimed.

The Illinois National Guard in their target practice use the Springfield rifle carrying a forty-five caliber rifle ball. A ball of this size struck claimant in the left leg near the ankle joint and was buried in the bone. A surgeon was called and removed the ball and claimant was by direction of the Surgeon General of the National Guard removed to St. John's Hospital where he was cared for at the expense of the State for fifty-three days. The injury was the result of a shot fired from a musket or Springfield rifle fired by some one of said National Guards while at target practice under the orders of the military authorities of the State of Illinois.

The claimant prior to the time of receiving the injury was receiving for his services as a farm hand $45.00 per month and since that time when able to perform labor has only received $18.00 per month.

The evidence in this case was taken more than one year after the injury was received and at the time of taking the evidence the claimant is still seriously affected. The surgeon who extracted the ball says: "It may become necessary yet to amputate the limb." The Surgeon General says: "The wound is of a serious nature and claimant will never fully recover."

The hill or back stop of this rifle range is less than one-fourth of a mile long and against this hill are placed twenty targets for rifle practice. At each target two men alternately discharge their rifles. So that forty men are kept at this target practice.

The inspector of rifle practice says in his testimony that it would be wild shooting to shoot over the hill when shooting at the target but he says, "they are capable of wild shooting."

While engaged at this target practice at the distance of one thousand yards from the target it is stated in argu-

ment that if the muzzle of the gun at the time of the discharge should be raised one half of an inch the ball would be thrown over the top of the hill. However this may be it appears by the evidence the Springfield rifles are capable of throwing a ball a distance of one mile. The claimant the evidence shows was within less than one-half mile of the targets at the time he received the injury.

That the injury received by the claimant was the result of a discharge of a gun in the hands of some one of the National Guard while engaged in the rifle practice is clearly shown by the evidence.

It is insisted on the part of the State that the State cannot be made liable for injuries arising from negligence of its agents or servants unless some positive statute is shown assuming such liability.

We are aware of the fact that it has been held in New York that the State is not liable for injuries arising from negligence or misfeasance of its agents in like manner as a natural person. In the case of Murdock Parlor Grate Co. v. The Commonwealth of Massachusetts, 24 N. E. 855, the court holds that the State is not liable for damages caused by the negligence of its servants in overloading the floor of a room hired by the State and the same rule obtains in most if not all the States.

In Bishop on Non Contract Law, Sec. 749, page 348, it is said: "One of the most obvious propositions of reason as well as of authority is, that a municipal corporation is a subordinate branch, or part, of the government. It has other functions but those of this class are of course discretionary. Now in numerous cases beyond what need be referred to here it is assumed that therefore the corporation is not answerable for its negligence in the discharge of those functions. We shall see as we proceed that other authorities do not so hold. One of the reasons apparently swaying the judicial mind toward this opinion is that the supreme governmental power, the State, cannot be sued without its consent. But when we look into this reason we perceive that the

non-liability of the State results from its dignity which is not possessed by a municipal corporation; and the State has always been deemed as capable of doing an individual a wrong as any private person and as liable to respond in damages though its response is of its own grace."

Chapter 129, Art. 4, Starr & Curtis' Statutes of the State of Illinois, provides that the Illinois National Guard shall parade for drill not less than three nor more than four days annually, etc.

The Statute provides further that the brigade commander shall direct such target practice at the annual parades and encampments as he may deem expedient, Starr & Curtis, page 2317. The injury received is the direct result of an act authorized by the State. It is something more than the mere negligence of a servant or agent. The National Guards were acting under the direct authority of the laws of the State.

We are of the opinion that the State is liable in this case for damages and of its own grace has authorized this Commission to hear and determine such cases. Session Laws, 1889, page 90. We have therefore fixed the damages of claimant at the sum of one thousand dollars ($1,000.)

THEODORE BICKERMAN

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*claim for damages arising from the construction of a dam by the State; statute of limitations.* A claim for damages arising from the construction of a dam by the State must be presented within two years of the date of the closing of the dam or it will be barred by the statute of limitations.

W. H. Fairbanks v. The State, ante page 1 followed.

The petition of claimant was filed with the Auditor of Public Accounts on the 23d day of October, 1879.

The petition recites that the claimant is the owner in fee of the following described land: Lot two of the southeast quarter (S. E. ¼) of section thirty-six, containing 147.50; also the southeast quarter (S. E. ¼) of the southwest quarter (S. W. ¼) of section thirty-six (36), containing forty acres, all being in township thirteen north range nine east of the 4th P. M., Marshall county, Illinois.

The petition recites that these lands are bordering upon the Illinois river and that prior to the act complained of were susceptible of cultivation, raising thereon crops of grain; that in October, 1877, the State of Illinois had constructed a dam across said river near Copperas Creek which had permanently raised the level of the water in the river between three and four feet making the lands of claimant wet and unfit for cultivation whereby it is claimed the claimant has been greatly damaged.

The proof taken had tendet to show that claimant had been damaged by the act of the State to some extent. The serious question is whether even conceding all that claimant states in his petition to be true, he has any lawful right to ask for an award against the State, by reason of the statute of limitations, which requires that all unliquidated claims against the State be filed within two years after the cause of action had accrued. We

have found in a number of other cases where the proof was the same that the dam in the Illinois river at Copperas Creek which the State caused to be constructed was closed on the 21st day of October, 1877; that whatever was done by the State which tended to injure claimant was finished more than two years before the claimant's petition was filed. So that his cause of action, if any he had, was already barred by the statute of limitations. We have carefully considered the brief and examined the authorities cited by claimant's counsel. We do not think the cases cited apply. We have before had occasion to discuss this question in the case of W. H. Fairbanks v. The State and in the opinion filed in that case stated the reasons and cited the authorities that compelled us to hold as we thought then and still think that this claim and those involving the same are barred by the statute of limitations, and for that reason our conclusion is that this claim should be rejected.

ELIZA A. BABB, ET AL.

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1880.

STATUTE OF LIMITATIONS—*petition filed within two years; claim not barred.* Where petition is filed within two years after closing of dam alleged to have caused damage to property of claimant, claim is not barred by statute of limitations.

The claimants, Eliza A. Babb and Estella J. Babb, filed their petition herein on the 20th day of October, A. D. 1879, in which they claim that they were before and since the 20th day of October, 1877, the legal owners of the lands described in their petition. That said lands are situated in the bottoms and low lands bordering upon the Illinois river. That during the months from May to October inclusive in each year said river is usually at or near low water mark and that during that time said lands were formerly left dry yielding large crops annually. That under and by virtue of the

authority of the State of Illinois in the month of October, A. D. 1877, a dam was constructed across said river near Copperas Creek. That by reason of the construction of said dam the water in said river is piling and backing up so that said lands have become water soaked and worthless and will so continue forever whereby claimants have been damaged to the amount of four hundred and fifteen dollars.

To this claim the Attorney General files a plea interposing the statute of limitations and the general issue.

Upon the petition, pleas and depositions filed in this case together with the general depositions this cause is heard.

The dam was closed October 22, 1877, and the petition in this case was filed within two years thereafter and hence the claim is not barred by the statute of limitations.

After a careful examination of the evidence in this case the Commission is of the opinion that the claimants have been damaged to the amount of one hundred dollars ($100.00) in the tract in section twenty-three and that such damages are caused by the backing of the water of the Illinois river upon said lands since the construction of the Copperas Creek dam.

The northeast quarter of the northwest quarter of section 14, township 29, north range 3 west, we find to be at its lowest point fifteen feet above and at its highest point twenty-seven feet above original low water mark. The Commission is unable to see how the construction of the Copperas Creek dam could injure this tract.

We fix the damages of these claimants at one hundred dollars.

JACOB JONES

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damages caused by construction of dam by State.* The Commission reviews the evidence and finds that the claimant is entitled to an award of $100 for damages to his land caused by the construction of Copperas Creek dam by the State.

Jacob Jones the claimant in this case filed his petition on the 20th day of October, A. D. 1879, charging that on the 20th day of October, A. D. 1877, and before and since that time he was the legal owner of the north half of the northeast quarter (N. E. ¼) of section twenty-seven; the southwest quarter of the southeast quarter of section twenty-seven; the northeast quarter of the northeast quarter of section thirty-four; and the northeast quarter of the southeast quarter of the northeast quarter of section thirty-four, all in township twenty-eight, north range three west. That said lands are all situated in the bottoms bordering on the Illinois river and all are subject to inundation from floods and high water in said river. That during the months of May to October, inclusive, of each year said river is usually at or near low water mark and the lands above described left dry and yielding large crops. That in the month of October, 1877, by virtue of the authority of the State of Illinois, a dam was constructed across said river near Copperas Creek. That by reason of said dam having been built the water in said river has backed upon and over said dam and thereby most of said lands have become water soaked and soft to such an extent that they no longer bear animals with safety and have become unproductive, liable to frequent overflows and almost worthless and will so remain forever. That thereby claimant has been damaged seven hundred and thirty dollars.

To this petition the Attorney General pleads the general issue and the statute of limitations.

The construction of the Copperas Creek dam is claimed as the immediate cause of the damages to claimant's lands. The dam was closed on the 22d day of October, A. D. 1877. Claimant's petition was filed October 20, A. D. 1879, within two years after said dam was closed. The claim is not therefore barred by the statute of limitations.

Mr. Wilson the surveyor who was appointed by an order of the Commission to go upon and examine these lands and to report his findings has not made an examination of claimant's lands.

An erroneous description of claimant's lands in the original petition which has since been corrected by amendment will no doubt account for the surveyor's omission to report in this case.

We find in this case a large amount of evidence going to show that the lands described in the amended petition are wet and for some cause less productive than they were prior to the construction of the dam. Quite a large number of witnesses produced are of the opinion that the wet condition of the lands since the construction of the dam is caused by the overflow or backing of the water up to such a point as to cause the under draining on this land to be affected and the land to become water soaked to such an extent that claimant's lands are damaged from six to fifteen dollars per acre.

A large proportion of the lands on which damages are claimed are of eighteen or twenty feet above old low water mark and are near the bluffs where the wet condition is evidently caused by springs from the bluffs. We cannot see how it is possible for lands located fifteen feet above the top of the Copperas Creek dam to be damaged by the construction of that dam.

We find however that a small part of claimant's lands are so low that in our opinion such part of said lands

are to a limited extent damaged by the construction of the dam. We have fixed the amount of the damages of this claimant at one hundred dollars ($100.00.)

THE HEIRS OF JAMES SEWARD

v.

THE STATE OF ILLINOIS.

Opinion filed December 12, 1890.

WATERS—*damage caused by construction of dam; when cause of action accrues.* A cause of action for damages sustained by reason of the construction of a dam whereby land is inundated, accrues at the completion of the dam.

James Seward filed his claim in the Auditor's office of the State of Illinois, October 20, 1879, for damages to his land caused by and incident to the construction of a dam near Copperas Creek in the Illinois river by the State of Illinois.

The property by him claimed to be damaged was described as follows:

"The southeast quarter of section 22 contains 160 acres of which 150 acres are damaged by said dam to the extent of $4 per acre."

"And the southeast quarter of the southeast quarter of section 27 containing 40 acres of which 20 acres are damaged to the extent of $5 per acre."

"And the southwest quarter of the northeast quarter of section thirty-four (34) containing forty acres of which forty acres are damaged to the extent of $3 per acre by said dam."

"And the northwest quarter of the northwest quarter of section thirty-five containing forty acres of which fifteen acres are damaged by said dam to the extent of $8 per acre."

"All in township twenty-nine north range three west of the 3d P. M."

The claimant averred in his petition that he was the owner of the land on the 20th of October, 1877, and that

said dam was constructed in that same month. There is no allegation as to the day of the month when said dam was completed or the damages accrued.

Claimant also stated in his petition that his said lands were situated in the bottoms and low lands bordering on the Illinois river, and were subject to inundations from floods in said river. That during the months of May, June, July, August, September and October, in each year said river was usually at or near low water mark at such times said land was left dry and yielded large crops of grass and were of great value for hay and pasture and when under cultivation yielding large crops of corn and other grains. That of the lands claimed to have been damaged, from twenty to forty acres had theretofore been farmed to corn and the remainder had been used for meadow and pasture. That the dam caused the water to rise opposite the land from two to three feet higher than it did before the dam was erected; with other allegations pertaining to the effect the building of the dam was supposed to have upon this land.

The total amount claimed was $1,020.00.

It appears that the said James Seward departed this life intestate and his death having been suggested and sufficiently made known to this Commission the claim now stands in the name of the heirs of the said James Seward without naming them.

The Commission having considered all the evidence in this case finds that the said claim was filed within two years from the time said dam was completed and [illegible] of action arose at the completion of said

And that as to the southeast quarter of the southeast quarter of section 27 and the southwest quarter of the northeast quarter of section 34 and the northwest quarter of the northwest quarter of section 35 in said township and range no damages were sustained consequent upon the building of said dam.

The land in the southeast quarter of section 22 appears to have had an elevation of a little less than eight feet above the river at its original low water mark. It does not appear that it ever could have been successfully drained, but on account of the building of the dam became more subject to overflow than previous thereto and for that reason less valuable for pasturage.

The other lands appear to have an elevation, those in section 27 of from fifteen to nineteen feet above the river and are springy and boggy. Those lands in section thirty-four were divided by Crow Creek which seems to be higher along its banks than the surface of the land at a distance away on either side so that when the creek overflows the adjacent lands are made wet.

The land in section 35 consists in part of bluff and is springy and a little higher than the lands along Crow creek, the water in Crow creek being some sixteen feet higher than the water in the river. We are not satisfied that these conditions are consequent upon the building of the Copperas Creek dam and therefore reject that part of the claim and award to the heirs of the said James Seward the said sum of $300.00 as and for all damages sustained

JEFFERSON TRICKLE

v.

THE STATE OF ILLINOIS.

Opinion filed October 20, 1891.

1. COMMISSION OF CLAIMS—*not restricted to consideration of claims which can only be prosecuted in court of law.* The statute does not restrict the Commission to the consideration of claims which can only be prosecuted in a court of law, and under the rules there prevailing in regard to proper parties.

2. SAME—*claims to be determined according to equity and justice.* The Commission of Claims is enjoined by the act creating it to determine all claims according to the principles of equity and justice, except when otherwise provided by the laws of the State.

3. LIMITATIONS—*theory upon which laws proceed.* All limitation laws proceed on the theory that the party by lapse of time and omissions on his part has forfeited his right to assert his title in the law. All statutes of limitations also must proceed on the idea that the party has full opportunity to try his right in the courts.

4. SAME—*statutes rest upon sound public policy.* Statutes of limitations rest upon principles of sound public policy, and are not to be evaded except by the methods provided therein. If claimants stand by inactive and permit their claims to be barred, it is not the law, but the party, who is responsible for the hardships entailed.

5. SAME—*statute runs against all claims except those sought to be enforced by government.* The statute of limitations runs against all claims except those which are sought to be enforced by the government in its name and in its behalf.

6. SAME—*government may avail itself of provisions of statute.* The government, although not precluded by the statute, may nevertheless avail itself thereof in suits against it, where there is a statute authorizing individuals to bring suits against it.

7. STATE INDEBTEDNESS—*policy of State toward creditors.* It has been the settled policy of the State for more than forty years to induce all persons having claims against it whether adjusted or not to present them that they may be settled in some manner.

This claim was filed with the Auditor of Public Accounts, August 1, 1882. The claim is based upon an in-

strument partly in print, and partly in writing, which reads:

100 Issued on No. 754. 100

Office of the Board of Public Works.

Springfield, Ill.

No. 5545 B March 18th, 1840.

Fund Commissioner of the State of Illinois.

Pay to the order of H. Fellows, Commissioner of the Board of Public Works, one hundred dollars, with interest from August 14th, 1840, until paid, at the rate of six per cent per annum and charge same to draft No. 754 dated July 15th, 1840.

Wm. Prentiss, Sec'y. J. Hogan, Pres.

100 100

Endorsed "Pay bearer,

H. Fellows, Com."

It is alleged that said claim accrued at Springfield in the County of Sangamon in the State of Illinois, at the date of said instrument, and that the claimant has been the "owner of said instrument or evidence of indebtedness ever since some time in the fall of the year 1840," and that he has had the same in his actual possession during the whole of the time since, except such time as it had been in the hands of his attorneys, Messrs. Hopkins & Hammond, for collection. That the principal with accrued interest remains due and unpaid.

That he purchased said claim for a valuable consideration of Martin B. Mason, of Knox county, Illinois, and received possession thereof from him. The Attorney General was notified of the filing of said claim. And the depositions of the claimant, Jefferson Trickle, and of Martin B. Mason were taken on the tenth or eleventh of August, 1882, in support of said claim. It appears that Trickle at the time the depositions were taken was seventy-seven (77) and Martin B. Mason seventy-four (74). It appears that Martin B. Mason was the son of Jacob Mason, and his administrator, and as such paid Jefferson Trickle among other funds certain Canal scrip which at that time was used and considered as money

and so considered and used in that transaction. That he had three pieces of this scrip of a hundred dollars each, and that in June, 1840, he delivered one of them to Jefferson Trickle, son-in-law of Jacob Mason on his share of the estate. That Mason died in October, 1837. The scrip was received by the administrator after the death of Jacob Mason. Trickle testifies that he became the owner through Martin B. Mason in either November or December, 1840; that he received it from the administrator of Jacob Mason's estate, in payment of one hundred dollars ($100.00) which he had deposited with said Mason in his lifetime with which to purchase a tract of land, but which had not been used for that purpose.

On the 20th of August, 1889, the Attorney General filed his objections to the claim:

First—That the facts stated as the basis of the claim are insufficient to entitle the claimant to have it allowed.

Second—That the claim was neither proved nor filed in the office of the Secretary of State previous to the 1st day of January, 1849, nor within two years from the time such claim may have arisen, as required by the statute in that behalf; and on August 4th, 1890, he leave filed an additional plea to the effect that the claim ought not to be allowed because more than twenty years elapsed after said claim accrued prior to the filing of said claim with this Commission and the commencement of the suit and that the same is forever barred by reason of the laches of said claim, and the statute of limitations.

It will be observed that the instrument upon which the claim was made is dated March 18th, 1840, is to bear interest from August 14th, 1840, and is to be charged to, or paid out of draft No. 754 dated July 15th, 1840.

There is no evidence explaining why it was to be paid out of a draft that was not to be issued for nearly four months subsequently, nor why it was made payable to the order of H. Follows, Commissioner, nor upon what account he paid it out.

Counsel for claimant and the Attorney General seem to differ in their opinions under which act of the Legis-

lature this paper was issued; the Attorney General contending:

First—The scrip claimed for was not issued by any one having authority to bind the State for the payment of money.

Second—Said scrip does not purport to bind the State or to be the obligation of the State for the payment of money.

Third—There is and was no authority to issue any scrip or drafts of this character which should be the binding obligations of the State.

Fourth—Said supposed scrip is only an order or draft for the transfer of funds from one proper custodian to another and is not and does not purport to be an obligation on the part of the State of Illinois, and neither creates a liability of the State to the officer named as payee in said draft nor to his assigns.

Fifth—The scrip was not negotiable and cannot be recovered upon by an assignee.

The Attorney General proceeds to argue that the draft or scrip in question, if legal, must be based upon the twenty-fourth section of the Act of February 27, 1837, relating to the construction of the Illinois and Michigan Canal; and shows quite satisfactorily that it cannot be supported as a valid document under the provisions of that Act.

The claimant insists that this scrip or draft was issued pursuant to the provisions of section ten, of the Act of February 1, 1840, providing a method for fully settling and closing up all claims and demands against the State which had grown out of its system of internal improvements, which section contains the provision that "the Board of Public Works shall also settle and adjust all dues and liabilities of every kind due and owing from the State under the provisions of the Act to establish and maintain a general system of Internal Improvements, approved February 27, 1837, and the acts supplemental and amendatory thereto, and give drafts for the amounts so settled and adjusted on the fund commissioner: And

when any person should receive drafts under the provisions of this section, his contract should be settled."

We are inclined to adopt the reasoning of the claimant on this point and hold that the paper in question might have been issued under the authority of that section.

We are also inclined to overrule the objection that "the paper in suit was not negotiable, and therefore cannot be recovered upon by an assignee in his own name." We think it immaterial, whether the claim is presented by the original owner, or by his "legal representatives" in any sense of these words. We do not understand the statute to restrict the Commission to the consideration of claims which can only be prosecuted in a court of law, and under the rules there prevailing in regard to proper parties.

We hold it sufficient that the allowance and payment of the claim would bar the claim by any other person.

We are enjoined by the act creating the Commission, to determine all claims according to the principles of equity and justice, except when otherwise provided by the laws of the State.

Act of 1877, Sec. 2.

We think a consideration of the several acts of the legislature pertaining to the funding and payment of the Canal indebtedness in connection with the evidence shows that paper of the character of that under consideration was in circulation among the people, and received and treated as legal; and if such was the contemporaneous construction of the laws, we think it should be adhered to now.

The question that gives the Commission most anxiety is whether the claim is barred by any statute or law of limitations, or laches of the claimant.

It is proper to inquire first, whether the State had provided a way for the claimant to enforce the payment of his claim or to procure an adjudication settling its validity.

All limitation laws proceed on the theory that the

party by lapse of time and omissions on his part has forfeited his right to assert his title in the law. All statutes of limitations also must proceed on the idea that the party has full opportunity afforded to try his right in the court.

Cooley's Constitutional Limitations 455-461; *Stearns* v. *Gittings*, 23 Ill., 388.

We believe an examination of the statutes will show that persons holding claims against the State have always been provided with a remedy under the laws.

By an Act in force June 1, 1820, it was made lawful for the Auditor of Public Accounts of the State of Illinois to be sued and to sue, to plead and to be impleaded, to answer and to be answered, to defend and to be defended in any court of record or other place where justice shall be judicially administered, in the name of the Auditor of Public Accounts for the people of the State of Illinois; and it was made the duty of the Attorney General to prosecute and defend all such suits. Appeals were provided for to the Supreme Court. If final judgment should be rendered against the Auditor it was his duty to forward a copy of the judgment and proceedings thereon to the next general assembly when if approved an appropriation should be made to satisfy it or such part as the General Assembly might deem just.

This Act was continued in force and is found in the revised statutes of 1845, Chapter 77, entitled "Officers," page 394.

The same Act is found in the second volume of Purple's Revision published in 1856 at page 787.

It is also included in the Revision of the laws, Scates, Trent & Blackwell, published in 1858, and found on page 797.

The same statute is also found in the third edition of the first volume of the statute edited by Gross, page 468, which is declared to contain all the general laws of the State. And received the sanction of the Legislature by an Act approved March 10, 1869.

These provisions of the Statute may have been con-

tinued in force after the adoption of the constitution of 1848 in compliance with section thirty-four (34) of Article III of that instrument, providing that "the General Assembly shall direct by law in what manner suits shall be brought against the State." We find no statute of limitations expressly governing actions against the State, except that of March 1, 1847, found in the first volume of Purple's Compilation, page 482, and in that of Scates, Treat & Blackwell, page 1170.

This act is limited to unliquidated claims against the State. This statute was enacted, "So that future Legislatures may know what unliquidated claims do exist against the State, and the grounds on which they are founded."

The claimant testifies that he never before made any effort to have this scrip paid by the State, that he always considered it secure and doing as well as he could with the money.

In claimant's brief, filed September 11th, 1900, it is said the paper is an inland draft in due form, and by the payee endorsed to the bearer and put in circulation.

If this be the true construction it must be subject to the limitation laws applicable to such paper, unless the statutes of limitation do not apply when the State is defendant.

Statutes of limitations were formerly regarded with little favor, and the courts devised numerous expedients and theories for their evasion; but latterly they are considered as beneficial and resting on principles of sound public policy, and as not to be evaded except by the methods provided therein.

Wood on Limitation of Actions, p. 5, Sec. 4 and note.

It is said "There certainly can be no hardship in requiring parties to settle their business matters within certain reasonable periods; and if, with the sure prospect of losing the rights to a remedy thereon, they stand by inactive and permit their claim to be barred,

it is not the law, but the party, who is *responsible for* the hardships entailed."

Wood on Limitation of Actions, p. 6;
Fisher v. *Harnden* 1. *Paine* (U. S. C. C.) 61.

The statute is said to run against all claims except those which are sought to be enforced by the government in its name and its behalf.

Miller v. *State*, 38 Ala., 600;
Wood on Limitations, 92.

The government although not precluded by the statute, may nevertheless avail itself thereof in suits against it, where there is a statute authorizing individuals to bring suits against it.

Wood on Limitations, 93;
Baxter v. *State*, 10 Wis., 454;
II Coke, 68.

From a consideration of the various statutes relative to the State indebtedness we believe it to have been the settled policy of the State for more than forty years to induce all persons having claims against it whether adjusted or not to present them that they might be satisfied in some manner; the statute specially providing that the owner of any of this scrip may present it to certain public officers mentioned in the statutes and receive in exchange the bonds of the State in payment—see:

Act of February 1, 1840, laws 1840, p. 70;
Act of February 21, 1843, laws 1843, p. 54;
Act of March 3, 1843, laws 1843, p. 62;
Act of March 1, 1845, laws 1845, p. 31;
Act of February 27, 1847, laws 1847, p. 22;
Act of February 25, 1847, laws 1847, p. 23;
Act of February 10, 1847, laws 1847, p. 24;
Act of February 22, 1847, laws 1847, p. 105;
Act of February 14, 1855, laws 1855, p. 101.

We therefore hold that the claim is barred by the stat-

utes of limitations and laches of the claimant as insisted upon by the State in its plea filed August 4, 1890.

The claim is therefore rejected.

E. D. BLANN, *President.*
R. D. ADAMS, *Commissioner.*
W. S. KAY, *Commissioner.*

I agree with the above written statement of the reasons for the determination reached.

I am also of the opinion that the Commission has no jurisdiction of the claim as it is presented.

It seems to me if it ever was a valid claim against the State that when issued it was an adjusted claim, and not embraced within any of the clauses of section 2 of the Act in force July 1, 1889, conferring jurisdiction on this Commission; unless under the first clause of section 2 the claim had been specially referred to the Commission by one or the other of the houses of the General Assembly.

I think the claim should be presented to the Legislature, when, if satisfied this paper evidenced a legal demand, it should determine whether public policy demands that the statute of limitations should be enforced; especially as the State has never directly declared that any other statute of limitations shall be enforced in its favor than the Act of March 1, 1847, relating to unliquidated claims, and that class of claims embraced in the second clause of the second section of the Act of July 1, 1889, creating the Commission of Claims.

W. S. KAY, *Commissioner.*

HEIRS OF ISAIAH JONES, DECEASED
v.
THE STATE OF ILLINOIS.

Opinion filed September 8, 1892.

WATERS—*damage to land caused by construction of dam.* Court reviews evidence and finds claimant not entitled to damages.

Isaiah Jones filed his claim October 20, 1879, for damages to his land and property caused by and incident to the construction of a dam near Copperas Creek in the Illinois river, by the State of Illinois. It appears that the claimant died since the filing of said claim, and it is now being prosecuted by the heirs and legal representatives of said claimant.

The land alleged to be damaged is described as the east half (E. ½) of the northeast quarter (N. E. ¼) of section three (3) in township twenty-eight (28) north of range three (3) west, of the 3d P. M., except twenty (20) acres off of the north end, containing sixty (60) acres; forty (40) acres of which is claimed to have been damaged to the extent of ten (10) dollars per acre.

The allegation of the complainant is, that all of said lands are situated in the bottoms and low lands bordering on the Illinois river, and subject to inundation from floods and high water in said river. That the dam at Copperas Creek lifts the water in the river opposite these lands about two and one-half (2½) feet higher than it would be but for the dam; thereby causing said lands to become water soaked and soft to such an extent that they will no longer bear animals with safety, and have become unproductive, and almost worthless, and will so remain forever.

To this claim the Attorney General of the State on the 10th of August, 1880, filed a plea insisting upon the statute of limitations.

The Commission from the evidence before it, does not find that said claim is subject to the bar of the statutes, but from a careful consideration of all the evidence in

the case, finds that the claim for damages is not sustained. It appears from the evidence to the satisfaction of the Commission, that said lands are from eighteen (18) to twenty (20) feet higher than the low water mark of the river opposite said lands after the construction of said dam. And while the evidence as to the opinions of the witnesses is conflicting as to whether said lands sustained any damage by the construction of said dam, this Commission cannot arrive at the conclusion from the evidence in the case, that if there has been any change in the condition or productiveness of said lands since the construction of said dam, it is attributable thereto. And therefore deny the claim; and award the claimants nothing.

GEORGE E. TURKINGTON

v.

THE STATE OF ILLINOIS.

Opinion filed November 1, 1892.

STATUTE OF LIMITATIONS—*is a bar to all unadjusted claims not filed with Auditor of State within two years from the time they accrue.* Claim growing out of service said to have been rendered by claimant and moneys by him expended in recruiting soldiers for service in war of the rebellion, is barred by statute of limitation if not filed with Auditor of State within two years from time same accrues.

The petition in this case shows that the cause of action or claim to have arisen in 1864, and grow out of services said to have been rendered by claimant and moneys by him expended in recruiting soldiers for service in the war of the Rebellion.

The claim was filed with the Auditor of State on the 24th day of April, A. D. 1891.

The plea of the statute of limitations is interposed, and the only question which the Commission deem it necessary therefore to consider is, whether the claim is barred by the Act of 1847.

This Commission has uniformly held that said act applies and is in force, and is a bar to all unadjusted

claims not filed with the Auditor of State within two years from the time they accrue.

We therefore hold that this claim is barred and that claimant is not entitled to an award.

Claim rejected.

WILLIAM W. McLAUGHLIN, ET AL.

v.

THE STATE OF ILLINOIS.

Opinion filed November 15, 1892.

1. WATERS—*claim for damages to land through construction of dam—when not barred.* A claim for damages to land caused by overflow of river as a consequence of the construction of a dam by the State of Illinois is not barred by statute of limitations if filed within two years after the same accrues.

2. SAME—*evidence entitling to award.* The Court reviews the evidence and holds that claimant's lands were damaged by the overflow or inundation occasioned by the construction of a dam by the State of Illinois.

The original petition in this case was filed October 20, 1879, on the part of Lewis McLaughlin, Harless McLaughlin, Claudius McLaughlin, Archibald McLaughlin, and Clara E. Gates.

Upon trial of this cause, on motion of claimants, the petition is amended making Charles McLaughlin, Mary McLaughlin, Marcus McLaughlin, Hiram McLaughlin, Ada McLaughlin; William McLaughlin and Darwin McLaughlin as the only heirs of William McLaughlin who departed this life intestate on the 1st day of July, A. D. 1876, co-complainants herein.

The petition charges that, on the 20th day of October, A. D. 1877, and before and since that time, claimants were, and have been, the undisputed owners of the lands fully described in the claim attached to the petition.

The lands described in the claim are as follows, to-wit:

The N. half S. W. fourth Sec. three T. 11 N. R. 9 E;

The S. half N. W. sec 3, T. 11 N. R. 9 E;

The N. E. fourth N. W. fourth sec. 3, T. 11 N. R. 9 E;

The N. W. fourth N. E. fourth sec. 10, T. 11 N. R. 9 E;

The E. half S. E. fourth, sec. 3 T. 11 N. R. 9 E.

This petition further charges that all of these lands are situated in the bottoms and low lands bordering upon the Illinois river, subject to inundations from floods and high waters in said river. That during the months of May, June, July, August, September and October in each year, said river is at or near low water mark and said lands left dry, yielding large crops of grass of great value, for hay, pasture, and produced large crops of corn and other grain. That seventy-two acres of said land had been farmed in corn and the remainder used for meadow and pasture.

That in the month of October, A. D. 1877, a dam was constructed across the said river near Copperas Creek, under and by virtue of the authority of the State of Illinois.

That said dam lifts the water at said Copperas Creek six and one-half feet higher than before the construction of said dam, and in the river opposite the lands of claimants described in said petition three feet higher than it would be but for said dam. The petition further states that said river is subject to summer freshets, raising the water in said river two to three feet, which, without said dam, were harmless to said lands, but with said dam makes what before said dam was built a freshet of two to three feet, now from four and one-half feet to six feet; the increase being caused wholly by the construction of said dam; and the piling and backing up of said river now from said dam and caused by the construction of said dam.

That thereby the claimants' lands have become water soaked and soft to such an extent that they no longer bear animals with safety and have become unproductive, liable to frequent destructive overflow and are worthless and will remain so forever whereby they have sustained damage to the amount of fifteen hundred and sixty-eight dollars.

August 9th, 1880, the Attorney General, acting for the State filed three pleas.

The statute of limitations is interposed and the claim is set up on the part of the State that the facts are insufficient to entitle the claimants to the allowance sought.

The Commission has heretofore decided that unless claims are presented for adjustment within two years they are barred.

This claim arises on account of the construction of the Coppems Creek dam, backing water over the claimants' lands, so that on that account said lands have become worthless. This dam was constructed on the 22d day of October, A. D. 1877, and this petition was filed October 20, 1879, which was within two years from the construction of said dam. If, therefore, any cause of action in fact, accrues to the claimants such claim is not barred by the statute of limitations.

There are then three questions remaining to be determined. They are: First—Were the lands damaged by the overflowing or inundation occasioned by the construction of said dam. Second—If so were the claimants at the time of such damage the legal owners of said lands. Third—The amount (if any) of damage.

After a careful examination of all the evidence in this case we are of the opinion that the construction of said dam so caused the water in the river to overflow and water soak a portion of claimants land as to render it less productive and less valuable for the purpose for which said lands are used. It appears from the evidence on file in this case that one H. A. McLaughlin, was the legal owner of the lands described in claimants' petition. That H. A. McLaughlin departed this life prior to the construction of said dam, intestate, seized of said land.

That he left surviving him Lewis McLaughlin, Hardess McLaughlin, Cimillus McLaughlin, Archibald McLaughlin, William McLaughlin and Elizabeth Ray, as his children and only heirs. That after the said H. A. McLaughlin departed this life Elizabeth Ray and William McLaughlin both departed this life intestate. That Elizabeth Ray left surviving her as her only heir claimant

Clara E. Gates, and that William McLaughlin left surviving his as his only heirs at law Charles McLaughlin, Mary McLaughlin, Marcus McLaughlin, Hiram McLaughlin, Ada McLaughlin, William McLaughlin and Darwin McLaughlin, all living and claimants herein.

We further find that the claimants, as heirs of the said H. A. McLaughlin have held open, notorious and peaceful possession of said lands, and have paid the tax thereon from the time of the death of the said H. A. McLaughlin to the present time; and that their title to said lands has never been disputed.

We find, therefore, that the claimants are the legal owners of said lands in the following proportion as tenants in common.

Lewis McLaughlin, Harlem McLaughlin, Claudius McLaughlin, Archibald McLaughlin and Clara E. Gates each one-sixth of said land, and the heirs of William McLaughlin hereinbefore named one-sixth of said land.

The evidence in this case and the survey both show that the N. half S. W. sec. 3 T. 11 N. R. 9 E., and the S. half N. W. sec. 3, T. 11 R. 9 E., are both low lands, and that the raising of the low water mark in the river near this land, caused by the construction of the dam has partially destroyed the productiveness of these two tracts, and rendered some twenty acres of but little if any value. We have, therefore, fixed the amount of damage to be paid claimants at the sum of four hundred dollars, said sum to be paid claimants as their interest in said lands are set forth herein.

ISAAC HOOE

v.

THE STATE OF ILLINOIS.

Opinion filed November 15, 1888.

1. STATUTE OF LIMITATIONS—*unadjusted claims must be filed within two years.* Claims must be filed with the Auditor within two years after cause of action accrues.

2. SAME—*what acts will not take claim out of statute of limitations.* The fact that claimant's attorney presented his claim to the Secretary of State, and to other officers not authorized to receive it, within two years from the time the cause of action accrued, does not take the claim out of the statute of limitations.

The claim filed in this case is for damages done to crops and lands caused by a break on the Illinois and Michigan canal. The break in the canal and the damages done to claimant's land, occurred on the 23d day of July, A. D. 1883. The petition was filed with the Auditor on the 5th day of August, A. D. 1880.

The Attorney General on the part of the State files his plea interposing as a defense the statute of limitations, and by agreement of the parties this cause is submitted for decision upon the plea thus filed.

The facts set forth in the affidavit of E. Sanford, attorney for the complainant, is relied upon as an excuse for failing to file the claim written two years after the cause of action accrued.

It appears from the affidavit as well as the petition on file that the break in the canal occurred on the 23d day of July, 1883. On the 12th day of the following September the claimant employed E. Sanford, to take such steps as were deemed necessary to procure for claimant compensation for said damage. In February, 1885, claimant's attorney presented a petition, such a one as is filed in this cause, to the Secretary of State, and requested secretary to file said petition. Upon being informed that the proper place to file said claim, was with the Auditor, the claimant thereupon, applied to that officer to have said petition filed. Upon a represen-

tation, secured from some one in the Auditor's office, the claim was withdrawn, and not then filed with the Auditor. The claim was presented to two of the former Commissioners of Claims who it seems advised claimant to present the claim to the Canal Commissioners and it was afterwards presented to the General Assembly of the State of Illinois, and finally on the fifth day of August, 1889, claimant filed his petition with the Auditor, and thus for the first time it came here for a hearing. This Commission has repeatedly decided that claims not filed with the Auditor within two years from the time the cause of action accrued are barred by the statute of limitations, and we are of the opinion that the several acts set forth in the affidavit, filed in this case, are not such as amount to a filing of such claim, within two years. The claimant must be held to have known that it was his duty to have filed his claim within two years after his cause of action accrued, with the Auditor of Public Accounts, and not having done so, his claim is barred by the statute of limitations.

CHARLES P. JOHNSON

v.

THE STATE OF ILLINOIS.

Opinion filed November 20, 1894.

Live Stock Commission—act of 1887 concerning board confers power to employ necessary clerks. Section 13 of the act of 1887 concerning the Live Stock Commission which provides that the members of the Board shall receive the sum of $5 per day, and necessary traveling expenses, *and other incidental expenses necessarily incurred in the performance* of their duties under this act confers upon the Commissioners the power to employ a clerk or secretary if necessary to do so.

The facts of this case are uncontroverted, and from the evidence before us may be briefly stated, as follows: Claimant was duly appointed and acted as clerk or secretary of the State Board of Live Stock Commissioners from December 29, 1886, to June 30, 1893, per-

forming the duties usually appertaining to the position of clerk or secretary. On January 4, 1888, said Board passed a resolution fixing the salary of this employe at $150 per month, which thereafter remained unchanged. Claimant has received his entire compensation excepting a balance of $200 which amount is conceded to be due and unpaid to him, provided his compensation is considered at the price of $150 per month.

Neither party offered evidence as to the value of claimant's services. Section 18 of the act of 1887, concerning the Live Stock Commission, provides that the members of the board shall receive the sum of $5 per day, and necessary traveling expenses, *and other incidental expenses necessarily incurred in the performance of their duties under this act.* We think this act conferred upon the Commissioners the power to employ a clerk or secretary if it was necessary so to do. All of the evidence before us is to the effect that it was necessary to have such officer and even in the absence of evidence upon this point it would be reasonable to presume that the necessity therefore existed. The Commissioners having fixed the salary of such officer at $150 per month, and such having been the salary of the position for more than six years prior to the termination of claimant's employment in that capacity, we must in the entire absence of any evidence of fraud or collusion or even unreasonableness of such amount, conclude that the same is reasonable, and that whatever balance is due to the claimant for such services at such rate should be paid by the State.

It is therefore considered by the Commission that the claimant be awarded in full of his damages by reason of his aforesaid claim against the State of Illinois the sum of $200.

PATRICK R. BANNON

v.

THE STATE OF ILLINOIS.

Opinion filed January 24, 1895.

WATERS—particular facts under which claimant is entitled to recover for damages to land caused by overflow of canal. Court reviews evidence and finds claimant entitled to damages for injury to lands caused by overflow of Illinois & Michigan and Des Plaines river, resulting from repairing and raising dam.

The claimant is the owner of about twenty-five acres of land situated just north of the north limits of the city of Joliet, and west of the Des Plaines river. A short distance south of the south line of claimant's land the river enters what is called the upper basin of the Illinois and Michigan canal, under what is known as the Tow-path bridge. This upper basin is a widening of the canal proper, and was constructed many years ago by the State of Illinois, and into it the river was diverted from its natural channel, entering it near its north end. This basin is about three-quarters of a mile in length, from the place where the channel widens, to the dam known as the Jackson street dam, over which the water flows into what is known as the lower basin. The tow-path is on the west side of the basin. The dam is about two hundred and sixty feet long, and between its west end and the west wall of the basin there is a lock. The entire volume of water from the river and the canal, passes through this basin and over this dam. Just west of the river and east of claimant's land is a right of way of the Chicago and Santa Fe Railroad Company, upon which, however, the railroad is not yet constructed. The water in the basin is nearly level, there being but little fall from north to south—some witnesses estimating the fall at three and three-quarters inches from the Tow-path bridge to the dam, and others placing it at a much smaller figure.

The claim herein is based upon the alleged raising of the Jackson street dam, whereby it is claimed that the water in the basin and in the river is considerably raised, and that in consequence the claimant's land has been overflowed, and is subject to overflow, to a greater extent than it would be, but for the raising of the dam; and that his land is thereby greatly damaged. It appears that the Jackson street dam is a solid cut stone structure, built by the State, upwards of forty years ago; that during the high water in February, 1893, about two thirds of the coping stone of the dam was washed away, leaving intact only about fifty-five feet of the west side, and about forty feet on the east side of the dam. To repair this break the State canal authorities caused a large amount of rip rap to be placed just back of the dam, and next to the break. This riprap consisted mostly of loose stones, which were hauled in, and dumped back of and upon the dam. So much of this material was hauled in, that it was piled up considerably higher than the height of the dam before the break. Much of the water passes through the rip rap but from the evidence before us, the conclusion is irresistible that the rip rap causes the water to rise considerably higher than it would have done, had the dam been restored to the condition in which it was before the break. Some of the witnesses differ widely as to the extent of this rise thus caused; but we think it reasonable to conclude from the evidence that it is about ten inches at the dam. It then becomes material to know what, if any, effect such rise in the water at the dam would have upon the river near claimant's property. Upon this question the evidence is quite conflicting, varying from one foot to nothing, in the opinions of the different witnesses. The actual effect seems to be impossible of exact ascertainment, especially under the evidence before us. It is quite apparent that there is very little fall from the north end of the basin to the dam. The opening under the Tow-path bridge does not seem to be sufficient for the free passage of the

water of the river into the basin. This sets back somewhat the water in the river, causing it to be some higher that the water in the basin. Whether a rise of a few inches of the water in the basin would cause an equal rise for a considerable distance in the river, is a question which, under the evidence is not free from doubt; but we think it reasonable to assume that it would have some effect on the water in the river, but not equal to the effect observed in the basin; and we think it equally reasonable to assume under the evidence, that a rise of ten inches at the dam, would have a marked effect upon the height of the water in the basin at the Tow-path bridge, but not so much as at the dam, for all, or the greater part, of the fall between the two points, must be deducted from the rise at the dam, to arrive at the effect at the Tow-path bridge. So, under all the evidence before us, we are led to the conclusion that the maximum effect of the rip rap placed upon the dam would be to cause a rise of about six and one-half inches in the river, at the south end of claimant's property. This effect would gradually lessen further north, because the flow of the river being toward the south, it is somewhat higher toward the north; and as claimant's property is about one quarter of a mile in length from north to south, this effect would be gradually lessened toward his north line.

Whether or not the increased height of the dam is permanent, is a matter of some importance, for if only temporary, the claimant cannot be said to have sustained any substantial damage; for the increased overflow which his land may have suffered, has not been shown to have, as yet, substantially diverted the property from any use to which it might reasonably have been put, including even its sale for building lots.

The reason given for raising the dam, is to deepen the water, in order to prevent boats from dragging in the mud at the bottom of the basin. It appears that the State has been at work dredging out the basin, yet it

does not appear that the dam will be again lowered when the basin is sufficiently dredged, if, indeed, there is any intention on the part of the State to further dredge the basin. And it does not appear that there is any provision made, or attempted to be made, or possible to be made, for the carrying off, in times of high water, the additional water that would otherwise be set back because of the additional height of the dam. It appears from the evidence that the canal authorities were notified by the claimant that his land would be damaged unless the dam was lowered to its former height; that the rip rap was thereupon somewhat leveled off by the canal authorities, but was not materially lowered. Whatever, if any, effect upon the conclusion reached by the Commission, a subsequent lowering of the dam may or ought to have, is not for us to determine; but for the purpose of the case we must, in justice to the claimant assume the permanence of the condition thus caused by the State, and by it permitted to remain for a period of nearly three years, against the protest of the claimant.

Under these circumstances it is apparent that through this action on the part of the State in raising the dam, part of the claimant's land has sustained damaged, and the only question is, how much.

Several witnesses have testified to a damage of five or six thousand dollars to the reputation of the property by reason of overflow. As regards this element, even though allowable in a proper case, yet it appears that the land in question most subject to overflow, was occasionally overflowed prior to the raising of the dam, and that raising the dam only increased the frequency, and the amount of the overflow. If occasional overflow damaged the reputation of this land, then such damage was done before the dam was raised. All claim for damage to reputation is therefore disallowed.

The question of the proper measure of damage in this case is not free from difficulty. There is no evidence to show with reasonable certainty, the market value of the

land before and after the raising of the dam. About twenty acres of the land was purchased by the claimant five or six years ago, at a price aggregating about five thousand dollars. This land, with other that he had, he subdivided into lots, and called it Edgewater Addition. Portion of the land was very low, and this he filled some, obtaining his material from a quarry which constitutes part of his addition. It would not be fair to compute the damages at the difference between the market value of the land before and since the dam was raised, as just about that time other conditions intervened which materially affected market values, and especially property held for speculative purposes, as this was and is. The stringency of the times has been such that not one of the lots in question has been sold. There is no evidence of what similarly-situated lots in the vicinity have brought, if indeed there have been any sales of such in the last few years.

The staking out of vacant property, and running of imaginary lines by platting the same into lots, does not materially enhance its value, although with many persons the mere mention of that uncertain and indefinite quantity "lot," at once induces belief in a largely increased valuation which would not otherwise exist.

Edgewater Addition presents a varied surface. The extreme westerly part is high, being ten or fifteen feet above the property immediately east, and forming a sort of bluff. The northerly half of the property is quite high, most of it being above the highest water mark, but containing some ravines and depressions. The south easterly portion is the part which is the lowest, and which has already been partly filled, and which it is necessary to fill still more, without taking into consideration the raising of the dam. A considerable portion of the property has been operated by the claimant as a stone quarry. This part is situated next east of the bluff, and much of the abruptness of the bluff is caused by the excavation of the quarry. Witnesses have testified that the property is especially valuable for residence

purposes, for workingmen's homes, and some to its value for manufacturing purposes. It seems apparent that, within reasonable limits, the higher above the level of the river, the more valuable is the land for either of these purposes. Property which is five or six feet above the level of the water is better adapted for residence and manufacturing, than if it was just even with the water's edge. If the claimant in working his quarries had designed to leave the property so it would be best suited for residence or manufacturing purposes, it would have been better if he had left it several feet higher than he did, so that it would not have been subject to overflow in any event. We think it hardly just, that as to this part of the property, he could cut it down to just about on a level with the surface of the water, and thereby decrease its value for occupation for residence or manufacturing purposes, and then complain because the river is raised a few inches. As to the ravines and depressions in the more northerly portion of the land it seems that to put this part of the property to its best use, they would have to be filled to a height to correspond to the land in the immediate vicinity. This land is high and dry, and is in no manner affected by the increased height of the dam, and as the depressions and ravines therein, would, in any event, have to be filled as suggested, no damage can be allowed on account thereof, and none for that part of the land which was used for quarry purposes.

It seems clear to us that something should be allowed for damage to the southeasterly part of the land; and we are inclined to the belief that such damaged should be measured by the reasonable cost of filling the same about six and one-half inches. Various estimates of the cost of such filling have been made. It appears that the filling already done was from plaintiff's quarry, and that the cost thereof was about twenty-five cents a yard. It is claimed that it is now difficult to obtain material for filling, and the same must be hauled by wagon for a long distance, and that it would therefore cost from

seventy-five to ninety cents a yard. Perhaps it would cost as much as this if it were hauled by wagon, and even more if it were hauled by less convenient means of transportation; but we believe that in the future, when, by increased demand for property the necessity for improving this property may exist, if the claimant will avail himself of those facilities which modern appliances for excavation and transportation afford, he can have the necessary filling done at a much less cost than as above suggested. The rigth of way of the Santa Fe railroad adjoins his property on the east; and by the time it becomes necessary to do this filling, the tracks of this road will in all probability have been laid. The Elgin, Joliet and Eastern road is not far north of this property, and has a switch track running to the manufactories which have been testified to as being just north of claimant's property; and in case of the use of this property for manufacturing purposes, which, indeed, seems to be the use to which the property is best adapted, this switch would doubtless be extended to this property; or it might be temporarily and cheaply extended thereto for the very purpose of the filling. In any case, the property would be in close proximity to a railroad, by means of which the filling could undoubtedly be hauled upon this property at a much less cost than estimated by any of the witnesses who testified to the price for loading it by men and hauling it by teams. It is quite impossible to determine exactly, either the amount of the filling which the raising of the dam necessitates, or the cost thereof. As in most questions of damages, a fair approximation is the best solution that can be hoped for. Under all the circumstances of the case, the Commission is of the opinion that the claimant ought to have and receive from the State of Illinois for all damages by reason of his aforesaid claim, the sum of twenty-one hundred dollars, together with one hundred and fifty-eight and 85-100 ($158.85) dollars costs, which amount is hereby awarded to the claimant, and against the State of Illinois.

JOHN SCANLAN

v.

THE STATE OF ILLINOIS.

Opinion filed January 24, 1895.

MILITARY SERVICE—*under what circumstances a claimant who is in military service of the State and is injured, can recover.* Claimant while in the military service of the State and in attendance at an armory leased by the State for drilling purposes in compliance with the orders of his superior officers, fell down an elevator shaft which was open and unprotected, he being at the time ignorant of its location and the passage way leading thereto being in darkness. Held that the circumstances are such as to entitle him to recover from the State.

The claimant in this case was first sergeant of Company H, 7th Regiment, Illinois National Guard.

This regiment used as an armory and for drill purposes, the second, third, fourth, fifth and sixth floors of a building known as No. 23, Lake street, Chicago, Illinois.

On the evening of October 9, 1893, the claimant was on the second floor of this building in compliance with the orders of his superior officers for drill purposes and while attempting to go to the water closet located in a hall, he fell down an elevator shaft and was seriously injured.

The evidence shows that the lease of the second, third, fourth, fifth and sixth floors of this building, was made on the part of the State by the Colonel of the Regiment and the rent money and the janitor in charge was paid by the State; that the claimant did not know of the location of the elevator shaft, and that said elevator was used for freight and not for passengers; and that the door or opening to the elevator was open and unprotected, and the hall was dark.

That the claimant's injuries were two fractured ribs and a lacerated kidney, and as a result of these injuries he was confined in the hospital of the Alexian Brothers for six weeks and for nine months was unable to work.

At the time of the accident the claimant was a mail

carrier, receiving a salary of sixty-five dollars per month.

While the evidence in this case fails to show any permanent or lasting injury, we are of the opinion that the accident occurred while claimant was in the military service of the State and that he was injured in such a manner and under such circumstances as entitles him to recover from the State, and after a careful consideration of the evidence and arguments of counsel, we award to the claimant, John Scanlan, the sum of seven hundred and fifty dollars and costs.

OSCAR JENKINS

v.

THE STATE OF ILLINOIS.

Opinion filed November 22, 1895.

MILITARY SERVICE—*reasonable prudence and caution in selection of officers precludes recovery by soldiers poisoned by materials furnished.* Where the State has been reasonably prudent and cautious in the selection of its officers and in the performance of its duties to claimant, a claim for damages alleged to be due for injuries sustained from blood-poisoning resulting from handling soap and meat furnished by officers of the State for the use of a company of the National Guard, of which claimant was a member, will be denied.

Oscar Jenkins, a private in Company H, Fourth Regiment, Illinois National Guard, while acting as cook for the company when on active duty in Chicago in July, 1894, became affected with blood poisoning, alleged to have been caused by handling meats or soap furnished by the officers of the State, for the use of the company.

Upon careful examination of the evidence in this case we fail to find any breach of duty on the part of the State which would result in a legal liability of the State for the injury complained of.

It does not appear from the testimony that the meats and soaps were not purchased from reputable dealers, or that the officers of the State, whose duty it was to furnish supplies to the company, had any notice of any

defects in the meats or soup, or that by the exercise of reasonable diligence and caution, could have discovered any such defect or unwholesome condition of either. It is not shown whether it was the meat or the soup that caused the injury complained of. The testimony does not disclose the performance of any act or the omission of any duty on the part of the officers in obtaining supplies for the company that would in any degree indicate an absence of prudence or forethought. In fact the evidence does not entirely satisfy us that it was the soup or meats that caused the injury. The witnesses give it as their opinion that it was either the soup or the meats, from the fact, as we infer, that they could account for it in no other way.

It does not appear from anything in the testimony, that any other person who used the soup, or who handled the meat from the time it left the slaughter house to the time it was consumed by the company, was injuriously affected to the slightest extent, and it is probable, to say the least, that if the cause of the injury was in the unwholesome or poisonous condition of the meat or soup, others handling same, would have been similarly affected.

From anything that is apparent in the testimony the State has been reasonably prudent and cautious, in the selection of its officers, and in the performance of its duties to claimant and his company, hence we find that the defendant is not guilty of such negligence or breach of duty as would create a legal liability in this case.

The claim is rejected.

FREDERICK KLOB

v.

THE STATE OF ILLINOIS.

Opinion filed January 20, 1898.

WAR CLAIMS—*State government is trustee of funds received from Federal government.* Where the Federal government has paid the State certain sums of money for the payment of war claims, the State government is to be regarded as a trustee, and claimant should not be barred of his rights to recover for his loss, by any statute of limitations.

In this case the claimant seeks to recover for losses he sustained by reason of the destruction of his crops on his farm in the summer of 1861. The evidence shows claimant to be a resident of Gardner township, Sangamon county, Illinois, and that in the summer of 1861 he was residing on and farming an eighty acre farm near Riverton, in Sangamon county, Illinois, and that he as tenant had taken possession of said land and the buildings thereon in the spring of 1860.

That for the year beginning March 1, 1861, and ending March 1, 1862, he paid as rent the sum of three hundred and sixty-five ($365) dollars and that this rent was paid in advance. The evidence also shows that in the spring of 1861, the State of Illinois established a military camp called Camp Butler and assembled there several thousand soldiers preparatory to their enlistment and muster into the service of the United States.

That while these troops composed of infantry, cavalry and artillery were under the control of the State of Illinois and before they had passed to the control of the United States some of the soldiers located at Camp Butler, carried away, consumed and destroyed the crops of claimant. The evidence shows that during a portion of the time these depredations were being committed claimant was sick with typhoid fever and that on account of the wrongful acts of the troops the farming operations of the claimant were a total failure. His oats, rye, corn,

potatoes, all his growing crops as well as his harvested grain was taken or destroyed by the soldiers.

The evidence also shows that claimant was a loyal man and that he has made earnest and persistent effort to recover the amount of his loss from the United States government. That he employed eminent counsel and his claim was filed in Washington with the proper officials but that the same was finally rejected by the United States on the ground that the federal government had paid to the State of Illinois large sums of money to reimburse the State for "War Claims" and to pay losses of this character sustained by citizens of the State.

It is admitted by counsel for the State that Illinois has at different periods since the year 1861 received from the federal government large sums of money, aggregating over a million dollars for the payment of war claims.

It is contended by the attorney for claimant that the State of Illinois having received these large appropriations from the federal government should be regarded as a trustee and that the claimant should not be barred of his rights to recover for his loss by any statute of limitations, and that the State should reimburse him notwithstanding the long lapse of time since the depredations complained of were committed.

We have not only heard the evidence in this cause when the case was submitted but have read all the evidence since the hearing and we have carefully considered the arguments of counsel for the claimant and the arguments of counsel for the State and after due deliberation we are of the opinion that under all the facts proven and the admitted facts concerning the appropriations by the United States to the State of Illinois that the claimant ought to recover in this proceeding.

We award Frederick Klor the sum of fifteen hundred dollars.

GEORGE MILLS ROGERS

v.

THE STATE OF ILLINOIS.

Opinion filed December 23, 1896.

FEES AND SALARIES—*Master in Chancery's fees.* A Master in Chancery is entitled to only such fees in taking testimony as are fixed by statute.

It appears from the evidence that the claimant was one of the Masters in Chancery of the circuit court of Cook county and that to him, as such Master, was referred the case of the Attorney General, etc. v. Elizabeth Cooling, to hear the evidence and report his conclusions.

It appears further that on behalf of the State there was taken before said Master 1,825 pages of testimony. For this service the claimant demands that the State pay him 50 cents per page or $912.50, less $450.00 by him received.

The claim is for services for which the statute fixes the rate of compensation. Section 20, Chapter 53, Revised Statute of Illinois, provides that Masters in Chancery for taking and reporting testimony under order of court shall receive the same fee as for taking depositions; and in the same act it is provided that Masters shall receive for taking depositions a fee of 15 cents per one hundred words. It is conceded that the pages of testimony, for which this claim is made, average about 250 words, for which the legal fee would be thirty-seven and one-half cents; but it is urged that the claimant attended personally to the taking of the depositions and that therefore 50 cents per page is a reasonable charge. It is hardly presumable that the statute fixing the fees at 15 cents per one hundred words contemplated that the Master should earn such fees without performing the services. Doubtless the original method of taking such testimony was for the Master to write out the testimony as given, and for this he would receive his fee. But this method has been superseded by the

present mode of employing a stenographer to do the work, whereby the Master, with little effort and in a short space of time becomes entitled to a large amount of fees, while the actual work of taking the testimony is done by the stenographer, who is paid as much or more for his work, as is evidenced by the claim for stenographer's fees for reporting this same testimony. While the method of taking testimony has changed the law has remained the same. In the matter of statutory fees the State should be bound by its laws the same as private suitors. If the law, as it is, permits officers to charge large fees for small services, the State at least should not complain.

This claim, like part of the O'Connor claim, was presented for allowance to the 39th General Assembly, and $450.00 was appropriated by the Legislature and paid to the claimant. While it is probable that the Legislature thereby intended to discharge the whole claim, yet the Master's fees having been fixed by statute, the statute should prevail.

If the claimant has rendered any extraordinary or unusual services not enumerated in the act above cited, the circuit court of Cook county, may, under said act, make him a special allowance therefor. No order for such allowance appears to have been made and, in fact, the only services rendered were such as are specifically provided for in the act. The legal fee for taking this testimony is 15 cents per one hundred words or thirty-seven and one-half cents per page, making $684.38. Upon this there has been paid $450.00, thus leaving due the balance of two hundred thirty-four dollars and thirty-eight cents.

It is therefore ordered by the Commission that the Claimant have and receive in full for his aforesaid claim against the State of Illinois the sum of two hundred thirty-four dollars and thirty-eight cents ($234.38.)

GREELY CARSON CO.

v.

THE STATE OF ILLINOIS.

Opinion filed December 29, 1896.

CONTRACTS—*with State officer for services.* A claim for services performed for the State under written contract with the Attorney General, and accepted by him, with no objection or defense to the claim being interposed by the State, will be allowed.

Claimant seeks to recover in this case on a contract in writing made on the 18th day of February, 1896, with the Attorney General on behalf of the State, for certain surveys and maps of the shore line of Lake Michigan at Chicago, for the specified sum of five hundred dollars.

It appears from the evidence that the surveys were made and the maps delivered to the Attorney General on the 31st day of March, 1896, in compliance with the contract, and the same were accepted by the Attorney General.

No objection or defense to the claim being interposed by or on behalf of the State, the claimant is awarded the sum of five hundred dollars.

CATHERINE CUTTING

v.

THE STATE OF ILLINOIS.

Opinion filed December 29, 1896.

WATERS—*damages sustained by raising height of dam.* Where a break in a dam under the jurisdiction of the State is repaired by the canal authorities of the State placing a considerable quantity of riprap back of the dam and next to the break, thus raising the height of the dam and causing damage to claimant's property by raising of the water above the dam, the claimant's property being situated above the dam, claimant is entitled to recover actual damages sustained.

The claimant's property here in question consists of an island in the Des Plaines river, of irregular shape, about

one quarter of a mile long, and containing about twenty-five acres of land, situated in the city of Joliet, Will County, Illinois. The foot or south end of the island is about one-third of a mile north of the Tow-path bridge, which bridge is at the confluence of the Illinois and Michigan canal, and the Des Plaines river. The Tow-path bridge is about two-thirds of a mile north of the so-called Jackson street dam.

The Jackson street dam as originally constructed was a solid cut stone structure, built by the State many years ago. It is about ten feet high, and forms the lower or south end of what is called the Upper basin. Through this basin, and over this dam passes the entire volume of water of the canal and the river, except what is drawn off for use for water power. In the spring of 1893 a considerable part of the dam was washed away by high water. The portion thus taken out consisted of several courses of stone running to within about 50 feet of the east and west ends of the dam. In order to repair this break in the dam, the canal authorities of the State, shortly thereafter, caused a considerable quantity of riprap, consisting principally of broken stone, to be placed immediately back of the dam and next to the break. This riprap was piled from one to one and a half feet higher than the original level of the dam.

The claimant alleges that by reason of the raising of the dam in this manner the water in the basin and in the river was correspondingly raised and thereby her said island damaged to the extent of five thousand dollars.

The raising of the dam in substantially the manner claimed, and as above indicated, is not controverted by the Attorney General, and it is not claimed that the increased height has been reduced, nor that it is the intention in the future to reduce the same. There is but little fall of water in this upper basin. The flow is from north to south. It is quite impossible to ascertain with any degree of exactness the precise amount of the

fall. It varies some with different stages of water, and there are many other conditions which affect the problem so as to make it quite difficult, if not impossible, of exact solution. Suffice it to say with accuracy sufficient for ordinary mortals, that the fall is slight from the Tow-path bridge to the Jackson street dam. But the south end of the island is nearly one-third of a mile north of the Tow-path bridge, and no claim whatever is made for damage to the southerly portion of the island, as that is high and dry. The part claimed to have been damaged is the northerly part of the island, consisting of six or seven acres of low land. From all the evidence we must conclude that this land is sufficiently north of the Jackson street dam, that the raising of the dam complained of had no very considerable effect upon the northerly part of the island. It must be true that the fact that some of this riprap may have stood 18 inches above the original level of the dam, did not raise the water at the dam to that height. About one-third of the dam remained as it originally was, and in addition thereto we know from observation as well as from the evidence that a large volume of the water passes through the loose stones of the riprap. Added to this, it is very clear from the evidence that when the water is high the opening under the Tow-path bridge retards the water of the river from flowing freely into the basin, and thereby becomes to an extent the controlling point, rather than the Jackson street dam.

We are strongly of the opinion that the effect of this riprap at the dam upon the part of the island claimed to be damaged is very far from that which is claimed. But we will give to the complainant the benefit of all the reasonable doubt, and for the purposes of her claim will concede that the water in the river was raised a few inches in consequence of this riprap.

The claim for damages herein is for the loss of three years crops, and for damage to the market value of the land. As to the latter we hardly feel that under the evidence there was any appreciable damage to the mar-

ket value of the land. The value placed upon it by the witnesses ranges from nothing to $1,000.00 per acre—widely divergent prices to say the least. It is our judgment that the land had no very great value in the market. It is not pretended that it was available for subdivision into lots or for building purposes. It is not connected with the main land, and can be reached only by boat, unless the water is sufficiently low to drive across. It is not claimed that the land had any special value except for market gardening. From the evidence, as well as from observation, we believe that the claimant received for the land upon its condemnation by the Sanitary District of Chicago substantially its market value, and that the slight rise in the river, if any there was, did not operate to lessen the price received for the land.

The question then remains as to the amount of damage, if any, which the claimant suffered by reason of the injury to her crops for three seasons succeeding the placing of the riprap in the dam. Upon the taking of the evidence all claim for the first year thereafter seems to have been abandoned, and the claim is for the damage for the years 1893 and 1894. For the purposes of this claim it is testified that upon these 6 or 7 acres practically no crop was raised these two years because of the increased height of the water. This evidence is in direct contradiction to what it appears she testified to in the condemnation proceedings brought by the Sanitary District of Chicago. It appears that she there testified that she raised large crops in 1893 and 1894, that in one of those years she raised 60,000 head of cabbage. Of course it was then to her interest to make the land as valuable as possible in order that she might obtain the largest possible amount in that proceeding, but it somewhat embarrasses us in this case to reconcile her former testimony with the evidence here offered. In any event we believe that if it was evident that because of this rise in the water she could not use the land, the extent of her

damage would be the rental value of the land for that time.

Some witnesses have testified that the annual rental value of this land was $100 per acre. This in our judgment is so extravagant as to be almost ridiculous. From this amount the testimony as to the rental value ranges to nothing, the other extreme. Twenty-five dollars per acre for the annual rental value in our judgment would be a most liberal and even excessive price. It is conceded that not more than 7 acres were affected by the alleged rise of the water. Figured at this rate the rental value for two years would be three hundred and fifty dollars. This sum would amply compensate her for any possible damage she has sustained by the raising of the dam.

It is therefore ordered by the Commission that the said claimant, Catherine Cutting, be awarded, in satisfaction of her aforesaid claim against the State of Illinois, the sum of three hundred and fifty dollars together with the costs of the taking of the testimony on behalf of the claimant.

EZEKIEL PHILLIPS

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1896.

PENAL INSTITUTIONS—*inmates must conform to rules.* Persons convicted of crime and sentenced to penitentiary must conform to statutes governing the penitentiary and controlling the inmates thereof and although sentence failed to state that claimant is to be put to hard labor and he does perform hard labor, claimant cannot recover.

There is no contention over the facts in this case. On October 31, 1876, the claimant was sentenced by the circuit court of Douglas County, Judge Oliver L. Davis, presiding, to the penitentiary of the State at Joliet for the term of his natural life. The judgment and sen-

tence of the court as shown by the certified copy of the record is as follows:

"THE PEOPLE, ETC.
785. v. } *Venue from Coles County.*
EZEKIEL PHILLIPS.

This day came the said People by their State's Attorney and the said defendant, Ezekiel Phillips as well in his own proper person as well as by his counsel also come and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not be pronounced against him on the verdict of guilty heretofore entered in this cause.

Therefore it is ordered and adjudged by the court that the said defendant be taken from the bar of this court to the common jail of Douglas county from whence he came and from thence by the sheriff of said Douglas county within five days from the date to the penitentiary of this State at Joliet and be delivered to the warden or keeper of said penitentiary and the said warden or keeper is hereby required and commanded to take the body of said defendant Ezekiel Phillips and confine him in said penitentiary in safe and secure custody for and during his natural life from and after the delivery hereof and that he pay costs of prosecution herein and that execution issue therefor."

The claimant under said sentence was taken to the State penitentiary at Joliet and there confined and afterwards was removed to the State penitentiary located at Chester, Illinois, and remained in the penitentiary at Chester until some time in 1893 when he was released by a pardon. He now claims that by reason of his having been put to hard labor while in the penitentiary at Joliet and in the penitentiary at Chester he should be reimbursed by the State for his labor and he asks this Commission to award him for his labor $30.00 per month for the term of his confinement, making a total sum of $5,400.00.

The counsel for the claimant contends that because the sentence of confinement does not specify that the claimant was to be put to labor, that therefore he has the right to recover from the State for the labor the claimant performed while in the two prisons. We have examined with some care the argument and brief filed by the counsel for the claimant and the authorities cited, but we are of the opinion that if the judgment of the court was sufficient to commit the claimant to the penitentiary, then the statutes governing the penitentiary and controlling the inmates of the penitentiary and requiring that convicts be kept at hard labor prevents any recovery in the case. We have therefore decided to disallow the claim.

H. W. ROKKER

v.

THE STATE OF ILLINOIS.

Opinion filed February 5, 1897.

1. CONSTITUTIONAL LAW—*General Assembly not to authorize payment of claims made without express authority of law.* Under Sec. 10, Art. 4, of the Constitution of 1870, the General Assembly cannot 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.

2. SAME—*contracts to be let to lowest responsible bidder.* Under Sec. 25 of Art. 4 of the Constitution, "The General Assembly shall provide by law, that the fuel, stationery, and printing paper furnished for the use of the State; the copying, printing, binding and distributing the laws and journals, and all other printing ordered by the General Assembly, shall be let by contract to the lowest responsible bidder."

3. SAME—*Commissioners of State contracts.* The Attorney General, Secretary of State, the State Treasurer, and the Auditor of Public Accounts are created Commissioners of State Contracts by chapter 127 R. S. The same chapter provides that the printing for the State shall be let by contract to the lowest bidder; that the

Commissioners of State Contracts shall advertise for bids; that the bids shall be opened and contracts awarded; that Commissioners shall have authority to cancel contracts when in their opinion contracts were obtained by fraud, conspiracy, or any unlawful means.

4. STATE CONTRACTS—*when State will not be liable on a quantum meruit.* When the provisions of the Constitution make all contracts entered into by the State without express authority of law null and void, the State having entered into such contract cannot be held liable on a *quantum meruit*.

5. STATUTE OF LIMITATIONS—*Equity follows the law.* Equity follows the law in the application of the statute of limitations, and where a claim for work done is not filed within five years next after the work was performed it is barred by the statute of limitations.

This is a claim against the State for a balance alleged to be due claimant for printing done for the State between October 1, 1886 and July 1, 1887.

It is set forth in the statement of claim, that in pursuance of a notice published, the firm of H. W. Rokker & Co., filed bids for doing the printing for the State for two years from October 1, 1886; that contracts were awarded to said firm, and entered into between said firm and the Commissioners of State Contracts on behalf of the State for said work; and that in pursuance of said contracts, printing was done for the State from October, 1886, to May 7, 1887; that on the last named date, said firm was notified that no further payments would be made on said contracts, and that thenceforth, they would be considered and treated as of no further validity; that upon receiving such notice, said firm stopped work, and on May 17, 1887, the Secretary of State notified claimant to proceed with the unfinished work then on hand and he should be paid for it at the rates specified in the original contracts; that the work was finished and delivered to the Secretary of State. Afterwards the Secretary of State gave numerous orders in writing for work to be paid for at the rates named in said contracts which the claimant performed and delivered to the Secretary of State; that up to the time the Commissioners of State Contracts cancelled the said contracts, work amounting to the sum of $32,722.11 had been performed, upon which had been paid the sum of $24,000.00, leav-

ing unpaid $8,722.11; that subsequently claimant performed work amounting to the sum of $9,385.16, upon which was paid $4,497.47, leaving a balance of $4,887.47, making due claimant in the aggregate $13,609.58 and interest; that the other members of the firm of H. W. Rokker assigned their interests in said contracts to the said claimant, H. W. Rokker.

The Attorney General, on behalf of the State, filed a denial of the claim, a plea of statute of limitations and two pleas of fraud, etc. It is conceded on the part of claimant's attorney that the said contracts could not be defended which relieves us of the necessity of considering the queation of their validity. The next question for our consideration, is, was there any other contract made with H. W. Rokker & Co., or the claimant for the printing done after said contracts with Rokker & Co., had been canceled on behalf of the State, by any officer or person having authority to bind the State?

Section 19, Article 4 of the Constitution of 1870, provides that "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.*"

Section 25 of same article provides that, "The General Assembly shall provide by law, that the fuel, stationary, and printing paper furnished for the use of the State; the copying, printing, binding and distributing of the laws and journals, and all other printing ordered by the General Assembly, shall be let by contract to the lowest responsible bidder." Chapter 127, Revised Statutes, provides that the Attorney General, Secretary of State, the State Treasurer, and the Auditor of Public Accounts, shall be Commissioners of State Con-

tracts; that the printing for the State shall be let by contract to the lowest bidder; that the Commissioners of State Contracts shall advertise for bids; that bids shall be opened and contracts awarded; that the Commissioners shall have authority to cancel contracts when in their opinion contracts were obtained by fraud, conspiracy, or any unlawful means. We have been unable to find any express authority conferred by law upon any officer or person, other than the Commissioners of State Contracts, to contract or bind the State in respect to the matters for which claimant seeks an award in this proceeding.

Claimant seeks to recover in this case upon the theory that the Secretary of State made a contract with him for the work and agreed to pay him at the rates specified in the original contracts. By what authority does the Secretary of State assume to make contracts of this kind? There is no such authority to be found in Chapter 127, or in any other place in the statute, that we have been able to discover, and in the absence of such authority, any contract by the Secretary of State would be null and void by the provisions of the constitution.

Claimant further insists, that in the absence of authority in the Secretary of State to bind the State by express contract the State would be liable on a *quantum meruit*. The law might imply a contract on the part of the State, to pay what the work was reasonably worth, in some cases, but in view of the provisions of the constitution, providing that such contracts should be let to the lowest bidder, and making all contracts made without express authority of law null and void, and prohibiting the General Assembly from providing for payment of any claim arising out of any such contract, we do not think that position tenable. If a contract could be implied against the State from the acts or doings of any of the officers of the State, the objects intended to be accomplished by the framers of the constitution would be defeated. But if the law did imply a contract on part of the State, more than five years having elapsed

between the performing the last of the work and the presenting of this claim to this Commission we think the claimant would be barred by the statute of limitations. Although this proceeding should be governed by the board rules of equity, as insisted by claimant's counsel, still equity follows the law in the application of the statute of limitations, and there is nothing in the statement of claim or disclosed by the evidence which can be considered a sufficient excuse for not having filed this claim within five years next after the work was performed.

The claim is disallowed.

ALEXANDER JOHNSON

v.

THE STATE OF ILLINOIS.

Opinion filed February 16, 1897.

PRACTICE—*where evidence fails to support claim.* Where evidence fails to support petitioner's claim, Court will refuse an award.

The claimant in this case seeks to recover for injuries he alleges to have received while a member of the Illinois National Guard at Camp Lincoln on the 13th day of July, 1895.

The petitioner, Alexander Johnson, sets forth that he enlisted as a private in Battery "D" of the Illinois National Guard on the 14th of April, 1894, and that while on duty at Camp Lincoln and under orders of his superior officers and while participating in a drill or sham battle he was directed to mount and that in attempting to do so he fell and the left rear wheel of the cannon passed over both feet.

The petition sets forth that claimant was taken to the camp hospital and his injuries treated and for five weeks he was unable to walk and that he has never fully recovered from the effects of his injuries.

After a careful examination of the evidence in this case we are of the opinion that claimant fails to prove that he received any serious or permanent injury or that he was disabled for any length of time.

In support of his petition claimant files his own evidence and that of his comrade, Walter Wait, and that of Dr. Charles Adams, surgeon of the First Regiment, Illinois National Guard—and a deposition of these the only witnesses in the case we have read with much care.

It appears that a wheel with a broad three inch tire supporting with another wheel a cannot weighing twelve hundred pounds passed over the insteps of claimant's feet.

That claimant was taken to the camp hospital and treated and that on the next day or the day following the accident he went home to Chicago.

Surgeon Adams in his evidence says, "There were no bones broken, no ligaments torn nor displacement of the bone entering into the instep."

The evidence fails to support petitioner's claim and we have decided in this case to refuse an award.

ELIZABETH H. RYAN

v.

THE STATE OF ILLINOIS.

Opinion filed February 17, 1897.

CLERICAL SERVICES—*reasonable allowance made for services rendered at request of State officers.* This claim is submitted on affidavits showing services on which claim is based were performed at the request of the Attorney General and that charges made are just and reasonable and the claim is allowed.

This claim is for taking and transcribing testimony to be used on behalf of the defense in the case of Catherine Cutting v. The People of the State of Illinois.

The Attorney General enters the appearance of the State and submits the cause for hearing and decision upon the affidavits attached to the claim. The affidavits show that the services were performed at the request of

the Attorney General, and that the charges made are just and reasonable. It is therefore considered that the claimant, Elizabeth H. Ryan be, and she is awarded the sum of thirty-one dollars and fifty cents ($31.50) in full of her claim.

MORRILL SPRAGUE

v.

THE STATE OF ILLINOIS.

Opinion filed February 27, 1897.

CLERICAL SERVICES—*rendered at request of State officer.* At the request of Attorney General claimant rendered services as Special Commissioner in taking depositions.

The Court reviews the evidence and holds the charges for services reasonable and makes award.

This claim is for services as Notary Public and Special Commissioner in taking depositions on behalf of the State in the claim of Catherine Cutting v. The People of the State of Illinois, in Commission of Claims.

The Attorney General enters the appearance of the State and submits the cause for hearing and decision upon the affidavits attached to the statements of claim.

It appears from the said affidavits that claimant rendered the services, at the request of the Attorney General, and that the charges made for such services are reasonable and just. It is therefore considered by the Commission that the claimant, Morrill Sprague, be, and he is awarded the sum of fifty dollars in full of his claim.

GEORGE HINGSTON

v.

THE STATE OF ILLINOIS.

Opinion filed December 16, 1897.

CLERICAL SERVICES—*rendered State; when claim will be allowed.* When there is no dispute as to the fact of employment and the amount claimed seems to be a reasonable demand for the work done for the State, award will be made.

This was a claim filed in the Auditor's office on March 31, 1897, by George Hingston, claiming an amount due of $178.40 for attending and reporting proceedings before Senate Committee and furnishing transcript of testimony of said proceedings.

There seems to be no dispute as to the fact of the employment and the amount claimed seems to be a reasonable demand for the work done.

It is therefore ordered that the claimant be allowed a judgment of one hundred seventy-eight dollars and six cents in full of his claim against the State of Illinois.

JOHN S. HENDERSON

v.

THE STATE OF ILLINOIS.

Opinion filed December 16, 1897.

STATUTE OF LIMITATIONS—*when claim is barred.* Claim filed April 2, 1897, for pay and subsistence in recruiting men for service in United States Army in August, 1862, is barred by statute of limitations.

From the declaration and bill of particulars filed by the claimant in the above entitled cause, we gather the following facts:

That the claimant with others in the summer of 1862 was authorized by one Colonel David O. Jenkins to recruit men for service in the army of the United States, and that on or about the first day of August, 1862, claimant began to recruit men for said service at Galesburg, Maquon and other points. That on the 27th of September, 1862, they were ordered to Peoria, Illinois, where they arrived on October 2d of the same year and where they remained in camp, drilling their men until January 7, 1863, at which time they were mustered into the service of the United States.

It further appears that claimant was commissioned Second Lieutenant of the company he helped to recruit. The bill of particulars filed by the claimant is as follows:

To pay from August 1st to December 17, 1862, being four months and seventeen days at $53 per month	$240.00
To four months and seventeen days subsistence.	221.60
Total	$461.60

The claim with the evidence supporting the same was filed with this Commission, April 2, 1897, to which claim the State by the Attorney General files two pleas; first, the general issue; second, the statute of limitations.

From the facts as shown by the evidence on file, we think it clear that claimant performed the services as alleged in recruiting the company of which he was commissioned Second Lieutenant, and that he undoubtedly expended certain sums of money while so engaged, but whether claimant expected the State to reimburse him for the same, or was induced to aid in recruiting said company with the knowledge of being commissioned one of the officers of the same, we are unable to determine, nor is it in the judgment of the Commission material for as the State has seen fit and proper to plead the statute of limitations to the claim, in the judgment of the Commission the claimant is barred of any right to recover, and as this Commission, has held the plea of the statute of limitations good in the case of Downey v. The State, we see no reason to change the same in this case, therefore the claim is denied.

JOHN R. O'CONNOR

v.

THE STATE OF ILLINOIS.

Opinion filed December 10, 1897.

FEES AND SALARIES—*when statute does not fix compensation only a reasonable amount will be allowed.* When a stenographer performing services for the State is not an official of any court and there is no statute which fixes the amount of compensation for the services such as were rendered, only a reasonable compensation for the services rendered will be allowed.

This was a claim filed in the Auditor's office, October 27, 1895, by John R. O'Connor, claiming eight hundred and eighty dollars ($880.00) for time and services as stenographer and law reporter in a certain cause pending before one George Mills Rogers, Master in Chancery of the Circuit Court of Cook county, in the matter of the People of the State of Illinois ex rel, Maurice T. Maloney v. Elizabeth Cooling.

On November 10, 1896, cause was submitted on testimony and on December 23, 1896, Commission allowed

claimant the sum of $296.25 in full of his claim, as will further appear by opinion of the Commission filed on said date. On the same day, a motion for re-hearing was made and motion granted. Re-hearing was set for December 30th. On December 30th motion was granted to file additional answer on part of State. On the same day, answer was filed by Attorney General as follows:

STATE OF ILLINOIS,
SANGAMON COUNTY.

JOHN R. O'CONNOR
v.
THE STATE OF ILLINOIS.

In the Commission of Claims.

Comes now the Honorable Maurice T. Moloney, Attorney General, and files his answer to said claim in behalf of the People of the State of Illinois, and answering says that it is true as alleged in said claim that said John R. O'Connor was employed by said Attorney General to take the testimony in the case of the People v. Elizabeth Cooling; that the price to be paid for said testimony was fifty cents per page, and fifteen cents for carbon copy per page. That 1,825 pages were so furnished by said claimant both of original and carbon copy. That said claimant also made a condensed abstract of said evidence as alleged, of 395 pages, and a carbon copy thereof, at the request of the Attorney General.

That said claim is just and in pursuance of agreements made with said claimant and the State of Illinois can not and ought not to object to the allowance thereof for $880 as claimed, said amount being in accordance with usual customary and reasonable charges for such work.

Said Attorney General therefore admits that there is due to said claimant the sum of $880 as claimed and consents to the allowance of said claim in that amount.

(Signed.) M. T. MOLONEY,
Attorney General.

On February 16, 1897, Attorney General makes a motion to withdraw answer as filed December 30, 1896, viz:

STATE OF ILLINOIS, }
SANGAMON COUNTY. } ss.

JOHN R. O'CONNOR
v. } *In the Commission of Claims.*
THE STATE OF ILLINOIS.

And now comes Edward C. Akin, Attorney General of the State of Illinois, and by leave of said Commission, withdraws the answer of Maurice T. Moloney, late Attorney General of this State, said answer having been filed therein December 30, 1896, after said Commission had acted upon the claim of the said claimant and allowed the same in the sum of $290.25. And the Attorney General here now objects to the petition for re-hearing filed herein December 28, 1896, and also objects to the allowance by said Commission to any other or further sum than the sum of $290.25 allowed said claimant as aforesaid.

(Signed.) EDWARD C. AKIN,
Attorney General.

This motion was set for hearing on February 16th. It seems it has never been disposed of. On February 23d cause was continued generally. And now the matter comes up for re-hearing upon the original evidence as submitted. Opinion filed by former Commission is as follows:

"STATE OF ILLINOIS.

IN THE COMMISSION OF CLAIMS.

JOHN R. O'CONNOR
v.
THE STATE OF ILLINOIS.

OPINION OF THE COMMISSION,

BY SAMUEL ALSCHULER, COMMISSIONER.

From the undisputed evidence upon this claim it appears that the claimant was employed as stenographer,

by the Attorney General, to take and report testimony in the suit of Attorney General, etc. v. Elizabeth Coulfug, pending in the circuit court of Cook county. Said testimony was taken before George Mills Rogers, to whom as Master in Chancery of said circuit court the said cause had been referred to take evidence and report conclusions.

It appears from the evidence that there was taken and transcribed, on behalf of the State, 1,825 pages of testimony, for which the claimant charges fifty cents per page, making $912.50. He further charges for one copy of such testimony at fifteen cents per page, making $273.75—a total for that service of $1,186.25. In addition to this the evidence shows that the claimant made a statement in narrative form of the evidence so taken, which he charges as 395 pages of abstract at one dollar per page, a copy of same at 25 cents per page—a total for this service of $493.75. Upon the claim for taking and transcribing the testimony he has received $800.00, leaving a balance of $880.00, for which he demands an award against the State.

It does not appear that the claimant is an official stenographer of any court. There is no statute which fixes the amount of compensation for the services such as were rendered by the claimant. The compensation fixed by law for similar services is 15 cents per folio of one hundred words, and from observation and investigation we believe that two and one half of such folios to a page of type writing is the ordinary and usual proportion in about the place where such court is held. There is no law fixing the price of a copy, but again drawing upon our experience we have no hesitancy in saying that 15 cents per page is more than ought to be charged. For a carbon copy it requires no further effort than the insertion of a sheet of carbon and another sheet of paper, together with the additional cost of the material. The claim for this first amount was presented for payment to the 39th General Assembly, and presumably the merits of the claim were there investigated, and the sum of

$800.00 was appropriated and paid upon the claim. There being no statutory compensation, and the amount of this appropriation being so near, what in our judgment would be a reasonable compensation for the services rendered up to that time, we cannot but believe that the Legislature intended the amount so appropriated to be in full payment of the bill rendered. Under these circumstances, so much of the claim as accrued before, and was presented for payment to the 39th General Assembly is disallowed.

Since the presentation of this claim as aforesaid, it appears from the evidence that the claimant rendered pages of abstract at $1.00, and a copy thereof at 25 cents per page. Conceding this service to be a proper one for which just compensation should be made by the State, (and there is no evidence to the contrary) the Commission is nevertheless of the opinion that the charges are exorbitant. The claimant states that the services consisted in a statement of the testimony in narrative form instead of by questions and answers. It does not appear to have been an abstract made for the purpose of presenting the evidence in a condensed form as required by the courts of appellate jurisdiction, but merely a narrative statement, and why he charges 25 cents per page for a carbon copy is quite beyond our comprehension. It is certainly no greater task to make a carbon copy of an abstract of testimony than of the testimony itself. It requires no more labor and no more material. If we regard 15 cents per page too great a charge for a copy of the testimony, certainly 25 cents per page is too high for a copy of the abstract. Under all the circumstances the Commission feels that a very liberal allowance for the abstract and copy would be 75 cents per page—making $296.25.

It is therefore ordered that the said claimant be awarded in full for his aforesaid claim against the State of Illinois the sum of two hundred and ninety-six dollars and twenty-five cents."

The answer of the Attorney General of December 30th appears as an attempt at a confession of judgment; but why the State should be called upon to pay more than a reasonable price for work performed, we cannot conceive and we know of no honest rule by which this could be tolerated. We believe the judgment allowed by the former Commission is a liberal compensation for the work done.

Therefore we sustain the judgment of the former Commission and order that the said claimant be awarded in full of his said claim against the State of Illinois, the sum of two hundred and ninety-six dollars and twenty-five cents.

JOHN DOWNEY

v.

THE STATE OF ILLINOIS.

Opinion filed December 16, 1897.

STATUTE OF LIMITATIONS—*Section 15 of Chapter 83, R. S. construed.* A claim for injuries received in May, 1873, is barred by statute of limitations if same is filed on April 29, 1897.

The demand of the claimant, in the above entitled cause for the sum of $1,000 is made for injuries received by him while performing certain work in or about the State House.

From the bill of particulars and the evidence filed by the claimant the following facts appear: That during the month of May, 1873, the claimant with others were engaged in setting the heater for the State House and while so engaged, in attempting to place a certain iron casting the same was thrown on his hands through the carelessness of a co-employe thereby crushing his hands very badly. It further appears from the files that on the 29th day of April, 1897, the above claim was filed in the Auditor's office and that on July 10th, 1897, the State by the Attorney General filed a plea of the statute of limitations; to which plea the claimant, by his attorney, filed his replication, September 24, 1897; to which the

State by the Attorney General filed a demurrer. We do not deem it necessary to discuss the question as to the liability of the State upon the facts submitted as it is apparent from the claimant's own statements set forth in his claim and the bill of particulars that he is barred of any right to recover under the statute of limitations in force in this State as prescribed in Sec. 15, of Chapter 83, of the Revised Statutes, and that the plea of the same by the State is proper.

The demurrer filed by the State to the replication of the same is sustained.

Claim dismissed.

M. S. CARR

v.

THE STATE OF ILLINOIS.

Opinion filed December 16, 1897.

STATUTE OF LIMITATIONS—*when claim is barred.* When cause of action accrues on December 17, 1862, and claim is filed April 2, 1897, pleading of statute of limitations operates as complete defense and claim will be denied.

This was a claim filed in the office of the Auditor of State, April 2, 1897, by M. S. Carr, for money expended in organizing and recruiting "A" company of the Fourteenth Illinois Cavalry, in the war of 1861. The files show that the claimant was commissioned as captain of the company and was mustered on the 17th day of December, 1862; but that company "A" was not mustered into the service of the United States until a later date. That claimant recruited and organized "A" company of the Fourteenth Illinois Cavalry Volunteers during the months of August and September, 1862; and, from that time on, having been elected as captain of the company in October, 1862, drilled his men at Peoria, Illinois, until the Fourteenth Cavalry Regiment was regularly mustered into the service of the United States on January 7, 1863.

That claimant expended his own money and was not paid from August 1, 1862, to December 17, 1862; and, it is for this service and for amounts of money expended that this claim is filed.

The items are for four months and seventeen days recruiting at $70 per month	$319.66
Four months and seventeen days subsistence.	221.60
Total	$541.26

To this claim the State files two pleas; first, the general issue; second, the statute of limitations. We do not question the justness of the claim, but the evidence shows that the same has long since been barred by the statute of limitations, and the statute of limitations having been pleaded we are of opinion that it operates as a complete defense to the claim.

In the claim of Downey v. The State, decided at the present session, the Commission so held and we see no reason for changing the rule announced in that claim. It is therefore the opinion of the Commission that this claim should be denied.

Claim dismissed.

HENRY W. CARPENTER

v.

THE STATE OF ILLINOIS.

Opinion filed December 16, 1897.

STATUTE OF LIMITATIONS—*when claim is barred.* When cause of action accrued in December, 1862, and claim is filed April 2, 1897, claim is barred by statute of limitations.

This is a claim filed by Henry W. Carpenter in the Auditors office, April 2, 1897, claiming an amount due of four hundred sixty-one dollars and ninety-three cents, for services rendered in recruiting men for company "A" Fourteenth Illinois Cavalry Volunteers from August to December, 1862. To the claimant's declaration, the Attorney General has filed the pleas of general issue and of limitations.

The evidence in support of this claim is meager; but if the claim were just, under the rule adopted by this Commission in the cases of Downey v. State, John S. Henderson v. State and Morgan S. Carr v. State, we would hold the claim barred by statute of limitations.

Therefore the claim is dismissed.

STATE BANK OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF SAMUEL E. HOBSON, DECEASED

v.

THE STATE OF ILLINOIS.

Opinion filed January 18, 1898.

1. MUNICIPAL CORPORATIONS—*The West Chicago Park Commissioners are a municipal corporation* with the power to assess and collect taxes with the Park District so created for the special corporated purposes of its creation.

2. SAME—*not liable for negligent acts of servants.* Municipal corporations created merely for purposes of civil administration are not liable for the tortious acts or negligence of its officers.

3. SAME—*officers are personally responsible for their negligence.* Officers of public corporations are personally responsible for their own negligence or misconduct in the performance or attempted performance of their official duties.

4. RESPONDEAT SUPERIOR—*public and State officers do not come within doctrine of.* Public or State officers with only certain powers and duties enjoined upon them by the statutes do not come within the doctrine of respondeat superior.

5. SURVIVAL OF ACTIONS—*for death from negligent act no—survivor at common law.* Cause of action for injuries resulting in death, did not survive to the executor or administrator at common law.

6. PERSONAL INJURIES—*survival of action given by statute.* The statute provides, "that whenever the death of a person shall be caused by wrongful act, negligence or default, and the neglect or default is such as would, if death had ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstance as amount in law to felony."

7. SAME—*upon what right to maintain actions after death of person injured depends.* The right to maintain an action after the

death of a party injured, depends entirely upon whether if death had not ensued the decedent could have maintained an action and recovered damages against the party sued.

8. STATE LIABILITY—*when State is bound by act of legislature.* The State is not bound by or included in any act of the legislature unless expressly named or necessarily implied, to give effect to the act.

This claim was filed in the Auditor's office, April 22, 1897, by the State Bank of Chicago, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, authorized and empowered, and duly qualified to act as administrator of the estate of Samuel E. Hobson, deceased.

The claim filed in this case, shows, that Samuel E. Hobson came to his death on the 17th day of October, 1896, in the city of Chicago, in the County of Cook, and State of Illinois, and it is claimed by the claimant to have been in the following manner; that is to say, said State of Illinois, acting through and by the South Park Commissioners, were engaged in the work of demolishing and tearing down certain buildings and structures upon the premises lately occupied by the World's Columbian Exposition, in Jackson Park, in the city of Chicago, aforesaid; and in or about said work, used and permitted to be used, certain dangerous explosives, known as dynamite and nitro-glycerine. That said Jackson Park was a public park, maintained for the use, enjoyment and recreation of the public generally; and that all persons were permitted to assemble and congregate there for pleasure at all times.

That said Samuel E. Hobson was, on the day last above mentioned, rightfully in said park, and was rightfully and properly in the exercise of all due caution, care and prudence, enjoying the same as a public park. That said State of Illinois, acting through and by said South Park Commissioners, in and about the prosecution of said work, wholly failed to use proper care to avoid injury to persons passing through said park, in the vicinity of the place, where said work, was being

conducted and where such explosives were being used; and wholly failed to give any notice or warning to said Samuel E. Hobson, who was then and there in said park and near enough to the place where such explosives were being used, to be struck by materials by such explosion. That when such explosives were about to be used, ignited and discharged at the place aforesaid, although the State of Illinois, through said South Park Commissioners, had full notice that Samuel E. Hobson was in said park, and near said place as aforesaid, wholly failed and neglected to give any warning or notice to persons then in said park, and near the place aforesaid, and to the said Samuel E. Hobson, to withdraw to a place of safety, and after the discharging of such explosives, at about the noon hour, the said State of Illinois, acting through said South Park Commissioners, who were in personal charge of said park, and who caused said explosives to be discharged at the place aforesaid, in said park; and, in consequence of said explosion a large piece or mass of metal was thrown by such explosion, and caused to strike, with great violence and force, the said Samuel E. Hobson, who was then and there in said park, and was then and there in all due exercise of care on his part, and the said Samuel E. Hobson was then and there, greatly bruised, wounded and injured. That he thereafter, on said last mentioned date died by reason of such injuries; whereby this claimant as administrator as aforesaid, and on behalf of the widow and next of kin, has sustained damages to the amount of $5,000.

To this claim, the State files a plea, that it does not owe the said claim or any part thereof, in manner and form as therein alleged; and is in no way indebted to the said claimant, the State Bank of Chicago, administrator of the estate of Samuel E. Hobson, deceased.

It was stipulated by the parties, that the evidence used at the coroner's inquest shall be used as the evidence on this hearing; and that the said Samuel E. Hobson left surviving him the following as his only heirs at law and

next of kin: Clara Hobson, his widow; Edwin N. Hobson, his father; Louandia Hobson, his mother; Beeshoba Phillips, Elizabeth Heilwagon and Effie Waller, his sisters; and George L. Hobson, his brother.

The evidence shows in this case, that the Columbia Salvage or Wrecking Company contracted to remove the structures and buildings erected by the World's Columbian Exposition, in Jackson Park. That the blast that killed Samuel E. Hobson was fired by Bruno Kniffler, a mechanical engineer, in the employ of the said Salvage and Wrecking Company without any permit from Mr. Jacob F. Foster, who was the superintendent for the South Park Commissioners. The use of the dynamite and explosives was prohibited, without the permission of the said superintendent.

And the evidence very clearly shows that Mr. Nusbaum, the superintendent of the Salvage Company, directed Kniffler to use dynamite to wreck the structure of the Machinery Hall building, that they were tearing down; it also shows that he was told before he used the explosives that he must get a permit from Mr. Foster, the superintendent, and he said he would. He did not, however, but directed Kniffler, his engineer, to proceed with his experiment, that of wrecking the Machinery Hall by the use of dynamite.

It is true that Mr. Nusbaum testified, that he told Park Officer Ledwith that he was going to use explosives, Thursday noon, and for him to tell Capt. Kelly of the fact, and if Capt. Kelly had any objections, he could notify Kniffler not to proceed. This evidence shows clearly that the Columbia Salvage or Wrecking Company had no permit whatever, from the Park Superintendent, and had no right whatever, to use the explosive in the park and that they did use such explosives entirely on their own responsibility. It also shows that neither the Park Superintendent nor the Park Foreman had any knowledge or notice that the Salvage Company were intending to blast without a permit from the Superintendent.

While it may be true that Ledwith, the Park policeman, was told by Mr. Nusbaum that he was intending to use dynamite to wreck the structure of Machinery Hall, that they were then tearing down, that officer told Nusbaum, that it was necessary to obtain a permit from Mr. Foster, the superintendent of the Park Commissioners, before he had any right to use explosives.

Mr. Dugan, the Park foreman, also informed Mr. Nusbaum, the superintendent of the Salvage Company, that if they were going to do any blasting, it would be necessary for them to get a permit from Mr. Foster the superintendent of the South Park System, and then Mr. Foster could notify him.

Nusbaum's evidence is to the effect, that he told Park Officer Ledwith that Knifller was going to use some explosives, Thursday noon, and for him to tell Capt. Kelly of the fact, and if Capt. Kelly had any objections, he would notify Knifller not to proceed with the experiment.

Thursday noon, about ten o'clock, Park Officer Ledwith came into his office and told him, that Superintendent Foster had gone up the road and that if he intended to see him he should do so then. While Mr. Nusbaum does not state what further conversation then took place between him and Ledwith, Ledwith, in his evidence, states, that he told Nusbaum that before he could use any explosives, he must get a permit from Mr. Foster, the superintendent, and Nusbaum said he would.

He also states that he afterwards went down to see Nusbaum, if he had notified Mr. Foster, and Nusbaum said that he had not, and that he had used explosives before and that the men around had been notified.

On the question of notice then, to the Park Commissioners, the evidence discloses, that Ledwith, the policeman, Dugan, the foreman and Morrison, his assistant, had heard some blasting was to be done, and the evidence also discloses that these parties each told Nusbaum, the

superintendent of the Salvage Company, that it could not be done without a permit from Mr. Foster, the superintendent.

Under this evidence there is no question, that the Park District would not be liable for the negligence which resulted in the death of Samuel E. Hobson. The Columbia Salvage and Wrecking Company or the officers of that company, are the parties who are responsible for the negligence which resulted in the death of Samuel E. Hobson. In the business of demolishing the structures in Jackson Park, they decided it would be better to use explosives to further their business interests and remove the structures as rapidly as possible, and in order to do so, directed that a blast should be fired without any permission whatever, which resulted in the untimely death of Samuel E. Hobson.

They and they alone are responsible for the accident.

It also appears from the files in this case, that an action of trespass on the case, was instituted against the South Park Commissioners in the Cook County circuit court, by the present claimant. That court decided that such an action would not lie and dismissed the proceeding, rendering judgment in favor of the Park Commissioners for costs, and that judgment remains in full force at this date. The judgment rendered in that case judicially determines that the Park Commissioners were not legally liable for the death of Hobson.

A recent case decided by Mr. JUSTICE WATERMAN—*Charles Bacher* v. *The West Chicago Park Commissioners*—is in point. That case holds that the West Chicago Park Commissioners is a municipal corporation having certain limited powers granted to it by the legislature. That members of the board of West Chicago Park Commissioners are agents by whom, in part, the people of the State carry on the government. Their functions are generally political and concern the State at large although, they are to be discharged within the

Town of West Chicago. That these Park Commissioners come within the term of officers.

Wilcox v. *The People*, 90 Ill., 188;
West Park Commissioners v. *The City of Chicago*, 152 Ill., 363.

"Ordinarily the principal is liable for the negligent acts of its servants in the course or line of his employment, in consequence of which a third person suffers injury, upon the principle of respondent superior, but a distinction exists in the case of municipal corporations, as a municipal corporation is not liable for the tortious acts or negligence of its officers.

Dillon on Mun. Corps., Secs. 975-978.

Public or State officers with only certain powers and duties enjoined upon them by the statutes do not come within the doctrine of respondent superior. Applying this rule, the South Park Commissioners being merely appointive officers, with certain statutory powers and mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance and request, but for the purpose of aiding and assisting the sovereign power of the State in carrying on the functions of the government and they are not liable for the negligence or tortious acts of its servants. This distainction exists between municipalities created alone at the instance of the sovereign power by general law and cities, incorporated towns and villages created for their own benefit.

Where municipalities are created and instituted by general law, there can be no liability for an action for damages, occasioned by the negligent acts of its servants.

Waltham v. *Kemper*, 55 Ill., 346.

At common law an action will not lie for injuries occasioned by the negligence of the officer or servants of counties, townships, school districts, road districts, or drainage districts, for injuries resulting from the negligent performance or non-performance of their duties, "and there is no distinction in the application of this

rule between neglecting to do or perform an act which ought to have been performed, and the performance of a duty in a negligent manner."

2 Dil. on Mun. Corps., Secs. 962-963;
Hedges v. *County of Madison*, 1 Gil., 567;
Town of Waltham v. *Kemper*, 55 Ill., 346;
Russell, Admr. etc. v. *Town of Steuben*, 57 Ill., 35;
Hollmbeck v. *Winnebago County*, 95 Ill., 148;
Elmore v. *Drainage Comrs.*, 135 Ill., 269;
Cooney v. *Hartland*, 95 Ill., 516.

The rule laid down in *Waltham* v. *Kemper*, 55 Ill., 340, is as applicable to counties and other governmental agencies or corporations, as it is to towns; but as to cities and villages, a different rule applies and a distinction between the two classes of corporations is clearly pointed out.

The Board of South Park Commissioners is a body politic and corporate and belongs to the first class. It was created by an act of the legislature, approved February 24, 1869. It is the State, through the Commissioners appointed by the Governor, doing the work of creating and maintaining the parks. They are responsible to the Governor, and no one but him, and are removable by him.

The municipality pays only the expenses of carrying on the work and has no voice as to what shall be done or who shall be employed. It was not the intention of the legislature that the Board of South Park Commissioners, as a corporation, should have the powers or assume the responsibilities of a city or village. The money so raised by taxation is raised for certain specific purposes, and cannot be diverted from those purposes to the payment of damages caused by the negligence of its officers or servants. It cannot be said that the Board of South Park Commissioners are agents of the State in any such sense as would make the State in any way responsible for the negligence of its officers.

The Board of Park Commissioners is a mere munici-

pal corporation with the power to assess and collect taxes with the Park District so created for the special corporate purposes of its creation.

The People, ex rel v. *Salomon*, 51 Ill., 37;
The People v. *Morgan*, 90 Ill., 558;
Dunham v. *The People*, 96 Ill., 331.

"It is a familiar rule, however, that officers of public corporations are personally responsible for their own negligence or misconduct in the performance or attempted performance of their official duties."

Tearney v. *Smith*, 86 Ill., 391;
Skinner v. *Morgan*, 21 Ill. App., 209;
Harris v. *Carson*, 40 Ill. App., 147.

The claim filed here, however, is against the State, and in the absence of any authority making the State expressly liable for the negligence or misconduct of officers of public corporations, it cannot be held liable. In this case it has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How then can it be now claimed that the State is liable for the acts of the Board of South Park Commissioners? Such a claim can have no foundation. In this case the remedy is clearly against Mr. Kniffler, who fired the blast, or against the Salvage Company in whose employ Mr. Kniffler was acting as mechanical engineer.

This claim is founded on Chapter 70 of the statutes concerning "Injuries to Person."

Causes of action for injuries resulting in death, did not survive to the executor or administrator at common law. To remedy this defect our statute was enacted.

It provides "that whenever the death of a person shall be caused by wrongful act, negligence or default, and the neglect or default is such as would, if death had ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwith-

standing the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

The right to maintain an action after the death of a party injured, therefore, depends entirely upon whether if death had not ensued the decedent could have maintained an action and recovered damages against the party sued.

Holton v. *Daly*, 106 Ill., 131.

In case Samuel E. Hobson had not died from the injuries which he received, at the time of the blast, but had lived possibly maimed for life, would there have been any claim against the State of Illinois?

Would not Mr. Hobson have been compelled to have instituted suit against the Salvage Company or some of its officers? Would any one contend they were not liable to respond in damages for the injuries he thus sustained?

The State is not bound by or included in any act of the legislature unless expressly named or necessarily implied, to give effect to the act; and the State of Illinois is not included in the chapter of the revised statutes above quoted. That act applies only to private individuals, associations or corporations.

We are therefore of the opinion that there is no liability existing against the State of Illinois for the payment of this claim; and believing that neither justice, equity or law demands the payment of this claim by the State; and believing that it would be laying down a rule, that could not be safely followed hereafter, we are of the opinion that this claim should not be allowed.

Claim dismissed.

ELIJAH R. SHERMAN

v.

THE STATE OF ILLINOIS.

Opinion filed August 10, 1898.

CONTRACTS—*with State officer for services; reasonable compensation allowed.* A Master in Chancery being requested by the Attorney General to take evidence and make report thereof will be allowed a reasonable and customary compensation therefor.

On the 27th day of October, A. D. 1893, the case of the People of the State of Illinois against the Illinois Central Railroad Company was pending in the circuit court of the United States for the northern district of Illinois, and was by an order of the court entered therein referred to the claimant as master in chancery to take proof and report the same to the court.

The claimant, as such master in chancery, took the testimony on behalf of the State of Illinois and presented his bill for the same and the Legislature at its session in January, 1895, passed an appropriation for the amount of bill then presented, being the sum $387.20, which was paid in July following.

After this bill had been presented and paid it became necessary to take further proofs in behalf of the State in rebuttal, and upon the request of the Attorney General the master in chancery took such additional evidence and made report thereof to the court pursuant to the order of reference and for such additional service charged and was allowed by the court $75.

This additional allowance was made on the 12th day of March, A. D. 1897, on due notice to the counsel representing the State of Illinois, and the order was entered by the circuit court of the United States fixing the compensation for such additional service at the sum of $75.

Such additional service was reasonable and satisfactory to the Attorney General representing the State and was the usual customary and reasonable fees and compensation of the masters in chancery in circuit courts of

the United States, and has never been paid. It is therefore considered by the Commission that said sum so claimed by the claimant is reasonable and just and that said sum of $75 is a proper allowance to be made and the sum of $75 is accordingly awarded the claimant.

THE ARMS PALACE AND STOCK CAR COMPANY

v.

THE STATE OF ILLINOIS.

Opinion filed August 10, 1898.

CONTRACTS—*with State to transport horses to encampment I. N. G.* Claimant made contract with Adjutant General for furnishing cars for transportation of horses from Bloomington and Chicago to Springfield and return. Court reviews evidence and finds such cars were necessary and were used for transportation of horses for the I. N. G. encampment at Springfield, Illinois, and makes award.

It appears from the statement of claimant, and the papers on file before the Commission, that the claimant, The Arms Palace and Stock Car Company is a corporation organized under the laws of the State of Ohio, and qualified to do business in the State of Illinois, and in pursuance of the business for which said corporation was organized, that of furnishing horse and stock cars for the transportation of animals, did on the 10th of July, 1896, enter into a contract with the military authorities of the State of Illinois represented by C. C. Hilton, Adjutant General of the State of Illinois, to furnish one car for the transportation of animals from Chicago to Springfield and return; for which service the State of Illinois became bound through its officers to pay to the said claimant the sum of thirty-two dollars. And afterward on July 25, 1896, the claimant entered into a contract with the same representatives of the State of Illinois to furnish two cars for the transportation of stock from Bloomington, Illinois, to Springfield, Illinois, and return for which service the said officers of the State of Illinois agreed to pay the sum of forty-eight dollars to the claimant.

It further appears from the papers on file before the Commission, that the said cots were necessary and were used for the transportation of horses for the use of the I. N. G. encampment at Springfield, Illinois.

It further appears from the files that the claimant in every way fulfilled his contracts and that the claimant has not received any part of the consideration named in the contracts.

We do not deem it necessary or essential to go into the facts relative to the filing of this claim before this Commission; suffice it to say that in the judgment of the Commission the services were rendered by the claimant for the benefit of the State of Illinois, in a legitimate channel, and at the request of persons in authority to make such request, and to legally bind the State by such contracts. In the judgment of the Commission the charges are reasonable and should have been paid at the time the service was rendered.

The judgment of the Commission is that eighty dollars, the full amount demanded by the claimant is awarded and appropriation for the same recommended.

EDWIN S. MUNROE

v.

THE STATE OF ILLINOIS.

Opinion filed October 5, 1898.

RENT OF ARMORY—*when claims will not be allowed.* When a claimant for additional rent on a building let by him as an armory has signed vouchers or receipts for the amount of the rent regularly, which vouchers were sent to the Auditor as a basis for the warrants which he was to draw money upon, his claim for additional rent will not be allowed.

This was a claim filed March 15, 1895, by Edwin S. Munroe, for a supposed balance for rent of armory. The claimant alleges he was the owner of a building in Joliet on the corner of Chicago and Clinton streets, the third story of which was used for an armory for company "B," 3d Infantry, formerly 4th

Infantry, which was rented November 1, 1883, and was occupied by said company from that time up to the filing of this claim at an annual rental of four hundred dollars per year.

The evidence shows it was paid annually by Captain F. A. Jackson, commanding the company, which sum the evidence discloses was mostly derived from the State of Illinois on warrants of the Auditor.

It also appears in evidence that from November 1, 1889, to January 1, 1893, five hundred dollars was claimed as rent, when the claimant was notified that no more than four hundred dollars annually would be paid. The deficiency claimed is $216.00 on a basis of five hundred dollars per year from January 1, 1889, to January 1, 1893. The rental was with Captain Jackson and the deficiency period claimed is from July 1, 1890, to January 1, 1893.

The evidence discloses claimant was paid for that period as follows:

January 1, 1891	$200.00
August 17, 1891	200.00
March 25, 1892	234.00
October 19, 1892	200.00
February 20, 1893	200.00
Total	$1,034.00

The evidence discloses that vouchers or receipts for the amount of the rent were signed by claimant for his pay regularly. These vouchers were sent to the Auditor as a basis for the warrants which he was to draw money upon. These receipts were required in advance in triplicate which claimant was required to sign, and claimant when he signed these vouchers knew precisely what he was being paid from the State for the use of his armory.

Claimant in his evidence, however, states he received money collected by Captain Jackson from outside sources to pay additional rent to make up the deficiency.

Claimant in his evidence states that he did not expect Captain Jackson or company "B" to be personally liable for his rent, and states that practically all the money due for rentals came through warrants from the Auditor of Public Accounts.

The evidence shows that claimant has receipted the State in full for the period of time claimed and that his vouchers then placed on file were introduced covering the identical period claimed by the claimant, showing conclusively that he has been paid in full by the State all that he is entitled to. We are therefore of opinion the award should be denied.

C. KINNEY SMITH

v.

THE STATE OF ILLINOIS.

Opinion filed December 14, 1898.

WATERS—*land damaged by water from feeder to canal.* The Commission reviews the evidence and awards the claimant damages in accordance with an agreement with the Attorney General.

It appears from the files in this case that the claimant, C. Kinney Smith, was the owner of certain real estate situated in Sections One (1), Six (6) and Seven (7), in township number thirty-three (33), range three (3) east of the 3d P. M., the same lying north of Fox river near the city of Ottawa, in the State of Illinois. It appears from the statement of the claimant as set forth in his claim that in the months of April and May, 1892, and also in the month of March, 1893, the said premises were partially overflowed by water from a feeder of the Illinois and Michigan canal which had been so negligently constructed as to be incapable of carrying the water in times of flood such as happened on the different times mentioned, thereby causing damage to the said property of claimant.

It further appears that on the 21st day of August, 1893, the claimant filed in this Commission his claim for

damages amounting to the sum of four thousand two hundred and twenty-five dollars.

The said claim has been pending in this Commission ever since. A large volume of the evidence was taken on behalf of the claimant and also by the State, but prior to hearing of arguments by either party before this Commission, the claimant through his attorney agreed with the Attorney General on behalf of the State to accept the sum of two hundred and fifty dollars in full of all damages set forth in said claim.

The Commission after examining the evidence and hearing the statement of the Attorney General concerning the same are of the opinion that the payment of the said amount to the claimant would be no more than simple justice, and we therefore award to the claimant the said sum of two hundred and fifty dollars and recommend that the legislature appropriate such amount to pay said award.

JAMES F. GREEN

v.

THE STATE OF ILLINOIS.

Opinion filed December 21, 1898.

MILITARY SERVICE—*injury to soldier through defective fire arm.* Where claimant is injured in the performance of his duty, as a member of the National Guard, acting under command of his superior officer in camp, is guilty of no carelessness or negligence whatever on his part contributing to said injury and said injury is caused by an old defective rifle, unfit for use and furnished him by the State, said rifle exploding accidentally, causing laceration of his thumb and left hand and rendering claimant permanently injured, claimant can recover.

The petition in this case alleges that James F. Green enlisted as a member of company "I" of the Fifth Regiment of the Illinois National Guards on the 28th day of June, A. D. 1897; that on the 31st day of August, 1897, company "I" of which the claimant was a member, was in camp at Camp Lincoln in the State of Illinois, by order of the proper authorities of said State for the purpose

of duty; that on said day the claimant was ordered by his superior officer to engage in target practice; that in obedience to said order, he engaged in target practice and while so engaged in target practice and while in the exercise of due care and caution for his own safety and without any negligence on his part, the rifle which he was using exploded and greatly lacerated and wounded his hand, nearly tearing off his thumb by which the claimant was permanently deprived of the perfect use of his left hand; that he suffered great pain and anguish and for the space of three months he was wholly disqualified from performing any labor or earning a livelihood; and that he has been permanently injured so that his ability to earn a livelihood is materially decreased; that the rifle he was using at the time was one furnished him by the State; and was an old and defective rifle and unfit for the use for which it was required.

The claimant introduced in support of his claim, the evidence of Col. James S. Culver, who was in command of the regiment at the time of the injury; the evidence of Captain E. S. Vickery who was in the immediate command of the company at the time; and the evidence of James L. Evans who was surgeon in charge of the Fifth Infantry at the time of the accident and who took charge of Mr. Green immediately after his injury; and the evidence of Dr. E. W. Ames, who was a physician on the field near Mr. Green at the time of the accident; and, also, the evidence of Oliver P. White, who was inspector of rifle range and only a few feet from the petitioner at the time of the injury.

These witnesses fully establish the claim of the petitioner and show conclusively that Mr. Green was injured in the line of his duty, acting under the command of his superior officers during the encampment at Camp Lincoln in August, 1897; and that he was guilty of no carelessness or negligence whatever on his part contributing to said injury; that the rifle exploded accidentally causing the laceration of the thumb of the left hand

of Mr. Green and rendering him permanently injured. The nature of the injury is substantially that of the entire left thumb reaching to the middle line of the palm of the hand to the wrist; that the thumb was blown back on the hand and was hanging by only about three-fourths of an inch of the skin and a little flesh; the bones were badly shattered and the evidence shows about twenty pieces of the bone were taken out of the wound.

Considering the nature and extent of the injury as shown by the evidence in this case and that the claimant's thumb is shriveled and stiffened at the joint and that the injury is a permanent one, we are of the opinion that the claimant is entitled to an award of seven hundred and fifty dollars; and that amount is fixed upon by the Commission as a just and proper allowance. Seven hundred and fifty dollars is therefore awarded to claimant.

LINCOLN H. HOSS

v.

THE STATE OF ILLINOIS.

Opinion filed December 21, 1898.

RESPONDEAT SUPERIOR—*State not liable for torts of its officers.* The State is not liable for the torts and negligent acts of its officers.

While the accident to the claimant in this case is to be deplored, and while the petition shows the injury is permanent, in the opinion of the Commission we have no power to bind the State.

The petition shows the claimant was acting under the direction of a foreman of the State's prison, and while obeying his orders fell from a derrick and was badly disabled. It also alleges that the surgeon in charge failed to perform his duty and by neglect and unskillfulness the result of his treatment was unsatisfactory to the claimant, rendering him a cripple for life.

To the petition, a demurrer was filed by the State. Admitting the truth of the allegations of the petition,

we are of the opinion that the State is not liable for the torts and negligent acts of its officers. This view is fully sustained by the following line of authorities, viz: Story on Agency, Sec. 319; The State Bank, Admr., etc. v. The State, decided by the Commission at its August session, 1897, and authorities there cited: Jacob Schmidt v. The State of Illinois, decided by the Commission at the August session, 1899, and authorities there cited.

Viewing this case as we do and believing ultimately that there can be no allowance made by this Commission it would be useless expense incurred if the Commission should overrule the demurrer in this case and permit the claimant to introduce evidence which would only involve the expenditure of money and ultimately result in no good.

If there is any liability in this case, it is not against the State, but against the officers personally; that the State cannot be held liable for the acts of its officers, however negligent, is a rule too well established to admit of controversy. Nor do we believe the Commission is authorized by any statute to change the rule of the common law so well established, even though such a rule of necessity frequently works a great hardship.

Believing, therefore, as we do that the demurrer to the petition is well taken, we feel disposed to sustain it, and therefore dismiss the petition.

JOHN J. CLANCY, AUGUST BUCHHOLZ, MICHAEL KILLEEN AND JOHN BUNES

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

PRACTICE—*rules of procedure of Commission must be followed.* Failure to comply with the rules of Commission providing for filing of claim will support motion to dismiss.

The claimants in this case have failed to file a claim as required by Sec. 4 of the act creating this Commission and prescribing its powers and duties.

The Attorney General on the 2d day of August, A. D. 1898, filed his motion in the office of the Auditor to dismiss the same, there being nothing but a copy of a bill introduced in the House of the 40th General Assembly.

It is therefore ordered by the Commission that said bill be stricken from the files and that this claim be dismissed.

JOHN H. HAMLINE

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

SERVICES—*rendered by appointment with Attorney General.* When an appointment has been made by the Attorney General and the claim for services is reasonable, claim will be allowed.

This is a claim filed in the Auditor's office in due form by the claimant, John H. Hamline, claiming an amount due for services rendered the State of Illinois under an appointment had with the Attorney General.

The evidence is conclusive that the appointment was made and the services were rendered and that a reasonable charge for the services would be $500.00; and that the claimant expended an amount of $31.00 for the printing of briefs and some other sundry matters.

Therefore it is ordered that the claimant be awarded the sum of five hundred thirty-one dollars.

ARTHUR D. MARTIN

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

CONTRACTS—*when receipts showing settlement of account are conclusive.* When claimant has given receipts showing an adjustment of his account they are conclusive in the absence of proof of fraud or mistake.

This is a claim filed by Arthur D. Martin in due form in the Auditor's office, on February 25, 1898, for the sum of $34,737.19, of which sum it is alleged to be for a balance of commission due the claimant for sales of chairs sold by claimant under two certain contracts with the Commissioners of the State Penitentiary at Joliet, Illinois, acting in behalf of the State of Illinois, and a balance of $14,000.00 for damages alleged to have been sustained by said claimant by reason of a breach on the part of the said Commissioners acting in behalf of the State of Illinois of the said two certain contracts.

On the hearing of this cause, claimant, by his attorneys, waived his claim to the $14,000.00; and the only matter in controversy for this Commission to pass upon is the claim of $20,737.19.

The evidence shows that the claimant entered into a contract with the Board of Commissioners of the Illinois Penitentiary at Joliet acting on behalf of the State of Illinois, on the 20th day of June, 1893. The conditions of this contract were that the claimant was to devote his time exclusively to the management of the chair factory at the State prison at Joliet, including the sale of all manufactured products.

His compensation was to be fifteen per cent of the gross sale of said business as long as the earnings of the men employed amounted to less than sixty cents per man per day; and the additional sum of five per cent, making the total commission twenty per cent, when the business upon its gross products developed an earning

of sixty cents per man employed per day after certain charges for interest of the money invested in said plant and costs per power and other items were deducted.

On the first day of September, 1894, another contract was entered into, the conditions of which in relation to the compensation, were substantially the same as the contract of June 20, 1893.

Both contracts contained other provisions which are not necessary to be considered in passing upon the merits of this claim.

The claimant's testimony is: That he operated under these two contracts and that from October 18, 1893, to February 20, 1896, the sales of chairs made by him under these two contracts amounted to $339,442.24, of which amount calculated on a basis of twenty per cent. commission, his earnings would amount to $67,888.45; of which amount, he credits the State with having paid him $47,151.26, leaving a balance as he claims to be due him of $20,737.19.

The claimant insists that the major part of this amount which he claims to be due is upon the extra five per cent. commission as provided in contracts; that the settlements made with him by the State were upon a basis of fifteen per cent; that the Commissioners and the Warden in making these settlements, made it upon a basis of fifteen per cent; and that the earnings of the men were sixty cents per day per man employed and that he is entitled to the twenty per cent commission on the gross sales as in the two said contracts provided.

The only positive evidence introduced by the claimant upon this point is the evidence of Warden Allen, which was contained in the report of an investigation committee appointed by the Senate of Illinois 39th General Assembly.

This evidence was introduced by the claimant under objections of the Attorney General and was allowed to be introduced and passed upon in the final hearing of this case.

The Commission is of the opinion that this evidence introduced in the form it was, is not competent and therefore is not considered in arriving at a judgment in this case.

The Commission is also of the opinion that there is not sufficient evidence to establish the fact that the earnings of the men amounted to sixty cents per day per man employed.

The State has introduced a number of receipts from the claimant, which, in the opinion of the Commission, are conclusive in the absence of proof of fraud or mistake. Many of the receipts contain a statement of the settlement for a period of time and there seems to have been an adjustment in full of accounts between the parties.

We are of the opinion that there is not sufficient evidence introduced to sustain the claim.

The judgment of the Commission is the claim be denied and the petition dismissed.

ANTON GRAJHWSKI

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

PRACTICE—*procedure prescribed must be followed.* Law governing prosecution of claims before the Commission must be followed, otherwise claim will be rejected.

The claimant in this case had a bill introduced for his relief before the 40th General Assembly but received no aid therefrom, he thereupon filed a copy of said bill before this Commission on the 21st day of May, 1897. No evidence was taken nor was there any proper claim filed as required by the statutes governing the filing of claims before the Commission. At the present session of the Commission the Attorney General on behalf of the State interposed a motion to dismiss the same on the ground that no claim had been filed in accordance with

the law. The Commission held as heretofore in the case of Schultz v. The State, that the ground of the motion was well founded and dismissed the case, holding that claimants desiring relief at the hands of this Commission must follow the law governing the prosecution of claims before the Commission.

ISAAC R. HITT, ET AL.

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

Separate Opinion by J. C. McKenzie, Commissioner.

1. STATUTE OF LIMITATIONS—*all unliquidated claims must be filed within two years.* The statute of limitations of 1847 provides, "that all claims for unliquidated damages against the State must be filed within two years after the right of action accrues or be forever barred."

2. BASIS—*act of 1857 still in force.* The statute of limitations of 1847 was not repealed by implication upon the passage of the act creating a Commission of Claims.

3. FEES AND SALARIES—*manner in which State agents may be appointed and paid.* The only case in which the State could be held liable for the payment of agents such as are considered in this case, is when the party making the appointment of such agents is duly empowered by an act of the General Assembly authorizing such appointment.

The amount demanded by claimants in this case, (something over thirty-six thousand ($36,000.00) dollars) as set forth in the petition of the claimants and by the evidence in support of their petition is for services rendered by claimant Hitt and John A. Logan and W. W. Wiltshire, deceased husbands of Mary S. Logan and Catherine Wiltshire respectively; the services being rendered by them in behalf of the State of Illinois, in prosecuting against the United States government, first, the claim for advances made by the State to the government to carry on the war under the Act of July 27, 1861; second, the direct tax claim; and third, the claim of five per cent on all public lands located with military land warrants in the State of Illinois.

The claimants set forth in their petition that claimant Hitt has been laboring for many years on all of the above claims under the authority given him by Ex-Governors Beveridge and Culfom, to act as State agent for the State of Illinois in the prosecution of said claims, and that John A. Logan and W. W. Wiltshire were each commissioned by the Governors of the State of Illinois in their lifetime to prosecute all of said claims and that they rendered valuable service to the State in recovering back from the government large sums of money, and that in the prosecution of said work large sums of money were expended and laid out by said Hitt, Logan and Wiltshire, for which claimants now seek reimbursement from the State.

The claimants sought relief at the hands of the General Assembly and a bill was introduced in the Fortieth General Assembly but failed to pass and was referred to this Commission.

On November 5, 1807, by leave of the Commission, claimants filed their amended petition, to which the State filed four pleas. The third being the five years' statute of limitations and the fourth being the two years' statute of limitations. To the said last plea, claimants interposed a demurrer. The State further set up in bar of claimants right to recover section 19 of article 4, of the Constitution of the State.

Clnimants offered in evidence in support of their claim the depositions of claimants, Hitt and Logan, Ex-Governor Beveridge of Illinois and Ex-Governor Crawford of Kansas, also certain reports of said Hitt made to the Governor of Illinois while claiming to act as such agent for the State.

The State offered in evidence certified copies of the so-called Commissions relied upon by claimants as a basis for their claim, and many letters and documentary evidence tending to throw light on the controversy.

The case was heard before the full Commission in December, 1898; claimants being ably represented by J. Otis Humphrey and the State by C. A. Hill, Assistant

Attorney General for the State, and by agreement of counsel the demurrer was allowed to stand until after the hearing of the evidence and arguments of counsel in order to better determine the force of the same.

We deem it our duty after hearing the contentions of the party to pass upon the demurrer filed by claimants before considering the merits of the case. The two years statute of limitations is found in the Act of 1847 (laws of Illinois) which prescribed the manner of prosecuting claims against the State and specifically set forth that all claims for unliquidated damages against the State must be filed within two years after the right of action accrues or be forever barred. The contention of counsel for claimants is that the statute of 1847 prescribing the manner of prosecuting claims against the State was repealed by implication upon the passage of the later act creating this Commission, and consequently the statute of limitations therein set forth was also repealed notwithstanding the act creating this Commission does not prescribe any limitation whatever to the filing of claims against the State. In view of the fact that the new act does not prescribe any limitations whatever to the filing of claims against the State, we are of the opinion the contention of the able counsel is not sound; that the rule of repeal by implication cannot be applied in this case; and while we do not in this opinion hold that the statute of limitations can be plead as a bar to claimants right to recover in this case, we are still of the opinion (and have so held before) that in all cases where the statute of limitations may be plead at all the two years statute is a complete and perfect defense. In our opinion had the claimants' demand any legal standing, or in other words there had been a contract made with the State not expressly forbidden by the Constitution we are of the opinion that the statute could not be relied on as a bar in this case, however we are forced to believe that the defense set up by the State, that admitting it to be true that the claimants were armed with

such Commissions as claimant Hitt testified to in his deposition, even then they would have no right to recover from the State under section 19, article 4, of the Constitution set up by the State which 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 under any agreement or contract made without express authority of law; and also such unauthorized agreements or contracts shall be null and void." This provision of the Constitution is too plain to admit of discussion. We hold that the only way in which the State could be held to respond in a matter of this character is where the party making the appointment is duly empowered by an act of the General Assembly authorizing such appointment, and we hold that under the very plain provision of the Constitution we are helpless to aid claimants, and further believe that the Legislature is powerless to act in their behalf and any bill making an appropriation in behalf of these claimants would in our opinion be unconstitutional and void. As to the merits of this case we do not think it necessary to discuss the matter but briefly: There is not a particle of evidence in the record tending to show that either claimant Hitt, John A. Logan or W. W. Wiltshire were ever legally appointed or authorized to act as State agent for the State of Illinois in the prosecution of any claims set forth in the petition of claimants. The evidence shows that the only services rendered by John A. Logan and W. W. Wiltshire were in relation to the five per cent on the military land warrants and that the Supreme Court of the United States decided that the State could not recover; and it is admitted by all the claimants that the parties rendering the services were to receive no compensation from the State unless successful in the prosecution of the matters they had in charge. So far as the services of John A. Logan and W. W. Wiltshire are con-

cerned they recovered nothing for the State and consequently under their own admissions are not entitled to any compensation from the State. As to claimant Hitt's right to recover there is no evidence in the record that tends to show that he was legally appointed agent for the State of Illinois to even look after any of the claims, his evidence to the contrary notwithstanding. He boldly testifies that the Commission he received from Ex-Governor Beveridge was broad enough and in fact covered all such matters. He attempts to corroborate his testimony on that point by the deposition of Ex-Governor Beveridge. The Commission as shown by a certified copy in evidence which he received from Beveridge, was simply a Commission appointing him as agent for the State to look after the swamp land located in this State and for which services he was to look to the various counties for his compensation. He is absolutely contradicted in his testimony by documentary evidence that cannot be controverted.

The Commission he received from Ex-Governor Cullom was without authority of law and Ex-Governor Cullom expressly stated as did Ex-Governor Hamilton afterwards, in their communications with Hitt in regard to the same that they had no power to bind the State for compensation for such services. There is no evidence that through the efforts of claimant Hitt any money was ever recovered from the United States government on any of said claims except it be the fifteen hundred and thirty-two dollars which he speaks of as being part of the money advanced by the State to carry on the war and which has since been paid to the State of Illinois. Had claimant Hitt been acting under legal authority as the duly authorized agent of the State of Illinois, he would be entitled to some compensation for such services, but we are of the opinion that no such authority was ever given him.

The generosity of claimant Hitt towards Mrs. John A. Logan and Mrs. Catherine Wiltshire in giving to them one-third of the amount claimed in this case when the

evidence plainly shows that they are not entitled to a single dollar of compensation, seems very strange indeed in the light of Hitt's own testimony that he has spent all the better years of his life in the prosecution of these claims while the other gentlemen spent but a few months and that in a fruitless effort to recover on one of said claims.

We are loath to believe that claimant Hitt wilfully falsified his statements concerning this matter, yet we cannot conceive how any sane man, intelligent and well posted on such matters as Mr. Hitt must have been, would follow a will-o'-the-wisp, as he has apparently done. In short we are of the opinion that this claim is absolutely without any foundation, legal, equitable, or moral, and that it would be a fraud upon justice to allow it. Therefore the claim is denied.

ISAAC R. HITT, ET AL
v.
THE STATE OF ILLINOIS.

Opinion filed December 30, 1903.

Separate opinion by W. S. Louden, Commissioner.

FEES AND SALARIES—*no extra compensation to be granted public officer after service rendered on contract.* Under Section 10 of Article 4 of the Constitution of 1870, which provides, "That 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 shall make appropriations for expenditures incurred in suppressing insurrection or repelling invasion," an agreement made with a party whereby he is to attempt to obtain a settlement of war claims owing the State by the United States Government and look to the legislature for his pay, is void.

The claimants in this case, Isaac R. Hitt, Mary S. Logan, widow of John A. Logan, deceased, and Catherine

Wiltshire, widow of W. W. Wiltshire, deceased, claim an amount due from the State of Illinois for alleged services rendered by authority averred by petitioners to have been given Isaac R. Hitt by Governors John L. Beveridge and Shelby M. Cullom to represent the State of Illinois in any and all claims of the State of Illinois against the United States and press them to a settlement.

This alleged authority was granted to Isaac R. Hitt by Governors Beveridge and Cullom with the express understanding that the said Hitt was to look to the Legislature of the State of Illinois for compensation for services.

The petition avers that Hitt employed General John A. Logan and Hon. W. W. Wiltshire to assist him in representing the State in these claims; that the services of General John A. Logan were rendered during the years of 1877, 1878 and 1879 while he was not in the employ of the United States Government; that the understanding between said Hitt, Logan and Wiltshire was that they should share equal in any compensation there should be allowed by the State of Illinois for services rendered; that through the efforts of said Hitt, Logan and Wiltshire, an act of Congress was passed in 1891 refunding to the State of Illinois, the sum of $274,569.63.

At the session of the 39th General Assembly of the State of Illinois, these claimants presented their claim and a bill allowing the claimants the sum of $30,000 was passed by the Senate and a similar bill for like amount was passed by the Senate of the 40th General Assembly. At the 40th General Assembly, a resolution was adopted by the House of Representives referring the bill to this Commission.

At the August session, 1897, of this Commission, these claimants by leave of this Commission, filed their amended petition.

The State filed four pleas to this claim; the fourth which is known as the two years statute of limitations,

to which fourth plea, a demurrer was filed by claimant's attorneys. The State also set up and relied upon as a complete defense to this claim, section nineteen of article four of the Constitution of 1870.

The opinion of the Commission is, that the two years statute of limitations does not apply in this case; and the demurrer is therefore sustained.

As to the other defense relied upon by the State, section nineteen of article four of the Constitution of 1870, which provides, "That the General Assembly shall never grant or authorize extra compensation 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 shall make appropriations for expenditures incurred in suppressing insurrection or repelling invasion."

In the opinion of the Commission, this is a good and complete defense against the claim; and upon this constitutional provision alone, the claim is, by this Commission, denied.

The testimony of the Governors making the appointment is all to the effect, that they knew that they had no authority to bind the State, nor is there any evidence that they attempted to do so. Hitt in his testimony says, the understanding was that he was to look to the Legislature for payment.

Governor Beveridge in his testimony says, "I requested Hitt to look after any and all claims of the State of Illinois against the United States Government and to press them to a settlement with the understanding that Hitt was to look to the Legislature of the State for compensation of services." He also says, "I know of no special authority for the appointment of Hitt."

Cullom in his appointment says, "That this authority is given with the express understanding that no liability

will be created under it against the State for costs or expenses of any kind."

The judgment of the Commission is that this claim be denied and the bill dismissed; but it is also decided by the Commission that each Commissioner should prepare an opinion as to the finding of the facts in the evidence so that if the claimants desire that they may prosecute their claim before the Legislature.

The first evidence to be considered is Hitt's appointment as State agent as alleged in the claimants' petition. Taking the testimony first of Governor Beveridge, interrogatory third: "If you at any time during said term employed Isaac R. Hitt to act on behalf of the State of Illinois to prosecute and obtain from the government of the United States, certain war claims due the State and principally the claim known as the direct tax claim, if so, please state the character of said employment and the terms thereof as nearly as you can?" Answer to the third interrogatory: "In answer in part to the interrogatory I offer a copy of a letter dated June 8, 1895, which letter was written by me, to be attached to this deposition as 'Exhibit A.' According to my best recollection as Governor of Illinois, I requested Isaac R. Hitt, who had been appointed agent of the State of Illinois in swamp land matters, to press to settlement all claims of Illinois against the United States of every kind and nature and gave him written authority therefor, with the understanding that he was to meet his own expenses and look to the Legislature of the State of Illinois for his compensation for money expended in services rendered in this behalf." The letter referred to reads as follows:

"CHICAGO, ILLINOIS, June 8, 1895.

I. R. Hitt, Esq.,
Chicago, Ill.,

Dear Sir:—

In pursuance of a joint resolution of the Illinois Legislature passed during my gubernatorial term, I, as Governor of the State, appointed you State agent to represent

the interest of the State and Counties under the swamp land grant.

Hon. H. D. Cook, of McLean county, formerly representing the State at Washington in the settlement of war claims having resigned, I requested you to look after any and all claims of the State of Illinois against the United States Government and to press them to a settlement with the understanding that you were to look to the Legislature of the State for compensation for your services.

Yours truly,

(Signed.) JOHN L. BEVERIDGE."

Certified copy of commission issued by Governor Cullom was dated July 20, 1880, authorizing Isaac R. Hitt to appear as agent or attorney for the State of Illinois "in any of the departments of the United States government, to secure the allowance and payment of any sums that may be due and owing to the State of Illinois on account of expenses, costs or charges incurred by the State in the war of Rebellion. This authority supercedes that given to R. G. and E. C. Ingersoll, July 2, 1878, and which is now resigned by Hon. R. G. Ingersoll, surviving member of the firm. This authority is given with the express understanding that no liability will be created against the State for costs and expenses of any kind whatsoever.

Very respectfully,

(Signed.) S. M. CULLOM, *Governor.*"

Hitt in his testimony says, "that the Beveridge and Cullom commission cover the direct tax. And Beveridge also states in a general way, I must depend upon the Legislature. The Cullom commission was some time in 1880."

The next question to be considered is, "*Was there any money recovered by the State from the United States government?*" The three following receipts were introduced in evidence, viz:

First: Date November 29, 1890, for the sum of $1,532.92, from Governor Fifer, "From appropriation made

by the U. S. government refunding to State expenses incurred in raising volunteers, Act July 27, 1861."

(Signed.) CHARLES BECKER, *State Treasurer*.

Second: Date April 23, 1891, for the sum of $956,750.00, received of Governor Fifer, "Refunding direct tax, levied by general government act of Congress, August 5, 1861."

(Signed.) E. S. WILSON, *State Treasurer*.

Third: Date March 30, 1893. "Received of John P. Altgeld, Governor of Illinois, seventeen thousand eight hundred seven and 04-100 dollars, being the amount of direct tax levied by the act of August 5, 1861, found due the State of Illinois on settlement with government of United States."

(Signed.) RUFUS N. RAMSAY, *State Treasurer*.

The next question to be considered is, "*Was the money recovered through the efforts of Isaac R. Hitt, John A. Logan and W. H. Wiltshire?*" Isaac R. Hitt's testimony: "The work done by me in the collection of the direct tax was begun in 1877. At that time, I employed Logan and Wiltshire to assist me in this claim. In 1877, Logan, Wiltshire and myself went to the war department and to the treasury department to obtain the data. We consulted at that time and many times afterwards during 1878 with Ex-Governor Samuel J. Crawford of Kansas, who was agent for the State, Prescott and Earl, agents for South Carolina, Wailes, agent for State of Maryland, Mullen, agent for California, Belknap, agent of Iowa, Lowe, of Iowa, and Garland, of Arkansas. We frequently consulted with the Attorney General's office, also Commissioner Raum of the Internal Revenue department and with the Secretary of the Treasury.

We discussed many methods of procedure but finally decided that our best claim was through Congress. Nearly every Congress from 1880 until 1888 had a measure before it relating to this claim; but no final action was taken. I was present at every session of Congress from 1870 down to this date. Have done all I could do as

agent for the State in urging Congress to adjust this claim. From 1876 to 1882, the agents of the several States worked to this same end and without concerted action.

I think in 1882, several state agents formed an association and from that time to the passage of the act of March 2, 1891, the organization was kept up, sent letters to governors of all states and printed circulars, disseminated information by letters and otherwise; obtained resolutions from the State legislators instructing members of Congress to vote for the refunding of the direct tax.

Judge Wiltshire and I attended all meetings of the association, paid our proportion of expense and appeared before committees in Congress from time to time.

General Logan's connection with this bill was during the years of 1877 and 1878 and early in 1879, prior to his election to the United States Senate.

During the years they worked together neither Logan or Wiltshire were in the service of the United States in any capacity. Both did faithful work; and I promised them that whatever the Legislature of the State of Illinois might give me for services as agent of the State, I would give them each one third of the same. That agreement was verbal, never reduced it to writing.

I know that both Logan and Wiltshire paid out money in connection with their services. Wiltshire assisted me on this claim to the date of his death.

My expenses on account of the direct tax has been over $5,000 between 1876 and 1891 for printing, clerk hire, stenographer, telegraph and postage bill, expenses to the association, traveling expenses and expenses in Washington. I charged one-third of my expense up to the direct tax claim.

I spent the best part of my life working for the State and have never received any benefit from it.

I think the first bill to refund the direct tax was introduced in 1879 or 1880; might have been as late as 1881 or 1883."

The evidence of Mary S. Logan is: "My husband was attorney for the State of Illinois from March, 1877, to March 4, 1879. He was employed by Mr. Hitt while associated with W. W. Wiltshire in the practice of law in Washington. He and Judge Wiltshire were to receive one-third of whatever compensation the Illinois Legislature should allow, whenever any of the claims should be paid by the government.

The services embraced the prosecution of all claims of the State against the government. I know this by being present on various occasions when the agreement and the nature of the claims were discussed.

General Logan was not connected with any services of the United States in any character whatever between the years of March 4, 1877, and 1878. He was in Washington continuously during the sessions of Congress and appeared before committees of both Houses and before the departments of claims.

He and Judge Wiltshire worked diligently at these claims daily during the period of two years from March, 1877, and March, 1879.

Mr. Logan's share of expenses in the prosecution of these claims was $714. I know this because as his administratrix, I paid to Mary H. Brady that amount which he had borrowed from her to defray these expenses.

The agreement between Hitt, Logan and Wiltshire related to all claims which Hitt was authorized to prosecute against the government from the State of Illinois.

When my husband re-entered the Senate in 1879, he turned all his legal business to Judge Wiltshire and did not participate in the prosecution of the claims thereafter."

The evidence of Governor Samuel J. Crawford of Kansas, is: "I am a lawyer, was employed by the State of Kansas, March 6, 1877, to prosecute claims against the United States, which employment continued until the direct tax was paid by the United States.

The services rendered in the direct tax claim consisted in preparing the case first, for presentation to the treasury department and afterwards to Congress.

Frequent meetings were held at which the attorneys of other states were present including the agent and attorneys of the State of Illinois who assisted in every way.

The attorneys for Illinois were Isaac R. Hitt, John A. Logan and W. W. Wiltshire.

The question of refunding the direct tax to states that had paid their quota was presented to the First Comptroller of the Treasury and the Comptroller of the Currency and the Secretary of the Treasury.

The attorneys, including those representing Illinois, took the position that it was the duty of the government either to collect the tax from the delinquent states or to refund it to those which had paid.

This question was submitted and discussed by them before the officials of the treasury department and the secretary of the treasury in a printed brief.

This work was done mainly by the representatives of South Carolina, Ohio, Indiana, Illinois, Kansas, Arkansas, Maryland, Iowa and Pennsylvania.

I acted with attorneys for the State of Illinois, Hitt, Logan and Wiltshire from 1877 until the claim was paid.

Logan began in 1877 and retired in 1879. Wiltshire continued until his death.

The foundation for the collection of this direct tax was ready long before 1885.

I know that Logan, Wiltshire and Hitt represented Illinois before the departments of the principal committees in Congress. They did their duty in presenting and prosecuting the refunding tax act and they helped to secure the State of Illinois about nine hundred thousand dollars and they should be paid for their services."

I am of the opinion that from the evidence, the finding of the facts by this Commission should be:

First: That Isaac R. Hitt labored under the impres-

sion that he was the authorized agent under the appointments of Governors Beveridge and Cullom to represent the State of Illinois in securing to the State any claims due it from the general government.

Second. That Hitt employed Logan and Wiltshire to assist him in prosecuting these claims of the State of Illinois against the United States government.

Third. That Hitt, Logan and Wiltshire performed services that were valuable to the State of Illinois in securing the refunding of $56,760.60 and also $17,807.94 levied by the general government against the State of Illinois by the act of Congress, August 5, 1861.

ISAAC R. HITT, ET AL

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1885.

Separate opinion by W. C. Jones.

1. STATUTE OF LIMITATIONS—*act of 1847 still in force.* The limitation act of 1847 has not been repealed directly or by implication, but is still in force.

2. FEES AND SALARIES—*contracts with State agents must be made by express authority of law.* In order that a State agent such as is under consideration in this case, may receive compensation for his services, his contract must have been made under express authority of law.

The real claimant, Mr. Isaac R. Hitt, alleges that he was appointed agent of the State of Illinois by Governor Beveridge in the year 1875, for the purpose of collecting all claims due the State from the general government growing out of the war of 1861. In order to ascertain what that appointment was, and the scope of the authority under the same, it may be stated here that the certified copy of the commission issued by Governor John L. Beveridge in 1875, simply appointed Mr. Isaac R. Hitt, State agent to look after the interests of the State growing out of the Swamp Land Act of 1850 and the amendments thereto.

Mr. Hitt in his testimony states that he acted as agent of the State under this authority from the date of his appointment to the present time; that his services began in 1875 and that he had examined at least two wagon loads of records, embracing claims to the amount of $4,000,000.00 paid and unpaid to the State; that he had three personal claims in his charge, viz:

First: Claim for balance due on account of advances made by the State to the United States under the act of Congress approved July 27, 1861; under which act he succeeded in collecting in 1890 items amounting to $1,532.02 which has been paid into the State Treasury.

Second: A claim amounting to $1,146,551.33 which was the direct tax paid by the State of Illinois. The State, however, having received a rebate of 15 per cent the amount actually paid by the State was only $974,568.03. This amount, $974,568.03, was finally repaid to the State under the act of Congress approved March 22, 1891.

It was for the collection of this direct tax claim, Mr. Hitt says much of his time was given during the years 1877, 1878 and 1879 and up to 1891, when the claim was finally paid to the State.

Third: The claim of 5 per cent for public lands lying within the limits of the State upon which land warrant entries were made. This claim is still unpaid and approximates about $1,000,000.00.

It will be perceived that Mr. Hitt claims that he gave most of his time and attention to the direct tax claim during the years 1877, 1878 and 1879 on up to 1891 when the claim finally passed Congress. The evidence in this claim discloses the fact that Mr. Hitt was appointed by Governor Beveridge to look after certain interests belonging to the State of Illinois, during the year 1875. His appointment, however, was simply to look after the interests of the State, growing out of the Swamp Land Act of September 28, 1850, and amendments thereto. During the years 1875, 1876 and 1877 and on up to July

28, 1880, Illinois had other State agents looking after the war claims belonging to the State.

Mr. H. D. Cook of McLean county, Illinois, was appointed State agent to collect war claims in 1867. July 2, 1878, Messrs. R. G. and E. C. Ingersoll were appointed, Governor Cullom stating at the time that there was no law authorizing the appointment. The appointment was resigned by the Hon. R. G. Ingersoll, surviving member of the firm; and, on July 28, 1880, a commission was issued by Governor Cullom to Mr. Isaac R. Hitt to appear as agent or attorney of the State of Illinois in any department of the United States government and to secure amounts and payments that might be due or owing from the United States to the State of Illinois on account of expenses, costs and charges incurred by the State in the war of the Rebellion. The commission contained this clause: "This authority is given with the express understanding that no liability will be created under it against the State, for costs and expenses of any kind whatever." It will thus be seen that Mr. Hitt had no semblance of authority to act for the State until this appointment. The appointment made by Governor Beveridge in 1875 was for no other purpose than looking after the interest of the State growing out of the Swamp Land Act.

Mr. Hitt in his testimony states, "that Gen. Logan, Judge Wiltshire and myself participated time and again during the years 1877 and 1878 and since that time Judge Wiltshire and myself appeared in connection with other agents before committees of Congress" to secure payment of claim belonging to Illinois. He states that the work done by him in connection with the direct tax was done in 1877. "At that time I employed Logan and Wiltshire to assist me in that claim; in 1877, Logan, Wiltshire and myself went to the war department to obtain data for full understanding of the merits of this claim."

Mr. Hitt evidently supposed at that time he was acting as State agent for Illinois, for the purpose of securing all

claims due from the general government to the State, but the records and files introduced in evidence show otherwise, and that he never received any authority to act and never had any appointment until July 28, 1880.

Mr. Hitt in his testimony further says: "During the years they worked together neither Logan nor Wiltshire were in the service of the United States in any capacity. Both did faithful work and I promised them that whatever the Legislature of Illinois might give me for services, as agent of the State, I would give them each one-third of the sum. That contract was verbal. Never reduced it to writing." In this connection it will be well to see what work Gen. Logan was authorized to do at that time by the State of Illinois. It has already been seen that Mr. Hitt was authorized only to look after the Swamp Land interests of the State. The records of the executive office of 1878 show that on February 28th, the Governor appointed Hon. John A. Logan agent of the State of Illinois to collect and receive any moneys recoverable from the United States on account of military locations of lands in the State of Illinois under an act of Congress. Under that appointment Gen. John A. Logan acted as agent for the State of Illinois until his election to the United States Senate; when Governor Cullom, December 27, 1879, appointed "Judge Wiltshire, of Washington City, D. C., as agent of the State of Illinois, to collect and receive any moneys recoverable from the United States on account of military locations of lands, in the State of Illinois, under an act of Congress, in place of Hon. John A. Logan, who has resigned." From that time on Gen. John A. Logan was a member of the United States Senate and his former partner, Judge Wiltshire, represented the State as State agent for the purpose for which he was appointed, viz: to collect and receive any moneys recoverable from the United States on account of military locations of lands in the State of Illinois under act of Congress.

The evidence shows that Gen. John A. Logan died on or about the ... day of ....., 1880, and that Judge

Wiltshire died on or about the ... day of ..... 1890. The evidence shows that Logan and Wiltshire prosecuted the claim for which they were agents until they reached a decision which was adverse in the Supreme Court of the United States. With the exception of Mr. Hitt's testimony there is no direct evidence showing that they ever had any connection with any claims in favor of the State against the United States except the one for which they were appointed agents.

The evidence shows that Mr. Hitt requested Governor John M. Hamilton to appoint him State agent to prosecute any and all claims due the State of Illinois growing out of the war of 1861; and, in reply to the request Governor Hamilton stated to Mr. Hitt, he had no authority given him, either by joint resolution or by an act of the Legislature, authorizing him to make the appointment.

It will be seen then that Governor John M. Hamilton when requested gave it as his opinion that he had no authority to make such an appointment and declined to act, and had there been authority in the first instance to make the appointment it would not have been necessary to have asked for reappointment, for such authority would have held good until the same was revoked.

One more reference to the evidence of Mr. Hitt. The evidence I refer to was introduced by the State and is a letter from Mr. Hitt to Governor Oglesby. This letter was dated February 24, 1886, and is a very important link in the testimony offered by the State. We quote: "The bill 104 provides to credit or repay each State the direct war tax in toto. The Illinois M. C. are not a unit on this question and some of them have come to no conclusion. Shall I favor or oppose it? The southern members generally are favoring the bill. I should be pleased to receive any advice or instruction you may give me."

Judging from the language used by Mr. Hitt at this time he was in doubt as to what course he should take;

and, had Governor Oglesby written back to him, "Oppose bill 104," Mr. Hitt would have lent opposition to the bill; and yet, bill 104 was the first bill introduced in to Congress authorizing the repayment of the "direct tax" to the States.

During the year 1886 Gen. Logan was a member of the Senate and died during that year. If Mr. Hitt was undecided at that time in regard to his course, it must be conceded his recollection may be a little at fault in regard to transactions which had previously taken place.

There is still another document, A Memorial to the 40th General Assembly, by Mr. Hitt, from which we quote: "I am not desirous personally to have anything further to do with the settlement of this account of the State against the United States, but would like to be paid whatever the Legislature may see proper to pay me for services performed and for the $400.00; and to pay me ten per cent on the $1,532.92 and I will be satisfied." Mr. Hitt has previously in this memorial complained that he has expended $400.00 in money; and, that the Legislature had made no appropriation to reimburse him for his expenses, nor had that body passed any act appropriating money to pay the per cent which he demanded on the amount he had collected for the State; and, he states in his memorial, if the State will pay him $553.20, he will be satisfied, and will not seek to act further as State agent; but, advises the Legislature there are other claims and the State should look after them.

THE STATUTE OF LIMITATIONS.

The limitation act of 1847 is pleaded in bar of this claim; and, a demurrer is filed to the plea. The demurrer is not well taken. The limitation act of 1847 is not repealed directly or by implication, but is still in force. But there is an objection to the allowance of any item in this case which seems insurmountable. A constitutional barrier. Section 19 of article 4, of the Constitution of Illinois, adopted 1870, provides, that

"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 incurred in suppressing insurrections or repelling invasions." No contract was ever made with Mr. Hitt or with Messrs. Logan and Wiltshire, nor could any legal contract have been made, for the reason there is nothing in all the evidence introduced showing that the General Assembly of Illinois, at any of its sessions, had ever passed a joint resolution or an act authorizing the appointment of any State agent for the purpose of collecting any of the claims for which Mr. Hitt now claims payment for services. That there was no law authorizing these appointments seems to have been well understood by the Governors appointing for the appointments all expressly state, that the State of Illinois shall not be held liable for any costs or expenses incurred of any kind whatever.

Claim denied.

JOHN SCHULTZ

v.

THE STATE OF ILLINOIS.

Opinion filed December 30, 1898.

PRACTICE—*rules of procedure must be followed.* Claim must be filed in accordance with provision of law governing presentation and prosecution of claims before Commission. Failure to comply with law governing practice before Commission is ground for dismissal of claim.

The claimant in this case had a bill introduced for his relief in the 40th General Assembly but received no aid therefrom; he then filed a copy of said bill with the Auditor on the 21st day of May, 1897, for the purpose of seeking relief at the hands of this Commission.

No formal claim was filed and no evidence in support of his claim was submitted. At the present session of the Commission the Attorney General in behalf of the State interposed a motion asking that the claim be dismissed on the ground that there was no claim filed in the case as required by the law governing the presentation and prosecution of claims before the Commission.

We are of the opinion that the grounds of the motion are well founded, and while the claimant may have a meritorious case, he like all other claimants is bound to follow the law governing the practice before this Commission which is no hardship as the law is very plain and explicit.

The claim for the above reasons is dismissed and stricken from the docket.

W. L. MULFORD

v.

THE STATE OF ILLINOIS.

Opinion filed December 23, 1899.

PRACTICE—*rules of procedure must be strictly adhered to.* This Commission is a Court governed by the statute and the rules of procedure heretofore adopted for the trial of cases before the Commission. It is necessary that claimant comply strictly with the law and rules of the Commission. For failure to comply with the law and rules of Commission as to taking and filing proofs in support of claim and filing abstracts and arguments, claim will be rejected.

This is a claim filed by the claimant, W. L. Mulford, against the State of Illinois for a balance of seventy-two dollars and twenty-two cents alleged to be due him for labor performed on the Illinois and Michigan canal by order of the superintendent of said canal. The time when the services were performed does not appear from the claim.

The claim was filed May 24, 1898, but no proofs or evidence other than the sworn claim of the party has been filed.

On September 16, 1898, the State by E. C. Akin filed a motion to dismiss on two grounds: First, that the claim was not filed three months prior to the meeting of the Commission in August as required by the statute; and, second, because said claimant does not set forth when said claim accrued as required by the rules of the Commission.

The Commission, however, thought best not to dismiss but allowed the claim to stand on the docket until the present session, believing it to be no more than just that claimant have an opportunity to file proofs, and amend his claim, if desired; claimant, however, wholly neglected to do the same, and on November 28, 1899, the State by E. C. Akin, Attorney General, filed another motion to dismiss on the following grounds, viz:

First: The claimant has failed and neglected to take and file proofs in support of his claim, etc.

Second: Claimant has failed and neglected to make and file abstracts and arguments as required by Rules 11 and 12 of this Commission.

Third: Upon the grounds stated in the former motion filed September 16, 1898.

This Commission is as we have said before a court governed by the statute and the rules of procedure adopted heretofore for the trial of cases before the same; it is essential and necessary that any one desiring an adjudication of his claim by the Commission, that he comply strictly with the law and the rules of the Commission; and as the claimant in this case has wholly neglected to do so we are compelled to dismiss his claim without inquiry into the merits of the same. For the reasons above stated the Commission unanimously agree to dismiss the claim.

CONTINENTAL INVESTMENT AND LOAN SOCIETY

v.

THE STATE OF ILLINOIS.

Opinion filed December 22, 1899.

PRACTICE—*Court rules must be observed.* Failure to file proper declaration meeting requirements of the statute and rules of the Commission; failure to take evidence in support of claim and failure to file abstracts and briefs as provided by rules 4, 7, 11 and 12, will support a motion by the State to dismiss the claim.

This is a claim filed May 16, 1898, in the Auditor's office, sworn to by Graham H. Harris, averring an indebtedness against the State of Illinois for fees and expenses paid out and accrued in the case of The People v. Continental Investment and Loan Society on relation to the Auditor of Public Accounts of the State of Illinois, which the claimant avers were paid out in defending said litigation. The claimant avers they were all necessary expenses paid out by order of the Board of Directors of the Continental Investment and Loan Society and the amounts were itemized and aggregate the

total sum of fifteen hundred and thirty-two dollars and ninety-five cents.

Rule 4 of the printed rules of the Commission, requires every claimant to file a written or printed declaration with the Auditor containing a statement of his or her claim, which declaration is required after giving the title of the court and term, and the venue, and the commencement, to state concisely the facts constituting the claim, the time when and the place where the claim arose, the amount claimed; and all facts necessary to a full understanding of such claim; and if such claim accrued by virtue of a contract, a copy of such contract to be filed with the declaration, together with the name and present residence, if known, of the officer or agent with whom the contract was made.

A bill of particulars stating in detail each item claimed and the amount shall be attached to and made a part of the declaration.

The claimant is also required to state his or her claim has never been assigned or if assigned, to whom and when such assignment was made and the names of all persons interested in the claim. He is also required to state that his or her claim has never before been presented to any department or officer of the State; or, if it has been, shall state when and to what department or officer, and what action has been had thereon.

The claimant should verify his claim and unless verified under oath by claimant it shall not be filed by the clerk. The declaration filed in this case falls short of these requirements and a motion was filed by the State asking that the cause be dismissed, assigning the following grounds:

First: That said claim does not state the result of the suit against the Continental Investment and Loan Society, or what judgment, if any, was entered therein.

Second: That said claim does not show how or in what way the State of Illinois is or should be held liable for the expenses accrued by the Continental Investment

and Loan Society in defending litigation in said claim mentioned.

Fourth: That said claim does not state when and to what department or officer the same was presented and with what results, or that it has never been presented to any department or officer.

This motion was filed August 2, 1898; but was not considered at the August term, 1898. On November 28, 1899, another motion was filed by the Attorney General for and on behalf of the State urging a dismissal of said claim, upon the grounds assigned in the first motion; and, upon the following additional grounds:

First: The claimant has failed to take and file proofs in support of his claim as required by section 4 of the statute governing proceedings in the Commission of Claims and of rule 7 of this Commission.

Second: Claimant has failed and neglected to make and file abstracts and argument as required by rules 11 and 12 of this Commission.

The objections urged by the State seem to be tenable. In other words, the files fail to show a proper declaration to have been filed meeting the requirements of the statute and the rules of this Commission; nor, does it appear any evidence has ever been taken in support of the claim; nor does it appear any abstract or briefs have been filed. It is not the disposition of this Commission to dismiss claims without a hearing upon the merits, but sufficient time has elapsed since the filing of this claim to have filed a proper declaration, to have taken the testimony necessary to support it, and to have filed the necessary arguments and briefs as required by rules 7, 11 and 12.

The Commission deeming the motions filed in this cause by the State and the grounds assigned well taken can do nothing else than enter an order dismissing the claim.

Claim dismissed.

SIDNEY N. JOHNSON

v.

THE STATE OF ILLINOIS.

Opinion filed December 23, 1899.

1. RESPONDEAT SUPERIOR—*State not liable for wrongful acts of subordinate officers.* The State is not liable for the wrongful acts or negligent conduct of its subordinate officers or agents.

2. COMMISSION OF CLAIMS—*no new liability against State created by act.* The law creating the Commission does not create any new liabilities against the State but simply provides a method by which claims may be allowed or rejected.

3. PRACTICE—*evidence may be filed where demurrer is sustained.* Upon claim being rejected on demurrer claimant can file evidence in order that claim can be submitted to the legislature.

The claim in this case was filed in the Auditor's office on the 31st day of August, 1899, and is based upon a personal injury received on the 17th day of September, 1897, under circumstances averred to be as follows, to-wit: That on that day about four o'clock, P. M., the claimant was riding a bicycle south on Albany avenue in the city of Chicago towards the intersection of Jackson boulevard and Albany avenue; that on reaching said Jackson boulevard the claimant turned westward and continued to ride said bicycle westward on Jackson boulevard to a point about seventy five (75) feet west of said Albany avenue; that at that point one, Ceitlan, an employe and servant of the Board of Park Commissioners of the town of West Chicago was engaged in the line of his duty and occupied with a certain hose reel watering the grass on the north side of said boulevard and was commencing to wheel said hose reel across said boulevard *standing about five and one-half (5½) feet* south of the north curb of Jackson boulevard and in the way of passing vehicles and was occupied in wheeling said hose reel south across said Jackson boulevard; that two ladies also were riding bicycles at that time and shouted to the said Ceitlan warning him not to proceed until they had passed, whereupon said Ceitlan without

looking to see if there was any danger of any collision or accident in the rear of the place where he was standing and without paying any attention to the persons or other vehicles on said boulevard, except said bicycles ridden by said ladies, suddenly and without warning ran backward with said reel and directly in the path of said claimant and in such a manner as the claimant was suddenly and violently thrown from his bicycle on to the asphalt pavement and sustained many permanent and serious injuries, to-wit: being a fracture of the left leg and a fracture of his left knee cap; and, from thence hitherto has been and still is unable to follow his usual occupation and business and unable to walk without use of cane and then only with great difficulty.

Claimant avers he was riding said bicycle at a slow rate of speed and was at and before said accident using all due care for his own safety. Claimant avers that at time of said accident he was engaged in soliciting fire insurance from which occupation he derived large sums of money and profits and since said accident claimant has not been able to and has not earned any money whatsoever and has been obliged to pay out and expend large sums of money for physicians' services in endeavoring to be healed of his said injuries.

The damages claimed for the injuries aforesaid are laid at ten thousand ($10,000) dollars.

To the declaration aforesaid the Attorney General on the 12th day of September, 1900, filed a general demurrer and the case comes before us at this time for disposition on the demurrer.

The demurrer raises the question whether the State of Illinois is responsible to the claimant for the wrongful or negligent acts of its subordinate officers. This question has been so frequently decided and the authorities are so numerous that we deem it only necessary to cite them. The question was before this Commission in the case of Jacob Schmidt v. The State, decided at the August session, A. D. 1899; it was again before the Com-

mission and decided at the August session 189.. In the case of ..... v. The State, and also before the Commission for decision and decided at the August session, 1898, in the case of Lincoln H. Ross v. The State. In these cases the Commission held the rule to be well settled that a State could not be held liable for the wrongful or negligent conduct of its officers. The principle is so well established by authority as to admit of no doubt:

Story on Agency, Sec. 319-322;
Hill v. *Boston*, 122 Mass., 344;
Gibbons v. *U. S.*, 8 Wall, 269;
U. S. v. *Kirkpatrick*, 9 Wheaton, 720;
Lewis v. *State of New York*, 66 New York, 71;
Sipple v. *State*, 99 N. Y., 284;
Clodfelter v. *The State*, 86 N. C., 51;
The State v. *Hill*, 54 Ala., 67.

The law creating the Commission does not create a new liability against the State, it simply provides a method by which a claim may be allowed or rejected against the State on a hearing before the Commission. In case of an award the same is paid by money appropriated for that purpose by an act of the General Assembly. There being no provision for an appeal from the decision of the Commission, the Commission feels that it is but just that parties coming before the Commission desiring to take evidence in support of their claim may do so, even though the Commission's decision may be adverse, as the matter can then be presented directly before the Legislature if parties deem they have a cause of sufficient merit. In this case therefore, while the Commission must sustain the demurrer and dismiss the claim on the ground of no liability against the State, the Commission will permit party to file evidence if they desire to do so during the present session.

The demurrer filed is sustained and the case dismissed.

J. G. FOGARTY

v.

THE STATE OF ILLINOIS.

Opinion filed December 28, 1899.

PRACTICE—*rules of Commission must be followed.* Rules of Commission and provisions of statute governing practice before the Commission are not unreasonable or technical and must be followed by persons seeking relief at the hands of the Commission.

The claimant, J. G. Fogarty, alleges in his claim filed May 5, 1899, that he is the lessee of certain property in the city of Springfield and that he sublet a portion of the building to company "C," Fifth Regiment, Illinois National Guard, and that there is due him a balance of ninety dollars rent for the months of July and August, 1895, also for rent of fixtures, forty dollars and interest on said sum amounting to twenty-nine dollars and eighteen cents making a total of one hundred and fifty-nine dollars and eighteen cents due and unpaid according to his statements in said claim. Claimant has filed no proofs, abstracts or arguments as required by the statute and the rules of the Commission but simply rested his case on the verified claim or declaration.

The State by E. C. Akin, Attorney General, very aptly filed a motion to dismiss for want of proof and due compliance with the statute and the rules of the Commission by claimant in prosecuting his claim.

The Commission in accord with its decisions rendered heretofore in similar cases are bound to sustain the motion of the state and dismiss the claim, without considering the merits of the claim at all, as we do not consider the rules of the Commission nor the provisions of the statutes governing the practice before the Commission unreasonable or technical, and it is no hardship on anyone to follow them strictly when seeking relief at the hands of the Commission, and any person unable to prosecute his own claim should employ competent counsel to assist him and not expect the Commission to do business in "Town Meeting" style.

Claim dismissed.

WILLIAM RHODES, ET AL.

v.

THE STATE OF ILLINOIS.

Opinion filed December 28, 1899.

STATUTES—*Chap. 129, Art. 9, Sec. 1, construed.* Where the order of the Commander in Chief of State militia calling it into service contains no language showing that the company was called into actual service "for the suppression of riot and the enforcement of the laws," and does not show that they were called to perform any duty "under orders of the Commander in Chief," its members are entitled to no more pay than is provided by law for officers of the United States army and navy of like grade.

This is a claim filed by William Rhodes and eight others who are members of company "M," Fourth Infantry of Illinois National Guard. These claimants claim that in compliance with an order from the Governor of Illinois, they, with other members of their company, left their homes on the 27th day of April, A. D. 1898, and performed military duty at the Fair Grounds at Springfield until after their rejection for services in the United States Volunteer Army.

These claimants admit to having received, by Auditor's warrants drawn on the Treasurer of the State of Illinois, sums of money based on a like grade of soldier's pay in the United States Army for the number of days in service, but claim they are entitled to two dollars per day for each days' service rendered, and that there is now due them the difference between the amount claimed by each, being forty-eight dollars and the thirteen dollars, amount received by each.

Chapter one hundred and twenty-nine (129), article nine (9), section one (1), seems to be the authority upon which these claimants base their claims.

This section reads as follows: "When in actual service for the suppression of riots and enforcement of the laws and when on duty under the orders of the Commander-in-Chief, and it is so specified in such order, officers of the Illinois National Guard and of the naval force of

Illinois, shall receive the same pay as provided by law for officers of the United States Army and Navy of like grade, and the enlisted men of the Illinois National Guard and of the naval force of Illinois, shall receive two dollars per day for each day service is actually so performed, said payment to be made on rolls prescribed by the Adjutant General."

The order of the Governor through the Adjutant General reads as follows:

"Springfield, Illinois, April 25, 1899.

Commanding Officer Company "M," Fourth Infl.,
Champaign, Illinois.

You will report your company for services in war, to your regiment commander at State Fair Grounds, Springfield, not later than noon, Wednesday. Acknowledge receipt of this order by wire.

(Signed.) J. N. Reece, *Adjutant General.*"

This order, in our opinion, contains no language showing that the company was called into actual service "for the suppression of riot and the enforcement of the laws." Nor do we interpret the order to show that they were called to perform any duty "under the orders of the Commander-in-Chief" which duty was specified *in said order. Nor is there any evidence submitted* showing that any services were performed by order of the Commander-in-Chief for the State of Illinois. Nor is there any evidence that any services were performed.

In the absence of these elements, we cannot see how this section applies, nor can we, from a careful reading of the military code of Illinois, find any law that will enable these claimants to receive more than they admit they have received, which pay is certainly, in our opinion correctly based upon section one (1) of article nine (9), which provides: "The militia when called into actual service, shall receive the same pay and allowance provided for like troops in service of the United States." This section, from the reading of the proof submitted, is what we interpret the order was issued under.

The claimants' bill is dismissed and judgment denied.

OSCAR B. ALEXANDER
v.
THE STATE OF ILLINOIS.

Opinion filed December 28, 1899.

RESPONDEAT SUPERIOR—*State not liable for torts of officers.* The State is not liable for the torts or negligent acts of its officers.

This is a claim filed by Oscar B. Alexander who was an inmate of the Illinois State Penitentiary at Joliet, and at work in the chair department of said penitentiary in the employ of agents of the State of Illinois. He was injured while working at a certain saw.

To the claimant's declaration, the State by its Attorney General, filed a demurrer setting up the following grounds:

First: That the facts stated in the claim do not entitle the claimant to have and maintain the same against the State of Illinois. Second: That the State of Illinois is not responsible to the claimant for the wrongful conduct and neglect of its subordinate officers. Third: That the State of Illinois is not responsible to the claimant for the wrongful and negligent conduct of the foreman in said claim referred to. Fourth: That the said State of Illinois is not responsible to the claimant for the wrongful or negligent conduct of the subordinate officers or foreman of the penitentiary at Joliet.

This Commission filed an opinion December 31, 1898, in the matter of Lincoln H. Ross v. The State of Illinois, holding that the State of Illinois is not liable for the torts or negligent acts of its officers.

The demurrer is sustained and claimant's bill is dismissed.

However, if this claimant desires to present the evidence to this Commission, we will make a finding upon the facts and if he desires to take an appeal to the Legislature, we will put the record in shape; but from a legal standpoint, we are of the opinion that the State is not liable.

JENNIE BREWSTER

v.

THE STATE OF ILLINOIS.

Opinion filed December 28, 1899.

RESPONDEAT SUPERIOR—*State not responsible for negligence or misconduct of its officers.* The State cannot be held responsible for the negligence or misconduct of its officers or subordinate agents. The State is not liable for acts of employes of Park Commissioners in operating a steam roller resulting in frightening of claimant's horse, causing horse to run away and injure claimant.

This is a claim filed against the State by claimant for ten thousand dollars damages, for injuries received by claimant in a runaway which occurred in Humboldt Park in the city of Chicago on the 12th day of May, 1897.

Claimant alleges in her declaration that she was driving in said park on said day, and had stopped to water her horse at a fountain in said park when her horse became frightened at a steam roller which the employes of the Park Commissioners of said park were operating in the park at the time, and being so frightened became unmanageable and ran away causing the buggy in which the claimant was riding to collide with another vehicle lawfully in said park and from the force of said collision the claimant was thrown violently from her buggy against the wheel of the other vehicle and thence to the ground thereby receiving serious and permanent injuries to her person for which she asks to be reimbursed from the State claiming that the State is liable on the ground that it was through the negligence of the Park Commissioners who are agents or servants of the State that she was so injured.

To the claim or declaration of the claimant, the State by E. C. Akin, Attorney General, filed a demurrer the specific allegations of which are as follows:

First: That the State of Illinois is not and cannot be

made responsible for the negligence or misconduct of the servants or agents of the West Chicago Park Commissioners.

Second: That the State of Illinois is not responsible for the negligence or misconduct of its subordinate officers or agents.

Third: It is not alleged and it does not appear that the injury to the said Jennie Brewster was due and owing to the negligence or misconduct of the West Chicago Park Commissioners or of their servant or servants.

The State also by H. C. Akin, Attorney General, also filed a motion to dismiss the claim on the ground that claimant did not comply with the law and rules of the Commission by filing abstracts and arguments with the evidence in the case.

The Commission heretofore held in the decision of the case of Lincoln H. Ross v. The State that the State could not be held responsible for the negligence or misconduct of its subordinate officers or servants, to do so would be against public policy and in the face of a long line of able decisions of our higher courts. This Commission having so held in the above case cited at its 1898 session can see no just reason for reversing the opinion given out at that time, therefore sustains the demurrer filed by the State, being fully satisfied that there is no liability existing against the State in this class of claims.

Demurrer sustained.

HERO B. HERR AND RICHARD S. WALSH
v.
THE STATE OF ILLINOIS.

Opinion filed December 28, 1899.

PRACTICE—*Court procedure must be observed.* Failure to take and file proofs in support of claim and to file abstracts and briefs is sufficient cause for dismissal of same.

The claim in this case was filed April 20, 1899, and is for an alleged balance due on a contract made between the claimants and the first battalion of the Illinois Naval Militia, by B. M. Shaffner, their commander; that the contract provides for the building of a foundation for the structure known as the model battle ship, Illinois; that the price to be paid for the work was twenty-four hundred thirty-eight and 34-100 dollars upon which fourteen hundred and fifty dollars was paid, leaving a balance due on the contract of nine hundred eighty-eight and 34-100 dollars, which the claimants aver has not yet been paid.

A copy of the contract duly signed was filed with the declaration as required by the rules of the Commission. To this declaration a plea of general issue was filed on the 29th day of May, 1899, and no other steps seem to have been taken until the 28th day of November, 1899, when the Attorney General filed a motion to dismiss claim for want of prosecution.

An examination of the files fails to show that the claimants have ever taken or filed any proofs in support of their claim, as required by section 4 of the statute governing proceedings in the Commission of Claims and of rule 7 of this Commission; and that the claimants have also failed and neglected to take and file abstracts and briefs as required by rules 11 and 12 of the Commission.

It is not the disposition of the Commission to dismiss claims without giving claimants an opportunity to take

their evidence and an opportunity to be heard on the merits, but in this case there seems to be no effort to prosecute the claim as required by the rules of the Commission and for such failure we have entered an order dismissing the claim.

Claim dismissed.

DAVID OLIVER

v.

THE STATE OF ILLINOIS.

Opinion filed January 11, 1910.

PRACTICE—*where no foundation in law exists for allowance of claim.* Where the record discloses no foundation in law for the allowance of claim, it is rejected.

The claimant in this case seeks recovery of one thousand dollars, rental for water power, paid in pursuance of the terms of a lease executed in April, 1900, between the State Canal Commissioners, as lessors, and the claimant as lessee; the basis or plea on which the claimant here seeks recovery being the unfortunate circumstance that the claimant's mill in which he expected to use the water power rented from the Canal Commissioners was destroyed by fire, and the water power, as a result of such fire, could not be used during the period for which one thousand dollars rent accrued. Neither in the evidence nor in the argument of claimant's attorneys is there disclosed any legal ground for recovery, nor any claim made that the sum paid (recovery of which is herein sought) was not due in accordance with the terms of the lease; nor is there any intimation that the claimant would have had a legal defense had he withheld the rent, in a suit for rent by the Canal Commissioners. It is in fact explicitly admitted in the written argument of claimant's counsel that "he was obliged to pay one thousand dollars to save his lease."

The inference may naturally be drawn that this claim is filed on the presumption that the Commissioners of

Claims may, out of the generosity of their own hearts and other peoples' money (from State funds to be appropriated by an equally generous and complacent Legislature) donate to the claimant a sum of money equal to that legally and rightfully paid to the State Canal Commissioners, in accordance with the terms of a lease voluntarily executed by the claimant.

From the fact that no legal ground of recovery is disclosed by the record, and from the language used in their argument by the claimant's attorneys, we infer that there is a misapprehension on their part, as to the scope and authority vested in this Commission by the act of the Legislature creating it.

Claimant's counsel urge that "It was not the fault of the (canal) Commissioners nor his (claimant's), and yet it is a misfortune to be felt more by him, if he has to lose than it would be by the State * * * *."

It should not be necessary to do more than call attention to this line of reasoning. What claim would ever be rejected if the assets of claimant are to be taken into account as against the resources of the State? In what court of law would it occur to an attorney, unless for unfair and unworthy appeal to prejudice, to suggest a comparison of the resources of litigants as an aid in determining legal liability? All such considerations are equally irrelevant and without weight before this Commission which was not created to give to claimants remedies against the State which could not be maintained against individuals. The Commission of Claims is not a bureau of charities, but a court, and under the law creating it must determine all claims in accordance with legal principles.

As the record disclosed no foundation in law for the allowance of this claim, it is rejected.

CYRUS A. JONES

v.

THE STATE OF ILLINOIS.

Opinion filed December 18, 1900.

MILITIA—*claim for additional compensation for services rendered.* The Commission sustains a demurrer to claimant's petition upon the authority of *Rhodes v. the State ante p. 214.*

In the above entitled cause the State filed a demurrer, based on two grounds:

First: That there is no liability under the law existing against the State.

Second: That the claimant has failed to comply with the rules of the Commission concerning the filing of proofs.

The first point in the demurrer is based on the decision of the Commission in the case of Wm. Rhodes, et al, decided at the August term, 1899, in which the Commission held that in such cases the State was not liable. The reasons being fully set forth in the opinion written by Judge W. S. Louden we do not deem it necessary to go into any argument of the matter, the Commission having decided to sustain the demurrer and dismiss the case.

Case dismissed.

CHARLES HATFIELD
v.
THE STATE OF ILLINOIS.

Opinion filed December 18, 1900.

MILITIA—*personal injury to member while doing duty at annual encampment.* Claimant while on duty as member of a troop of cavalry in their annual encampment received an injury by his horse falling on him while making a charge on the parade ground, which resulted in his right arm and shoulder being broken. The captain gave the command to charge the batteries. As they went by, the cannon were fired and the balloon on the parade ground ascended and the horses were frightened and became tangled up together, resulting in the injury. Held that the claimant exercising due care and caution and being in the line of his duty at the time he received the injury, is entitled to recover.

Charles Hatfield, the claimant in this case, was a member of troop "B," First Cavalry, Illinois National Guard. In March, 1898, he enlisted in said organization, and on the 31st day of August, A. D. 1899, and while the troop was in Camp Lincoln, near Springfield, Illinois, in their annual encampment while on duty as a member of said troop he received an injury by his horse falling on him while making a charge on the parade ground which resulted in his right arm and shoulder being broken. Colonel Young was in command of the regiment at the time, and Lieutenant Douglass was in command of troop "B."

Captain Bornique gave the command to charge the batteries. As they went by, the cannon were fired and the balloon on the parade ground ascended and the horses were frightened and became tangled up together and the horse of claimant collided with another horse and fell about midway of the parade ground. The horse in falling struck him on the head and knocked him down on his shoulder and arm, fracturing both, the saddle striking him and the horse rolling over him.

At the time of the injury the claimant was a carpenter and earning fifty dollars per month. He was treated by

Dr. Robertson from the third day of August, 1899, the day of the injury, to September 2, 1899, when he returned to Bloomington, Illinois, his home. Dr. Fulwiler, of Bloomington, Illinois, attended him from that time to December, 1899, and has attended him many times since.

The evidence shows that claimant was exercising due care and caution and was in the line of his duty at the time he received the injury. The evidence also discloses that the injury was serious and painful and may be permanent in character. The evidence shows claimant has incurred a liability of one hundred dollars for services of a physician and has also been unable to earn anything since his injury. The claimant is fully supported in his evidence by the testimony of his superior officers and comrades and by the testimony of his physician showing clearly a right of recovery.

We are therefore of the opinion a claim should be allowed in his favor for one thousand dollars, the amount claimed. Claimant is therefore allowed one thousand dollars.

WILLIAM O. SNYDER

v.

THE STATE OF ILLINOIS.

Opinion filed December 18, 1900.

MILITIA—*claim for services rendered.* The Commission sustains a demurrer to claimant's petition upon the authority of *Rhodes v. The State ante p. 213.*

The claimant in this case files a claim to recover from the State of Illinois for services rendered as a member of the State Militia equal to pay when called out for riot or other active duty under the express command of the commander in chief, whereas at the time the services were rendered he was not serving in such capacity but was called for the purpose of entering the service of the United States, not to do service for the State.

To claimant's petition the State files a demurrer based on two grounds:

First, that there is no liability on the part of the State, and,

Second, that the claimant has failed to comply with the rules of the commission regarding the filing of proofs.

The Commission is of the opinion that the demurrer is well founded, being in harmony with the decision of this Commission in the case of Wm. Rhodes, et al v. The State and filed at the August term, 1899; therefore the demurrer is sustained and the case is dismissed.

CHARLES HATFIELD

v.

THE STATE OF ILLINOIS.

Opinion filed May 1, 1901.

1. RESPONDEAT SUPERIOR—*State not legally liable for negligence of officers.* The State can not be held legally liable for either the neglect of duty or the negligent performance of duty by the officers of a troop or regiment while on their annual encampment.

2. STATE LIABILITY—*founded upon its own consent.* The liability of the State for any claim, must be founded on its own consent expressed through some act of the Legislature.

The claim in this case was filed with the Auditor on the 20th day of December, A. D. 1899, to the August term of the Commission of Claims.

The general issue was interposed by the Attorney General. The case was heard at the August session, and an opinion filed on the 18th day of December, 1900, finding for the claimant and awarding damages in the sum of one thousand dollars.

On the 23d of February, 1901, the Attorney General filed a motion for a rehearing of said cause, assigning the following reasons for same:

"First: The finding in said cause is contrary to the evidence and the facts therein.

Second: The finding is contrary to the law applicable to said case.

Third: As to matter of law, the said Commission of Claims under the facts in the case, had no jurisdiction to award any amount whatever.

Fourth: Admitting the facts to be as urged in said statement of claim as is stated in the finding of this Honorable Commission, still the facts do not furnish any foundation on which to base a liability of the State to the claimant in the amount awarded, nor in any other amount whatever."

On the hearing of this cause at the August session no evidence was presented or brief filed on behalf of the State. The case being determined entirely upon the evidence and brief of the claimant, a rehearing was considered proper, and granted.

The question now is do the facts presented by claimant's evidence establish a legal liability on the part of the State of Illinois to respond in damages for the injuries received by the claimant.

From the evidence taken it appears that Charles Hatfield, the claimant in this case, enlisted as a member of troop "B," First Cavalry, Illinois National Guard, in March, 1898. That in August, 1899, the National Guard was holding its annual encampment at Camp Lincoln, near Springfield. That on the 31st day of August, 1899, the claimant as a member of his troop was participating in a cavalry charge, which had been properly ordered by the officer in command, and his horse fell. The horse rolled over claimant, and broke his arm and collar bone. The injuries received were serious and painful, requiring the attention of a physician for two months regularly, and for sixty days longer occasionally. We are satisfied that the defendant received an injury while in the line of his duty as a member of his troop, obeying the orders of his officers, which resulted in his losing about six months time, and that he expended about $100 in employing physicians to attend him. We are also satisfied that the facts of the case are sufficient to warrant the legislature in making an appropriation under the head of relief, to compensate claimant for loss of

time, expenses incurred, etc., but do the facts constitute a claim or cause of action, against the State, which would justify this Commission in making an award in favor of claimant?

A slight effort is made on the part of the attorneys for the claimant to show negligence on the part of some one of the officers of the troop or regiment, but who was negligent, or in what manner negligent does not appear. The evidence upon the question of negligence is not sufficient to make out a case in favor of the claimant, if the case had been brought in a court of law against a private individual for an injury received under similar circumstances.

But even if negligence had been proven, in view of the uniform holding of our Supreme Court, and also the ruling of this Commission in a number of cases, the State could not be held legally liable for either the neglect of duty or the negligent performance of duty by the officers of said troop or regiment on the occasion of the claimant's receiving the injury in question.

Story on Agency, Sec. 319;
Dillon on Municipal Corporations, Sec. 975-978;
State Bank, admr. v. The State, decided by the Commission at its August session in 1897;
Jacob Schmidt v. The State, decided by the Commission at its August session, 1900.

Carrying out the above doctrine that the State is not liable for the negligence of its officers or servants, the Supreme Court has also held that counties, towns, road districts, and drainage districts are not responsible for injuries resulting from the negligent performance, or non performance of the duties of its officers or servants.

Town of Waltham v. *Kemper*, 55 Ill., 346;
Russell, Admr. etc. v. *Town of Steuben*, 57 Ill., 35;
Hollenbeck v. *Winnebago Co.*, 95 Ill., 148;
Elmore v. *Drainage Comrs.*, 135 Ill., 269.

In the above case of Hollenbeck, Admr. v. Winnebago Co., 95 Ill., 148, the court says: "In fact the powers and duties of counties bear such a due analogy to the governmental functions of the State at large that as well might the State be held responsible for the negligent acts of its officers as counties. They stand in many respects upon the same footing. The one as well as the other is organized for political purposes."

It is also contended that as the National Government makes just and liberal compensation for all injuries received by a soldier in the United States army, while in the line of his duty, the State of Illinois should be held equally liable to a member of the National Guard, who is injured while in the line of his duty, performing service for the State. The liability of the National Government, however, is not by virtue of any common law right of the injured soldier, but in consequence of a United States statute making proper provision for soldiers injured while in the performance of their duties for the government. The State of Illinois however has no such statute, giving a member of the National Guard a legal claim or demand against the State for injuries received while in the line of duty in the State militia.

In the case of Murdock Parlor Grate Co. v. Com. (Mass.) 8 L. R. A., 399, the court holds that an action to recover damages for injuries resulting from the negligence of a servant of the Commonwealth in the performance of his duties, is not "a claim," within the meaning of the Massachusetts Act of 1887, chap. 216, which authorizes the maintenance of a suit against the commonwealth to recover "all claims," against the State, whether at law or equity.

Also in the case of West & A. R. Co. v. The State, (Ga.) 14 L. R. A., 438, the Court decided that under an act submitting to a commission or court the "legal rights" of the parties, claims alleged to rest upon "equity and good conscience," but not shown to be recognized by any established doctrine of equity jurisprudence cannot be considered.

The liability of any State for any claim, must be founded on its own consent expressed through some act of the Legislature.

It is the opinion of this Commission that there is clearly no common law or statutory liability in this case against the State of Illinois.

But in view of the fact that the Legislature from time to time by special acts has made appropriations for injuries received under similar circumstances, we do not feel disposed to disturb the finding of the Commission in this case.

The following cited cases are some of those in which appropriations have been made:

Frederick Wagner—Appropriation made in 1873 and 1875 for injuries received by premature discharge of a gun in the hands of another member of his company.

William G. Hill—Appropriation of $2,500, in 1885, for injuries received by premature discharge of a cannon which belonged to the State at a soldiers reunion at Belleville, Ill.

George McKee—Appropriation of $2,500 in 1885 for injuries received while in the line of his duty firing a salute on the occasion of the death of James A. Garfield, late president of the United States.

W. J. Ralph—Appropriation of $1,500 in 1885 for injuries received in the line of duty participating in the sham battle at Bloomington, Ill.

Mrs. R. A. Purdy—Appropriation of $2,500 in 1887, whose husband, R. A. Purdy, a private in Co. I. 4th Reg. Ill. Nat. Guards, was injured in a sham battle at Buffalo Rock, near Ottawa, Ill.

John A. Lyle—Appropriation of $3,000 in 1887, who was injured by premature discharge of a cannon belonging to the State, and furnished by proper requisition at a soldiers' reunion held at Sterling, Ill.

Peter McGee—Appropriation of $1,500 in 1887 who was injured by premature discharge of a cannon belonging to the State at a reunion of the Army of the Tennessee.

Jacob Schmidt—Appropriation of $2,500 in 1891, who was injured by an attack made upon him by an unruly convict confined in the Southern Illinois Penitentiary while said Schmidt was in the line of his duty as an officer of said institution.

Samuel Warren—Appropriation of $3,000 in 1895.

J. A. Cowley—Appropriation $2,500 in 1895.

Valentine Fitzpatrick—Appropriation of $1,500 in 1897, for injuries received while in the line of his duty as a member of the Illinois National Guards.

James F. Green—Appropriation of $1,200 in 1899, for injuries received by the explosion of a gun while in the line of his duty as a member of the National Guards.

Ada J. Hunt—Appropriation of $2,000 in 1899, for the death of her son caused by exposure while in the line of his duty as a member of Company M, Ill. National Guards.

LYDIA HERRING, ADMINISTRATRIX OF THE ESTATE OF HAROLD S. HERRING, DECEASED

v.

THE STATE OF ILLINOIS.

Opinion filed January 21, 1902.

1. PROXIMATE CAUSE—*not sufficient to show one of two conjectures more probable than the other.* In attempting to prove a defect to be the proximate cause of an accident it is not sufficient to show that it is more probable that the injury was caused by the defect than otherwise.

2. MASTER AND SERVANT—*what necessary in order to hold master liable for defect.* A servant, in order to recover for an injury, for defects in the appliances in his business, is required to establish three propositions. 1st: That the appliances were defective. 2d: That the master had notice thereof, or knowledge, or ought to have had, and 3d: That the servant did not know of the defect, and had not equal means of knowing with the master.

3. SAME—*servant must report defect at once.* It is the duty of a servant to report a defect at once to his superiors, and if he fails to do so it is negligence on his part that will bar recovery.

The record in this case shows that claimant's intestate, Harold Herring, was a trumpeter in company "C," 5th Regiment, Illinois National Guards. The company was called out for duty in November, 1898, to suppress rioting at Pana, during the miners' strike. Herring was on duty with his company from the date of its call until the date of his death, December 20, 1898. As a trumpeter he was not required to carry a gun, but on the night of his death serious trouble was expected, and every member of the company was on duty, and Herring volunteered to go on patrol duty with a gun, instead of guarding the barracks. His services were accepted and he was detailed for duty with a squad of eight men to guard incoming trains, and stationed with another soldier, Robert Steele, at a point near the tracks of the Big Four railroad, with instructions to watch all incoming trains, and report the arrival of any large body of men, and to protect themselves, if necessary. They were assigned to this position for duty about eleven o'clock at night, and instructed to stay close to the railroad tracks, but the distance they should go from the track was not designated. The night was cold and disagreeable, having rained and sleeted, and the two boys took shelter in a coal shed near by on a private lot bordering on the right of way of the railroad. The shed was about nine feet long and six feet wide, with a low roof, and with a door on the east side and a small window on the north side with a pile of coal slipping down from the window sill. In a short time a coal train passed, and Steele testified he stepped out of the shed followed by Herring, to watch the train, and after they got outside he heard the click of a gun, and supposed that Herring had cocked his gun. It seems the train did not stop, and they returned to the shed. Soon after this, as Steele was standing in the door and Herring was kneeling on the coal pile looking out of the window of the shed, leaning on his gun, Herring called to Steele to come to the window and look at a strange light that had attracted his attention, but before he could step to the win-

dow there was a report of a gun, and being blinded by the flash, supposed someone had shot from the outside. Steele backed out of the door of the shed and took a position so as to be prepared to defend himself, but not hearing any further noise inside of the shed, or outside, ran about two blocks east to where the Sergeant in command of the squad was stationed, and reported that Herring had either shot himself or had been killed. The Sergeant assembled a squad and went to the shed, and found the dead body of Herring lying with his head and shoulders out of the door, with his gun, which had recently been discharged, by his side. The bullet had entered his right side, taking a slanting course upward, and gone out of the left shoulder blade.

It is contended by counsel for claimant that the gun furnished Herring was defective, in that it would go off with a slight jar at the half-cock, safety or full-cock, and by reason of such defect the gun was accidentally discharged, causing his death while in the line of his duty, and that the State should pay damages to his administratrix.

The claim is resisted by the Attorney General on the grounds:

First: Because the doctrine of *respondeat superior* does not apply to the State.

Second: That even if the State could be held liable for the misfeasance of its officers or agents, no recovery could be had under the evidence in the case at bar.

We have reached a conclusion and decided the case under the second ground of defense, and it will not be necessary, therefore, to consider the first.

Applying to this case the same rules of law that would be applicable if the case were one between individuals brought by an employe against an employer, it would be necessary to show, of course, that the defect complained of was the proximate cause of the death of the deceased. There is no doubt the gun of the deceased was defective; that it would go off either at safety, half or full-cock with a slight jar, but the evidence fails to

show that the defect caused the discharge of the gun which resulted in the death of the deceased. Steele, the companion of the deceased, testified that when they went out of the shed he heard the click of a gun, and it would seem from his testimony that Herring returned to the shed with his gun cocked, and was kneeling on the coal pile leaning over the muzzle of the gun, when the accident occurred. Of course the accident would be more likely to occur with a gun which would not stand cocked, but he had placed himself in a position where the accident would be liable to occur if the gun had not been defective, and it is not enough to show that one conjecture is more probable than another.

Bailey's Personal Injuries, Vol. I, pp. 563-564.

Accidents of this kind are of frequent occurrence with guns without defects, and this evidence shows that the deceased was not in the exercise of due care and caution for his own safety, regardless of the condition of the gun.

But if it be conceded that the accident would not have occurred but for the defect of the gun, then the case should be decided by the rules laid down by our Supreme Court to justify a recovery by an employe or subordinate against his employer for an injury received by reason of defective implements or tools alleged to constitute the wrongful act or neglect of the principal.

In Goldie v. Werner, 151 Ill., 551, our Supreme Court say:

"A servant, in order to recover for an injury for defects in the appliances in the business, is required to establish three propositions:

First: That the appliances were defective;

Second: That the master had notice thereof, or knowledge, or ought to have had; and,

Third: That the servant did not know of the defect, and had not equal means of knowing with the master."

See also,

Hope v. Medaris, 156 Ill., 283;

L. E. & W. R. R. Co. v. Wilson, 189 Ill., 89.

Applying these rules to this case we think the evidence in the record clearly shows the first proposition—that the gun was defective. There is no evidence in the record, however, to show under the second proposition that the superior officers of the deceased had knowledge of the defect, but even if it is assumed that they ought to have had, under the circumstances shown in the evidence, yet claimant has wholly failed to establish the third proposition in order to maintain a recovery, to-wit: that the deceased did not know of the defect of the gun.

The record shows by the witness, Bogardus, called by claimant, who is an expert marksman, and familiar with guns, and a member of Co. "C," that at the request of the deceased he examined the gun either the night of the accident, or within a day or two prior thereto, and that he informed the deceased of the condition of the gun, and told him to go to the Sergeant and get another gun, or refuse to go out. This clearly shows that the deceased did know of the defect of the gun. The record does not, however, disclose whether the deceased ever informed any of his superior officers of the condition of the gun. It was the duty of the deceased to report this defect at once to his superior officers, and if he failed to do so it would be negligence on his part that would bar recovery.

T. W. & W. R. R. Co. v. Eddy, 72 Ill., 138;
Hoice v. Medaris, 183 Ill., 288;
Bailey's Personal Injuries, Vol. I, Secs. 830 and 837.

He may, of course, have reported the defect in the gun to some one of his superior officers, although the record is silent on that point, but whether he did or not, under the rules laid down in the cases we have cited, he assumed the hazard in the use of the defective gun after he had learned of its defect, and voluntarily continued using it.

When we apply the established rules of our Supreme Court to the evidence in this record we feel constrained

to hold that no award can be made, and the claim is therefore rejected, but it is directed that the parties hereto shall not be concluded by this opinion in case the claim is presented to the Legislature.

EDWARD GLEASON AND EDWARD D. GLEASON, DOING BUSINESS AS GLEASON & SON.

v.

THE STATE OF ILLINOIS.

Opinion filed August 28, 1902.

BUILDING CONTRACTS—*when architect's certificate is final.* Contractors under a building contract which makes the architect the judge of whether any work or material is an extra, and of the amount which should be added or deducted from the contract for such change or addition, who have a right to appeal to arbitration if they think they are not fairly treated, and fail to do so, can neither claim that certain work should have been considered an extra which the architect did not so consider, nor that a larger sum should be allowed than was allowed by the architect. When parties to a building contract agree upon an arbitrator to settle disputes, and when the contract provides that no money is payable thereon except upon the certificate of the architect, the decision of the arbitrator is final in the absence of fraud or mistake.

On the 5th day of March, A. D. 1901, Edward Gleason and Edward D. Gleason, doing business under the firm name of Gleason & Son, filed in the Auditor's office the claim in this case, against the State of Illinois for the sum of $96,859.26.

The claim is in the nature of an action of assumpsit, growing out of a contract made by the said Edward Gleason & Son, on June 7, A. D. 1898, with the Commissioners of the Asylum for the Incurable Insane, at Hartonville, Illinois, to construct five buildings, namely Employes' Quarters, Domestic Building, Supply Department, Power House and Shops and Boiler House.

The contract was in writing and the right was reserved to the Commissioners to omit certain portions of the work called for by the contract and to make certain changes therein enumerated.

The Commissioners elected to omit the power house and shops and to make the changes enumerated in the addenda.

The contract price after allowing for the omissions and changes aforesaid, was one hundred fifty-four thousand six hundred seventy-eight dollars and fifty cents, ($154,678.50.)

The contract required the execution of bond for the faithful performance thereof by the said Gleason & Son, before the same should become operative and effective. The bond was executed and approved on the 15th day of June, A. D. 1898.

The plans and specifications upon which the contract was let, and which were referred to in the contract, were prepared by Messrs. Reeves & Baillie, architects, of Peoria, Illinois. And the work was to be done, and materials to be furnished by the said Gleason & Son, under the direction and to the satisfaction of the said Reeves & Baillie, who by the said contract were made the superintendents of the construction of the said building.

Article III of the contract provided that "No alterations should be made in the work shown or described by the drawings and specifications, except upon a written order of the architect and Commissioners and when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In case of dissent from such award by either party thereto, the valuation of the work added or omitted shall be referred to three disinterested arbitrators, who shall be each practical mechanics and builders, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference.

Article IV provided that "The contractors should within twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from

the grounds and buildings all material condemned by them, whether worked or unworked, and to take down all portions of the work which the architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications."

Article V of the contract provided, "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of a proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the Commissioners shall be at liberty, after three days written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient grounds for such action, the Commissioners shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the said premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor, and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the Commissioners, in finishing the work, such excess shall be paid by the Commissioners to the contractor; but if such expenses shall exceed such unpaid balance, the contractor shall pay the difference to the Commissioners. The expenses incurred by the Commissioners as herein provided, either for furnishing ma-

terials or finishing the work, and any damage incurred through such default, shall be audited and certified by the architects whose certificates thereof shall be conclusive upon the parties."

Article VI provided that the work should be all completed by the first day of April, A. D. 1899, and time was made of the essence of the contract.

Article VII provided that, "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Commissioners, or the Architects, or of any other contractor employed by the Commissioners upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employes, through no default of the contractor, then the time herein for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor shall be presented in writing to the architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified by the architects, but appeal from their decision may be made to arbitration, as provided in Article III of this contract."

Article VIII provided that the Commissioners should provide all labor and materials not included in this contract in such a manner as not to delay the material progress of the work, and in event of failure so to do, thereby causing loss to the contractor, agree that they will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Commissioners shall become liable (as above stated) that he shall make good to the Commissioners any such damage. The amount of such loss or damage to either party shall, in every case, be fixed and determined by the architect or by arbitration as provided in Article III of this contract.

It was provided in Article IX that payments should be

made by the Commissioners, to the contractors, in installments, as follows: Ninety per cent of all materials and labor that has been used in the construction of the buildings, as per estimates of the architects issued the first of each month. Final payment to be made within thirty days after the contract is fulfilled and accepted by the architect and Commissioners.

And if at any time there shall be evidence of any lien, or claim, for which, if established, the Commissioners or the said premises might become liable, and which is chargeable to the contractor, the Commissioners shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify them against such lien or claim.

Work was commenced on the buildings provided for in the said contract about the first of August, 1898, but was not completed by the first of April, 1899. Commissioners did not seek to terminate the employment by reason of the lapse of time given for the completion of the contract, but permitted the contractors to do work after that time.

On the 12th day of May, 1899, the architects delivered to the Commissioners a notice as required by said contract, reciting that the contractors had neglected and are now neglecting to supply a sufficiency of properly skilled workmen and material for the prosecution of the work upon the buildings under said contract. That the workmen have refused to proceed with any work, and that there are no materials with which said workmen can be employed, and that said contractors have violated said agreement in such failure, and have also violated the agreement in failing to complete the buildings within the time specified in said contract, etc.

On the same day, (the 12th of May) the Commissioners, in compliance with the terms of the contract, caused a notice to be served upon the contractor as follows:

"PEORIA, May 12, 1899.

To Edward Gleason & Son, Contractors:

You are hereby notified that the architects for the un-

designed in the construction of the buildings for the Asylum for the Incurable Insane at Bartonville, in accordance with the contract between you and the undersigned, have certified to us that you have failed and neglected, and now fail and neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality with which to prosecute the work of said asylum buildings at Bartonville, Illinois, according to your contract with the undersigned, and we now hereby notify you further, that unless you do within three days of the service of this notice, supply a sufficiency of properly skilled workmen and materials of the proper quality, we shall terminate your contract as contractors for said work, and enter upon and take possession of said premises, and shall take possession of all materials, tools and appliances thereon, and shall complete said work and shall charge the expense thereof to you. You are further notified that you have violated the contract in failing to complete the buildings within the time specified in said contract, and for these defaults we have elected to declare your contract forfeited, and we shall retain any and all sums that may be due you, for the purpose of paying your sub-contractors."

(Signed by the Commissioners.)

The evidence shows that at the expiration of the three days, that Mr. Edward Gleason, Sr., appeared before the Commissioners at their meeting and applied for three days' extension of the time in which to demonstrate his ability to proceed with the contract, and it further appears that the extension was granted.

On the 19th of May, at the expiration of this extension, the Commissioners caused the second notice to be served upon the said Gleason & Son, reciting that, "having recently served notice of forfeiture of your contract, and having verbally given you three days ending May 19th, to enable you to ascertain whether you could go on and complete your contract, we now find that you have not a sufficient number of skilled workmen, or a

sufficient amount of materials to push the work under your contract, and it being apparent that you are not able to complete the same, we are compelled to adhere to our notice of forfeiture, and shall take possession and complete the work as in your contract with the undersigned provided. We waive no rights under our previous notice, simply giving you an opportunity to demonstrate your ability to proceed and we are now satisfied that you are wholly unable to do so."

The evidence shows that Mr. Reeves served this notice by reading it to Mr. Edward Gleason, at the works, and also delivering him a copy, and that Mr. Gleason surrendered possession without objection or protest, and left the grounds, and never at any time afterwards, offered to do any work upon the buildings, or made any request to be permitted to complete the buildings under his contract.

The Commissioners thereupon took charge of the buildings, materials, tools and appliances upon the grounds.

They also notified the bondsmen of Gleason & Son, and offered to permit them to complete the contract. Their representative came down to look over the situation, but did not indicate any desire or intention to accept the offer and left without making any reply to the proposition.

The Commissioners then made arrangements with the sub-contractors of Gleason & Son, to complete their contracts, and employed a foreman, and other workmen, and procured material and proceeded with the work of completion of the said buildings under the provisions of Article V of the contract.

The Commissioners had paid to Gleason & Son, on the contract, the sum of $91,043.64 at the time they suspended work in May, leaving still due them upon the completion of the contract, the sum of $62,734.85. The Commissioners proceeded with the work until this amount was expended, and then they had to suspend work until after the meeting of the legislature when an-

other appropriation was procured to complete the work. And the evidence shows that they had expended the sum of $56,869.20 more in completing the buildings on December 2, 1899, than remained due the Gleasons, for the entire completion of the work when they suspended work on the 19th of May, 1899.

Claimants now contend that the Commissioners unlawfully took charge of said buildings, and illegally terminated the employment of the claimants as such contractors. That such unlawful action on the part of the Commissioners amounts to a rescission of the contract on the part of the Commissioners, and that claimants have the election of bringing suit on the contract, or may ignore the contract entirely, and bring suit on a quantum meruit for the value of the work done on the contract, less payments made on same, and for the value of all work done and materials furnished, on extra work, less payments made on same, (ignoring the allowances which have been made to them for said extra work by the architects.) Also for the materials, tools and appliances taken charge of by the State.

Claimants file a bill of particulars in which they set up the following demands for work, damages, materials, tools, etc:

Value of work done up to May 19, 1899	$124,824.19
To revising and designing and making new iron plans	1,300.00
To extra work done on four buildings up to May 19, 1899	10,518.85
To 52 tons of extra iron	4,160.00
To the overcharge of old material	1,149.12
To misappropriation of $1,000.87 for moneys withheld from Gleasons to pay alleged Bushnell brick claim	1,000.87
To water plant (appropriated by State) ...	3,050.00
To increased cost of doing work in winter months	18,207.00

Contractor's plant (appropriated by State)	11,423.00
Material on ground	7,162.00
	$191,804.03
By cash, contract and extras	
By cash, old material	94,944.77
Balance	$96,859.26

Claimants on the trial of the case elect to rely upon a quantum merult and treat the contract as rescinded by the Commissioners.

The defense claim that the work was done under contract, and that the contract is still in full force and effect; that the Commissioners acted under the provisions of Article V of said contract, and in compliance with the provisions thereof, in taking charge of said buildings and completing the same; that claimants had been allowed by the architect, and paid the sum of $7,815.10 for extras, and not having made any objection or asked for arbitration as required by the contract, they cannot claim anything further for extras. That the Commissioners have paid the sum of $57,000 more for expenses of completing the building than was due the said Gleason & Son, under their contract, and therefore no award can be allowed to them by this Commission.

Claimants insist that the action of the Commissioners in taking charge of the buildings, and completing them, were illegal and amounted to a rescission of said contract:

First: For the reason that they were not in default under their contract as certified by the architect.

Second: There was not a proper certificate of the architect to authorize the Commissioners to take charge of said buildings and proceed to complete them under the provisions of Article V of the contract.

Under Article V, the Commissioners were clearly authorized to take possession of the buildings and complete them upon certain conditions if the contractors were not proceeding with the work properly, or if they

were not providing a sufficiency of properly skilled workmen and materials, and the architect was of the opinion that such facts were sufficient to warrant the Commissioners in doing so.

This is clearly the intention of the parties to the contract. And when the architect made his certificate to the Commissioners, it is also clear that he understood that he was making a certificate which the contract required of him, in order to justify the Commissioners to take charge of the buildings and complete them. It is also clear that each of the parties to the contract so understood it. No objection was made to the form of the notice, or claim by claimant, or his attorney, who was present at the meeting, that the notice was not sufficient to warrant a termination of the employment of the said Gleason & Son, as such contractors. Neither were the facts contained in the certificate of the architect disputed or in any manner contradicted. The facts surrounding the transaction, and the conduct of the parties proved in evidence tend to show that the truth of the facts therein contained were impliedly admitted, and that Mr. Gleason, at the meeting of the Commissioners, and in the presence of his attorney, Mr. Foster, verbally applied for an extension of time for three days, in which to demonstrate his ability to proceed with his contract. This is not only shown by the record of the Commissioners, but sworn to by two witnesses, and not denied by any one except Mr. Gleason, and he admits being at the meeting, and that the extension was granted to him, as claimed, and that he acquiesced in the same, and does not claim to have made any refutation of the charges against him.

And when the second notice of the Commissioners, terminating the contract, was read to Mr. Gleason by Mr. Reeves, on the 19th, he still makes no denial of the facts recited, neither asserts his ability to proceed nor objects to the form of the notice, or to the certificate of the architect, but voluntarily, and without a single protest, surrenders possession, under the contract, and walks out

and never goes back to do any further work on the buildings or offers to do so.

While there is a conflict in the evidence, after a careful consideration of all the evidence, the conduct of the parties, as shown by the evidence, also the fact that the liens filed by the sub-contractors and material men amounted to more than the estimate allowed to the contractors upon this last occasion, we are of the opinion that the certificate of the architect was true, and that the facts warranted the Commissioners in taking charge of the buildings and completing them as provided in the contract. And when the claimants voluntarily turned over the buildings to the Commissioners without protest or objection, and permitted them to complete them without any intimation that the facts recited by the architect were not true, or that the certificate of the architect or the notice were not sufficient to warrant them in taking possession, they impliedly admit such facts and should be estopped from denying either of them after the Commissioners have taken charge and finished the buildings.

From the books of the Commissioners and other evidence it is shown that the State has spent about $57,000 in excess of the Gleason contract in finishing these buildings. Claimants insists that it was not necessary to have expended so much in order to finish them, and seek to show by estimates that it could have been done for less.

But taking the most favorable showing which is consistent with evidence, we cannot see how the claimants could have been benefited by being permitted to complete the contract, so far as receiving any additional amount of money is concerned. It is conceded that there had been paid to Gleason & Son on the original contract $91,948.64
There was due the sub-contractors of Gleason 57,594.48
Amount shown to be due material men of Gleason, May 19 ..... 4,244.44

Take the estimate of Mr. Mace, a witness for the claimants, and exclude all items which would fall under the contract of either the sub-contractors, and he shows it would require to complete the building the sum of	20,717.40
Making a total of	$174,559.00

This would make the buildings cost the State something like $20,000.00 more than the original Gleason contract. This is all from the showing of the evidence of the claimant except the $4,244.44 which was claimed to be paid to material men of Gleason & Son, which was due them when they quit the works on May the 19th, 1899.

Claimants demand $10,518.85 for extra work done on the four buildings. The evidence shows that the architect allowed the sum of $7,816.19 to the contractors for extra work, which was paid to them. And Mr. Wilson, Mr. Reed and Mr. Reeves all testify that while the claimants made several complaints about the estimates of the architects on the original contract being too small, they made no complaint whatever about any of the extra work, except the smoke stack.

Under Article III of the contract, claimants, if not satisfied with the value of the work fixed by the architect, should have caused the same to be arbitrated, and having failed to do so, are presumed to have been satisfied and are bound by the allowance of the architect. Payments were made upon all of these extras, upon the certificate of the architects. The contract making him the judge of whether any work or material was an extra, and of the amount which should be added or deducted from the contract for such change or addition, the claimants are bound by his certificate. They had the right to appeal to arbitration if they thought they were not fairly treated. And having failed to do so, they can neither claim that certain work should have been considered an extra which the architect did not so consider, nor that a

larger sum should be allowed than was allowed by the architect.

In the case of *Gilmore v. Courtney*, 158 Ill., 482, the court uses the following language:

"Where parties to a building contract agree upon an arbitrator to settle disputes, and where the contract provides that no money is payable thereon except upon the certificate of the architect, the decision of the arbitrator is final, in the absence of fraud or mistake. In *Snell v. Brown*, 71 Ill., 133, this court laid down the rule as to what is sufficient fraud to reject an architect's decision under such a contract. It was there held that where a person voluntarily enters into an agreement that a third person shall estimate work done and pass upon its quality, with power to reject and condemn all material, which in his opinion does not conform to the contract, he cannot avoid or disregard it, except for fraud clearly proved."

The court further says in the case of *Snell v. Brown*, 71 Ill., on page 143:

"It is true his conduct may be impeached and his estimates set aside for fraud; but fraud cannot, as is assumed in this instruction for appellees, be presumed merely because his estimates for work done pursuant to the terms of the contract are less than the measurements actually done. Even if he by mistake in judgment, err in condemning or rejecting work, it would be no ground to impeach his estimate."

It was also held that it is not sufficient merely to show that work was rejected or condemned which in the opinion of others should not have been condemned. This may indeed be proved as a circumstance tending in some degree to establish fraud, but it is not conclusive. The evidence must show that the engineer knowingly and wilfully disregarded his duty and rejected or condemned work, which he knew or at least should have known fully conformed in all respects to the terms of the contract.

We do not find from the evidence in this case that the architect Reeves acted fraudulently, and even if there

had been no appeal permitted from his decision, his rulings would govern. But in this case claimants were not compelled to rely upon the decision of the architect; under the provisions of the contract if not satisfied, they had the right to appeal to three disinterested arbitrators. And having failed to do so, they can not now be heard to question the rulings of the architect.

We do not think there is anything in claimants' demand for $1,300 for revising and designing iron plans. From the evidence of Vanderkloot, the secretary and treasurer of the South Halsted Street Iron Works, it appears that the plans in question were prepared by the engineer of said Iron Company, and that no charge was made for same against Gleason & Son.

Neither do we think their claim of $4,160.00 for extra iron should be allowed. It does not appear from the evidence that the iron furnished by the South Halsted Street Iron Works was in fact heavier than the iron called for by the original plans which the Iron Company submitted to the architects, and was rejected by them for the reason that it was too light. And when the plans were approved by the architects, with an increased weight over that first submitted to them the Iron Company required Gleason & Son to pay them an additional sum of $1,100 which Mr. Vanderkloot testified was for this increased weight, and not for designing iron plans.

It does not appear, however, that this was an increased weight over the original plans; and the plan upon which the first bid of $25,000 was made was never approved by the architects, but on the contrary when first shown to them was rejected, and it was changed and made to comply with the demands of the architect. No claim or pretense was made that it was an increase over the original contract and specifications, or that the contractor was entitled to an additional allowance for this increase. In fact the change which was made in the iron plans was made at the solicitation of the Gleasons and no extra allowance was allowed by the architect for an increase,

or even asked for by the claimants, so far as the evidence shows.

The architect now claims, and it is also sworn to by another witness, that the iron substituted for that called for in the original plans and specifications, was in fact much lighter, and that the State is entitled to a deduction from the contract price.

It is, however, clear to the Commission that neither party to the contract, at the time, expected that any allowance should be made, either in favor of the claimant, or a deduction made in favor of the State; otherwise there would have been a computation and allowance asked for from the architect and if either party was not satisfied with his award, they would have appealed to arbitration, as provided in Article III of the contract. No claim seems to have been made for any of these amounts until long after the Gleasons had suspended work on the building.

Claimants' demand of $18,207.00 for increased cost of doing the work in the winter months is not sustained by the evidence. We do not find from the evidence that claimants have clearly shown that the delay in commencing the work was the fault of the Commissioners, or of any person employed by them. But if delay had been caused by default of the Commissioners or of any person employed by the Commissioners to make the necessary excavations, as contended, claimants should have proceeded under the provisions of Article VI, to have had their time extended, and under the provisions of Article VIII to have the architect estimate the loss or damage which they had sustained by reason of such failure of parties to make the excavations in proper time. And if not satisfied with the allowance of the architect, they should have appealed to arbitration as provided in Article III. Not having made any such demands at the time, the inference is that claimants did not then think they were entitled to any such claim.

While it does not appear from the evidence that the claimants have ever sought to regain their working plant, still if the State has appropriated same, they would be entitled to an allowance for what it was reasonably worth. Also they would be entitled to a reasonable allowance for the parts of the water plant which the State has appropriated. This from the evidence would be a small sum.

But from the view which the Commission takes of the case, it is unnecessary to pass upon the question as to what would be a proper allowance for the claimant for these items. Neither is it necessary to determine the exact amount which the Commissioners have paid in completing the buildings in excess of the amount which is due the claimants on the original contract and all special claims which they are entitled to in this case for the reason that this Commission has no jurisdiction to make an award in favor of the State against the claimants for any amount which the Commission might determine is due the State from the claimants.

The Commissioners are of the opinion that the amount which the Commissioners paid for completing the buildings is much more than all sums due the claimants on the original contract, for special work, or for any of the other demands, which the claimants have filed in this case.

We therefore find that claimants are not entitled to any award in this case against the State of Illinois, for any sum whatever, and the claim is therefore rejected.

HARRY R. WITTE

v.

THE STATE OF ILLINOIS.

Opinion filed September 19, 1902.

MILITIA—*State liable for death of member killed while at target practice under orders.* State is liable for death of an officer of the National Guard killed at target practice while performing his duties as such officer, in pursuance of lawful orders from the Commander in Chief.

The petition in this case was originally filed by Harry R. Witte, administrator of the estate of Edward R. Witte, deceased.

The record shows that the said Edward R. Witte, deceased, was, on the 4th day of October, 1901, the second lieutenant of Company C, 3d Reg. Inf., Illinois National Guard, which company was located at Ottawa, and commanded by Captain Sidney R. Blanchard. The claim arises out of the accidental shooting on said date, of the said Edward R. Witte, at the rifle range of said Company, just east of the city limits of the city of Ottawa, from the effects of which shooting he died on the 7th day of October, 1901, and is brought under Section 4 of Article 9, of Chap. 129, Revised Statutes of Illinois, entitled, "State Militia," or "Military and Naval Code of the State of Illinois," which section was added as an amendment to said article by act approved May 11, 1901, and in force July 1, 1901.

The section is as follows: "In every case where an officer, soldier or seaman of the Illinois National Guard or the Naval Militia of Illinois shall be killed or wounded while performing his duties as officer, soldier or seaman in pursuance of lawful orders from the Commander in Chief, said officer, soldier or seaman, or his legal heirs shall have a claim against the State for financial help or assistance, and the State Board of Claims shall act on and adjust the same as the merits of each case demand."

This section of the statute has never been construed by this Commission, and in the oral argument of the case, the point was raised whether the proceeding should have been commenced in the name of the administrator of the said Edward R. Witte, deceased, or his legal heirs, and claimants' attorneys asked leave to amend their petition by adding "Alice Witte, widow, and Nelson Witte, only son, by Alice Witte, his next friend, sole heirs of Edward R. Witte, deceased," as claimants. No objection was made to the amendment and it was allowed, leaving the question to this Commission to determine to whom an award should be made if at all.

The claim is resisted, however, by the Attorney General, on the ground that no award can be made in this case to any one, under the evidence in the record and a proper construction of the law.

We will first pass on the evidence and then on the question to whom the award should be made, if at all.

The record shows that the range in question was originally constructed with private funds of the company, sometime in 1900, pursuant to orders and directions emanating from the general inspector of rifle practice of the State of Illinois, no funds being available from the State in that year for rifle ranges, except for Springfield and Ft. Logan; that in 1901 there was allowed from the State appropriations, upon the recommendation of the general inspector of rifle practice, to further equip this range, the sum of $125.00; that on May 28, 1901, a general order No. 10, was issued by order of the Commander in Chief and published and distributed for the information and guidance of the officers and enlisted men of the Illinois National Guard, approving the rules and regulations for the government of target practice, during the season of 1901, submitted by the general inspector of rifle practice. Sec. I of Art. 5 of the Military and Naval Code, provides that the general inspector of rifle practice shall have charge of the rifle practice throughout the State and shall superintend the manner in which the same shall be conducted, under the orders of the Com-

mander in Chief. These rules provide that each company shall have certain terms of yearly service or practice with the rifle upon the range and that the rifle season will open June 1st and close October 31st, 1901.

Captain Blanchard testified that his company was composed principally of business men and it was impracticable for any large number of the men to get away to the rifle range at any one time; that on October 4, 1901, most of the men had completed their firing for the year and their scores had been handed in and filed; that very few of the men qualified to shoot from the 800 and 1,000 yards ranges; that those who had qualified to shoot at 800 and 1,000 yards had nearly all completed their firing at these ranges and were through for the year; that among the men who were qualified to pass to the higher ranges, but who had not as yet completed their firing for the year were Captain Blanchard himself, and Robert Strohmeyer, a corporal in said company; that Edward R. Witte, deceased, had already qualified as a sharpshooter and had completed his firing for the year and made his score at 800 and 1,000 yards ranges; that on said date, Lieutenant Witte telephoned him that he would be at liberty from his business that afternoon to do the marking, if any of those who had qualified could get away; that he replied that he could go and that as Strohmeyer had also qualified that he had better go also.

He further testified that he then ordered and directed Witte to go to the range that afternoon and told him to order Strohmeyer to go also if he could leave his work, and that afterwards, he, himself, gave orders to Strohmeyer to go; that he, Lieutenant Witte and Corporal Strohmeyer repaired to the range that afternoon, arriving there about one thirty o'clock, pursuant to orders, as aforesaid; that he assumed charge of the range and Witte and Strohmeyer were from first to last, under his immediate supervision and directions; that Lieutenant Witte was stationed by him at the target house to do the

marking and did no firing himself upon that day; that the range had been equipped with a telephone, one instrument being in the target house and another that could be attached and detached at will, from the connections at each station from 800 yards back to and including 1,000 yards range; that it was not necessary to use the telephone up to the 600 yards range, but that beyond the 600 yards range, after a shot was fired, the marker at the target house would step out in front of the target, get the value of the shot, step back into the house and telephone it to the scorer at the other end of the line, and then step back and paste up the hole in the target, and then return to the target house and telephone the scorer that all was ready for the next shot, and not until this was done, and until the scorer received this second message and communicated it to the man on the firing stand, did the marksman have any right to fire another shot.

The whole construction of the range and the position of the targets are explained by the Captain in his testimony, but suffice it to say that all that is necessary to be repeated in this opinion is what we have already stated and that Captain Blanchard had finished firing at 1,000 yards and Strohmeyer had taken position for firing at that range. At that range, the marksman lies down on the firing platform on his back with his feet crossed at the ankles, pointing toward the target and the barrel of his rifle resting in the crotch formed by the crossed ankles and feet. This method of firing is called the "Texas Grip." Strohmeyer had fired five shots from this range while in that position, completing one score. Captain Blanchard stood with his back to Strohmeyer about two feet away doing the scoring. At the conclusion of the score, Lieutenant Witte telephoned from the target house the value of the last shot. Captain Blanchard had just stated to Strohmeyer that he had made fourteen on that score, that he ought to do better on the next. At that instant, Strohmeyer became confused and fired the first shot on the next score, without waiting to be noti-

fied by the Captain that the marker had telephoned that all was clear for the next shot, or that he should fire. On that afternoon, Lieutenant Witte was dressed in straw colored trousers and a light undershirt. The evidence shows that the 1,000 yards target was 12 feet wide and 6 feet high, made of heavy buff paper, supported by cloth stretched over a woolen frame. The bull's eye in the center of the target was black and about four feet high and 18 to 22 inches wide.

Captain Blanchard and Corporal Strohmeyer both testify that it was impossible to see Witte, while standing against the buff back ground of the target, with the naked eye. Failing to get any answer from the target house after the last shot, Strohmeyer ran to the place and there found Witte lying in the trench, mortally wounded from the effects of his last shot.

It appears from the evidence of the location of the wound, and the mark made by the bullet on the target, that Witte had just completed pasting over the last shot hole and had turned partly around to go back to shelter. He was at once conveyed to the hospital in the city of Ottawa and died from the effects of the shot on the 7th of October following.

It appears from the evidence that neither of the three men were intoxicated; that Strohmeyer and Witte were good friends, and that they had excellent habits, and we are satisfied that the shooting of Witte by Strohmeyer was purely accidental.

The record also shows by the evidence of the attending physicians of Witte, that his death was caused from the shot received while on the range. The evidence of Captain Blanchard and Corporal Strohmeyer, the only persons present, are practically the same in regard to the circumstances connected with the accident.

We believe from the evidence of the witnesses contained in the record, taken in connection with general order No. 10, issued by order of the Commander in Chief, in 1901, and Section I, Article 5 of the Military and Naval

Code, giving the general inspector of rifle practice charge of the rifle practice throughout the State, under the orders of the Commander in Chief, that Lieutenant Witte was an officer of the Illinois National Guard and that he was mortally wounded on the 4th day of October, 1901, from the effects of which wound he died on the 7th day of October, 1901, while performing his duties as such officer, in pursuance of lawful orders from the Commander in Chief, and that, under the section under which this claim arises, an award should be made to some one.

The Commission is of the opinion that an award should be made in favor of the legal heirs of Edward R. Witte, deceased. The evidence does not, however, disclose the names of the legal heirs and as no good purpose would be subserved by continuing this case for the additional proof, we therefore make an award in favor of Harry R. Witte, administrator of the estate of Edward R. Witte, deceased, for the sum of three thousand dollars ($3,000), for the exclusive use and benefit of the legal heirs of Edward R. Witte, deceased, to be distributed by said administrator under the order and direction of the Probate Court of La Salle county, Illinois.

PATRICK H. O'DONNELL, ADMINISTRATOR OF THE ESTATE OF GEORGE C. STOW, DECEASED

v.

THE STATE OF ILLINOIS.

Opinion filed October 1, 1902.

1. RESPONDEAT SUPERIOR—*doctrine does not apply against State.* The doctrine of *respondeat superior* does not apply as against the State; the State is not liable for the acts of its agents.

2. COMMISSION OF CLAIMS—*can allow claims only where legislature has created liability on part of State.* The Commission of Claims can allow claims against the State only in cases where by express statutory provision the Legislature has created a liability on the part of the State for the acts of its agents, or, rather, waived the exemption of the State from such liability.

3. MILITIA—*in what cases there is a liability for injury to member of.* In order to sustain a recovery for injury to a member of the National Guard or Naval Militia it must come within the provisions of Sec. 4, of Art. 9, of the Military Code, which provides that "In every case when an officer, soldier or seaman of the Illinois National Guard or the Naval Militia of Illinois, shall be killed or wounded while performing his duties as officer, soldier or seaman, in pursuance of orders from the Commander in Chief, said officer, soldier or seaman, or his legal heirs, shall have a claim against the State for financial help or assistance, and the State Board of Claims shall act on and adjust the same as the merits of each case may demand."

From the record in this case it appears that Geo. C. Stow, deceased, was at the time of his death, a member of the Illinois National Guard, and that in pursuance of orders of the Commander in Chief, he was encamped with his company at Camp Lincoln, near Springfield, on the 6th day of July, 1901, and on that day was drowned in the swimming pool at said camp. Testimony was introduced tending to show that the pool was not constructed with due regard to safety, and that it "was furnished by the State for the enlisted men to bathe in." Whether or not either or both these contentions are true we do not regard as material in determining this case. It has been held repeatedly by the Supreme Court, and that ruling followed by this Commission, that the doctrine of *respondeat superior* does not apply as against

the State; that the State is not liable for the acts of its agents.

In the case of Ross v. The State, decided by this Commission in 1898, it was said: "that the State cannot be held liable for the acts of its officers, however, negligent, is a rule too well established to admit of controversy"—citing, among other authorities, Schmidt v. The State—Commission of Claims, 1890; State Bank of Chicago, Admr. v. The State—Commission of Claims, 1898; Hedges v. County of Madison, 1 Gilm., 567; Town of Waltham v. Kemper, 55 Ill., 346; Elmore v. Drainage Com., 135 Ill., 269.

This Commission can, therefore, allow claims against the State only in cases where by express statutory provision the Legislature has created a liability on the part of the State for the acts of its agents; or rather, waived the *exemption* of the State from such liability; and to sustain a recovery in this case, it must come within the provisions of Sec. 4, of Art. 9, of the Military Code, which section reads as follows:

"In every case when an officer, soldier or seaman of the Illinois National Guard or the Naval Militia of Illinois shall be killed or wounded while performing his duties as officer, soldier or seaman, in pursuance of orders from the Commander in Chief, said officer, soldier or seaman, or his legal heirs, shall have a claim against the State for financial help or assistance, and the State Board of Claims shall act on and adjust the same as the merits of each case may demand."

We interpret this language to mean that to create the basis for a claim under the provisions of this act the following facts must appear: That the National Guardsman or Naval Militiaman for whom relief may be sought was "killed or wounded;" and that he received his injury "while performing his duties as officer, soldier, or seaman;" and "in pursuance of lawful orders."

Whether or not drowning comes within the terms "killed or wounded,"—a question raised on the part of

the State—we are not called upon to decide in this case, for we do not feel that the evidence would justify us in finding that George C. Stow was drowned "while performing his duties," * * * "in pursuance of lawful orders."

To sustain the theory that he was drowned while so engaged it has been contended by claimant's attorneys in their oral and printed arguments that "enlisted men are expected to keep their bodies clean as well as their uniforms and guns," and that "the only place for them to bathe was the swimming pool." We do not feel that the testimony brings the claim within the intent and meaning of the section on which claimant must rely; there is no evidence to show that the deceased, when drowned, was engaged in the performance of a duty in pursuance of orders. On the contrary it would seem from the evidence that swimming was permitted as a privilege rather than ordered or expected as a duty.

To sustain this claim it would be necessary to construe the section quoted as intending to give a basis of claim against the State for every injury occurring at any time, from any cause, during the time of service, without reference to whether the claimant was killed or wounded in the performance of duty, in the execution of lawful orders or whether the injury was due to accident or carelessness on the part of the person injured and while engaged in his own pursuits.

Had it been the intention of the Legislature, in drawing the provisions of the section, to give relief for any injury received during the *term of service*, they certainly would not have used the words that explicitly and clearly make it a condition of recovery that the claimant must have received his injury while performing his duties and in pursuance of lawful orders. Under the statute, as worded, and under the only construction of its wording that seems possible, we are obliged to reject this claim, without prejudice, however, to other relief, and it is expressly ordered that the claimant is not concluded hereby.

JOHN H. TEDENS AND ANDREW C. DYSTRUP, COPARTNERS, DOING BUSINESS AS TEDENS & DYSTRUP

v.

THE STATE OF ILLINOIS.

Opinion filed October 2, 1902.

1. LANDLORD AND TENANT—*tenant cannot dispute title of landlord.* And if the real owner is threatened with suit from one who has no title whatever, and he should recognize the title of the adverse claimant, and enter into a lease, and accept possession under same and pay rent under said lease, he could not afterwards dispute the title of the other party and recover the rent paid.

2. SAME—*cannot set up better title in himself or third person.* A tenant cannot set up a better title in himself or in a third person.

The claim in this case was filed with the Auditor of Public Accounts on the 6th day of March, A. D. 1902, to the August term of the Commission, A. D. 1902, by John H. Tedens and Andrew Dystrup, partners doing business under the firm name of Tedens & Dystrup, against the State of Illinois, for the recovery of $600 rent claimed to have been unlawfully collected by the Canal Commissioners of the State of Illinois.

The claim grows out of a certain lease executed by the Canal Commissioners to John H. Tedens, (who is the father of John H. Tedens, claimant), and John Thornmahlen late partners who did business under the firm name of J. H. Tedens & Co.

Said lease was for the following lands to-wit: All the right the State of Illinois possesses to that portion of the reserved ninety feet strip lying on the berm or south side of the Canal in Section twenty (20) in township No. thirty-seven (37), range eleven (11), East, described as follows: Commencing at the West side of what is known as Stevens street in the village of Lemont, Cook county, Illinois, and extending in a southwesterly direction down the canal for a distance of 280 feet, constituting a frontage of ninety feet on said Stevens street and a depth 280 feet along said canal.

The annual rent agreed upon was $150, payable in advance. It was provided in said lease that upon default in payment of the said rent, the parties of the second part, John H. Tedens & Co., should surrender said premises to the board of Canal Commissioners.

Said lease also provided that the said land was to be used for mercantile and dwelling house purposes. The lease also contained a stipulation that the lessees would not re-let said tract of land or any part thereof without the consent in writing of the said party of the first part, the Canal Commissioners.

Said lease contained the further agreement, that if at any time within five years from date thereof, it should be determined by the courts of last resort that the ninety feet strip therein described is not under the control of the Board of Canal Commissioners of the State of Illinois then and in that event the rents that may have been paid by the said J. H. Tedens & Co., should be refunded to them or to their successors or assigns by the State of Illinois through its Board of Canal Commissioners.

Said lease under seal, signed by the Board of Canal Commissioners, by its president and secretary and by John H. Tedens and John Thornablen.

It appears from the evidence that John H. Tedens & Co. were in possession of said premises and that they paid rents thereon, under said lease for two years.

It further appears that John H. Tedens & Co. made a voluntary assignment to Frank Welch as assignee, for the benefit of their creditors, on the 10th day of November, A. D. 1898, thereby conveying to said assignees, all of their property, real, personal and mixed. And on or about the 20th of December, 1898, John H. Tedens Sr., died.

The said John H. Tedens & Co. were engaged in the general mercantile business and their store was located on the premises joining the leased premises, and they erected a warehouse on the premises leased from the Canal Commissioners.

On January the 23d, 1899, Frank Welch as assignee,

sold the stock of goods to John H. Tedens, jr., and Andrew C. Dystrup, partners, etc., and leased them the premises occupied by the storehouse and also the leased premises.

On February 2, 1899, a petition was filed in bankruptcy, by the creditors of the said J. H. Tedens & Co., in the United States District Court for the Northern District of Illinois, against John Thormahlen, surviving partner of John H. Tedens & Co., and he was adjudged a bankrupt, and at the first meeting of creditors the said Frank W. Welch was selected and appointed trustee of said estate.

On September 5, 1899, the Canal Commissioners made demand on the trustee for payment of $300 being two years rent then in arrears under said lease.

The trustee refused payment, as he claimed, on the ground that the matter was then in controversy in the suit of Werling v. Ingersoll, then pending in the Supreme Court of the State of Illinois.

The Canal Commissioners filed an intervening petition in the bankruptcy proceeding in the United States Court, and procured an order on the 6th day of September, 1899, that said trustee pay to the Canal Commissioners the said sum of $300, it being also agreed by the Canal Commissioners that if the said trustee paid to them the said sum of $300 rent then due, and paid the subsequent amounts as they fell due while said lease was in his hands, that they would agree that the said trustee should assign the said lease to any one to whom he should sell the same. And on the same day said trustee in compliance with said order paid to the said Canal Commissioners, the said sum of three hundred dollars the rent then due.

On the 12th of December, 1899, an order was entered authorizing the trustee to offer for sale the store premises of Tedens & Co.

And on the 22d day of December, the said trustee was ordered by the said U. S. District Court to convey said

store premises to the said Tedens & Dystrup. And on the 16th day of January, 1900, the said Frank W. Welch as such trustee conveyed the said store premises to the said Tedens & Dystrup.

And on November the 26th, 1900, the said trustee assigned and delivered to the said Tedens & Dystrup the lease above described, executed by the said Canal Commissioners to the said J. H. Tedens & Co., being the same parties to whom said trustee had sold the store premises.

On the following day, the 27th of November, A. D. 1900, the said trustee procured an order authorizing him to sell at public sale all the desperate notes, accounts and judgments of said estate of J. H. Tedens & Co., and on the 14th of December, 1900, pursuant to said order the trustee sold all of the desperate assets, among which is claimed a $450 conditional claim against the Canal Commissioners, was sold, to one Archibald D. Brown, and on the same day the said Frank W. Welch as such trustee by his deed of assignment assigned and delivered all of the said desperate accounts of the estate of the said J. H. Tedens & Co., amounting to the sum of $55,000.58 to the said Archibald D. Brown, for the sum of $250.00.

On the 21st day of January, A. D. 1901, the said Archibald D. Brown sold and assigned the entire list of desperate assets, which he had purchased to the said Tedens & Dystrup for the sum of $275.

Claimants now insist that it has been decided by the courts of last resort that the State of Illinois had no right to the control of the said leased premises, and that as they have purchased the said conditional demand against said Canal Commissioners that they are entitled to recover the amount of money which has been paid as rent for the said leased property, both by the said J. H. Tedens & Co., and by the said Frank W. Welch as trustee.

It is insisted by claimant that they are entitled to recover upon two grounds. First, under the provisions of the contract, providing that the Canal Commissioners

would refund all moneys paid as rent if it should be decided by the courts of last resort, within five years from the execution of said contract that the said Canal Commissioners had no right to the control of the said premises, mentioned in said lease. Second, that the claimants are entitled to recover upon the ground that the State of Illinois, through its Canal Commissioners have collected money, which it was not lawfully entitled to, and that therefore, the State should refund it to the claimants as the assignees of said claim.

It is claimed by the defense that the said J. H. Tedens & Co., having accepted a lease of the said premises and made themselves the tenants of the State, are estopped from denying the title of the State, their landlord. And the evidence showing that the claimants in this case, have accepted an assignment of the said lease from the said Frank W. Welch, as trustee in bankruptcy, of the said estate of J. H. Tedens & Co., they are also estopped from questioning the title of the State, which is also their landlord, by reason of their having accepted an assignment of the said lease and going into the possession of the said property under the trustee of said estate of J. H. Tedens & Co. The defense also contend that the courts of last resort have not decided that the State of Illinois is not entitled to the possession of the said property, within the provisions of the said contract.

No principle of law is better settled, than that the tenant can not dispute the title of his landlord and if the real owner is threatened with suit from one who has no title whatever, and he should recognize the title of the adverse claimant, and enter into a lease, and accept possession under same and pay rent under said lease, he could not afterwards dispute the title of the other party and recover the rent paid.

Holsen v. *Holsen*, 145 Ill., 658.

It has been decided by our Supreme Court, that the tenant can not set up a better title in himself or in a third person.

Sexton v. *Curley*, 147 Ill., 260.

The said John H. Todens and John Thornahlen having recognized the right of the State, by accepting a lease from them and holding possession under the same and paying rent to the Canal Commissioners, were clearly estopped from questioning the title of the State, or seeking to have the rent paid by them refunded, unless they can do so under the provisions of said lease.

Have the claimants made out a case under the contract conditions of the lease? Two things must be proved by the claimants to make out a case: First: They must prove that it has been decided by the courts of last resort that the State of Illinois has no title to or right to the control of the premises mentioned in the lease. Second, This decision of the courts of last resort, deciding that the State has no right to the control of the said premises, must be rendered by such court of last resort within five years from the execution of the contract.

It is not contended by the claimants that there has been any decision of any court with reference to the title to the land in question, but it is claimed that the case of Werling v. Ingersoll although brought to test the title to land in a different county from the land in question, was in fact decisive of the title to the land mentioned in the case at bar.

While we are of the opinion that the claimants might prove that the courts of last resort had held that the State of Illinois had no right to the control of the land in question by a decision of said court, in a case other than in a case between the said John H. Todens & Co. and the Canal Commissioners, brought for the purpose of testing the title to the said premises, yet if they rely upon a decision in another case, they must prove that the facts and conditions of each case are substantially the same, that the State claims title from the same source that was claimed in the case of Werling v. Ingersoll, and that the State has no other title.

While it may be true that the State claims title under the Statute of 1822, the same as in the case of Werling

v. Ingersoll, 182 Ill., 25 and 181 U. S. 131, still claimants have not proven this fact, and the Commission are not permitted to presume any part of their case. In the case of Werling v. Ingersol, the court in the opinion says, that it is proven that the land in question is not in a section taken by the State under the Statute of 1827. Also in the case of the *City of Chicago* v. *McGraw*, 75 Ill., 566, it was also stated that it was proven on the trial that the premises in question were in a section reserved to the United States. Claimants have not proved that the premises in question are not in a section belonging to the State of Illinois under the act of 1827. In fact no evidence was offered upon this question, but it was insisted upon the argument that the mere fact that the government had sold a portion of the land in section twenty, township thirty-seven north range eleven east, that this fact proved that this was not one of the sections granted to the State of Illinois. But the fact that the government frequently has sold from the same tract twice, and it has been decided by the courts that where this happens, that the first grant controls and takes title, would indicate that this fact would not be sufficient proof of the fact that this was not one of the sections belonging to the State.

In fact claimants have not shown that the title claimed by the State may not be other and different from the act of 1822, or the act of 1827.

The Commission are also of the opinion that the claimants have failed to prove the second proposition, that the title was decided against the State by the courts of last resort within five years from the time of the execution of the lease in question.

The lease was executed on the 15th day of April, A. D. 1895, and the suit was decided in the Supreme Court of the United States on the fifteenth day of April, A. D. 1901, just six years after the execution of the lease. If the decision of the United States Court was intended by the "Courts of last resort," then claimants could not recover under their contract or lease for the reason that

the time had expired in which they were permitted to recover under the provisions of the lease.

It is claimed that the case of Werling v. Ingersol, 182 Ill., 25, decided the question in this case and that it was decided on the 10th of October, A. D. 1899, which was less than five years from the time of the execution of the lease in question.

The Commission are of the opinion that the opinion of the United States Court, was the court of last resort within the meaning of the lease. It can not be claimed that the case of Werling v. Ingersol, 182 Ill., 25, was the decision referred to by the lease, for the reason, that the same questions which were decided by it had long before been decided by the same court in the case of the City of Chicago v. McGraw, 75 Ill., 566. This case was decided in 1874, which was several years before the execution of the lease in question so it could clearly not have been the decision intended by the lease. In the case of Werling v. Ingersol, 182 Ill., 25, the court does not discuss the reasons for the holding but simply says, "We refer to that case (meaning City of Chicago v. McGraw, 75 Ill., 566), for the reasons given in support of this conclusion so reached. It is unnecessary to repeat those reasons here."

If the State had no other title to the premises in the lease to J. H. Tedens & Co. than the rights given under the Statute of 1822, then clearly they intended some other decision than by the Supreme Court of the State of Illinois, for the Supreme Court of the State of Illinois had held long before the execution of the lease to Tedens & Co. that the State of Illinois acquired no title to the ninety feet strip along the Canal under said statute. So if it should be admitted that the State had no other title than under this Statute of 1822, it must clearly follow, that the parties at the time of making the lease, and referring to a decision of the question by the courts of last resort, within five years from the execution of the

house, intended to mean the decision of the United States Court.

The Commission is of the opinion that claimants have failed to make out a case, and the claim is rejected.

FRANK G. BELT

v.

THE STATE OF ILLINOIS.

Opinion filed November 25, 1902.

RESPONDEAT SUPERIOR—*State not liable for negligence of its agents.* The State is not liable for injuries caused by the default or neglect of its agents or employes.

This claim was brought to recover the value of a peach orchard that was killed or injured as a result of "spraying," done under the direction of the State Entomologist, presumably acting in pursuance of an act of the General Assembly, in force April 11, 1899, entitled, "An Act to prevent the spread in Illinois of the San Jose scale."

We do not deem it necessary in determining liability in this case to decide whether or not the treatment of the trees by spraying, as given under the direction of the State Entomologist was a proper treatment, though we are inclined to believe it was done by the method then recognized and approved by the authorities and experts on horticulture and had been followed successfully by the State Entomologist in many other cases.

However this may be, in our view of the law applicable to the facts, claimant cannot recover. Though doubtless true, as counsel for claimant says in his written argument, that "no rule of law is better established than that the principal is liable for the acts of his agent when done in the course of business," it is equally well recognized that this principle of liability (the doctrine of *respondeat superior*) is not applicable as against the State. That the State is not liable for injuries caused by the default or neglect of its agents or employes.

Such has been repeatedly the ruling of this Commis-

sion, following the decisions of the Supreme Court in the following and other cases:

Hedges v. County of Madison, 1 Gilman, 567;
Town of Waltham v. *Kemper*, 55 Ill., 346;
Bussell, Admr. v. Town of Steuben, 57 Ill., 35;
Hollenbeck v. Winnebago Co., 95 Ill., 148;
Elmore v. Drainage Commrs., 135 Ill., 269;
Cooney v. Hartland, 95 Ill., 516.

It is further contended by counsel for the claimant that he was not notified by the State Entomologist to treat his trees—nor did he refuse to treat his trees—and that without such refusal by the claimant the Entomologist had no right to treat the infested trees; and it is further contended that the act under which the Entomologist was presumably acting was unconstitutional—and that the Entomologist was therefore acting without authority of law.

Without passing on these contentions, the Commission suggest that if they were all true, the only effect would be that the remedy does not exist against the State—the liability, if any exists, would be on the part of the person acting under an unconstitutional act—or attempting to execute an act without following its provisions.

Under the law as we find it, following the rulings of the Supreme Court and the precedents of this Commission, the claim is rejected; without prejudice, however, to other relief, and it is expressly ordered that the claimant shall not be concluded hereby, attention however being called to the evidence presented, as to the excessive claim for damage ($3,184.00) in the statement of claim.

According to the testimony of the claimant, his orchard was set out in 1899, in peach trees *costing about twenty cents* each. For his 504 peach trees killed or injured he fixes his loss at $3,184.00, an average of over $6 for each tree.

By his own testimony, the cost of cultivating the orchard for the two seasons before it was destroyed was $350;

this amount is not, however, substantiated by the items of expense for cultivation as given by the claimant himself.

E. C. Green, assistant State Entomologist, shown to be an authority on this subject, says the value of the trees at the time of the spraying was not over 50 cents each, making the total value $252.00, which is doubtless a fair estimate of the loss suffered by the claimant.

WILLIAM T. WALLACE

v.

THE STATE OF ILLINOIS.

Opinion filed November 25, 1902.

RESPONDEAT SUPERIOR—*State is not liable for the default of its agents or employes.* Where State Entomologist sprays fruit trees of claimant and as result the orchard is destroyed, claimant is not entitled to award.

In this claim recovery is sought for the value of an orchard alleged to have been destroyed as a result of "spraying" done under the authority of the State Entomologist.

The law under which the entomologist was presumably acting was enacted "to prevent the spread in Illinois of the San Jose scale." (In force April 11, 1899.) The claimant's attorney contends that "claimant never refused to treat the infested trees; and until such refusal by the claimant, the State Entomologist or his assistant had no right to treat the trees and spray them as was done" and that under the provisions of the law "claimant was entitled to written notice giving him a specified time to treat the trees." And further contends that the act is unconstitutional, as authorizing the destruction of property without due process of law.

As to the first of these contentions, that the provisions of the law, as to notice, were not followed, it would seem that the formality of notice might be considered waived from the fact that claimant wrote to the State Entomolo-

gist requesting that his trees be treated—see claimant's letter dated November 24, 1900, marked "Exhibit A."

The law has been repeatedly announced by the Supreme Court and uniformly followed by this Commission that the State is not liable for the default or neglect of its agents or employes—that the doctrine of *respondeat superior* is not applicable as against the State.

Hedges v. *County of Madison*, 1 Gilman, 567;
Town of Waltham v. *Kemper*, 55 Ill., 346;
White v. *County of Bond*, 58 Ill., 297;
Symonds v. *Clay County*, 71 Ill., 355;
Hollenbeck v. *Winnebago County*, 95 Ill., 148;
Elmore v. *Drainage Comrs.*, 135 Ill., 269.

Without going into the question of whether the "spraying" was properly done—though the testimony of the expert tends to show that the treatment was that recognized and followed by the authorities on this subject; without attempting to pass on the constitutionality of the law or even as to whether that would in any case be within the province of this Commission; in accordance with the above decisions, we hold that even if the provisions of the law were not followed the State is not liable for the acts of its agents in improperly carrying out the provisions of the law—nor would the State be liable for damage done by persons presumably acting under the law—even if it were admitted to be unconstitutional—which we are not called upon to decide, though ample authority is cited in the brief of the Attorney General to sustain the constitutionality of the law, if that were essential or material to a finding in this case. We rest our decision, however, on the rule that the State cannot be held liable for the acts of its agents, even if negligence were shown—and on this ground *the claim is rejected*.

While the Commission, under this construction of the law feel constrained to hold that the damage to claimant's orchard is a loss or misfortune for which the State is not legally liable, the claim is rejected without prejudice and it is expressly ordered that the claimant shall

not be concluded hereby; calling attention, however, to the evidence as to the extent of claimant's loss. In the statement of claim, verified by affidavit, claimant fixes his loss for 1,300 trees at $6,415.00, or about $5 per tree.

In his cross examination the claimant states that his land (20 acres), with the trees, was worth $100 per acre; after the trees were destroyed that it was worth $55 per acre—a difference of $45 per acre, or $900 for the entire orchard. Mr. E. C. Green, assistant State Entomologist, who examined the orchard and discovered its infestation by the San Jose scale and directed the "spraying," states that about one hundred of the trees were so badly infested as to be worthless and were cut down; that about one-half the remainder (600) were worth 75 cents each and the balance (600) about 25 cents each—making a loss of $600 according to this estimate, or $900 based on claimant's valuation of his land. Whichever amount be correct, between these amounts ($600 and $900), it would seem, the claimant's loss might be fairly estimated.

LUCIUS G. FISHER

v.

THE STATE OF ILLINOIS.

Opinion filed December 31, 1902.

1. RESPONDEAT SUPERIOR—*State not bound where agents have transcended their powers.* State cannot be bound by acts or contracts of its officers or agents where such officer or agent has transcended or exceeded his lawful or legitimate powers.

2. RATIFICATION—*of unauthorized acts by State.* The State may ratify unauthorized acts of its officers or agents.

Claimant in this case asks for an award in the sum of thirty-nine hundred eighty-nine and 98-100 dollars ($3,989.98) for rent and accrued interest thereon for rooms belonging to claimant, occupied by the State Architect as his offices, from the first day of September, A. D. 1899, to the 15th day of September, A. D. 1901. The record shows that R. Bruce Watson was appointed

State Architect by Governor Tanner on July 1, 1899, under the provisions of an act creating the office, approved April 24, 1899, and in force July 1, 1899. The act under which the State Architect was appointed provided the amount of salary he should receive, and defined his duties and powers, but made no provisions for the expense of an office to be occupied by him, and conferred no authority upon the State Architect, nor any other officer of the State, to create any liability against the State for office rent, or expense of any kind.

It is a well established rule of law that the State cannot be bound by the acts or contracts of its officers or agents, where such officer or agent has transcended or exceeded his lawful and legitimate powers.

Throop on Public Officers, Sec. 551, and cases cited.

Mechem on Public Officers, Sec. 884, and cases cited;

It is also a well established rule of law that a State may ratify the unauthorized acts of its officers or agents.

Mechem on Public Officers, Sec. 585, and cases cietd;

Throop on Public Officers, Sec. 551, and cases cited.

It is contended by counsel for claimant in this case that the State has ratified the act of the State Architect in renting the offices, and that the State is therefore liable for the claim, whether the State Architect had any authority to make the contract or not.

The record shows that at or about the time the State Architect was appointed, he went to Springfield, and that he and Governor Tanner called upon the Secretary of State, and asked him, as Custodian of the State House, to furnish an office for the State Architect, who informed him that none of the rooms in the State House originally intended for offices were vacant, but that he could, however, furnish a room for Mr. Watson on the fourth floor, and that he referred the matter to the Superintendent of the Capitol Building, Capt. R. J. Beck. The

Secretary of State also testified that the Governor argued that a room should be furnished for the State Architect because the office was one that should be located at the capital of the State.

Capt. R. J. Beck testified that he took Mr. Watson to room 17, on the fourth floor, which was about twenty-four feet square, with two windows, and told him that he could have that room for his office; Mr. Watson was not satisfied with the room in its then condition, and wanted it painted, daubed and frescoed, and put in better shape. This he was willing to do, and told Mr. Watson he would do whenever he was ready and willing to occupy the room, but that Mr. Watson never returned to inquire about the room.

Mr. Watson testified that the room was not satisfactory, and that he so reported to Governor Tanner, and that the Governor authorized him to rent rooms, and that, acting on the authority given him by the Governor, he rented rooms 1800, 1802, 1804, 1806, 1808, 1810 and 1812 in the Fisher Building, on the corner of Dearborn and Van Buren streets, in the city of Chicago, which premises belonged to the claimant, and entered into a lease on the 10th day of July, 1899, whereby said premises were demised to the State of Illinois from the first day of August, A. D. 1899, to the 30th day of September, A. D. 1903, at a monthly rental of two hundred ninety dollars ($290.00) per month. The lease was offered in evidence and was signed

"State of Illinois, by R. Bruce Watson, State Architect."

He further testified that he afterwards ascertained that on account of the falling off of the work for the State, he could get along with less room, and entered into a new lease with claimant on the 16th day of February, A. D. 1900, leasing two of said rooms, Nos. 1800 and 1802, from the first day of March, A. D. 1900, to the 30th day of April, A. D. 1903, at a rental of one hundred dollars ($100.00) per month, and executed the second lease in the same manner he did the first, and was released from obligation of the first lease. He also

testified that he occupied these two rooms from March 1, 1900, as State Architect, until September 15, 1901, at which time he surrendered them to claimant. He is corroborated in all of his testimony in regard to renting the rooms by Charles B. Osborne, who was the agent of the claimant, and who testified that the rental value as fixed in the leases was a reasonable rental value.

We do not think these facts sufficient to show a ratification by the State of the action of the State Architect in renting the rooms. The mere fact that the Governor authorized the State Architect to rent the rooms did not clothe him with legal authority necessary to bind the State. There is no more law authorizing the Governor to execute a lease of this kind than there is to authorize the State Architect, and the fact that the Governor directed the State Architect to execute the lease, if he did do so, would not in any way affect the liability of the State.

It is strenuously urged by counsel for the claimant that a substantial benefit accrued to the State of Illinois from the use of the rooms by the State Architect, and authorities are cited where it has been held under such circumstances, that a ratification by the State would be presumed.

We are unable in this case, however, to see where the State has derived any benefit by the occupancy of the rooms by the State Architect, that it would not have derived if the State Architect had performed in his own private office the duties required of him by the statute under which he was appointed. The act did not require the State Architect to maintain a public office at any place, and did not require him to give up his private business for the business of the State, and the record does not show that he did do so. The statute under which he was appointed gives him a salary of five thousand dollars a year, and we are of the opinion that this salary, when taken in connection with the salary allowed other State officers, is amply sufficient for the State

Architect to provide any additional room he may require in Chicago, to his private offices, and yet leave remaining a larger salary than is received by most of the officers of the State.

Believing, therefore, that the State Architect was not legally authorized to contract for the renting of rooms, and that the State is not bound for the payment therefor, the claim is rejected.

ARTHUR FRANTZEN COMPANY

v.

THE STATE OF ILLINOIS.

Opinion filed December 31, 1902.

1. STATE ARCHITECT—*has no authority to create any liability against the State.* The act under which the Supervising or State Architect was appointed, provided the amount of salary which he should receive, and defined his duties and powers, and made no provision for expenses of the office, and conferred no authority upon the State Architect, or any other person, to create any liability against the State for office rent, or expense of any kind.

2. RESPONDEAT SUPERIOR—*State not bound where officers have transcended their powers.* The State cannot be bound by the acts and contracts of its officers or agents, where such officer or agent has transcended or exceeded his lawful and legitimate powers.

3. PUBLIC OFFICERS—*person deals with officer at his peril.* A person dealing with an officer must at his peril, ascertain the extent of his power.

This is a claim for certain materials furnished, and labor performed by the claimant, a corporation duly incorporated under the laws of the State of Illinois, in equipping the offices of the Supervising Architect of the State of Illinois, or State Architect, with certain electrical appliances, consisting of an office telephone system, electric bells and push buttons, connecting the various offices with one another, and with the waiting room of said offices.

There is no dispute about the facts in the case. R. Bruce Watson was appointed Supervising Architect of the State of Illinois by Governor Tanner, July 1, 1899.

under the provisions of an act creating the office, approved April 24, 1899, and in force July 1, 1899.

The only evidence in the record is the testimony of the Supervising Architect, and W. R. Rattenbury, president of the said claimant corporation. The Supervising Architect testified that sometime after his appointment, the Governor told him to rent space and go ahead and make necessary arrangements to get out certain work for the State; that he rented space in the Fisher Building, in the city of Chicago, and had several different offices that necessitated some annunciators, push buttons, etc., in conducting the business of the office, and that he ordered the work done by the claimant through his assistant. That the bill, as first presented, was for one hundred thirty-four and 70-100 dollars ($134.70); that representatives of claimant called several times at his office to collect the bill, but that he made objection to the amount of the bill, and refused to approve it; that the bill was afterwards rectified and cut down to one hundred four and 70-100 ($104.70), which he thought a reasonable amount, and that he approved the same, and accepted the work on behalf of the State; that he then informed the representatives of the claimant that the law creating the office of the State Architect did not make any provisions for office rent, equipment of office, and the payment for the same, but that he had been given to understand by Governor Tanner that the matter would be adjusted, and instructed to go ahead and take steps to have the necessary work done. He further testified that he took the matter up with Governor Tanner, and afterwards with the State Board of Charities, but that the State Board of Charities made no provisions or arrangements to pay the bill, and that the Governor approved their action.

W. H. Rattenbury testified that he was the president of the claimant corporation, that said service and material were furnished by claimant on the order of the Assistant of the State Architect, that the prices charged were the usual and regular prices charged for that char-

acter of work; that the amount claimed was due and unpaid. He first stated that the work was done in April or May, A. D. 1900, but corrected the statement after investigation, and stated that the work was completed in September, A. D. 1899; that the first bill rendered to the State Architect, was for the sum of one hundred thirty-four and 70-100 dollars ($134.70), but that the work was not itemized in that bill; that the bill was held by the State Architect until April or May, 1900, at which time he requested an itemized statement; that the itemized statement or second bill was for one hundred four and 70-100 dollars ($104.70), and was dated in May, A. D. 1900; that he did not know positively whether the State Architect, or the State, was to pay the bill, but that he considered the order of the Architect a sufficient guaranty that the money would be paid.

The claim was filed in the office of the Auditor of Public Accounts on the 10th day of April, A. D. 1902, and is resisted by the Attorney General for the following reasons:

First: That the claim, if any ever existed, is barred by the statute of limitations.

Second: That the work was not done for, or received by the State of Illinois, and there is no liability on the part of the State for the payment of the claim.

Third: That R. Bruce Watson, who ordered the work done, had no authority to contract for the work on behalf of the State, or to bind the State for the payment therefor.

In the claim filed by the claimant corporation, and sworn to by the witness Rattenbury, it was set out that the work was done in the months of April or May, of the year 1900, but in his evidence given in the case, he stated that he desired to correct his testimony, and stated that the work was done in the month of September, 1899.

Section 4 of an act to limit the time of bringing claims against the State of Illinois, approved March 1, 1847,

Hurd's Statutes, 1901, page 418, provides that all unliquidated claims against the State shall be proved up, and filed within two years from the time such claims may have arisen.

As more than two years intervened between the time when the work was done and the material furnished, and the time when the claim was filed with the State Auditor, it is barred by the statute if unliquidated. If, however, the State Architect had the power to bind the State, the claim became liquidated when he approved the bill and accepted the work.

The only question then for determination, is—did the State Architect have the power to bind the State.

The act under which the Supervising or State Architect was appointed, provided the amount of salary which he should receive, and defined his duties and powers, and made no provision for expenses of the office, and conferred no authority upon the State Architect, or any other person, to create any liability against the State for office rent, or expense of any kind.

It is a well established rule of law that the State cannot be bound by the acts and contracts of its officers or agents, where such officer or agent has transcended or exceeded his lawful and legitimate powers.

Throop on Public Officers, Sec. 551;
Mechem on Public Officers, Sec. 834;
Tomm v. *Lavalle*, 92 Ill., 268.

The same authorities also hold that every person dealing with an officer must at his peril, ascertain the extent of his power.

It is argued by counsel for claimant, however, that as the work performed by claimant was done in good faith, at the request of the State official who was acting in good faith, under the direction of the Governor who had appointed him, and as there is no dispute as to the services rendered and materials furnished, nor as to their value that the claim should not be defeated on mere technicalities.

We cannot, however, disregard the established rules of law.

"The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implication, and such is the well established rule. There can be no occasion or excuse in such a case for indulging in presumptions or relying upon appearances, but the authority must be traced home to its source, and must be shown actually to exist."

Mechem on Public Officers, Sec. 830.

The mere fact that the Governor authorized the State Architect to have the work done, did not clothe him with legal authority necessary to bind the State.

In the case of Floyd Acceptances, reported in 7 Wall, page 666, Justice Miller makes use of the following language:

"We have no officers in the government, from the president down to the most subordinate agent, who does not hold office under the law with prescribed duties and limited authority."

There is no law authorizing the Governor to direct the State Architect to have the work done, and the fact that he did so would not in any way affect the liability of the State.

The State Architect was not legally authorized to contract for the work on behalf of the State, or to bind the State for the payment therefor.

The claim is therefore rejected.

FREDERICK W. TIERNEY

v.

THE STATE OF ILLINOIS.

Opinion filed December 31, 1902.

1. COMMISSION OF CLAIMS—*Law creating commission does not create new liability against State.* The law creating the Commission of Claims does not undertake to create a new liability against the State, but provides a method by which claims against the State may be heard before this Commission and claims rejected or awards made in favor of the claimant. Such Commission shall hear such claims according to its rules and established practice and determine the same according to equity and justice, except as otherwise provided in the laws of this State.

2. STATUTES—*Will usually not be given a retrospective operation.* A statute will not be given a retrospective operation, even though such an operation will not violate the paramount law of the constitution, unless there is a clearly expressed intention that it shall have such an operation.

3. STATUTES—*When to be construed to have a retrospective operation.* A statute will be construed to have a retrospective operation only when the language is so clear as to admit of no other construction.

The claimant in this case, Frederick W. Tierney, was a member of Company A, 4th Regiment, Illinois National Guard, of Arcola, Illinois, and was with the fourth regiment during its service in the Spanish-American war.

Frederick W. Tierney resided on a farm near Humboldt Station, six miles south of Arcola on the Illinois Central railroad.

On the 10th day of July, A. D. 1900, he received a card from an officer of his company notifying him to report at the armory at Arcola at 9 o'clock on July the 14th, prepared to proceed to Camp Lincoln at Springfield, Illinois, for the annual encampment.

In pursuance of said order the said Frederick W. Tierney, on the morning of the 14th of July, A. D. 1900, went to Humboldt, Illinois, for the purpose of taking a passenger train from Humboldt to Arcola, but just as he arrived at the station the passenger train pulled out

and left him. A freight train was standing on the side track. He explained to the train men his anxiety to reach Arcola on time, and was permitted, either by the conductor or brakeman, to get into a box car, said freight train not being permitted to carry passengers. When the train arrived at Arcola he found that it was not going to stop, and only slowed up a little for the Vandalia crossing. Seeing that his only chance of getting to the armory on time was to endeavor to get off, and as the engineer was apparently increasing his speed, he attempted to get off.

He looked out of the car and saw a pile of cinders, and thinking it would furnish him a good place to light he jumped from the car out of the side door while the car was in motion. In making the effort to get out he fell and both feet were caught under the car wheels and both feet were badly mashed, so that his left foot had to be amputated below the knee and his right foot near the instep. Claimant is permanently injured and unable to follow his occupation of farming, or to engage in any other occupation whereby he may earn a living for himself where any considerable physical exertion is required. The evidence clearly discloses that the claimant is a sober, honest and industrious young man. But do the facts constitute such a case as will justify this Commission in making an award in favor of claimant.

In this case, as is usually the case, there seems to be a misunderstanding of the powers of this Commission. In complainant's brief, it is frankly admitted that if in the decision of the case we are to be controlled by the stern rules of law, the same as if claimant brought suit against a railroad company in a State court, that the claimant must fail.

But it is argued that the act creating this Commission, and prescribing its powers and duties, confers upon the Commission the power to decide cases in such a manner as would seem to be just and equitable to the Commission, wholly regardless of the established principles of law and equity as administered by the courts.

The uniform holding of the Commission, however, has been different, as shown from the following language taken from the opinion of the Commission in the case of Jacob Schmidt v. The State, decided in 1890.

"The law creating this Commission does not undertake to create a new liability against the State, but provides a method by which claims against the State may be heard before this Commission and claim rejected or award made in favor of the claimant. The statute creating this Commission, after reciting the various classes of claims of which the Commission might have jurisdiction, among which may be said to be included claim of this petitioner, provides: 'and such commission shall hear such claims according to its rules and established practice and determine the same according to equity and justice, except as otherwise provided in the laws of this State and shall file with the records of each claim determined a brief written statement of the reasons of the determination.'

The point has been pressed in argument by counsel for claimant that the Legislature would have the right in a case of this kind, in its discretion, to allow a reasonable sum to persons injured, making an appropriation for its payment although the claim was, strictly speaking, neither a legal or equitable claim, and that the intent of the act creating this Commission, was to transfer to this Commission the same discretionary power that the Legislature would have; or in other words, that the Commission would be justified, although believing the claim was neither an equitable or legal claim against the State, in its discretion to make an award against the State in favor of claimant. To this proposition we cannot assent. It is our understanding that in the use of the language, to determine the same according to the principles of equity and justice, is meant and used with a legal signification, and that this Commission has no power to make an award in any case, unless the facts show a legal or equitable claim against the State. We do not believe it was the intention of the Legislature to

leave it discretionary with the Commission to make an award in favor of the claimant regardless of the question as to whether or not he had a legal claim against the State.

"We are of the opinion further, that it would be an exceedingly dangerous precedent, to hold that the Commission had any such discretion. While it is true (and we have endeavored in this case to find some principle upon which we might make an award in favor of this claimant) that his health and usefulness have been practically destroyed, recognizing that it is one of those cases appealing strongly to the sympathy of those who have heard this evidence, or are familiar with the facts in the case, and we can not but believe that if the facts of this case are presented to the Legislature of this State, that some relief will be granted to this unfortunate claimant, yet, 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."

We quote from the opinion in the above case, decided by a former Commission, not because the facts are similar to the case now before the Commission, but for the purpose of showing that the practice of the Commission has not been as contended by counsel for claimant in this case, "to create new and additional liabilities against the State," but simply to provide a method by which legal and equitable claims against the State may be heard and passed upon.

It is practically conceded that there is no common law or statutory liability on the part of the State under the facts in this case, unless section 4 of the Military and Naval Code of Illinois, as amended by laws of 1901, Hurd's R. S. page 1713, Section 68n, creates such liability.

Section 4 of the Military and Naval Code of Illinois, as amended by laws of 1901, which went into effect July 1, 1901, provides that, "In every case where an officer, soldier or seaman of the Illinois National Guard or the Naval Militia of Illinois shall be killed or wounded while

performing his duties as officer, soldier or seaman in pursuance of lawful orders from the Commander in Chief, said officer, soldier or seaman, or his legal heirs, shall have a claim against the State for financial help or assistance, and the State Board of Claims shall act on and adjust the same as the merits of each case may demand."

It is contended by counsel for claimant, that as the constitution only prohibits the passage of *expost facto* laws, and does not apply to retrospective laws which merely affect private rights, and as the language of the statute does not limit it to cases which occur after the passing of the act in question, that it would be held to apply to past as well as future accidents which come within the provisions of said statute.

It is true that the constitution does not prohibit the passing of retrospective laws which are not *expost facto* laws; our Supreme Court has however held that, "a statute will not be given a retrospective operation, even though such an operation will not violate the paramount law of the constitution, unless there is clearly expressed intention that it shall have such an operation."

Garret v. *Wiggins*, 1 Scammon, 335;
LaSalle v. *Blanchard*, 1 Ill. App., 635;
Marsh v. *Chesnut*, 14 Ill., 223.

"It will be construed to have a retrospective operation only when the language is so clear as to admit of no other construction."

Robinson v. *Rowan*, 2 Scam., 499.

"A statute is retrospective in its operation only where it is made so in its terms."

Deininger v. *McConnel*, 41 Ill., 227.

There being nothing in the provisions of section 4 of the statute above referred to indicating an intention to give it a retrospective operation, the Commission are of the opinion that the provisions of section 4, of the Military and Naval Code, above referred to, do not apply to the case now before the Commission, the injury in

this case having occurred several months before said statute went into effect.

In view of the above holdings of our Supreme Court, and the established practice of this Commission, we are compelled to hold that we have no power under the facts in this case to make an award in his favor, and we therefore reject the claim; but we do so without prejudice, reserving to claimant the right to present the matter to the Legislature. And the Commission are of the opinion that while the facts do not justify this Commission in making an award, yet they are sufficient to justify the Legislature in making an appropriation, in favor of claimant, of some amount to assist him as they have repeatedly done in former cases where members of the National Guard were injured while in the discharge of their duty to the State as such member of the National Guard.

The claim is therefore rejected.

ARTHUR D. MARTIN

v.

THE STATE OF ILLINOIS.

Opinion filed January 21, 1903.

CONTRACTS—*for labor of convicts.* The Court on re-hearing reviews the evidence and adheres to the former opinion of the Commission rejecting the claim.

The claim in this case was filed by claimant, February 25, 1898, for the sum of $34,737.10. The cause was heard at the August session, A. D. 1898, of the Commission and an opinion rendered and filed in the cause on the 30th day of December, 1898, rejecting the claim. A petition for rehearing was filed in the cause January 14, 1899, and rehearing was granted March 22, 1899.

The claim is based upon two contracts, entered into by the claimant, with the Commissioners of the State Penitentiary at Joliet, for the balance of the commissions due claimant, for the sale of chairs as provided in said con-

tracts and for damages sustained by claimant, by reason of a breach on the part of said Commissioners of said contracts.

The balance due on commissions claimed, was for the sum of $20,737.10, and the damages claimed were for the sum of $14,000. As will be observed from the former opinion rendered in the cause, the claimant, by his attorneys, at the former hearing waived his claim for damages for $14,000 and the only matter in controversy at the former trial was the balance claimed to be due as commissions which is the only matter in controversy at the present hearing.

The first contract bears date June 20, 1893, and provides for the establishment of a chair factory at the penitentiary and that claimant for devoting his time exclusively to the management and conduct of the business, and selling the manufactured product was to be compensated by a commission of fifteen per cent on the gross sales of the business, as long as the earnings of the men (convicts) employed to do the work in the factory, amounted to less than sixty cents per man, per day.

The contract further provided that an additional commission of five per cent making the total commission twenty per cent should be allowed when the business, on its gross product, developed an earning of sixty cents per man employed, per day; it being understood and agreed that in ascertaining such earnings, the interest on the amount invested in the plant and the business, shall be computed at the rate of six per cent per annum, and all such interest together with the cost of power, cost of material, cost of civilian labor and teaming, and commission paid claimant be deducted from the gross receipts of the business.

The second contract bears date September 1, 1894, and provides that the first contract be abrogated, and should only remain in force and effect to enable the parties to adjust and settle their accounts to the date of the second contract, according to their respective rights and for no other purpose.

It was not provided in the second contract that claimant should thereafter have the management of the business; but it provided that he should sell the product of the plant and be compensated by the same commissions allowed in the first contract, and to be paid monthly.

Claimant sold chairs, manufactured in the penitentiary, under the second contract, until March 1, 1896, and on the second day of March, 1896, by mutual consent, the contract was cancelled and annulled, by agreement in writing.

The record contains certified copies of the vouchers issued to claimant, for commissions during the existence of both contracts, which vouchers are receipted in full by claimant.

It is contended by claimant that these vouchers were not intended to be in full of the extra five per cent commission, to be allowed in case the prison labor should reach or exceed sixty cents per day, per man. The Commission in the opinion rendered in the former case held that there was not sufficient evidence at that time in the record to establish the fact that the earnings of the men, amounted to sixty cents per day, per man employed; and also held that the vouchers issued to claimant, and receipted by him in full, showed an adjustment in full of the accounts between the parties.

There is no member of the present Commission, who was a member of the Commission at the former hearing, and we find no written reasons on file, in the case for the granting of the rehearing. It appears, however, from the petition on file for a rehearing, that it was urged that the evidence of the warden of the penitentiary should be taken in the case, and a full opportunity given claimant to examine the books of the penitentiary and ascertain the earnings of the prisoners for the period in question. Since granting the rehearing the claimant has caused the books of account at the penitentiary to be examined by Seymour Walton, an expert accountant, and has taken his evidence in the case. Walton, testified

that from an examination of the books he found, that the earnings of the prisoners, during the period of the first contract, did not amount to sixty cents per day, per man, but that during the period of the second contract, did amount to sixty cents per day, per man. He stated, however, in his direct examination that it was impossible to make an accurate statement of the cost to manufacture the chairs during the whole period of the second contract, exclusive of labor, because, there was no inventory taken at the end of that period. He further stated, however, that he was able to make an accurate statement as shown from the books of the cost of manufacturing chairs from the first day of September, 1894, to August 31, 1895, inclusive, exclusive of labor, and that the cost for said year, as appeared from the books, was $100,695.77, and that he arrived at the total cost of the manufacturing of the chairs for the eighteen months during which the second contract was in existence by adding one half the cost of the first year which would make a total cost of manufacturing chairs for said eighteen months, exclusive of labor, $164,543.65. He further stated in his direct examination that the total gross sales for the eighteen months, as shown by the books were $257,079.47. He further stated in his cross-examination that the number of days, prison labor, as shown by the books of the men employed, in and for, the chair department, September 1, 1894, to August 31, 1895, was 56,533; and the number of days, prison labor, beginning September 1, 1895, and ending February 20, 1896, was 29,043. This of course, would make a total number of days prison labor in the chair department, under the second contract of 85,576. He stated on cross-examination that in ascertaining the earnings of the convicts, per man, per day, he divided the difference between the cost of manufacture, as shown by the books, and the gross sales, by the number of working days of the convicts, as shown by the check roll. He stated also, that in ascertaining the total cost he had not included the interest on the plant or the commissions of claimant as

provided by the contract. He stated that he did not find these amounts on the books and he went by the books altogether and not by the contracts. Now if we deduct the total cost to manufacture, as found by the expert, under the second contract, which was $104,543.65, from the total gross sales, $257,079.48, we have remaining $92,535.82, which if divided by the total number of men employed, as shown by the check roll, would amount to more than sixty cents per day, per man. The contracts provided, however, that interest at the rate of six per cent per annum, on the amount invested in the plant and business, and the commissions to be allowed should be included in the cost and deducted from the gross sales, in ascertaining the earnings of the convicts. The accountant stated that the interest on the plant and business would amount to $3,311.54.

The amount of commissions, at twenty per cent on $257,079.47 would be $51,415.89, which added to the interest would amount to $54,727.43. If we add this amount to the $104,543.65, the amount of cost found by the accountant, which did not include interest and commissions we will have $210,271.08, and if we deduct this amount from $257,079.47, the amount of gross sales, we will have remaining $37,808.39. If we divide this latter amount by eighty-five thousand five seventy-six, being the number of men employed as shown by the check roll, we find that the earnings of the men would be about 44 cents per man, per day.

We are of the opinion that the testimony of the expert witness fails to establish that the convicts during the period of the second contract earned the sum of sixty cents per day per man.

Claimant has also taken evidence since the former hearing to show that the charges for power and steam, were exorbitant and unreasonable, but if we make an allowance for an extra charge for power and steam we would be unable to find from the record, as it stands, that the convicts earned sixty cents per day, per man, according to the contract.

The evidence of Robert L. Allen, who was warden of the penitentiary, during the existence of both contracts, has been taken by the State, since the former hearing, and he testified that the vouchers which were receipted in full by claimant, from time to time during the existence of the contracts were intended to be settlements in full up to their date. That whenever he and the claimant were unable to agree upon the amount due claimant, it was referred to the Commissioners and a settlement was made between them.

Voucher No. 218 issued October 17, 1895, shows on its face that it was a settlement in full to September 1, 1895. Warden Allen swears positively that this was a settlement in full up to that time and the record of the Commissioners shows that there was a settlement made in compromise at that time, differences having arisen between the management of the chair department and the claimant, in regard to the amount of commissions to be allowed him.

The record also shows a number of sales made by claimant where the goods were returned and a number of sales made by him, at prices below the scale agreed upon and that he agreed in all those instances where the Commissioners filled the orders, that he would waive his commissions or that he would take for his commissions such sum, as remained above the cost price of the chairs.

The expert accountant, Walton, testified on cross-examination that in the course of his investigation, he found that there were certain sales for which claimant was not credited with any commissions. That he saw a letter from claimant in which it was stated that he was not to receive commissions on certain sales, unless the profits justified it. He also stated that in a number of instances goods were sold at cost and that no commissions were credited to him on those sales.

There is a letter in the record, dated October 16, 1895, and addressed to the warden and signed by the claimant in which he agrees, in case certain orders then stand-

ing on the books as per list attached, were filed, he would accept in full of his commissions on said orders, the surplus on each sale over such amount, as shall realize the net prices as entered on the estimated cost list. The list attached to the letter contains an itemized list of orders aggregating $23,261.20 and also refers to other orders, the amounts of which are not given.

We think this voucher No. 218, taken in connection with the evidence of Warden Allen and the expert accountant and the record of the Commissioners and the letter of claimant, contained in the record, was intended as an annual settlement in full to the first day of September, 1895. The vouchers issued after that date are receipted in full by claimant and if they were not intended to be in full it seems to us an inventory of the stock on hand would have been demanded by claimant at the time when the contract was mutually annulled, in order to determine whether or not he was entitled to an extra commission. This was not done and we think the vouchers in the record show a complete settlement and adjustment of all accounts between the claimant and the Commissioners.

We therefore see no reason for reversing the judgment of the former Commission and it is therefore ordered that the claim be rejected.

CHICAGO LEAGUE BALL CLUB
v.
THE STATE OF ILLINOIS.

Opinion filed January 21, 1903.

MILITIA—*liability of State for damages caused by State troops during riot.* Where a tumult or riot assumes such proportions that it becomes necessary that the sovereign shall interfere and exert the supreme power of the State, to that extent the general State government is the actor and the burden of expense which its acts incur is not to be borne by the city in which the act occurs, but by the State itself.

This is a claim for the use of and damage to claimant's ball park, in the city of Chicago, by certain regiments of the State Militia called into service and occupying said park for twenty (20) days under the order of the Governor as Commander in Chief, during the great railroad strike of 1894.

Suit was originally brought by claimant in the circuit court of Cook county against the city of Chicago, seeking recovery for said use and occupancy and for damages to said ground and appurtenances thereto.

After a finding for the defendant on the first trial in the circuit court (before Judge Dunne) reversed on appeal to the Appellate court, on the second trial in the circuit court, judgment for the sum of four thousand seven hundred and sixty-one ($4,761) dollars was entered and said judgment affirmed by the Appellate court; but on appeal to the Supreme court (*City of Chicago* v. *Ball Club*, 196 Ill., 54) the judgment was reversed in an opinion holding that recovery must be sought, not from the city, "but it is for the State in its sovereign capacity to determine whether compensation will be made out of its treasury." Further the court said: "When a tumult or riot assumes such proportions that it becomes necessary that the sovereign shall interfere and exert the Supreme power of the State, to that extent the general State government is the actor and the burden

of expense which its acts incur are not to be borne by the city."

In view of this decision of the Supreme Court and as conceded in the argument of the Attorney General, it remains for this Commission to determine only what would be reasonable compensation for the occupancy of and damage to the claimant's property by the State Militia.

As to the rental value thereof, witnesses widely vary in their opinion and testimony—one real estate man (Mr. Hale) who was familiar with the particular property in question and with rental values in the vicinity, fixed thirty-five ($35) dollars per day as a fair rental; Mr. Buchman, another real estate man, familiar with the property and its rental value in 1894, estimates that the ball park was worth about forty ($40) dollars per day for the whole year or one hundred and twenty ($120) dollars per day estimating the ball season to be limited to four months.

Mr. Hart, the president of the ball club, and other base ball men, testified that the grounds were worth five hundred ($500) dollars per day; but Mr. Hart admits on cross examination that the total income from the ball park for 1895, the year succeeding its occupancy by the militia, was only eight hundred and ten ($810) dollars; for the year 1894 when it was rented to the Athletic club and the bicycle club for a contingent rental based on the gross receipts Hart testified that he "thought the base ball club received some rental during 1894; could not say how much, wouldn't attempt to say it was as much as one thousand dollars." Mr. Hart also testified that the ball club was very anxious to get rid of the lease in 1894 and offered to rent the grounds for five thousand five hundred dollars or six thousand dollars. Computing the rental at the latter sum (six thousand dollars) the highest possible figure at which the rental value can be estimated would be one hundred dollars per day, even on Mr. Hart's basis of sixty days as constituting the season in which the income must be secured.

But it is a matter of common knowledge that for the purposes the grounds were used in the seasons of 1894 and 1895—*bicycling, athletics, base ball or foot ball*—there are at least four seasonable months or one hundred and twenty (120) days adapted to out of door sports—which would give a daily rental value of fifty ($50) dollars; or one thousand ($1,000) dollars for the twenty days the grounds were occupied by the militia.

As to the items of damage as disclosed in the bill of particulars ("Exhibit A."), these are confessedly made up by Mr. Hart from a memorandum made some time after the militia vacated the grounds; they are admitted to be estimates, based on hearsay. The following items should clearly be deducted:

Tickets, as to which the evidence was stricken out	$50.00
Plumbing, as to which the evidence was stricken out	10.00
Hurdles, the number being estimated or guessed at from hearsay; the statement or estimate of 28 hurdles at $2.25 being stricken out	56.25
Benches, number not known	50.00
Lumber, bought in 1892, used in 1893, witness did not know whether or not it was there July 6, 1894	80.00
Repairing bicycle track, $760. Mr. Hart did not know how much he paid for the repairing; did not know whether it was as much as $100. Later in his testimony he says more than $100 was spent, how much he did not know; showing his estimate is pure guess work; but allowing $100, there should be deducted from the charge as made	660.00
Repairs on diamond. Mr. Hart admitted he did not know how much was spent on repairing the diamond; there is evidence that it never was repaired; so it would seem that the item of charge for this repair should be deducted as being either a guess or fictitious	500.00

As to the two last charges, apparently after thoughts, the first is based on a loss ..... of profit imaginary and not capable of computation, supported by no evidence; as is true of the last charge	611.00 321.91
	$2,359.16

Deducting these items from the total ($3,258.00) claimed in the bill of particulars, we think one thousand ($1,000) dollars a liberal estimate and allowance for damage to the property and adopting the sum of six thousand ($6,000) dollars as a fair yearly rental value of the grounds, this being the amount for which Mr. Hart testified he offered to rent it for the year 1894—and limiting the season to four months or one hundred and twenty (120) days during which the grounds were available for the uses to which they were intended, would make a rental value of fifty ($50) dollars per day which approximates the value fixed by the only witnesses (Hale and Buchman) whose opinions are entitled to special consideration. Adopting this as the fairest basis of determining a reasonable compensation for the use of the grounds for the twenty (20) days they were occupied by the militia, we consider one thousand ($1,000) dollars for rental and one thousand ($1,000) dollars for damages and destruction of property should amply and *fairly recompense the claimant.*

While this amount is less than that for which judgment was rendered in the circuit court, we feel in no way called upon to give undue consideration to that finding.

The question of damages as supported by the evidence is no more conclusively established by that judgment than was the interpretation of the law as to liability.

We therefore allow and award to said claimant the sum of two thousand ($2,000) dollars in full for all demand for rent, occupancy of grounds and damages.

CHARLES BAILEY

v.

THE STATE OF ILLINOIS.

Opinion filed March 11, 1903.

1. RESPONDEAT SUPERIOR—*doctrine does not apply to State.* The State is not liable for the fault or neglect of its agents or employes.

2. STATUTES—*usually to be given a prospective operation only.* In construing a statute a prospective operation only will be given to it, unless its terms show the legislative intention that it shall have a retrospective effect.

3. SAME—*presumption of intention is against words having a retroactive effect.* The presumption of intention is against words having a retroactive effect, not in favor of it, and words will be presumed to be prospective only, unless there is an evident and unmistakable intention expressed in the words that the act shall be retrospective.

This is a claim for injuries received by the claimant while serving as a member of Battery A, I. N. G., in annual encampment at Camp Lincoln in the summer of 1900.

Being assigned to the duty of firing the sunset gun during the week of the encampment, the claimant on the afternoon or early evening of July 29, called upon private Jesse Rupert, who was acting quartermaster, but not commissioned, and private Albert G. Stephens to assist him in discharging the cannon and lowering the flag, in pursuance of such order.

From evidence offered, it appears that the cartridge (about one pound of powder in a flannel sack) was too large for the muzzle of the cannon; that in the attempt to ram this in, the sack was broken and part of the powder ran on the ground. From some cause, not clearly shown, the powder was ignited, and an explosion occurred by which the claimant, Rupert and Stephens, were all seriously injured.

Evidence was introduced tending to show that the cannon was old and worn; also that the breaking of the cartridge or powder sack was due to its being too large;

but all of this we consider immaterial, as there is no claim that either of these circumstances, if true, caused the explosion. The proximate cause of the explosion, so far as any cause is shown by the evidence, and the only theory upon which it can be reasonably accounted for, is that some by-stander threw a lighted cigar, cigarette or match on the powder that was trickling from the broken sack to the ground. One or more of the witnesses testifies that this was the case and that a cavalryman among the by-standers was guilty of this criminal carelessness. Unaccountable and deplorable as this may seem, for the purpose of reaching a conclusion in this case, it is immaterial. Whatever may have caused this sad accident, in view of the law applicable, as interpreted and applied by this Commission, there is no liability on the part of the State.

Surely it cannot be contended that this act of criminal recklessness was committed by *authority of the State*, the only way in which the State could become liable, since it is a well established principle of law, repeatedly announced by the Supreme Court, that the State is not liable for the fault or neglect of its agents or employes; that the doctrine of *respondeat superior* does not apply as against the State:

Hedges v. *County of Madison*, 1 Gilman, 567;
Town of Waltham v. *Kemper*, 55 Ill., 340;
White v. *County of Bond*, 58 Ill., 297;
Symonds v. *Clay County*, 71 Ill., 355;
Hollenbeck v. *Winnebago Co.*, 95 Ill., 148;
Cooney v. *Hartland*, 95 Ill., 516;
Elmore v. *Drainage Commrs.*, 135 Ill., 269.

Holding the above view, the Commission can find no liability on the part of the State unless warrant can be found under the provisions of section 4 of article 8 of the Military Code, approved May 11, in force July 1, 1901.

Notwithstanding this enactment was passed and went into effect *after* the accident on which this claim is founded, counsel for claimant contends that this act is

retroactive, and so brings this claim within its provisions.

Argument is made and authorities cited to support the contention that nothing in the Constitution of the United States or of the State of Illinois prohibits the General Assembly from passing a retroactive law. This is not disputed by the Attorney General, nor does this Commission doubt the right and power to pass a retroactive law; but the question is not what it *can* do but what it *has* done in this instance.

To the wording of its enactments must we look for the intention of the General Assembly; and the act relied on in this case is worded as follows: "In every case where an officer, soldier or seaman of the Illinois National Guard, or the Naval Militia of Illinois, shall be killed or wounded, while performing his duties as officer, soldier or seaman in pursuance of lawful orders from the Commander in Chief, said officer, soldier or seaman, or his legal heirs shall have a claim against the State for financial help or assistance, and the State Board of Claims shall act on and adjust the same as the merits of each case may demand."

There is no confusion or uncertainty as to the intention expressed in those words; "in every case where an officer, soldier, etc., *shall be* killed or wounded" * * * he or his legal heirs shall have a claim against the State.

It would be doing violence to the plain meaning of words for this Commission to interpret the phrase "shall be" as synonymous with "*has been* or shall be."

They are not fairly susceptible of such meaning and the Commission feels bound to give the words the simple, natural, inevitable meaning that they convey, and in doing so, we only comply with the rule of law that "In construing a statute a *prospective operation only* will be given to it, unless its terms show the legislative intention that it shall have a retrospective effect."

Stone v. *Tyler*, 173 Ill., 147, citing,
Knight v. *Regole*, 66 Ill., 122;
People v. *McClellan*, 137 Ill., 352.

The presumption of intention is against words having a retroactive effect, not in favor of it, and words will be presumed to be *prospective only*, unless there is an evident and unmistakable intention, expressed in the words, that the act shall be retrospective.

A statute will not be so construed unless the language of the act is so clear and positive as to leave no room for doubt that it was the intention of the Legislature to make it retroactive.

Voigt v. Kreston, 164 Ill., 314, citing,
Benton v. Brotherhood of R. R. Brakemen, 146 Ill., 570.

We fully agree with claimant's counsel that the Legislature could have made this law retroactive; but such an intention is not apparent in the language of the act, nor do we feel warranted in giving the words an interpretation that would make them retroactive.

For the foregoing reasons, under the limitations of our authority and obligation to endeavor to interpret the law as it stands, not to amend or make laws, we are obliged to and do reject this claim, without prejudice however, to the right of the claimant to seek other relief.

We realize that the injuries received by the claimant and his associates were serious and that each of them endured great pain, and received permanent injuries. The evidence shows that the claimant in this case was confined at St. John's Hospital in Springfield, for seven or eight weeks after the accident, and was under treatment for a long time after returning to his home; the nature and extent of his injuries being described by his attending physician at Danville, Dr. Perrige, at pp. 32, 33 and 34, of depositions on file in this case.

While it is difficult to fix any monetary compensation for physical suffering and permanent disability, it may be safe to assume that the claimant himself did not estimate his claim "for financial help or assistance" at more than $2,500, the amount sought in the bill intro-

duced in the House of Representatives at the session of 1901; this amount doubtless being fixed with the approval of the claimant, though the claim filed in this case is for $5,000, the amount sought by the bill introduced in the Senate of the same session. We refer to this only as giving presumably the claimant's original idea as to the amount satisfactory to him; and call attention to the discrepancy between the amounts sought respectively in the House bill on the one hand ($2,500), and of the Senate bill and claim filed in this case, on the other ($5,000.)

It is not an agreeable duty for this Commission to refuse awards in such cases. But under the law as we feel bound to interpret it, we reject this claim, without prejudice, however, to other relief.

ALBERT G. STEPHENS

v.

THE STATE OF ILLINOIS.

Opinion filed March 13, 1903.

MILITIA—*Personal injuries received while in the service. Balsley v. The State of Illinois followed:* The circumstances and material facts in this case are the same as in Balsley v. the State of Illinois and for the reasons therein assigned this claim is also rejected.

The claimant herein seeks recovery for injuries received while serving as a member of Battery A, I. N. G., at Camp Lincoln, July 29, 1900. This being the same explosion in which Charles Balsley and Jesse Rupert were also seriously injured, the circumstances and material facts were fully set forth in the opinion filed by this Commission in the claim of the said Charles Balsley.

For the reasons therein assigned this claim is also rejected, without prejudice, however, to other relief; and attention is called to the circumstance that this claimant, as did Balsley and Rupert in their claims before this Commission, has doubled the amount sought

in the original House bill introduced for his relief—which provided for an appropriation of $500 in place of the $1,000 herein sought.

It may be reasonably assumed therefore that even in the estimation of the claimant, $500 should be the limit in attempting to fix a fair compensation for the injuries received by the claimant.

JESSE RUPERT

v.

THE STATE OF ILLINOIS.

Opinion filed March 18, 1903.

MILITIA—injuries received by reason of the explosion of powder. Baisley v. State of Illinois followed.

This claim is founded on injuries received from the explosion of powder in attempting to fire a cannon at Camp Lincoln, July 20, 1900, as a result of which claimant in this case, and Charles Baisley and Albert G. Stephens, two of his associates in Battery A, I. N. G., were seriously and permanently injured.

The material facts and circumstances of the accident are set forth in the opinion heretofore filed in the claim of Charles Baisley; repetition is therefore not necessary here.

For the reasons therein assigned—fully applicable in this case—this claim is also rejected, without prejudice however, to other relief.

Attention is called to the fact, as was also done in the case of Charles Baisley, that the original bill introduced in the House of Representatives, seeking relief for this claimant, was for an appropriation of $2,500 in place of $5,000 as sought herein.

This amount ($2,500.00), doubtless approved by the claimant, would naturally suggest this sum as the limit of the measure of claimant's damages.

H. W. ROKKER

v.

THE STATE OF ILLINOIS.

Opinion filed March 30, 1905.

1. COMMISSIONERS OF CONTRACTS—*power possessed by them is purely statutory.* The power exercised by the Commissioners of Contracts is purely statutory; and the law requires that every prerequisite to the exercise of such a power, as stated in the statute, must actually precede its exercise.

2. SAME—*power derived from R. S. Ch. 127.* The only power of the Commissioners of Contracts to bind the State in making contracts is derived from the law approved March 31, 1874, in force July 1, 1874, (Revised Statutes Ch. 127) naming certain State officials "Commissioners of Contracts" and defining their powers, said law being enacted in pursuance of Section 23, Art. 4, of the Constitution, which provides that "The General Assembly shall provide, by law, that the printing, binding the laws and journals, and all other printing ordered by the General Assembly, shall be let by contract, to the lowest responsible bidder."

3. SAME—*have power to cancel contracts obtained by fraud, conspiracy or other unlawful means.* The law of 1874 (R. S. Ch. 127) provides penalties for paying any person to refrain from bidding for such contracts and gives the Commissioners authority to cancel contracts, when in their opinion said contracts were obtained by fraud, conspiracy, or unlawful means.

4. SAME—*contracts may be made only after a public letting.* An indispensable condition precedent to the powers of the Commissioners of Contracts to contract is, that there shall be a public letting in which there is entire freedom of competition.

5. CONTRACTS—*to prevent competition in bidding. No rights accrue under.* No one can derive rights under a contract made for the purpose of preventing competition in bidding.

6. SAME—*power of Secretary of State to bind the State by contract.* The Secretary of State cannot bind the State by contracts where there is no express authority given him by statute to do so.

7. SAME—*State not liable on quantum meruit where Secretary of State lets printing contract without public bidding.* The State is not liable on a quantum meruit for State printing done where the work was done at the instance of the Secretary of State without being let to the lowest bidder. The Constitution provides that such contracts should be let to the lowest bidder and makes all contracts made without express authority of law null and void, and prohibits

the General Assembly from providing for payment of any claim arising out of any such contract.

8. STATUTE OF LIMITATIONS—*unliquidated claims.* Unliquidated claims against the State shall be proved up and filed within two years from the time such claims may have arisen; and any claim not presented and proved up as above, and filed, shall be forever barred from payment by the State.

This claim is a survival of similar claims, founded on the same circumstances, presented at intervals during the past fifteen years by H. W. Rokker before various tribunals, seeking recovery in varying amounts, but with uniform results.

If only a temporary relief from the prosecution of this claim is to be expected, a recital of its history would be as unnecessary as it is burdensome; yet with some hope that the claim may now be finally disposed of, a statement of its origin, its repeated rejection and persistent revival, may be useful to posterity by tending to discourage its further prosecution, at least before the Commission of Claims.

From the record now before the Commission, it appears that on the 13th day of September, 1886, the firm of H. W. Rokker & Co., secured a contract for State printing, said contract being executed, on the part of the State, by the Attorney General, Secretary of State, the State Treasurer and Auditor of Public Accounts, who are, *ex-officio,* Commissioners of State Contracts.

Under this contract, between October, 1886, and May 7, 1887, Rokker & Co. did work for the State, entitling them to $32,722, on which total payments of $24,000 were made by the State, leaving a balance, according to the claims of Rokker & Co. of $8,722.

On the 7th day of May, 1887, Rokker & Co. were notified that no further payments would be made under the contract; whereupon Rokker and his associates filed in the circuit court of Sangamon county, a petition praying a writ of *mandamus,* directed to the State officers (naming them) who are *ex-officio* Commissioners of State Contracts, commanding them as such Commissioners, to forthwith certify petitioner's said accounts, and com-

manding said Auditor to draw his warrant for the said balance claimed ($8,722), and commanding the State Treasurer to pay the same to the petitioners.

The defendants, by the Attorney General, in their answer to said petition, among other things set forth, that Henry W. Rokker and others named, including every individual and firm engaged in the printing business in the city of Springfield, had on or about September 6, 1880, (prior to the execution of said printing contract for the State) formed a combination for the purpose of making bids for the several classes of printing to be done for the State of Illinois for the two years, beginning October 1, 1880, in accordance with the terms of the advertisements for bids; which said combination was formed in the form of a partnership, and for the purpose of obtaining the contracts for said printing at a high rate, and for the further purpose of preventing the several members of said combination from competing with each other for the contracts for said printing; that in accordance with the terms of said combination, Rokker and his associates paid the six individuals and firms (named in said petition) engaged in the printing business in Springfield, the sum of $1,000 each in consideration of their becoming members of said combination and refraining from competing for said printing contracts, though several members of the combination did file bids at higher figures than the bid of Rokker. The collusion being unknown to the Commissioners of Contracts, they were deceived into believing that the bids were made in actual competition, while in fact all the bidders were interested in and parties to the bid of Rokker & Co.

The defendants in said *mandamus* proceedings (the State officials *ex-officio* Commissioners of Contracts) in their answer further averred that said combination was formed in violation of the laws of the State of Illinois; that the contracts relied upon for the recovery of the claim, were procured by unlawful means and by fraud upon the part of the petitioners (Rokker, et al) and through violation of the law; that the said contracts

were null and void, and of no binding force or effect upon the State or the Commissioners of State Contracts; and that no further payment ought to be made on account of said contracts. To which answer the petitioners (Rokker and his associates) demurred. The circuit court sustaining the demurrer—which finding was reversed on writ of error to the Supreme Court—the finding of the latter court (reported in the case of Dement, et al v. Rokker, et al, 126 Ill., 174) so far as now material or bearing on the claim now under consideration, being in substance as follows:

That the power exercised by the Commissioners of Contracts is purely statutory; and the law requires that every prerequisite to the exercise of such a power, as stated in the statute, must actually precede its exercise. "And it is manifest from the language employed, that it is intended by our constitution that this rule shall be rigidly applied to contracts assuming to bind the State, for it provides (Sec. 19, Article 4) that *'the General Assembly shall never * * * 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.'*"

The only power of the Commissioners of Contracts to bind the State in making contracts is derived from the law approved March 31, 1874, in force July 1, 1874, (Revised Statutes Ch. 127) naming certain State officials "Commissioners of Contracts" and defining their powers—said law being enacted in pursuance of Section 25, Article 4, of the constitution which provides that "The General Assembly shall provide, by law, that the printing, binding the laws and journals, and all other printing ordered by the General Assembly, shall be let by contract, to the lowest responsible bidder."

Among other provisions, the law of 1874, above referred to, prescribes that "the furnishing of all fuel, stationery and printing paper for the use of the State,

and the copying, printing, binding and distributing the laws and journals, reports and all other printing, and distributing ordered by the General Assembly, shall be let by contract, to the lowest responsible bidder, in the manner hereinafter provided."

Said act also provides penalties for paying any person to refrain from bidding for such contracts, and gives the Commissioners authority to cancel contracts, when in their opinion said contracts were obtained by fraud, conspiracy, or unlawful means.

Continuing, the court say that only under the above constitutional and statutory authority, can the Commissioners make contracts binding on the State. "An indispensable condition precedent to their power to contract is, that there shall be a public letting in which there is entire freedom of competition." Penalties are imposed by the law for preventing bids, hence inferentially prohibiting the interference with free bidding; "Hence if that which is thus prohibited, was done, the letting was necessarily void, and a party cannot be entitled to enforce an agreement which he induced the adverse party to enter into only by doing that which subjected him to punishment by confinement in the penitentiary. * * *."

All of the authorities are in substantial accord that no one can derive rights under a contract made for the purpose of preventing competition in bidding. Citing numerous authorities, page 198, volume 126, Ill. Rep.

Through this decision of the Supreme Court, (filed November 14, 1888) the first effort of claimant to secure the balance claimed under his contract being rendered unsuccessful, his next attempt at recovery was made by the introduction of bills at successive sessions of the General Assembly, as appears from the testimony of Mr. Rokker (in the claim prosecuted in 1896, before this Commission) who testified that he "brought his claim before the Assembly every session, and they failed to pass on it; waited to the end of the session, and it dropped out." Finally on May 4, 1895, claim was filed

with the Commission of Claims for balance due for printing done by claimant H. W. Rokker for the State, between October 1, 1886, and July 1, 1887, amounting to $13,600.58, together with interest thereon, at six per cent per annum, from July 1, 1887, this amount apparently included the balance ($8,722.11) claimed in the mandamus proceedings heretofore referred to, and also the balance ($4,407.47) claimed for work done by H. W. Rokker, after the abrogation of the contract with Commissioners of Contracts, by written notice of the Secretary of State.

In the opinion filed by the Commission, we notice the following: "It is conceded on the part of the claimant's attorneys, that the said contracts (with the Commissioners of Contracts) could not be defended, which relieves us of the necessity of considering their validity. * * * * *" and further on, "claimant seeks to recover in this case upon the theory that the Secretary of State made a contract with him for the work, and agreed to pay him at the rate specified in the original contract. By what authority (the opinion continues) does the Secretary of State assume to make contracts of this kind? There is no such authority to be found in Chapter 127, nor in any other place in the statute, that we have been able to discover, and in the absence of such authority, any contract by the Secretary of State would be null and void, by the provisions of the constitution."

And continuing, "claimant further insists that, in the absence of authority in the Secretary of State to bind the State by express contract, the State would be liable on a *quantum meruit*. The law might imply a contract on the part of the State to pay what the work was reasonably worth, in some cases, but in view of the provisions of the constitution providing that such contracts should be let to the lowest bidder, and making all contracts made without express authority of law null and void, and prohibiting the General Assembly from providing for payment of any claim arising out of any such contract we do not think that position tenable.

if a contract should be implied from the acts or doings of any of the officers of the State, the objects intended to be accomplished by the framers of the constitution would be defeated."

The Commission further held that even if such a contract could be implied, the claim was barred by the statute of limitations. Being rejected by this Commission, the claim next appears in the form of a bill introduced in the Senate at the last session of the General Assembly seeking an appropriation for $8,992.94, this being the balance claimed ($4,887, and interest) for work done, after the abrogation of the contract with the Commissioners of Contracts, on the understanding or agreement with the Secretary of State.

This bill having been referred to the committee on appropriations, was reported back to the Senate with a recommendation that it be referred to the Commission of Claims—which recommendation was carried out by the Senate, said bill being filed with the clerk of this Commission April 26, 1901; following which, on May 2, 1902, the claimant herein did file with the clerk of this Commission his claim for $18,609.58, and later, on leave granted, did on December 15, 1902, file his amended petition reducing the amount claimed, to the sum of $8,992.94 "so as to conform to the Senate bill above referred to." On behalf of the State, pleas were filed by the Attorney General, denying plaintiff's right of recovery because of former adjudication by this Commission, in opinion filed at the August term, 1896, and for further plea in that the causes of action did not accrue within two years next preceding the commencement of this proceeding, and that the claimant is barred from recovery, because he failed to file his claim with the Auditor within two years from the time it is alleged to have accrued.

We would feel constrained to reject this claim both on the ground that it was not filed within the time required by that statute, and because of the former finding of this Commission (August term, 1896) it being pro-

vided in the act creating the Commission (Sec. 7) that "In case said Commission shall reject any claim, so filed as aforesaid, upon the hearing thereof, such rejection shall conclude all parties thereto, unless said Commission shall, in their award thereon, otherwise direct."

Nor can we seriously consider the contention of claimant's counsel that the introduction of a bill in the General Assembly, and reference of the same to this Commission (as in this instance) takes it out of the requirement that "unliquidated claims against the State shall be proved up and filed within two years from the time such claims may have arisen; and any claim not presented and proved up as above, and filed, shall be forever barred from payment by the State." Laws 1847, p. 32.

To hold otherwise would involve the contention that the reference of a bill to this Commission had the effect of repealing a law now on the statute book.

However, even if the two year limitation were not in this case applicable, and had there been no former adjudication of this claim, we should still feel bound, under the law heretofore cited, to reject this claim.

If as claimed, work was done under a contract with or by direction of the Secretary of State, such action was wholly without authority of law, and had no binding effect on any one except possibly the Secretary himself; he certainly could not, in the face of the constitution and the statutory provisions hereinbefore quoted, bind the State; nor could the legislature properly make an appropriation for such an unauthorized payment in view of the constitutional provision (Sec. 19, Art. 4) that *"the General Assembly shall never * * * 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."*

This language is sufficiently plain and emphatic to determine this Commission that even in the absence of other considerations and defenses, this claim has no foundation in law, and it is therefore rejected.

WILLIAM Z. PARTELLO

v.

THE STATE OF ILLINOIS.

Opinion filed March 20, 1903.

CONTRACTS—*no recovery after all rights have been relinquished.* When a party being unable to carry out the terms of his contract, gives the other party a written relinquishment of all rights he may have thereunder, he cannot afterwards recover for money paid out by him under such contract.

William Z. Partello claims from the State the sum of $28,000.00.

The claim is in the nature of an action of assumpsit growing out of a written contract made on August 31, 1892, by him with the Board of Managers of the Illinois State Reformatory at Pontiac, Illinois, to furnish all labor and material required to erect and fully complete three buildings, viz: a cell house with attached school and lavatory building, a solitary and medical examination building combined, and a trade school building.

The plans and specifications upon which the contract was let were referred to in and made a part of the contract, and the material was to be furnished and the work done strictly according to the same.

Article II of the contract provided that the material used be of the best quality and the work executed in the most workmanlike manner, both material and work to be to the entire satisfaction of said Board.

Article III provided that the entire work should be fully completed on or before the 1st day of August, A. D. 1893. That if through the fault of the Board of Managers the work was delayed, it also provides that the contractor be allowed one additional day to the time

above stated for each and every day said work was delayed by the fault of the Board of Managers, strikes or other causes over which the contractor had no control.

Also that if the contractor without being so prevented failed to comply with the terms of said contract which relate to the time within which the work was to be completed, then and in that event, he was to forfeit the sum of $25.00 per day for each and every day thereafter until the work was completed; and that such sum be deducted from any money due him and if that amount was not due, then he was to pay the deficiency.

Article IV provided that should the contractor fail to prosecute the work with such diligence as in the judgment of the Board would insure the completion of the work within the time specified in the contract, or fail to comply with any of the terms thereof, and thereby in the judgment of the Board hazard the satisfactory completion of the work, as stipulated, and after giving the contractor ten days notice in writing, and upon his failure to prosecute the work within said ten days, then the Board was authorized and empowered to take possession of the machinery, tools and material of the contractor and supply whatever was necessary and complete the work and deduct the cost thereof from any money due the contractor and if sufficient sum was not due him, then in that event he was to pay the deficiency.

Article V provided that all work exhibited in or provided to be done by the plans and drawings and not mentioned in the specifications or vice versa, be performed as if same were fully mentioned in such, without extra charge.

Article VI relates to alterations by addition or omissions on the work and amount and manner of payment for same.

Article VII provided for the use of labor of inmates of the reformatory on the work and the payment therefor.

Article VIII provided that the Board shall appoint an architect and superintendent to have charge of the work but that the final acceptance thereof shall rest with

the Board, and that the acts of such architect shall be merely advisory.

Article IX provided that the contract price of said buildings complete be $105,384.00. Payments to be made as follows: Ninety per cent of the value of the work executed to the satisfaction of the Board, to be paid in monthly installments as the work progressed, the said value to be ascertained by the architect according to the terms of the specifications, which specifications provide that "such monthly payments shall be based upon the estimated value of the quantity of such work and computed from the contract *unit of value.*"

Ten per cent to be retained until the completion of the entire work and the approval and acceptance thereof by the Board, and in case of non-fulfillment of the contract by the contractor, this amount was to be forfeited, such forfeiture not to relieve him from liability to the Board for any damages sustained by reason of any breach of the contract.

Article X provided that the contractor shall save and keep harmless the Board of Managers from all claims, loss or damage arising from the negligence of the contractor, and to properly protect the work until completed and accepted.

Article XI provided that the contractor shall with two good and sufficient sureties execute a bond to the Board for $52,500.00 for the faithful performance of the contract and that the contract should not be assigned without the written consent of the Board.

The claimant alleges in his statement of claim herein filed:

First: That after the execution of said contract he proceeded under the terms thereof with said work with all due diligence and furnished material necessary to the progress of said work.

Second: That instead of being paid in monthly installments, ninety per cent of the value of the work, labor and material performed and furnished under said con-

tract, he was paid only about forty per cent thereof, and that by reason of not receiving ninety per cent, he was delayed and hindered in the progress of said work.

Third: That on or about the 27th day of April, 1893, without right or authority, under the terms of said contract, the said Board of Managers undertook to cancel the contract and prevent him from proceeding with said work.

Fourth: That at the time said action was taken by said Managers there was due him for extra work allowed by the architect and superintendent of said work the sum of $1,838.00 and a further sum of $15,419.76 for work and material put into the said building.

Fifth: That at the time the said contract was cancelled, there was material left upon the grounds of the said Reformatory at Pontiac, belonging to the claimant, which was afterward appropriated and used in the said building by the said Managers, amounting to the sum of $12,580.00 and for which the claimant has never been paid.

Sixth: That in June, 1893, one George McIntosh, made an offer to said Board of Managers to complete the work covered by the contract of claimant for $80,000.00 and in addition thereto, to pay the claimant the sum due him for work and material then done and furnished under said contract; also to take, use and pay for the material belonging to claimant, and then on the ground at said reformatory, and that at the request of said McIntosh and the said Board of Managers, the claimant consented thereto; and that thereafter on the 8th day of July, A. D. 1893, the contract was let to said McIntosh, who thereupon duly entered into a contract with said Board of Managers to complete the work called for by the contract, made by the claimant. That afterwards without the knowledge or consent of claimant, said Board released said McIntosh from said contract.

In answer to the allegation set out in claimant's claim, the State has filed pleas denying any indebtedness whatever to the plaintiff; also averring that the claimant

voluntarily relinquished to the State in May, 1893, all claims which he might have against the State, under and by virtue of said contract; also setting out that claimant failed to prosecute and the Board of Managers in pursuance of the terms of the contract, terminated his employment and all rights thereunder, and also that claimant's claim was barred by the statute of limitations.

Partello began work on the buildings in August, 1892. It appears from the evidence that a small force of men was employed and the work progressed correspondingly slow. It soon became apparent to the Board that unless better progress was made, the work would not be completed within the time specified in the contract, and that the appropriation to construct those buildings would lapse before their completion, and the same be thereby delayed until further appropriation by the State. That Partello from the beginning was repeatedly urged by members of the Board to exercise such diligence in the prosecution of the work as the contract required.

About April 1, 1893, Partello became financially involved and soon thereafter, the unused material which he then had upon the grounds of the reformatory was seized by his creditors under writs of attachment, executions and replevins and thereupon the prosecution of the work was practically abandoned by him.

Having failed to prosecute the work, as required by contract and for the above reasons having abandoned the same, Partello was notified in writing by the Board on April 6, 1893, that unless within ten days he prosecuted the work in such manner as to comply with the terms of such contract, the same would be cancelled and terminated.

On May 2, 1893, Partello appeared in person at a meeting of the Board which was then being held at Pontiac, and stated that he could not carry out the contract and requested to be relieved of same. He thereupon gave the Board his relinquishment which is

written on the back of the bond attached to the contract and is as follows:

"PONTIAC, ILL., May 2, 1893.

In consideration of the premises I hereby relinquish all rights I may have under this contract and agree that said contract may be transferred to such person or persons as the Board of Managers shall appoint or select.

(Signed.) WILLIAM Z. PARTELLO."

The Board on June 1, 1893, accepted same by a resolution as follows:

"Be it therefore resolved, and ordered by the Board of Managers of the Illinois State Reformatory that the contract of this Board with said William Z. Partello be, and the same is hereby declared to be cancelled and terminated.

This Board reserving the right to prosecute suit for all damages sustained by the State by the failure of said Partello to fulfill his contract."

In relation to this release and the forfeiture of the contract, the records of the Board show that in December, 1893, the credit to Partello of the sum of $1,449.35 on the books of the reformatory was then disposed of as follows:

"On motion of Manager Ela, the following order was entered in relation to Wm. Z. Partello:

"It appearing on the books of the reformatory that there is a balance standing to the credit of Wm. Z. Partello of $1,449.35, and it also appearing that there is actually due the State from said Partello a large sum of money; much more than the above apparent balance, on account of his failure to fulfill his contract with this Board for the construction of the buildings, the clerk is hereby directed to enter a memorandum of that fact as against said apparent credit balance standing on said books."

Having for the reasons above stated, forfeited his contract and having thus elected to surrender same with full knowledge of all the facts, no reason is perceived why the conditions in such release contained are not

obligatory upon him both in law and in equity. The language of the release is:

"I hereby release *all rights* I may have in this contract."

It was in writing deliberately executed by the claimant and so accepted by the Board. And was by all parties concerned intended to be a forfeiture of and a complete bar to any claim which Partello might have under and by virtue of such contract.

This relinquishment considered in connection with the resolution of the Board, in accepting same and declaring the contract terminated, and reserving the right to prosecute suit against the claimant for all damages sustained by the State by reason of his failure to fulfill his contract, the manner in which the Board disposed of the balance appearing to his credit on the books of the Board together with the testimony of a number of credible witnesses, all prove that there was a good and sufficient consideration for this release and that the same *is a bar* to any claim for work or material then constructed into said buildings.

It is shown by the evidence that at a meeting of the Board held on June 1, 1893, Partello was notified to return the plans and specifications for the buildings.

The records of the Board show that on June 22, 1893, an order was passed to advertise for bids for the construction of the reformatory buildings, and that on July 6th, among others, a bid was received from one George McIntosh to complete two of the three buildings covered by the Partello contract, namely, the cell house and attached school building and a solitary and medical examination building, for $80,000.00.

Afterward on July 8, 1893, the Board awarded to said McIntosh a contract to construct one of the two buildings covered by his bid, namely, the cell-house and attached school building, for the sum of $78,800.00.

Records of the Board also show that said McIntosh afterwards refused to give bond and execute the contract for such work.

It is contended that Partello executed the release in consideration of the contract being made by the Board of Managers with said McIntosh to complete the buildings and that McIntosh was released from his contract by the Board without the consent of Partello and that it was part of the contract with McIntosh, that he, (McIntosh) was to pay Partello, the amount claimed to be due him and that therefore the State is now liable to pay him such claimed balance.

McIntosh in his testimony before this Commission, denies that such arrangement was ever made with or by him and all of the evidence shows clearly that this contention has no foundation in fact but on the contrary, appears to be an after-creation.

Aside from the testimony of claimant, the record in this case is absolutely wanting in any proof that the Board of Managers was at any time a party to any contract by which Partello was to be paid out of any sum that the Board of Managers might pay to any other contractor for the completion of the buildings; besides the release was dated May 2, 1893, and it is matter which appears on the records of the Board, and is not disputed except by testimony of claimant, that the only bid from said McIntosh for the construction of these buildings was received by the Board on July 6, 1893, more than two months after the release was made and the contract surrendered.

Not only is this contention of claimant wholly unreasonable but it was impossible for it to be as testified to by him. The bid of McIntosh did not cover all of the buildings included in Partello's contract and again, it appears that Partello took his contract at a very low figure, his bid being about $35,000.00 below any other proposal made for the work.

Is it within reason and common experience that Mr. McIntosh or any other intelligent contractor, would pay a bonus for being allowed to assume such an obligation regardless of the great advance in labor and material, as shown by the evidence in this case?

It also appears that the bid of McIntosh was made in competition with other bids and was much the lower bid. These bids were in writing, and it is shown by the testimony of the bidders and of the members of the Board who have testified herein, that the bid included no terms or conditions except those contained in the bids themselves, and it appears from an inspection of said bids that no reference is made therein to Partello or his contract.

It is claimed by Partello that his monthly estimates of the architect were too low, and that instead of being ninety per cent of the value of the work, they were not to exceed 41 per cent thereof.

The evidence is that the architect, according to the contract made the monthly estimates upon the work done and that the same (less the ten per cent which was to be retained till the work was completed) was paid in monthly installments as in the contract provided, and that no objections as to the correctness of these estimates were made by him at any time to the Board.

These estimates were made by the architect during the progress of the work under the terms of the contract and were so received and acted upon by the Board. If the estimates were not correct it was the duty of Partello at that time to make known his objection to the Board and have the matter then adjusted. Not having done so, he is not in a position to complain after he had voluntarily surrendered his contract and released the State from all his rights under the same. This rule certainly applies to like controversies between two individuals and no reason is perceived why it should not apply here.

It will be observed that Partello contends that he should have received monthly, 90 per cent of the *value* of the work done. This is not what the contract provided. The language of the specifications is that such estimates shall be "based upon the estimated value of the quantity of such work and computed from the contract

unit of value." The "contract unit of value" was $105,884.00.

The proof is that owing to the rapid advance in the price of labor and material and the limited time in which the appropriation would lapse after Partello surrendered his contract, the Board was unable to relet the work within the appropriation then at its command, and that it therefore decided to purchase material and employ labor necessary to complete certain two of the three buildings covered by the Partello contract. And in the work, the Board used the labor of the inmates of the reformatory as far as practicable and added nothing to the plans to increase the cost of the buildings, and yet under economical management, the actual cost of these two buildings to the State, was between $30,000 and $35,000 in excess of the price specified in the contract with Partello. So that if the $15,419.76 herein claimed for labor and material was put in buildings, be added, there would be an excess of $46,000 to $51,000 not including the value of the labor done by the inmates of the reformatory, which is not included in the above excess of $30,000 to $35,000. Giving Partello credit for the sum of $15,419.76, there still remains an excess of more than $35,000 due from him to the State by reason of failure to carry out the terms of his contract.

The undisputed proof is that after the buildings were completed the Board of Managers sought to recover these damages from Partello and his bondsmen, and that upon investigation it was found that both Partello and his said sureties were wholly insolvent and that for this reason the effort to collect damages on the bond was abandoned.

$12,580.24 is claimed for material which claimant alleges he left upon the grounds of the reformatory, taken possession of and afterwards used by the Board in completing the buildings.

The evidence shows that about the time of the signing of the release, Partello had a considerable quantity

of unused material, such as brick, stone, cement, iron, lime, etc., on the reformatory grounds. The claimant testifies that this was taken possession of and used by the Board, without payment therefor. That Partello has a claim against the State for material so used is wholly without foundation in fact.

The proof taken from the records and the testimony of reliable witnesses, on this question conclusively show that all the material belonging to Partello upon the reformatory grounds at the time he surrendered his contract, was seized by his creditors under writs of attachment and writs of execution, or taken possession of under writs of replevin procured by firms which had sold him such material. T. W. Coe, then sheriff of Livingston county, testified before this Commission that during the months of April and May, A. D. 1893, he, in his capacity as sheriff levied upon and sold all of this material under various writs of attachment and executions obtained against Partello by his creditors (excepting however such parts thereof as was replevined by persons claiming to be the owners thereof.)

The officer's return on one of these writs of attachment is as follows:

STATE OF ILLINOIS }
LIVINGSTON COUNTY, } ss.

By virtue of the within writ of attachment I have levied upon the following described property, to-wit: One pile of pressed bricks supposed to be about 40,000, north of the north end of the new building now being erected on the grounds of the Illinois State Reformatory. Also a lot of cut stone sills and caps on said grounds, also a lot of iron columns near pile of pressed brick described as above, also a lot of pressed brick in south shed near building, also a lot of cement in north shed near east family building and west of the new building being erected on grounds aforesaid. This cement levied upon subject to levy by W. H. Bentley, constable.

This 20th day of April, A. D. 1893.

(Signed.) T. W. Coe, *Sheriff.*

I have also levied upon a part of car-load of cut-stone windows, caps and sills on car on side track of Chicago & Alton R. R. and near said reformatory grounds, and on C. & A. car No. 1877. I have also summoned the National Bank of Pontiac as garnishee, by delivering a true copy thereof to J. E. Morrow, president of said bank, at the direction of plaintiff.

This 21st day of April, A. D. 1893.

STATE OF ILLINOIS, } ss.
LIVINGSTON COUNTY. }

I have duly served the within summons by summoning the within named defendant, William Z. Partello, as I am therein commanded.

This 25th day of April, A. D. 1893.

T. W. COE, *Sheriff*.

The court records of Livingston county produced in evidence herein further show that the material seized under and by virtue of these various writs was afterwards sold under same and the proceeds derived therefrom were prorated among the creditors, the amount received not being sufficient to satisfy the claims in full. The proof further shows that none of this material was used in the building, except such as was purchased from the legal owners thereof, and paid for by the Board, after the same had been taken from Partello.

The evidence also shows that some of the material for which claimant is now demanding pay was never used in the buildings, but was replevined and taken away by the owners.

The first intimation of any claim by Partello was in August, 1893, when the Board received a letter which is as follows:

"CHICAGO, ILL., Aug. 5, 1893.

To the Board of Commissioners of the Reformatory at Pontiac.

Gentlemen: There is about nine thousand dollars ($9,000.00) due me on account of money paid out by me in excess of what I have received in the work on the

reformatory at Pontiac, during the time I held the contract for the building work.

Legal counsel has advised me to make my demand for this money due me, and I hereby demand prompt settlement of my claim.

Very respectfully,

(Signed.) W. Z. PARTELLO."

Later in the same year his attorney, Mr. Crafts, presented claim for him to the Board for $15,223.00 and in 1897 he had introduced for him in the House of Representatives, a bill for an act to appropriate to him $18,632.21.

Afterwards in 1898 he filed with this Commission a claim presumably sworn to by claimant, as required by the statutes for $15,419.76, and in 1901, he procured another bill to be introduced in the House for $28,000.00.

From these unexplainable differences in the amounts claimed at different times, it is plain that there has always been in the mind of claimant a vague uncertainty as to his claim against the State.

Much evidence has been produced before this Commission in this case and without entering into what would be a tedious review of all the testimony bearing upon claimant's right to recover against the State, and aside from the statute of limitations, a careful examination of the evidence has satisfied us that after waiving all technicalities and by applying to the facts the most liberal principles of equity, it clearly appears that there is no merit in this claim against the State of Illinois for any sum whatever.

The claim is therefore rejected.

HENRIETTA E. HARPER
v.
THE STATE OF ILLINOIS.

Opinion filed November 16, 1904.

1. RESPONDEAT SUPERIOR—*doctrine does not apply to counties, townships, etc.* The doctrine of respondeat superior is not applicable to municipal corporations, such as counties, townships, school districts, road districts, drainage districts, etc.

2. SAME—*doctrine does not apply to State.* The doctrine of respondeat superior does not apply to the State.

During the month of August, 1902, the claimant, Henrietta E. Harper, a woman of mature years, in company with other members of her family, while visiting Lincoln Park, in the city of Chicago, for her own amusement and that of her companions, indulged in feeding the zebras kept there on exhibition. These zebras were confined in an enclosure about seventy-five (75) feet square, made by a wire fence about four (4) feet high, outside of which fence and on the side accessible to visitors, was another wire fence between seven and eight feet high; the outside fence being a few feet from the inner fence. The claimant thrust her hands through the meshes of the outside fence, and while with her hand in this position, was throwing bread over the inner fence to the zebras, one of which rushed up to the inner fence and reaching over it, seized her thumb with its teeth, thereby inflicting a severe and permanent injury upon her. To recover compensation for said injury, this claim is filed against the State.

It is contended by claimant that the said Board of Park Commissioners, through its employes, was guilty of negligence in not providing suitable signs and notices, warning people of the vicious tendencies of the zebras in question, and that as said Board and its employes were officers and agents of the State, the State is therefore liable for said injuries.

The general rule of law is that the principle is lia-

ble for the negligent acts of its servants, in the course or scope of their employment, upon the application of the principle of *respondeat superior*; yet a distinction exists as to municipal corporations, such as counties, townships, school districts, road districts, drainage districts, and public park districts.

To these our courts have uniformly held, that the principle of *respondeat superior* does not apply.

Dillon on Mun. Cor., Secs. 975-978;
Waltham v. *Kemper*, 55 Ill., 346;
Hedges v. *County of Madison*, 1 Gil., 567;
Elsmore v. *Drainage Comrs.*, 135 Ill., 269.

The State, however, is a sovereignty, and the exception which applies to the above mentioned corporations, with much greater force and uniformity applies to the State, as it is invariably held that the State is not responsible for the misfeasance, wrongs, or negligence, or omissions of duty of subordinate officers or agents, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs. That would involve it in all its operations in embarrassments and difficulties and losses, which would be subversive of the public interest. Laches is never imputed to the government.

Story on Agency, Sec. 318.
Dill on Mun. Corp., Sec. 975.

In the case of Jacob Schmidt v. State, decided by the Commissions of Claims in this State in 1890, and in other cases since decided, it has been uniformly held, that the doctrine of *respondeat superior* does not apply to the State, and the following cases are cited in support of this position.

Murdock Parlor Grate Co. v. *Com.*, 24 N. E., 855.
Hill v. *Boston*, 122 Mass., 344.
Gibbons v. *U. S.*, 8 Wall, 269.
2 Dillon Mun. Cor., Sec. 761-2.
Hedges v. *County of Madison*, 1 Gil., 567.
Town of Waltham v. *Kemper*, 55 Ill., 346.

This claim is therefore rejected.

JAMES M. LEE,
LUTHER M. DEARBORN,

The case having been submitted and oral argument heard before his appointment, Judge Searle took no part in the decision. Nov. 16, 1904.

LUTHER M. DEARBORN,
Presiding Judge.

BERTO G. HOLMES
v.
THE STATE OF ILLINOIS.

Opinion filed February 17, 1905.

1. TRESPASSERS—*not precluded from recovering for negligence of another.* A trespasser is not precluded from recovering for a loss occasioned by the negligence of another, unless his act contributed to the injury.

2. CANAL COMMISSIONERS—*Rights and duties as to bridges.* While it has been decided in People v. Canal Trustees, 14 Ill., 402, that the Trustees were under no legal obligation to build bridges over the canal on highways opened after the construction of the canal, the reasoning of that court does not apply to a case where the canal was opened after the highway. The canal commissioners in the latter case, at least have the legal right, if it is not their legal duty to construct and maintain such bridges; and such has been the uniform and long continued construction of the law by the State itself, through its proper officers. The canal Trustees or Commissioners also having the legal right to enter into contract with the Commissioners of Highways for the construction and maintenance of bridges, after seventy years exclusive control of the bridge in question by the canal commissioners, it will be presumed in the absence of evidence to the contrary, that there was such a contract, and that such control was exercised in accordance with such contract.

3. SAME—*When doctrine applies to a municipal corporation.* A municipal corporation is never estopped to deny its right to make a contract, but the doctrine of estoppel is applied to it when acting in its private, as contra-distinguished from its governmental, capacity, whenever the act is within its chartered power.

4. COURT OF CLAIMS—*legislative intent in creating.* It was not the legislative intent, in creating the Court of Claims to create thereby, new liabilities against the State.

5. RESPONDEAT SUPERIOR—*when doctrine applies to State.* While no private action lies unless the right to bring it is expressly conferred 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 welfare, there is an implied or common law liability for the negligence of municipal officers in the performance of corporate acts which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation.

6. ILLINOIS AND MICHIGAN CANAL—*operation, of, not a governmental function.* The Illinois and Michigan canal is owned by the State as a business enterprise; its ownership, control and operation, for hire and rewate, is not a governmental function.

This is a claim by Berto G. Holmes against the State of Illinois for damages for injuries to his person and property sustained as the result of the fall of a bridge over a "feeder" of the Illinois and Michigan canal. Claim is made for five thousand ($5,000.00) dollars, but this is reduced to seventeen hundred and forty-four dollars ($1,744.00) dollars by the bill of particulars filed by claimant. The case is submitted on the evidence introduced by claimant, with the stipulation that in the decision of the case, the evidence introduced in the case of Chas. A. Peterson, Admr. v. The State, growing out of the same disaster, shall also be considered. It appears from the evidence that in 1887 and 1888 the State, through its proper officers, constructed, as appurtenant to the Illinois and Michigan canal, a "feeder," extending from Fox river to the said canal, through a portion of La Salle county, near the city of Ottawa; that said "feeder" intersected a public highway, in such county, known as "Dayton Road," previously established and used. That the State, upon said completion of such "feeder," constructed thereover, on said highway, a wooden bridge known as a "pony truss" bridge, consisting of one wooden arch upon either side, resting upon plates or abutments at either end, and thus supporting the weight of the bridge; these arches each being composed of three pieces of timber, one long piece acting

as a keystone and the other two proceeding diagonally from the ends of the keystone down to and upon the plates and abutments at either end. The bridge in question was sixty-nine and eight-tenths feet long and seventeen and one-half feet wide between the chords. And that the State has ever since maintained said bridge at its own expense, and had exclusive control thereover. It appears that neither the highway commissioners, nor county, have ever had anything whatever to do with the construction, maintenance, repair or control of such bridge; but it does not appear from the record, whether there was any contract or arrangement of any kind with reference thereto between the State, through its trustees or commissioners, and the highway commissioners, or the county.

On September 11, 1902, claimant was slowly crossing this bridge, with an ordinary threshing machine outfit, consisting of traction engine, water tank and thresher; that when the engine had reached about the middle of the bridge, going south, the bridge gave way and precipitated claimant, his employe, Andrew T. Peterson and engine and threshing outfit into the canal, killing Peterson and injuring claimant and damaging his said property. It appears that the cause of the bridges' giving way, was the very rotten condition of the south east support of the bridge, a wooden beam or support known as a "batter-post" resting on the pier; a condition not observable from the highway, but which could easily have been ascertained by the most casual inspection of the bridge. It is shown that the bridge was of a type and character, that had it been in proper state of preservation, would have supported the outfit. In fact, claimant had himself crossed it with his outfit a few weeks before. It also appears that the claimant had not observed the statute, in laying down planks on the bridge for the engine to pass over; but it further appears from the uncontradicted expert evidence in the record, that such failure to plank, in no wise contributed to the fall of the bridge; in other words, that the use of such planks would not

have distributed the weight so as to relieve the strain on the rotten support, or prevent its giving way. As stated above, claimant's employe, Peterson, was killed; claimant received wounds and scalds that kept him from his work and under a doctor's care about two months and his engine was damaged to the extent of about three hundred ($300.00) dollars, and the balance of the outfit, estimated at the value of about seven hundred ($700.00) dollars, substantially ruined; claimant's whole damage being estimated at seventeen hundred and forty-four ($1,744.00) dollars.

It is manifest from the record in this case, indeed is conceded by the State, that this claim is meritorious and presented in good faith, and should be allowed, if no legal defense be shown. Three legal defenses, however, are urged by the State, against the claim.

1st. That claimant was not himself in the exercise of due care.

2d. That the State was under no legal obligation to maintain the bridge in question.

3d. That the State is not liable for the negligence of its officers, the Canal Commissioners.

The contention that claimant was not himself in the exercise of due care, rests almost, if not wholly, on the fact that he did not lay plank for his engine to cross on, in compliance with Section 268, Chap. 121, Rev. Stat., 1908. This statute is a penal statute. Whether the reason underlying it was to distribute the load on the bridge or to prevent the wear and tear of the floor planking by the ordinary spurs or toes on the tire of the wheels of ordinary traction engines, is questionable; we are inclined to the latter view, as the more reasonable, as the effect of the use of such plank could have no appreciable influence in the distribution of the load on the supports of the bridge; however, in our judgment, it is not necessary in the decision of this case to determine the reason of the law. As stated, it is a penal statute. Its violation does not, in our judgment, make the violator a trespasser; and even if it did, his trespass, on

the well recognized authorities of this State, would not preclude his recovery for loss occasioned by the negligence of another, unless his act, contributed to the injury. This the evidence clearly establishes it did not do. Claimant was slowly crossing the bridge with his outfit. He had crossed the bridge with it before, and judging from the style and apparent character of the bridge, was, we think, entirely warranted in thinking it could be safely so passed over. So that we are of the opinion, the claimant, on the whole, showed no such lack of due care as to preclude him from recovery, if otherwise entitled to recover.

The second defense urged, is that the State was under no legal obligation to either construct the bridge, or keep the same in repair. It is undoubtedly true as contended by the State, that the law confers on highway commissioners, the general duties of constructing and repairing the bridges on public highways; and that it is competent for the State to assign such duties to its subordinate municipalities. And the Supreme Court in *People, etc. v. Canal Trustees*, 14 Ill., 402, has held that the canal authorities are under no legal obligation to construct bridges over the canal, on highways intersecting such canal, opened *after* the construction of the canal; in this instance the road was laid out first and the reasoning of the court in the above case does not apply; indeed, the stress laid upon the fact in that case, that the canal was constructed first, would indicate an inclination to a contrary holding where the road was opened first, and furthermore, there seems in that case to be a recognition by the court, of the power and authority of the Canal Commissioners to construct and have bridges over the canal, if they see fit so to do. Section 8 of the Canal Act. (Chap. 9, Rev. Stat.) gives the Canal Commissioners control over the canal, its "feeders" and appurtenances; and Sections 23, 24 and 27 *ibid*, power to control the construction of bridges thereover and to regulate the use of the same, and that the fines incurred

by violation of its regulations shall go to them. These are all powers and rights generally conferred by statute, on the commissioners of highways, and seem to us to evince the legislative intent to confer the right and power, if not the duty, to construct and repair bridges over the canal, on the Canal Commissioners. That, it clearly appears, has been the construction of the law, by the State itself, through its proper officers. The State nearly seventy years ago constructed the bridge in question, renewed it and repaired it from time to time, and exercised exclusive jurisdiction over it. If the State, through its Commissioners, had the right and power, as we are inclined to think it had, to construct the bridge, or to at least enter into arrangements with the county or highway commissioners for its construction and maintenance, after such lapse of time, and in the absence of evidence on the question, it would on well recognized principles, be presumed that the officers performed their duty and that such an arrangement was made.

Suppose under the facts of this case this question arose on the prosecution of a person for malicious mischief, in defacing or maliciously injuring the bridge in question, in the indictment for which one of the necessary allegations would be as to the ownership of the bridge; and the State or Canal Commissioners should be the alleged owners, could conviction be defeated on the ground that the State or Commissioners were not in law the owners? We think clearly not. Furthermore, we think that while the doctrine of estoppel ordinarily does not apply against the State, yet it does in this case. This canal, its ownership and control, is not a governmental function, but a purely business enterprise. The State clearly had the power to construct and maintain the bridge in question, even though the Commissioners did not have. Having that power, and through its proper officers, its Canal Trustees and Commissioners, exercising it, through a long period of time, it should be,

and is, we think, legally estopped from denying its rightful exercise.

A municipal corporation (county) is never estopped to deny its right to make a contract, but the doctrine of estoppel is applied to it when acting in its private, as contra-distinguished from its governmental, capacity, whenever the act is within its chartered power; *Barnard & Co. v. County of Sangamon*, 100 Ill., 116; *City of Chicago v. Williams*, 182 Ill., 135; *City of Chicago v. Sexton*, 115 Ill., 280; *County of Cook v. Harms*, 108 Ill., 151.

If the question upon whom the legal duty rests to construct and repair bridges over the canal, arose between the Canal Commissioners and highway commissioners, a very different question would be presented than is now presented to this court, between the State and one of its citizens. It would certainly be a very harsh doctrine to exempt the State from liability in this case on the ground of want of authority on the part of the Canal Commissioners to construct and maintain the bridge in question; after it has at least tolerated such acts of its officers for two generations; and we cannot so hold.

The last defense urged is in our opinion, the most serious, i. e., that the State is not liable for the negligence of its officers. This as a general proposition is undoubtedly true. The act creating this court, certainly confers very broad jurisdiction on the court and seems to recognize the liability of the State in actions arising out of the acts and omissions of its officers, including "Canal Commissioners," sounding in tort, and directs us to determine claims against the State according to the principles of equity and justice. The Act of the Federal Government, establishing its Court of Claims, expressly excepts such claims from the jurisdiction of that court. But notwithstanding the omission of such exemption from our statutes, and the broad powers conferred, we are inclined to the view that it was not the legislative intent, to create thereby, new liabilities against the State. But in this case, we doubt the ap-

plicability of the doctrine exempting the State from liability, for the negligence of its officers. The doctrine finds its justification in considerations of public policy. The same considerations of public policy that the courts of this State have uniformly looked to in exempting municipalities from liability for the acts of omission and commission of their police officers, members of fire departments, etc. But the courts of this State have distinguished between such cases where they hold the doctrine of no liability; and another line of cases where the municipalities are engaged in enterprises of a business nature, for profit, in contra-distinction to purely governmental functions, and they are not exempted. Says Mr. JUSTICE MAGRUDER in *City of Chicago* v. *Williams*, 182 Ill., 135: "There is an implied or common law liability for the negligence of municipal officers in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. 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 welfare, no private action lies unless the right to bring it is expressly conferred. This distinction is well recognized by our Supreme Court as applied to all classes of municipalities."

The Illinois and Michigan canal is owned by the State as a business enterprise, its ownership, control and operation, for hire and reward, is not a governmental function. The doctrine applied by our Supreme Court to other municipalities, applies with equal force and reason in our judgment, to the State. No considerations of public policy, (the sole reason for the rule) apply to the exemption of the State from liability for damage to the persons and property of its citizens, caused by it in enterprises of a purely business nature. On the contrary such a holding would be plainly contrary to the spirit of our constitution and laws.

We are therefore, of the opinion that claimant is entitled to an award of damages. In view of the fact that the damages are unliquidated, and the exact amount thereof are impossible of ascertainment, from the evidence, we do not feel bound by the estimates thereof made by claimant, or his counsel, but feel warranted in exercising our own best judgment as to the amount to be fixed; and we fix his damages at $1,500.00. We accordingly award the claimant, Berta G. Holmes, the sum of fifteen hundred ($1,500.00) dollars as damages to his person and property, growing out of the matter in the above entitled suit complained of.

EUGENE B. PHILLIPS

v.

THE STATE OF ILLINOIS.

Opinion filed February 17, 1905.

1. WATERS—*degree of care required by collector of artificially collected waters.* The weight of authority seems to sustain the proposition that the collector of artificially collected waters, as in the case of the owners of wild and dangerous animals, must retain them in his control at his peril, and is liable for damages done by them if they escape, whether negligent or not, except it happen by the Act of God.

2. RESPONDEAT SUPERIOR—*when doctrine does not apply.* The doctrine that the State is not liable for the negligence of its officers, does not apply to the officers in charge of the Illinois and Michigan canal.

This is a claim made by Eugene B. Phillips against the State for damages growing out of the flooding of his lands by waters from the Illinois and Michigan canal. The case is submitted on the evidence introduced by the claimant only. Claimant in 1902 was farming a rented farm in La Salle county, adjacent to said canal. In July of that year the banks of the canal broke and permitted the waters of the canal to escape upon claimant's said lands and destroy or injure about forty acres of his crops. It is not absolutely certain from the evidence just what caused the break in the bank, but the evidence tends to prove that the break was due to holes

made in the bank by musk-rats; and that claimant had given timely notice to the canal authorities of such burrowings. There is great contrariety of judicial opinion as to the degree of care required by the collector of artificially collected waters, in reservoirs and canals, to retain them in control. One class of cases holding to the doctrine that the collector of such waters, as in the case of the owners of wild and dangerous animals, must retain them in his control at his peril, and is liable for damages done by them if they escape, whether negligent or not, except it happen by the Act of God, etc. The other sustains the doctrine that before such liability attaches, such collector of waters must be chargeable with negligence. The courts of our State seem inclined to the former position; *Kankakee Water Co. v. Reeves,* 45 Ill. App., 285, and we incline to the same view. We deem it unnecessary, however, in view of the evidence in this case, to decide between the two lines of authority; deeming the uncontradicted evidence sufficient to sustain a judgment, even on the latter theory; if not defeated on other grounds.

Practically the only defense urged by the State's counsel is the proposition that the State is not liable for the negligence of its officers. We fail to concur in the views of State's counsel on this proposition as applied to the officers in charge of the Illinois and Michigan canal and have decided adversely to that contention in the case of Holmes v. The State; *supra,* the opinion in which case we file on this date, and which fully expresses our views on the question. The principles announced in that case, being decisive of this, we feel constrained to make an award in claimant's favor. The claim is made for damages in the amount of $600; and claimant and his witnesses testifying in a general way, estimate the damage done, at from $500 to $600; but this estimate is not only very general in its nature but is also on the basis of a full harvested crop and at the highest market values. Estimating the damages in detail from the somewhat insufficient data furnished, we think $10.00 per acre

or $400.00 for the total acreage destroyed and damaged, would fairly cover claimant's damages. We, therefore, accordingly award claimant, Eugene B. Phillips, the sum of four hundred dollars ($400.00) as damages for his loss, growing out of the matter in the above entitled suit complained of.

CHARLES A. PETERSON

v.

THE STATE OF ILLINOIS.

Opinion filed February 17, 1905.

DAMAGES:, *Caused by falling bridge over feeder of Illinois and Michigan Canal.* Claimant was injured by the falling of a bridge over a "feeder" of the Illinois and Michigan canal. The court reviews the evidence and holds the claimant entitled to $2,500. Holmes v. the State followed.

This is a claim by Charles A. Peterson, administrator of the estate of Andrew T. Peterson, for damages to the said estate, by reason of the death of deceased, caused by the fall of a bridge over a "feeder" of the Illinois and Michigan canal, due to the alleged negligence of the Canal Commissioners in permitting the same to be and become out of repair.

Deceased was an employe of Berto O. Holmes and was assisting him in conveying across the bridge in question, his threshing outfit, when the bridge fell and he was instantly killed thereby; and in this claim the same state of facts and legal principles are involved as in the claim of Berto O. Holmes v. The State. And our award and opinion in that case on this date filed, is decisive of the merits of this, except on the question of the amount of damages.

On the latter question the evidence in the record, is not in a very satisfactory condition to enable us to determine the exact amount of damages we ought to award.

At the time of the death of deceased, the legal limit of

recovery in case of death was five thousand ($5,000.00) dollars; and was limited to the actual pecuniary loss to the next of kin. We consider that we are bound by such rule. From the very nature of such damages, they are ordinarily incapable of exact ascertainment, and our courts have not exacted much certainty in evidentiary data for their ascertainment. But yet in this case, the evidence certainly falls short of what might have been produced by claimant bearing on that question. The father of deceased, Ole Peterson, according to the evidence, is the only next of kin, in any measure dependent on deceased for support. Deceased at the time of his death was twenty-one years, five months and eleven days old; he left him surviving two brothers, Charles A. and Ever Peterson, a sister, Tillie, since married and now named Mrs. Phillip Brooks, and his said father, Ole Peterson. Deceased had always lived with his father on a farm, and at the time of his death he and his sister and father were living together. The father was seventy-four years old and was demented, to what extent is not shown; but was said not to be able to work. Whether deceased or his father rented the farm upon which they lived is also uncertain from the evidence. Deceased worked on the farm either for himself or his father, and together with his brother Charles A., employed their sister to keep house for their father; and deceased helped support the old gentleman; but to what extent is not satisfactorily shown.

The foregoing is the substance of the evidence we have to guide us in fixing the amount of damages. We suppose we are entitled to the same latitude in arriving at the amount of damages as a jury would be, and in view of the meagre evidence bearing on the question we cannot hope to escape the charge of guessing at the amount so often made in such cases against juries. But keeping in view the compensatory feature of the law and the age of the father, the next of kin deprived of means of support, we fix the damages at $2,500.00.

We therefore accordingly award claimant, Charles A. as administrator of the estate of Andrew T. Peterson, deceased, the sum of two thousand five hundred ($2,500.00) dollars, as damages for the death of deceased, growing out of the matter in the above entitled suit complained of.

LOUIS H. KRUEGER
v.
THE STATE OF ILLINOIS.

Opinion filed April 1, 1905.

STATUTE OF LIMITATIONS—*Claim for a definite sum as compensation for military services not barred by.* Claimant served in the State militia and earned $37 from the State which he has not received because of his absence in the Philippines during the life of the appropriation made to pay the claim. *Held* that such claim is not an unliquidated claim barred by the statute of limitations, because not presented within two years from the time the claim arose.

On the 26th day of April, 1898, the claimant, Louis H. Krueger, as a member of Troop "M," First Illinois Volunteer Cavalry was called into service by the State, and on the 21st day of May of said year was mustered into the United States service and immediately thereafter as a part of the regular army, was sent to the Philippine Islands where he was mustered out of service, and returned to this country. Having served 26 days in said Troop "M," he was entitled to the sum of fifty ($50.00) dollars from the State for said services, as is provided by the Military Code of this State, article 8, paragraph 35, Starr & Curtis, Statutes. Prior to his departure to the Philippine Islands he received from the State the sum of thirteen ($13.00) dollars, and this claim for thirty-seven ($37.00) dollars is for the balance due him for said services.

The pay roll of said Troop "M," filed by the Adjutant General with the State Auditor, shows that the claimant actually served the number of days claimed, and that

there is thirty-seven ($37.00) dollars yet due him from the State. An appropriation to pay this amount together with similar claims was made by the General Assembly in 1869. Which appropriation the claimant was unable to avail himself of because of his said absence. That the claimant rendered the services or that said amount is due him is not denied by the State. It is contended, however, that this claim is barred by the statute of limitations. The statute so relied upon provides that all persons having *unliquidated* claims against the State of Illinois shall present the same within two years from the time such claims may have arisen. When the claimant entered into the services of the State the above section of the military code, which was in force, provided the amount of compensation he should receive for his services and his enlistment became an acceptance of the provisions of said code by which the sum he was to receive became fixed and certain and, therefore his claim does not come within the statute of limitations. We accordingly award the claimant Louis H. Krueger the sum of thirty-seven ($37.00) dollars the amount of his claim in this proceeding.

JENNIE A. RATTO

v.

THE STATE OF ILLINOIS.

Opinion filed April 10, 1903.

STATUTE OF LIMITATIONS—*running not stopped by introduction of bill relating to claim in Legislature.* The running of the statute of limitations against a claim for damages against the State is not stopped by the introduction of a bill for relief in either branch of the Legislature.

The facts on which the claimant bases her right of recovery are set forth in the petition substantially as follows: That the claimant is the widow of Gasper R. Ratto, who held a position as "Deputy Game and Fish Warden for the State," from the year 1897 until his death February 11, 1902. For the further statement of material facts, quotation is made from the petition as follows:

"Petitioner further says that on or about the 15th day of December, A. D. 1901, said Gasper R. Ratto while engaged in his duties as such Deputy Game Warden had left his residence before five A. M., and had gone to the American Express office at the Illinois Central Railroad Depot in Chicago, to inspect incoming packages; that about 6:30 A. M., having opened a barrel or box containing game, to discover whether it contained anything which had been shipped contrary to the provisions of the law, as he withdrew his hand, he received a scratch on the back of same and the wound became infected from some poisonous germ connected with the game or the barrel and resulted in blood poisoning, and although medical aid was promptly sought, and everything done that could be done to prevent the spread of the infection, these efforts were not successful and said Ratto died February 11, 1902."

It is further set forth that "a bill for relief was introduced into the House of Representatives at the session of 1903, being House Bill No. 390, which was referred to the Committee on Claims; that this committee ap-

pointed a special committee to hear evidence in the case and, under its direction, evidence was taken and laid before the committee; that on consideration of said evidence the committee recommended a favorable report, but that the adjournment of the Legislature prevented any further proceedings."

Petitioner further states that she has attached hereto a copy of the depositions aforesaid and prays the court that same may be received by the court as the evidence in this case, required to be taken by deposition."

It is further stated in the petition that the said Gasper R. Ratto left a widow, the claimant herein, and nine children; that "six of said children are living with the petitioner, the three older of whom have been compelled to secure employment to aid in their own support and that of the family, and the three younger of said children, varying from thirteen to seventeen years of age are still in school." It is further stated that "said Gasper R. Ratto at the time of his death left no property, and petitioner has no property nor any income except that derived from what her said children earn."

In consideration of this statement of facts the sum of $8,000 is asked as proper relief for the claimant and her children.

In behalf of the State, pleas were filed by the Attorney General denying liability of the State, because the facts alleged in claimant's petition are not sufficient in law to entitle claimant to recover thereunder, and further that said claim was not presented within two years from the time such claim may have arisen, and is therefore barred by the statute of limitations.

Under the law creating this court, there is a provision that it "shall file with the records of each claim determined, a brief written statement of the reason of the determination."

The foregoing statement of the case should be a sufficient compliance with the above requirement—a complete "statement of the reason of the determination"

which constrains the court to reject this claim; however much it may appeal to personal sympathy for the unfortunate, it is unwarranted under the laws by which this court must be governed in allowing or rejecting claims—and in our view of the laws applicable we are constrained to reject the claim.

Careful consideration has been given to the able arguments of the plaintiff's attorney; but, however ingenious or ingenuous they may be, we cannot concur with his interpretation of the law creating this court—nor as to the purpose for which it was created, nor as to the scope of its authority.

Inasmuch, however, as counsel's interpretation has not heretofore been presented in argument before the court, so far as recorded or recalled, it would seem desirable to present the general tenor of the argument and counsel's views of the law applicable. They are best indicated by quotations from the argument filed:

"Petitioner further represents that it has heretofore been the praiseworthy custom of the State of Illinois to come to the relief of families the heads of which have lost their lives in the service of the State; that while such action has usually been taken where the deceased was in the military service of the State, there should be no distinction in principle from such service and the service which said Ratto was rendering; that said Ratto was exposed not only to the dangers arising from active opposition by men provided with fire-arms with whose unlawful business or pleasure he, in the exercise of his duties was interfering, but was also in danger of impairment of health and loss of life from the effects of swamps, malaria, and accidents on the water, and as the sequel proved, by the far more insidious and fatal effects of poisonous germs taken into his system while quietly and faithfully fulfilling the duties of his office; that such service, though not surrounded by the traditions and glamour of military service, is nevertheless a species of military service, requiring the constant use and possession of arms and the meeting of lawless individuals or

parties likewise armed, engaged in the violation of positive law."

P. 3. Claimant's petition.

"It needs no argument to show that the Court was not organized to take cognizance of simply legal or equitable claims, but includes all claims whatsoever. Those based upon a moral obligation are fully within the scope of the court's investigation and decision."

"It is precisely because the State cannot be made a defendant in any court of the State—in other words, because there can be no *legal claim* against it that the Court of Claims was established."

P. 2. Brief and Argument for Claimant.

"With all due respect to the Attorney General, it is quite obvious that there is no allegation in the petition of negligence on the part of the State. There could be none. Nor does the objection that the statute of limitations has run apply to a case of this kind. Statutes of limitations cut off the *right of action* after the expiration of a given period. Where no right of action has ever existed it cannot be cut off by any statute. Even here, however, the record shows that the death of Ratto occurred February 11, 1902, and that the bill for relief was introduced in the House of Representatives February 5, 1903, but a little over one year thereafter. So that even if it were necessary that a claim be made within two years, it was done in this case."

P. 8. Brief and Argument for Claimant.

As to this reasoning of the claimant's attorney, as above briefly indicated, it is felt that no extended comment is necessary.

As to the contention above, that "there should be no distinction in principle from such service (militia) and the service which Ratto was rendering: there was no distinction, until the Legislature saw fit to establish one by enacting Sec. 4, Article IX, of the Military Code in force July 1, 1901." This court has not yet now is it at present disposed to abolish the distinction that the Legis-

future has seen fit to create. While the Legislature has at all times shown a liberal disposition towards those killed or wounded in the military service of the State and has, before the enactment of 1901 made frequent appropriations therefor; nevertheless this court had not assumed the power or privilege of disbursing the State's funds for such purposes, however much personal sympathy might have so inclined the members of the court.

It is fair to state, and attention is called to the fact that in the Hatfield case against the State, on a rehearing thereof an award is made for injury received in the military service, on the ground that the Legislature had frequently made appropriations in similar cases: but even in that case (of Hatfield) the opinion throughout, up to the making of the award, was an argument that such awards by the Court of Claims (or the Commissioners of Claims) were unauthorized—though the Legislature, being a law unto itself, could do as it saw fit. Since the Hatfield case, the reasoning in the opinion filed on rehearing has been followed; the *award of the claim* has not been accepted as a precedent: though since the enactment of Sec. 4, Article IX of the Military Code, in force July 1, 1901, the question is more one of contention, as in this case, than as to what is the present law.

As to the argument that the statute of limitations does not "apply to a case of this kind: that statutes of limitations cut off the *right of action* after the expiration of a given period. Where no right of action has ever existed it cannot be cut off by any statute." This argument does not appeal to the court, except for its novelty.

As to the introduction of a bill, relating to this claim, in the House of Representatives, and the argument that the running of the statute is thereby stopped; without disrespect to the General Assembly, which was the creator of the Court of Claims, and likewise, in 1847, of the statute of limitations, yet we hold that its own creature, the statute of limitations would continue to operate just as effectively after the introduction of a bill in

either branch of the General Assembly as if the bill had been introduced, in the shape of a resolution in a political or any other convention.

In spite of the eloquence and ingenuity of the claimant's attorney, the court can not agree with him in his reasoning and the claim is rejected as not warranted in law, and for a further reason, if any were necessary, it is barred by the statute of limitations.

HARRY D. PALMER

v.

THE STATE OF ILLINOIS.

Opinion filed April 10, 1905.

1. STATUTE OF LIMITATIONS—*act of 1847 not repealed.* Neither the act creating the Commission nor the later act creating the Court of Claims specifically repeals the limitation act of 1847; nor is it repealed by implication.

2. SAME—*intention and purpose of the act of 1847.* The act of 1847 was passed solely with reference to claims against the State, and with the special purpose of fixing a two years limitation within which then existing claims should be proven and filed; and a like limit as to presenting unliquidated claims against the State that might thereafter arise. The limitation was the essential intention and purpose of the act. The different officers named before which the various kinds of claims should be proved up and filed, were incident to the main purpose of the act.

3. STATUTES—*rule of construction as to repeal by implication.* It is a rule of construction that a law passed with reference to a specific thing is not affected by the passage of a general law unless it is definitely shown by the language of the general law that it was intended to repeal or modify the special act.

No testimony having been taken in this case either for the claimant or in behalf of the State, there is no dispute as to the circumstances out of which this claim arose. As stated in the petition which is verified by the affidavit of the claimant and is in no way contradicted or disputed, said claimant was on the 29th day of September, 1901, an enlisted man in "Troop A" First Cavalry, of the "Illinois National Guard;" that said First Cavalry was a regular integral part of the military force of

the State of Illinois, called into action (service?) by the State for the preservation of the public peace; that said organization was prepared for said service; that on the said 29th day of September he was called into action (?) at Chicago, Illinois, by his superior officers and while at drill in the performance of his duty he was kicked in the right side by his horse.

The claimant was then taken to a hospital in Chicago where it was found necessary to perform several serious operations and "was detained in hospital for *many months* and for *many months* after leaving hospital was slowly regaining an imperfect health:" his bill for surgical service was the sum of $155.00; the hospital bill was $217.25; loss of wages during the time spent in hospital and in convalescing $000.00, making a total of $972.25 as the amount.

In behalf of the State, the Attorney General in the pleas filed denies liability of the State: that the facts, as disclosed are not sufficient to entitle claimant to recover; and further, the defense of the statute of limitations is interposed.

As to the first defense: This claim was founded on Section 4, Article IX of the "Military Code" in force July 1, 1901, and in the absence of other defense the court would consider the claim well founded. The case of Balsley v. The State, cited in the brief filed for the defense, is not applicable. In that case, though the opinion of this court was filed March 11, 1903, the injury, for which claimant sought recovery, was inflicted July 29, 1900, before the passage of the act above referred to. In the Balsley case this court held that the above enactment was not retroactive and that as the doctrine of *respondent superior* does not apply against the State, therefore Balsley had no right of recovery.

The circumstances are different in this case, the injury, for which an award is sought, having occurred September 29, 1901, several months after said Section 4, Article IX went into effect.

We do not enter into a discussion as to the proper amount of the award, if any award were to be made; the petition fails to show what wages or salary or occupation, if any, the claimant had at the time of the action; nor is the time he was incapacitated definitely stated except that he was detained in the hospital "many months" and for "many months" after leaving the hospital he was slowly regaining an impaired health.

This vagueness is not material in this particular case, inasmuch as the court feels constrained to hold that the claim is barred by the statute of limitations.

It is contended by claimant's attorney that the Act of March 7, 1847 (statute of limitations) was, in effect, repealed by the Act creating the Commission of Claims; (in force July 1, 1877) inasmuch as said Act does not specifically "impose any such limitation on its powers."

Neither the Act creating the Commission nor the latter Act creating the Court of Claims, specifically repeals the limitation act of 1847: Nor are we satisfied that it is repealed by implication.

The Act of 1847 was passed solely with reference to claims against the State, and with the special purpose of fixing a two years limitation within which then existing claims should be proven and filed; and a like limit as to presenting unliquidated claims against the State that might thereafter arise. The limitation was the essential intention and purpose of the Act: The different officers named before which the various kinds of claims should be proven up and filed—were incident to the main purpose of the Act.

As argued by the Attorney General in the case of Partello v. The State (ante p. 309), "It is a rule of construction that a law passed with reference to a specific thing is not affected by the passage of a general law unless it is definitely shown by the language of the general law that it was intended to repeal or modify the special Act."

In the case of Fairbanks v. The State (ante p. 1), it was held, after thorough and able argument

on this point, that the limitation act had not been repealed. So far as we have been able to discover, this ruling has been uniformly followed by the court. If it is an unjust law it should be repealed by the Legislature. This court is not disposed to ignore laws which are in force nor, in effect, to attempt the repeal of laws, by rendering decisions in conflict with them.

For this reason the claim is rejected.

WM. H. REEVES, ET AL

v.

THE STATE OF ILLINOIS.

Opinion filed April 20, 1905.

1. WORDS AND PHRASES—*construction of term, "2% of cost," in computing architects' fees.* The term 2% of the cost of the buildings when used to designate the amount of an architect's commission for superintending the erection of buildings, signifies 2% of the contract price and not 2% of the actual cost price.

2. FEES AND SALARIES—*provision of Constitution as to payment of claims under agreements made without express authority of law.* Section 19, of Article IV, Constitution of 1870, provides that "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."

3. CONSTITUTIONAL LAW—*money not to be diverted from appropriation by resolution.* Article IV, Section 17, of the Constitution provides that, no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution.

4. STATUTE OF LIMITATIONS—*act of 1847 in force.* The statute of limitations of 1847 was not repealed by implication, by the act of 1877 creating a commission of claims.

This is a claim for services rendered as architects by Wm. H. Reeves and J. M. Baillie, doing business under the firm name of Reeves & Baillie, under a contract entered into by said firm with the Commissioners of the

Asylum for the Incurable Insane at Bartonville—which contract reads as follows:

"This agreement made and entered into this 18th day of February, A. D. eighteen hundred and ninety-eight, by and between Reeves & Baillie, Architects, parties of the first part, hereinafter known as the architects, and the Commissioners of the Asylum for the Incurable Insane at Bartonville, Illinois, owners, parties of the second part, hereinafter known as owners.

Witnesseth: That the said architects for and in consideration of the payments to be made to them by the said owners as hereinafter provided, do hereby covenant and agree to furnish for all building improvements upon said Asylum site, full architectural services, including plans, details, specifications and architectural supervision of construction, including a local superintendent on grounds during the construction of building. The said superintendent shall be satisfactory to the Commissioners. The said work to be done in a skillful and workmanlike manner. Said owners, for and in consideration of said architects strictly performing the covenants and agreements above specified, by and at the time mentioned do hereby agree to pay to the said architects a sum as stated below: three (3) per cent when any plans, details and specifications are completed, and the balance to be paid at the rate of two (2) per cent on contractor's estimate during the construction of the buildings for superintendence.

When more than one (1) building is built from the same plan, three (3) per cent of the cost of the first building is to be paid for plans, and specifications and two (2) per cent of the cost of all the buildings to be paid for superintendence.

It is agreed that in case the work is abandoned before completion, the architects are to be reimbursed for their labor as follows:

For preliminary studies one (1) per cent of estimated cost of building improvements.

For preliminary studies, general drawings and specifications three (3) per cent of estimated cost of buildings.

For preliminary studies, general drawings, specifications and details .....

For partial superintendence ..... per cent of the value of so much of the building as is completed at the time of such abandonment, in addition to the amount to be paid for preliminary studies, general drawings, specifications and details as above specified.

Additional reimbursements, as agreed upon, to be made to the architect by the owner for the following additional service, to-wit:

For surveys of land and measurements incident thereto.

For alterations and additions in the contracts or plans caused by deviations from the original scheme after the working drawings have been completed.

For necessary traveling expenses and for time spent in visiting for professional consultation .....

It is also agreed, that until a definite estimate is furnished, the architects' charges shall be based upon the proposed cost of the work, and the payments received by the architects from the owners during such time, shall be considered as installments of the entire fee, which is based upon the actual cost. The actual or total cost of the building when completed shall include all the fixtures necessary to render it fit for occupation, and the architects shall be entitled to extra compensation for furniture or other articles designed or purchased by them.

It is further agreed, that if any material or work used in the construction of the building be already upon the ground, or comes into the possession of the owners without expense to them, the value of said material or work is to be added to the sum actually expended upon the building before the architects' commission is completed.

It is further agreed that all drawings, specifications, etc., as instruments of service, are the property of the

architects and are to be returned to them after having answered the purpose for which they were made, or upon demand of the architects.

The work provided for in this contract shall be completed within three years from the date thereof.

Should any dispute arise respecting the provisions of this contract or any question arising thereunder or the value of the work done in case of abandonment, the same shall be submitted to three arbitrators, each of the disputing parties choosing one, and these two a third, and the decision of such arbitrators, shall be final and binding on all parties. And in case of such dispute if, after written notice from one party to another of the appointment of an arbitrator, the party so notified fails to appoint a second arbitrator within ten (10) days from the receipt of such notice, the arbitrator appointed by the party giving such notice shall proceed alone and decide the matter in dispute and his decision shall be final and binding on all parties, the same as if the matter had been decided by three arbitrators appointed as above provided.

The entire expense of such arbitration shall be borne by the party declared to be in the wrong.

Architects—Parties of the First part:

REEVES & BAILLIE, [SEAL.]

Owners—Parties of the Second part:

F. W. MENKE, [SEAL.]

M. P. REID, [SEAL.]

J. W. WILSON, [SEAL.]

Agreement between Reeves & Baillie, Architects, of the first part, and

Commissioners of the Asylum for the Incurable Insane, Bartonville, Illinois, of the second part.

For architectural services on building improvements, located at asylum site, Bartonville, Illinois.

Peoria, February 18, 1898."

Accompanying the petition filed in this case is a statement of account, (marked "Exhibit B") verified by the affidavit of J. M. Baillie, which is identical with the copy

of said account contained in the brief and argument of claimants' attorneys, except that said latter statement credits the Commissioners with $805.70, not credited in the original statement, for payments made to the claimants since the filing of their petition: which latter statements of account is as follows:

ITEM No. 1.

To superintending the general construction of four buildings, known as the Employes, Domestic and Supply building and Boiler house, two per cent of Gleason & Sons contract, $54,678.50 ..... $3,093.57
Rec. on account 2,374.12

Bal $719.45

ITEM No. 2.

To superintending the general construction of four buildings known as the Employes, Domestic Supply building and Boiler house, two per cent of the extra cost incurred in finishing Gleason & Sons forfeited contract ..... $61,215.42 less deduction 3,989.75

57,225.67

$1,144.51

ITEM No. 3.

To superintend the plumbing of four buildings, known as Employes, Domestic and Supply building and Boiler house, two per cent of John O'Neill & Sons contract $12,644 ..... $252.88
Received on account 70.08

Bal $182.80

ITEM No. 4.

To plans and specifications of the following buildings at three per cent of the cost based on the lowest bid

submitted for the building (exclusive of heating and plumbing):

Cottage A (erected)	$14,270	$428.10	
Cottage B	15,795	473.85	
Cottage C	38,800	1,164.00	
Cottage D	19,081	572.43	
Dining hall (erected)	11,152	334.56	
Bath house	10,317	309.51	
Hospital	70,720	2,121.60	
Milk house	4,308	129.24	
Horse and cow barn	18,081	542.43	
Administration bldg	40,000	1,200.00	
Physicians res	12,000	360.00	
			$7,635.72

ITEM No. 5.

Made sketches for the following buildings for which a charge of one per cent of estimated cost is made:

Amusement hall	$12,000	$120.00	
Chapel morgue	7,000	70.00	
Water tower	8,000	80.00	
			270.00
			$7,905.72
Rec. payment			3,040.00
Bal			$4,265.72
Amt. with $2,046.76 brought forward, .			$6,312.48

ITEM No. 6.

DEDUCTIONS FOR SUMS RECEIVED SINCE FILING OF CLAIM.

For sketches for water tower	$ 80.00
For plans and specifications for Cottage "B"	473.80
For credit on horse and cow barn as per agreement	251.00
	$ 805.70
Total amount of claim	$6,312.48
Total amount received or agreed to be deducted	805.70
Balance of claim	$5,506.78

In behalf of the State, the Attorney General denies its liability; first, because the contract on which claimants rely was, as to most of their claim, made by the Commissioners without any authority and is therefore void: and second, that most of the items making up the claims are barred by the statute of limitations as to unliquidated claims against the State, not having been filed within two years after the cause of action accrued, as required by the act of 1847. Laws of 1847.

For convenience of reference the items making up the foregoing statements have been numbered from one to six.

As to item No. 1 (balance $719.45) and item No. 3 (balance $182.80) being for services rendered in superintending the construction of buildings authorized by the Legislature for which an appropriation had been made by the act of June 14, 1897, the court is of the opinion that these charges constitute legal claims and are in accordance with the contract hereinbefore quoted, viz: two per cent of the contract price for superintendence of construction.

Nor is the statute of limitations, pleaded in behalf of the State, a bar to either of those items (Nos. 1 and 3), nor to item No. 2, as the services for which these charges were made (superintending the construction of buildings under the Gleason contract) were not completed until March 1, 1902; page 16 of Deposition, the claim being filed April 30, 1903. As to item No. 2, $1,144.51, we have doubt as to the legality of this charge; for the construction to be placed on the wording of the contract, so far as it is applicable to this item is not entirely clear. Under their contract claimants were entitled to two per cent for superintendence. Is this commission to be figured on the contract price or on the actual cost price, as has been done in the statement of account. In one clause of the contract (written into a printed form —Exhibit B attached to claimants petition) are these words, "Said owners (the commissioners) * * * agree to pay said architects a sum as stated below—

three (3) per cent when any plans, details and specifications are completed, and the balance to be paid at the rate of two (2) per cent on *contractors estimates during the construction of the buildings for superintendence.*"

Further on in said contract is a clause—in a printed form—which reads, "It is also agreed that until a definite estimate is furnished, the architects' charges shall be based upon the proposed cost of the work, and the payments received by the architects from the owners during such time, shall be considered as installments of the entire fee, which is based upon the actual cost." To admit of a reasonable construction the word "cost" as last above used, must be understood as the cost under the contract. The cost to the Commissioners under the contract, not the cost to the contractor, nor the cost to the Commissioners who, succeeding the contractors as in this case, were obliged to finish the contract themselves. That this was the understanding of the claimants is shown by the fact that all their charges (in the statement of their account) are based and figured on the "Bids"—i. e. the cost, the contract price. The contract for the buildings on which this charge for superintendence is based, was let to Gleason & Sons for $154,678.50—on this amount claimants figured their three per cent charge for plans and specifications; but in as much as Gleason & Sons failed to carry out their contract and by reason of such failure, the Commissioners were themselves obliged to complete said buildings, at an additional cost of $57,-226.67 beyond the Gleason contract price, the claimants charge their two per cent commission on this additional cost, for superintendence.

We do not believe the contract is reasonably susceptible of such a construction, nor do we believe that either party at the time the contract was made intended or expected that it should be so construed, if they thought of such a contingency at all, which is not likely!

Had the cost of material, labor, etc. depreciated instead of advancing in price, thereby enabling the Commissioners to complete the buildings for less than the

contract price, it is not likely that claimants would have been willing to figure the two per cent commission on the decreased cost of the building, nor should they, under reversed conditions, expect commissions on the increased cost. We more readily adopt this interpretation of the contract (limiting the commission to the contract price) as there was no consequent hardship or loss (rather the opposite) to the claimants, resulting from the completion of the buildings by the Commissioners, though at an increased cost. Under the terms of their contract claimants were obliged to have a superintendent on the grounds during the construction of the buildings "at an expense of $5 a day every day he was there" (page 17 Deposition of W. H. Reeves.) "We furnished a man on the grounds at our expense during the entire construction of the buildings up to the time the contract for the erection of the buildings was forfeited by the Commissioners." Page 5 of deposition. "How much, if any, of the time we kept a man on the ground after the forfeiture of the Gleason contract I do not know." Page 7 Deposition Wm. H. Reeves. From the above it would appear that the completion of the building by the Commissioners, though at an increased cost over the contract price, effected a saving to the claimants rather than a loss or hardship. Irrespective of this consideration which has no legal bearing, we think the legal effect of the contract and the intention of the parties was that the percentage for superintendence should be based on the contract price, as was the three per cent for plans and specifications. (Deposition of W. H. Reeves, p.) "We were paid in full"—for the plans and specifications—"at the rate of three per cent (on $154,768.50) as the contract called for."

In accordance with the above views we hold that this charge of $1,144.51 (item No. 2 of Statement of Account) should not be allowed.

As to item No. 4, for plans and specifications of eleven buildings, for which in the aggregate a claim of $7,635.72 is made, being three per cent on the total

amount ($254,524.00) of the "bids" for said buildings, and as to item No. 5 for sketches of three buildings, for which a claim of $270.00 is made, being one per cent on the total amount ($27,000) of the bids for said three buildings, the Attorney General denies any liability on the part of the State, for the reason that the contract under which the services of claimants were rendered, was made by the Commissioners without authority of law.

From the letter of J. Mack Tanner, secretary, attached to the claim and marked "Exhibit C," it appears that this whole claim was presented to the Board of Charities and was by them disapproved, with a recommendation that it be not paid excepting as to the items of $719.45 and $182.80 for superintendence under the Gleason contract—basing their disapproval on the contention that the Commissioners, in entering into the contract with Reeves & Baillie, exceeded their authority.

That part of the letter applicable to items No. 4 and No. 5 of the account is as follows:

"A further claim was made for architectural service in preparing plans, specifications, etc., for certain buildings known as Cottages A, B, C and D, horse and cow barn, milk house, bath house, dining hall, hospital building and physician's cottage. If the Board of Commissions entered into any contract or agreement with Messrs. Reeves & Baillie to prepare such plans, they exceeded their authority for the law states: 'That they shall not have power to bind the State by any contract beyond the amount of the appropriation, which may at the time have been made for the purposes expressed in the contract.'

"These plans were prepared in 1898. At the time no appropriation had been made for the construction of any of the buildings for which these plans were drawn. In 1899, however, appropriations were made for nine cottages, one hospital building, two dining rooms, one bath house, one horse and cow barn and one milk house. Also for a water tower, for which plans were not prepared.

The nine cottages were all constructed from one plan.

"It would appear therefore, that the authority of the trustees or Commissioners did not extend beyond having plans prepared for these buildings for which appropriations were made. Inasmuch as Reeves & Baillie were paid improperly, as we believe, $3,640 out of funds appropriated for other purposes, they have already drawn more than could in our judgment be legally drawn and should not therefore receive the balance above mentioned as being due them until the whole matter shall be legally determined."

While we coincide with the Board of Charities in their conclusion that the Commissioners of the Asylum had no authority for entering into the contract with Reeves & Baillie for the plans and specifications, our conclusion is based on other provisions of the law than that cited in Mr. Tanner's letter—Hurd's Statutes, chapter 23, section 20—for we are inclined to agree with the contention of claimants attorneys that the restriction contained in said act is applicable only to the trustees of the institutions named in the body of the act. Trustees of most of the State institutions created since the above enactment are, by express provision of the act creating them, restricted and made subject to the above law. Though this provision is omitted in the act of 1895 creating the asylum for the incurable insane at Bartonville, yet we think it can hardly be contended that the omission exempts the Commissioners from the provisions of the constitution applicable to this subject.

Section 19 of Article IV, Constitution of 1870, is 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 un-*

authorized agreements or contracts shall be null and void."

In this case there was no appropriation, no express authority for erecting any of the buildings for which these plans and specifications were drawn and for which these charges are made. The appropriation of 1897 was for a specific purpose, for the erection of certain buildings therein named—none of those for which this charge is made being of the number.

It is urged by claimants' attorneys that the authority for the action of the Commissioners in employing the claimants to make these plans and specifications is contained in the joint resolution adopted by the Senate January 6, 1898. Concurred in by the House of Representatives, February 2, 1898. But this effect could not have been accomplished even if that had been the intention of the General Assembly—for the appropriation of 1897, having been made for a specific purpose, it could not by resolution, joint or separate, be diverted from that purpose, as would be done in this case if the contract relied on by claimants had been carried out as to the payment of these items.

"No money shall be drawn from the Treasury except in pursuance of an appropriation made by law, and on the presentation of a warrant issued by the Auditor thereon; *and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution."*

Const. Art. 4, Sec. 17.

(See *Burritt v. Commissioners of State Contracts*, 120 Ill. Rep., 322, as to the interpretation of the above constitutional provision and its prohibition of appropriations by "Resolutions.") Nor does the resolution of the General Assembly disclose any intention to divert the appropriation of 1895 to any other purpose than that indicated in the act. It had been found advisable to remove to a different site a building already constructed, located inadvertently over an

abandoned coal mine—authority to the trustees to make such change of site and to the Governor to hasten the construction of said building (provided for by the act of 1895) was all that was attempted or intended by the resolution, which was as follows:

CONCERNING HOSPITAL FOR INSANE, BARTONVILLE.

WHEREAS, The fortieth General Assembly in regular session made an appropriation of $247,750, for the construction, completion and maintenance of a hospital for the insane at Bartonville, Peoria county, Illinois; and

WHEREAS, It has been ascertained that said building was being constructed upon an insufficient foundation and that it would be detrimental to the interests of the State to complete said building upon the site where it is now located; and

WHEREAS, The appropriation by the said General Assembly provides for the completion of said building upon its present site; and

WHEREAS, It is necessary for the comfort and care of a large number of insane persons now in the several almshouses of Illinois, that said building be completed at the earliest possible moment for the relief of such persons; and

WHEREAS, The Governor of Illinois has made a careful examination of said structure and all the facts and circumstances surrounding the same, and did, on the 4th day of January, 1898, send a special message to the General Assembly calling attention to the condition of said institution and the need of its immediate completion, and making a request in reference to the appropriation aforesaid; therefore, be it

Resolved, by the Senate, the House of Representatives concurring: That it is the sense of the General Assembly that said institution should at once be completed, and that said appropriation as made should be used for that purpose on such site as may be selected by the Board of Trustees of such institution upon the land at Bartonville now owned by the State of Illinois; be it further

Resolved, That we concur in the recommendation of the Governor in said special message and accede to his request therein; be it further

Resolved, That the Governor is hereby authorized and requested to immediately proceed to the reconstruction of said building and its completion at the earliest possible moment, and that he use the appropriation made by this General Assembly, at its regular session for said purpose.

Adopted by the Senate January 5, 1898.

Concurred in by the House February 2, 1898.

We are unable to find anywhere, either in the original act of 1895 creating the institution, nor in the appropriation act of 1897, nor in the above resolution any authority or appropriation by which the Commissioners could bind the State for plans and specifications of buildings to cost (according to the bids included in items No. 4 and No. 5 of the statement of account) the sum of $281,524—for which there had been, at the date of the contract—February 18, 1898—no appropriation whatever. While we do not question the good faith of the claimants, yet with their intelligence and extended experience in transacting business with trustees and officers and agents of the State, we feel that they were at least negligent and careless in that they failed to inform themselves as to what authority the Commissioners had for making the contract under which this large amount of work was done in the preparation of plans, etc. The wisdom of the constitutional restriction prohibiting payment by the General Assembly of claims created against the State under any agreement or contract made without express authority of law and declaring "all such unauthorized agreements or contracts to be null and void"—is borne out by this case in which no offense more serious than ignorance of the law is suspected or intimated. Yet if this claim of seven thousand or more dollars could be allowed for services rendered under an unauthorized contract, by the same rule there would be nothing to prevent other Boards of Trustees from binding the State in

like manner and for unlimited amounts, without reference to legislative authority or appropriations. Apart from the above construction of the law under which we hold that the commissioners had no autohrity to make the contract except as to the so called Gleason buildings, (which were authorized by the appropriation act of 1897) and that the charges for services rendered thereunder must be disallowed—we hold that the defense of the statute of limitations pleaded by the Attorney General bars recovery on all the items of the account, excepting for services rendered in connection with the Gleason contract, superintendence of those buildings not being completed until March 1, 1902 (page 16 of deposition) but the plans and specifications and sketches included in items Nos. 4 and 5 were completed during the winter, spring and summer of 1899—see abstract of evidence pages 5, 6 and 7—and the claim not being filed until April 30, 1903, there was failure to comply with the law which provides that "hereafter all unliquidated claims against the State shall be proved up and filed as above (with the Auditor) within two years from the time such claim may have arisen; and any claim not presented and proved up as above and filed shall be forever barred from payment by the State." It is contended in the brief and argument filed by claimants' attorneys that the "last work done on the cottages 'A' and 'C' and dining hall was performed on April 18, 1902," referring apparently to work of superintendence. However this may be, it does not establish the right of recovery as to the items contained in this statement of account, which were for services in drawing plans, specifications and sketches completed not later than the summer of 1899, June 1, 1899. The employment of claimant for making plans, specifications and sketches was under the contract of February 18, 1898. Whether or not that contract was authorized, whether it was legal and binding or null and void, the work done under this contract, for which the charges in items No. 4 and No. 5 are made, was completed during the summer of 1899, at which time the cause of action ac-

ermed and inasmuch as the claim was not filed until April 30, 1903, it is barred by the statute of 1847, requiring that unliquidated claims shall be filed within two years. It is contended by claimants' attorneys that as to cottages "A" and "C" and the dining room, claims for these charges is saved from the operation of the statute because "the last work done on them was performed on April 18, 1902" about one year before the claim was filed. If this is correct, that work, presumedly for superintendence of construction on said cottages, must have been done under a separate and subsequent order, understanding or agreement; not that under which the plans and specifications were drawn and upon which this suit is brought, probably after subsequent appropriations were made warranting such employment of the claimant by the Commissioners. It is apparent from the evidence of W. H. Reeves that the plans and specifications for all the buildings named in item No. 4 and No. 5 were ordered in October and November, 1898 (see page 7 of depositions) and were all completed by the 1st of June, 1899—(page 9 of depositions) four years before the filing of this claim—the subsequent employment of claimants (if that was the fact) to superintend the construction of those buildings would not take from the operation of the statute those claims for plans and specifications made in pursuance of a separate order or alleged contract with the Commissioners made in the fall of 1898.

The claimants' attorneys argue with great earnestness that this court being, as they claim, "a court, not of oppression but one in the nature of a court of equity, which looks to the substance rather than to form and seeks to do justice between the parties," etc. Granting that this may be true, it cannot be contended or conceded that the court can ignore statutes and laws or by its decisions in effect repeal statutes or repeal the constitution. If the statute of limitations (of 1847) relating to unliquidated claims is unreasonable or works injustice to

claimants, its repeal by legislative authority should be sought. This court cannot repeal, amend or ignore the act so long as it is in force. So far as the court is informed or has been able to discover, the binding effect of this statute has been recognized and uniformly applied to all claims coming within its provisions. In the claim of Fairbanks v. the State filed with the Auditor May 11, 1880, the defense of the statute of 1847 was pleaded by the Attorney General in behalf of the State. The question was fully and ably argued by attorneys on both sides and on full consideration it was held by the court that the contention of claimants' counsel, that the statute of limitations (1847) had, by implication, been repealed by the act of 1877 creating a Commission of Claims, was untenable. That the act of 1877 "provides a forum for hearing and disposing of claims against the State and as to the manner of presentation and pressing such claims; but there is nothing in the act itself that is in conflict with the statute of limitations of 1847 above quoted and for that reason could not repeal that statute by implication." It was further held that the fact that the Legislature had made appropriations for similar claims, does not have the effect of repealing the law—a statute law cannot be repealed or annulled in any such manner—no authority has been cited by attorneys in this or any other case, so far as we are informed, which can be construed as repealing or attempting to repeal the statute of limitations of 1847. This court has uniformly held and as at present constituted, still holds that the statute is in full force and effect, and in accordance with this opinion we hold that all the items of claimants' statement of account, excepting those arising under the Gleason contract are barred by this statute of limitations. As to item No. 2 for $1,144.51, this charge (founded on the increased cost of construction over and above the contract price) is disallowed as not being warranted by a reasonable construction of the contract dated February 18, 1898, on which claimant relies for recovery.

As to all the charges and claims for services included

in item No. 4 (total, $7,635.72) and in item No. 5 (total, $270) the court reject all of said claims, holding that they are founded on a contract made without authority on the part of the Commissioners, for which no appropriation had been made at the date of said contract (February 18, 1898) and that said contract was, therefore, null and void.

Aside from, or in addition to the above finding the court holds further that all the charges for services included in said items No. 4 and No. 5 are barred by the statute of limitations of 1847.

In conclusion, summarizing the foregoing findings, item No. 1, balance $710.45 is allowed; item No. 3, balance $182.80 is allowed, making a total sum of $902.25 that could be properly credited to claimants. Inasmuch, however, as all the other items of account and all other claims herein made are hereby disallowed and rejected; and inasmuch as it appears from the statement of account filed with this claim, and from evidence presented by claimants that the sums of $3,640 and $805.70 (total, $4,445.70) have been paid on this account to the claimants in addition to $4,640.85 (three per cent on $154,678) and $2,374.12 credited in the statement of account, we find that after deducting the above credit of $902.25 to which claimants were entitled there has been paid to said claimants by the Asylum Commissioners, without authority of law, and from appropriations made for other purposes, the sum of $3,542.70, over and above just credits and claims to which claimants were legally entitled.

The claim is therefore rejected. There is no provision for a further finding by this court.

JOHN R. CLAUSEN

v.

THE STATE OF ILLINOIS.

Opinion filed April 1, 1905.

Krueger v. State, ante p. 336, followed:

This claim being founded upon the same facts and circumstances as the claim of Louis H. Krueger v. The State of Illinois wherein an opinion was filed at this term of this Court. The finding in said case being the same as in this.

We accordingly award the claimant John R. Clausen the sum of thirty-seven ($37.00) dollars the amount of his claim in this proceeding.

BERNHARDT ETTNER

v.

STATE OF ILLINOIS.

Opinion filed April 10, 1905.

Crissey v. State, p. 365 follows:

This claim is founded upon the same state of facts as the claim of J. N. Crissey v. State of Illinois. Which claim was decided by this court at this term. The reasons for rejecting the same apply in all particulars to this case. This claim is therefore rejected.

J. N. CRISSEY

v.

STATE OF ILLINOIS.

Opinion filed April 10, 1905.

1. STATUTE OF LIMITATIONS—*as to filing of unliquidated claims, still in force.* The statute of limitations providing that all unliquidated claims against the State shall be filed within two years fro mthe time such claims arise, is still in force.

2. SAME—*introduction of bill in legislature within two years does not meet requirements of statute.* The statute provides the manner in which a claim must be presented against the State and the mere introduction of a bill in the general assembly does not meet the requirements of such statute.

3. LIQUIDATED DAMAGES—*what are.* A claim for damages for a herd of cattle taken and destroyed by the State where the value of the property must be ascertained from evidence, is a claim for unliquidatd damages.

The claimant in his bill of complaint alleges, that on the 18th day of January, 1901, the State of Illinois, by its duly appointed, qualified and acting Board of Live Stock Commissioners and its Veterinary Surgeon, acting under the direction and command of said Board, and without the permit or consent of the claimant and without warrant or authority of law, wrongfully, illegally and negligently, and with force, entered upon the premises of the claimant in the County of McHenry in this State, and under a pretended law of this State, took possession of a herd of cows and young cattle then and there the property of claimant and of the value of $940, and drove and carried them away without the consent of the claimant, and caused the same to be shipped and taken to the city of Chicago, a distance of about 70 miles from the said farm of claimant, and there killed and destroyed said cattle without warrant of law, and that there is due claimant from the tate as compensation for said cattle the sum of $474, with interest thereon till July 1, 1904, making a total of 545.60.

As a defense to these allegations the State in addition to the general issue pleads:

First. That said cattle were taken with the consent and at the request of the claimant.

Second. That the State has made full payment to the claimant for said cattle.

Third. That an accounting and adjustment has been made prior to the filing of this complaint, and that the amount that the State should pay to claimant for said cattle was adjusted, settled upon and agreed to by the claimant, and that the said amount was paid to the claimant in full satisfaction of all claims on account of the destruction of said cattle.

Fourth. That this claim is barred by the statute of limitations.

It appears from the evidence that one of the State Veterinary Surgeons went to the farm of the claimant and obtained from him a written request to test the cattle in question for Tuberculosis. Said request provided that, in the event any of said cattle proved to have indication of the presence of Tuberculosis, to indicate, in the judgment of the State Veterinary, the presence of Tuberculosis in such cattle, then such animals so affected were to be slaughtered; and if post-mortem indicated, in the judgment of the Veterinary, that the flesh of any of said animal was unfit for food, then the carcass of said animal was to be destroyed or manufactured into fertilizer. By said request the claimant also agreed and stipulated that the slaughter and destruction of any of said animals so affected should be without loss to the State of Illinois.

There was also a stipulation in said request that the carcass of any animal so slaughtered which should pass the inspection for human food, was to be disposed of by claimant, and in the event that post-mortem examination would not disclose the presence of disease of any animal, the State Board of Live Stock Commissioners was to make compensation to claimant for the differ-

once between the proceeds derived from the sale of such carcass found fit for human food and a fair, reasonable appraised value for such animals on foot, the cattle being appraised by the claimant and the Veterinary Surgeon, and their value agreed upon as sound cattle. . . .

The claimant contends that the request to have these cattle tested and the diseased ones slaughtered was obtained from him by force of threats and intimidation and is therefore void; and that he is entitled to their appraised value as sound cattle.

The proof shows that these cattle were tested at the farm of claimant; that said test showed some were diseased and some not; that the latter were left with the claimant and the former were afterwards taken to Chicago and there slaughtered and a post-mortem examination made for Tuberculosis; that all of said cattle so slaughtered were affected with Tuberculosis in various stages of advancement.

The evidence also shows that the carcasses of said cattle were disposed of by said board according to the stipulations in said request, that an allowance was made to claimant by said board for said cattle according to its rules; that payment of the sum specified in said allowance was made to claimant, and that he accepted said amount without objection or protest, and up to the time of filing this claim in this court made no legal demand for further or additional compensation from the State or from said board. There is nothing in the evidence tending to show that said payment was not made by the State and accepted by the claimant as a full and satisfactory settlement for said cattle. Hence the only logical conclusion to be arrived at is that the claimant voluntarily agreed to have these cattle tested, and that such agreement is binding upon him.

Under this state of the proof, no reason is perceived why the claim should not be barred both in law and equity, and the claimant estopped from recovering additional compensation. All the actions of the claimant

subsequent to the signing by him of the request to have these cattle tested lead to the conclusion that said request was made voluntarily and without force or intimidation and that he so considered it.

The statute of limitations is also interposed as a defense by the State. This statute provides that all unliquidated claims against the State shall be presented within two years from the time such claim may have arisen.

It is argued at length by counsel for claimant that said statute does not apply to this case for three reasons.

First. That said statute has been repealed.

Second. That this is a liquidated claim and does not come within the statute.

Third. That within two years from the time this claim arose there was a bill introduced in the general assembly of this State to pay this claim and that the introduction of said bill meets the provision of the statute requiring claims to be presented within two years.

As to the first contention it has been uniformly held by the commission of claims of which the court of claims is the successor, that said statute is an existing law of this State.

Trickle v. *State*, decided Oct. 20, 1897;
Henderson v. *State*, decided Dec. 16, 1897;
Carr v. *State*, decided Dec. 16, 1897;
Carpenter v. *State*, decided Dec. 16, 1897;
Fairbanks v. *State*, decided Dec. 16, 1889.

If the request of claimant to have these cattle tested was void then it conferred no right upon the officers of the State to make an appraisement of the cattle in question, and such appraisement, if made, created no obligation upon the State. Therefore, the claimants' damages if his contention be correct would be the value of the property taken, which damages must necessarily be ascertained from evidence other than from said appraisement, and therefore would be a claim for unliquidated

damages. This claim having been filed in this Court on the 30th day of April A. D. 1904, more than two years after it arose, is therefore barred by the statute of limitations.

As to the third contention. The statute provides the manner in which a claim must be presented against the State and giving said statute the most liberal construction it cannot be held that the mere introduction of a bill in the general assembly in any way meets with the requirements of said statute.

For the above reasons this claim is rejected.

INDEX.

PAGE.

ACTIONS.
survival of actions for death from negligent act..... 158
personal injuries, survival of action given by statute..... 168
when action for damage by construction of dam accrues 1, 13, 35, 100

CANAL COMMISSIONERS.
rights and duties as to bridges..... 324

CLERICAL SERVICES.
reasonable allowance made for services rendered at request of state officers..... 146, 147
when claim will be allowed for services rendered state..... 148

COMMISSION OF CLAIMS.
legislative intent in creating..... 76, 326
power conferred upon by statute creating..... 27, 44
law creating commission does not create new liability against state 208, 279
can allow claims only where legislature has created liability on part of state..... 266
not restricted to consideration of claims which can only be prosecuted in court of law..... 103
claims to be determined according to equity and justice..... 103
claimant must present a legal or equitable claim against state 70

COMMISSIONERS OF CONTRACTS.
power of is purely statutory..... 301
power derived from Ch. 127, R. S..... 301
have power to cancel contracts obtained by fraud, conspiracy or other unlawful means..... 301
contracts may be made only after a public letting..... 301

CONSTITUTIONAL LAW.
money not to be diverted from appropriation by resolution of legislature 346
General Assembly not to authorize payment of claims made without express authority of law..... 141
contracts to be let to lowest responsible bidder..... 141

CONSTITUTIONAL LAW.—*Continued.*

PAGE.

commissioners of contracts 141
when state will not be liable on a quantum meruit 142

CONTRACTS.—See COMMISSIONERS OF CONTRACTS.

for labor of convicts 178, 284
when receipts showing settlement of account are conclusive 178, 284
with state officer for services; reasonable compensation allowed 135, 163
with state to transport horses to encampment of Illinois National Guard 159
when architects' certificate provided for in building contract is final 233
to prevent competition in bidding; no rights accrue under .. 301
power of secretary of state to bind the state by contract 301
state not liable on quantum meruit where secretary of state lets printing contract without public bidding 301
no recovery after all rights under contract have been relinquished 309

COURT OF CLAIMS.—See COMMISSION OF CLAIMS.

DAMAGES.

caused by falling bridge over feeder of Illinois and Michigan canal 324
there can be only one satisfaction for damages caused by dam 1
action for erection of dam by state does not survive 1
to land by construction of state dam 51
no damages allowed on lands purchased after cause of action accrued 51

ESTOPPEL.

when doctrine applies to a municipal corporation 324

FEES AND SALARIES.—See also MILITIA.

when statute does not fix compensation, only a reasonable amount will be allowed 160
master in chancery's fees 133
manner in which state agents may be appointed and paid ... 183
no extra compensation to be granted public officer after service rendered on contract 187
contracts with state agents must be made by express authority of law 196
provision of constitution as to payment of claims under agreements made without express authority of law 246
pay of militia 313

PAGE.

ILLINOIS AND MICHIGAN CANAL.
operation of not a governmental function..... 325

LANDLORD AND TENANT.
tenant cannot dispute title of landlord..... 258
tenant cannot set up better title in himself or third person. 258

LIMITATIONS.—See STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES.
what are..... 365

LIVE STOCK COMMISSION.
act of 1887 concerning board confers power to employ necessary clerks 119

MASTER AND SERVANT.
what is necessary in order to hold master liable for defect.. 225
servant must report defect at once..... 225

MILITIA AND MILITARY SERVICE.
under what circumstances a person injured in the military service of the state can recover..... 128
reasonable prudence and caution in selection of officers precludes recovery by soldiers poisoned by materials furnished 129
injury to soldier through defective fire arm..... 173
pay of members of militia..... 213
liability of state for damages caused by state troops during riot 291
when claim for rent of armory will not be allowed..... 170
in what cases there is a liability for injury to member of militia 259
state is liable for death of member killed while at target practice under orders 240
personal injuries received while in the service.....299, 300
claim for additional compensation for services rendered 213, 220, 222
personal injury to member while doing duty at annual encampment 221
injuries received by members of militia..... 223
under what circumstances person is entitled to relief when injured by discharge of rifle by member of militia..... 91

MUNICIPAL CORPORATIONS.
West Chicago park commissioners are a municipal corporation 168
what municipal corporations are not liable for negligent acts of servants..... 158
officers are personally responsible for their negligence..... 168

PAGE.

PARK COMMISSIONERS.—See MUNICIPAL CORPORATIONS.

PENAL INSTITUTIONS.
inmates must conform to rules..... 139

PERSONAL INJURIES.
survival of action given by statute..... 158
upon what the right to maintain actions after death of person injured depends..... 158

PLEADINGS.
must show what part of lands are injured..... 46

PRACTICE.
evidence may be filed after demurrer is sustained..... 202
where evidence fails to support claim, court will refuse award..... 145
when claim is not barred by statute of limitations..... 10
effect of change of claimant's name..... 19
claims to be determined according to equity and justice..... 103
where testimony is conflicting..... 62
when statement of reasons for court's decision is unnecessary..... 52
rules of procedure of commission must be followed:..... 177, 181, 203, 204, 205, 211, 217
as to conclusiveness of decision..... 76
where the record discloses no foundation in law for the allowance of the claim, it is rejected..... 218

PUBLIC OFFICERS.
person deals with officer at his peril..... 274

PROXIMATE CAUSE.
not sufficient to show one of two conjectures more probable than the other..... 228

RATIFICATION.
the state may ratify unauthorized acts of its officers or agents..... 271

RENT OF ARMORY.
when claim for will not be allowed..... 170

RESPONDEAT SUPERIOR.
state is not liable for negligence of its agents..... 266
state is not liable for the default of its agents or employes.. 188
state not bound where agents have transcended their powers..... 270, 274
doctrine does not apply to counties, townships, etc..... 322

RESPONDEAT SUPERIOR.—*Continued.*

PAGE.

what municipal corporations are not liable for negligent acts of servants 168
park commissioners are personally responsible for their negligence 158
doctrine does not apply against state.....255, 295, 322
state not liable for negligence of employes..... 76
state is liable for damages caused by bullets fired by militia in target practice..... 81
public and state officers do not come within doctrine of..... 168
state not legally liable for negligence of officers..... 223
when doctrine applies to state.....325, 332
state not liable for torts of its officers.....175, 214
the doctrine that the state is not liable for the negligence of its officers does not apply to the officers in charge of the Illinois and Michigan canal..... 322
state is not responsible for wrongful acts of subordinate officers 215
state is not responsible for wrongful acts of subordinate officers 208

SERVICES.
rendered by appointment with attorney general..... 178

SERVICES, CLERICAL.—See FEES AND SALARIES.
reasonable allowance made for services rendered at request of state officers 146, 147

STATE ARCHITECT.
has no authority to create any liability against the state.. 274

STATE CONTRACTS.—See CONTRACTS.
when state will not be liable on a quantum meruit..... 142

STATE INDEBTEDNESS.
policy of state towards creditors..... 103

STATE LIABILITY.
founded upon state's consent..... 223

STATUTE OF LIMITATIONS.
act of 1847 not repealed by act creating commission of claims 1
act of 1847 not annulled by legislative appropriation for barred claims 1
act of 1847 still in force.....1, 26, 182, 196, 343, 347
equity follows the law..... 142
unliquidated claims must be filed within two years.13, 24, 30, 182

STATUTE OF LIMITATIONS.—*Continued.*

PAGE.
running of not stopped by introduction of bill relating to claim in legislature 338
intention and purpose of the act of 1847..... 342
when claim is not barred by.....18, 46, 96
when claim is barred by.....17, 32, 149, 156, 157
is a bar to all unadjusted claims not filed with auditor of state within two years from the time they accrue.....113, 118
theory upon which laws of limitations proceed..... 103
statutes rest upon sound public policy..... 102
statute runs against all claims except those sought to be enforced by the government..... 103
government may avail itself of provisions of statute..... 103
statute as to filing of unliquidated claims is still in force.. 365
introduction of bill in legislature within two years does not meet requirements of statute of limitations..... 365
how two years' time is to be computed..... 65
provisions of act of 1847.....27, 44
as applied to claim for damages to property caused by erection of dam by authority of state and consequent overflow of Illinois river.....23, 42, 95
claim not filed within two years' is barred.....31, 32, 59
petition must be filed within two years.....34, 37, 38, 39, 59
section 16, chapter 33, Revised Statutes, construed..... 365

STATUTES.
section 15, chapter 83 Revised Statutes construed..... 155
presumption of intention is against words having a retroactive effect 295
section 1, article 9, chapter 129, construed..... 212
rule of construction as to repeal by implication..... 343
will usually not be given a retrospective operation.....279, 295
when to be construed to have a retrospective operation..... 279

TRESPASSERS.
not precluded from recovering for negligence of another trespasser 324

WAR CLAIMS.
state government is trustee of funds received from federal government 131

WATERS.
land damaged by water from feeder to canal..... 172
damage to mill by removal of dams..... 67
state may abandon locks and dams without liability to those using the water privilege..... 71

WATERS—Continued.

PAGE.

parties damaged by the removal of a state dam in river not entitled to damages from the state..... 74
claimant entitled to damage for land flooded by construction of state dam 67
damages caused by construction of a dam by the state..... .....59, 85, 87, 88, 89, 98, 112
claim not barred when filed within two years after cause of action accrues..... .....51, 114
degree of care required by collector of artificially collected waters 322
statute of limitations—when cause of action accrues for damages arising from construction of a dam.....35, 100
particular facts under which claimant is entitled to recover for damages to lands caused by overflow of canal..... 121
damages sustained by raising height of dam..... 135
damage to lands by backing of water caused by construction of dam..... 66
particular facts not showing damage by construction of dam. 8
damages caused by erection of dam by State..... ....1, 9, 16, 18, 21, 23. 24

WORDS AND PHRASES.

construction of term "2 per cent of cost" in computing architects' fees 340