CASES

ILLINOIS STATE

DECIDED IN

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THE COURT OF CLAIMS

OF THE

STATE OF ILLINOIS

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PREFACE

The opinions of the Court herein reported, are published by authority of the provisions of section 10 of an Act entitled, "An Act to create the Court of Claims and to prescribe its power and duties," approved May 16, 1903, in force July 1, 1903. (Hurd's Revised Statutes 1913, p. 754.

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

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OFFICERS OF THE COURT

JUDGES:

MARTIN A. BRENNAN, *Presiding Judge,* Bloomington, Ill.
BENJAMIN P. ALSCHULER, *Judge,* Aurora, Ill.
EDWARD J. BRUNDAGE, *Judge,* Chicago, Ill.

P. J. LUCEY, *Attorney General*
ARTHUR R. ROY, *Assistant Attorney General*
JAMES J. BRADY, *Auditor of Public Accounts and ex-officio Clerk*
R. T. POWDERLY, *Deputy Clerk*

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
and 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
and 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
and 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 and ex-officio Clerk of Commission

1893.

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

M. T. Maloney.....Attorney General
David Gore.....Auditor of Public Accounts and 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 and 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.

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JUDGES AND OFFICERS
OF
COURT OF CLAIMS

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 and ex-officio Clerk of Court

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1905.

James M. Lee.....Presiding Judge
Lawrence B. Stringer.....Judge
Charles J. Searle.....Judge

W. H. Stead.....Attorney General
J. S. McCullough.....Auditor of Public Accounts and ex-officio Clerk of Court

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1908.

Lawrence B. Stringer.....Presiding Judge
Charles J. Searle.....Judge
William Johnson .....Judge

W. H. Stead.....Attorney General
J. S. McCullough.....Auditor of Public Accounts and ex-officio Clerk of Court

STATE AUDIT.

1910.

Lawrence B. Stringer.....Presiding Judge
William Johnson.....Judge
Archie G. Kennedy.....Judge

W. H. Stead.....Attorney General
J. S. McCullough.....Auditor of Public Accounts and ex-officio Clerk of Court

1913.

Martin A. Brennan.....Presiding Judge
Benjamin P. Alschuler.....Judge
[1]Richard McMurdy.....Judge
[2]George W. Dowell.....Judge

1. Resigned Nov. 8, 1913. 2. Vice McMurdy.

P. J. Lucey.....Attorney General
James J. Brady.....Auditor of Public Accounts and ex-officio Clerk of Court

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1915.

Martin A. Brennan.....Presiding Judge
Benjamin P. Alschuler.....Judge
[1]George W. Dowell.....Judge
[2]Edward J. Brundage.....Judge

[1]Resigned.
[2]Appointed on July 6, 1915, in place of Dowell.

P. J. Lucey.....Attorney General
James J. Brady.....Auditor of Public Accounts and ex-officio Clerk of Court

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 Capitol 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. In force July 1, 1877. (Session Laws 1877, pp. 64, 65.)

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. In force July 1, 1881. (Session Laws 1881, pp. 60, 61.)

Act of 1889.

AN ACT to amend sections 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 3, 1889. In force July 1, 1889. (Session Laws 1889, pp. 89-91.)

Act of 1903.

AN ACT to create the Court of Claims and to prescribe its powers and duties.

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 29, 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 claim a 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 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. In force July 1, 1903. (Session Laws 1903, pp. 140-142.)

Hurd's Rev. Stat. 1913, Chap. 37, pp. 754-756.

STATUTE OF LIMITATIONS.

AN ACT to limit the time for persons to bring claims against the State of Illinois.

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. In force March 1, 1847. (Session Laws 1847, p. 32.) Hurd's Rev. Stat. 1913, Chap. 84, p. 1578.

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS.

PLEADINGS.

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

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

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS.

A. B.

v.

STATE OF ILLINOIS.

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

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

particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the declaration.

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

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

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

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

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

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

STATUTE OF LIMITATIONS.

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

EVIDENCE.

12. Upon the filing of a declaration the parties may take evidence at such time and place and before such notary public or other officer as shall be agreed upon between them. If they are unable to agree, either party may, upon notice to the other, submit the matter to any judge of this Court, who shall designate the time and place and the officer before whom the testimony shall

be taken, and shall transmit the order to the clerk, who shall thereupon enter the same of record as an order of the Court and shall issue a dedimus to such officer.

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

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

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

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

17. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be prejudiced by the failure of the State to file evidence in its behalf in apt time, but a hearing shall be had upon the evidence filed by the claimant, unless for good cause shown, additional time to file evidence be granted to the State.

ABSTRACTS AND BRIEFS.

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

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

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

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

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

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

RECORDS AND CALENDAR.

24. The clerk shall record all orders of the Court, including the final disposition of causes. He shall keep a docket in which he shall enter all claims filed, together with their numbers and dates of filing, the names of claimants, of attorneys of record and their addresses, and he shall, as papers are filed, enter the same upon such docket. At least ten days prior to each session of the Court he shall prepare a calendar of the causes to be disposed of at such session.

ORAL ARGUMENTS.

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

REFERENCE BY GENERAL ASSEMBLY.

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

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OPINIONS OF THE COURT

GEORGE F. ADAMS AND EBENEZER TILLOTSON, PARTNERS, ETC.,

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

1. LICENSE FEE—*payment under void statute.* The Act of April 11, 1899, requiring persons desiring to operate a private employment agency to obtain a license from the Secretary of State is unconstitutional (*Mathews* v. *People*, 202 Ill., 389), and fees paid involuntarily under such statute may be recovered.

2. VOLUNTARY PAYMENT—*no recovery.* Money paid into the State treasury voluntarily may not be recovered back.

3. DURESS—*money paid under.* Money paid into the State treasury under duress may be recovered back.

4. SAME—*what constitutes.* Prosecution to enforce collections with threatened arrest constitutes compulsion and duress.

F. L. Harpham and C. W. Greenfield, for Claimants.
W. H. Stead, Attorney General, for State.

George F. Adams and Ebenezer Tillotson, partners, and doing business under the firm name of Adams and Tillotson, are claimants herein for the sum of two hundred ($200.00) dollars, being a license fee paid by them on November 14, 1901, to Hon. James A. Rose, Secretary of State, for a license to operate a private employment agency under the Act of the General Assembly pertaining thereto, approved April 11, 1899, and in force July 1, 1899. (Session Laws, 1899; pp. 268-271.)

The case is presented on claimants' statement of claim in due form; pleas filed by the State, amounting in effect to the general issue; and depositions adduced by claimants.

It is conceded by the State that the said license fee was paid by claimants to the Secretary of State, and by him into the State treasury, prior to the filing of the claim. It is also conceded that the Act requiring such payment and license is unconstitutional, it being so held by the Supreme Court, April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

The decision of the case hinges upon the point whether the said license fee was paid by claimants voluntarily, or under compulsion and duress.

The evidence relevant to this question is not as full and clear as we could wish; but we think, shows with tolerable clearness that claimants, in the early part of the year 1901, were running an employment agency in Chicago; that they were both arrested by two city police officers for running such agency without a license and taken before a justice of the peace, and required to give bond for their appearance to answer to the said charge; that they then went to City Prosecutor Taylor, who advised them that he had charge of the prosecution of the cases for and on behalf of the state's attorney; that a case was then pending in the courts testing the legality of the Act in question, and their case would be postponed pending the decision in that case, and giving them a letter to that effect to the lawyer prosecuting their case before the justice of the peace; that under such arrangement their case was so postponed till in the fall, when they were advised the law had been held valid in the test case alluded to; when, to avoid rearrest or trial, with consequent imprisonment or fine, and interference with their business, they applied for a license, and paid the fee, herein sought to be recovered. The evidence does not disclose a copy of the complaint, warrant or docket entries; nor any special authority under which the two policemen or detectives were acting; nor the status of the city prosecutor further than his statement that he represented the state's attorney and, inferentially, the State, and except that the sequel proved his authority. It is upon

this lack of clearness in the evidence that the State bases its contention that no such compulsion or duress existed as to entitle claimants to recover back their money so paid; that the complaint may have been under a city ordinance, and the city prosecutor acting on behalf of the city, and not of the State. But in the absence of any evidence to the contrary, we think the evidence sufficiently shows prosecution to have been under the Act in question and by officers entrusted with its enforcement.

In the view we take of the evidence and the facts thereby established, it hardly needs the citation of authority to support the proposition, that the claimants have shown such duress as, under the law, entitles them to recover back from the State the illegal fee paid by them. For, however much confusion there may be in the authorities on the question as to what state of facts constitute such compulsion and duress, as to entitle the payer of an illegal tax to recover the same, the authorities unanimously agree, that actual prosecution and arrest to enforce collection by public authorities charged with that legal duty, clearly constitute such compulsion and duress.

Yates v. *Royal Insurance Co.*, 200 Ill., 202.
German All. Ins. Co. v. *VanCleave,* 191 Ill., 410.
Chicago v. *Waukesha Brewing Co.*, 97 Ill. App., 583.
And cases therein cited.

We, therefore, find in favor of claimants and accordingly award them damages in the sum of two hundred ($200.00) dollars.

WILLIAM O. ADDLEMAN

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

1. PRACTICE—*failure to comply with rules.* Failure upon the part of claimant to take evidence and file abstracts and briefs as required by statute and by the rules will support a motion by the Attorney General to dismiss the claim.

2. SAME—*when Court will not pass on claim.* The Court will not pass upon a claim merely from a verified declaration or statement.

This claim was filed in this Court on the 18th day of October, A. D. 1904, by the claimant, William O. Addleman, of Mt. Pulaski, Logan County, Illinois, for five thousand ($5,000.00) dollars as damages for injuries received by him while in the employ of the State of Illinois as guard of the Illinois State Penitentiary at Joliet, on or about the 13th day of December, A. D. 1902.

Claimant alleges in his declaration, that the injuries complained of were caused by the neglect of the State of Illinois to properly light and maintain banisters along a certain runway, through which the guards of said institution were compelled to pass in the night time.

To the said declaration a demurrer was filed by the Attoreny General on the 2d day of October, A. D. 1905, and November 13th of said year set for a hearing thereon. On the next day after said date fixed for said hearing, the claimant, not having appeared either in person or by counsel, the Attorney General moved the Court to withdraw said demurrer, which motion was allowed and the demurrer withdrawn, and the Attorney General thereupon entered a motion to strike said cause from the docket for non-compliance with the rules of this Court, on the part of the claimant, in neglecting and failing to take evidence in support of said claim and to file abstracts and briefs as required by the statute and the rules of this Court.

An examination of the files fails to show that any proofs in support of his claim have ever been taken by the claimant as required by the statute and the rules of this Court. The claimant simply rests his case on his verified declaration, and from all indications expects this Court to determine the merits of this case therefrom. This the law does not give this Court the power to do.

While it is not the disposition of this Court to strike claims from the docket, yet sufficient time has elapsed since the filing of this claim to have taken testimony in support of it and to have filed the required arguments and briefs.

The motion to strike this case from the docket is therefore allowed, and the same is stricken with leave to claimant to reinstate.

BENJAMIN BUCKNER
v.
STATE OF ILLINOIS.

Opinion filed September 28, 1906.

MILITARY SERVICE—*when award will be made for injuries received in.* Claimant served the State prior to his muster into the service of the United States, and following the case of *Krueger* v. *State*, 1 Court of Claims Rep., 336, is entitled to an award.

The claimant, Benjamin Buckner, on the 28th day of June, 1898, as a member of Company "I" of the Eighth Regiment of the Illinois Volunteer Infantry, was called into the service of the State, and on the 18th day of July of said year was mustered into the service of the United States.

He now claims, that there is due him from the State, for said services, the sum of $61.00. The evidence, however, shows that he was in the service of the State twenty days, and under the statute of the State of Illinois, was entitled to $2.00 per day, or a total of $40.00 for such services.

The evidence further shows, that he has received, as part payment for the said services, the sum of $10.40, which leaves a balance of $29.60, lawfully due him.

The questions of law raised in this case are the same as those considered in the case of *Krueger* v. *State*, 1 Court of Claims Report, 336, and the reasons for allowing that claim apply to this.

We accordingly award to said Benjamin Buckner, the sum of $29.60, the amount shown by the evidence to be due him.

CHICAGO RAILWAY EMPLOYMENT AGENCY, A CORPORATION,

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

1. LICENSE FEE—*payment under void statute.* Claimant paid a fee to obtain a license to operate a private employment agency under the Act of April 11, 1899, (Session Laws 1899, pp. 268-271), but not under compulsion and duress. The Act was later held to be unconstitutional in the case of *Mathews* v. *People*, 202 Ill., 389. *Held*, that claimant is not entitled to an award.

2. ILLEGAL TAX—*when may not be recovered.* Mere payment of an illegal tax, under apprehension that the authorities may proceed with its collection, is not sufficient to entitle a person to recover the same back. (*Yates* v. *Royal Insurance Co.*, 200 Ill., 202.)

E. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

This case involves a claim on the part of claimant as in the cases of *Adams & Tillotson* and *Sarah Mandel* v. *The State, supra,* to a license fee of $200.00 paid into the State treasury by claimant for a license to run an employment agency under the Act of 1889, (Session Laws, 1889, pp. 268-271), declared unconstitutional in *Mathews* v. *People,* 202 Ill., 389. And, as in those cases, the decision turns upon the question as to whether the said license fee was voluntarily paid, or paid under compulsion and duress by those charged with the supposed legal duty of the collection.

But, unlike as in those cases, we are of the opinion that, in this case, claimant utterly fails to make out his case. Mere payment of any illegal tax under the fear that the public authorities charged with its collection will proceed to its collection under the penalties of the law, are not of themselves sufficient to entitle one to recover back such tax after payment.

Yates v. *Royal Insurance Co.,* 200 Ill., 202.

There can be no contention, and in fact it is not contended by claimant's attorneys, that more is shown

by the evidence in this case. Neither claimant nor any of its officers were prosecuted or arrested; no threats were made against it or them and, in fact, no demand was made either of it nor them of payment of the license fee. Claimant wanted to go into the business of running an employment agency and, hearing that the State was exacting payment of a license fee, under the Act in question, consulted its attorneys, and, under their advice, applied and paid for and secured such license, without threat or protest.

Such a payment is, under the authority above cited, and, as we believe, under all the authorities, purely a voluntary payment, and as such does not entitle the payor to its recovery, consequently, we reject the claim.

J. B. HAYDEN AND MARY F. MCCORMICK, CO-PARTNERS AS J. B. HAYDEN & CO.,

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

LICENSE FEE—*Adams & Tillotson v. State ante followed.* This claim is governed by the decision of the Court in *Adams & Tillotson v. State, supra.*

Louis T. Orr, for Claimant.
W. H. Stead, Attorney General, for State.

J. B. Hayden and Mary F. McCormick, as co-partners under the firm name of J. B. Hayden & Co., are claimants herein against the State of Illinois for the sum of four hundred ($400.00) dollars, being the aggregate sum of two license fees of two hundred ($200.00) dollars each, paid by them on August 4, 1899, and December 13, 1901, respectively, to Honorable James A. Rose, Secretary of State, for licenses issued to claimants to operate a "private employment agency" in the city of Chicago, under the Act of the General Assembly, pertaining thereto, passed April 11, 1899, and going into force July 1, 1899 (Session Laws 1899, pp. 268-271), said Act being held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

Like the case decided by this Court in *Adams & Tillotson* v. *The State,* September 28, 1906 (see opinion filed therein), this case turns upon the question whether such license fees were paid by claimants, voluntarily, or under threats, compulsion, and duress.

The evidence shows that prior to claimants paying such license fees, their payment was demanded by Mr. Geary, "Superintendent of Free Employment Agencies"; that claimants strenuously objected to the payment of such fees, but were threatened by him that their place of business would be closed and they criminally

prosecuted, if they did not pay such fees; that before the payment of the last license fee, they were further threatened by two police officers, presumably acting for the State, with having their place of business closed and being prosecuted and arrested if they did not pay such annual license fee and procure license under such Act; that before claimants paid such fees, they were informed and knew that the State was prosecuting, under such Act, those refusing to pay such fees; and claimants paid such fees under the fear and expectation of having their place of business closed and of being arrested and criminally prosecuted if they did not pay such fees.

Under this state of facts we are clearly of the opinion that such fees were paid by claimants under what amounts, in law, to compulsion and duress, and under protest. In view of our opinion in the case of *Adams & Tillotson* v. *The State,* cited *supra,* and the cases therein cited, in support of that decision, it is hardly necessary for us to enter into extended discussion of the law applicable to this case. In our opinion, the facts of this case bring the case clearly within the doctrine there announced and applied in favor of claimants.

We, therefore, accordingly award the claimants the sum of four hundred ($400.00) dollars.

HENRY HENKE
v.
STATE OF ILLINOIS.

Opinion filed September 28, 1906.

1. NON-LIABILITY OF STATE—*what does not constitute claim against the State.* The basis of this claim, as submitted and contended for by claimant is, that the Lincoln Park Board, through its employees, was guilty of negligence in not providing claimant, a painter, with reasonably safe appliances to work upon, and in not inspecting and testing such appliances; that the members of such board were officers and agents of the State, and that the State is therefore liable. *Held*, that no liability attached.

2. JURISDICTION—*class of claims Court may pass upon.* Claimant cites sec. 3 of the Act of 1903, which provides that, "and it shall be the duty of said Court to hear and determine * * * all other unadjusted claims of whatsoever nature or character against the State of Illinois," as showing that the Court of Claims has jurisdiction to allow claims of this class.

3. SAME—*creation of Commission and Court did not increase State's liability.* In the establishment of the Commission of Claims and the present Court of Claims, it was not the intention of the legislature to create a new class of claims against the State, but it was to provide a tribunal in which claims against the State, which civilized governments have always recognized, might be determined.

4. AWARD—*what must be shown to justify.* In order to justify the allowance of a claim, the facts must show either a legal or equitable claim against the State.

5. RESPONDEAT SUPERIOR—*doctrine of not applicable to the State.* The State is not responsible for the misfeasance, wrongs, negligence or omissions of duty of its officers, agents or servants, for it does not guarantee to any person the fidelity of the officers or agents, whom it employs.

Walter F. Heineman, for Claimant.
W. H. Stead, Attorney General, for State.

This is a claim for personal injuries received by Henry Henke as a result of the breaking of a scaffold, while claimant was employed as a painter at Lincoln Park, Chicago, Illinois.

Claimant was employed by the Lincoln Park Board, September 21, 1901, and worked as a painter for the said board continuously up until the date of the said accident, September 29, 1902.

The evidence shows that on the day of the injury, claimant was working on a scaffold, painting the ribs of the large palm house; that the scaffold upon which he was working had been erected by carpenters likewise employed by the park board; that claimant had nothing whatever to do with the erection of the scaffold; that about noon, while claimant was performing his duties, he walked upon a plank placed in the scaffold, which suddenly broke about the middle and precipitated him to the ground; that the plank, which broke under him, was found after the accident to have had a knot or cross-grain running through it at the place where the break occurred; that this knot was on the under side of the plank and that the plank was painted gray, so that the defect could not be seen by claimant; and that as a result of the said accident the arches of both of claimant's feet were permanently destroyed in addition to temporary injuries of a painful character. To recover damages for these injuries, this claim has been filed against the State.

It is contended by claimant that the park board, through its employees, were guilty of negligence in not providing reasonably safe appliances for claimant to work upon and in not inspecting the appliances used by claimant or subjecting them to proper tests, and that as said board were officers and agents of the State, the State is therefore liable.

It is also further contended in this case that under the various Acts establishing the now Court of Claims of this State, jurisdiction has been given this Court to allow claims of this nature and thus hold the State liable for the negligence, misfeasance and laches of its officers and agents, the Lincoln Park Board and its employees. And this it is claimed, is given under section three of the Act of 1903, which recites that "it

shall be the duty of said Court to hear and determine, * * * all other unadjusted claims of whatsoever nature or character against the State of Illinois."

Prior to 1877 there was no forum or tribunal in this State wherein claims could be filed against the State of Illinois. By the Act of 1877, first creating the Commission of Claims, to be composed of one Judge of the Supreme Court and two circuit judges of the State, it was declared to be the duty of the Commission "to hear and determine all unadjusted claims of all persons against the State of Illinois." During the existence of the Commission under this Act no claim for personal injuries seems to have been filed against the State.

In 1889 the legislature revised the Commission of Claims Act, changing the manner in which the Commission should be constituted, and specifically setting forth its jurisdiction. The clause referred to in section three by claimant as to "all other unadjusted claims" first appeared in this Act.

The same year this Act went into force, the Commission early passed upon the question here involved and the opinion then rendered has been an established principle, closely followed by this Court, ever since in the adjudication of similar cases.

It was then held (*Schmidt* v. *State*, 1 Court of Claims Rep., 76, 79) that "the law creating this Commission does not undertake to create a new liability against the State, but provides a method by which claims against the State may be heard before this Commission." And again on page 80, "It is our understanding that, * * * this Commission has no power to make an award in any case unless the facts show a legal or equitable claim against the State."

In so doing the Commission seemed to follow the opinion of the Massachusetts Court filed the same year, in *Murdock Grate Co.* v. *Commonwealth*, 24 N. E., 854, where the Court, in passing upon a similar statute in that State succinctly says: "The Act we are discussing discloses no intention to create against the State

a new and heretofore unrecognized class of liabilities, but only an intention to provide a judicial tribunal where well recognized existing liabilities can be adjudicated."

The Act of 1903, creating the Court of Claims, successor to the Commission of Claims, re-enacts the section referred to, and, since the passage of the Act of 1903, this Court has still uniformly held to the doctrine that in the establishment of this tribunal it was not the intention to create a new class of claims against the State, but to provide a tribunal to determine those claims against the State which civilized governments have always recognized.

It is therefore to be considered whether a claim for an injury done by or the result of the negligence of an officer or agent of the State, is one for which a liability exists against the State, even if there did not exist this tribunal to pass upon it.

In the case of *Murdock Grate Company* v. *Commonwealth,* above cited, the Court say (page 855):

"States have always found it necessary to take and use the property of their citizens for the purposes of their government. They have assumed various responsibilities on behalf of their citizens or others. They have also always been parties to contracts for the borrowing of money, the purchase of property, the employment of labor. And the duties arising from such acts have always been fully recognized, even if judicial tribunals have not always been provided, to make proper compensation for, or adjustment or payment of the demands arising from such acts. But we do not find that demands founded on the neglect or torts of ministerial officers engaged as servants in the performance of duties, which the State as a sovereign has undertaken to perform, have ever been held to render it liable. Nor does this rest upon the narrow ground that there are no means by which such obligations can be enforced, but on the larger ground that no obligations arise therefrom."

In *Gibbons* v. *U. S.*, 8 Wall., 269, 274, the Court say: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."

"The government does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments and difficulties and losses, which would be subversive of the public interests." Story on Agency, sec. 319.

In *Gibbons* v. *U. S.*, *supra*, the Court further say: "The cases of *U. S.* v. *Kirkpatrick*, 9 Wheat., 720, and *Dox* v. *Postmaster General*, 1 Pet., 318, establish the principle that even in regard to matters connected with the cause of action by the United States, the government is not responsible for the laches, however gross, of its officers."

It was held in *Lewis* v. *State*, 96 N. Y., 71, that "no principle of law, not any adjudged case, would make the State liable for the negligence or misfeasance of its agents in like manner as a natural person is responsible for the acts of his servants."

See also *Bowen* v. *State*, 108 N. Y., 166, and *Splittorf* v. *State*, 108 N. Y., 205,

holding similarly.

It is likewise a well established principle of law in this State, that a private action will not lie against counties, townships, school districts, or drainage districts, for injuries occasioned by the negligence of its servants or officers in respect to the performance or non-performance of their duties, and in the application of this rule, there is no distinction between the neglecting to do or perform an act which ought to have been performed and the performance of the duty in a negligent manner. See *Hedges* v. *County of Madison*, 1 Gil., 567; *Town of Waltham* v. *Kemper*, 55 Ill., 346; *Bussell* v. *Town of Steuben*, 57 Ill., 35; *White* v. *County of Bond*, 58 Ill., 297; *Symonds* v. *Clay County*, 71 Ill.,

355; *Hollenbeck* v. *Winnebago County,* 95 Ill., 148; *Cooney* v. *Hartland,* 95 Ill., 516; *Elmore* v. *Drainage Comrs.,* 135 Ill., 269.

If counties, townships, school and drainage districts are not to be held in damages for the negligence of their officers, for the reason that they are governmental corporations, how much less can the sovereignty itself which creates these sub-divisions be so held?

In *Hollenbeck, Admr.,* v. *Winnebago County,* 95 Ill., 148 on p. 162, our Court say: "No reason is perceived why a county should be held to respond in damages for the negligence of its officers. * * * 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."

While it is true that that portion of the above decision which refers to the liability of the State is mere *obiter,* still it is a clear indication of how our Court would pass upon this question, if same came squarely before it.

In consonance then with the United States Supreme Court, the Courts of Massachusetts and New York and in our own State, this Court has uniformly held and now holds that the State is not responsible for the misfeasance, wrongs, negligence or omissions of duty of its officers, agents or servants, for it does not guarantee to any person the fidelity of the agents or officers whom it employs.

Counsel cites in brief the case of *Holmes* v. *State,* 1 Court of Claims Reports, page 324, as an exception to this rule. This was a claim for damages for injuries sustained in the fall of a defective bridge over the Illinois and Michigan Canal and the claim was allowed by this Court. The distinction here drawn is that the said canal is not a governmental function, but is a business enterprise, conducted for profit. This distinction is clearly drawn in *City of Chicago* v. *Wil-*

liams, 182 Ill., 135, where in passing upon a similar question in connection with municipal corporations, on pp. 137, 138, the Court say:

"* * * 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 benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred."

The case in question not coming within this exception, the claim is necessarily rejected, but inasmuch as we recognize that it is a case appealing strongly to sympathy, the rejection of the claim is made without prejudice, and it is expressly directed that such rejection does not conclude the claimant herein or bar his further presentation of his claim to a subsequent legislature.

SARAH MANDEL

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

LICENSE FEE—*Adams & Tillotson* v. *State ante followed.* This claim is governed by the decision of the Court in *Adams & Tillotson* v. *State, supra.*

F. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

Like in the case of *Adams & Tillotson* v. *The State, supra,* claimant in this case, Sarah Mandel, bases her claim on the payment of a license fee of two hundred dollars ($200.00) paid to Honorable James A. Rose, Secretary of State, in 1901, to run an employment agency under the Act of 1899 (Session Laws of 1899, pp. 268-271), *declared unconstitutional* by the Supreme Court April 24, 1903. 202 Ill., 389.

The case is submitted on statement of claim in due form, pleas amounting to the general issue, deposition of claimant and stipulations that the $200.00 paid by claimant to the Secretary of State was by him paid into the State treasury; and that George W. Geary, alluded to in the deposition, was the duly appointed, qualified and acting Superintendent of Private Employment Agencies at the time the money was paid.

The uncontradicted evidence in the case establishes that prior to November 1, 1901, claimant was running an employment agency in the City of Chicago; that George W. Geary was then the Superintendent of Agencies charged with the supposed legal duty of enforcing said Act; that in pursuance of his said supposed authority and duty under the Act he (and the Secretary of State as well) demanded again and again, both personally and by his subordinate officers, payment of the said license fee, under repeated threats of arrest, prosecution and the forcible closing of her place

of business; and that, induced solely by fear that such State official would put his said threats into execution, claimant finally paid the license fee of $200.00, now in the State treasury, and received her license.

In view of what we have said in *Adams & Tillotson, supra,* it is deemed unnecessary to repeat what we there said, nor to again cite the authorities there cited; we deem it sufficient to say that we are of the opinion that claimant has clearly established her contention that the illegal license fee was paid into the State treasury under legal compulsion and duress, and we accordingly award her damages in the sum of two hundred dollars ($200.00).

MARY A. RILEY, ADMINISTRATRIX OF THE ESTATE OF JESSE L. ALLEN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed September 28, 1906.

NON-LIABILITY OF STATE—*Henke* v. *State ante followed.* The law as announced in *Henke* v. *State, supra,* applies to this claim.

Wm. T. Wilson, for Claimant.
W. H. Stead, Attorney General, for State.

In this case Mary A. Riley, as administratrix of the estate of Jesse L. Allen, deceased, files her claim for damages for personal injuries received by the said Jesse L. Allen, at the Illinois Central Hospital for the Insane at Jacksonville, Illinois, from which injuries, it is alleged, the said Allen died.

The statement in the case sets out that the said Allen entered the employ of the Board of Trustees of the said institution, as a cook, about February 1, 1905; that on February 9th, he was ordered by the head cook of the institution to run a certain elevator; that in attempting to run the said elevator, he became entangled in the ropes of the elevator and as a result he was injured to such an extent that death subsequently ensued.

No evidence was taken and filed in this case as required by the statutes, but the Attorney General, instead of moving to strike the case from the files for want of prosecution and failure to comply with the statute and the rules of this Court, as he might have done, has seen fit to enter a demurrer to the declaration.

The ground of demurrer, namely, that the facts as alleged in the declaration do not show any liability on the part of the State, is well taken.

In the opinion in the case of *Henke* v. *State,* filed of even date herewith, this question is discussed at length, and the authorities extensively cited.

It is there held, as this Court has uniformly held since its inception as a Commission, and as the Courts of New York, Massachusetts and our own State, and the Federal Courts likewise, have held, that the State is not liable for the misfeasance, torts, wrongs, negligence or omissions of duty of its officers or agents, for it does not undertake to guarantee to any persons the fidelity of those it employs.

Demurrer in this case is therefore sustained and claim rejected.

LUCIUS M. ROOD
v.
STATE OF ILLINOIS.

Opinion filed September 28, 1906.

1. NON-LIABILITY OF STATE—*what does not constitute claim against the State.* Claimant, while employed at his duties in Lincoln Park, and without fault on his part, was struck upon the head with a bale of straw thrown from a barn by a co-employee. *Held*, that the State is not liable.

2. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State, and the State is not liable for the misfeasance, torts, wrongs, negligence or omissions of duty of its officers or agents. (*Henke* v. *State*, *supra*, cited by Court.)

The declaration in this case alleges that Lucius M. Rood, while employed at Lincoln Park, in the City of Chicago, Illinois, on the 21st day of June, A. D. 1903, was severely injured by being struck on the head by a bale of straw, which was thrown from the second story of a barn located in said park; that the said Lucius M. Rood was at the time and for some time previous thereto employed by the commissioners of said Lincoln Park, and that while in the performance of his duty, without fault on his part, was struck as aforesaid; that the said bale of straw was thrown from the said barn by a co-employee of said claimant, by the name of John Anderson; and that in consequence of said injuries the said Lucius M. Rood has been confined to his bed ever since, has been unable to work and has suffered permanent disabilities.

To the said declaration the Attorney General has filed a demurrer.

As this Court has uniformly held since its organization that the State is not liable for the misfeasance, torts, wrongs, negligence or omissions of duty of its officers or agents, and that it does not undertake to guarantee to any persons the fidelity of those it em-

ploys (see *Henke* v. *State*, filed of even date herewith), the demurrer must be sustained.

Inasmuch, however, as we recognize that this is a case appealing strongly to sympathy, the sustaining of the demurrer is hereby declared to be without prejudice to the said claimant, and the rejection of the claim is not to conclude the claimant herein or to bar his further presentation of this claim to the legislature.

DR. C. PRUYN STRINGFIELD
v.
STATE OF ILLINOIS.

Opinion filed September 28, 1906.

PRACTICE—*rules of—failure to observe.* **Where claimant has not filed either proofs, abstracts or briefs, as required by the rules of the Court of Claims, the Court will dismiss the claim upon motion of the Attorney General.**

Alonzo Hoff, for Claimant.
W. H. Stead, Attorney General, for State.

The claimant, Dr. C. Pruyn Stringfield, on the 6th day of April, 1903, filed his claim in this Court for compensation for medical and surgical services rendered to one Sergeant Henry Becker, on accounut of injuries received by said Becker while he was in the service of the State, and one of and acting with a detachment of Troop A of Illinois Cavalry, and while said Troop was detailed as escort to His Royal Highness, Prince Henry of Prussia, in Chicago, on the 5th day of March, A. D. 1903.

The amount claimed is $350.00.

No steps having been taken by the complainant to comply with the rules of this Court, or the requirements of the statute in regard to the filing of proofs, abstracts and arguments, on the 13th day of November, A. D. 1905, a motion was made by the Attorney General to dismiss this case for want of prosecution, which motion is allowed and the cause dismissed accordingly.

THE SAMARITAN HOSPITAL
v.
STATE OF ILLINOIS.

Opinion filed September 28, 1906

PRACTICE—*rules of—failure to observe.* Failure on the part of claimant to file proofs, abstracts and briefs, as required by the rules, will support a motion by the Attorney General to dismiss.

Alonzo Hoff, for Claimant.
W. H. Stead, Attorney General, for State.

The claimant, The Samaritan Hospital, filed its claim in this Court on the 20th day of April, 1903.

The claim is for $180.00 for nursing, and treatment of Sergeant Henry Becker, a member of the Illinois National Guard, while recovering from the effects of an injury received during the entertainment of Prince Henry of Prussia, in Chicago, on March 5, 1903.

No proofs, abstracts or arguments, having been filed in this Court by the claimant, the Attorney General, on the 13th day of November, 1905, moved the dismissal of this case for want of prosecution, which motion is therefore allowed and the cause dismissed.

ALBERT W. LEIDEL
v.
STATE OF ILLINOIS.

Opinion filed November 16, 1906.

1. NON-LIABILITY OF STATE—*when liability does not attach.* Claimant was injured in the stone quarry while employed as a keeper at the Southern Illinois Penitentiary. *Held*, that no liability against the State attached.

2. RESPONDEAT SUPERIOR—*doctrine of not applicable to State* The doctrine of *respondeat superior* does not apply to the State, and the State is not liable for the negligence of its officers, employees or agents.

Northcott, Hoff and Orr, for Claimant.
W. H. Stead, Attorney General, for State.

This is a claim for personal injuries received by Albert W. Leidel as a result of a caving in of some dirt in a rock quarry while claimant was employed as a keeper in the Southern Illinois Penitentiary at Chester, Illinois.

Claimant had for a number of years been employed as keeper in charge of convicts and on the 20th day of February, A. D. 1905, he had a gang at work under him, clearing away the dirt over a ledge of rock and he was at work by order of the superintendent of the stone department in said penitentiary. While directing his men and while in the general line of his duty, a bank of dirt caved in on him and resulted in very serious personal injuries. The evidence shows that the claimant's injuries are serious and permanent.

It is contended by the claimant that the superintendent of the stone department was negligent in sending Albert W. Leidel, as keeper, with a gang of four or five persons, to work in clearing off said dirt in the dangerous condition it was in and that this negligence on the part of the superintendent of the stone department, who was an agent of the State, makes the State liable for the injuries of said claimant.

It is further contended in this case that under the various Acts establishing the present Court of Claims of this State, jurisdiction was given this Court to allow claims of this nature and thus hold the State liable for the negligence and misfeasance of its officers and agents. And this, it is claimed, is given under section three of the Act of 1903, which recites that "It shall be the duty of said Court to hear and determine * * * all other unadjusted claims of whatsoever nature or character against the State of Illinois."

The law governing this case was so fully discussed in the case of *Henry Henke* v. *State of Illinois,* decided by this Court on September 29, 1906, that it is not necessary here to cite any authorities in support of the proposition, that the State is not liable for the acts or misconduct of its agents as contended for in such matters. And this decision is also supported by a long line of previous decisions by courts of this and other states. This being the law governing this case, the claim is necessarily rejected, but, inasmuch as we recognize that it is a case appealing strongly to sympathy, the rejection of the claim is made without prejudice and it is expressly directed that such rejection does not conclude the claimant herein so as to bar his further presentation of this claim to a subsequent legislature.

SAMUEL B. BRIERLY

v.

STATE OF ILLINOIS.

Opinion filed December 29, 1906.

LICENSE FEE—*paid under protest—may be recovered—when.* Illegal fees paid into the State treasury under protest, by compulsion or duress may be recovered.

Louis T. Orr, for Claimant.
W. H. Stead, Attorney General, for State.

Samuel B. Brierly is claimant herein against the State of Illinois for the sum of four hundred ($400.00) dollars, being the aggregate sum of two license fees of two hundred ($200.00) dollars each, paid by claimant on or about August 24, 1899, and on April 8, 1902, respectively, to Hon. James A. Rose, Secretary of State, for licenses issued to claimant to operate a "private employment agency" in the city of Chicago, under the Act of the General Assembly pertaining thereto, passed April 11, 1899, and going into effect July 1, 1899 (Session Laws 1899, pp. 268-271). Said Act being held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

The facts in this case are substantially like those in the case of *J. B. Hayden & Co.* v. *The State,* this day decided by us. (See opinion therein.) And in view of what we have therein held and announced, we deem it unnecessary to further set forth or discuss either the facts of the case, or the law applicable thereto. Suffice to say that, as in that case, we think in this, that claimant paid such illegal fees to the State, under what amounts in law to compulsion and duress, and under protest. We, therefore, accordingly award claimant, Samuel B. Brierly, the sum of four hundred ($400.00) dollars.

CHARLES W. DUNHAM
v.
STATE OF ILLINOIS.

Opinion filed December 20, 1906.

LICENSE FEE—*when may be recovered.* Claimant paid a fee to obtain a license to operate a private employment agency under the Act of April 11, 1899 (Session Laws 1899, pp. 268-271), under compulsion and duress. The Supreme Court of this State having declared said Act unconstitutional (*Mathews* v. *People*, 202 Ill., 389), claimant is entitled to a return of the fee so paid.

Louis T. Orr, for Claimant.
W. H. Stead, Attorney General, for State.

Charles W. Dunham filed a claim herein against the State of Illinois for the sum of two hundred ($200.00) dollars, being the amount of a license fee paid by claimant, on or about September 11, 1902, to Honorable James A. Rose, Secretary of State, for a license to operate, in the city of Chicago, a "private employment agency" under the Act of the General Assembly pertaining thereto, passed April 11, 1899, and going into force July 1, 1899, (Session Laws, 1899, pp. 268-271), said Act being held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People*, 202 Ill., 389.

The facts in this case are, in our opinion, in no essential particular different from those in the two cases this day decided by us, entitled respectively, *J. B. Hayden & Co.* v. *The State*, and *Brierly* v. *The State;* in both of which, and particularly the first named, opinions of some length have been filed.

As in those cases, we are of the opinion that the evidence shows the payment of such illegal license fee to the State under what amounts in law to compulsion and duress, and under protest, and that claimant is rightfully entitled to an award for the amount so paid and herein claimed.

We, therefore, accordingly award the claimant herein, Charles W. Dunham, the sum of two hundred ($200.00) dollars.

THE SMITH-HIPPEN CO.
v.
STATE OF ILLINOIS.

Opinion filed December 29, 1906.

1. STATE—CONTRACTS—*appropriation must be available for.* In order for a State board to make a valid contract for the performance of services, it must have an appropriation available to pay for the same.

2. RECOVERY—*when none may be had.* Claimant did certain dredging in an outlet of Spring Lake, in Tazewell County, which lake and its outlet were under the control of the Canal Commissioners. The commissioners did not authorize the work. One of its members advised claimant that the board had no appropriation available, the appropriation by the General Assembly having been held invalid (*Burke v. Snively*, 208 Ill., 328). *Held*, that no liability attached against the State to pay for the dredging.

3. SPRING LAKE—*navigable when.* Spring Lake was navigable and had a natural outlet into the Illinois River until 1877, when the outlet was obstructed by the State by the construction of Copperas Creek Lock. This artificial outlet having become obstructed was dredged by the Canal Commissioners in 1890 and 1895, by authority of the General Assembly.

4. JURISDICTION—*class of claims Court may allow.* The Court of Claims is vested with authority to allow legal claims only.

Wm. A. Potts, for Claimant.
W. H. Stead, Attorney General, for State.

There is practically no controversy about the facts in this case. Spring Lake is a lake in Tazewell County that, prior to 1877, was naturally navigable and had a natural and navigable outlet into the Illinois River. In 1877 this natural outlet was obstructed and closed by the construction by the State of Copperas Creek Lock, under the authority of an Act of the General Assembly in force July 1, 1877, the State, under the direction of its Canal Commissioners, constructed an artificial outlet from the river to such lake. In 1890 such artificial outlet becoming obstructed by deposit from the river, was dredged out by the Canal Commissioners,

by direction of resolution of the General Assembly; and again in 1895, by like authority. In 1904 claimants, grain dealers and the owner of an elevator on the banks of such lake, and dependant, in the conduct of their business, on the transportation facilities afforded by such lake, its outlet and the river, and others similarly situated, called the attention of Mr. Snively, the President of the Canal Commissioners, to the fact that said outlet was again obstructed and closed to navigation by deposit from the river; and requested such board to remove such obstruction and restore its navigability. The matter was not brought to the attention of the board, as a board, at least; and the board took no action whatever in regard to the matter. But Mr. Snively, President of the board, advised claimants that the board had no money appropriated, or available for the purpose; the appropriations made by the General Assembly available for such purposes having been held invalid by the courts (see *Burke* v. *Snively*, 208 Ill., 328); that if the commissioners had the funds they would do the work; "that they (claimants) would have to try and get some other dredge boat to clean out this obstruction and take our (claimants') chances of collecting it from the State," claimant having no correspondence or conversation with the board or any of the other commissioners, and only that single conversation with Mr. Snively. Mr. Unlund of claimant's company testifying: "Q. In that conversation, then, Mr. Snively did not promise, on behalf of the Canal Commissioners, or in behalf of the State, that the Canal Commissioners, or the State would be responsible for it, is that right? A. No sir; I do not think that he promised to do that; only suggested that we should bring in our claim to the State (Court of Claims) and thought it would be allowed. He made no agreement with us that the Canal Commissioners would pay it." Under such condition claimants procured the dredging of such outlet, at a cost to them of $2,572.40, a reasonable sum for the service, so far

as shown by the evidence, and the amount for which claim is now made; claim therefore being made in due form.

The question presented is whether on this state of facts the State of Illinois is liable to claimants for such amount expended by them.

Did the State, through its Canal Commissioners, make an express contract to pay? If not, do the facts raise an implied contract?

It can be assumed that Spring Lake was under the general jurisdiction of the Canal Commissioners. But if so, did the board expressly contract for the work? Counsel for claimants do not even so contend. The matter was never before the board. The board had no appropriation available for the purpose, and this was known to claimants before they did the work. Having no appropriation, not only did the board have no authority to authorize such expenditure, but they were by positive and penal enactment expressly forbidden to authorize such expenditure. It may be taken for granted then, that not only did the board make no express contract for the work, but that they also had no power to make it.

It follows, then, we think as a plain matter of course, that the Canal Commissioners, having no power or authority to make such contract, the law will imply none. It would be subversive of all legal limitation of official acts to hold that that could be done by indirection, that could not be directly done. The law recognizes no such absurdity.

Indeed, to do full justice to claimant's counsel, he does not contend for such doctrine, but invokes the supposed equitable jurisdiction of this Court, under paragraph five of section three, of the Act creating and defining the jurisdiction of this Court, viz: "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, etc." At first blush it might appear that counsel is justified

in the position taken. It was clearly the duty of the State to have done this work. The work, so far as shown, was honestly and efficiently done for the benefit of the State. And it would seem to follow that the State is equitably bound to pay for the same. But it has been the uniform holding of this Court, that it was not the intent of the clause in question to authorize the Court to allow claims other than legal claims. The legislature is the supreme authority of the State, in the matters of the making of its laws and its appropriations; and we have not felt at liberty to arrogate to ourselves the power contended for, by virtue of the general clause in question, which would be the practical usurpation of both of those purely legislative functions. We are therefore of the opinion that claimants are not entitled to judgment.

JOHN WILDHAGEN

v.

STATE OF ILLINOIS.

Opinion filed December 20, 1906.

MILITARY SERVICE—*when award will be made.* Claimant enlisted in the Illinois National Guard and was called by the Governor to rendezvous at Springfield for service in the Spanish-American War, which he did. Upon a call of the President of the United States, claimant's company was mustered into the United States service, but as claimant's company had more members than the United States Army regulations authorized, he was rejected. The General Assembly having made an appropriation to pay such enlisted men (Session Laws 1901, p. 61), an award is accordingly made.

Alfred E. Manning, for Claimant.
W. H. Stead, Attorney General, for State.

It is shown by the petition and evidence herein that John Wildhagen, the claimant in this case, enlisted in Company B, First Infantry, Illinois National Guard, on April 25, 1898; that on April 25, 1898, said Company was called by the Governor to rendezvous at Springfield for service in the Spanish-American War; that claimant left Chicago on April 26, 1898, with his said company, and went to said place of rendezvous; that he was in camp with his said company till May 15, 1898, a total of seventeen days, in constant attendance and in the full performance of his military duties; that upon the call of the President of the United States, said regiment and company was mustered into the United States service, but that by reason of the United States Army regulations, claimant's company had more than its quota of men, and claimant was rejected from the United States service, through no fault of his, and although he had successfully passed physical and other examination, as to his fitness, both by the Federal and State authorities; that claimant received no pay for his service, either from the State or United States.

In 1901, the General Assembly, by an Act duly passed and approved, appropriated $36,000.00 for the pay-

ment of such enlisted men, who were so rejected, at the rate of two dollars per day, from the time called out until rejected. (Session Laws of 1901, p. 61.)

Such being the facts of the case, the State, through the Honorable Attorney General, under the ruling of this Court in the case of *Kruger* v. *The State*, 1 Ct. of Claims, Rep. 336, concedes claimant's right to recover, and files his consent that claimant be awarded the sum of thirty-four ($34.00) dollars, which is hereby accordingly done.

MICHAELE DI COSOLA

v.

STATE OF ILLINOIS.

Opinion filed December 19, 1908.

LICENSE FEE—*payment under void statute.* **Claimant paid a fee to obtain a license to operate a private employment agency under the Act of April 11, 1899, (Session Laws 1899, pp. 268-271), under threat of arrest which amounted to duress. The Act being later declared unconstitutional (*Mathews* v. *People*, 202 Ill., 389), he is entitled to a return of the fee so paid.**

R. De Stefano, for Claimant.
W. H. Stead, Attorney General, for State.

Michaele Di Cosola, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by him of a license fee to Honorable James A. Rose, Secretary of State, on or about March 19, 1902, for a license to operate a "private employment agency for hire" in the city of Chicago under an Act of the General Assembly pertaining thereto passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

The only question involved is whether such license fee was paid under what amounts in law to duress. It clearly appears from the evidence that claimant paid such license fee under threats of arrest by those charged with the enforcement of the supposed law. In the cases of *Adams & Tillotson* v. *The State,* and *Hayden & McCormick* v. *The State,* involving claims for license fees, paid under the Act in question under threat of arrest, as shown by the evidence herein, we have held that the threats and acts of the officers charged with the enforcement of the Act, amounted to duress; and we likewise hold in this case. Indeed, the Honorable Attorney General representing the State

herein, concedes that the awards and opinions in the two cases above cited control in this case; and consents to an award herein.

We, therefore, accordingly award claimant the sum of two hundred ($200.00) dollars.

MIKE CUCULICK

v.

STATE OF ILLINOIS.

Opinion filed December 19, 1908.

LICENSE FEE—*Di Cosola v. State ante followed.* This claim is similar to that of *Di Cosola* v. *State, supra,* and the law governing the allowance of that claim applies to this claim.

E. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

Mike Cuculick, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by him of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about March 18, 1903, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 18, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola* v. *The State,* decided by this Court at the present term, and in which an award was made in favor of the claimant; what we said and held in that case controls in this; and likewise as in that case the Honorable Attorney General consents to an award herein in the sum of two hundred ($200.00) dollars.

We, therefore, award the claimant the sum of two hundred ($200.00) dollars.

FISK TEACHERS AGENCIES
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1908.

LICENSE FEE—*Di Cosola v. State ante followed.* This claim is similar to that of *Di Cosola v. State, supra,* and the law governing the allowance of that claim applies to this claim.

E. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

Fisk Teachers Agencies, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by it of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about May 16, 1902, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Matheus* v. *The People,* 202 Ill. 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaels Di Cosola* v. *The State,* decided by this Court at the present term, and in which an award was made in favor of the claimant. What was said and held in that case controls in this; and likewise as in that case the Honorable Attorney General consents to an award herein in the sum of two hundred ($200,00) dollars.

We, therefore, accordingly award claimant the sum of two hundred ($200.00) dollars.

ALESSANDRO CONFORTI

v.

STATE OF ILLINOIS.

Opinion filed December 19, 1908.

LICENSE FEE—*Di Cosola v. State ante followed.* This case is controlled by the decision of the Court in the case of *Michaele Di Cosola* v. *State of Illinois, supra.*

R. DeStefano, for Claimant.
W. H. Stead, Attorney General, for State.

Alessandro Conforti, claimant herein, seeks to recover four hundred ($400.00) dollars on account of the payment by him of two license fees in that amount, to Honorable James A. Rose, Secretary of State, on or about January 3, 1902, and April 1, 1903, for licenses to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

The case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola* v. *The State,* decided by this Court at the present term, and in which an award was made in favor of claimant. What we said and held in that case controls in this; and likewise as in that case the Honorable Attorney General consents to an award herein in the sum of four hundred ($400.00) dollars.

We, therefore, accordingly award claimant the sum of four hundred ($400.00) dollars.

LOUIS KRAMPE
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1903.

LICENSE FEE—*Di Cosola v. State ante followed.* This case is controlled by the decision of the Court in the case of *Michaele Di Cosola v. State of Illinois, supra.*

Isaac Loeb and S. A. Ettelson, for Claimant.
W. H. Stead, Attorney General, for State.

Louis Krampe, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by him of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about April 25, 1902, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews v. The People,* 202 Ill., 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola v. The State,* decided by this Court at the present term, and in which an award was made in favor of the claimant. What was said and held in that case controls in this; and likewise as in that case, the Honorable Attorney General consents to an award herein in the sum of two hundred ($200.00) dollars.

We, therefore, accordingly award claimant the sum of two hundred ($200.00) dollars.

OSCAR A. ROSS

v.

STATE OF ILLINOIS.

Opinion filed December 10, 1908.

LICENSE FEE—*Di Cosola v. State ante followed.* This claim is similar to that of *Di Cosola* v. *State, supra,* and the law governing the allowance of that claim applies to this claim.

E. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

Oscar A. Ross, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by him of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about November 14, 1901, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly, relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People,* 202 Ill., 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola* v. *The State,* decided by this Court at the present term, and in which an award was made in favor of claimant. What we said and held in that case controls in this; and likewise, as in that case, the Honorable Attorney General consents to an award herein in the sum of two hundred ($200.00) dollars.

We, therefore, accordingly award claimant the sum of two hundred ($200.00) dollars.

LIBBIE M. SMITH
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1903.

LICENSE FEE—*Di Cosola v. State ante followed.* This claim is similar to that of *Di Cosola* v. *State, supra*, and the law governing the allowance of that claim applies to this claim.

Homer J. Galpin, for Claimant.
W. H. Stead, Attorney General, for State.

Libbie M. Smith, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by her of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about May 10, 1902, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional by the Supreme Court April 24, 1903, in the case of *Mathews* v. *The People*, 202 Ill., 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola* v. *The State*, decided by this Court at the present term, and in which an award was made in favor of the claimant. What was said and held in that case controls in this; and likewise, as in that case, the Honorable Attorney General consents to an award herein in the sum of two hundred ($200.00) dollars.

We, therefore, accordingly award claimant the sum of two hundred ($200.00) dollars.

C. J. ALBERT
v.
STATE OF ILLINOIS.

Opinion filed December 10, 1908.

LICENSE FEE—*Di Cosola v. State ante followed.* This case is controlled by the decision of the Court in the case of *Di Cosola* v. *State, supra.*

E. L. Harpham and C. W. Greenfield, for Claimant.
W. H. Stead, Attorney General, for State.

C. J. Albert, claimant herein, seeks to recover two hundred ($200.00) dollars on account of the payment by him of a license fee in that amount to Honorable James A. Rose, Secretary of State, on or about April 29, 1902, for a license to operate a "private employment agency for hire" in the city of Chicago, under an Act of the General Assembly relative thereto, passed April 11, 1899, and going into effect July 1, 1899, held unconstitutional in the case of *Mathews* v. *The People,* 202 Ill., 389.

This case is on the same state of facts and involves the same questions as in the case of *Michaele Di Cosola* v. *The State,* decided by this Court at the present term, and in which an award was made in favor of the claimant. What we said and held in that case controls in this; and likewise, as in that case, the Honorable Attorney General consents to an award herein in the sum of two hundred ($200.00) dollars.

We, therefore, accordingly award the claimant the sum of two hundred ($200.00) dollars.

PHILLIP R. CRIPPIN
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1908.

1. MILITARY SERVICE—*when award will be made.* Where a member of the National Guard, while in the performance of his duties under the command of the Commander-in-Chief is injured, the Court of Claims will make an award.

2. DAMAGES—*for loss of thumb.* Where the injury consists in the loss of a thumb, an award of six hundred ($600.00) dollars was allowed.

James Miles, for Claimant.
W. H. Stead, Attorney General, for State.

Phillip R. Crippen filed his claim the 3rd day of March, A. D. 1908, with the Auditor of Public Accounts of the State of Illinois, for the sum of twenty-five hundred ($2,500.00) dollars for an injury sustained while performing his duty as an officer and soldier. Claimant filed depositions in support of his claim. The Attorney General of the State of Illinois plead the general issue to the said claim. The said cause was argued orally by the attorneys before the Court. It appears in the declaration that the said claim has not been assigned in whole or in part.

The claimant while a regularly enlisted member of the Illinois National Guard and while at target practice under the lawful orders of the Commander-in-Chief was injured at Camp Logan Rifle Range, a State reservation for rifle practice. The said injury occurred on the 8th day of September, A. D. 1907, by the explosion of a rifle in the hands of claimant while he was firing at a target, and in the exercise of due care and caution for his own safety. The explosion of the rifle appears to have been caused by latent defect in the breech of the barrel and magazine, which occurred by reason of the crystallization of the steel which weakened this portion of the gun to such an extent that upon its dis-

charge in firing at a target, in the pursuance of military orders, the weapon burst at the point of its weakness and defect.

It appears from the evidence that no reasonable inspection would have exposed the defects which caused the bursting and subsequent injury.

It appears from the evidence that claimant, in pursuance of military orders of his superior officers, was engaged in target practice at the time of the said injury. It also appears from the evidence that claimant examined the condition of the rifle from time to time and that he was an experienced rifleman, having qualified as a sharp-shooter in 1905, and as a marksman in 1906, and that he examined the condition of the rifle from time to time immediately preceding the explosion and injury. It appears that the said rifle was not subjected to excessive or improper use. The rifle seemed to be in good condition on the day claimant was injured. Claimant states that he took precaution to clean and inspect the rifle before firing. It appears from the evidence that the arms are inspected once a year by the Federal Government.

It also appears that the rifle did not rest upon the ground between the first and second shot, which removes any question of the possibility of any foreign substance getting into the barrel. It also appears that when the second shot was fired at the target, the rifle exploded at its chamber or barrel, taking off claimant's left thumb flush with the hand, and lacerating his index finger. It does not appear from the evidence that any permanent injury resulted from the injury to the index finger. Claimant states that he was unable, from his observation of the rifle, to say what caused it to explode, except that, the steel after the explosion showed some indication of crystallization. It appears from the evidence that crystallization of the steel had occurred, but could not have been ascertained by reasonable or even close inspection. The ordnance officer of the First Infantry furnished the gun to Company C. It was issued to the State by the Government and the

Adjutant General in return issued it to the First Infantry upon receipt of Colonel Sanborn. Claimant was a commissioned officer and had been a lieutenant for about three years at the time of the accident.

The Court is of the opinion that the proof in this case clearly established a claim in behalf of the claimant against the State of Illinois, and that claimant was wounded while performing his duties as an officer and soldier in pursuance of lawful orders from the Commander-in-Chief, and is under law entitled to a claim against the State of Illinois for financial help or assistance according to the circumstances involved.

Article 11, section 4, 1908 Hurd's Revised Statutes of State of Illinois, page 2077.

Another question presents itself for consideration, which is the amount to be allowed claimant by reason of his said injury. Claimant's attorney urges in his brief under Number 8, as follows: "Aside from the damages to which claimant would be entitled in law, it is the duty of the Court of Claims to award such financial help and assistance as the merits of the case may demand."

It has been decided by the Commission of Claims of the State of Illinois in the case of *O'Donnell* v. *The State of Illinois*, page 255, that the Commission of Claims "can allow claims against the State of Illinois 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 liabilities and to sustain a recovery, it must come within the provisions of section 4, article 9, of the Military Code."

Counsel for claimant in his oral argument before the Court urged that he was unable to find a case judicially determining the value of a thumb. In *L. & N. R. R. Co.* v. *Law*, 21 Southwestern Reporter, page 648, a jury allowed two thousand ($2,000.00) dollars for the loss of a thumb. We quote from the said case the following language:

"It being the province of the jury to assess damages as well as try the facts, this Court is not authorized nor ever inclined to disturb a verdict made, or because damages may be so assessed for a greater amount than we think is entirely reasonable and just, but as the statute has made it the duty of the Court to do so whenever the condition provided for in section 340 exists, we have no right to hesitate. In this case the amount of damages assessed is so utterly unreasonable and unjust, being at least four times more than it should have been, that the verdict clearly appears to us to have been given under the influence of partiality and prejudice, and therefore cannot stand."

This was a case where the left thumb was injured, making amputation at the first joint necessary.

The item in claimant's declaration for one hundred ($100.00) dollars to Doctor William S. White for operation and medical attention, the Court is of the opinion should be disallowed, for the reason that the said William S. White was, at the time the said services were rendered, an assistant surgeon of the National Guard of the State of Illinois. It appears from the evidence that the duties of the said assistant surgeon is to look after the general welfare of the command and take care of the sick and injured whenever ordered. The said surgeon received a military order from the captain of Company C to attend the claimant, and that the order was given because claimant had been injured while at target practice as aforesaid. The said item of one hundred dollars is disallowed.

From anything that appears in the record the claimant's earning capacity has not been impaired. It is true there is some evidence that it will be more difficult for the claimant to secure employment. It appears that claimant is employed as cashier of the Illinois Tunnel Company, telephone department, and that he is chief clerk and cashier. It does not appear from the evidence that claimant is unemployed by reason of his injury, or that he is receiving less pay per diem

or less salary as a result of the said injury. It may be inferred from the evidence that the injury to the said claimant is one that will still leave him able to earn as much, in many occupations as he was earning before the injury. The Court is of the opinion that it should take into consideration claimant's earning capacity in arriving at the amount of damages to be allowed.

Claimant's attorney refers to *Green* v. *The State*, 1 Court of Claims Reports, 173, as follows:

"It appears in that case that Green, in obedience to orders while 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 that he was using exploded and greatly lacerated and wounded his hand, nearly tearing off his thumb, by which 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 and earning a livelihood, and that he was permanently injured so that his ability to earn a livelihood has been materially decreased."

The injury in the said case appears to have been more serious than the injury which we are now considering, and it also appears that the claimant in the case cited suffered greater permanent disability.

The Court is of the opinion, after a careful consideration of all the evidence and facts presented, that six hundred ($600.00) dollars would be a reasonable award to the claimant in full of his claim against the State of Illinois, by reason of the said injury, for financial help and assistance, according to the merits of his claim.

The claimant is therefore awarded by the Court the sum of six hundred ($600.00) dollars, in full payment of the said injury.

HOME LIFE INSURANCE COMPANY OF NEW YORK
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1908.

1. INSURANCE—*statute with reference to foreign life companies.* This is a claim to recover certain moneys paid to the State of Illinois by claimant, upon premiums collected by it on life insurance policies in this State during the years 1902-1903 and is based upon sec. 200, chap. 73, Hurd's Rev. Stat., relating to Life Insurance, which provides that,

"whenever the existing or future laws of any other state of the United States shall require of life insurance companies, incorporated by or organized under the laws of this State and having agencies in such other state, * * * any payment for taxes, fines, * * * license fees or otherwise, greater than the amount required for such purposes from similar companies of other states, by the then existing laws of this State, then and in every such case, all life insurance companies of such states, * * * shall be and are hereby required * * * to pay to the Auditor, for taxes, fines, * * * license fees or any other obligation, an amount equal to the amount of such charges and payments imposed by the laws of such other state upon the companies of this State * * *."

2. RETROACTIVE OPERATION OF STATUTE—*construction by State official.* The New York Statute provided that all life insurance companies,

"incorporated, organized or formed under, by or pursuant to the laws of any other state of the United States and doing business" in the State of New York, as well as all domestic companies, should pay

"an annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this State, equal to one per cent on the gross amount of premiums received during the preceding calendar year for business done,"

in that state. The Comptroller of Insurance of New York construed the above statute to the effect that the tax was to be levied on all premiums received during the year, irrespective of whether the premiums were collected on policies issued before or after the act went into effect. The Superintendent of Insurance of Illinois followed the construction placed upon said statute by the Comptroller of Insurance of New York, and held that the claimant should pay to the State of Illinois a one per cent tax upon premiums received

by claimant in this State, and thereupon claimant paid said tax. Later the Court of Appeals of New York, in the case of *People ex rel., Provident Savings Life Assurance Society* v. *Miller, State Comptroller*, 179 N. Y., 227, held, that as to domestic corporations, the tax was limited to premiums collected on policies issued subsequent to the Act going into effect. Claimant, after the above decision had been rendered, contended that the payments were illegal and should be refunded.

3. MISTAKE OF LAW—*defined.* A mistake of law is an erroneous conclusion as to the legal effect of known facts. The construction of words is a matter of law. (*Purvines* v. *Harrison*, 151 Ill., 219.) A mistake of law is one which occurs when a person is truly acquainted with the existence or non-existence of facts, but comes to an erroneous conclusion as to their legal effect. (30 Cyc., 1315.)

4. SAME—*voluntary payment under—no recovery.* The tax having been paid voluntarily, under a mistake of law, and not under a mistake of fact, no recovery may be had. (*Yates* v. *Royal Insurance Co.*, 200 Ill., 202; *Elston* v. *City of Chicago*, 40 Ill., 514; *People* v. *Miner*, 46 Ill., 274; *Swanston* v. *Ijams*, 68 Ill., 165; *Otis* v. *People*, 196 Ill., 542; *Walser* v. *Board of Education*, 160 Ill., 272.)

5. SAME—*voluntary payment under unconstitutional statute—no recovery.* Where a payment is made voluntarily under a statute which is later held to be unconstitutional, there can be no recovery. (*Yates* v. *Royal Insurance Co., supra.*)

6. SAME—*payment under mistaken belief—no recovery.* Payment of money into the treasury of this State under the belief that there was then in existence a particular statute of another state which exacted a tax similar to the statute of this State, is not a mistake of fact; neither is a mistake as to a foreign law a mistake of fact.

7. PRESUMPTION—*of law.* Every person is presumed to know the law in the country where he dwells.

8. CORPORATION—*situs of.* A corporation is a citizen, resident and inhabitant of the state by or under which it was created and of that state only, even though it may be doing business in another state and have part or all of its property there.

9. FOREIGN LAW—*defined.* A foreign law is a law foreign to the residence of the individual making the mistake. (*Marshall* v. *Coleman*, 187 Ill., 556.)

10. RECIPROCAL LAW—*when operative.* The reciprocal law of Illinois has no force or effect until some other state has passed a law taxing Illinois corporations, and then it becomes effective to tax the companies of such other state in the same manner in this State.

11. JUDICIAL NOTICE—*taken of what.* Courts take judicial notice of the construction placed upon a law of a sister state by the courts of that state. (*McDeed* v. *McDeed*, 67 Ill., 545; *Hoes* v. *Van Alstyne*, 20 Ill., 202.)

12. JURISDICTION—*class of claims Court may allow.* Claimant finally contends that on equitable principles it is entitled to recover. The allowance of legal and equitable claims is governed by legal principles. Equity follows the law.

Isham, Lincoln and Beale, for Claimant:

LIQUIDATED CLAIM—what constitutes.

Hairston v. *Sumner*, 17 Southern, 709; *Jones* v. *Hunt*, 74 Texas, 657, 12 S. W., 832; *Kennedy* v. *County of Queens*, 47 N. Y. App. Div., 250, 261; *Chicago, etc., Ry. Co.* v. *Clark*, 92 Fed., 968, 985; *Roberts* v. *Prior*, 20 Ga., 561; *Clark* v. *Dutton*, 69 Ill., 521; *Charnley* v. *Sibley*, 73 Fed., 980, 982; *Krueger* v. *State*, Vol. 1, Ill. Court of Claims Reports, p. 336.

Statute of limitations does not run until mistake is discovered.

McIntosh v. *Saunders*, 68 Ill., 128; *Gordon* v. *Johnson*, 186 Ill., 18, 31; *Board of Supervisors* v. *Winnebago, etc.*, 52 Ill., 299; 2 Story's Equity Jurisprudence, Par. 1521a.

W. H. Stead, Attorney General, and George B. Gillespie, for State:

A claim is liquidated when the amount due is fixed by law or has been ascertained and agreed upon by the parties, unliquidated when it has not been so settled.

Chicago, R. I. & P. Ry. Co. v. *Mills*, 69 Pac., 317; *Commercial Union Assurance Co.* v. *Meyer*, 29 S. W., 93; *Jones* v. *Hunt*, 12 S. W., 832; *Mitchell* v. *Addison*, 20 Ga., 50; *Hargraves* v. *Cooke*, 15 Ga., 321; *Kennedy* v. *Queens Co.*, 62 N. Y. Supp., 276, 47 App. Div., 250; *Kercheval* v. *Doty*, 31 Wis., 476; *Treat* v. *Price*, 66 N. W., 834; *Continental Ins. Co.* v. *Chase*, 33 S. W., 602; *Clark* v. *Dutton*, 69 Ill., 521; *Ostrander* v. *Scott*, 161 Ill., 339; *Warner* v. *Tyler*, 81 Ill., 15; *Underhill* v. *Gaff*, 48 Ill., 198.

Where a tax is voluntarily paid with knowledge of the facts, there can be no recovery.

Walser v. *Board of Education*, 160 Ill., 272; *Elston* v. *City of Chicago*, 40 Ill., 514; *The People* v. *Miner, Auditor*, 46 Ill., 374; *Swantson* v. *Ijams*, 63 Ill., 165; *Falls* v. *City of Cairo*, 58 Ill., 403; *Otis* v. *The People*, 196 Ill., 542; *Yates* v. *Royal Insurance Co.*, 200 Ill., 206

Ignorance of the law is no excuse.
Marshall v. *Coleman*, 187 Ill., 556, 581.

This is an action to recover back money paid by claimant to the State of Illinois on January 31, 1903, and February 3, 1904, as a tax upon its premium receipts from business done in the State of Illinois, during the years of 1902 and 1903, upon policies issued by claimant prior to January 1, 1902.

Claimant, The Home Life Insurance Company, is a New York corporation, having been incorporated under the laws of that State in 1860, and having done business in the State of New York since its incorporation, and in the State of Illinois for over 30 years.

Section 200, chapter 73, of the Statutes of Illinois, relating to life insurance, provides that "whenever the existing or future laws of any state of the United States * * * shall require of insurance companies incorporated by or organized under the laws of this State and having agencies in such other state, * * * any payment for taxes, fines, * * * license fees or otherwise, greater than the amount required for such purposes from similar companies of other states, by the then existing laws of this State, then and in every such case all companies of such states shall be and are hereby required * * * to pay to the Auditor, for taxes, fines, * * * license fees and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such state upon the companies of this State."

On March 16, 1901, the legislature of the State of New York passed and the Governor approved a law, the same going into full force and effect on October 1, 1901, which provided that all life insurance companies "incorporated, organized or formed under, by, or pursuant to the laws of any other state of the United States and doing business" in the state of New York, as well as all domestic companies, should pay "an annual state tax for the privilege of exercising corporate franchises or for carrying on business in their

corporate or organized capacity within this State, equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done" in that state, said tax to be paid annually into the State treasury on or before the first day of June.

The Comptroller of Insurance of New York construed the above statute to mean that the tax was to be levied on *all* premiums received during the calendar year, irrespective of whether such premiums were collected on policies issued before or after the Act went into effect.

The Superintendent of Insurance of Illinois followed this construction and prepared printed notices, one of which was sent claimant, under date December 16, 1901, to the effect that there would be due the State of Illinois, from the claimant, "a tax of one per cent on premiums received by claimant, for business done in the State of Illinois during the year 1902," that "the law required these fees and taxes to be paid as a condition precedent to doing business in this State, and that therefore it was absolutely necessary that draft be forwarded" for the same.

Claimant promptly complied with the request of the Superintendent of Insurance and, without any word of protest or complaint of any kind, on January 31, 1903, forwarded to the superintendent a draft, $2,173.86 of the amount of which represented the one per cent of the premiums received by claimant on business done in the State of Illinois for the year 1902.

Subsequently, on February 3, 1904, claimant forwarded to the Superintendent of Insurance the sum of $2,343.87, being one per cent of the premiums received for the year 1903, and on January 27, 1905, the further sum of $2,407.72, premiums for the year 1904. The only notice sent the claimant by the superintendent was the one of December 16, 1901.

In October of 1904, the New York Court of Appeals, in the case of the *People ex rel Provident Savings Life*

Assurance Society v. *Miller, State Comptroller*, reported in the 179 N. Y., 227, construed the New York statute differently from the construction placed upon it by the Comptroller and in so doing reversed the Appellate Division.

The case of *People ex rel. Provident Savings Life Assurance Society* v. *Miller* was one where the relator was a corporation, incorporated under the laws of New York and hence, as to that state, a domestic corporation. The Comptroller had assessed said corporation for the year 1901 upon the entire amount of its premium receipts for that year. The Court of Appeals, by a divided Court, two of the five judges dissenting, held that, as to domestic corporations, the tax must be limited to new policy premiums, commencing with those collected during the calendar year 1902, and not upon premiums derived from contracts made prior to January 1, 1902.

Claimant therefore alleges that of the amount of tax paid by it, under the reciprocal law of Illinois to the Superintendent of Insurance of Illinois, in January of 1903 and in February of 1904, upon the business done by it in the State of Illinois, for years 1902 and 1903, respectively, that $1,902.16 paid in 1903 and $1,732.67 paid in 1904, was paid on premiums on policies issued prior to January 1, 1902, and that the said amounts, under the judicial construction of the New York Act of 1901, by the New York Court of Appeals, was an overcharge, was illegally collected and should be paid back, by the State of Illinois, with interest thereon from date of payment.

Claimant made demand upon the Superintendent of Insurance of Illinois for the return of said amounts and upon his refusal to so do, brings its claim before this Court.

Since the filing of this claim, the New York legislature, on March 23, 1905, passed an amendatory Act to the Act of 1901, providing for an annual tax of one per cent "on the gross amount of premiums received during the preceding calendar year for business done"

at any time, in that state, "including all premiums received during such calendar year, on all policies issued or delivered in all years prior to such preceding calendar year."

In *Connecticut Mutual Life Insurance Co.* v. *Kelsey*, 101 N. Y. Supp., 902, the Appellate Division of the New York Court, construed this amendatory Act to require foreign insurance companies doing business in New York to pay said tax upon all premiums collected by said companies in the year 1904, on all policies in force in that state, whenever issued. This opinion has been affirmed by the New York Court of Appeals in 188 N. Y., 541, and claimant therefore makes no claim for a refund or recovery of any portion of the tax paid by it in 1905 to the Superintendent of Insurance of Illinois, on premiums collected in 1904.

It may be said in the outset, that no question of payment under compulsion or duress is urged by claimant in this case, and no evidence of duress appears in the record. Claimant received in December of 1901, from the Superintendent of Insurance of Illinois, notice that the tax in question, on premiums for the year 1902, would be due. Said tax was not due, if due at all, under the New York law until June 1, 1903. The Illinois statute does not require an annual report to be filed until March first. Claimant sent draft for said tax on January 31, 1903, making no protest or complaint about the payment of the tax. In answer to the question, "What reply, if any, did your company make to claimant's exhibit No. 1?" (referring to the notice sent by the Illinois Superintendent), Mr. Marshall, the actuary for claimant, replied, "No reply, except the practical one of paying the tax." The tax on premiums for the year 1903 was not due until June 1, 1904, nor the Illinois report until March 1, 1904. Claimant forwarded same February 3, 1904, on its own motion, without notice from the Superintendent of Insurance of Illinois. The payment therefore was clearly a voluntary one in both cases and the question here is not one as to duress, but

whether claimant can recover back a tax voluntarily paid under mistake, whether of fact or law.

It may next be noted that if the said payments were made by claimant under a mistake of law, there can be no recovery back in this case, of payments so made. This proposition is so elementary and so well established in Illinois, as well as in all other jurisdictions, that citation of authority is hardly necessary. The case of *Yates* v. *Royal Insurance Co.*, 200 Ill., 206, is particularly in point, it being a case where payments were made to the Superintendent of Insurance of Illinois, under a law which was subsequently held to be unconstitutional. So also *Elston* v. *City of Chicago*, 40 Ill., 514; *People* v. *Miner*, 46 Ill., 374; *Swantson* v. Ijams, 63 Ill., 165; *Union Building Association* v. *City of Chicago*, 61 Ill., 439; *Otis* v. *People*, 196 Ill., 542; *Walser* v. *Board of Education*, 160 Ill., 272.

But claimant bases its right to judgment in this cause on the ground that the mistake under which it labored was a mistake of fact and not a mistake of law, and that money paid under a mistake of fact can be recovered back in a proper action. In maintaining this position, claimant's counsel indulge in an exceedingly ingenious argument and predicate it upon two theories: First, that it paid the alleged excess tax under a belief that there was a New York law levying such a tax on foreign companies, that subsequently the New York Courts held that there was no such law and that claimant's mistake was a mistake of the fact of the existence of such a law; and second, that claimant's mistake was of a New York law, that the New York laws are foreign laws as to Illinois, where the transaction was had, and that a mistake of a foreign law is a mistake of fact.

In order to intelligently discuss these propositions, let us see just what the New York legislature and the New York courts did, and what the nature of the mistake was that claimant made.

The New York legislature passed a law levying a tax equal to one per cent "on the gross premiums re-

ceived during the preceding calendar year, for business done" in the state of New York by both domestic and foreign concerns. The passage of this law in March, 1901, its approval by the Governor and its becoming operative October 1, 1901, are facts concerning which claimant or no one else made a mistake.

The language of the law indicated that the legislature intended to levy the tax on *all* premiums received by companies, during the calendar year, from *all* policies issued by them, irrespective of whether the policies were issued before or after the passage of the law. The Comptroller of New York so construed it and so levied the tax. Claimant followed the Comptroller's construction and paid the tax, according to this construction, both to the Comptroller of New York, on premiums received in New York, and to the Superintendent of Insurance of Illinois, on premiums received on policies in Illinois, and this without complaint or protest.

The Provident Assurance Society, likewise a New York concern, however, refused to follow this construction and filed a suit in the courts of New York to have the law construed. The Appellate Division held the Comptroller's construction to be the correct one. On appeal to the Court of Appeals, this Court of last resort, by a divided Court, two judges dissenting, reversed the Appellate Division and construed the law to mean that only such premiums should be taxed as were received during the calendar year, upon policies issued on and after January 1, 1902.

It will thus be seen that the entire question here was what was the proper construction and interpretation of the law. It was a matter of construction. Claimant construed it one way. The Court construed it another. Claimant misconstrued and misapprehended the meaning of the law. Claimant made no mistake as to the fact of the passage of the law or the fact that the law was in existence, but made its mistake as to the proper interpretation and legal effect of that law.

A mistake of law is an erroneous conclusion as to the legal effect of known facts. The construction of words is a matter of law. *Purvines* v. *Harrison*, 151 Ill., 219, 223. A mistake of law is one which occurs when a person is truly acquainted with the existence or non-existence of facts, but comes to an erroneous conclusion as to their legal effect. 30 Cyc., 1315.

Claimant's argument, that because it believed there was a law in New York taxing premiums on policies issued prior to 1902, that the New York courts subsequently held that the law in force taxed premiums only on policies issued on or after January 1, 1902, and not on policies issued prior to 1902, that therefore there was no law taxing premiums on policies issued prior to 1902, and claimant believing there was such a law, made a mistake of fact and not of law, is purely specious and untenable.

As well might it be said that a tax paid under a law subsequently held unconstitutional was a mistake of fact. In fact, more so, for when a statute is held unconstitutional the authorities all hold that the effect is to render the statute null and void, *ab initio*, from date of enactment, as if there had never been such a law. 8 Cyc., 804.

But the case of *Yates* v. *Royal Insurance Co., supra*, was just such a case. The Royal Insurance Co. believed there was a law in Illinois taxing premiums and paid under that belief; the Illinois Supreme Court held the law under which said tax was paid unconstitutional, and hence null and void, *ab initio*, but our Court held that a tax voluntarily paid under an Act subsequently held unconstitutional is a mistake of law, and not of fact, and cannot be recovered back.

On the proposition of the construction of a law, *Elliott* v. *Swartwout*, 10 Pet., 137, is in point. This was a case where excessive tariff duties were exacted by a collector of import duties, on certain shawls. The collector, in his construction of the provisions of the tariff Act, classified the shawls as manufactures of wool.

Suit was brought to recover back from the collector the excess of duty paid, on the ground that the shawls should have been classified as worsted, the rate on worsteds being lower than the rate on wools. The Court construed the tariff act in such a way as to make the proper classification of the shawls as worsteds, but held that the excess, being voluntarily paid, under a mistake of law, could not be recovered back. The Court say:

"The collector has received the money in the ordinary and regular course of his duty, and has paid it over into the treasury and no objection made at the time of payment. This presents the case of a purely voluntary payment, without objection. It is to be considered as a voluntary payment by mutual mistake of law. The construction of the law is open to both parties and they are each presumed to know it. Any instruction from the Treasury Department could not change the law or affect the rights of plaintiff. He was not bound to take and adopt that construction. He was at liberty to judge for himself and act accordingly. * * * The case put in question is one where no suit would lie at all. It is a case of a voluntary payment under a mistake of law and the money paid into the treasury."

Again the Court say: "There are many doubtful questions of law. When they arise defendant has an option to litigate the question or submit to the demand and pay the money. But it would be most mischievous and unjust if he, who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money. This doctrine is peculiarly applicable to a case where the money has been paid over to the public treasury, as in the question now under consideration."

In *Healey* v. *United States,* 29 U. S. Court of Claims, 115, the U. S. Court of Claims held that "where the law is unsettled, and in doubt, money paid in mistake of its true construction may be considered in the nature

of a compromise and cannot be recovered back." See also *DeBow & Co.* v. *U. S.*, 11 U. S. Court of Claims, 672.

In view of the authorities cited and the facts in this case, we are of the opinion that the mistake made by claimant was a mistake in the interpretation, construction and legal effect of the New York law, not of the fact of the existence of the law, and to that extent was a mistake of law.

But again, claimant contends that as the payment was made in Illinois, under a mistake of a New York law, that the New York law was, as to the place of transaction, a foreign law and that a mistake of a foreign law is a mistake of fact.

It is conceded that claimant was a New York corporation, incorporated and organized under the laws of New York. "The status of a corporation is determined by the place of its origin." 19 Cyc., 1204. "A corporation is a citizen, resident and inhabitant of the state by or under which it was created and of that state only, even though it may be doing business in another state and have part or all of its property there." 19 Cyc., 1219, and authorities there cited. Claimant was therefore a resident of New York.

It is also a well established principle that "every person is presumed to know the law of the country in which he dwells or resides." 16 Cyc., 1083 and cases cited. "All persons subject to a law are irrebuttably presumed to know what it is." Wharton on Civil Evidence, 3 Ed., 1240. Claimant resided in New York and was presumed to know the law of that state. There is also no question that as a domestic insurance corporation in New York, claimant was "subject" to the law in question, for the same law which taxed foreign companies taxed domestic companies as well. Claimant was amenable to that law and complied therewith. It was then presumed to know this law and the presumption is "irrebuttable."

Claimant construes the term "foreign law" to mean a law foreign to the *locus* of transaction. What it seeks here to take advantage of is the rule that a mistake of a foreign law is a mistake of fact. What then is the meaning of the term "foreign law" as here used? Foreign as to whom? Obviously, foreign as to the person making the mistake, who is seeking to recover back what was paid under such mistake and not foreign to the place of transaction. Claimant made the mistake in this case. How then can it be said that claimant made a mistake of a law foreign to it, when its mistake was of the law of its own state?

In the case of *Marshall* v. *Coleman*, 187 Ill., 581, our Courts have substantially construed the term "foreign law," in this connection, to mean a law foreign to the residence of the individual making the mistake. In that case Mrs. Coleman had an inheritance and rights to property in Illinois. The Illinois property was the subject matter of the proceedings, which proceedings were held in Illinois, yet our Court held that, "being a resident of Colorado she was not affected with knowledge of the statutes of Illinois, in which State she did not reside." Place of residence of the individual, who made the mistake, was here made the criterion as to what was a foreign law. Why should not the same rule apply to claimant in the case at bar?

The reciprocal law of Illinois has no force and effect until some other state has passed a law taxing Illinois concerns, and then it becomes effective to tax the companies of such other states in Illinois in the same manner. The tax is levied upon corporations of such other states, upon their business in this State. It is based upon the presumption that the corporations, in such other states, come into Illinois with full knowledge of the law of their own state and with knowledge of what their own state taxes Illinois companies, doing business in their state, and that, if they propose to tranasct business in Illinois, they will be subject to the same tax in Illinois that their own state levies on Illinois

concerns, and this as a condition of their entrance to this State to transact business. The reciprocal law of Illinois deals with foreign companies as such, is directed solely against foreign concerns and has no other object.

In this entire transaction, claimant's status is that of a New York corporation. If it had not been a foreign corporation, it would not have been taxed. Even though the transaction in part occurred in Illinois, claimant's character in the transaction is that of a corporation incorporated in New York and the application of any law to claimant, in this matter, must of necessity be an application to claimant in its capacity as a New York corporation. As a New York corporation, it must then be charged with knowledge of the laws of New York, and any mistake as to that law is a mistake of the law of its own state and therefore a mistake of law.

It would be stretching a technicality to its utmost to say that claimant, coming into this State as a foreign corporation, being allowed the privileges of this State as a foreign corporation, by laws of comity, being taxed as a foreign corporation for the reason that the laws of its own state tax foreign corporations there, should be allowed, in a transaction of this kind, to divest itself of its character, as a foreign corporation and place itself on the plane of a domestic corporation, in order that it may take shelter under the rule that a mistake of a foreign law is a mistake of fact.

Claimant argues, in this connection, that "suppose claimant had refused to pay the tax and some action had been brought to determine whether the Illinois law required the payment of the tax on gross receipts; to prove that the tax was due it would have been necessary to give evidence of the New York statute as of any other fact," and concludes that if the Court itself is not presumed to know the New York law, how is claimant presumed to know it?

This would depend upon the forum where the action was brought. If in Illinois, this might be true; but if brought in New York, claimant would not be claiming there that the New York Act was a foreign law or that claimant was not presumed to have knowledge of the Act, neither would it be necessary to introduce proof of it, for the New York courts would take judicial knowledge of the law.

But claimant contends that the transaction was had in Illinois, and that in Illinois proof of a New York statute must be made as a fact. But, as we have already shown, claimant's mistake in this case was not a mistake of the fact that there was a New York statute taxing premiums on policies, but its mistake was as to the interpretation, construction and legal effect of that statute. Proof of the statute would, it is true, have to be made in an Illinois proceeding, as a fact, but not so, as to the construction and interpretation placed upon it by the New York courts. The Illinois courts would take judicial knowledge of the construction of the law as given by the New York courts.

"Courts have uniformly taken notice of the construction given to foreign statutes, by foreign tribunals; and to enable them to do this, they always have been in the habit of looking to the reports of such tribunals." *McDeed* v. *McDeed*, 67 Ill., 545; *Hoes* v. *Van Alstyne*, 20 Ill., 201.

Again, it should be noted that even if, in the first instance, in a legal proceeding in Illinois, the taxing statute of New York would have had to be proven as a fact, that, as soon as so proven as a fact, it then and thereupon becomes, in effect, the law of Illinois. In ordinary cases, where proof is made of foreign statutes, the foreign statute is a fact before proof and remains and continues, after proof, to be a fact for all time and for all purposes. But under our reciprocal law, the fact once proven is incorporated into and in effect becomes the Illinois law.

Referring to the reciprocal statute of Illinois, our Court, in *Germania Ins. Co.* v. *Swigert*, 128 Ill., 246, say: "The manifest purpose of this enactment is to restrict insurance companies of other states in doing business in this State, by precisely the same restrictions with which insurance companies of this State are restricted in such other states, and so, necessarily, our law must read, with respect to insurance companies of Louisiana doing business in this State, in the exact language and meaning of the law of Louisiana, with respect to insurance companies of other states doing business in that state."

In *Talbott* v. *Fidelity Co.*, 74 Md., 536, in construing the reciprocal insurance law of Maryland, with reference to the New York law, the Court say: "When the New York statute imposes an obligation or a prohibition not found in ours, that obligation and prohibition must be treated as if found in so many words in our statute and enforced accordingly. Our statute makes the New York law our law, to control the action of our Commissioners of Insurance."

In any view of the case taken, we are of the opinion that claimant made payment of the alleged excess taxes, in this case, under a mistake of the construction, interpretation and legal effect of a law of the State, in which claimant resided, and hence its mistake was a mistake of law.

But a still more serious feature of this case has not been adverted to either in the briefs of claimant or of the State. The reciprocal law of Illinois has to do only with the question of whether or not the laws of other states tax Illinois corporations doing business in those states. For the purpose of our reciprocal statute, it is immaterial whether or not the New York law taxes its own corporations but the all-important question here is: Did the New York law provide for a tax upon premiums upon policies issued prior to January 1, 1902, by Illinois and other corporations foreign to New York?

That in the case of *People ex rel Provident Savings Life Assurance Society* v. *Miller*, the New York Court of Appeals held that the New York law did not apply to premiums on policies issued prior to 1902, by domestic insurance corporations, is conceded. But has it even passed upon that proposition, with reference to companies foreign to New York? Has that feature of the law as yet received judicial construction?

The Provident Assurance Society was a domestic concern incorporated in New York, and the question before the New York Court was purely with reference to domestic companies. In fact, the Court in its opinion takes pains to differentiate between the application of the law to domestic and foreign concerns, and bases its differentiation upon the differentiation mentioned in the New York law.

Domestic corporations, in a state, transact business by virtue of their corporate franchises; foreign corporations by virtue of the laws of comity.

The New York law levied the premium tax on domestic companies, as the law specifically states, "for the privilege of exercising corporate franchises." It levied the tax on foreign companies, not for the privilege of "exercising corporate franchises," but for the privilege of "carrying on business in their corporate organized capacity within the State." In this regard, domestic and foreign corporations were placed on a different footing.

The Court, in its opinion, holds that domestic corporations cannot be taxed on premiums on policies issued by domestic concerns prior to 1902, because such premiums were collected on "past contracts," which "did not depend upon the exercise of the franchises." This is the basic principle of the opinion and it has reference, and reference alone, to the case of domestic corporations, to the exclusion of foreign concerns.

The Court say: "The tax is purely a franchise tax, and nothing else," as to domestic corporations. The

tax imposed for carrying on business in their corporate organized capacity, (quoting the language of the statute) applies only to foreign corporations deriving their franchises from other sovereignties.

The Court does not say whether a tax on premiums received from policies issued prior to 1902, by foreign concerns, such tax being for the privilege of "carrying on business within the State," is a proper tax or not. It *might* or it might not be. It does not follow from analogy from the opinion rendered, in the case of domestic concerns. The conditions are different. The Court did not adjudicate this question. It has never adjudicated it. It remains just where it was when claimant paid its tax to the Superintendent of Insurance of Illinois.

We have not undertaken to discuss the authorities cited by claimant, from other jurisdictions than our own, the proposition of law here involved being variously construed in the various jurisdictions, some holding to the rule rigidly, and others to varying extents, modifying the same.

In Illinois the rule has been most rigidly and strictly enforced. In fact, our authorities have gone so far as to hold that where a tax has been levied without any authority of law whatsoever and paid voluntarily, with a full knowledge of the circumstances under which it was demanded, it cannot be recovered back. *Elston* v. *City of Chicago*, 40 Ill., 514.

A school district which has collected its full tax levied cannot recover from another district taxes collected by it upon lands within the former, through a mistake of the clerk as to the location of the lands, although the rate per cent of tax as extended in the former was thereby made greater than it otherwise would have been. *Walser* v. *Board of Education*, 160 Ill., 272.

Taxpayers in one school district, who voluntarily pay a tax, levied by mistake upon their lands to another district, cannot recover back the same, where the books were kept open and means of knowledge of all the facts

existed, although they supposed they were paying the tax of the district in which their lands lay. *Walser* v. *Board of Education, supra.*

With reference to the question raised of claimant's equitable position for recovery, it need only be said that in the application of the rule herein discussed, equity follows the law. *Upton* v. *Tribilcock*, 91 U. S., 45; 30 Cyc., 1314, and authorities cited.

In view of the facts in this case and the authorities applicable thereto, we are of the opinion that the alleged excess payments made by claimant to the Superintendent of Insurance of Illinois, under the operation of the reciprocal law of Illinois, cannot be recovered back and the claim is therefore rejected.

EDWARD J. LEBEAU
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1908.

1. MILITARY SERVICE—*when recovery may be had.* Claimant was injured while in performance of his duties in the military service of the State at Camp Lincoln. *Held*, that claimant is entitled to an award for loss of time.

2. EXPENSES—*what are proper.* Expense of a private room in a hospital is a reasonable expense to be included in the claim.

3. SAME—*what are not proper.* Expenses of a special diet, fruit, flowers, laundry and clothing are not proper items of expense to be included in the claim.

4. DAMAGES—*what may be considered in measuring.* Impaired health, earning capacity, mental worry, anguish and permanent disfigurement of body may be considered in determining the amount of an award.

Frank J. Burns, for Claimant.

W. H. Stead, Attorney General, for State.

Edward J. Lebeau, claimant in the above entitled cause, filed his claim on the 23rd day of April, A. D. 1908, with the Auditor of Public Accounts of the State of Illinois, for the sum of seven hundred three dollars and eighty cents ($703.80), which claim by leave of Court was amended to nine hundred three dollars and thirty cents ($903.30). The Attorney General of the State of Illinois plead the general issue to the said claim and amendment. The said claimant filed depositions in support of his claim.

The said claimant seeks to recover damages by reason of the alleged serious injuries received while in the military service of the State of Illinois, on or about the 3rd day of July, A. D. 1906, at Camp Lincoln, near Springfield, Illinois, where the said Lebeau was in the actual performance of his duties under military orders from his superior officers at the annual encampment of the Third Infantry, Illinois National Guard.

The claimant, on the 16th day of May, A. D. 1906, at twenty-three years of age, enlisted as a soldier in Company L of the Third Regiment of Infantry, Illinois National Guard, for the term of three years, at Kankakee, Illinois, and was a member of the said company under the rank of corporal, at the time of the said injury.

The said claimant was under military orders of his superior officers and was in charge of the stable detail on the 3rd day of July, 1906, when the said injury occurred. It was the claimant's duty under the said orders to transfer the horses from the stable detail located in the rear of the quarters of the field officers of said regiment at Camp Lincoln to the picket line, about a quarter of a mile distant, to the place of drill and ceremony, for the use of the superior officers. In pursuance of his said duties, while riding one horse and leading two other horses to the aforesaid picket line from the stable detail, and while in the exercise of due care and caution for his own safety, one of the horses he was leading suddenly became frightened and pulled said Lebeau backward with such force and violence that he was then and there ruptured. Being severely injured, he was assisted by several soldiers to the camp hospital at said Camp Lincoln and was taken from there under military orders to the emergency hospital at Kankakee, Illinois, for proper medical attention, and where Captain R. C. Bourland, Assistant Surgeon of the Third Infantry, Illinois National Guard, acting under military orders of his superior officers, performed a necessary surgical operation on the said claimant for inguinal hernia. The operation is regarded as a major operation. Claimant remained at the said hospital for a period of about five weeks and was confined to his bed the major portion of that time and did not recover sufficiently to resume work at his usual trade, which was that of a carpenter, nor to perform work of any kind until about the first day of October, A. D. 1906, and was therefore by reason of

the said injuries rendered incapable of following his usual occupation from the third day of July until about the first day of October, A. D. 1906. The record in this case tends to show that the said operation was entirely successful, and that the claimant fully recovered from the effects of the said injury and the said operation. Said Captain Bourland was assisted in the said operation by Doctors G. H. Lee and J. H. Kanaga, of Kankakee, Illinois.

The item in claimant's bill of particulars for six hundred forty-eight (648) hours loss of time at thirty-five ($.35) cents per hour, the wages received per hour, and for loss of overtime estimated at sixty (60) hours at fifty-two and one-half ($.52½) cents per hour, the wages received per hour for overtime, making a total of two hundred fifty-eight dollars and thirty cents ($258.30), the Court is of the opinion has been established by the evidence and should be allowed. The said overtime clearly represents a part of the claimant's earning capacity.

Section 4, article XI, chapter 129, Revised Statutes of Illinois.

Referring to the expense item in claimant's bill of particulars for two dollars per week for five weeks, amounting to ten ($10.00) dollars, for a private room for claimant while in the said hospital, the Court is of the opinion that said item is a reasonable expense and materially added to the comfort and aided in the speedy recovery of the claimant and should be allowed in his behalf.

Referring to the item in claimant's bill of particulars for forty ($40.00) dollars to father and sister by reason of special diet, fruit, flowers, laundry, clothing and supplies, the Court is of the opinion after a careful examination of the record that the said item of forty ($40.00) dollars should be disallowed, as it is clearly established by the record in this case that the said hospital furnished all proper and necessary diet for the claimant, and that the fruit and flowers fur-

nished were luxuries and so far as the evidence discloses the item of laundry, clothing and supplies are not matters which can be charged against the State. It would seem that this item is entirely of a personal and affectionate nature and what was advanced to the claimant by his said father and sister not of a personal nature, was, as a matter of kindness and affection, and cannot properly be charged as an item of expense against the said State. The said item is therefore disallowed.

Referring to the item in claimant's bill of particulars for the alleged difference in wages from Christmas, 1906, to July 1, 1907, by reason of claimant being forced to abandon the trade of carpenter and accept employment of a less laborious nature, which was also a dollar and a quarter per day less remunerative, the said loss is therein estimated as being one hundred fifty-six (156) actual working days at a loss of one dollar and twenty-five cents ($1.25) per day, amounting to a total loss of one hundred ninety-five ($195.00) dollars.

With reference thereto, claimant states in his testimony, that he was examined by a physician since being discharged from the hospital, and there is no intimation that he had not fully recovered, and he further states that he has received no treatment whatever after being discharged from the said hospital. Referring to claimant's testimony, he was asked the following questions, and answered as follows:

On page 5, "Was your health good after you left the hospital?"

A. "Yes, sir."

On page 7, "How long did you work at the carpenter trade after you left the hospital?" Answer, "Until last Christmas."

On page 9 he was asked, "Do you ever have any pain in the place where the operation was performed?" Answer, "No, sir."

The claimant began work at his usual trade at the same pay per diem on or about the first day of October, A. D. 1906, and continued for several months in the same employment as he was engaged in before the said injury, and made no complaint of disability, which would tend to establish that his earning capacity had been impaired on or about or after the first day of October, 1906. It also appears from the record that claimant, after about the middle of October of the year in question, resumed the usual and customary drilling with his military company with the same degree of efficiency exercised prior to said injury.

It appears further from the evidence in this case that claimant, after resuming work on or about October 1, 1906, after the said injury, worked continuously. It is urged that he was forced by reason of the said injury, to accept employment of a less laborious nature. It does not appear from the evidence that claimant necessarily abandoned the carpenter trade on account of the said injury. Claimant says in his testimony the fear which he entertained in regard to doing any heavy lifting, existed only in his mind. The evidence tends to show that claimant had fully recovered from the said injury and operation, and was capable of following his usual trade and calling from Christmas, 1906, to July 1, 1907, and the said item of one hundred ninety-five ($195.00) dollars is therefore disallowed.

Referring to the item in claimant's bill of particulars for impaired health, earning capacity, mental worry, anguish and permanent disfigurement of body, it appears from the evidence that claimant was temporarily impaired in health, and in his earning capacity after the said injury, and prior to, on or about the first of October, 1906, and that claimant suffered pain by reason of the said injury. The Court is of the opinion that no permanent disfigurement of body has been shown by the proof in this case, and after a thorough consideration of all the evidence and the merits

of the said case, the Court finds that the sum of four hundred ($400.00) dollars will compensate claimant for all loss occasioned by reason of the said injury.

It is therefore the conclusion of the Court that the claimant is entitled to an award of four hundred ($400.00) dollars.

FRANK J. PRENTISS
v.
STATE OF ILLINOIS.

Opinion filed December 19, 1908.

1. PRACTICE—*statute.* The Court of Claims is required to hear claims according to its rules and established practice and determine the same according to the principles of equity and justice.

2. SAME—*rules of.* Every claimant, in addition to stating the facts upon which his claim is based, must state, first: Whether the same has ever been presented to any State department or State officer, and, if so, when, and to what department or officer and what action has been taken thereon; second: Whether the claim has been assigned or not, and, if assigned, to whom and the date of such assignment, and if other persons are interested in the claim, their names must be stated.

George E. Dawson, for Claimant.
W. H. Stead, Attorney General, for State.

The said Frank J. Prentiss filed his claim on the 23rd day of April, A. D. 1908, with the Auditor of Public Accounts of the State of Illinois, which claim by leave of Court was amended. The Attorney General of the State of Illinois plead the general issue to the said claim and amendment. Claimant filed depositions in support of his claim. The said cause was argued orally by the attorneys before the Court.

Claimant says in his amended statement of claim: "Petitioner files herewith a claim for damages for injury to one bay gelding, caused by improper use of same by Captain Alsip's troop, First Cavalry of the Illinois National Guard, at the encampment at Springfield, Illinois, in August, 1906, in the sum of four hundred fifty ($450.00) dollars, and makes a statement of facts upon which the said claim is based, as follows:"

In the following seven paragraphs the petitioner alleges definite and indefinite damages of various kinds incident to the injury of the said horse, aggregating an indefinite sum considerably in excess of the said four hundred fifty ($450.00) dollars.

It is sufficient here to say, that the claimant seeks to recover damages for an alleged injury to his horse, a bay gelding, caused by improper use while in the service of Captain Charles H. Alsip's troop, First Cavalry Regiment of the Illinois National Guard, at the encampment at Springfield, Illinois, in August, 1906. It is urged that a person purporting to be Captain Charles H. Alsip, of the First Cavalry Regiment of the Illinois National Guard, secured by written order from claimant for the use of his troop at the occasion of the State Encampment, six horses, adapted to the cavalry service, and that the said horses were to be returned in good condition. The horse alleged to have been injured was one of the said six horses.

It does not appear from the statement of claim or the record, whether this claim has been presented to any State department or State officer, and if it has been presented to any State department or State officer, the said statement of claim or the record does not state what action has been taken or had thereon. It does not appear from the statement of claim or the record, whether this claim has been assigned or not, and if assigned, to whom, nor the date of such assignment and the names of any other person who may be interested therein.

Under the statute of the State of Illinois, it is the duty of the Court of Claims to hear claims according to its rules and established practice and determine the same, as provided for by law. The Court is therefore of the opinion, that the claimant has not complied with Rule 4 of the rules of the Court of Claims of the State of Illinois, adopted, filed and in full force and effect December 16, 1906. The rule is as follows:

"Every claimant shall state that the claim has never before been presented to any State department or State officer, or if it has been, shall state when and to what department or officer, and what action has been had thereon. Every claimant shall further state whether said claim has been assigned or not, and if

assigned, to whom, the date of such assignment and the names of any other persons who may be interested therein. If the claim be for lands permanently or temporarily appropriated or damaged by the State, the declaration shall state the amount and location of the land and specific description thereof. A bill of particulars, stating in detail each item and the amount claimed, shall be attached to said declaration and made a part thereof."

It does not appear from the statement of claim or from the record, that this claim has been presented through proper military channels to the Adjutant General of the State of Illinois for consideration, as is provided for by the rules and regulations of the Illinois National Guard.

Claimant urges that the said horses were delivered on a written order to a person purporting to be Captain Charles H. Alsip. The claimant in his testimony says he did not preserve this order; that he gave it to somebody at 525 North Clark street, and that they never gave it back to him, and that he tried to get it back. It does not appear to whom claimant gave this order or when and where any effort was made to recover it. If the said claim accrued by virtue of a contract, a copy of such contract should appear in the record of this case.

Hurd's Revised Statutes of the State of Illinois, section 5, page 697.

It appears to the Court that there is insufficient proof in the record that the claimant had his said alleged dealings with an authorized agent of the State of Illinois, through the regular military channels.

If the said Captain Charles H. Alsip was an officer, as alleged, and duly authorized by law through military orders to contract with claimant with reference to the matters referred to herein, it is not established by the record in this case, and if the said matters are true, as alleged, they are easily susceptible of proof.

It does not appear to the Court from a careful examination of the record, that this claim or any part thereof, accrued by authority of law.

"The General Assembly shall never grant or 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, * * * ."

Constitution of 1870, article IV, section 19.

We do not deem it necessary to continue this argument at any greater length.

In consideration of the reasons above set forth, the claim is dismissed, without prejudice, however, to its presentation and prosecution before the proper department.

METROPOLITAN LIFE INSURANCE COMPANY, OF NEW YORK,

v.

STATE OF ILLINOIS.

Opinion filed December 19, 1908.

INSURANCE—RECIPROCAL STATUTE—*Home Life Insurance Company v. State ante followed.* This claim is similar to all intents and purposes as the claim of *Home Life Insurance Company of New York v. State, supra*, and the law as announced by the Court in the opinion there filed applies to and governs the decision of this claim.

Logan Hay, for Claimant.
W. H. Stead, Attorney General, for State.

This is an action to recover money paid by claimant to the State of Illinois, as a tax upon its premium receipts for the years 1901, 1902 and 1903, upon policies issued by it, in the State of Illinois, prior to January 1, 1902.

The facts in this case are very similar to the facts in the case of the *Home Life Insurance Company* v. *State of Illinois*, an extended opinion in which case has been filed of even date herewith, and the principles of law involved in this case are substantially the same as in the case of the Home Life Company referred to.

Claimant is a New York corporation, organized and incorporated under the laws of that state, and was doing business in Illinois, in the years mentioned, as a life insurance concern.

By the reciprocal clause of the insurance law of Illinois, claimant became liable to pay as a tax, on business done in Illinois, an amount equal to the tax, if any, which the law of New York levied upon Illinois life insurance corporations, carrying on business in the state of New York.

By the New York Act of 1901, which went into effect October first of that year, all life insurance concerns, foreign, as well as domestic, were required to pay an

annual state tax of one per cent upon the gross amount of premiums received in that state, during the preceding calendar year.

Under date of December 16, 1901, the Superintendent of Insurance of Illinois notified claimant, that under the reciprocal law of Illinois, there would be due the State of Illinois from it, a tax of one per cent on premiums received by it, for business done in Illinois for the year 1901.

Claimant received this notice January 8, 1902, and thereupon computed what the amount of this tax would be, and without protest or complaint on January 31, 1902, forwarded to the Superintendent of Insurance of Illinois a draft for $20,155.13, in payment of said tax.

Upon receipt of another similar notice in January of 1903, with reference to business done in the year 1902, claimant again, on February 2, 1903, sent the superintendent a draft for $23,670.14, and upon similar notice received in March, 1904, sent a draft for $27,705.64, as payment of the tax for the business done in the year 1903.

In October of 1904, the Court of Appeals of New York, in the case of *The People ex rel. Provident Savings Life Assurance Society* v. *Miller*, 179 N. Y., 227, construed the New York Act of 1901 to be a tax upon premiums paid on policies issued on or after January 1, 1902, and not on policies issued prior to 1902.

Claimant now asks to recover back from the State of Illinois all tax paid by it for the years 1901, 1902 and 1903, on premiums received from Illinois policies issued prior to 1902, which it alleges to be the sum of $60,148.61, with interest thereon from date of payment.

It is unnecessary here to discuss the legal and equitable questions involved in this case, as to whether the payments sought to be recovered back were made under a mistake of law or fact, for we have discussed them at considerable length in an opinion filed this day in the case of the *Home Life Insurance Company* v. *State*,

which case was docketed in advance of this and which opinion is respectfully referred to as conclusive of our views upon these propositions.

In that case, payments of the tax were made under substantially the same set of facts, and the same principles of law are applicable thereto, and we there held and so hold in the case at bar, that the payments so made, were made under a mistake of law and not of fact.

In this case, however, differing to that extent from the case of the *Home Life Company*, claimant seems to raise the question as to whether the payments were voluntarily made or whether under some degree of compulsion or duress.

This alleged element of duress seems to be based upon the wording of the circulars sent claimant, which claimant construes as threats of the revocation of its license. A reading of the circulars, however, will show that the element of threat is wanting and that the language of the circular in this case is substantially the same as that used by the superintendent in the case of *Yates* v. *Royal Insurance Company*, 200 Ill., 206, the only difference being, that in the *Royal Insurance Company case*, two circulars were sent instead of one, as in this case. Yet, in the *Royal Insurance Company case*, the Court held that the wording of the circular did not make a case of compulsion or duress sufficient to remove the case from the rule, that money paid voluntarily under a mistake of law cannot be recovered.

Further than this, the record shows no protest or complaint on the part of claimant against the payments. It also shows that two payments were made nearly a month before the time provided under the Illinois law for filing reports and all of them made more than two months before they were due under the provisions of the New York Act.

As the Court said in *Yates* v. *Royal Insurance Company, supra*, we say here, that "there is no evidence in the record that the company in any manner indi-

cated that it made the payment with any reservation of its rights, and as we read the record it does not appear the company was unwilling to pay and paid only because of the coercive or compulsory provision of the Act."

For the reasons indicated, we are of the opinion that claimant has no legal or equitable claim against the State and the claim is therefore rejected.

SAMUEL E. FLANNIGAN
v.
STATE OF ILLINOIS.

Opinion filed December 29, 1908.

RES ADJUDICATA—*what constitutes.* Where a claim has been heard, either before the Commission of Claims or its successor, the Court of Claims, and a decision rendered, such decision will be final, unless a rehearing is applied for and granted and the decision changed.

W. S. Cantrall, for Claimant.
W. H. Stead, Attorney General, for State.

This is a claim by Samuel E. Flannigan for $1,655.00 which he claims to be due him as salary as a trustee of the Southern Illinois Normal University. He alleges in his verified claim that in 1869 he was appointed a trustee of said board by John M. Palmer, then Governor of the State of Illinois; and that thereafter he was elected secretary of said board, and served both as trustee and secretary for a period of two years, beginning in March, 1869; and that he received as salary and expenses for said services the sum of $1,475.00, and that the amount claimed is yet due him from the State.

He also alleged in his said claim that in 1878 he filed a claim for said balance due him, with the Commission of Claims of this State.

To his demand the Attorney General has filed various pleas, among which is the plea of former adjudication.

It appears both from the verified claim and the evidence introduced in this case, that this claim was filed in the Auditor's office in 1878, and that a hearing was thereafter had thereon before the Commission of Claims, and that said claim was rejected. Having been so considered and determined upon its merits at that time, it is now barred from further hearing in this Court, and is therefore rejected.

JAMES REDDICK, ADMINISTRATOR OF THE ESTATE OF JOSEPH PIMES, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 1, 1909.

1. MILITARY SERVICE—*claim for death while in.* This claim was originally brought by James Reddick, administrator of the estate of Joseph Pimes, deceased, on his own behalf and on behalf of the mother of said deceased. Reddick having died, John F. Devine was appointed in his place, and the brothers of said Joseph Pimes, deceased, were added as claimants.

2. NAVAL RESERVES—*commanding officer.* The captain of the Naval Reserves is its commanding officer under the Governor.

3. RULES AND REGULATIONS—*who makes.* The statutes authorize the Commander-in-Chief to make rules and regulations for the government of the military and naval forces of the State, which rules and regulations shall conform as nearly as practicable to the regulations of the Army and Navy of the United States.

4. FINANCIAL HELP OR ASSISTANCE—*defined.* "Financial help or assistance," as used in section 4 of article 11 of the Military and Naval Code of 1903, does not mean compensatory damages. It means a voluntary contribution on the part of the State in the nature of a pension.

6. CLAIMS—*how brought.* Claims of this character may be brought either in the name of the legal heirs directly, or in the name of the administrator for the use of the legal heirs. (*Witte* v. *State*, 1 Ct. of Cl. Rep., 249.)

Wm. Pettis and Robt. C. Busse, (Geo. E. Dawson, of Counsel) for Claimant.

W. H. Stead, Attorney General, and Chas. E. Woodward, Assistant Attorney General, (Roy Wright, of Counsel) for State.

This is a claim originally made against the State of Illinois by James Reddick, administrator of the estate of Joseph Pimes, deceased, on his own behalf as administrator, and on behalf of Celia Pimes, the surviving mother of deceased, alleged in the petition to be his only heir. It is stipulated that John F. Devine is the duly appointed successor of said James Reddick, now deceased. By amendment of the claim, Marx,

Selig, Henry and David Pimes, brothers of deceased Joseph Pimes, are added as claimants; and the proof shows that deceased died unmarried, leaving the mother and said brothers the sole surviving heirs of deceased.

The claim is brought under section four (4), article eleven (11), of the Illinois Military and Naval Code of 1903, being section 93, chapter 129, revised statutes 1908, which section of the statute is as follows:

"Section 93.—When killed or wounded in service.—Claim against State.] 4. In every case where an officer, soldier or seaman of the Illinois National Guard or the Naval Reserve of Illinois shall be killed or wounded while performing his duty as an 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."

The deceased in his lifetime and at the time of his death was a duly enlisted seaman of the First Division of the State Naval Reserves, a branch of the State Militia, located and with headquarters at Chicago. At the time of the death of deceased, Captain Warren F. Purdy was commanding officer (under the Governor) of the Naval Reserves; Lieutenant Cecil Page was commanding officer of said First Division. For some months previous hereto, and at the time of the death of deceased, Thomas Peter Coffee was Acting Coxswain in said First Division. Said First Division has its headquarters at No. 20 Michigan Avenue and its boathouse near the Randolph street viaduct.

On Thursday evening, July 5, 1906, deceased with five other more or less inexperienced seamen of said First Division, under the immediate command of Coxswain Coffee, were at boat drill on the lake. The boat was of the rowboat pattern in use in the Navy, four seated, with a capacity of ten or twelve persons;

fitted for sails, and termed in nautical parlance a "Dingy." The crew had rowed from the boathouse to near the mouth of the Chicago River, and shortly after 9 p. m. were returning to the boathouse under sail, when the boat capsized and deceased and four of his comrades were drowned, viz: Antonio Capodice, Edward M. O'Carroll, Ralph Heeg, and Robert E. Schrom; Coxswain Coffee and Seaman Frank Randall being the only survivors of the accident.

The Attorney General, on behalf of the State, files what amounts to a plea of the general issue and the main contention in the case is as to whether the deceased was killed "while performing his duty as a seaman in pursuance of lawful orders from the Commander-in-Chief", within the meaning of the statute in that behalf. Claimant's petition charges the State and its officers with negligence in not providing the boat with life preservers and other safety appliances, etc., but this position is abandoned on the hearing, and the right to recovery is based solely on death due to accident in performance of military duty in pursuance of lawful orders. On the other hand the State contends that in participating in "sailing" deceased was not in performance of his duties under lawful orders, and also that the proof fails to show that the deceased was himself free from contributory negligence.

The solution of the question at issue depends largely upon the orders under which deceased was serving when drowned and the duties, authority and discretion of the various officers over him.

The Captain of the Naval Reserves is its commanding officer, under the Governor. The statutes authorize the Commander-in-Chief to make rules and regulations for the government of military and naval forces of the State, but provide that such rules and regulations shall conform as nearly as practicable to the regulations for the Army and Navy of the United States, and that when otherwise not provided, the rules and regulations of the United States shall govern,

(chapter 129, Revised Statutes). The law of the State makes provision for an annual cruise of the Naval Reserves; and for thirty drills per year as a minimum, to be weekly or semi-weekly, (Chapter 129, Ibid). The laws and regulations for the Illinois National Guard, embracing the Naval Reserves, make like provisions; they strictly enjoin obedience to orders, but do not contain special directions for drill nor undertake to particularize the duties of the various officers.

The United States Navy regulations provide that apprentices shall be carefully taught to pull, sail, steer, hook on and handle boats in all conditions of weather. Blue Jackets Manual, a semi-official publication in use by the United States Naval department and Illinois Naval reserves, makes it the duty of the coxswain to instruct the crew in the principles of handling a boat under oars and *sail* at every opportunity.

The evidence shows that on March 10, 1906, a general order was issued by the Commander-in-Chief, for the annual cruise of the First Division on the United States Steamship Dorothea from August 18 to 25. By virtue of this general order preparatory weekly drills were necessary and ordered by the captain, and by his direction Lieutenant Page, commanding the Division, by order dated June 15, 1906, ordered deceased to report for duty and drill once a week. About 8 p. m. July 5, regular drill night, deceased, with his comrades, reported for duty.

Lieutenant Page commanding, ordered Coxswain Coffee to take deceased and his comrades and give them drill with the boat. No directions were given as to whether the drill should be in rowing or sailing; no directions had been given against sailing. Coxswain Coffee took his men as directed, proceeded from headquarters to the boathouse, launched the boat and proceeded to drill the men in rowing the boat from the boat house to near the mouth of the river. On the return, some of the crew suggested that they sail back. The coxswain acquiesced in this suggestion and or-

dered the sail hoisted, and they sailed toward the boat house, under the guidance and command of the coxswain. The evidence is quite meagre as to the details of the accident, but does show that quite a stiff breeze was blowing and that when the boat got opposite a gap in the breakwater opposite the foot of Van Buren street, through which the waves were running high, the coxswain undertook to "tack" and capsized the boat. Deceased and the entire crew were thrown into the water, and deceased and four of his comrades were drowned.

We are clearly of the opinion that deceased was at the time performing his duty pursuant to lawful orders of his Commander-in-Chief. The order for drilling had been properly transmitted down the line from the Commander-in-Chief. It was within the authority, indeed, was the duty of the coxswain to drill the recruits in sailing. The boat was equipped for sailing. It had been used for that purpose. It is true no express order had eminated from higher authority than the coxswain, to drill with sails, but no such order was necessary; it was his duty to so drill them, and it was clearly within his authority and discretion to determine the time and manner to so drill them. Not only does this appear from the Army and Navy Regulations above quoted, but Coxswain Coffee himself on the witness stand testified: "It was the usual custom to have rowing and *sailing* given at all times. First, instructions were given in rowing and then in sailing afterwards," and when asked "In whose discretion was it as to which manner or method the drills should be adopted?" answered, "The party in charge of the boat." "Which would be the coxswain." Answer, "Yes sir." And Lieutenant Page commanding, when asked, "Has the coxswain discretion after receiving such an order as you gave him that night as to what will or shall be done in the course of his duties?" answered, "Yes sir." It is very manifest from an inspection of the Naval regulations, pertaining to the

duties of the coxswain and seaman, as well as from a consideration of the oral evidence, that it was clearly within the discretion of the coxswain, acting under his orders, to order and engage in drill with sails. He gave such order and in the drill deceased lost his life. It is argued by the State that because the suggestion for such drill came from some member of the crew, the State is thereby in some way relieved of liability. We fail to appreciate how the source of the suggestion can make a particle of difference. In the first place it is not shown that the suggestion came from the deceased; but it would make no difference if it did. The giving of the order was within the authority and discretion of the coxswain, and he gave it; and it does not make a particle of difference where he got the suggestion.

It is also urged that it is not shown but what deceased was guilty of contributory negligence. It is not necessary to decide whether such question is involved under the statute in question, as we think it is fairly shown by the evidence that deceased's death was in no way due to any contributory negligence on his part. The evidence clearly shows that the boat was capsized in turning under the management of the coxswain, the man at the helm; and was in no way due to any act or omission on the part of the deceased.

We are therefore of the opinion that deceased was killed "while performing his duty as a * * * seaman pursuant of lawful orders from his Commander-in-Chief"; and that his legal heirs have a claim against the State for financial help and assistance, within the meaning of the statute.

It is urged by claimant that the meaning of this statute is that compensatory damages should be allowed, and in view of that contention much evidence has been adduced by claimant, as to the earning capacity of deceased, dependency of the heirs, etc. In the view we take of the meaning of this statute it will be unnecessary to discuss this evidence at length. We do

not think the language or purpose of the statute capable of the construction placed upon it by claimant.

Financial help and assistance does not mean compensatory damages. It means a voluntary contribution on the part of the State, in the nature of a pension, and imposes the duty on this Court to determine the amount. We have no doubt that deceased was a most worthy young man, of good habits, fair education, good earning powers, and that his mother and brothers suffered a great loss in his most unfortunate death, and in arriving at our award we do not desire to be understood as fixing an amount that we deem full compensation to them for their loss. Acting on the purpose and spirit, as well as the letter of the law, as we understand it, and keeping in view the precedents of this Court, as well as taking into consideration the needs of the heirs of deceased for "financial help and assistance" we award claimant the sum of two thousand ($2,000.00) dollars.

It is suggested by the State that on the authority of the case of *Witte* v. *State*, 1 Ct. of Cl., 249, this proceeding should be on behalf of the legal heirs of the deceased and not by the administrator. We are of the opinion that the proceeding should be, and is, on behalf of the legal heirs of deceased; but we held in the above case that it was proper for the action to be brought by the administrator for the use of the legal heirs, and we adhere to that holding; the proceeds of the award not to go into the general assets of the estate, but to go solely to the heirs, to be distributed by the Court having jurisdiction of the estate, in accordance with law.

We, therefore, award claimant, John F. Devine, administrator of the estate of Joseph Pimes, deceased, for the sole use and benefit of the legal heirs of the deceased, Joseph Pimes, the sum of two thousand ($2,000.00) dollars.

JAMES REDDICK, ADMINISTRATOR OF THE ESTATE OF RALPH HEEG, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 1, 1909.

MILITARY SERVICE—*Reddick, admr. est. Pimes, v. State ante followed.* This claim is based upon the same state of facts as the claim of *Reddick, admr., est. of Pimes, dec'd., v. State, supra,* and the law as announced by the Court in the decision of that claim applies to this claim.

Wm. Pettis and Robt. C. Busse, (Geo. E. Dawson, of Counsel) for Claimant.

W .H. Stead, Attorney General, and Chas. E. Woodward, Assistant Attorney General, (Roy Wright, of Counsel) for State.

Deceased, Ralph Heeg, was a seaman of the First Division, Illinois Naval Reserves, and with Joseph Pimes, et. al., was drowned while at boat drill in Chicago harbor on the night of July 5, 1906. The issues and proof as to the accident as well as the stipulations under which the case is submitted are the same in this case as in the *Pimes case,* and there discussed at length, and what we there said is decisive of this case, and in favor of claimant.

Claim was originally brought by James Reddick, administrator, who has since died, John F. Devine being appointed his successor in his own behalf as such, and for the next of kin. The petition was amended by adding as claimants, Katherine Heeg, mother, Cornelius Heeg, father, Edward, Harvey, George and Lloyd Heeg, by Cornelius Heeg, next friend, brothers of deceased. And the proof is that deceased died unmarried and left him surviving said named persons his sole heirs.

Our award in favor of the claimant will be in the same amount as in the *Pimes case.* We accordingly

award claimant, John F. Devine, administrator of the estate of Ralph Heeg, deceased, for the sole use and benefit of the legal heirs of said Ralph Heeg, deceased, the sum of two thousand ($2,000.00) dollars.

JAMES REDDICK, ADMINISTRATOR OF THE ESTATE OF ROBERT E. SCHROM, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 1, 1909.

1. MILITARY SERVICE—*Reddick, admr. est. Pimes, v. State ante followed.* This claim is based upon the same state of facts as the claim of *Reddick, admr. est. of Pimes, dec'd.*, v. *State, supra*, and the law as announced by the Court in the decision of that claim applies to this claim.

2. OATH—*failure to take—no defense.* The State also makes the additional defense to this claim to the effect that the deceased had not taken the prescribed oath and consequently was not a member of the Naval Reserves. *Held*, under the facts, that deceased was a member.

3. SAME—*facts which will save taking oath.* Where an applicant for military service makes due application, appears for service and subjects himself to orders, he will not be heard to say that he is not in the service. (*Foye* v. *Curtis*, 38 Mass., 330; *Hammond* v. *Dunbar*, 41 Mass., 174.)

4. FRAUD—*only will protect State.* Nor can the State, after it has assumed authority over an applicant, and accepted his services, be heard to say that such applicant was not legally in the service, unless such applicant got into the service by fraud.

Wm. Pettis, (Robt. C. Busse and Geo. E. Dawson, of Counsel) for Claimant.

W. H. Stead, Attorney General, and Chas. E. Woodward, Assistant Attorney General, (Roy Wright, of Counsel) for State.

Deceased, Robert E. Schrom, was drowned with Joseph Pimes, et al., at boat drill in Chicago harbor, on the night of July 5, 1906. The issues and proofs as to the accident, as well as the stipulations under which the case is submitted, are the same in this case, as in the *Pimes case*, and there discussed at length, except as hereinafter stated; and what we there said applies in this case.

Claim was originally brought by James Reddick, administrator of the estate of Robert E. Schrom, who

has since died; John F. Devine, being appointed his successor, and in his own behalf, as such and for the next of kin; the petition was amended by adding Ida E. Schrom, mother, and Ethel Schrom, sister (deceased father, Henry W. Schrom, dying after the death of deceased and leaving as his sole heirs said mother and sister of deceased), whom the proof shows to be the sole heirs at law of deceased, who died unmarried.

The State makes the additional defense in this case that deceased was not a duly enlisted seaman of the Naval Reserves at the time of his death, not having taken the oath. The law requires the recruit to sign an enlistment paper and take an oath (sec. 68, chap. 129, Rev. Stat. 1908). The proof shows that deceased signed an enlistment paper including the oath, and furnished his parents' written consent to his enlistment on the form prescribed and furnished by the State, and that he delivered the same to the proper officer, Lieutenant Page, who had filled it out, and who was duly authorized by law to administer the oath. The enlistment paper itself is not in evidence, appearing to have been lost at some of the numerous hearings of the case; but proper preliminary proof was made to justify the admission of secondary evidence of its contents, which proof was made and there is left no doubt of its having been so signed and delivered. Just why the oath was not in fact administered and the jurat filled out does not very clearly appear. But it seems to have been regarded as more or less a mere formality and in the stress of other duties, the Lieutenant simply failed to attend to the matter. It appears that both the recruit and his officers regarded him as duly enlisted. He had been instructed concerning the annual cruise and the necessity for drilling therefor; and to get leave of absence from his employer, etc., subjected himself to the orders and discipline of the officers, who assumed such authority over him, was ordered out on the particular drill in which he lost his life, and to all intents and purposes became a member of the Naval Reserve.

Quite a number of authorities are cited by claimant's attorneys in support of the proposition, that the failure of deceased to get leave of absence from his employer and to take the oath is under the facts of this case immaterial; that, nevertheless deceased was a seaman, and his heirs are entitled to the benefit of the statute under which claim is made. Most all of the authorities are inaccessible to us. The State furnishes no authority on the subject. We are inclined to accept claimant's view. Having made due application for admission and appeared for military service and subjected himself to orders, we think the deceased could not have been heard to raise the objection, that he hadn't taken the oath. (*Foye* v. *Curtis*, 38 Mass., 330; *Hammond* v. *Dunbar*, 41 Mass., 172); nor do we think the State, after it assumed authority over deceased as a seaman, can be heard to say that he was not a seaman. By accepting his application, assuming jurisdiction over him and ordering him into service, the State waives the right when he is killed in its actual service to say that he was not properly in its service. It seems to have been through no fault of deceased that the technical requirements of his enlistment were not fully completed. He acted upon the assumption that he was enlisted and was so treated by the State, through its duly authorized officers.

It would be a most unjust doctrine that would enable the State to escape liability on such a ground, and one we refuse to sanction.

We accordingly award claimant, John F. Devine, administrator of the estate of Robert E. Schrom, deceased, for the sole use and benefit of the legal heirs of said Robert E. Schrom, deceased, the sum of two thousand ($2,000.00) dollars.

JAMES REDDICK, ADMINISTRATOR OF THE ESTATE OF EDWARD M. O'CARROLL, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 1, 1909.

MILITARY SERVICE—*Reddick, admr. est. Pimes, v. State ante followed.* **This claim is based upon the same state of facts as the claim of *Reddick, admr. est. of Pimes, dec'd.*, v. *State, supra*, and the law as announced by the Court in the decision of that claim applies to this claim.**

Wm. Pettis, (Robt. C. Busse and Geo. E. Dawson, of Counsel) for Claimant.

W. H. Stead, Attorney General, and Chas. E. Woodward, Assistant Attorney General, (Roy Wright, of Counsel) for State.

Deceased, Edward M. O'Carroll, was a seaman of the First Division Illinois Naval Reserves, and with Joseph Pimes, et al., was drowned while at boat drill, in Chicago harbor, on the night of July 5, 1906. The issues and proof as to the accident, as well as the stipulations under which the case is submitted, are the same in this case as in the *Pimes case*, and there discussed at length; and what we there said is decisive of this case, and in favor of claimant.

Claim was originally brought by James Reddick, administrator of the estate of Edward M. O'Carroll, deceased, who has since died; John F. Devine, being appointed his successor, and in his own behalf as such and for the next of kin of deceased; the petition was amended by adding as claimants, Teresa O'Carroll, mother, and Alphonseous O'Carroll, brother, "his heirs and only heirs at law" and whom the proof shows to be the sole heirs at law of deceased, who died unmarried.

Our award in favor of claimant will be in the same amount as in the *Pimes case*. We accordingly award claimant, John F. Devine, administrator of the estate

of Edward M. O'Carroll, deceased, for the sole use and benefit of the legal heirs of said Edward M. O'Carroll, deceased, the sum of two thousand ($2,000.00) dollars.

JAMES REDDICK, ADMINISTRATOR OF THE ESTATE OF ANTONIO CAPODICE (OR CAPODICI), DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 1, 1909.

MILITARY SERVICE—*Reddick, admr. est. Pimes v. State ante followed.* This claim is based upon the same state of facts as the claim of *Reddick, admr. est. of Pimes, dec'd.*, v. *State, supra*, and the law as announced by the Court in the decision of that claim applies to this claim.

George E. Dawson, (R .C. Busse and Wm. Pettis, of Counsel) for Claimant.

W. H. Stead, Attorney General, Chas. E. Woodward, Assistant Attorney General, (Roy Wright, of Counsel) for State.

Deceased, Antonio Capodice, was a seaman of the First Division Illinois Naval Reserves, and with Joseph Pimes, et al., was drowned while at boat drill in Chicago harbor, on the night of July 5, 1906. The issues and proof as to the accident, as well as the stipulations under which the case is submitted, are the same in this case as in the *Pimes case*, and there discussed at length; and what we there said is decisive of this case, and in favor of claimant.

Claim was originally brought by James Reddick, administrator, who has since died; John F. Devine being appointed his successor, and in his own behalf as such, and for the next of kin; the petition was amended by adding as claimants Agostino Capodice, father, Anna Capodice, mother, Mateo, Ginseppe and Salvator Capodice, brothers, and Rosa and Cornelia Capodice, sisters, as his "next of kin and only heirs at law" and whom the proof shows to be the sole heirs at law of deceased, who died unmarried.

Our award in favor of claimant will be in the same amount as in the *Pimes case*. We accordingly award claimant, John F. Devine, administrator of the estate

of Antonio Capodice (or Capodici), deceased, for the sole use and benefit of the legal heirs of said Antonio Capodice, deceased, the sum of two thousand ($2,000.00) dollars.

D. J. McCARTY
v.
STATE OF ILLINOIS.

Opinion filed January 1, 1909.

1. DAMAGES—*for loss of hay crop.* Claimant's crop of hay was damaged by the overflow of water caused by placing water-gates in a brook adjacent to the State School for the Deaf and Dumb at Jacksonville, Illinois. *Held*, that claimant is entitled to an award covering the amount of his damages.

2. RIPARIAN RIGHTS—*owner of land has.* The owner of land over which a stream flows has a usufruct in the water while it passes, but cannot arrest its flow to the damage of others. (*Druley* v. *Adams*, 102 Ill., 177; *Batavia Mfg. Co.* v. *Newton Wagon Co.*, 91 Ill., 230.)

R. L. Montgomery, for Claimant.
W. H. Stead, Attorney General, for State.

Claimant in the above entitled cause filed his claim on the 28th day of February, A. D. 1908, for the sum of one hundred five ($105.00) dollars, with the Auditor of Public Accounts of the State of Illinois. The Attorney General of the State of Illinois filed the general issue to said claim. The claimant filed depositions in support of his claim.

This is a claim for damages sustained by reason of damage to a crop of hay that was cut and lying in the swath on three and one-half acres of land, which is adjacent to certain land occupied by the State School for the Deaf at Jacksonville, Illinois. The premises in question were leased by the claimant of Thomas Allen, the latter part of June or during the month of July, in the year 1907. The said premises were leased on share rent. Under the terms of the lease, the landlord was to receive one-half of the crop from the claimant for harvesting the hay.

The said hay land is just along a brook in which was constructed water gates, for the purpose of backing up the water to furnish a supply in a reservoir

for the use of the said school, and which said water gates and reservoir were under the sole control and management of the said school.

On the 4th day of August, 1907, the said gates being closed, the water in the brook, after heavy and continuous raining at the time in question, backed up and overflowed approximately three and one-half acres of the said rented hay or meadow land of claimant.

It appears from the evidence that the said three and one-half acres would have yielded approximately two and one-half tons per acre, a total of eight and three-fourths tons of hay. It appears from the evidence that there was about one-eighth of an acre of the said three and one-half acres of meadow land, that was high land, and that the overflow of water did not reach the hay at that place.

It appears from the evidence that the managers of the said school were duly notified as to the probable results that would be caused by keeping the said gates in the said brook closed, but that even after having said notice, the gates in the brook were permitted to remain closed and to obstruct the water in the said brook in its natural water course.

It appears from the evidence that the hay in question had been cut on or about the third day of August, 1907, and had been left lying in the swath as cut, and that heavy rains fell on the fourth, fifth and sixth days of August, 1907. It appears from the evidence that these rains would have colored and decreased the strength of the hay. It is quite natural that some sediment would have been dashed against the hay in question by the said heavy rains.

It appears, however, from the evidence, that the said water gates in question were of sufficient size to molest and obstruct the water in its natural water course, and that a part of the damage to the hay in question resulted from the said obstruction. It is therefore the conclusion of the Court that a part of the damage to the said hay was caused by reason of

the said gates having been kept closed as aforesaid, and that the said hay would have been seriously damaged from the heavy continuous rains.

It appears from the evidence that Thomas Allen, the owner of the land in question, and his father, who are witnesses in behalf of the claimant for the full amount of damages sustained by reason of the said overflow, and that the said Allen consents and acquiesces that the said claimant shall collect the full amount of damages sustained by reason of the said overflow.

The attorney for the claimant cites the following in support of the said claim:

"The owner of land, over which a stream flows, has a usufruct in the water while it passes, but cannot arrest its flow to the injury of others."

Druley v. *Adams*, 102 Ill., 177; *Batavia Mfg. Co.* v. *Newton Wagon Co.*, 91 Ill., 230.

"The grantee of land bordering on a non-navigable stream is entitled to recover damages against the party who, to his injury, diverts the water passing over his land from its natural channel."

Board of Trustees of Illinois and Michigan Canal v. *Haven*, 5 Gilman, 548.

"Persons in whose behalf, and under whose direction, a suit is prosecuted or defended in the name of some other person, are bound by the judgment."

Anderson v. *Chic. Ry. Co.*, 200 Ill., 329.

It appears that claimant and the landlord have mutually agreed that the claimant in the above entitled cause should collect the total amount of damages by them mutually sustained, and that the matter of damages or rent between them would be amicably adjusted.

It is the opinion of the Court that the claimant has sustained damages by reason of the said water gates having been closed as aforesaid. It is the conclusion of the Court that the claimant be allowed the sum of fifty $50.00) dollars in full for all damages sustained as stated aforesaid.

LAWRENCE BLICKHAN
v.
STATE OF ILLINOIS.

Opinion filed December 3, 1910.

MILITARY SERVICE—*award for injuries while in.* Where a member of the Naval Reserve is injured while in the performance of his duties under orders of the Commander-in-Chief, he may have a claim in this Court and his legal heirs may have a claim, in case he be killed.

John F. Garner, for Claimant.
W. H. Stead, Attorney General, for State.

Lawrence Blickhan filed his claim on the 11th day of August, A. D. 1908, with the Auditor of Public Accounts of the State of Illinois, for the sum of two hundred sixty ($260.00) dollars, for an injury sustained while performing his duty as a legally enlisted seaman of the Illinois Naval Reserve, attached to the Tenth Division, located at Quincy, Illinois. Claimant filed depositions in support of his claim in due time. The Attorney General of the State of Illinois plead the general issue to the said claim.

It is established by the evidence that claimant was a legally enlisted seaman, in the Tenth Division of the Illinois Naval Reserve, at the time of the injury in question. The said Division was ordered by the Commander-in-Chief, under what is known as general order number 10, bearing date April 27, 1908, and which said order is now on file in the Adjutant General's office in Springfield, Illinois, which said order commanded a cruise of duty on board the United States Steamship Dorothea, a training ship used by the State of Illinois to train its Naval Reserves. The said cruise extended from June 27, to the 4th day of July, 1908, inclusive.

The claimant, while on the said cruise, was ordered and directed by commissioned and acting officers of the Illinois Naval Reserve, to do and perform the

duties of an oiler in the engine room of said ship. The claimant was a plumber by trade and occupation and not a machinist. While performing his said duties as oiler in the engine room, and while in the exercise of due care for his own safety, he was injured on the 27th day of June, A. D. 1908. The said injury consisted of the permanent loss of the end of the second finger of his right hand, past the first joint, and the pain and loss of time incident thereto. It is contended that the injury interferes or renders the claimant less able to follow his usual vocation.

It is established from the evidence that claimant expended for medical aid, after being discharged by the Naval surgeons, the sum of ten dollars.

The claimant asks one hundred fifty ($150.00) dollars assistance under the statute for the permanent disability sustained, which we deem reasonable.

It is established by the evidence that claimant, by reason of the said injuries, was unable to follow his usual occupation for a period of five weeks, and that he received on an average of fifteen ($15.00) dollars per week, and on account of said loss of time, sustained a loss of seventy-five ($75.00) dollars. We are of the opinion that claimant is entitled to an award of two hundred thirty-five ($235.00) dollars, for financial help and assistance from the State of Illinois.

"In every case where an officer, soldier or seaman of the Illinois National Guard or the Naval Reserve of Illinois, shall be killed or wounded while performing his duty as an 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 the case may demand."

Hurd's Revised Statutes, chapter 129, article 10, section 93.

In consideration of the foregoing, we award claimant, Lawrence Blickhan, the sum of two hundred thirty-five ($235.00) dollars, in full satisfaction of his said claim.

ROBERT LOUIS MUNDELIUS

v.

STATE OF ILLINOIS.

Opinion filed December 8, 1910.

MILITARY SERVICE—*award for injuries while in.* **Claimant, a member of the Illinois National Guard, while in camp at Camp Lincoln and while in the performance of his duties, was injured by being kicked by a horse. *Held*, that claimant is entitled to an award on account of such injury sustained and loss of time occasioned thereby.**

C. Fred Rush, for Claimant.
W. H. Stead, Attorney General, for State.

Robert Louis Mundelius, claimant in this case, was a member of Troop C, First Cavalry, Illinois National Guard. He enlisted in said organization on November 22, 1906. On August 11, 1907, claimant was at Camp Lincoln with his troop pursuant to general order No. 4, issued by order of the Commander-in-Chief. About 4:30 o'clock in the afternoon of August 11, Troop C was ordered out with the regiment for evening parade.

The claimant, Robert Louis Mundelius, was with his troop, and while the regiment was passing in review before the regimental commander, according to orders by the regimental commander, the claimant was kicked by the horse next to him on the right, which was being ridden by one Corporal Miller.

The horse struck him on the right leg on the tibia midway between the knee and ankle. He was at once taken to the hospital for treatment where he remained five days. The external evidence of the injury was a hole which penetrated into the bone and the bone was splintered. The serious character of the injury did not appear to the surgeon at the hospital at Camp Lincoln, as after four or five days claimant was discharged from the hospital, with the information that there was nothing seriously wrong with his leg, and

he was told to walk around on crutches and use his leg as much as he could.

After his return to Chicago claimant's leg still continued to hurt him and he consulted a doctor in his neighborhood who advised him to go to the hospital. This he did. At the hospital it was found that the wound had become infected and efforts were made by chiseling out part of the bone along the side of the fracture, to institute a perfect drainage and by antiseptic treatment, to overcome the infection and if possible save claimant's leg.

It was found, however, that it was impossible to overcome the infection, and in March, 1908, the leg was amputated below the knee joint with the object of saving the knee joint. After the operation the original infection still persisted, and it was evident that nothing but an amputation above the knee would be a cure. The leg was again amputated, above the knee, in July, 1908.

During the time of his injury claimant was in the hospital at one time two (2) months and at another time five (5) months and during the intervals was treated at his home. Claimant has been unable to do much work ever since he was injured. Prior to his injury he was a barber, earning about twenty ($20.00) dollars per week. Claimant had no means of support except his wages as a barber and had a family consisting of a wife, who was an invalid, one child and his wife's mother. During the time since he was injured he has been supported by money borrowed from his friends and relatives and by money raised by subscription and donated to him. His physician bills have been guaranteed by his friends. The total amount of money borrowed, hospital and surgeon bills, amounts at the present time to about twenty-six hundred ($2,600.00) dollars.

From the facts, as above set forth, it is clear that the case of claimant comes within section 4 of article 11 of chapter 129, being the military and naval code of

Illinois, in force July 1, 1903, which was the law at the time of the injury to claimant. The only question which remains in the opinion of the Court, is the amount which should be paid the claimant.

It clearly appears that during the past three years claimant has been able to do very little work so that he has lost almost his entire time for three (3) years. The evidence discloses that he was receiving about twenty ($20.00) dollars per week wages, which for the three years would amount to about three thousand ($3,000.00) dollars. The evidence discloses that he has become liable for money borrowed, physician and hospital bills to about the amount of twenty-six hundred ($2,600.00) dollars; that of this amount about sixteen hundred ($1,600.00) dollars was for hospital and surgeon bills. This shows an actual loss to the claimant in loss of time and extraordinary expenses up to the present time of about forty-six hundred ($4,600.00) dollars. In addition to this loss of time and extraordinary expenses, there is to be taken into consideration the fact, of the extreme suffering that has been endured by claimant, and the further fact, that he is permanently injured and his productive ability greatly reduced.

This is not an ordinary case of the loss of a leg, but is extraordinary by reason of the unfavorable manner in which this wound refused to respond to treatment and the length of time that claimant has been laid up; and it appears to the Court, that claimant should be paid for his loss of time and his unusual expense in connection with the treatment of his wound, in addition to the amount which has been ordinarily allowed by this Court in cases of similar character. Arriving at a conclusion in this manner, we have therefore fixed the damage of claimant at the sum of fifty-five hundred ($5,500.00) dollars.

HENRY A. FOWLER, ADMINISTRATOR OF THE ESTATE OF MARIA TOMASZEWSKA, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 3, 1910.

1. NON-LIABILITY OF STATE—*what does not constitute claim against the State.* In this claim, complainant's intestate was run over in Lincoln Park by an automobile, which had been commandered by one of the park policemen. *Held*, that no recovery could be had.

2. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* Even though the cause of the accident, which resulted in the death of claimant's intestate, was the negligence of the park policeman, still there is no liability on the part of the State therefor in view of the well established rule, that the State is not liable for the torts of its officers, agents, servants or employees.

George McMahon, for Claimant.
W. H. Stead, Attorney General, for State.

The record in this case shows that about six o'clock on the afternoon of Sunday, June 28, 1908, claimant's intestate, Maria Tomaszewska, and her three daughters were in the vicinity of the Grant monument in Lincoln Park, in the city of Chicago, and were crossing one of the park boulevards at this point, when the said intestate was knocked down and run over by a passing automobile, receiving injuries from which she died a few minutes after the accident. The testimony further shows that a few minutes before the accident occurred the automobile in question had been boarded by a park policeman, who was noticed to speak a few words to the driver; that the driver thereupon increased the speed of the automobile; that the policeman rode on the foot-board of the car and was in that position when the car struck claimant's intestate. It also appears that ahead of the automobile were two motor cycles connected with a rope or wire, tandem fashion, the one in the rear being towed by the former, the rear cycle being out of repair. There is no evi-

dence as to the identity of the driver of the automobile and no testimony as to what was said by the policeman to the driver, but it is sought to be inferred that the policeman being desirous of overtaking these motor cycles had boarded the automobile, told the driver to increase his speed and that while running at an unlawful rate of speed, and in a reckless manner, the said intestate was struck and killed. The State's liability to respond in damages in this case is based upon the assumption; that the driver was under the direction of the policeman; that the policeman had been appointed by the Lincoln Park Commissioners, and that the park being a function of the State government, the State is liable for the wrongful act of the park policeman. The evidence further shows that the location of the accident was a dangerous one, the same being at the intersection of four roads, and there is no evidence as to whether the intestate was, at the time, in the exercise of due care and caution for her own safety. There is much discrepancy in the evidence as to the rate of speed at which the automobile was being driven. Three witnesses testify on this point. One James W. Twohig, who himself had been the owner of an automobile for a year, testified that in his judgment the automobile that struck the intestate was moving at the rate of twenty-five miles per hour. One Samuel Lehman, who freely admits that he is not familiar with the speed of automobiles, gives his opinion that the speed was seventy or eighty miles an hour. Dr. A. H. Brumbach, a professor in the College of Physicians and Surgeons, who was driving by in his own automobile at the time of the accident and who got out of his car to render medical assistance to the intestate, testified that in his judgment the automobile which struck the intestate was moving at the rate of only fifteen miles an hour. Dr. Brumbach had been operating a car for seven years. All witnesses testify that no warning was given by the oncoming automobile as far as they heard.

It is hardly necessary in this case to discuss the general facts, for the reason that even if the evidence showed (which at best it only does by general inference), that the injury resulted from the wrongful or negligent act or acts of the policeman, there is no liability on the State therefor, in view of the well established rule that the State is not liable for the torts of its agents, servants or employees.

In *State Bank of Chicago, Administrator, etc.*, v. *State*, 1 Court of Claims Report, page 158, claimant's intestate, who was rightfully in Jackson Park and enjoying the same as a public park, was killed by the alleged unskillful handling of explosives in demolishing the World's Fair buildings by a wrecking company which had contracted with the Park Commissioners to dismantle said buildings. In that case this Court, on page 164, said:

"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*." Applying this rule, the South Park Commissioners, being merely appointive officers, with certain statutory powers, are mere assistants to the State in the exercise of its functions, are created for the purpose of aiding and assisting the sovereign power of the State in carrying on the functions of government, and they are not liable for the negligence or tortious acts of its servants. 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. It has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How then, can it be claimed that the State is liable for the acts of the commissioners? 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."

In *Johnson* v. *State,* 1 Court of Claims Reports, page 208, where an employee of the Board of Park Commissioners of West Chicago, in using a hose reel to water the grass, tripped up a bicyclist who was thrown to the ground and injured, this Court said: "The demurrer raises the question whether the State 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. (Court then cites *Schmidt* v. *State* and *Ross* v. *State.*) In these cases the rule has been 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."

In *Harper* v. *State,* 1 Court of Claims, page 322, this Court said: "It is contended by claimant that the said Board of Park Commissioners, through its employees, 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 employees were officers and agents of the State, the State is therefore liable for said injuries. The general rule of law is, that the principal is liable for the negligent act of his servants, in the course or scope of his 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."

"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, and 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, difficulties and losses, which would be subversive of the public interest."

In *Hollenbeck, administrator*, v. *Winnebago County*, 95 Ill., 148, 162, the Court said: "No reason is perceived why a county should be held to respond in damages for the negligence of its officers. * * * 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."

It is needless to pursue this line of authorities further. In the case at bar, it is not clear that the deceased was in the exercise of due care and caution for her own safety; it is not clear that the policeman was directing the driver of the car in his movements; it is not clear that the car was being driven in a reckless manner or at an unlawful rate of speed; it is not clear that the failure of the driver of the car to blow his horn and give warning was the fault of the policeman; it is not clear that the death of the deceased was the proximate result of the negligence of the policeman. But, if for the sake of argument, it be admitted that all of these propositions have been clearly proven, still the liability attaches to the policeman individually, and by no process of legal reasoning does it attach to the State of Illinois. The claim is therefore rejected.

JAMES McMILLAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JAMES McMILLAN AND COMPANY,

v.

STATE OF ILLINOIS.

Opinion filed January 21, 1911.

1. CONTRACTS—*proposals.* Where a proposal is submitted by a contractor and the same accepted, it is incumbent upon the contractor, in a suit to recover therefor, to show that the article was furnished in accordance with the proposal.

2. SAME—*retention of article.* When the contract fixes the time within which the purchaser may reject the article, the retention of the same for a longer period will amount to an acceptance of the same.

3. SAME—*interpretation.* Where there is doubt or uncertainty as to the proper construction to be given the terms of a contract, recourse may be had to the interpretation the parties have put upon it.

W. S. Corbin, for Claimant.
W. H. Stead, Attorney General, for State.

Claimant filed his claim on the 24th day of April, A. D. 1909, with the Auditor of Public Accounts of the State of Illinois, for the sum of twenty-six hundred twenty-five ($2,625.00) dollars, alleged to be due from the State of Illinois to the claimant to balance account for eight James McMillan Smokeless Furnaces and eight sets Whelan Shake and Dumping Grates and sundry items of repair and material as set forth in claimant's bill of particulars. The Honorable W. H. Stead, Attorney General of the State of Illinois, plead the general issue to the said claim.

A commission was created by an Act of the General Assembly of the State of Illinois, entitled "An Act to provide for the repair of the State Capitol Building at Springfield, Illinois," and making appropriations therefor, approved May 18, 1905, in force July 1, 1905, which said commission consisted of the Governor, Lieutenant Governor, Secretary of State, Auditor of

Public Accounts, the Attorney General and State Treasurer of the State of Illinois.

Claimant made the following proposal to the said commission, which proposal was accepted, and the said proposal is in the words and figures as follows, to-wit:

"Chicago, October 4, 1906.

W. Carbys Zimmerman,
State Architect,

Dear Sir:—We propose to equip eight (8) 66'x16' horizontal tubular boilers situated at the State Capitol Power Building, Springfield, Illinois, complete with the James McMillan Smokeless Furnace for the sum of three hundred ($300.00) dollars per boiler on the following conditions:

We will allow you a thirty days trial of these furnaces, and if they do not prevent ninety per cent of the smoke, we will remove them without any cost to you. If after a trial of thirty days these furnaces do prevent ninety per cent of the smoke, we are to receive the above amount mentioned.

We will guarantee these furnaces will cost you nothing for repair for one year; should any repairs be necessary, we will take care of same at our own expense. In looking over the boilers we find the iron door liners are badly burned and also that the grate bars are in very bad condition. We have a special tile door liner made of high grade Pennsylvania fire brick which will stand much better than iron, which we will furnish and set in position and do necessary brick work around same for an additional sum of forty ($40.00) dollars per boiler.

We further propose to furnish and set in place a straight common grate bar with a five inch air space, five feet long and six feet wide, heavy pattern for the sum of seventy-five ($75.00) dollars per boiler, or if you prefer a shaking grate we would furnish and set

in place a Whelan Shaking and Dumping grate for the sum of one hundred and five ($105.00) dollars per boiler. Very respectfully,

JAMES McMILLAN & COMPANY."

No additional conditions were added in the acceptance of the said proposal, nor was there any change in the terms or conditions of the said proposal except, that the said smoke consumers should be placed into one boiler at a time, so as not to shut down the plant. The sum of two hundred twenty-five ($225.00) dollars to balance account for material, appliances and labor performed by claimant with reference to sundry repairs and improvements, not including the said eight McMillan Smokeless Furnaces, has not at any time, so far as the records disclose, been in dispute. It appeared during the oral argument of the said claim that the said sum of two hundred twenty-five ($225.00) dollars had never been disputed, and could have been paid at any time. It does not appear that claimant at any time made any specific request for this particular amount, but that it was presented in the statement which included the twenty-four hundred ($2,400.00) dollars for the said eight McMillan Smokeless Furnaces. It is not established by the evidence that the commission at any time accepted the said McMillan Smoke Consumers, and therefore the item in claimant's bill of particulars which is and has been in dispute is the eight James McMillan Smoke Consumers placed in the horizontal tubular boilers at the State Capitol Power House at Springfield, Illinois, the proposed price being three hundred ($300.00) dollars per smoke consumer, making a total of twenty-four hundred ($2,400.00) dollars in dispute between the said claimant and the State of Illinois.

It is urged by the claimant that the eight smoke consumers complied with the conditions of the said proposal, and that they were accepted by the said repair commission through its alleged agent, James E. Cole. It is not established by the evidence that the

smoke consumers complied with and fulfilled the conditions of the said proposal. We are of the opinion that there has not been any legal acceptance of the said eight smoke consumers by the commission at any time, and the record does not disclose that the said commission in any way directed or attempted to confer any power on the said Cole to accept the said smoke consumers in behalf of the said commission. It appears that in about thirty days after the said smoke consumers had been installed, that they were not working satisfactorily, and that this information was communicated to the claimant, and in fact and legal effect the time for testing the said eight smoke consumers was by mutual and common consent extended and continued indefinitely. It appears from the evidence that the claimant and defendant were to arrange for some subsequent date for the final test of said eight smoke consumers under the conditions of the said proposal.

It is urged that the letter bearing date January 22, 1907, to James McMillan & Company, signed by James E. Cole, Superintendent of Construction, is an acceptance of the smoke consumers in question. The text of the letter is:

"In reply to yours of January 18, I wish to say that bills for furnaces, etc., must be made out to the State of Illinois, and sent to me for approval.

I wish to say that the consumers are not working as satisfactorily as I expected, but I have not had the time to look into the matter to find out where the trouble lay."

This letter clearly cannot be held to be an acceptance. In the first paragraph it directs how the bills are to be made out and the bills sent for approval. This does not express or imply that James E. Cole personally was to pass upon the approval or disapproval of the smoke consumers. In the second paragraph of the said letter it appears that the smoke

consumers are not working as satisfactorily as expected, and that the superintendent had not had the time to look into the matter and find out where the trouble lay. The burden of proof is upon the claimant to prove that the smoke consumers were in accord with the said proposal, and that they prevented ninety per cent of the smoke as specified in the said proposal. Certain photographs and other evidence is introduced to establish that the smoke consumers did consume ninety per cent of the smoke. No test of any kind, except the ordinary use, occurred within the thirty days and the test that occurred on August 6, 1907, was not a satisfactory or complete test under the said proposal. The smoke consumers to fulfill the requirements of the said proposal should consume ninety per cent of the smoke as fired by the regular fireman employed to fire the boilers in question. That no acceptance had occurred during the first thirty days' trial is apparent from claimant's letter bearing date July 27, 1907, in which a proposal is made to go down to Springfield on August 1, to make a test on the McMillan furnaces located at the State Capitol Power House. It appears from the evidence that the boilers during this test were only carrying a very small load, and that there were a very few lights burning, and that the principal load was an elevator. This we do not consider an adequate test under the said proposal.

It is urged that Mr. Cole has made certain admissions with reference to accepting the consumers in question. This, however, is denied by Mr. Cole and apparently is not well founded. It is sufficient to say that it was not in his province to accept or reject the smoke consumers, but that the approval or disapproval of the smoke consumers under the said proposal was and remained with the repair commission. It was incumbent upon the claimant to ascertain the extent of authority conferred upon James E. Cole by the commission or law.

It is urged that the letter bearing date April 11, 1908, signed by James A. Rose, was an admission of acceptance. This we do not think is the proper interpretation of that letter. It appears from the evidence in a letter written by Governor Charles S. Deneen, that the commission desired a report or certificate from the State Architect regarding the character of the improvements made before the commission considered the matter of approval and payment.

On January 16, 1908, claimant wrote to James E. Cole, Superintendent of Construction, the following letter:

"Chicago, Illinois, January 16, 1908.

Mr. James E. Cole,

Superintendent of Construction,
Supreme Court Building.

Dear Sir:—Some time ago we wrote you in regard to the McMillan Smokeless Furnaces under the boilers at the State Power House, yet we have not heard from you. These furnaces were to be tried in the cold weather. They cannot be tested if they are not in shape, and as the weather is not all right to make such a test we would suggest that we would get down there and make this test at once as agreed upon. Kindly let us hear from you at once in regard to this matter.

Very respectfully,

James McMillan & Co."

In the said letter it is established that a new subsequent test had been agreed upon. It appears from the said letter that the test referred to therein should be made in cold weather. It is substantially admitted that the test in August was not a complete or proper test under the said proposal.

It is clearly established that at no time prior to January 16, 1908, were the smoke consumers in question accepted, and that claimant desired to make another test so as to determine whether or not they had fulfilled the contract under the said proposal. It does

not appear that claimant took any steps whatever to make the test just suggested, and we cannot assume that he was prevented from making another test, or that the absence of a test is equivalent to an approval and acceptance of the smoke consumers. The time limit in the said proposal is not the essence of the contract in question, but whether the smoke consumers did consume ninety per cent of the smoke, and fulfill the requirements in the said proposal. Under the said proposal claimant allowed the State of Illinois thirty days' trial of the smoke consumers, and if they did not prevent ninety per cent of the smoke, claimant would remove them without any cost to the State.

Hyde v. *Love Bros.*, 63 Ill. App., page 45.

It appears from the evidence that on May 17, 1907, the furnaces were smoking as badly as ever, although the weather was warm, and while the usual workmen were then firing the boilers. The smoke consuming devices consisted of a brick arch built in the furnace.

In a letter bearing date December 18, 1907, the following language appears:

"I am informed by the engineer at the State Power House that the arches installed by you are falling down. I have not had time to look into this matter thoroughly, but he reports practically all of them in the same condition. If I remember rightly your contract calls to keep same in repair for a year, but I do not desire you to do anything in regard to this patching until further orders, as the question is still open in regard to taking these arches out."

This is a letter written to the James McMillan & Company by James E. Cole, Superintendent of Construction.

On March 18, 1907, claimant in a letter to Mr. Cole says:

"We will come down to Springfield, and prove to your entire satisfaction that the McMillan furnaces can and will comply with all the requirements of the contract."

This letter is prior to the letter written to Mr. W. Carbys Zimmerman by James E. Cole, May 17, 1907, in which Mr. Cole states that he has never at any time accepted same, nor had he given McMillan any reason to think that there was any possibility of his accepting same until the smoke consumers had fulfilled the terms of the contract. It also appears from the said letter that the furnaces at the time they were installed appeared to take care of the smoke for a very short time, but after that they were smoking as badly as ever.

It is urged that after the installation of the smoke consumers the heating system at the capitol building was changed and the radiation increased and that more boilers were required in keeping up steam than prior to the installation of said smoke consumers. It also appears from the evidence that the heating system was so changed, that the amount of boiler capacity to keep up steam and power was not materially increased. Mr. Whitney, the electrician, testified that there did not seem to be much difference in the amount of smoke before and after the installation of the smoke consumers. This, and other evidence in the record discloses, that the smoke consumers were not fulfilling the requirements of the contract during the first thirty days.

It appears from the evidence that after the smoke consumers in question were installed, that it required six boilers in the place of four which had been sufficient to furnish steam and power. It is urged that the State kept the furnaces until they were burned out and destroyed. This does not appear to be the proper interpretation of the attitude of the State. It is fully established by the evidence that the defendant was desirous of giving the plaintiff every opportunity to so construct and perfect the smoke consuming devices, so as to fully comply with the terms of the proposal and subsequent representations.

It is urged that when the contract fixes the time within which the purchaser may reject, the retention

of the article for a longer period of time amounts to an acceptance, and thereby makes the purchaser liable for the purchase price. The contention just urged is not supported by the facts in this case, as the acts of claimant and defendant clearly demonstrate, that the first thirty days' trial limit was waived, and the matter of testing the said smoke consumers continued from time to time, with the mutual understanding, that in the future a complete test was to be made and the matter of approval or rejection finally determined. The written proposal was varied with reference to the time limit by subsequent transactions and conversations. It is conceded by claimant that neither Mr. Zimmerman, the State Architect, nor Mr. Cole, Superintendent of Construction, had been made arbiter with power to decide upon the character or quality of the work. The defendant does not appear to have taken the position that a certificate from the State Architect, or the Superintendent of Construction, was a condition precedent to payment, but that the commission desired a report from the State Architect, or the Superintendent, regarding the character of improvements made before considering the matter of approval and payment. It cannot be said that the report requested from the Superintendent of Construction by the commission was unreasonable.

We do not consider the case in question parallel with the case of *McMillan* v. *DeTamble*, 93 Ill. App., page 65. In the said case on page 69, the following language appears: "There was evidence tending strongly to show that defendant made no objection to the furnace during the thirty days' trial of it, which was given; that he did, in fact, accept it, and made no objection to paying for the furnace until long after the expiration of the thirty days; also, that the furnace complied with the conditions mentioned in the contract." Claimant was informed in about thirty days, that the smoke consumers were not working satisfactorily and

had not been, but for a very short time. This was during the first thirty days' trial, and no acceptance can be assumed to have occurred.

Mr. Cole was asked the following questions (Defendant's evidence, page 9): "Have you any opinion with reference to what per cent of the smoke was prevented by the smoke consumers, if any?" A. "I should say that from twenty to twenty-five per cent reduction of smoke would be a very high estimate." Considering, that he was in charge of the construction and unquestionably in a proper position to judge as to the efficiency of the smoke consumers, this estimate by the Superintendent of Construction is significant.

We are of the opinion that claimant under the said proposal and subsequent acts, transactions, conversation and correspondence, contracted and guaranteed to install eight smoke consumers, that would consume ninety per cent of the smoke of the boilers in question, and that the smoke consumers did not fulfill the requirements of the said proposal or subsequent representations and should have been removed by claimant.

" * * * The meaning of a written contract is ordinarily a question of law for the Court and not one of fact for the jury, but if the construction depends not only upon the meaning of the words employed but upon extrinsic facts and circumstances, or upon the construction which the parties themselves have placed upon the contract, which is to be proved like any other fact, if such facts are controverted, the inference to be drawn is for the jury, and in such a case the whole question as to what the contract was, should be submitted to the jury under proper instructions."

Turner v. *Osgood Art Co.*, 223 Ill., 629, 635.

In consideration of the foregoing, we are of the opinion that claimant should be awarded the sum of two hundred twenty-five ($225.00) dollars, to balance account for items of account referred to herein, and

that the claim of twenty-four hundred ($2,400.00) dollars for the eight smoke consumers in question should be rejected.

Claimant James McMillan is therefore awarded the sum of two hundred twenty-five ($225.00) dollars.

William McKinley, R. W. Hood and J. R. Ebersole
v.
State of Illinois.

Opinion filed January 31, 1911.

1. Corporations—*license fees.*

"That all companies and corporations hereafter organized under the laws of the State of Illinois, before they shall be permitted to file any papers in the office of the Secretary of State, or make any application for the purpose of becoming incorporated, shall pay to him fees as follows: All companies having a capital stock of * * * $5,000.00, shall pay the sum of $50.00."

Hurd's Rev. Stat., 1909, chap. 53, par. 10a.

2. License Fee—*when no recovery of.* Where an application for a license to open books for subscription to the capital stock of a corporation is made, accompanied by the license fee, and the license issued, no refund of the fee or any part thereof can be made, no matter whether the books were opened or not, or whether the incorporation was completed or not.

3. Same—*retention by State.* The retention of the license fee by the Secretary of State is in no way conditional upon the Commissioners taking any further steps.

E. P. Field, for Claimant.
W. H. Stead, Attorney General, for State.

The statement of claim in this case shows that William McKinley, R. W. Hood and J. R. Ebersole, claimants, did on October 22, 1904, file in the office of Honorable James A. Rose, Secretary of State of Illinois, a statement duly signed and acknowledged according to law, for the purpose of forming a corporation to be known as "The Monmouth Military Tract Bindery," with a capital stock of five thousand ($5,000.00) dollars; that in pursuance of the filing of said statement the Secretary of State issued to said applicants, as Commissioners, a license to open books for subscription to the capital stock of said corporation, and that after said license was issued, books were not opened by said Commissioners for subscription to the capital stock of

said corporation, and that after the issuance of said license no action whatever was taken to complete the organization of said corporation.

To this claim the State of Illinois, by W. H. Stead, Attorney General, filed a general demurrer. The ground of demurrer on the part of the State is that the fee in question was paid voluntarily and that it is indivisible.

The Court is of the opinion that the contention of the State is well founded. The provision of the statute in reference to the case at bar is par. 10a, chap. 53, Hurd's Revised Statutes 1909, which is as follows: "That all companies and corporations hereafter organized under the laws of the State of Illinois, before they shall be permitted to file any papers in the office of the Secretary of State or make any application for the purpose of becoming incorporated, shall pay to him fees as follows: All companies having a capital stock of * * * $5,000.00 shall pay the sum of $50.00."

From this provision of the law it is clear that payment of the sum of fifty dollars ($50.00) was a requirement which must be complied with, before the Secretary of State could issue any papers whatever, and the retention of the fee by the Secretary of State is in no way made conditional upon the Commissioners taking further steps.

The law does not make this fee divisible, and this Court has no authority to decide this case contrary to the plain provisions of the law.

The Act creating the Court directs, sec. 5, par. 333, chap. 37, "* * * 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. * * *."

It is clear from the language of the Act just quoted, that this Court has no authority to arbitrarily dis-

regard the plain provision of the law involved in this case, as contended for by attorney for claimants, on the ground of equity and justice.

This Court is bound by the plain provision of this law and is not authorized to legislate in favor of claimants. The demurrer is therefore sustained and the case is dismissed.

JENNIE SANFORD GRIFFITH, EXECUTRIX OF THE LAST WILL OF MERRITT E. SANFORD, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed February 16, 1911.

1. INHERITANCE TAX—*stocks and bonds of foreign corporations not subject to.* In this claim the inheritance tax was assessed and fixed by the county judge of Cook County on all of the property of deceased, which included stocks and bonds of foreign corporations, which tax was paid by the executrix under protest. An appeal was prayed by the executrix to the county court, which court reduced the tax, eliminating from the appraisement the stocks and bonds of foreign corporations. An appeal was then prayed by the People to the Supreme Court, which Court affirmed the decision of the county court, as to the amount of the tax to be paid by the beneficiaries, but reversed that part which ordered the county treasurer to repay the sum of $497.00. (*People* v. *Griffith*, 245 Ill., p. 532.)

2. STATUTE—*section 10 construed.* Sec. 10 of the inheritance tax law provides that when any amount of inheritance tax "shall have been paid erroneously to the State Treasurer, it shall be lawful for him on satisfactory proof rendered to him by said county treasurer of said erroneous payments, to refund and pay to the executor, administrator or trustee, person or persons who have paid any such tax in error the amount of such tax so paid, provided, that all applications for the repayment of said tax shall be made within two years from the date of said payment." In construing this section the Supreme Court in the *Griffith case, supra*, held that it was not the intention to authorize county treasurers to repay tax erroneously paid to them, but that the State Treasurer, upon proper proof, is to refund such amounts.

3. VOLUNTARY PAYMENT OF ILLEGAL TAX—*may not be recovered.* It is a well established principle of law in this State, that there can be no recovery of taxes erroneously or illegally paid, unless the same were paid under duress or compulsion. (*Yates* v. *Insurance Co.*, 200 Ill., 202.)

4. PAID UNDER PROTEST—*may be recovered.* In this claim the executrix endorsed on the check "paid under protest" and since simple payment under protest would not amount to duress or compulsion, claimant, to recover, must recover, if at all, under section 10.

5. STATUTE OF LIMITATIONS—*does not run pending appeal.* The requirement of section 10, that application for repayment must be made within two years from the date of payment, does not apply where an appeal is pending.

Musgrave and Lee, for Claimant.

W. H. Stead, Attorney General, and Roy Wright, Assistant Attorney General, for State.

The evidence in this cause shows that Merritt E. Sanford, a resident of Rome, New York, died in Chicago, October 28, 1906. His will was admitted to probate in Cook County on the petition of his sister, Jennie Sanford Griffith, to whom letters testamentary were issued as executrix, November 27, 1906. Sanford died seized of real estate in Chicago valued at $20,000. He was also found to be the possessor of certain securities, which were found in a safe deposit vault in Chicago, where they had been deposited by decedent for safe keeping. These securities and their appraised values were as follows: Certificates of stock of Illinois corporations, $21,575; certificates of foreign corporations, $24,962.50; bonds issued by Illinois corporations, $19,484.58; bonds issued by foreign corporations, $38,910; and bonds of a railroad company organized under the laws of Illinois and Iowa, of the value of $9,100. He also left cash on deposit with certain Chicago banks, to the amount of $1,194.76, and other personal effects and chattels in Cook County valued at $1,523. The inheritance tax appraiser appointed by the county court of Cook County, included in his appraisement of property all the property above mentioned. The county judge of Cook County, upon such report and appraisement, assessed and fixed the inheritance taxes to be paid by the beneficiaries under the will, at $1,423.25, and on April 26, 1907, the executrix paid to the county treasurer of Cook County, the sum of $1,352.09, being the taxes so fixed, less five per cent deducted, in accordance with the statute, on account of payment within six months after testator's death. Payment of this amount was made by check

and upon the check the words "paid under protest" were endorsed by the attorneys of the executrix. Subsequently the money so paid was turned over to the State treasury by the county treasurer of Cook County. From the order of the county judge fixing the taxes, an appeal was prayed by the executrix to the county court of Cook County, where after a hearing on May 17, 1909, the stocks and bonds of foreign corporations were held by that court not subject to an inheritance tax under the laws of this State.

The same court found that the taxes, on the remainder of the property included in the appraiser's report, should be $900, and ordered that the county treasurer refund to the executrix, the sum of $497.09, being the difference between the amount previously fixed by the county judge and the amount as finally fixed by the county court, less the discount in both cases. From this judgment of the county court of Cook County an appeal was taken by the People to the Supreme Court of Illinois, which said Court, on June 29, 1910, affirmed the judgment of the county court, as to the amount of inheritance tax to be paid by the beneficiaries in this estate, but reversed that part of the judgment ordering the repayment by the county treasurer of the said $497.09. (*People* v. *Griffith*, 245 Ill., 532.)

The construction of section 10 of the Inheritance Tax Act was involved in this cause. This section provides, that when any amount of the inheritance tax "shall have been paid erroneously to the State Treasurer, it shall be lawful for him, on satisfactory proof rendered to him by said county treasurer of said erroneous payments, to refund and pay to the executor, administrator or trustee, person or persons who have paid any such tax in error the amount of such tax so paid, provided, that all applications for repayment of said tax shall be made within two years from the date of said payment." In reference to this section, the Supreme Court held that it was not the intention of this section to authorize the county treas-

urer to repay taxes erroneously paid to him, but, that the State Treasurer, upon proper proof, was to refund such amounts. To secure such a refund of the said $497.09, now covered into the State treasury, is the object of the claimant in filing her claim in this Court.

It is a well established principle of law in Illinois, that there can be no recovery of back taxes, erroneously or illegally paid, unless the same were paid under actual duress or compulsion. *Yates* v. *Insurance Co.*, 200 Ill., 202, and cases cited.

Upon the check, by which payment of the taxes in question was made, the endorsement of the words "paid under protest" obviously did not amount to payment under duress or compulsion. Therefore, if recovery can be had in this cause, it must be had under section ten, above referred to, which section makes special provision for repayment in case of erroneous payments in the matter of an inheritance tax.

The difficulty encountered in this regard, however, is the requirement of said section ten, that application for repayment must be made within two years from the date of payment. In this case, payment was made to the county treasurer, April 26, 1907, and the two years' limitation therefor had run April 26, 1909. The evidence further shows, that neither during that period, nor afterward, was any application made to the State Treasurer for repayment, either by the county treasurer of Cook County, or the claimant, and the question therefore arises, whether claimant is barred of recovery in this cause by limitation.

Section ten, referred to above, is somewhat vague and uncertain as to the manner in which application for repayment is to be made, or as to the person by whom or to whom such application is to be made. As conditions precedent to repayment, two incidents are to concur: First, the county treasurer is to render to the State Treasurer satisfactory proof of the erroneous payment and, secondly, an application is to

be made for repayment, but whether application is to be made by the payer to the county treasurer, by the payer to the State Treasurer, or by the payer to the county treasurer and then by the county treasurer to the State Treasurer, is not at all evident from the context.

It would seem to be the most natural method, however, for the person who had erroneously paid the tax to the county treasurer, to apply for repayment to the very same officer to whom payment in the first instance was made, and that the county treasurer, who is presumed to have paid this erroneous tax to the State Treasurer, would thereupon make proof of the erroneous payment to said State Treasurer and the latter officer then make repayment.

Again, under section ten referred to, repayment is to be made by the State Treasurer upon satisfactory proof being made to him, by the county treasurer, of the erroneous payment. It is unlikely that the county treasurer would render such proof, unless application were first made to him for repayment by the party erroneously paying the tax, notice of the erroneous payment being thus brought to his attention, and it is not unreasonable to suppose that this is the application which is intended should be made within the two years period.

There is no definite direction in section ten as to this matter of application, and there is nothing in the section to indicate that the application is to be accompanied by any formality. In this case, at the time the tax was paid, claimant expressed protest by endorsing the same on the check. This protest was followed by an appeal by the claimant, from the order of the county judge, fixing this tax and by the time the county court rendered its opinion that part of the tax was illegal, the limitation had run. There was no laches or lack of diligence on the part of claimant. She was protesting against the payment all the time and was seeking relief from the same by the only legal remedy

at hand, following her remedy to the Supreme Court of the State. Her acts and conduct in the matter constituted a constructive application of the very strongest kind and was of a continuing character.

From all the facts in this case, it is the opinion of this Court, that not only as a matter of equity and justice is claimant entitled to an award, but such an award is also in conformity with law. Her claim for $497.09 is therefore hereby allowed.

BERTHEL C. B. JORGENSEN
v.
STATE OF ILLINOIS.

Opinion filed May 3, 1911.

1. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State.

2. SAME—*State does not act as guarantor of its servants.* The State does not undertake to guarantee to any person the fidelity of its officers, servants, employees, appointees or agents, and the State is not liable for injuries resulting from acts or neglects of such officers, servants, employees, appointees or agents.

3. JURISDICTION—*when Court may allow claim.* No power is vested in this Court to allow a claim unless the facts show a legal liability.

Charles W. Hadley, for Claimant.
W. H. Stead, Attorney General, for State.

In this case the claimant, Berthel C. B. Jorgensen, has filed his petition setting forth that on the tenth day of June, A. D. 1906, and for a period of one year prior thereto, he was employed as a milker upon the dairy farm owned, controlled and conducted by the State at the University of Illinois; that the said claimant was on the said tenth day of June, A. D. 1906, of the age of twenty years and that as such employee he performed services as such milker under the direction, supervision and control of a certain other employee of the State in charge of said dairy farm; that at the time aforesaid and for a period of six months prior thereto, the State owned and possessed a certain calf on the farm aforesaid, and that the said calf was then and there, afflicted with a dangerous and infectious disease; that the said employee so in charge of said dairy farm, then and there directed and instructed the claimant to administer medicine to said calf; that the said claimant, following the instructions and directions of the said employee, then and there administered said medicine to said calf by opening its mouth and pouring

the medicine down the throat of the said animal; that while opening the mouth of said calf, as so directed, the hands of the claimant came in contact with the saliva of said calf, so infected with disease as aforesaid, and that through a break or abrasion of the skin on the hands of the said claimant, the said infected saliva inoculated the claimant with the disease with which the said calf was infected, and the claimant thereby became sick, sore, lame and disordered and so remained for a long space of time; that as a result of said infection, the claimant has lost the use and control of his right arm and is disabled in the use of said arm for the remainder of his natural life.

Claimant further alleges, that at the time he was inoculated with the said disease he was in the exercise of due care and caution for his own safety, and was not informed of the character and nature of the said disease with which the said animal was afflicted, or of the dangers of the employment in which he was engaged.

Claimant also files with his petition a duly authenticated transcript of the evidence taken in this cause, said evidence having been taken and transcribed under an agreement with the Attorney General of the State, and in the manner provided for in the statutes of Illinois. Said evidence, as far as the same applied to the facts connected with the injury received, substantially sustains the allegations of the petition.

To the said petition of the claimant, however, the Attorney General, on behalf of the State, files a general demurrer and as a ground for such demurrer urges, that the said facts are not sufficient in law for the claimant to maintain his action against the State of Illinois, in that, the State does not undertake to guarantee to any persons the fidelity of its officers, servants, employees, appointees or agents, and that the State is not liable for dangers resulting from the acts or neglects of such officers, servants, employees, appointees or agents.

In the adjudication of claims filed against the State of Illinois, this Court, from the nature and purposes of its creation, is limited to a consideration of the question, whether, from the facts alleged and proven, any legal liability attaches to the State and no authority or power is vested in this Court to allow any claim presented for consideration unless, the facts alleged and proven show the existence of such a legal liability.

In *Schmidt* v. *State*, 1 Court of Claims Reports, page 76, this Court held, that the law creating it did not undertake to create new liabilities against the State, but simply provided a remedy by which claims might be heard and that this Court, "has no power to make an award in any case unless the facts show a legal or equitable claim against the State." In passing upon a similar Act, the Supreme Court of Massachusetts, (*Murdock Grate Co.* v. *Commonwealth*, 24 N. E., 855) held, that the said Act "disclosed no intention to create against the State a new and heretofore unrecognized class of liabilities, but only an intention to provide a judicial tribunal where well recognized existing liabilities can be adjudicated" and this principle of law has been strictly followed and adhered to by this Court in the adjudication of claims from the creation of the Court to the present.

The demurrer interposed in this cause, raises this question of the legal liability of the State, as deducible from the allegations of the petition, which allegations, for the purposes of such demurrer, must be taken as true. The principle of law urged by the Attorney General in support of the demurrer has been well established by the Supreme Court of the United States, the United States Court of Claims, and the Supreme Courts of various state jurisdictions, including our own. In *Gibbons* v. *United States*, 8 Wall., 269, the Court held that "no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents, however gross." See also *United States* v. *Kirkpat-*

rick, 9 Wheat., 720; *Dox* v. *Postmaster-General*, 1 Peters, 318; *Lewis* v. *State*, 96 N. Y., 71; *Murdock Grate Co.* v. *Commonwealth*, 24 N. E., 855; *Bowen* v. *State*, 108 N. Y., 166; *Splittorf* v. *State*, 108 N. Y., 205; *Hollenbeck* v. *Winnebago County*, 95 Ill., 162; *Hedges* v. *County of Madison*, 1 Gil., 567; *Town of Waltham* v. *Kemper*, 55 Ill., 346; *Symonds* v. *Clay County*, 71 Ill., 355; *Hill* v. *Boston*, 122 Mass., 344; *Curran* v. *Boston*, 151 Mass., 505; Cooley's Constitutional Limitations, 240, 247; Story on Agency, 319; Dillon on Municipal Corporations, 761.

This proposition of law, so well established, has been consistently followed by this Court in the adjudication of all claims, that have ever come before it, and applies with equal force to the cause now on hearing. In passing upon the demurrer herein interposed, the Court recognizes the meritorious nature of the claim presented, the unfortunate character of the occurrence and the resulting consequences to the claimant, but being limited, as before stated, to a consideration of the issues involved from the standpoint of the legal liability of the State in such cases, this Court is forced to sustain the demurrer. The demurrer is therefore sustained and the petition dismissed.

FREDERIC F. NORCROSS AND HAROLD B. WRENN, EXECUTORS OF THE LAST WILL OF JOHN H. WRENN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 23, 1912.

1. INHERITANCE TAX—*refund of—appeal.* Claimant, in order to secure a refund of an inheritance tax erroneously fixed by the county judge and paid under protest, should appeal from the order of the judge fixing the tax, to the county court, and obtain a decision in his favor.

2. SAME—*demand.* Demand for a refund of the tax should be made on the State and county treasurers.

John V. Norcross, for Claimant.
W. H. Stead, Attorney General, for State.

The evidence in this case shows, that on the 13th day of May, 1911, John H. Wrenn died testate at the city of Chicago, Cook County, Illinois, and that the plaintiffs herein were on the 27th day of June, A. D. 1911, duly appointed executors of the last will and testament of said decedent and are now acting as such executors; that after the death of said decedent David E. Shanahan was appointed by the county court of Cook County inheritance tax appraiser, and in his report found that under paragraphs "A and B" of the eighth clause of said last will and testament, the property therein devised and bequeathed was liable to the payment of an inheritance tax of fifty-six hundred twenty-nine and 92-100 ($5,629.92) dollars; that said appraiser filed a written report of his appraisal in the office of the county judge of Cook County, and on the tenth day of November, 1911, the Honorable John E. Owens, judge of said court, fixed the tax upon the various estates created by said will, in accordance with the report of said appraiser, at the sum of twenty-one thousand seven hundred ninety-four and 26-100 ($21,794.26) dollars, which sum included the sum of fifty-six hundred twenty-nine and 92-100 ($5,629.92)

Claimant further states in his petition, that on, to-wit; the 19th day of October, 1910, he, with two of the supposed stockholders of the said Rockford Tool Company, applied for and obtained a license to incorporate the Rockford Tool Company with a capital stock of fifty thousand ($50,000.00) dollars; that with the application for said license, they remitted the sum of ninety-five ($95.00) dollars, and received a voucher therefor; that further proceedings with reference to the said application of October 19, 1910, were thereafter taken and that a charter was duly issued to the Rockford Tool Company, by the State of Illinois, on said last application, and which charter was filed in the office of the recorder of deeds of Winnebago County, in the State of Illinois, and thereupon said last incorporation became complete.

To this claim, the State of Illinois, by W. H. Stead, Attorney General, filed a general demurrer. The general demurrer is sustained by the Court. The Attorney General in his demurrer contends that the claim in the above entitled matter and the matters therein contained, in manner and form as the above is set forth, are not sufficient in law for the claimant to maintain his action against the State of Illinois. The incorporation fee in this case was voluntarily paid. The provision of the statute in reference to the case at bar, paragraph 10a, chapter 53, Hurd's Revised Statutes, 1908, is as follows:

"All companies and corporations hereafter organized under the laws of the State of Illinois, before they shall be permitted to file any papers in the office of the Secretary of State, or make any application for the purpose of becoming incorporated, shall pay to him fees as follows: All companies having a capital stock of * * * $5,000 shall pay the sum of fifty dollars, and all companies having a capital stock of over five thousand dollars shall pay in addition to the said sum of fifty dollars the sum of one dollar for each one thousand dollars of capital stock over $5,000."

From the foregoing provision of law it is clear, that the payment of the said sum of fifty-five dollars was absolutely required by law, and was necessary to be complied with before the Secretary of State could issue a license to the Rockford Tool Company for the subscription of stock. The retention of the fee by the Secretary of State is in no way conditional upon the Commissioners completing the incorporation. In the case of *William McKinley, et al.* v. *State of Illinois*, in the Court of Claims, it was decided that an incorporation fee, voluntarily paid, was not divisible, and that the retention of the incorporation fee by the Secretary of State was in no way made conditional upon the Commissioners taking any further steps.

In section 4 of chapter 32, Hurd's Revised Statutes, 1908, of the State of Illinois, it is provided, that unless the proposed corporation shall be fully organized and proceed to business as provided for in the incorporation Act of the State of Illinois, that such license shall be deemed revoked, and all proceedings thereunder void. In the case at bar, the incorporation license was duly issued on the 20th day of January, 1906, and the incorporation of the said proposed corporation was never completed under the said license, according to the Incorporation Act of the State of Illinois. The Court has no authority to decide cases contrary to the plain provisions of the law. It is stated in the Incorporation Act of the State of Illinois, that the incorporation should be completed within two years after the date of the issuance of the license; otherwise, the license should be deemed revoked and all proceedings thereunder void.

The Court is bound by the foregoing specific provisions of law, and the demurrer is therefore sustained and the case dismissed.

CAPITOL COAL COMPANY
v.
STATE OF ILLINOIS.

Opinion filed November 23, 1912.

1. CONTRACTS—*no recovery under—when.* Claimant seeks to recover fifty cents for each ton of coal delivered at the Power House, in addition to the contract price. *Held*, that under the constitution, statutes, advertisement, proposal and contract, claimant cannot recover.

2. DELIVERY—*elements of:* a. The time of delivery; b. The quantity to be delivered; c. The place of delivery.

3. SAME—*place of.* If no place of delivery is appointed in the contract, it is the duty of the seller to ascertain from the buyer where he will receive them. (*Bean v. Simpson*, 16 Me., 40.)

Albert Salzenstein, for Claimant.
W. H. Stead, Attorney General, for State.

The petition in this case shows, that the claimant is a corporation organized and existing under the laws of the State of Illinois, with its principal office in the city of Springfield, Illinois, and engaged in the business of mining and selling coal; that on or about July 30, 1908, the Commissioners of State Contracts, advertised for proposals "for furnishing bituminous coal * * * for the period beginning October 1, 1908, and ending September 30, 1910. The said coal to be delivered as directed by the Secretary of State, at such time or times and in such quantities as the Secretary of State may direct"; that the petitioner on September 5, 1908, made a proposal in writing "to furnish coal in accordance with the foregoing advertisement for the use of the State of Illinois, from the first day of October, 1908, to the 30th day of September, 1910", which proposal was accepted by the Commissioners of State Contracts, and a contract was entered into between the commissioners and claimant, in which said advertisement for proposals was referred to, and in which said claimant agreed to furnish coal for the required period

upon the terms and in the manner prescribed in the statutes in such cases made and provided; that claimant entered upon the performance of its contract and delivered to the State of Illinois, all the coal that it was directed by the Secretary of State to deliver, the total amount being thirteen thousand twenty-six and sixty-eight hundredths (13,026.68) tons, and delivered it at such times and in such quantities as he directed; that the Secretary of State directed it to deliver all of said coal at the Power House of the State of Illinois, in the city of Springfield, Illinois; that upon the presentation by claimant of its first bill, it included and asked for the payment of fifty cents (50c) per ton for delivery at said Power House, over and above the contract price, but, that the Secretary of State refused to so include it, claiming, that under the contract, claimant was bound to deliver the coal at said Power House of the State of Illinois.

The Attorney General, representing the State of Illinois, has filed a demurrer to this claim.

The question then submitted for our decision is, whether the claimant is entitled to recover from the State of Illinois fifty cents (50c) per ton for delivering the coal at the said Power House, taking into consideration the advertising for proposals, the proposal of claimant, the contract and the statutes of the State of Illinois.

The advertisement for proposals provides as follows, "for furnishing bituminous coal of the following grades, etc., * * * the said coal to be delivered as directed by the Secretary of State." The proposal of claimant provided as follows: 'Capital Coal Company propose to furnish coal in accordance with the foregoing advertisement, etc." The contract provided among other things as follows: "The said party of the first part agrees to furnish coal for the State of Illinois * * * upon the terms and in the manner prescribed in the statute in such cases made and provided."

The constitution and laws of the State of Illinois

provide, that the fuel furnished for the use of the State should be let by contract to the lowest responsible bidder, and that the commissioners shall advertise in a daily paper, published at Springfield, for the proposals to furnish fuel for the State. Section 55, chap. 127, Hurd's Statute 1911, page 2195 provides, "on the delivery of any fuel, the Secretary of State shall examine the same as to quality and quantity and if he finds the same to be in accordance with the contract, he shall give his receipt therefor, and if it is not according to the contract he shall reject it. He shall keep an account of all fuel delivered to him and by him furnished to the State House and several officers to which fuel may be furnished." From the above quotations, from the advertisement, the proposal, the contract and the statutes, it is clear, to our mind, that the contract provides for the furnishing of the coal and also for the delivery of the coal as directed by the Secretary of State.

Bringing the coal to the tipple by the claimant, might perhaps, be said to be a furnishing of the coal, but could not be said to be a delivery to the State of Illinois. Section 55 provides for the inspection of the coal as to quality and quantity on the delivery of any fuel. This section clearly provides for the delivery of the fuel and does not contemplate that the Secretary of State shall inspect the fuel, at the tipple of the claimant, and if he finds the same to be in accordance with the contract give his receipt therefor.

From the foregoing we think the only fair construction to be placed upon the contract in question is, that the claimant was under obligation to deliver the coal in question at the Power House of the State of Illinois, in Springfield, at the prices specified in its proposal and, that it was not entitled to make an additional charge for so delivering the coal.

The advertisement for bids was open to all bidders, without regard to location of their place of business, and all bidders were asked to make proposals for the

same thing, i. e., "For furnishing bituminous coal * * * for the period beginning October 1, 1908, and ending September 30, 1910; the said coal to be *delivered* as directed by the Secretary of State at such time or times and in such quantities as the Secretary of State may direct." If the contention of the claimant is the law, then all bidders would not be bidding on the same thing. If the proposal of the claimant means furnishing coal at the tipple of the claimant, then a like proposal by a dealer in coal in the city of Chicago, would mean that he would furnish the coal proposed at his coal yards in the city of Chicago and the Secretary of State would be compelled to inspect it there. This contention would be absurd.

The cases of *Smith* v. *Gillette*, 50 Ill., 290, and *Bosworth* v. *Frankberger*, 15 Ill., 509, cited by counsel for claimant, are not in point, for the reason, that the contracts in question in those cases did not provide for delivery, whereas, in the case at bar the contract was to furnish and deliver.

In making a delivery three elements are necessary:

(1) The time or times of delivery.

(2) The quantity or quantities to be delivered.

(3) The place of delivery.

(1) The time or times of delivery, and (2) the quantity or quantities to be delivered are specifically placed under the direction of the Secretary of State. It is unnecessary to state (3) the place of delivery, for it was evident from the fact, that it was to be furnished and delivered for "the use of the State of Illinois," that said coal was to be delivered to the State of Illinois, and "under the direction of the Secretary of State of the State of Illinois."

In *Bean* v. *Simpson*, 16 Me., 49, it is held that if no place is appointed in the contract for the delivery of specific articles, it is the duty of the seller to ascertain from the buyer where he will receive them. 35 Cyc., 172.

Where the goods are bulky and cumbersome and no place of delivery is fixed, the seller should ask the buyer to appoint the place of delivery. 35 Cyc., 173, citing *Allen* v. *Woods*, 24 Pa. State, 76; *Mallory* v. *Lyman*, 4 Chandl. (Wis.), 143.

We are therefore of the opinion, that the contract in question required the claimants to deliver the coal in question to the Power House of the State of Illinois, upon the direction of the Secretary of State, and that claimant is not entitled to any additional compensation for so delivering it; that in consequence the demurrer of the defendant, the State of Illinois, is sustained and the case is dismissed.

FREDERIC F. NORCROSS AND HAROLD B. WRENN, EXECUTORS OF THE LAST WILL OF JOHN H. WRENN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 23, 1912.

1. INHERITANCE TAX—*refund of—appeal.* Claimant, in order to secure a refund of an inheritance tax erroneously fixed by the county judge and paid under protest, should appeal from the order of the judge fixing the tax, to the county court, and obtain a decision in his favor.

2. SAME—*demand.* Demand for a refund of the tax should be made on the State and county treasurers.

John V. Norcross, for Claimant.
W. H. Stead, Attorney General, for State.

The evidence in this case shows, that on the 13th day of May, 1911, John H. Wrenn died testate at the city of Chicago, Cook County, Illinois, and that the plaintiffs herein were on the 27th day of June, A. D. 1911, duly appointed executors of the last will and testament of said decedent and are now acting as such executors; that after the death of said decedent David E. Shanahan was appointed by the county court of Cook County inheritance tax appraiser, and in his report found that under paragraphs "A and B" of the eighth clause of said last will and testament, the property therein devised and bequeathed was liable to the payment of an inheritance tax of fifty-six hundred twenty-nine and 92-100 ($5,629.92) dollars; that said appraiser filed a written report of his appraisal in the office of the county judge of Cook County, and on the tenth day of November, 1911, the Honorable John E. Owens, judge of said court, fixed the tax upon the various estates created by said will, in accordance with the report of said appraiser, at the sum of twenty-one thousand seven hundred ninety-four and 26-100 ($21,794.26) dollars, which sum included the sum of fifty-six hundred twenty-nine and 92-100 ($5,629.92)

dollars, so assessed against the property included in paragraphs "A and B" of said eighth clause. On the tenth day of November, 1911, the plaintiffs paid to the county treasurer of Cook County, Illinois, the full amount of tax so assessed, less five per cent thereof, according to the law, which money was paid under protest, duress and compulsion and not voluntarily, and that said payment was made erroneously.

That afterwards, said plaintiffs appealed to the county court of Cook County, and the county court of Cook County, upon such appeal, found that said executors had made a total erroneous payment in excess of the tax assessable under paragraphs "A and B" of the eighth clause of said will, of thirty-two hundred eighty-three and 50-100 ($3,283.50) dollars, and made a final order to that effect; that afterwards, an application was made by said plaintiffs on William L. O'Connell, county treasurer of Cook County, and upon E. E. Mitchel, State Treasurer of the State of Illinois, for the money over-paid amounting to thirty-two hundred eighty-three and 50-100 ($3,283.50) dollars. and said William L. O'Connell, county treasurer of Cook County, Illinois, also notified the State Treasurer of Illinois, of the demand for repayment, all of which was done within two years of the date of making said payment.

These facts bring this case clearly within section ten, of an Act to tax gifts, legacies, inheritances, transfers, appointments and interests in certain cases, and to provide for the collection of the same and repealing certain Acts therein named; approved June 14, 1909, in force July 1, 1909, and the amount of said tax, so erroneously paid, to the State Treasurer, thirty-two hundred eighty-three and 50-100 ($3,283.50) dollars, should be refunded by the State Treasurer to the said plaintiffs. And, inasmuch, as the State Treasurer has not repaid the amount, and has represented to the claimants, that there is no appropriation from which such refund could be made, and, inasmuch, as there is no other provision of law, that would enable the claim-

ants to recover the amount so erroneously paid, it is the opinion of this Court, that the claimants are entitled to an award; their claim for thirty-two hundred eighty-three and 50-100 dollars is therefore hereby allowed.

SARAH BROCKWAY SMITH
v.
STATE OF ILLINOIS.

Opinion filed November 23, 1912.

1. TRESPASS—*damage by National Guard.* Claimant's property, consisting of plants, shrubs, flowers, trees, pipes and plumbing, was damaged by the Illinois National Guard while conducting a sham battle. *Held*, that claimant is entitled to an award covering the amount of her damages.

2. JURISDICTION—*to hear military claims.* Section 3 of the Act creating the Court of Claims provides, that it shall hear and determine all unadjusted and controverted claims against the State arising out of the military power of the State when called into action for the preservation of the public peace or order, or for instruction in camp, etc.

Joseph V. Graff, for Claimant.
W. H. Stead, Attorney General, for State.

The declaration and evidence in this case show that on the 26th day of August, A. D. 1910, the Illinois National Guard was in encampment for instruction pursuant to the laws of the State of Illinois, in the county of Peoria and State of Illinois, and that they did then and there trespass on the premises of the claimant and damage and destroy certain plants, shrubs, flowers and trees thereon in the sum of two hundred fifteen and 50-100 ($215.50) dollars, and likewise damaged and destroyed certain pipes, plumbing and fittings in the sum of twelve and fifty-two one hundredths ($12.52) dollars, making a total damage of two hundred twenty-eight and 2-100 ($228.02) dollars.

The trespass in question was committed without any authority from the claimant while the National Guard was engaged in a sham battle; they moved in a body over the premises of the claimant and destroyed property as charged in the declaration. The amount of the damage is shown by competent proof to be two hundred twenty-eight and 2-100 ($228.02) dollars. The

Act creating the Court of Claims, approved May 16, 1903, in force July 1, 1903, provides, among other things, as follows: Section 3 * * * "and it shall be the duty of said Court to hear and determine the following matters * * * 3d, all unadjusted and controverted claims against * * * 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."

The facts as above set forth are uncontroverted and in the opinion of the Court bring this case clearly within the provisions of section three above quoted, and claimant is therefore entitled to an award. Her claim for two hundred twenty-eight and 2-100 ($228.02) dollars is therefore hereby allowed.

B. F. GREEN

v.

STATE OF ILLINOIS.

Opinion filed November 23, 1912.

STATUTE OF LIMITATIONS—*claim must be filed within two years from date of accrual.* This statement of claim shows that injuries to claimant were received in 1904, and the claim was not filed with the Auditor of Public Accounts until 1909. *Held*, that the same is barred by the two year limitation statute.

Zimmerman and Rinehart, for Claimant.
W. H. Stead, Attorney General, for State.

The petition in this case shows that claim was filed for injuries received by claimant on or about the fifth day of December, 1904. The claim was filed in the office of the Auditor of Public Accounts on December 30, 1909, more than five years after the cause of action accrued. The State of Illinois has interposed a plea of the Statute of Limitations.

Rule eight of the rules of this Court is as follows: "If it appears on the face of the declaration that the claim is barred by any Statute Limitations and it does not further appear on the face of the declaration that some disability recognized by law existed which prevented claimant from filing his declaration within the limitations, it will be considered that no such disability existed, and the cause may be dismissed on motion."

Paragraph 14, chapter 83, of the Statutes of Illinois, provides: "That action for damages for an injury to a person * * * shall be commenced within two years next after the cause of action accrued."

It does not appear on the face of the declaration that some disability recognized by law existed which prevented claimant from filing a declaration within the limitations. The plea of the Statute of Limitations having been interposed, it is the opinion of this Court that the claim is barred by the Statute of Limitations, and that the claimant is not entitled to an award. His claim is therefore refused.

JAMES T. BURNS
v.
STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. MILITARY SERVICE—*defense of member in.* Where a member of the National Guard or Naval Reserve is prosecuted by civil or criminal action on account of any act done by such member in the performance of his military duties, the expenses of his defense shall be borne by the State.

2. ATTORNEY GENERAL—*duty to defend.* In cases of this character, the Attorney General may defend the suit either personally or by one of his assistants, or, if not, then he shall approve the selection of an attorney to conduct the defense.

3. SAME—*to approve expenses.* Vouchers covering items of expense are to be approved by the Attorney General and paid by the Adjutant General.

4. STATE AFFAIRS—*how conducted.* Departments of the State government must be conducted upon business lines and each department may adopt reasonable rules and regulations for the proper transaction of the business pertaining to that department.

Burns and Burns, for Claimant.
W. H. Stead, Attorney General, for State.

The claimant in this cause seeks reimbursement for moneys expended by him as an attorney for Joseph B. Klein, a member of the Fifth Infantry, Illinois National Guard, who was indicted for murder by a grand jury in Kankakee County and subsequently tried on said charge in Ford County, upon a change of venue. The indictment was based upon the killing of one, Earl Nelson, by the said Klein, in August of 1908, while said Klein was in active service as a militiaman at the time of the Springfield riots, and while said Fifth Infantry was embarking from Kankakee for Springfield to assist in quelling the disorder.

Claimant alleges that the Attorney General, under the provisions of the Military Code (sec. 9, art. XXII) had appointed claimant to assist in the defense of said

Klein at said trial, that certain witnesses had to be brought from Kankakee to Ford County to testify in behalf of the said Klein, that these witnesses were not possessed of the necessary private funds to pay their railroad fare and hotel expenses, and that under instructions of the Attorney General's office, claimant advanced the money needed to meet the expenses of said witnesses, amounting to thirteen dollars; that subsequently claimant filed a claim for reimbursement for said amount and said claim was refused. To secure said reimbursement, claimant has brought suit in this Court.

Owing to the fact that the expenses of taking testimony in this cause would exceed the amount of the claim, it is stipulated by the Attorney General, that the material facts alleged in the declaration shall be considered as if duly proven by the claimant by depositions regularly taken.

Section 8 of article XXII of the Military Code provides, that where any member of the National Guard is prosecuted criminally for any act committed by said member, while in the performance of military duty, that all the expense of the defense, "including attorney's fees, witness fees for the defense, defendant's court costs and all costs for transcripts of records and abstracts shall be paid by the State, provided, that the Attorney General shall be first consulted in regard to and approve of the selection of the attorney for the defense."

Section 9 further provides, that "the expense of such defense, as provided for in the preceding section, shall be paid by the Adjutant General out of the military emergency or either military fund of the State upon vouchers and bills approved by the Attorney General."

The statute here points out a definite remedy for the payment of expenses incurred in defense of militiamen in criminal cases. Vouchers are to be made out, approved by the Attorney General, and paid by the Adjutant General.

There is no claim that in the case at bar there were no funds in the department to meet these expenses, but the declaration sets forth that the items in question were rejected by the Adjutant General. The reason given for the rejection, as stated by claimant, was, that "claimant could not or did not apportion these items among the witnesses so that same could be divided from their witness fees."

It is not apparent from the declaration why there was an impossibility of an apportionment of these expenses between witness fees on the one hand, and railroad fare and other incidentals on the other. This would seem to be a mathematical proposition which could be easily solved as the data must have been in the possession of claimant. If claimant omitted to so apportion the expenses or simply made a claim for a lump sum without itemizing the same, or was unable to itemize the expenses on account of not having preserved the data, this is claimant's misfortune.

The statute specifically mentions witness fees and other items of expenses and differentiates them from general expenses, such as the claim in this cause.

All departments of the State service must be conducted upon business lines, and must adopt reasonable rules and regulations for the proper transaction of the business pertaining to that department. In adopting a rule, that expenses for the defense of militiamen under criminal charges should be properly itemized and apportioned, the Adjutant General's office is adopting a reasonable rule of procedure, that is substantially sanctioned by the statute.

This Court does not deem it wise, therefore, to interfere with the methods of business procedure in the various departments of the State service. The remedy in this cause is with the Adjutant General and the matter of this claim should be adjusted by him. The claim is therefore rejected.

FRANKLIN A. DENISON
v.
STATE OF ILLINOIS.

Opinion filed November 30, 1918.

MILITARY SERVICE—*when award will be made for injuries received in.* Claimant was injured while in the performance of his duties in the military service of the State at Camp Lincoln. *Held*, that he is entitled to an award in accordance with the provisions of the Military and Naval Code.

John L. McInerney, for Claimant.
W. H. Stead, Attorney General, for State.

Franklin A. Denison, claimant in the above entitled cause, was a member of the National Guard of the State of Illinois. On the 29th day of July, A. D. 1904, a portion of the said National Guard, by order of the Governor of the State of Illinois, was at Camp Lincoln, in the city of Springfield, Illinois. The claimant was in camp in obedience to orders from his superior officers, and while under orders and in service upon an inspection and review of the Eighth Regiment, Illinois National Guard, was injured by reason of the horse upon which he was riding becoming unruly and ungovernable. The claimant was thrown violently from the horse upon the ground, causing a severe injury. It is established by the evidence, that the injury sustained by Major Denison, was two fractures of the collar bone and a fracture of the head of the humerus and bruises and pain, loss of time and suffering incident thereto. It appears from the evidence, that Major Denison was unable to follow his usual occupation for a period of four months, and, that claimant suffered great pain and incurred considerable expense in reducing the said fractures and in his effort to fully recover from the said injuries. The injuries in question were no doubt severe and painful. The claimant appears to have been in the exercise of ordinary care for his own safety.

We are of the opinion that the evidence establishes that claimant has a legal claim against the State of Illinois, for compensation and assistance, as is provided for by statute of the State of Illinois, (See Hurd's Revised Statutes, chapter 129, paragraph 93), that "In every case where an officer, soldier or seaman of the Illinois National Guard or the Naval Reserve of Illinois, shall be killed or wounded, while performing his duty as an 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."

In consideration of the foregoing, claimant is allowed the sum of six hundred ($600.00) dollars in full settlement and compensation for the injuries and expenses incident thereto.

WILLIAM HAROLD ERWIN, BY J. D. ERWIN, HIS FATHER, AS NEXT FRIEND,

v.

STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* is not applicable to the State.

2. RES ADJUDICATA—*effect of rejection of claim.* If the Court of Claims reject a claim, such rejection concludes the claimant, unless the Court otherwise directs.

Kraus, Alschuler and Holden, for Claimant.
W. H. Stead, Attorney General, for State.

The petition in this case discloses that the claimant, William H. Erwin, was a student in the College of Agriculture at the State of Illinois; that he was employed by one of the instructors at the College of Agriculture to work at the beef cattle barns, and that while so employed and assisting in caring for the cattle, under the direction of the Superintendent, he was severely injured, as the claimant alleges, by reason of the negligence of the Superintendent.

The State, by the Attorney General, has filed a demurrer, which directly raises the question as to the liability of the State, for the negligence of its officers, servants or agents. The question involved in this demurrer has been decided adversely to the claimant in a great many cases in this Court. The points made by attorneys for claimant in their argument have been decided adversely to their contention in the case of *Schmidt* v. *State of Illinois*, I. C. C. R., 76.

In our opinion the claimant does not show a legal or equitable claim against the State of Illinois. The demurrer is therefore sustained and the claim dismissed.

Section 7 of the Act creating the Court of Claims is as follows: "In case said Court shall reject any

claim, so filed as aforesaid upon the hearing thereof, such rejection shall conclude the claimant unless said Court shall otherwise direct." Under the power thus conferred upon us by the above section, we direct that claimant shall not be concluded by the above finding.

JOHN W. HINCHSCLIFF, BY HIS FATHER AND NEXT FRIEND, CHARLES M. HINCHSCLIFF

v.

STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. PRACTICE—*claim by minor—how exhibited.* Where a minor seeks an award, the claim should be exhibited in the name of the minor by his guardian, if he have a guardian, and if not, then by his next friend.

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

3. OFFICERS—*Park Commissioners are.* Park Commissioners, appointed by the Governor, by and with the advice and consent of the Senate, are officers.

Cratty Bros. and Jarvis and Chas. Knudson, for Claimant.
W. H. Stead, Attorney General, for State.

Claimant in this cause is a minor of four years of age, and asks damages, by his father and next friend, for injuries received July 14, 1907, while said claimant was walking with his parents along one of the footpaths in Humboldt Park, in the city of Chicago.

In his declaration, claimant alleges, that at the time the said claimant was walking along said footpath, in said park, one of the openings at the foot or base of one of the electric arc poles, in said park was negligently left open, exposing the electric wires which supply the electric current to the arc light above; that claimant, being of tender years and not appreciating the danger, placed his arm through said opening and came in contact with the said wires, and that he received a severe electric shock, as a result of said contact and was severely burned and permanently injured, disfiguring him for life, and incapacitating him in future years from earning a livelihood. For these injuries

so sustained, claimant brings this action against the State and seeks damages.

The principle of law is so well established in cases of this class, that it is hardly necessary to more than refer to it. In *State Bank* v. *State*, 1 Court of Claims Reports, 158, 164, this Court said:

"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*. Applying this rule, the South Park Commissioners being merely appointive officers, with certain statutory powers are mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance 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."

If, then, the South Park Commissioners are not liable for the negligent acts of the servants appointed by them, there could be no liability devolving upon the State, which appoints these commissioners.

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

In view of these holdings, there can be no liability on the part of the State in the cause at bar and the claim is therefore rejected.

ILLINOIS TRUST AND SAVINGS BANK, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF HARRIET G. McVICKER, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 20, 1913.

1. INHERITANCE TAX—*refund where debts are proven after distribution.* Claimant asks a refund of an inheritance tax and bases its claim upon the fact that debts were proven against the estate after the distribution of the legacies, from which the inheritance tax had been deducted, and the legatee was required to refund a portion of the legacy. *Held*, that claimant is entitled to refund of the tax so erroneously paid.

2. STATUTE—*section 8.* Section 8 of the inheritance tax law provides, that whenever debts shall be proved against the estate of a decedent after distribution of legacies, from which the tax has been deducted, and the legatee is required to refund any portion of the legacy, a portion of said tax shall be repaid to him by the executor or administrator, if said tax has not been paid into the State or county treasury, or by the county treasurer, if it has been paid into the county treasury. In this claim the money had been paid into the State treasury; hence claimant's only remedy is resort to the Court of Claims.

James C. Hutchins, for Claimant.
W. H. Stead, Attorney General, for State.

This claim is for a refund of inheritance tax, and is based upon the fact that debts were proven against the estate of decedent after the distribution of legacies from which the inheritance tax had been deducted, and the legatee was required to refund a portion of the legacy.

The evidence in this case discloses that a total tax against the residuary estate of said deceased was fixed at nineteen hundred forty and 75-100 ($1,940.75) dollars; that on June 12, 1906, the claimant, as executor, paid the inheritance tax as fixed in said estate in the sum of twenty-three hundred eighty-three and 3-100 ($2,383.03) dollars, to the county treasurer of Cook

County, Illinois, as required by law, which sum included said sum of nineteen hundred forty and 75-100 ($1,940.75) dollars, assessed against said residuary estate; that at the time said inheritance tax was fixed and paid, as above stated, there was pending against the estate of said Harriet G. McVicker, deceased, the claim of one L. C. H. E. Zeigler, in the sum of one hundred ten thousand ($110,000.00) dollars, which claim was duly allowed and the judgment affirmed by the Supreme Court of the State of Illinois, in the sum of one hundred thousand ($100,000.00) dollars on June 8, 1910; that on July 1, 1910, said claimant, as trustee, transferred to itself, as executor, property and cash of the value of ninety-four thousand ($94,000.00) dollars. This sum transferred to said executor, together with the sum remaining in the hands of the executor, was used by said executor to pay the said Zeigler judgment; that said executor did, on July 10, 1910, pay to said Zeigler, in satisfaction of said judgment, interest and costs, the sum of one hundred thirteen thousand four hundred eighty-two and 77-100 ($113,482.77) dollars.

Section eight of the law imposing the inheritance tax, in force July 1, 1909, provided, that whenever debts should be proved against the estate of a decedent after distribution of legacies from which the inheritance tax has been deducted in compliance with this Act, and the legatee is required to refund any portion of the legacies, a portion of the said tax shall be repaid to him by the executor or administrator, if the said tax has not been paid into the State or county treasury, or by the county treasurer, if it has been so paid.

In this case the county treasurer had paid the money received from said estate into the State treasury, and consequently the same was not in his hands at the time that the judgment was affirmed against said estate.

The claimant presented its claim for a repayment to it of a proper portion of said inheritance tax to

the county treasurer of Cook County, and said claim was refused by the county treasurer on the ground that there were no funds applicable to the repayment of said amount; that said claim was thereafter, on or about the eighth day of January, 1912, presented to the Treasurer of the State of Illinois, and demand was made upon said State Treasurer for the repayment to the claimant of the sum of one thousand ($1,000.00) dollars, the proportion of the tax so paid which ought to be refunded as aforesaid; that on or about the eleventh day of January, 1912, the said State Treasurer, of the State of Illinois, refused the said demand upon the ground that there were no moneys applicable to the repayment of said sum.

From the facts in this case claimant is clearly within the meaning of paragraph 8 of the statutes in reference to tax on gifts, legacies and inheritances, approved June 14, 1909; in force July 1, 1909. Section 8 does not seem to make any provision as to how said tax shall be repaid to the executor or administrator, if the same has been paid by the county treasurer to the State Treasurer, but from the facts in this case it is clear, that the residuum of this estate has been reduced by the sum of one thousand ($1,000.00) dollars, by the payment of the Zeigler judgment, and consequently the amount of the inheritance tax, which should have been paid, reduced by one per cent of one hundred thousand ($100,000.00) dollars, which is one thousand ($1,000.00) dollars, and there is therefore, now one thousand ($1,000.00) dollars held by the Treasurer of the State of Illinois, which rightfully belongs to the claimant. Claimant has complied, as far as within its power, with all laws of the State of Illinois, in reference to securing the repayment of this sum and has been unsuccessful in procuring it to be repaid.

The amendment of the claim which asks for an additional amount of ninety-three and 73-100 ($93.73) dollars, cannot be allowed by this Court as the application for refund, which was made to the county and

State Treasurer, was for the sum of one thousand ($1,000.00) dollars, and inasmuch, as no claim has been presented to the county or State Treasurer for the additional amount of ninety-three and 73-100 ($93.73) dollars, this Court cannot allow the same for the reason, that the statute in reference to an application for the refund of inheritance taxes erroneously paid must be made to the county or State Treasurer within two (2) years of the time of payment of the same.

From all of the facts in this case, it is the opinion of this Court, that the contention of claimant, as to the ninety-three and 73-100 ($93.73) dollars, should be rejected, and it should be sustained as to the sum of one thousand ($1,000.00) dollars. Its claim therefore for one thousand ($1,000.00) dollars is hereby allowed.

JOSEPHINE JOHNSON

v.

STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. RESPONDEAT SUPERIOR—*rule of does not apply to State.* The rule of *respondeat superior* is inapplicable to the State, and the State is not liable for the negligence of its officers and agents.

2. COURT OF CLAIMS—*not a bureau of charities.* The Court of Claims is not a bureau of charities, but a Court, and must determine all claims in accordance with legal principles.

3. JURISDICTION—*Act creating Court did not increase liability of State.* The law creating the Court of Claims did not undertake to create new liabilities against the State, but merely provided a means by which claims against the State could be heard.

G. A. Shallberg, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in question was filed to the October Term, A. D. 1911. Claimant seeks to recover for an injury received while in the employ of the State as a nurse at the State Hospital for the Insane, at Watertown, the injury in question being the result of a blow upon the head struck by a patient under claimant's charge and care as such nurse, Clara Weaver, who was violently insane, having committed the assault.

The State of Illinois, by William H. Stead, Attorney General, filed a demurrer to the said claim. The said claimant filed her claim with the Auditor of Public Accounts on the first day of May, A. D. 1911, alleging that she had sustained damages to the amount of five thousand ($5,000.00) dollars.

It has been frequently held that the State is not liable for the negligence of its officers and agents. In *Oliver* v. *State,* I. C. C., page 218, this Court said: "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."

In *Tierney* v. *State*, 1 C. C., 279, on page 281, this Court expressed itself in the following language, to-wit: "* * * 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."

The law applicable to this case has heretofore been fully discussed. In the case of *Henke* v. *State*, it was decided by this Court, on September 29, 1906, that the State is not liable for the misfeasance, torts, wrongs, negligence or omissions in the duty of its officers or agents, for it does not undertake to guarantee to any person the fidelity of those it employs.

In *Schmidt* v. *State*, Court of Claims Reports 1, page 76, this Court held that the law creating it did not undertake to create new liabilities against the State, but simply provided a remedy by which claims might be heard and that this Court "has no power to make an award in any case unless the facts show a legal or equitable claim against the State." The demurrer filed in the said cause raised the question of a legal liability on the part of the State. The declaration and record in the above case does not disclose any cause of action against the State, and the claim is not well founded in law, and the demurrer is therefore sustained.

CHARLES KRUEGER
v.
STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. MILITARY SERVICE—*when award will be made.* Claimant, while in the service of the State as a member of the National Guard, was poisoned by coming into contact with poison ivy, and after returning from said encampment was unable to labor for a number of days. *Held*, that claimant is entitled to recover for time lost.

2. JURISDICTION—*to hear military claims.* The Military Code provides, that where an enlisted man is injured while performing his duty under orders of the Commander-in-Chief, he shall have a claim against the State for financial help or assistance, and the Court of Claims shall act on and adjust the same, as the merits of the case may demand.

Burns and Burns, for Claimant.
W. H. Stead, Attorney General, for State.

Claimant in this cause was a regularly enlisted man of Company L, Third Infantry, Illinois National Guard, in which company he has served for ten years. He alleges in his declaration, that while in regular encampment at Camp Deneen, in Springfield, in August of 1910, his company was ordered to make certain marches and maneuvers throughout the surrounding country, and, that while taking part in these maneuvers he came in contact with certain poison ivy and was poisoned thereby; that as a result of said poisoning he was caused great pain and was disabled during the remaining period of encampment and for seventeen days after returning to his home; that during said seventeen days he was unable to follow his regular employment; that he lost fifteen working days thereby and that his regular rate of wages was two dollars per day.

Claimant further alleges, that under paragraph 153, chapter 129, Revised Statutes of Illinois, the Adjutant

General's department allowed him twenty-two dollars and ten cents, being one-half his active service pay during his disability, and twenty-three dollars for physician's services during said period. He now makes claim for the additional sum of seven and 90-100 dollars, being the difference between thirty dollars (his loss of fifteen working days at two dollars per day) and the twenty-two dollars and ten cents allowed him by the Adjutant General's Department.

Owing to the fact that the cost of taking evidence would exceed the amount of the claim herein, it has been stipulated of record by the Attorney General, that the facts as stated in the declaration can be proven, and are to be considered by this Court the same as if they had been duly proven by depositions taken as provided by law.

In paragraph 154 of the Military Code, it is provided, that where an enlisted man of the National Guard, shall be injured while performing his duty, in pursuance of orders from his Commander-in-Chief, he shall have a claim against the State for financial help or assistance, and the Court of Claims shall act on and adjust the same as the merits of each case may demand.

The facts as stated in the declaration being admitted of record in this cause, under the provisions of paragraph 154 of the Military Code, the claimant herein is entitled to an award and award is so made to the amount of seven and 90-100 dollars.

THOMAS O'BRIEN

v.

STATE OF ILLINOIS.

Opinion filed November 30, 1918.

RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State.

Green and Palmer, for Claimant.
W. H. Stead, Attorney General, for State.

This is a claim filed by Thomas O'Brien, for injuries received by him while employed as a helper and general utility man in the department of engineering at the University of Illinois, situated in Urbana, in the county of Champaign, and State of Illinois. The claim filed charges that injury was occasioned by reason of negligence in the construction and maintenance of a gutter and driveway, on the grounds belonging to the said university.

The facts relied upon are set out in full in the claimant's declaration and it is not necessary to repeat them here.

The Attorney General has filed a demurrer to the claimant's declaration, and in support of his demurrer has argued that the State is not liable for the negligence of its officers and employees in the construction or maintenance of said driveway and grounds.

This Court has heretofore held in numerous cases, that the State could not be held responsible for the negligence or misconduct of its subordinate officers, agents or servants. See *Schmidt* v. *State of Illinois*, 1 Court of Claims Report, page 76, and cases therein cited. We see no reason to change the former ruling of this Court.

It is therefore the opinion of the Court, that claimant has no legal claim against the State of Illinois, and the demurrer is sustained and the claimant's bill is dismissed.

Section 7 of the Act creating the Court of Claims, is as follows: "In case said Court shall reject any claim, so filed as aforesaid, upon the hearing thereof, such rejection shall conclude the claimant, unless said Court shall otherwise direct." Under the power thus conferred upon us by the above section, we direct that claimant shall not be concluded by the above finding.

HENRY PRYOR
v.
STATE OF ILLINOIS.

Opinion filed November 30, 1912.

RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State.

A. L. Williams, for Claimant.
W. H. Stead, Attorney General, for State.

The petition filed in this case discloses that Henry Pryor while confined in the penitentiary at Joliet, Illinois, and while working in the capacity of a laborer on the rock quarry, was injured by an explosion of dynamite. To this claim the State, by the Attorney General, has filed a general demurrer, which raises the question as to the sufficiency of the claim as filed. The question raised has been frequently decided by this Court. The case of *Oscar Alexander* v. *State of Illinois*, 1 C. C. R., p. 214, was a claim filed by an inmate of the same penitentiary for an injury received while working at a saw. To this claim a demurrer was filed and sustained and claimant's bill dismissed.

We see no reason for making any different holding in this case. The demurrer is therefore sustained, and the claim dismissed.

Section 7 of the Act creating the Court of Claims, is as follows: "In case said Court shall reject any claim, so filed as aforesaid, upon the hearing thereof, such rejection shall conclude the claimant, unless said Court shall otherwise direct."

Under the power thus conferred upon us by the above section, we direct that claimant shall not be concluded by the above finding.

UNION BOILER TUBE CLEANER COMPANY, FOR THE USE OF THE UNION NATIONAL BANK OF PITTSBURG,

v.

STATE OF ILLINOIS.

Opinion filed November 30, 1912.

1. CONTRACTS—*payment by installments.* Claimant contracted with the Board of Managers of the Illinois State Reformatory for the installation of a tube cleaning device, and in pursuance thereof installed the same. Payments were to be made in installments. No complaint was made that the device was not satisfactory. After several payments had been made, further payment was refused. *Held*, that claimant is entitled to an award for the unpaid balance of the contract price.

2. INTEREST—*State not liable for.* Since the contract did not specifically provide for interest on deferred payments, none will be allowed.

A. C. Norton, for Claimant.
W. H. Stead, Attorney General, for State.

On September 28, 1897, claimant in this cause entered into a written contract with the Illinois State Reformatory, at Pontiac, Illinois, by its Board of Managers, for the installation and use in said reformatory of a certain tube cleaning device, of which said claimant was patentee.

This contract was in the form of a lease with power to purchase. Under this contract, the said reformatory was to pay the sum of $200 at the date of execution of the contract, and $200 annually until the sum of $1,500 was paid, when the said device was to become the absolute property of the reformatory.

On October 1, 1897, the said device was installed in the reformatory, and the same was used from that date until some time in the year 1901, when its use was abandoned.

During the period of its use, the following sums were paid claimant by the reformatory, under the terms of the contract, to-wit: November 9, 1897, $400;

September 10, 1898, $200; September 11, 1899, $200; December 10, 1900, $200; October 10, 1901, $200; amounting in total to $1,200. Since the latter date no further payment has ever been made, and claimant brings this cause to recover the amount of $300 and interest, which it claims is still due and owing under the said contract.

To the declaration in this cause, the Attorney General has filed the plea of general issue, which is followed by a statement, that his department "is unable to find any evidence, other than that disclosed by the cross examination of claimant's witnesses, upon the question of the liability of the State upon the contract, and cannot render the Court any assistance in reaching a conclusion in this cause.

The evidence taken in this cause substantially supports the allegations in the declaration. No question is raised as to the legality of the contract and there is no dispute as to the amounts paid under the same. The assistant engineer who operated the device from its installation until some time in the year 1900, testifies, that during that period it worked successfully and, that he never had any difficulty in operating it. The superintendent testifies, however, that the chief engineer once informed him, that the device was not practical, but, this being hearsay evidence is not competent in this regard and the chief engineer himself was not placed upon the stand.

Payments were made annually according to the terms of the contract from 1897 to 1901, and there is no evidence of any complaint being made by the reformatory authorities to the claimant, at any time, that the device was not operating successfully. The payment for the year 1900 was not forwarded when due, but was paid after notice by the claimant to the reformatory and the letter accompanying the payment simply states, that the matter of payment was overlooked, thanks claimant for the notice, but makes no complaint of the device.

The first default in payment occurred in 1902, and the only reason given for such default is in a communication to claimant from the superintendent of the reformatory, in which he states that the contract was made prior to his administration and, that he will refer the matter to the board. There is no evidence of any action being taken by the board upon the matter, except in a communication from the chief clerk of the reformatory to the claimant stating, that it was his opinion, that the board would be willing to pay "perhaps $250 cash in settlement of the contract." But in none of this correspondence is it pretended, that there was any failure of warranty or that the balance of $300 was not a just obligation.

In view of these facts, it is the opinion of this Court, that there should be an award to the claimant in this cause of $300 and the same is hereby awarded. No interest is awarded for the reason, that the contract does not provide for interest on deferred payments, and for the further reason, that it has not been the practice of this Court to award interest on claims against the State of Illinois, in cases where interest is not specifically provided for by contract.

SUSAN WEBSTER DODGE AND RALPH H. ENSIGN, EXECUTORS OF THE LAST WILL OF MARY H. DODGE, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

1. INHERITANCE TAX—*when no refund will be made.* In this claim an inheritance tax was paid by the executors, but no appeal was prayed from the order of the county judge fixing the tax to the county court. *Held*, that claimants were not entitled to an award.

2. SAME—*Stock owned by non-resident.* An inheritance tax may properly be assessed upon shares of stock in an Illinois corporation, owned by a non-resident, even though such non-resident has no real estate in this State.

3. SAME—*must appeal to secure refund.* It is essential that anyone desiring a refund of an inheritance tax erroneously paid, must first have the tax declared erroneous by some court of this State in accordance with the inheritance tax law.

4. COURT OF CLAIMS—*not a court of review.* The Court of Claims is not vested with authority to review the action of the county judge in fixing the inheritance tax. Claimants' remedy was by way of appeal to the county court.

Archibald Cattell, for Claimants.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of her death, but that at the time of her death, said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and

made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimants filed their petition before the county judge, who appointed the inheritance tax appraiser, praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimants allege that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimants' contentions are, that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimants have not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court

is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that anyone desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimants in this case have wholly neglected to take the steps provided by this law, we are compelled to dismiss their claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimants may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimants.

WILLIAM R. BUCKMINSTER, ADMINISTRATOR OF THE ESTATE OF ELLEN B. STONE, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State at the time of her death, but that at the time of her death, said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court, and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that as far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a Court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax de-

clared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

HENRY G. ELLIOTT, EXECUTOR OF THE LAST WILL OF ALICE C. BOSTWICK, DECEASED.

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimants.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of her death, but that at the time of her death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that anyone desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inher-

itance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

WILLIAM D. ELLWANGER, EXECUTOR OF THE LAST WILL OF GEORGE ELLWANGER, DECEASED,

v.

STATE OF ILLINOIS

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois at the time of his death, and did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that anyone desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance

tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

JOHN B. FOLGER, EXECUTOR OF THE LAST WILL OF JOHN ELLIOTT ATKINS, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1915.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois at the time of his death, did not have any real estate in Illinois, and therefore the county judge of Cook County had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance

tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

ARMOR HOLLINGSWORTH, EXECUTOR OF THE LAST WILL OF ARMOR L. HOLLINGSWORTH, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of his death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the in-

heritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

HENRY M. ROWLING, EXECUTOR OF THE LAST WILL OF VIOLA C. LYMAN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of her death, but that at the time of her death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance

tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

C. J. STEWART, PUBLIC TRUSTEE AND EXECUTOR OF THE LAST WILL OF JOHN WILLIAM DAY, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of his death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the in-

heritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

N. ELLEN STOCKTON AND EMMA S. TURPIN, EXECUTORS OF THE LAST WILL OF SARAH HARVEY, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State at the time of her death, but that at the time of her death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimants filed their petition before the county judge, who appointed the inheritance tax appraiser,

praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimants allege, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimants' contentions are that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimants have not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the in-

heritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimants in this case have wholly neglected to take the steps provided by this law, we are compelled to dismiss their claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch as there are certain questions involved in this claim, which claimants may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimants.

UNITED STATES TRUST COMPANY OF NEW YORK, EXECUTOR OF THE LAST WILL OF EMMA A. TILLOTSON, AND GEORGE L. SHEARER, ITS DULY AUTHORIZED AGENT AND ATTORNEY IN THIS BEHALF,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

INHERITANCE TAX—*Dodge & Ensign, ex., v. State ante followed.* This claim is based upon a similar state of facts as that of *Dodge & Ensign, executors, etc., Mary H. Dodge, deceased, v. State, supra,* and the law as announced by the Court in the decision of that claim governs this claim.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of her death she was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of her death, but that at the time of her death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed its petition before the county judge, who appointed the inheritance tax appraiser, praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of her death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that

any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss its claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

ALVA E. BELMONT, ELLEN P. KELLOGG AND JOHN PRENTICE KELLOGG, EXECUTORS, ETC., OF THE LAST WILL OF ARMIDA VOGEL SMITH, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

1. INHERITANCE TAX—*to obtain a refund an appeal must be taken.* Where an inheritance tax has been fixed by order of the county judge and the time for an appeal to the county court has passed, the county judge cannot afterwards entertain a petition to set aside the order fixing the tax.

2. COURT OF CLAIMS—*will not review another court's jurisdiction.* The Court of Claims will not pass upon the question of another court's jurisdiction.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer of Cook

County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

That claimants filed their petition before the county judge, who appointed the inheritance tax appraiser, praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimants allege, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimants' contentions are that the deceased was a non-resident of the State of Illinois, at the time of his death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimants have not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question

provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimants in this case have wholly neglected to take the steps provided by this law, we are compelled to dismiss their claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimants may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimants.

GUSTAV MATTERN, EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF FRANK C. BUSH, DECEASED, FOR THE USE OF FRANK C. RATHJE,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

1. INHERITANCE TAX—*when no refund will be awarded.* Claimant contends that the property was appraised at $4,670.12, whereas it should have been appraised at $1,340.24. No appeal was taken from the order of the county judge fixing the tax. *Held*, that claimant is not entitled to an award.

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

3. ORDER OF COUNTY JUDGE—*how reviewed.* The statute provides for the manner of reviewing the order of the county judge in inheritance tax matters.

Adolph H. Wesemann, for Claimant.
W. H. Stead, Attorney General, for State.

The claim filed in this case is for a refund of inheritance tax paid under the inheritance tax law of the State of Illinois, and is based upon the condition, that certain property devised and bequeathed to Minna Lischewski and Martha Prost was appraised at the value of forty-six hundred seventy and 12-100 ($4,670.12) dollars, by the appraiser appointed in said estate by the county judge of Cook County, Illinois, and afterwards approved by the county judge, whereas, the claimant alleges the said appraised valuation should have been fixed at the sum of six hundred seventy and 12-100 ($670.12) dollars each.

The claim filed fails to show that any appeal was taken from the order of the county judge in fixing the tax based upon the above valuation. It does appear, however, in the records, that an appeal was not taken, as provided by the inheritance tax law. The order of the county judge consequently stands unquestioned,

except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous, by some court in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated the claim is therefore dismissed.

EDWARD F. ADAMS, EXECUTOR OF THE LAST WILL OF BENJAMIN ADAMS, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed April 18, 1913.

1. INHERITANCE TAX—*to secure refund must obtain favorable decision.* In order to entitle a claimant to a refund of inheritance taxes erroneously paid into the State treasury, the claimant must have obtained a final decision in his favor in some court.

2. COURT OF CLAIMS—*not a court of review.* The Court of Claims does not sit as a court of review to pass upon the decisions of any other court.

3. ORDER OF COUNTY JUDGE—*how reviewed.* The statute with reference to inheritance taxes provides the manner in which an order of the county judge may be reviewed.

Archibald Cattell, for Claimant.
W. H. Stead, Attorney General, for State.

The claim in this case is for a refund of inheritance tax claimed to have been erroneously paid. The claim in question discloses that the deceased died prior to July 1, 1909; that at the time of his death he was not a resident of the State of Illinois, and did not own any real estate in this State, at the time of his death, but that at the time of his death said decedent was the owner of certain shares of stock in Illinois corporations; that the corporations refused to transfer the stock without the consent of the inheritance tax attorney; that an appraiser was appointed by the county judge of Cook County, Illinois, who appraised the value of the stock so held, fixed the amount of the tax, and made his report to the county judge of Cook County, who entered an order approving the report and fixing the tax; that no appeal was taken from the order of the county judge in fixing the amount of the inheritance tax, as provided by law; that the inheritance tax was paid to the county treasurer of Cook County; that demands were made upon the county treasurer

of Cook County, and upon the State Treasurer of Illinois, for a refund of the tax so paid.

The claimant filed his petition before the county judge, who appointed the inheritance tax appraiser, praying for a vacation of the order, through the execution of which the inheritance tax in question was levied and collected, which petition was denied.

Claimant alleges, that "the county court was wholly without jurisdiction, and the county judge wholly without jurisdiction, in taking any of the steps which resulted in the imposition of said tax and its collection;" that "the proceedings of the county court were wholly void." The grounds for claimant's contentions are that the deceased was a non-resident of the State of Illinois, at the time of his death, did not have any real estate in Illinois, and therefore the county judge of Cook County, Illinois, had no jurisdiction to fix an inheritance tax.

The State of Illinois, by the Attorney General, has demurred to the claim. This Court is asked to review the proceedings in the county court and the order of the county judge, and hold that the county court had no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and this Court is asked to assume the power conferred upon the county court under the statute in question, and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax, until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question

provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous, by some court of this State in accordance with the inheritance tax law, and inasmuch, as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss his claim without a consideration of the merits of the same.

For the reasons above stated, the claim is therefore dismissed, but inasmuch, as there are certain questions involved in this claim, which claimant may desire to submit for decision to some other court, we direct that the rejection of this claim by this Court shall not conclude the claimant.

EMMA E. SMITH, EUGENE C. WILSON, AND EDWARD N. WILSON

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1913.

INHERITANCE TAX—*Court will not make award unless appeal is taken and favorable decision obtained.* Unless an appeal is prosecuted by a claimant, seeking a refund of an inheritance tax erroneously paid, and a decision obtained in favor of such claimant, this Court will not make an award for a refund of the tax erroneously paid.

Joseph L. Shaw, for Claimants.
W. H. Stead, Attorney General, for State.

Claimants have paid an inheritance tax in proceedings lately pending in Henry County. They claim to have overpaid, in that, they have not had the benefit of some deductions which would reduce the amount of their taxable inheritance and consequently the amount of their tax. Some of these deductions consist of claims against the decedent's estate allowed prior and some subsequent to the inheritance tax appraisement. The amount of the main item, the executor's commissions, had not been fixed by the Court at the time of the appraisement, although it could easily have been estimated. The tax was paid immediately and within six months of the decedent's death, in order to take advantage of the five per cent statutory discount. The estate having been closed, a demand is now made for a rebate on the basis of the deductions claimed. The claim appears to be meritorious but defective, for no appeal was taken to the county court from the finding of the county judge, as provided by law, and no reason appears why this has not been done. Claimants for a refund of overpaid inheritance taxes must exhaust all remedies expressly provided by statute, before coming to this Court. The public convenience suggests it and the law requires it. The claim will therefore be denied.

E. H. TITUS, WILSON H. TUCKER AND SAMUEL ORDWAY, EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWARD P. HATCH, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1913.

1. INHERITANCE TAX—*when award will be made.* Where a final decision has been rendered by a court of competent jurisdiction in favor of a claimant seeking a refund of inheritance taxes erroneously paid, this Court will order a refund of the amount erroneously received by the State.

Elmer E. Wagner, for Claimants.

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

The record in this case shows that Edward P. Hatch, a resident of New York City, died on September 20, 1909, and among the assets of his estate were one thousand shares of the common stock of the Chicago and Great Western Railway Company. On February 16, 1911, the county judge of Cook County, on the recommendation of the appraiser theretofore appointed, fixed the inheritance tax in this State, in said estate, based on an appraisal of twenty-eight ($28.00) dollars per share as the value of the stock. It appears further, that the appraiser appraised and valued the stock as stock of the Chicago and Great Western Railroad Company instead of the Chicago & Great Western Railway Company, and at the time of the appraisal, the shares of stock of the former company were worth twenty-eight ($28.00) dollars per share and the stock of the latter company was worth but four ($4.00) dollars per share. In consequence of this appraisal, the value of the stock was fixed at twenty-eight thousand ($28,000.00) dollars, when it should have been fixed at four thousand ($4,000.00) dollars. Thereafter, for the purpose of securing the consent of the county treasurer to the transfer of the stock, the executors de-

posited with him a sum of money, and he applied a portion of the amount deposited, one hundred thirty dollars and fourteen cents ($130.14), to the payment of the tax as found by the county judge, and he then, out of said tax, paid to the State Treasurer, one hundred twenty-seven dollars and fifty-four cents ($127.54).

The claimants appealed from the finding of the county judge to the county court, and on September 1, 1911, the county court found that the said shares were erroneously appraised at twenty-eight thousand ($28,000.00) dollars, by the appraiser, and found further, that the value was four thousand ($4,000.00) dollars, instead of said twenty-eight thousand ($28,000.00) dollars, in consequence of which, all the several estates growing out of the estate of Edward P. Hatch, deceased, were exempt from taxation, and the court ordered, that the order fixing the tax entered February 16, 1911, be set aside and vacated, and that no tax be fixed as against the several estates. This is a final order of the county court from which no appeal has been taken.

This Court has heretofore held, that it has jurisdiction to pass upon claims of this character, and when, as in the case of *Griffith* v. *State of Illinois,* in which an opinion was filed in the October Term, 1910, there has been a final adjudication by a court of competent jurisdiction, that a tax has been erroneously paid, this Court will order a refund of the amount received by the State.

In this case it appears that claimants have done all that the law requires of them, to secure the repayment of money paid by them. There is a final adjudication in the county court, the executors made demand of both the State Treasurer and county treasurer for a refund under section 10 of the statute, and *did not secure same and have started* suit in this Court within the time required by law.

Under such state of facts, the Court finds that the claimants are entitled to repayment out of the State

treasury of the money received, and it is accordingly ordered, that the claim be allowed in the sum of one hundred twenty-seven dollars and fifty-four cents ($127.54).

Judge McMurdy took no part in the decision of this case.

JOHN P. BRADFORD

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

ARMORIES—*lease of.* Court reviews the evidence and rejects claim.

Bert W. Adsit, for Claimant.

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

This is an action brought by claimant to recover three hundred forty-eight ($348) dollars, for money expended in procuring and preparing plans and specifications for an armory to be erected by claimant, in the city of Pontiac, Illinois; the same to be used by Company "F" Third Infantry, Illinois National Guard.

It appears that Major Strawn, of Pontiac, had a conversation with the claimant in which it was suggested, that it might be a good thing to have a new armory erected at Pontiac.

Claimant advised Major Strawn in substance, that if the necessary arrangements could be made with the proper authorities of the State of Illinois, that he would be willing to erect an armory for their use. Claimant visited different cities for the purpose of securing suggestions as to the kind of a building he was going to erect, and incurred some expense in so doing; he also laid out about three hundred ($300) dollars in having plans and specifications drafted.

Some time prior to the eighth day of March, 1909, Major Strawn had several interviews with Adjutant General Scott, and was informed by him, that if claimant would erect the armory, he would execute a lease with him on behalf of the State of Illinois.

Later, on the eighth day of March, 1909, General Scott made and delivered a written agreement with claimant, in which it was stated, that he would enter

into a lease with claimant, "on behalf of the State of Illinois, for rental of an armory at Pontiac, upon completion of the same, in the sum of one thousand ($1,000) dollars per annum," and among other things it provided, that the building was to be ready for occupancy about August 1, 1909.

Shortly after this written proposition was delivered to claimant, General Scott died, and it was suggested to claimant by Major Strawn, that he should not proceed with the erection of said building until an Adjutant General was appointed to succeed General Scott.

Some time after January 1, 1910, Frank S. Dickson was appointed Adjutant General, to fill the vacancy caused by the death of General Scott, and it appears that there was some misunderstanding between him and the claimant relative to the terms of said proposed lease, and it further appears that General Dickson informed claimant, that he would not enter into a lease for the proposed armory.

Claimant did not have any contract with General Scott prior to his visit with him at Springfield, on March 8, 1909, when he received the written proposal for a lease, and it is clearly shown, that at that time he had procured the plans and specifications and submitted them to General Scott, at their meeting as an inducement to get a contract from him for the building when completed, and that said plans were prepared prior to March 8, 1909, and there is nothing in the evidence to show that General Scott's proposal caused claimant to entail any additional expense.

It is contended by claimant, that the proposal of General Scott to enter into a lease for the armory when completed, was such an agreement as would entitle him to compensation for expenses incurred in securing the plans and specifications for said building.

Notwithstanding, that the claimant received the written proposal from General Scott, he did not proceed with the erection of the building and saw fit to wait until such time as some other person should succeed

General Scott. It would appear that claimant accepted this proposition with a thorough understanding that he was not bound thereby, and claimant could not be held to answer in damages had he refused to erect the armory as contemplated, even though the State insisted that it should be erected and the proposed contract carried out.

As far as we can determine from all the evidence submitted in this case, it appears that this was a strictly business proposition in which the claimant was interested, and the expense he incurred in securing plans and specifications was only incident to his attempt to secure what he deemed a profitable investment.

Had General Scott refused to deliver to claimant the written proposal of March 8, 1909, could it be said that claimant in this case would be entitled to recover from the State the amount of expenditures he now seeks to recover? We think not.

The written proposal of General Scott did not occasion the expenditures herein claimed, and the claimant deemed it advisable not to proceed with the erection of the building, after learning of General Scott's death.

From a fair consideration of all the evidence, we are of the opinion, that the State is not liable for the expenditures made by claimant in his endeavor to induce the State to enter into a contract with him.

This claim should not be allowed and the same is accordingly rejected.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

1. INSURANCE—*foreign fire companies required to pay two per cent.* Foreign Fire Insurance Companies are required to pay two per cent of the amount of their gross premiums collected in this State, into the State treasury, less the aggregate amount of fire department and local taxes paid by them.

2. MISTAKE OF FACT—*money paid under may be recovered.* Money paid under a mistake of fact may be recovered, but not so if paid under a misapprehension as to what the law on the subject really is.

Bates, Harding, Edgerton & Bates, for Claimant:

A payment made under a mistake of fact may be recovered back.

22 Am. & Eng. Enc. of Law, 2d Ed., 621; 30 Cyc., 1316; *International Bank* v. *Bartalott,* 11 Ill. App., 620; *Prickett* v. *Madison County,* 14 Ill. App., 454; *Devine* v. *Edwards,* 87 Ill., 177; *McLean County Bank* v. *Mitchell,* 88 Ill., 52; *Wolf* v. *Beaird,* 123 Ill., 585.

Money paid under a bona fide forgetfulness of a fact is paid under a mistake of fact.

Simms v. *Vick,* 151 N. C., 78, 18 A. & E. Ann. Cas., 699, 24 L. R. A. (N. S.). 517; *Kelley* v. *Solari,* 9 M. & W., 54; *Guild* v. *Baldridge,* 2 Swan., 295; *Lewellen* v. *Garrett,* 58 Ind., 442.

The fact that the party had in his possession the means of knowledge does not preclude him from recovery.

Simms v. *Vick, supra; Allen* v. *Mayer, etc., New York,* 4 E. D. Smith, 404.

Section 65, of chapter 134 of the Laws of 1902 of the State of New Jersey, reads:

"Every insurance company, other than life, of another state or foreign country, transacting business in this State, shall on or before the fifteenth day of February of each year make to the Commissioner of banking and insurance a report, signed and sworn to by an officer of the company, or by its United States manager if a company of a foreign country, stating the gross amount of premiums received by such company,

and by each agent thereof, on business of the said company in this state for the preceding calendar year, including all premiums received from other companies for re-insurance of them, and the amount of premiums returned to the insured during said year on policies canceled, and the amount of premiums paid for re-insurance in other insurance companies of other states or foreign countries, authorized to do business in this state, and shall pay to said Commissioner, on or before the fifteenth day of February, a tax of two per centum upon such gross amount of premiums, less such returned premiums and such re-insurance premiums paid, which tax shall be in lieu of all other franchise taxes imposed upon said corporation: *Provided*, any taxes hereafter paid to the treasurer of any firemen's relief association of this state, by fire insurance companies of other states and foreign countries and their agents, in accordance with the provisions of the Act entitled, 'An Act to facilitate the collection from fire insurance companies not organized under the laws of this state, but doing business herein, and from agents and brokers, of certain premiums for the benevolent funds of the several duly incorporated firemen's relief associations in this state,' approved May second, one thousand eight hundred and eighty-five, shall be considered a part of the tax payable by such companies under this section, and nothing herein contained shall be construed to repeal, alter or change the provisions of the said recited Act."

Paragraph 77, of chapter 73, Hurd's Revised Statutes of Illinois, 1913, page 1406, provides:

"Whenever the existing or future laws of any state of the United States, or any other kingdom or country, shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other state, kingdom or country, any deposit or securities in such state, kingdom or country, for the protection of policy holders or otherwise, of any payment for taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, then and in every such case all companies of such states, establishing or having heretofore established an agency or agencies in the state, shall be and are hereby required to make the same deposit, for a like purpose, with the Auditor of this State. and to pay to the Auditor, for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such state upon the companies of this State

and the agents thereof: *Provided*, that the payment required of such foreign companies shall, in no case, be less than required by this Act."

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

A mistake of fact is not ground for recovery of money paid thereunder, if the person paying the same has knowledge, or means of knowledge, of all the facts connected therewith.

Elston v. *City of Chicago*, 40 Ill., 514; *Walser* v. *Bd. of Education*, 160 id., 272; *Hudson* v. *People ex rel.*, 188 id., 103; *Otis* v. *People ex rel.*, 196 id., 546; *Town of Lyons* v. *Cook*, 9 Ill. App., 543.

Money paid voluntarily under a mistake of law, but with knowledge of all the facts, cannot be recovered.

Building Assn. v. *City of Chicago*, 61 Ill., 439; *Swanston* v. *Ijams*, 63 id., 165; *Yates* v. *Royal Ins. Co.*, 200 id., 202; *Home Life Ins. Co. of N. Y.* v. *State, Court of Claims*, opinion filed Dec. 19, 1908; *Illinois Glass Co.* v. *Chicago Telephone Co.*, 234 Ill., 535, 544.

Claimant, the Firemen's Insurance Company of Newark, New Jersey, is a corporation organized and existing under the laws of the state of New Jersey, and authorized by its charter to engage in said state and elsewhere in the business of insurance; and it has been engaged in such business under a license in the State of Illinois, for many years; and as an insurance company organized under the laws of another state it is taxed in the State of Illinois, a sum of two per cent of the gross premiums received in the State of Illinois, less the aggregate amount of fire department and local taxes paid by it in the various towns, cities and counties in the State of Illinois; that in the month of February, 1912, it made its return to the Insurance Department of the State of Illinois, of its gross premium receipts in Illinois for the year ending December 31, 1911, amounting to the sum of $181,142.08; that the two per cent tax upon the said premium receipts amounted to the sum of $3,622.84; that it returned with its said statement of gross premiums a voucher showing the payment by it of fire department and local

taxes during the year 1911, amounting to the sum of $1,965.99, and that it paid to Fred W. Potter, then Superintendent of Insurance of the State of Illinois, the difference between the said two per cent on its gross premium receipts and the amount of fire department and local taxes paid, to-wit: the sum of $1,656.85, and in addition to that, the fees required by law for filing the annual statement amounting to $20.00, and for advertising annual statement amounting to $80.00, in all the sum of $1,756.85, the receipt of which sum was duly acknowledged by the Superintendent of Insurance by voucher.

The claimant in returning to said Fred W. Potter, then Superintendent of Insurance, its voucher for fire department and local taxes paid by it during the year 1911, to be deducted from the two per cent tax on its gross premium receipts in the State of Illinois, through an oversight or a mistake on the part of its cashier, neglected to return a certain voucher issued by the city collector of the city of Chicago, showing the payment by it on September 5, 1911, of the sum of $1,484.68, the fire insurance tax imposed on it by and under the terms of an ordinance of the city of Chicago, passed February 3, 1896, said sum being the two per cent tax levied on the business of claimant in the city of Chicago, for the year ending June 30, 1911, and that by its failure to include said voucher in the credits to which it was entitled, in estimating a tax to be paid to the State of Illinois for the year 1911, it paid to the State of Illinois the sum of $1,484.68 more than was in fact due from it; and that since it discovered the error or mistake, it took the matter up with Fred W. Potter, then Superintendent of Insurance, and stated to him the facts in regard to the mistake occurring in the omission of said credit, and asked to be reimbursed said amount and was advised by Fred W. Potter, then Superintendent of Insurance, to return said voucher with its tax statement for the year 1912, at which time it would be allowed its credits against the taxes for that year.

It made up its tax statement for the year 1912, and after deducting its two per cent of its gross premium receipts in the State of Illinois on account of fire department and local taxes during the year 1912, there was not a sufficient sum due the State of Illinois, from it to reimburse it in the sum of $1,484.68, at which time it was advised by Fred W. Potter, then Superintendent of Insurance, to file its claim in this Court, and ask to be awarded said sum by reason of said clerical error or mistake of facts.

We are aware that since the Supreme Court of Illinois decided in *Raymond* v. *Hartford Fire Insurance Company,* 196 Ill., 329, that an Act approved April 19, 1889, entitled, "An Act Providing for a Tax on Gross Premium Receipts of Insurance Companies and Associations Other than Life," was unconstitutional and void, there has been on the statute books of Illinois no statute providing for the taxation of the premium receipts of insurance companies organized under the laws of other states and countries, and therefore such companies are taxed under the provisions of the reciprocal laws of the State of Illinois, applicable to fire insurance companies; in which law we fail to see any dispute, whereby it is necessary for us to pass or place a construction on, as it seems, that both the claimant and the State have agreed, that the statute of New Jersey, and the statute of Illinois, as quoted in claimant's brief, govern the payment of the tax to the State.

We are of the opinion, that the only question in this case to be passed upon by this Court, is the question whether or not claimant is entitled to recover from the State of Illinois, the said sum of $1,484.68 by reason of a clerical error or a mistake. From the evidence submitted by claimant, which is undisputed, it appears that it had some time prior to the payment of this tax established an agency in Chicago, in charge of Montgomery & Funkhouser, which had during the existence of such agency, always paid the fire tax to the city of Chicago, and mailed their voucher to the claimant's

western department, which gave them credit for the amount in their account with the company, and that the western department of the Firemen's Insurance Company, always took the agent's vouchers and in making out the report to the Superintendent of Insurance of the State of Illinois, mailed the voucher with the report and asked for and received a reduction for such amount, and that the agent's voucher for the payment of fire taxes of various cities was always kept in a file for that purpose, but that some time prior to the making of the report by the western department of claimant to the Superintendent of Insurance of this State, the agency of Montgomery & Funkhouser had ceased doing business, and the western department of the Firemen's Insurance Company had taken over the affairs so far as it could, and had paid the fire tax to the city of Chicago, through some of its officers, and in making up a statement for the State of Illinois six months later, its cashier, in going through the agent's accounts for the taxation items, failed to include in his report this particular item.

It is contended by counsel for claimant, that the failure to mail this voucher covering this tax to the Superintendent of Insurance for the year 1911, is clearly a clerical error or a mistake of fact, and that by reason of it being a mistake of fact, it should be awarded the sum of $1,484.68, and supports its claim with numerous decisions of courts of this and other states.

Counsel for claimant also claims, that by reason of this Court having equity jurisdiction from an equitable standpoint, it is entitled to an award, citing *Trickle* v. *State of Illinois*, 1 Court of Claims Reports, 103, wherein this Court said: "It is enjoined by the Act creating the Commisison, to determine claims according to the principles of equity and justice, except when otherwise provided by the laws of the State."

The State of Illinois insists, that the claimant is not entitled to recover for the reason, that the money in question was paid by said company into the State

treasury voluntarily, and that it had means of knowledge at its command of all the credits to which it was entitled, and having once paid such money into the State treasury voluntarily and without compulsion and with such means of knowledge at its command, it is not entitled to recover the same.

We have examined the authorities submitted by counsel, and applying the same as we see them to the facts in this case, which disclose that this money was paid through forgetfulness or mistake of fact, and not through mistake of law, we are of the opinion that claimant is entitled to an award.

This case differs from the case of the *Home Life Insurance Company* v. *State of Illinois,* heretofore decided by this Court, in that, the claimant in that case paid the taxes voluntarily under a mistake of law, and was therefore not entitled to recover according to the holdings of the courts of this State.

In the case of the *Illinois Glass Company* v. *The Chicago Telephone Company,* 234 Ill., 544, the Court said that a tax voluntarily paid, *where there was no mistake of fact,* could not be recovered back, which we believe is a true rule of law, but from the facts in this case we believe that the failure to send the voucher in question with the annual report to the superintendent of the Insurance Department of the State, was clearly a mistake of fact, caused by forgetfulness, and that the claimants are entitled to an award in the sum of one thousand four hundred eighty-four and 68-100 ($1,484.68) dollars, and the same is therefore accordingly awarded.

FRANK O. JOHNSON
v.
STATE OF ILLINOIS.

Opinion filed May 22, 1914.

1. NEGLIGENCE—*when State liable for.* Claimant's property, located across the street from the stone quarry at the Illinois State Penitentiary, was damaged by blasting in the quarry. *Held*, that claimant is entitled to an award on account of such damage to his property.

2. JURISDICTION—*statute as to this class of claims.* In this claim, the Court's jurisdiction to hear "all claims against the State for taking or damaging private property by the State for public purposes in the construction or for use of any State institution," is called in question.

3. DAMAGES—*measure of.* Where the injury is permanent, only one recovery may be had, and the measure of damages is the depreciation in value, occasioned and to be occasioned by the maintenance of the nuisance. (*C. & E. I. R. R. Co.* v. *Loeb*, 118 Ill., 203), cited by the Court.

4. EMINENT DOMAIN—*compensation for property taken by.* Private property cannot be taken or damaged for public use without just compensation.

Lagger & Blatt, and Brown, Hay & Hand, for Claimant:

The Court of Claims Act contemplates compensation not only for the physical taking of property, but for damages resulting from public use.

"The measure of damages which is to be adopted is the same as though a direct proceeding by condemnation had been brought to determine the amount of damages."

Aldis v. *Union Elevated R. R. Co.*, 203 Ill., 567.

"If plaintiff was entitled to recover at all, as he was confined to a single action, he ought to recover whatever damage he has sustained by the operation of the plant—both present and future damages."

Hyde Park Light Co. v. *Porter*, 167 Ill., 276.

"The allegation of injury to the market value was an allegation of permanent injury. Depreciation of market value is not measure of damages for temporary injury which may be removed or abated."

North Shore St. Ry. Co. v. *Payne*, 192 Ill., 239.

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

Claimant is a resident and property owner in Joliet, and claims to have sustained damage to his residence because of the maintenance and operation by the State as a part of the penitentiary, of a stone quarry, immediately adjacent to his residence. In the conducting of the stone quarry the State has resorted to blasting operations, as a result of which, stones were cast upon claimant's property and his building sustained damage, all of which he claims causes depreciation in the value of his property.

In this case, the Court is relieved of part of the duties ordinarily imposed upon it, in that, the question of liability of the State for damage has been agreed upon by the parties and the State admits its liability. Both claimant and the State seem to have taken the evidence on the theory, that the measure of damage was depreciation in the value of the property, and not physical depreciation, but the State now defends on the question of the measure of damage, and argues, that the true measure is the physical depreciation sustained within two years of the time of the filing of this claim.

This Court, by the law to which it owes its existence, is called upon to determine "all claims against the State for taking or damaging private property for the State, for public purposes in the construction or for use of any State institution." We have satisfied ourselves, aside from the admissions of counsel, that this statute is directly applicable to the matter before us, in that, this is a claim for the damaging of private property for public purposes, for use of the penitentiary at Joliet, which is a State institution.

Claimant made a contract to purchase the property in question, on October 17, 1902, and acquired title by deed on May 1, 1906. He paid three hundred ($300.00) dollars for the lot, and erected a house and other improvements in 1906, at an expenditure aggregating about twenty-five hundred ($2,500.00) dollars. At the

time claimant purchased his property, there had been a quarry on the penitentiary site, that was not being operated, and actual active operations in the quarry did not commence, until after claimant had started to build his house. There has been blasting going on since 1907, and it has continued at intervals down to the time of the filing of the claim. Stones have been thrown through the roof of the house, cistern cracked, foundation of the house cracked, shingles loosened, windows blown out and broken, plastering cracked, and claimant has been put to many inconveniences.

Claimant's property, it is apparent from the record, is not most advantageously situated for residential purposes. In addition to the quarry complained of, which is to the south of his residence, the steel mills lie to the west, and interurban and local street car lines are in the front of his house, and according to his testimony, there is a great deal of noise, independent of the noise in the quarry. Claimant himself apparently lays his claim to damage to the fact, that the stones from the blasts caused actual physical damage, and states that the work in the quarry is going away from his residence, and that, if it were not prosecuted at the time of taking the testimony that, in his opinion, his property would be as good for residence purposes as it was before the blasting commenced. He stated further, that the penitentiary people have done practically all of the repairing that has been done. It is apparent also from the evidence, that in addition to the blasting in the quarry, that some place on the premises seems to be used as a garbage crematory, without any particular regard being had for the disposition of the odor of the burning garbage, although this is not specifically set forth in the declaration as an element of damage.

Considerable testimony has been offered on the question of depreciation in value of the property, and on the question of damages. Very little of it would pass as expert testimony, and it is very largely made up of

the testimony of friends and neighbors of claimant, or people interested to a greater or less degree in the ultimate outcome of this case, and in the application of the principles as to the question of damages in this particular case.

On the question of the measure of damages, a similar question has been passed upon by the Commission of Claims, in *Fairbanks* v. *State*, 1 C. of C. R. 1, wherein the Commission, on page 4, stated:

"We think the rule well established, that where the obstruction, as in this case, was lawful, it could not be treated as a nuisance, for that would imply the right to have it abated. Evidently there could be but one satisfaction for the injury sustained, and that would be for the permanent injury to the land caused by the obstruction of the river."

In that case is cited the case of *Chicago & Eastern Illinois R. R. Co* v. *Loeb*, 118 Ill., 203, which is a well considered and leading case on the principles herein involved.

Adopting the language of that case as applicable to the case at bar, we hold, "that in an action brought for deterioration in the 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 one recovery in such action will be a bar to all future actions for the same cause." In this case, as in the last cited case, we might also say: "The cause of damage here is not a nuisance proper," though the line of reasoning, whether or not it be actually a nuisance in law, is the same. We are not prepared to hold, that the operation of a stone quarry as an adjunct of the penitentiary is in law, a nuisance, yet, following the language of that opinion, "we think it to be within the true intent and meaning of this provision as to damage (the constitutional provision that private property shall not be taken or damaged for public use, without just compensation), 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 the taking of property, where there is but one proceeding, and an assessment of compensation and damages once for all."

In view of the fact that this stone quarry was not being operated as such and in the manner complained of at the time claimant bought his property and made his improvements, but on the contrary all the damage sustained by reason of the operation of the quarry was sustained since such time, there must be a recovery by claimant in this case and the measure of damages is the depreciation, if any, in the fair cash market value of the premises.

Witnesses for claimant, fix upon varying figures as their estimates of damages, and differ as to the reasons for their estimates of the damages as fixed by them. Two witnesses place the damage at fifty per cent of the original value, due to the fact, that there is a quarry, and the fact that stones are thrown on claimant's property. Claimant himself, includes in his estimate of damage, the fact that property in the vicinity is not improving as regards price, because of the location of the quarry. On the part of the State, one witness, a real estate agent, placed the value of the property, at twenty-three hundred ($2,300.00) dollars, and estimates the damage at not more than three hundred ($300.00) to five hundred ($500.00) dollars, and another witness for the State places the damage at five hundred ($500.00) dollars. Both witnesses for the State are real estate men, and claimant's witnesses are his neighbors and friends or people interested in the result of this case.

We have carefully examined the evidence on the question of damage, and conclude, that claimant should have a recovery from the State of Illinois, as his just damage, in the sum of seven hundred fifty ($750.00) dollars.

WALTER O. JONES, BY GRACE E. JONES, HIS NEXT FRIEND,

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

1. NON-LIABILITY OF STATE—*State in absence of statute not liable for injuries to those employed by it.* Claimant, a student at the University of Illinois, was employed in various positions, and while working in the department of fire protection was injured. *Held*, that no liability attached.

2. PUBLIC POLICY—*of State.* The State's exemption from liability does not find its justification solely from considerations of public policy. (*City of Chicago* v. *Williams*, 182 Ill., 135; *Minear* v. *State Board of Agriculture*, 259 Ill., 549, cited by the Court.)

3. GOVERNMENTAL FUNCTION—*University of Illinois.* The State in conducting the University of Illinois exercises a governmental function, and does not conduct a business enterprise.

4. SAFETY APPLIANCE ACT—*not applicable to State.* The Safety Appliance Act has no application to the State in its relations to its employees.

Robert E. Fitzgerald, for Claimant:

The doctrine that the State is exempt from liability for the torts and negligence of its servants, finds justification solely from considerations of public policy.

Holmes v. *State*, I. C. of C. R., 324.

The master owes to the employee the duty of guarding and protecting machinery, as provided in section 1 of Act of 1909, Session Laws, 1909, p. 202.

Streator v. *Western Wheeled Scraper Company*, 254 Ill., 244.

The neglect of the duty imposed by statute for the protection of an employee, is actionable negligence, providing the injury is caused thereby. It is negligence *per se.*

Western Anthracite Coal Company v. *Beaver*, 192 Ill., 333.

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

The doctrine of *respondeat superior* does not apply to the State, and the State, in the absence of a statute providing therefor, is not liable in damages for the negligence of its officers, agents or employees.

Leidel v. *State*, C. of C., Oct. Sess., 1906; *Jorgenson* v. *State*, Oct. Sess., 1911; *People* v. *Brown*, 67 Ill., 435, 438; *Minear* v. *State Board of Agriculture*, 259 Ill., 549.

Claimant was a student at the University of Illinois, and was employed in various jobs about the university. On December 29, 1912, while in the employ of the Superintendent of Buildings, in the department of fire protection, he was directed to watch a motor and belt in the engineering building. There is a conflict of testimony between claimant and the superintendent, as to instructions given by the superintendent, but in our ultimate view of the case, this is immaterial. Suffice it to say, claimant had never had anything to do with the particular machinery upon which he received injury. At the time of the accident in question, he had taken a piece of waste to catch some oil that was dripping in the vicinity of certain cog-wheels, and the waste was caught in the cogs and one of his hands drawn in, as to which one, the record is silent. As a result of this accident, he sustained injuries which caused the amputation of the first finger at the second joint, the second finger at the second joint, and the mashing of the nail and first joint of the third finger. Claimant, since the accident, is able to draw and write with facility as evidenced by the diagram made by him and introduced in evidence. In addition to these injuries, claimant suffered a nervous breakdown and lost the time of a full college year.

The evidence is to the effect, that the cogs were defectively guarded, and there is a question in the minds of the Court, as to whether or not there was any guard over these particular wheels which caused the injury.

Claimant's counsel urges, that the exemption of the State from liability finds its justification solely from considerations of public policy, and cites *Holmes* v. *State of Illinois*, 1 C. of C. R., where, at page 331, the Court said:

"The doctrine (exempting the State from such liability) finds its justification in considerations of public policy."

We do not understand, that this Court then intended to hold, that the basis upon which this principle of law is founded, is public policy. Nor, do we so hold. It is the theory of the common law, repeatedly expressed, as stated in *City of Chicago* v. *Williams*, 182 Ill., 135, (cited in the *Holmes case* as authority):

"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."

In *Minear* v. *State Board of Agriculture*, 259 Ill., 549, the Supreme Court of this State has said:

"If, as we hold, the State Board of Agriculture is an agency of the State, in the exercise of governmental functions, it is not liable, under the common law, for injuries claimed to have been sustained as a result of its negligence."

There is no statute which makes the State liable to respond in damages in a case, such as the one before us.

There is no evidence in the record as to what the functions of the University of Illinois are, nor is there any allegation in the declaration. Counsel for claimant argues, that it is within the province of this Court, with a knowledge of the purposes for which the university was instituted, to determine whether or not, in the conduct thereof, the State was exercising a governmental function or conducting a business enterprise for profit. By reference to the statutes, and with that knowledge with which counsel credits the Court, the Court concludes, that the university is conducted by the State in the exercise of its governmental function.

Claimant has failed to prove negligence on the part of the State in any degree, that even approximates a preponderance of evidence, and, in like measure, his proof as to his own exercise of care is lacking.

We cannot agree with claimant, that the public policy of the State, with reference to its relations with its employees, is any different now, than it was at the time the *Holmes case* was decided. The Safety Appliance Act has no application to the State in its relations to its employees.

It is the judgment of this Court, that this claim be, and the same is hereby rejected.

LEROY D. KELLOGG
v.
STATE OF ILLINOIS.

Opinion filed May 22, 1914.

INHERITANCE TAX—*when refund will be awarded.* In this claim the inheritance tax was fixed by the county judge of Cook County, and an appeal prayed to the county court, pending which appeal, the tax so fixed was paid under protest, after which the county court reduced the tax as fixed by the county judge. The Court awards claimant the difference between the tax as fixed by the county judge and as reduced by the county court.

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

The claimant in this case seeks to recover for certain inheritance tax moneys paid under protest, in connection with the estate of Milo G. Kellogg, deceased, which said estate was administered upon in Cook County, Illinois.

The county judge of said county made an order in said estate fixing the inheritance tax at thirty-one thousand one hundred thirty-five and 60-100 ($31,135.60) dollars, from which order an appeal was prayed and prosecuted by the claimant and other heirs to the county court of said county, as was authorized by statute. Pending the appeal, the amount of tax so levied was paid under protest to the county treasurer of Cook County, in order to obtain the statutory discount. The county court made a reduction of six hundred fifty-eight and 33-100 ($658.33) dollars, and it is for this amount, that claimant, on his account and as assignee of the other heirs, asks an award.

The record in this case discloses, that the claimant did everything essential to protect himself against the excessive levy by the county judge, and we are of the opinion, that claimant is entitled to recover the amount so rebated by the county court, less two (2%) per cent

which was deducted by the county treasurer, in remitting to the State Treasurer, conformably to the statute.

We, therefore, make an award in favor of the claimant, for six hundred forty-five and 17-100 ($645.17) dollars.

JAMES KINNEY

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

FEES AND SALARIES—*sum appropriated limits amount of, in absence of other statute.* Claimant acted as clerk for the State Board of Equalization, and worked more than the usual number of hours per day. The statute allows $5.00 per day, and the proof shows he worked 153 days and was allowed $825.00 by an appropriation made by the legislature. *Held*, that no recovery could be had.

Adolph Bernard, for Claimant.

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

Claimant was employed as a clerk of the State Board of Equalization, during the last five months of the year 1912. He spent practically all of his time doing clerical work for the Committee on Assessment of Railroad Property, and in the course of his employment worked more hours per day, than is usual in this line of employment.

The statute fixes the salary for clerk hire at five ($5.00) dollars per day, for this class of work, but owing to the fact, that the clerks on this committee had worked considerable overtime, the Board of Equalization, on the fourth day of December, 1912, adopted a report and resolution of the Committee on Assessment of Railroad Property, which recommended that each clerk be allowed compensation for two hundred (200) days.

The claimant was actually employed one hundred fifty-three (153) days, for which he received eight hundred twenty-five ($825.00) dollars, but in view of the resolution adopted by the Board of Equalization, he filed his claim for one hundred seventy-five ($175.00) dollars, which would make up for the two hundred (200) days at five ($5.00) dollars per day. The legislature made an appropriation of eight hundred twenty-

five ($825.00) dollars, to cover his salary in this case, which is sixty ($60.00) dollars over and above the regular rate fixed by statute, and claimant received and accepted same.

We know of no law binding the State for claims of this kind, and taking into consideration the fact, that the claimant received for his services an amount in excess of that authorized by statute (chap. 120, par. 116, Hurd's Revised Statute, 1911), we are of the opinion, that this claim should not be allowed.

The claim is accordingly rejected.

EDWARD S. HODGSON

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

FEES AND SALARIES—*Kinney* v. *State ante followed.* This case is identical with that of *Kinney* v. *State, supra.*

Adolph Bernard, for Claimant.

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

The claim in this case, is identical with the claim of *James Kinney* v. *State of Illinois,* in which an opinion was filed in this October Term, 1913.

The claim is rejected for the same reasons set forth in the above opinion.

PEYTON-PALMER COMPANY
v.
STATE OF ILLINOIS.

Opinion filed May 22, 1914.

LICENSE FEES—*only one license required to sell chick and scratch food.* Where the manufacturer of chick and scratch food has obtained a license to sell such food in this State, a retailer who buys from such manufacturer, is not required to obtain a license to sell the same.

Lindley, Penwell and Lindley, and Alonzo Hoff, for Claimant.

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

The verified declaration of claimant alleges, that the claimant, Peyton-Palmer Company, is a corporation organized and existing under the laws of the State of Illinois, and doing business in the county of Sangamon, as vendors of one brand each, of chick and scratch feed; and that on August 17, 1910, it paid to the defendant, the State of Illinois, $50.00; September 5, 1911, $25.00; December 11, 1911, $50,00, for the year 1912. And, January 18, 1913, $50.00, making a total of $175.00, as a license fee, to vend the one brand each of chick and scratch feed; and that it had bought said feed stuffs outright as a seller, or agents from the Ralston Purina Company of St. Louis, in the State of Missouri, who were the manufacturers; and that it paid said license fee to the defendant, the State of Illinois, under threats of prosecution, under an Act to regulate the sale and analysis of concentrated feeding stuffs, approved May 18, 1905, in force July 1, 1905.

It further alleges, that the Ralston Purina Company of St. Louis, in the State of Missouri, as such manufacturers, had paid a license fee to the defendant, the State of Illinois, on January 31, 1910, on one brand each of chick and scratch feed $25.00; February 23, 1911, one brand chick feed, $25.00; December 30, 1911,

one brand scratch feed, $25.00; January 25, 1912, one brand chick feed, $25.00; January 22, 1913, one brand chick and scratch feed, $50.00.

There being no dispute as to the facts, the only question before this Court, is the construction of section 35, chapter 127B, Hurd's Revised Statutes, to regulate the sale and analysis of concentrated feed stuffs, as to whether or not an agent or seller of a manufacturer, importer or shipper, shall be required to pay such license fee, whenever the manufacturer, importer or shipper, has already paid same, which is the fact in this case. From the reading of the last clause of said section, it would therefore seem, that the legislature clearly intended, that but one license fee should be paid to the State of Illinois, for the sale, shipping or manufacturing of one certain brand of concentrated feeding stuffs in the State; and, that if the manufacturer, importer or shipper paid the license fee, then the agent or seller of such manufacturer or shipper, would not be required to pay the same.

This license fee, having been paid by the manufacturer, the Ralston Purina Company of the city of St. Louis, State of Missouri, we are clearly of the opinion, under the language of this statute, that claimants were not required to pay the same as sellers, or agents, and are, therefore, entitled to a judgment in the sum of $175.00, and we, therefore, accordingly award claimant, Peyton-Palmer Company, the said sum of $175.00.

LEWIS E. TAYLOR
v.
STATE OF ILLINOIS.

Opinion filed May 22, 1914.

1. RESPONDEAT SUPERIOR—*rule of not applicable to State.* The rule of *respondeat superior* does not apply to the State.

2. MASTER AND SERVANT—*law of not applicable to State.* The law of master and servant is inapplicable as between the State and one of its employees.

3. GOVERNMENTAL FUNCTION—*operation of Joliet penitentiary is exercise of.* The penitentiary at Joliet, is operated by the State as a State institution, and in the operation of the stone quarry at said penitentiary, the State acts in a governmental capacity.

4. PRACTICE—*Court cannot disregard legal principles.* The Court of Claims, in the exercise of the equitable powers of which it is possessed, cannot disregard legal principles.

William A. Murphy, for Claimant:

By analogy to the relation of master and servant, it was the duty of the State to use reasonable care in furnishing claimant, its servant, reasonably safe appliances wherewith, and places wherein, to do his work.

Orr v. *Waterson*, 228 Ill., 138; *Mo. Malleable Iron Company* v. *Dillon*, 206 Ill., 145; *Armour* v. *Brazeau*, 191 Ill., 117.

A master is presumed to have notice of any defect in the appliances or materials furnished to the servant, which, by the use of ordinary care, he might know.

Consolidated Coal Co. v. *Haenni*, 146 Ill., 614.

It is the master's duty to find out defects which a reasonable investigation will disclose. The employer has a duty of inspection as well as observation.

Ill. Steel Co. v. *Mann*, 100 Ill. App., 367.

A servant, while bound to take notice of patent defects in an appliance, is not required to make an examination for latent ones, and may properly act on the presumption, that the master has used ordinary care to make the appliance reasonably safe.

Leonard v. *Kinnare*, 174 Ill., 532.

No defect is latent, which an inspection will disclose.

Libby MacNeill & Libby v. *Cook*, 123 Ill. App., 574.

Knowledge of defects from which an injury results, is a matter of defense, and the burden of proof is on the defendant to show that it was possessed by the plaintiff.

George B. Swift Co. v. *Gaylord*, 126 Ill. App., 281; *Pressed Steel Car Co.* v. *Herath*, 110 Ill. App., 596; *C. & E. I. R. R. Co.* v. *Hines*, 132 Ill., 161.

In order to charge an employee with negligence, he must know of the defect, and know that it is such as will interfere with the use of the appliance, so as to make it dangerous to use it.

Hartrich v. *Hawes*, 202 Ill., 334.

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

The doctrine of *respondeat superior* does not apply to the State, and the State, in the absence of statute providing therefor, is not liable in damages for the malfeasance, misfeasance or negligence of its officers, agents or employees.

Alexander v. *State*, 1 Ct. of Cl. Rep., 214; *Brewster* v. *State*, 1 id., 215; *O'Donnell, Administrator,* v. *State*, 1 id., 255; *Belt* v. *State*, 1 id., 266, and other cases cited.

One who knows of defects, but does not report the same to his superior, cannot recover.

Herring Admx., v. *State*, 1 Ct. of Cl. Rep., 228.

In order that a servant may recover upon the ground of negligence of the master, three things must concur: (1) that the appliance was defective; (2) that there was actual notice to the master, or imputed knowledge; (3) that there was ignorance upon the part of the servant of the defect.

Goldie v. *Werner*, 151 Ill., 551; *Howe* v. *Medaris*, 183 Ill., 288; *L. E. & W. R. R. Co.* v. *Wilson*, 189 Ill., 89.

A legal or equitable right must exist as the basis of an award by the Court of Claims.

Oliver v. *State*, 1 Ct. of Cl. Rep., 218; *Hatfield* v. *State*, 1 Ct. of Cl. Rep., 223.

Claimant, while in the employ of the State as a guard or keeper at the penitentiary at Joliet, met with accident and injury in the stone quarry, operated in connection with the penitentiary, on November 4, 1910.

In the operation of the stone quarry, the State had various employees who had charge of the quarrying and crushing of stone, and the actual work was principally done by convict labor. The quarry was exca-

vated to a depth of about fifty feet below the level, upon which was located the stone crusher, and running from the floor of the quarry to the crusher, was an incline upon which were laid tracks. On these tracks, steel cars loaded with stone, were conveyed from the quarry to the crusher, the cars being drawn up the incline by cables operated by electric power. On one end of the car in question, was a draft iron or draw bar, fastened underneath the body of the car. This draft iron was about an inch and a half wide, a half inch thick and sixteen inches long, bolted to the underside of the body of the car, and had a hole in the projecting end in which was placed a hook connected with the cable, when it was desired to draw the car up the incline.

On the day in question, and at the time of the accident, one of these cars had been loaded and drawn up on the tracks, so that it was partly over the top of the incline, and while in this position, the car itself was standing on an angle with the cable pulling against the draft iron, not on a line with the floor of the car, but, on an angle with the floor. While the car was in this position, the draft iron broke, and the car went back down the incline, nothing having been provided to hold it. When it struck the bottom, it overturned, and the stones with which it had been loaded, were thrown about promiscuously, and one of them struck claimant, who, at the particular moment, was running away from the incline as rapidly as he could. Claimant had been employed about the base of the incline superintending the handling of the cars by the convicts.

The cause of the accident was the breaking of the draft iron, and one witness testified that the break was partly an old one, being partly rusty and partly fresh, and another witness testified, it was entirely a fresh break. The break was at the point where the draft iron was bolted to the bed of the car.

The injury consisted of a compound, comminuted fracture of the tibia of the left leg, and a simple fracture of the fibula. There is a shortening of the left

leg of about one and a half inches, and the attending physicians agree, that claimant will be permanently crippled, and will be unable to perform any labor that will require him to walk about to any great extent. Claimant is forty-three years of age.

The State does not contest the extent of the injury, nor is there any contention over the manner in which the accident happened.

The claim is defended on the ground that claimant had notice of the defect, and that the doctrine of *respondeat superior* is not applicable. Claimant attempts, by analogy, to apply the rule of law applicable to the relation of master and servant to the case at bar.

One of claimant's witnesses testified, that about an hour and a half before the accident, he told claimant of the defect in the iron bar. Claimant's recollection as to this testimony is indistinct, and there is no categorical denial by him of the statement of this witness on this proposition, but on this branch of the case, if the law which is applicable to the relation of master and servant were to be followed, we would be compelled to hold that such knowledge alone on the part of claimant, taken in connection with a consideration of the whole record, would not bar a recovery by claimant on the ground, that he assumed the risk or was guilty of contributory negligence. All this evidence shows is knowledge of the defect, but the record is silent on any knowledge of, or appreciation of danger, due to the existence of the defect, on the part of claimant. There is no evidence that claimant was charged with any duty in connection with the care or management of the car in question.

But, viewed from the claimant's side of this case, there is a far more serious question involved. As stated in *O'Donnell* v. *State,* 1 Ct. of Cl. Rep., at page 255, 256: "This Commission can, therefore, allow claims against the State, only in cases where by express statutory provision the legislature has cre-

ated 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." We can allow claims in those cases wherein the State has not acted in the governmental capacity but has been conducting a business enterprise.

While it was stipulated in this case, that the penitentiary in question, was being operated by the State as a State institution, there is no evidence in the record, that the operation of the quarry was any other or different in its purpose, than other work done by convicts in the penitentiary. We have no right to assume from the state of the record, nor could we so hold, unless the evidence were before us, that the quarry in question, was conducted by the State otherwise than in its governmental capacity. There is no evidence that it was conducted as a business enterprise. It has likewise been held by this Court, and by many other courts, that the rule of *respondeat superior* does not apply to the State. This statement, of course, must be limited to cases wherein the State is exercising its governmental functions.

While claimant was in the employ of the State, and paid by the State, we cannot agree with his contention, in our interpretation of the law, that an analogy can be drawn between his relations with his employer and the relation of master and servant. Hence, we must hold, because of the legal status of the parties as hereinbefore pointed out, that the law and rules with reference to the relation of master and servant are here inapplicable.

As has also been repeatedly held by this Court, we cannot, in the exercise of such equitable powers as the statute has conferred upon us, disregard legal principles, even though we might be constrained to award damages.

The injuries sustained by claimant are severe, and would readily entitle him to a judgment of at least $2,500 in courts of general jurisdiction, against an em-

ployer, and we would be inclined to award him that amount were it in our power.

However, we must reject this claim for the reasons stated, but under the authority conferred upon us by statute, we direct that the rejection of this claim shall not conclude the claimant, should he endeavor to otherwise obtain redress for the injuries by him sustained.

THE CHICAGO AND ALTON RAILWAY COMPANY
v.
STATE OF ILLINOIS.

Opinion filed May 22, 1914.

1. DEMURRAGE—*right of railroad company to charge.* The law in this State is well established, that a railroad company has a legal right to assess and collect demurrage charges for the detention of its cars. (*Schumacher* v. *C. N. W. Ry. Co.*, 207 Ill., 199; *Woolner Distilling Company* v. *P. E. Ry. Co.*, 136 Ill. App., 479.)

2. SAME—*does not depend on statute.* The fact that there is no express statute authorizing railroad companies to charge demurrage, will not defeat their claim for the same.

Winston, Payne, Strawn and Shaw, for Claimant.
P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, for State.

The claimant in this case seeks to recover demurrage from the State on account of certain coal cars having been held at the Illinois State Penitentiary at Joliet, Illinois, for a longer time than was allowed according to their tariff schedule, which was on file and approved by the Interstate Commerce Commission, at the time these charges accrued.

From May 1, 1911, to June 9, 1913, the Illinois State Penitentiary received a great many cars of coal from the Sangamon Coal Company of Springfield, Illinois, over the lines of the claimant, and very often more coal was received by them, than could be readily handled, with the result, that the yards of that institution, were often blocked with the claimant's cars. Whenever the cars in question reached their destination, the claimant, through its employees, notified the officials of the penitentiary in writing of their arrival, stating that the cars were being held at the risk of the consignee and, that unless they removed them within a certain time, demurrage charges would be assessed according to the regular rates of the Demurrage Bureau.

The claimant made repeated attempts to collect for the demurrage assessed, but was not successful. The matter was taken up and discussed at different times between the agents of the claimant, and the officials of the penitentiary, but payment of the account was refused on the ground, that no appropriation was made for this purpose. Not being able to make a satisfactory adjustment of the account, claimant filed its claim in this Court and asks that we make an award in its favor for the amount claimed.

There can be no question, but that several cars of the claimant were held at the penitentiary longer than the allotted time as fixed by the Tariff Schedule, and as it is not contended that anything was ever paid on this claim, the principal question before the Court, is whether or not the claimant is entitled to recover for demurrage charges in this case. The State in its contention against the allowance of the claim insists, that there is no law upon the statute books of this State fixing the rates of demurrage which railroad companies may charge, and that the claimant could only recover upon a *quantum meruit.*

It is also contended that there is no proof of the reasonableness of the charges, and that any award that might be made in this case would of necessity be based upon mere conjecture or speculation. That the officials of the penitentiary were aware of the fact, that they would be expected to pay demurrage on cars that were not released within the allotted time, is evidenced by many conversations and communications between the agent of the claimant, and the chief engineer of the penitentiary, who had charge of the shipment of coal delivered to the penitentiary. When pressed for a settlement of this claim, he evidently recognized the justice of it, for he wrote the Sangamon Coal Company of Springfield, Illinois, that they were shipping cars in such quantities, that he could not take care of them, and that, unless they regulated the shipments to conform to his directions, he would expect them to pay

demurrage. For nearly two (2) years, the officials in charge of the penitentiary received almost daily notices, relative to the demurrage that was being charged against them, and at no time was the reasonableness of the charges ever questioned by them.

The charges assessed were made in accordance with the claimant's regular schedule on file with the Interstate Commerce Commission, and as the State did not offer any evidence in support of their contention, with reference to the reasonableness of the charges made, we are not in position to say, that the charges are unreasonable. Neither, are we in a position to say, that the claimant was to blame for the manner in which the cars were shipped from the Sangamon Coal Company to the penitentiary.

We believe it to be well established law in this State, that a railroad company has the right to assess and collect demurrage charges for the detention of its cars (*Schumacher* v. *C. N. W. Ry. Co.*, 207 Ill., 199; *Woolner Distilling Company*, v. *P. E. Ry. Co.*, 136 App., 479), and in view of the evidence submitted to us, we are of the opinion, that the claimant is entitled to recover the amount of its claim.

We, therefore, find for the claimant, and make an award in its favor of three hundred fifty-seven ($357) dollars.

LAURENCE O. TINSMAN

v.

STATE OF ILLINOIS.

Opinion filed May 22, 1914.

PRACTICE—*rule of.* A failure on the part of claimant to take evidence, and file abstracts and briefs, as required by the rules of this Court, will support a motion by the Attorney General to dismiss.

John E. Kost, for Claimant.

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

This claim was filed in this Court on the 26th day of January, 1912, by the claimant, Laurence O. Tinsman, of Galesburg, Knox County, Illinois, for the sum of $25.00, which he paid to the State Board of Commissioners of Labor, to open up and operate a private employment agency at Galesburg, Knox County, Illinois.

Claimant alleges in his declaration, that he received a license, No. 2020, from the State Board of Commissioners of Labor at 14 East Main Street, Galesburg, Illinois, for which he paid the sum of $25.00, which payment was made on the 20th day of June, 1911, and that he conducted and operated said agency until August 1, 1911, when he quit said business and left the city.

No evidence having been taken and filed in support of the claim set up in the declaration, as required by statute and rule 13, of the rules of this Court, the Attorney General thereupon filed a motion in this Court, on the 8th day of November, 1912, to dismiss said claim for non-compliance with the rules, on the part of the claimant in neglecting and failing to take evidence in support of said claim, and to file abstracts and briefs as required by the statute and the rules of this Court.

An examination of the files fails to show that any proofs in support of his claim have ever been taken by the claimant, as required by the statute and the rules of this Court; the claimant simply rests his case on

his verified declaration, and from all indications expects this Court to determine the merits of this case therefrom. This, the law does not give this Court the power to do.

While it is not the disposition of this Court to dismiss claims, yet, this Court is bound to follow the rules established by it for the transaction of its business, and sufficient time having elapsed since the filing of this claim, to have taken testimony in support of it, and to have filed the arguments and briefs, and the claimant having failed to do so, the motion to dismiss this claim is therefore allowed, and the same is therefore dismissed.

CATHERINE MORRISSEY
v.
STATE OF ILLINOIS.

Opinion filed November 19, 1914.

1. CONTRIBUTORY NEGLIGENCE—*when claimant not chargeable with.* Where a claimant, who in passing over a bridge has no knowledge of any of its defects, he will not be chargeable with contributory negligence.

2. NOTICE OF DEFECT—*what is.* An examination of the bridge by an employee of the Illinois and Michigan Canal Commission, after notice of a defect in the bridge, is notice to the State.

3. CONSTRUCTIVE NOTICE—*what constitutes.* The evidence in this claim also shows, that the defect in the bridge had existed for such length of time as would constitute constructive notice.

4. MUNICIPAL OFFICERS—*duty as to bridges, etc.* A duty is imposed upon municipal officers to use ordinary care in keeping the bridges, culverts, etc., of such municipality in safe condition for public travel, and this involves the anticipation of defects that are the natural and ordinary result of use and climatic influences. (*City of LaSalle* v. *Porterfield*, 138 Ill., 114; *Sherwin* v. *City of Aurora*, 257 Ill., 458.)

5. ACCEPTANCE—*what will not constitute.* The replanking of the bridge by the corporate authorities of the Village of North Utica, following an offer by the Canal Commissioners to turn the bridge over to such authorities, will not amount to an acceptance of such bridge by the corporate authorities of North Utica.

6. GOVERNMENTAL FUNCTION—BUSINESS ENTERPRISE—*where State exercises former no liability attaches—but in case of latter liability does attach.* Where the State exercises a governmental function only, no liability attaches, whereas, if it is engaged either wholly or partially in a business enterprise, and the exercise of the governmental function cannot be disassociated from the business enterprise, liability attaches.

7. HOLMES V. STATE—*overruled.* The case of *Holmes* v. *State*, 1 Court of Claims Rep., 324, overruled.

8. STATE—*may act how.* The State may act in a governmental way along the same lines that an individual may act.

9. SAME—*not a corporation.* The State of Illinois is not a corporation in any sense.

10. CITIES—*may be liable when township or school district would not be.* A city may be liable in damages in case where a township or school district would not be.

11. SAME—*no liability where it acts governmentally.* Where a city exercises a governmental function, no liability in tort attaches.

12. CANAL COMMISSIONERS—*not a corporation—are what?* The Canal Commissioners are not a body corporate. Such commissioners and their employees are public servants under the exclusive control of the State, and they derive their powers solely by virtue of the statutes of the State.

13. LIABILITY OF STATE—*rests on statute.* Where the State has assumed liability for injuries to those in its service, such liability is assumed by virtue of some statute of the State.

14. GOVERNMENTAL FUNCTION—*conduct of University of Illinois is, exercise of.* The State in conducting the University of Illinois acts in a governmental capacity, and is not liable in tort. (*Jones* v. *State, supra*), and the penitentiaries in the manufacture of goods and wares act governmentally, and are not liable in tort. (*Taylor* v. *State, supra*). The cases of *Minear* v. *State Board of Agriculture*, 259 Ill., 549; *Hern* v. *Iowa State Agricultural Society*, 91 Ia., 97; *Berman* v. *Minnesota State Board of Agriculture*, 93 Minn., 125; *Trustees of Illinois Industrial University* v. *Board of Supervisors of Champaign County*, 76 Ill., 184, and *Chicago* v. *Williams*, 182 Ill., 135, cited by the Court.

15. JURISDICTION—*Act creating Court did not increase liability of State.* The Act creating this Court did not increase or enlarge the State's liability.

16. STATE—*where stockholder in corporation—liable.* Where a State becomes stockholder in a corporation, it divests itself, for the purpose of the business, of its sovereign capacity and liability attaches.

17. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State.

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimants:

The canal is a business enterprise.
Holmes v. *State of Illinois*, 1 C. of C. R., 324.

The State is liable to individuals for the misfeasance, laches, acts or neglect of its officers, agents and servants, when such officers, agents and servants, in what they do, are not proceeding in the mere carrying out of the purely governmental policy or functions of the State, but are doing those things, which have relation to the management of corporate or private concerns of the State conducted for profit, as a business enterprise.

Bank of U. S. v. *Planters Bank of Ga.*, 9 Wheaton, 904; *Hand* v. *Brookline*, 126 Mass., 324; *Scott* v. *Manchester*, 1st

Hurlstone & Norman (English case), p. 59; *Scott* v. *Manchester*, 2d Hurlstone & Norman, 208; *Oliver* v. *Worcester*, 102 Mass., 489; *Hill* v. *Boston*, 122 Mass., 344, 358, 359; *Western Saving Fund Society et al.* v. *Philadelphia*, 31 Penn. St., 185, 189; *Bailey* v. *Mayor, etc.*, 3d Hill (N. Y.), 531, 539; *City of Chicago* v. *Williams*, 182 Ill., 135; *Barnard & Co.* v. *County of Sangamon*, 190 Ill., 116; *City of Chicago* v. *Sexton*, 115 Ill., 230; *County of Cook* v. *Harms*, 108 Ill., 151; *City of Chicago* v. *Selz, etc.*, 202 Ill., 545; *Culver* v. *City of Streator*, 130 Ill., 238.

The State of Illinois not only collects toll for passage over the canal, of boats and barges, but receives rent from the real estate owned in connection with this canal. Also sells ice and water to institutions along its banks, and further derives considerable revenue from water power.

Section 8 of the statute creating the canal, specifies certain revenues not at all compatible with the mere use of the canal as a means of communication by water.

Section 12 of said Act requires the commissioners of the canal to make quarterly statements, and to "pay into the State treasury the balance of all moneys in their hands, except such sums as shall be necessary to be retained by them for the purpose of making repairs upon said canal, locks and dams."

Sections 15 to 24, both inclusive, comprise a system of fines and penalties, and section 27 disposes of the fines, by directing them to be paid into the State treasury.

A *quasi* corporation may, however, by its own voluntary act, become something more than the mere governmental instrumentality, that the State originally made it and intended it to be, and may thus assume a new character. Such a change of character may be brought about, it seems, by the assumption and performance of some special duty, undertaken for its own private advantage which has been either imposed upon it by the legislature with its own consent, expressed or implied, or conferred upon it by the legislature, at its request, or voluntarily assumed without any action on the part of the legislature. When a *quasi* corporation assumes in any one of these ways, the performance of duties for its own private advantage, it thereby ceases to be a pure *quasi* corporation, and becomes to that extent a municipal corporation proper. With such a change in character, comes also a change in the rule of liability, and such corporation is held to be responsible to the same extent as a municipal corporation proper, under like circumstances.

Thompson v. *Polk*, 38 Minn., 130 (1888), 36 N. W. Rep., 267; *Schussler* v. *Hennepin County*, 67 Minn., 412 (1897), 70 N. W. Rep., 6; *Rowland* v. *Kalamazoo County*, 49 Mich., 553 (1883), 14 N. W. Rep., 494; *Moulton* v. *Scarborough*, 71 Me., 267 (1880); *Hand v. Brookline*, 126 Mass., 324 (1872); *Coburn* v. *San Mateo County*, 75 Fed. Rep., 520, 537 (1896); Williams on Municipal Liability for Tort, Chap. 1, p. 3-7; *Tollefson* v. *City of Ottawa*, 228 Ill., 134.

The State by its own Act created the canal, and for over seventy-six years has operated it, maintaining and rebuilding bridges at this particular intersection, during all that time, except such temporary repairs as were made by the village of Utica.

A municipal corporation acting in its private capacity having the lawful power to do the act, may be estopped the same as an individual. This distinction is clearly set forth in *State* v. *Illinois Cent. R. R. Co.*, 246 Ill., 188. At page 234 the Court denies that the State's charter to the defendant, made the arrangement a partnership and a private business enterprise, and therefore subject to the doctrine of estoppel, and declaring the proper application of estoppel as follows, viz: "That the rule (Estoppel of the State) invoked by appellee on this point, applies only to contracts, where the State goes into business as a partner with individuals, or in competition with her citizens." The Court then quotes with approval *Barnard Co.* v. *Sangamon*, 190 Ill., 116, and *Chicago* v. *Sexton*, 115 id., 230 which were cited by the Court of Claims decision in the *Holmes case*.

The provision for fines for fast driving was for the purpose of preventing injury to the property owned by the State and the State, and not local municipalities wherein the bridges were located, received the fines collected therefor. Constructing bridges over the canal is prevented under penalty, the fine to be paid to the State, the State thereby declaring that it has the sole power over the bridges.

Cities have authority to construct bridges and make public improvements by authority generally delegated by the State, but where the State specifically restrains everybody from in any manner interfering with bridges, repairing, or building new bridges over the canal, the care and maintenance, and the duty of building bridges remains entirely within the sovereign power of the State.

Canal Act, Hurd's Rev. Stat., Chap. 19; *Rouse* v. *Somerville*, 130 Mass., 361.

When constructed by public authority, they are in law regarded as public highways, with the right of tolls attached.

Rogers et al. v. *Bradshaw*, 20 Johns, 735; *Riddle* v. *Props. of Locks* 7 Mass., 169; *Commonwealth* v. *Fisher*, 1 P. & W. (Penn.), 462; *Cooper* v. *Williams*, 4 Ham. (Ohio), 253; 1 Wait's, Actions and Defenses, 736; *Rex* v. *Kent*, 13 East., 220.

The fact that the village of North Utica may have been guilty as joint tort feaser with the canal authorities, will not relieve the State of its liability to claimants.

The partial assumption of control of a bridge by a municipality, does not deprive the Canal Commissioners of their rights, or relieve them from the duties and liabilities in respect thereto. The statute imposed certain duties on the city of Marseilles. It was a charter duty imposed upon the village to repair bridges and the fact that the township authorities assumed control of the bridge, did not relieve the village from its duties.

Village of Marseilles v. *Howland*, 124 Ill., 547; *Rouse* v. *Somerville*, 130 Mass., 36.

Where private persons cut a canal across a public highway for their benefit held bound to erect and maintain a bridge over same.

Phoenixville v. *Phoenix Ins. Co.*, 45 Penn. St., 135.

Claimant was not guilty of contributory negligence.

Jones v. Shelby Co., 100 N. W., 520 (Ia.); *St. Louis Bridge Co.* v. *Miller*, 138 Ill., 465.

The State was bound to use ordinary diligence, and is liable for want of ordinary care on the part of its servants.

Weisenberg v. *Winneconne*, 56 Wis., 667; *City of Chicago* v. *Major*, 18 Ill. 349; *City of Chicago* v. *Hesing*, 83 Ill., 204; *City of Aurora* v. *Dale*, 90 Ill., 46; *Aurora* v. *Hillman*, 90 Ill., 61.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel) for State:

The rule of *respondeat superior* does not apply.

Moody v. *State Prison*, 128 N. C., 12, 53 L. R. A., 855; *Murdock Parlor Grate Co.* v. *Comm.*, 152 Mass., 28, 8 L. R. A., 399; *Gibbons* v. *U. S.*, 8 Wall., 269; *Town of Waltham* v. *Kemper*, 55 Ill., 346; *Hedges* v. *County of Madison*, 1 Gilm., 567; *White* v. *County of Bond*, 58 Ill., 297; *Symonds* v. *County of Clay*, 71 Ill., 355; *Hollenbeck* v. *Winnebago County*, 95 Ill., 148; *Elmore* v. *Drainage Comrs.*, 135 Ill., 269; *Town of Odell* v. *Schroeder*, 58 Ill., 353; *Nagle* v. *Wakey*, 161 Ill., 387; *Kinnare* v. *City of Chicago*, 171 Ill., 332; *Belt* v. *State*, 1 Ct. Cl. Rep., 266; *Wallace* v. *State*, 1 Ct. Cl. Rep., 268; *Balsley* v.

State, 1 Ct. Cl. Rep., 295; *Hatfield* v. *State*, 1 Ct. Cl. Rep., 225; *O'Donnell* v. *State*, 1 Ct. Cl. Rep., 255; *Schmidt* v. *State*, 1 Ct. Cl. Rep., 76; *State Bank of Chicago* v. *State*, 1 Ct. Cl. Rep., 158; *Ross* v. *State*, 1 Ct. Cl. Rep., 175; *Johnson* v. *State*, 1 Ct. Cl. Rep., 208; *Alexander* v. *State*, 1 Ct. Cl. Rep., 214; *Brewster* v. *State*, 1 Ct. Cl. Rep., 215; *Harper* v. *State*, 1 Ct. Cl. Rep., 322.

In constructing, operating and maintaining the Illinois and Michigan Canal, the State is exercising its sovereign political functions.

One of the chief cares and imperative duties of all governments is the aid, encouragement, stimulation and promotion of intercourse, trade and commerce. This duty is universally recognized, and in its exercise, the State is discharging its sovereign functions.

Denning v. *State*, 123 Cal., 316; *Sharples* v. *Mayor*, 21 Pa. St., 147; *Rubottom* v. *McClure*, 4 Black (Ind.), 505; *L. S. & M. S.* v. *Ohio*, 173 U. S., 285; 1 Farnham, Water & Water Rights, Sec. 98, p. 443.

It was the exclusive duty and obligation of the village of North Utica to repair and maintain the bridge. No duty on the State to build or maintain bridges.

People ex rel. v. *Canal Trustees*, 14 Ill., 402.

The rule of estoppel cannot be invoked, the State being a sovereignty.

On July 4, 1910, claimant, Catherine Morrissey, was walking across a bridge at North Utica, over the Illinois and Michigan canal. There were several people congregated on the bridge with the purpose of witnessing a tub race, which was to be held on the canal as a part of the Fourth of July celebration, then being held in the village. When claimant had reached a point about the middle of the bridge, the bridge suddenly collapsed, and she was caught in the wreckage and her left leg was broken between the ankle and knee, and she received injuries to the back.

The injuries to the leg were very severe, consisting of a compound fracture of both bones between the knee and ankle, the skin being broken and bones protruding. The tibia was broken into fragments. Claimant remained in a hospital at Ottawa from July 5 to August 10, and the leg was kept in a cast until December 1,

and an X-ray examination at that time disclosed that the fibula had united irregularly and that there was no bony union of the tibia. She used crutches until May 1, 1911, and after that time used one crutch until November, 1911. Since that time she is unable to walk without the use of a brace, and never will be able to use the leg without using a brace. The leg is one inch shorter than the right leg, and the prognosis is bad; in addition she sustained nervous disturbances.

Prior to the injury she was a seamstress, but since then has been unable to work. The testimony shows that she has been put to an expense of about $1,100.00. The nearest bridge to the bridge in question, in either direction across the canal, is at a distance of five miles. North Utica, at the time of the accident, had a population of about one thousand, and this bridge was used considerably by farmers hauling grain, by the Fire Brick Company which hauled clay, by pedestrians and for divers other uses. The canal at the point in question runs due east and west. The street upon which the bridge was located, was, prior to the establishment of the village and the construction of the canal, a public highway, connecting the old village of Utica, which lay along the Illinois River, about one mile south of the present village, with the country north. Since the construction of the canal, the old village of Utica has gone out of existence.

The bridge was erected in 1901, being of the type known as the "Knock Down Bridge." It was built by and under the direction of the Canal Commissioners, and was of a type common along the canal. It was a truss bridge, constructed with two top chords and with perpendicular beams or rods, which ran down from the top chords to the timbers beneath. The top chords were supported on slanting chords called ell chords, which in turn rested on iron shoes, which rested upon piers on either bank of the canal. The shoes were likewise connected with each other by a succession of iron rods, which ran the length of the bridge, to prevent

them from spreading. The perpendicular rods, connected with timbers running crossway of the bridge, called needle beams, upon which were laid stringers, and across which in turn was laid the floor of the bridge.

The weight of the bridge was first supported by the top chords, and in turn by the ell chords and shoes resting on the piers. The bridge was calculated to sustain from fifty to seventy-five tons without danger.

In the summer of 1908, a sidewalk was put upon the west side of the bridge by the village of Utica. It was bolted to the timbers underneath the bridge, but its construction in no way weakened the structure. The Canal Commissioners had knowledge of the fact that this sidewalk was there.

On the day of the accident in question, there were perhaps one hundred people on the bridge, but the evidence shows, that this bridge had at many times previous, supported a far greater weight of clay wagons and teams, traction engines, droves of cattle, etc.

At the time the bridge collapsed, there was no warning in the way of cracking of timbers, so that the people could get off the bridge. There was no sign or notice of danger on the bridge.

It is evident that the southwest ell chord was rotten, and several of the exhibits in the case were pieces of the various chords which were rotted.

About two months before the accident, the superintendent of the canal made an examination of the bridge at the request of the village authorities, which examination consisted of rapping the timbers with a wrench and using his knife. It is apparent that it was but a very superficial and cursory examination, as a thorough examination would have undoubtedly shown the defective condition of the structure.

Claimant contends, that she herself was in the exercise of ordinary care; that the bridge was the property of, and under the control of the State; that the State

was negligent; that the State, in the conduct of the canal, was not exercising a governmental function, but was conducting purely a business enterprise; that if there is any liability on the part of the village, it is concurrent with that of the State.

The evidence further shows, that the Canal Commissioners, by resolution, attempted to turn the bridge over to the village of North Utica, but there is no evidence of any acceptance by the village, and while there is evidence, that the village exercised some jurisdiction over the bridge, at the same time, the Canal Commissioners also exercised some jurisdiction, and the fact has crept into the evidence, that the bridge to replace the fallen structure, was constructed by, and at the expense of the State, through the Canal Commissioners.

There is no dispute as to the principal facts in the case, *i. e.*, the accident and its cause, the injury and the extent thereof; and the questions involved are very largely purely questions of law.

We will discuss first, the question as to claimant's care or lack of care, and the negligence of the defendant:

Claimant had no knowledge of any defects in the bridge, or of any danger incident thereto. She was walking across the bridge when it collapsed. The mere statement of these facts, gives evidence, that claimant was not in any way negligent.

Applying the common rule as to notice on the part of the State of defect in construction, assuming for the time being, that the State owed a duty, we are of the belief, that the State had notice of the defects and danger. An examination was made by an employee of the canal commission about two months before the accident. The examination was purely superficial, but it was made after the receipt of notice of defect. From the testimony in the case, and from the examination of the exhibits, it must be evident, that this examination was indeed entirely superficial, and in no sense thorough, else the defects complained of, would have been

discovered. In this particular, the State, by its employee, charged with the duty, was negligent. Aside from these facts, this defect must have existed for such a length of time, that the rule of constructive notice would apply.

In the *City of LaSalle* v. *Porterfield*, 138 Ill., 114, quoted with approval in *Sherwin* v. *City of Aurora*, 257 Ill., 458, the Supreme Court said: "* * * It is the duty of municipal officers to use ordinary care in keeping its bridges, culverts, etc., in a safe condition for public travel, and this involves the anticipation of defects that are the natural and ordinary result of use and climatic influences * * *." This statement of the law is in like manner, applicable to the State, if it maintained the bridge, not in a governmental capacity.

We naturally now turn to the consideration of whether or not the State exercised any ownership or control of the bridge in question.

The evidence on this phase of the case is quite voluminous, and there is some conflict. In an endeavor, however, to reconcile the somewhat contradictory evidence of the parties, and to apply the law thereto, we will first briefly state our conclusions on the facts.

At the time of the accident, the State had operated the canal upwards of seventy-five years, and during that time had maintained a bridge at this particular highway crossing. The highway crossing at this point was in existence before the canal was built, and the building of the canal was necessarily subject to the rights of the public in the highway, and in recognition of this fact, bridges have been built and maintained at this point of crossing. On November 7, 1902, the Canal Commissioners served a notice upon the village of Utica, wherein, after stating that the law would not impose any duty upon them to build, maintain or keep in repair any bridges over the canal, but that such duty rested upon the village, the commissioners notified the village, that they would not build any bridges across the canal, that they would not thereafter maintain or

keep any of the bridges over the canal in repair, and, that as soon as said bridges became in need of repair, the commissioners would be compelled to close or remove them, unless some other arrangements were made. This was followed in the same notice by the statement, that the Canal Commissioners "hereby offer to deliver to you, and transfer to you, the ownership of all bridges," which were built by the State, upon proper terms to safeguard and protect the canal.

This notice was received by the village board of North Utica on December 2, 1902, and referred to the village attorney. On December 1, 1903, the village board ordered the planking of the canal bridge.

There is no evidence of any actual acceptance by the village of the bridge, unless it be the fact, that the village board ordered the planking of it. The Canal Commissioners evidenced having had no faith in the efficacy of their notice, as the record shows that the State offered evidence, that at a meeting of the Canal Commissioners, held on July 12, 1910, it was voted to erect a new bridge in place of the one that was destroyed, and a new bridge was erected by the Canal Commissioners. We do not believe, that the mere fact that the village board replanked the bridge, was an acceptance of the bridge by the village from the State. It is undoubtedly the fact, that this work was done by the village because the condition of the bridge was such, due to the negligence on the part of the Canal Commissioners, that the work had to be done.

The evidence leads us to believe, that the commissioners themselves, did not take the notice, which they served upon the village, in any way seriously, nor did they consider, that they had parted with the ownership of the bridge. On receipt of a letter from the village president, a few weeks prior to the accident, the Canal Commissioners sent an inspector to make an inspection, and after the collapse of the bridge, the canal authorities cleared away the wreckage, evidencing the ownership of the structure by the State, by removing the timbers to Lockport.

The most that can be said in favor of the State's contention as to the ownership of this bridge, would be, that the village exercised some jurisdiction over it and might be jointly liable with the State, in a proper case, for damages.

We do not agree with counsel for the State in their contention, that there is no evidence that the highway of which this bridge was a part, existed prior to the building of the canal. The evidence of John L. Clark, a man eighty years of age, who resided in the Township of Utica from 1834 to 1883, establishes this fact.

Up to this point it may be said, that if the status of the State, in the case at bar, was the same as that of an ordinary body corporate or an individual, the duty of this Court, with reference to determining the liability of the defendant, would be clear, but we are now called upon to determine the status of the State with reference to the manner of its control of this canal. If the State exercised governmental function only, then there can be no liability, as has been repeatedly held by this Court, and courts of last resort generally. If, on the other hand, the State was engaged in a private enterprise, we will say to the extent if it was but partially so engaged, and the exercise of governmental function could not be dissociated from the private, then, of course, a liability would attach.

We are asked by the State to decide this case squarely contrary to the opinion of this Court, in the case of *Holmes* v. *State*, 1 C. of C. R., 334, and likewise contrary to the opinion of our immediate predecessors in office, who passed upon a demurrer filed by the State on which this, and other questions were raised. In the *Holmes case*, the facts were materially the same as in the case at bar, and the Court in that case found for the claimant. On a demurrer in this case, decided June 15, 1912, as before stated, the contention of the State was overruled.

If we are to be guided solely by the precedent established by this Court, in this particular instance, we

might again say our course would be clear, but we deem it our duty to consider the precedents of courts of last resort, and to give to the opinions of our own Supreme Court, far greater weight than to the precedents established by this Court.

An examination of the cases leads us irresistibly to the conclusion, that the test of the capacity in which the State acts is, not what its agents may have been doing, but, it is to be determined under what authority or law the agents were acting, and whether or not the State retains sole control of the agency involved. It cannot be said, that the State cannot act governmentally along exactly the same lines, that a private individual may act. We can readily appreciate, that the leasing of privileges to cut ice or power privileges may be, in their nature, private enterprise, yet on the other hand, it cannot be said that the State in the exercise of governmental function, cannot do these very things. The State is not a corporation in any sense of the word. A city is subject to liabilities, to which a township or a school board or a state are not liable, because it has a corporate entity. In those acts which are enjoined by law on a city, a city acts governmentally, and no liability attaches for negligence of omission or commission by its officers or agents. In this case, the Canal Commissioners are not in any sense a body corporate. If they were, this action would be brought against them as such body, and not against the State. The State, in the discretion of its legislature, may change the official organization of the canal commission at will, and the Canal Commissioners and their employees are, in every sense of the word, public servants, under the complete control and direction of the State. Whatever of authority is vested in the commission or its employees, is either specifically provided for by statute, or is necessarily incidental thereto. The conduct of the canal, is solely within the control of the State, and measured by the test, as heretofore stated, it would appear, that in the conduct of the canal, the State acts solely in a governmental capacity.

The *Holmes case* is practically *sui generis,* with respect to the holding of this Court in the past, in holding that the State entered into a private business enterprise. There are cases, wherein the State has assumed responsibility for injuries sustained, even when the defense of the exercise of governmental function might have been interposed, but this is done only by statute, and the State clearly has the right to do that; for instance, in the Military and Naval Code, it is provided, that one in the service injured while on duty shall be compensated therefor, so the State could have enacted that one injured through negligence of the State, on the canal, should be compensated, but the difficulty confronting the claimant is, that there is no statute that so provides, and in the absence of such statute, it is the opinion of this Court that the finding in the *Holmes case* should not be followed.

The State of Illinois, in many of its institutions and branches of government, does things which private individuals likewise do. For instance, at the University of Illinois, tuition is charged, students are employed in various capacities, and the same things are done in other universities, privately owned, yet, this Court has repeatedly said, that the State in the conduct of the university exercises a governmental function, and we have held, in *Jones v. State,* October Term, 1913, that there can be no recovery arising in tort at the university.

The penitentiaries, surely governmental in their nature, have in the past made and sold large quantities of goods of various kinds, undoubtedly at a profit, but persons injured while at work, whether convicts or employees of the State, have been denied a recovery because of the nature of the institution. *Taylor v. State,* October Term, 1913. The Supreme Court of Illinois, in *Minear v. State Board of Agriculture,* 259 Ill., 549, in its opinion filed October 28, 1913, which it will be noted is subsequent to the decision on the demurrer in this case by our predecessors, discusses a

question similar to the one in the case at bar. At the Illinois State Fair, plaintiff paid admission to the grounds, and while on an elevated seat was, due to the breaking of the stand in which he was seated, thrown to the ground and injured. The case has many points of similarity with the one under consideration with respect to the legal questions involved. Plaintiff in that case, sued the State Board of Agriculture, under the section of the statute authorizing the board to be sued. Under the statute the State Board of Agriculture is authorized to hold its fairs. Persons holding fairs can and do act in private capacities, but this is no reason why a state cannot do the same thing. It was argued by plaintiff in the *Minear case*, that the State Board of Agriculture acted both governmentally and privately, but the Supreme Court held that it "was created as an arm or agency of the State for the purpose of managing and conducting a department of the State, and all the powers conferred and duties enjoined upon the board were for the purpose of enabling it to manage the department in such manner as to best promote the objects of its creation." In the case of *Hern v. Iowa State Agricultural Society*, 91 Ia., 97, is a statement quoted in the *Minear case*. "The only question for us to determine is as to the liability of the society for the acts complained of, and at the outset it is important to have in mind that the society is in no sense a corporation for pecuniary profit. It is an agency of the State. It exists for the sole purpose of promoting the public interests in the business of agriculture. Its public character more fully appears when we consider that its organization is provided for by statute; that it has no stockholders; that by law the president of each county agricultural society in the State, or other delegate therefrom, duly authorized, is made a member of the board of directors; that said board is required to make annual reports to the Governor, which are to be distributed throughout the State; that the powers of the board are prescribed by statute.

* * * Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable thereto. The society is an arm or agency of the State, organized for the promotion of the public good and for the advancement of the agricultural interests of the State. It would be manifestly wrong to permit its funds to be used to pay damages arising out of the commission of wrongful acts by its officers and servants and which are in no wise connected with the object and purpose of the society's creation."

In the case of *Berman* v. *Minnesota State Board of Agriculture*, 93 Minn., 125, cited in the *Minear case*, the Court held, that the defendant was a department of the State, and said "the necessary result of this conclusion places the society directly under the exclusive authority of the State, which may change its officers or its organization and provide for different regulations for the government of the fair, as the best interests of the public may, in the judgment and wisdom of the legislature, hereafter determine. Hence for such injuries as plaintiff claims to have sustained an appeal to the legislature furnishes the only redress, and we must assume that it will be granted if deserved."

And the *Minear case*, the Court, in holding that the State Board of Agriculture is a branch of the government, held that it could not be sued in tort. We cannot see any difference in principle between that case and the case under consideration.

In the case of *Trustees of Illinois Industrial University* v. *Board of Supervisors*, 76 Ill., 184, an attempt was made to tax the lands of the Illinois Industrial University, and our Supreme Court held that a tax could not be levied, as the university was property of the State. On page 187 the Court said: "* * * it will be observed that the State retains the power of appointing its trustees, and, no doubt, has power, through agents other than the trustees, to sell and dispose of the property of the institution, or they may, at

pleasure, amend or even repeal the charter, as public policy or the interest of the university may require." It would appear, that the Supreme Court then had in mind, that the test of a State's liability to pay taxes would be whether or not the State retains sole management and control.

In *Chicago* v. *Williams*, 182 Ill., 135, on page 138 the Court said: "* * * where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred." It must be conceded in this case, that all lawful acts done by, or omissions of the Canal Commissioners, or their agents, are the acts and omissions of public officers, acting in their public capacities for which there can be no recovery in tort, and for wrongful acts of such officers there can certainly be no recovery because the doctrine of *respondeat superior* does not apply to the State, and it is not liable for malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. *Ross* v. *State*, 1 C. of C. R., 175, and many other cases decided by this Court, holding to the same rule.

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

We have seen cases where a state has become a stockholder in a corporation, and the holding that it thereby divests itself for the purposes of the business of that corporation, of its sovereign capacity, but such cases are clearly distinguishable from cases like the one at bar, and those above cited, wherein the State retains sole management and control. When we consider that

the State Board of Agriculture, when it charges admission to the State fair, is held not to be engaged in private business enterprise, but to be carrying out solely the purposes of the agricultural department of the State, and exercising governmental functions only, we cannot agree with the ruling in the *Holmes case.*

This appears to be a harsh rule, but we do not make the law and can only interpret it as we find it, and much as we would like to find a judgment for the claimant in this case, considering the facts as they are, we must reject this claim with the statement, however, that if it were in our power to make an award, we would in this case award to the claimant the sum of $7,500.00. The only negligence in this case was the negligence of servants of the State. Claimant herself was in the exercise of reasonable care for her own safety, and had no reason to suspect that there was any danger in going upon the bridge.

This claim is accordingly rejected, but without prejudice to the claimant, and the judgment of this Court herein shall not be considered as a bar to her right to present her claim to the legislature.

IDA ACKERMAN

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This case is controlled by the decision of the Court in the case of *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimants.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases.

The facts in this case and the law applicable thereto are essentially the same as in the *Morrissey case,* except that claimant was standing on the bridge at the time it collapsed. She was on the west sidewalk which had been attached to the bridge by the village authorities. When the bridge fell, because of the defective condition of the supporting timbers, the sidewalk fell with it. Claimant was rightfully on the sidewalk, and the proximate cause of the accident was the falling of the bridge. No negligence of the claimant in any manner contributed to cause the accident.

As a result of the accident, claimant received injuries to her back that confined her to her bed for about two weeks, and was unable to attend to her household duties for about a month. She also received some slight injuries to the ankle.

Her doctor bills for the attendance of two doctors was ten dollars. Her injuries are apparently not very severe.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of two hundred dollars.

MONS ANDERSON

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This case is controlled by the decision of the Court in the case of *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts in this case and the law applicable thereto are, excepting as to the degree of injury, the same as in the case of *Morrissey* v. *State of Illinois.*

Claimant was walking over the bridge when it collapsed. He fell into the water, was rendered unconscious and remained in the hospital seventeen days. Previous to the accident his right leg had been amputated, and as a result of the accident he received lacerations on the stump of the leg, his left knee and ankle were sprained, he received a bruise on the right side of the body, and claims nervous breakdown. He admitted that he had nervous trouble and headaches prior to the injury.

On the authority of the *Morrissey case,* it is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present his claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of five hundred dollars.

MARGARET FARMER, ADMINISTRATRIX OF THE ESTATE OF ROSE FARMER, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This claim is governed by the decision of the Court in *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases.

The principal facts in this case and the law applicable thereto are essentially the same as in the *Morrissey case,* except that decedent was under the bridge at the time it fell. It appears that the tow-path running under the bridge, had been used as a thoroughfare for upwards of thirty years. This roadway along the canal was, to all intents and purposes, a public way. It led from Clark street to the canal dock, and had been used by the public generally and very largely so by teams from an elevator.

The accident to decedent did not result from any negligence on her part, and the only defense that could be urged against her was that she was a trespasser. In our view of the case, decedent was rightfully under the bridge. The place was entirely open and unobstructed, and had been used for so great a length of time, that if no prescriptive right had attached, the invitation to use same was extended. In view of the fact that the Canal Commissioners had actual notice of the dangerous condition, and that their negligence in not remedying this condition approached such a degree as might be said to be gross, we would be inclined to

hold that claimant is entitled to recover, were it not for the reasons announced in the decision of the *Morrissey case*. The point where decedent was standing was within the limits of the highway, which existed prior to the time of the construction of the canal.

Decedent was sixteen years of age, a high school graduate, and had a music and school teacher's certificate. She left surviving her, her mother, two sisters and one brother. At the time of her death, she was working in a telephone office, earning pay at the rate of $1.50 per day.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of thirty-five hundred dollars.

PEARL BAUMAN

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Farmer* v. *State ante followed.* This case is controlled by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Farmer* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and its decision is controlled by the decisions of the *Morrissey* and *Farmer cases.*

The attending physician testified that there was a laceration of the scalp with no other injury. Claimant complains of headaches, and says she cannot do heavy work.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of one hundred dollars.

ISABELLE BENNETT

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This case is controlled by the decision of the Court in the case of *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts and law applicable thereto are essentially the same as in the *Morrissey case.*

Claimant was seven years old at the time of the accident, and was walking across the bridge. When the bridge collapsed, her ankle was caught, as a result of which, she had a Potts fracture, the tibia being broken on the inside and the fibula on the outside. There has been a very good and complete recovery.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of seven hundred fifty dollars.

JOHN GODWIN, ADMINISTRATOR OF THE ESTATE OF INEZ GODWIN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Farmer* v. *State ante followed.* This claim is governed by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Farmer* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and its decision is controlled by the decisions of the *Morrissey* and *Farmer cases.*

Decedent was under the bridge at the time of the accident. She was twelve years old, and left surviving her, her father, mother and five brothers and sisters. She sustained a compound fracture of a leg and tetanus set in, as a result of which she died fourteen days after the accident.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present his claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of three thousand dollars.

GEORGE HANSON

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Farmer* v. *State ante followed.* This claim is governed by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Farmer* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and the decision is controlled by the decisions of the *Morrissey* and *Farmer cases.*

Claimant, at the time of the accident, was ten years old. He sustained cuts around the right eye and a comminuted fracture of the skull, beginning about one inch above the eye socket and extending back about four inches, and downward under the eye and in toward the nose. Crushed bones were removed and he lost about a teaspoonful of brain tissue. His expression is like that of a person devoid of intellect. The size of the right eye is affected, being smaller than the left, and the nerves, controlling the right side of the face, are impaired. Claimant exhibits involuntary facial contortions, his mental powers have been depleted. In the opinion of the attending physicians, he will undoubtedly become an epileptic in the later years of his life, and they do not believe him to be of sound mind. Three physicians testified, and in their opinion the prognosis is very bad.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present his claim to the legislature, and with the statement, that if it were within our power, we would award claimant the sum of ten thousand dollars.

JOSEPH HERRICK

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This claim is governed by the decisions of the Court in cases of *Morrissey* v. *State, supra,* and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and excepting as to injuries sustained, is the same as the *Morrissey* and *Ackerman cases.*

Claimant was on the west sidewalk when the bridge fell. A big beam fell across his back and shoulders, and as a result, he was in bed for eight weeks with pain in his back, and he coughed up blood, had pain for six or eight months, and two and a half years later had not entirely recovered. He had been earning $3.50 a day at machinist and blacksmith work. Since the accident, he has been working as an oiler at $3.00 per day.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present his claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of seven hundred fifty dollars.

GEORGE W. KELLEY, ADMINISTRATOR OF THE ESTATE OF VERNE KELLEY, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This claim is governed by the decision of the Court in *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts and law applicable thereto, in this case are essentially the same as in the *Morrissey case.*

Deceased was a son of George W. Kelley, and with his father, mother, brother and sister was walking across the bridge at the time it collapsed. He was fourteen years of age. He died within twenty-four hours after the accident from symptoms indicating death from rupture of the intestines.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant, as administrator of decedent, to present his claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of three thousand dollars.

VIVIAN KELLEY

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This claim is governed by the decision of the Court in *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts and law applicable thereto, are essentially the same as in the *Morrissey case.*

Vivian Kelley, at the time of the accident, was eleven years of age. She was a daughter of George W. Kelley, and together with her father, mother and two brothers was walking across the bridge.

As a result of the accident she sustained a fractured rib on the left side, and injuries to her lungs, and at the time her testimony was taken, some two and a half years later, still complained of pain.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of seven hundred fifty dollars.

NELS MUNSON

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This case is controlled by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and its decision is controlled by the decisions in the *Morrissey* and *Ackerman cases.*

Claimant was a concrete contractor, and did masonry work prior to the time of the accident. His attending physician testified that claimant will not be able to do hard work again. He suffered no broken bones, but received a rupture of the spinous ligaments at the middle of the lower lumbar regions, likewise an injury to the liver. There has not been a good recovery.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present his claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of twenty-five hundred dollars.

CATHERINE PAYNE
v.
STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Farmer* v. *State ante followed.* This case is controlled by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Farmer* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases and its decision is controlled by the decisions in the *Morrissey* and *Farmer cases.*

Claimant sustained a fracture of the right forearm below the elbow in the upper third. Both bones were fractured, the arm was in splints for about four or five weeks and is now a trifle crooked.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award the claimant the sum of five hundred dollars.

NORMA PAYNE

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Farmer* v. *State ante followed.* This case is controlled by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Farmer* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases and its decision is controlled by the decisions in the *Morrissey* and *Farmer cases.*

Claimant was eight years of age at the time of the accident, and was underneath the bridge. A part of the bridge fell upon her, her left leg was fractured near the hip. She was in bed eight weeks, and used crutches for a month. There is a shortening of about an inch with a limited motion in the flexing of the knee. Claimant is lame.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of twenty-five hundred dollars.

MOLLIE RAMENOFSKY

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This case is controlled by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts and law applicable thereto, are essentially the same as in the *Morrissey* and *Ackerman cases.*

Claimant was standing on the sidewalk at the time the bridge collapsed. At the time of the accident, claimant was twenty-three years of age, and as a result of the accident was in the hospital three weeks attended by two physicians, was then home for eight weeks, and had a trained nurse, used a wheel chair several weeks, and testified, that it was nine months before she was able to do anything, that she was not entirely recovered two and a half years after the accident. Her left arm was broken, face cut, neck cut and wrenched, bruised all over the body and injured on her spine. She had been earning forty dollars a month. Her actual expenses were two hundred seventy-nine dollars, and she claims loss of clothes, jewelry, etc., at two hundred eighty-three dollars. Her attending physician testified, that in his opinion, claimant is a neurasthenic as a result of the injury.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of fifteen hundred dollars.

ETHEL STEELE

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This claim is governed by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and its decision is controlled by the decisions of the *Morrissey* and *Ackerman cases.*

Claimant sustained as injuries, the breaking of both bones of the left leg above the ankle, and she could not use the leg normally for about five months, but since that time has had no difficulty. There is no shortening of the leg, and no limp.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of seven hundred fifty dollars.

NETTIE STEELE

v.

STATE OF ILLINOIS.

Opinion filed November 10, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This claim is governed by the decisions of the Court in the cases of *Morrissey* v. *State, supra*, and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and the facts in this case and the law applicable thereto are essentially the same as in the *Morrissey* and *Ackerman cases.*

Claimant sustained as injuries, bruises to her right side, and was confined to bed for two months. She suffered pain for a considerable time after that.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of two hundred dollars.

LILLIAN SUMBERG

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State* and *Ackerman* v. *State ante followed.* This claim is governed by the decisions of the Court in the cases of *Morrissey* v. *State, supra,* and *Ackerman* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

This is one of the so-called Utica bridge cases, and its decision is controlled by the decisions of the *Morrissey* and *Ackerman cases.*

Claimant sustained injuries as a result of the accident, the tearing of the ligaments of the right leg near the hip. There were no broken bones. She was in bed three weeks and walked on crutches three months. She also sustained a cut on the left leg, and an injury across the back. She suffered intense pain, and two and a half years after the accident, there was a stiffness in the left knee, and she cannot flex the leg. She is permanently lame. Her physician testified that he believes her injuries are permanent.

It is the judgment of the Court, that the claim be denied, without prejudice to the right of claimant to present her claim to the legislature, and with the statement, that if it were within our power, we would award to claimant the sum of two thousand dollars.

MARGARET WOODBURY
v.
STATE OF ILLINOIS.

Opinion filed November 10, 1914.

NON-LIABILITY OF STATE—*Morrissey* v. *State ante followed.* This case is controlled by the decision of the Court in the case of *Morrissey* v. *State, supra.*

Chipperfield & Chipperfield, Browne & Wiley, Duncan, Doyle & O'Conor, Howard H. Bayne, George P. Hills, Gleim & Colwell, for Claimant.

P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, (Stead, Woodward & Hibbs, of Counsel), for State.

The facts in this case are essentially the same as in the *Morrissey case.*

Claimant was walking across the bridge when it fell. After the accident, she was confined in bed for three weeks and then to a chair for about a month. She was unable to do anything for over three months. A part of the bridge struck her below the breast bone. There were no bones fractured, but there was a tearing of the intercostal muscles, and a tearing away of the attachment of the diaphragm on the left side.

She is a neurasthenic as a result of the accident, and has sustained injuries to the kidneys.

It is the judgment of the Court, that claimant be denied her claim, but without prejudice to her right to present her claim to the legislature, and with the statement, that if it were within our power, we would award her the sum of one thousand dollars.

BEATRICE ALICE POOLE SOUBERBIELLE AND ADRIEN SOUBERBIELLE, ADMINISTRATRIX AND ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF MARIANO EDOUARD SOUBERBIELLE, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

INHERITANCE TAX—*facts showing right to refund.* Claimants, in order to secure the transfer of certain shares of stock owned by decedent, a resident of New York, in the Pullman Company, an Illinois corporation, and to protect the State of Illinois in the collection of an inheritance tax from the estate of decedent, deposited with one of the Chicago banks an amount sufficient to cover said tax. After the fixing of the tax by the county judge, the bank paid the tax as fixed, after which an appeal was prayed to the county court, which court reduced the amount of the tax. *Held*, that claimants are entitled to a refund of the tax erroneously paid.

Burry, Johnstone & Peters, for Claimants.

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

The claim in this case is for a refund of inheritance tax, claimed to have been erroneously and excessively paid to the county treasurer of Cook County, on the 17th day of October, A. D. 1913, and is made under provisions of section 10 of an Act entitled, "An Act to tax gifts, legacies, inheritances, transfers, appointments and interests in certain cases and provide for the collection of same, and repealing certain Acts therein named," approved June 14, 1909.

The claim in question discloses, that decedent died testate on August 17, 1912, and on July 3, 1913, claimants were duly appointed administrators with the will annexed of the estate of said deceased by the surrogate's court of the county and State of New York, and were duly qualified and acting as such administrators.

That among the assets of the estate of said deceased, were six hundred shares of stock of the Pullman Com-

pany, a corporation, incorporated under the laws of the State of Illinois; that claimants as administrators made application in Illinois in the usual manner for the appointment of an appraiser and for the entry of an order fixing the amount of inheritance tax on said shares of stock, and to secure the payment of any tax that might be assessed against said interests, claimants deposited with the Peoples Trust & Savings Bank of Chicago, to the credit of the inheritance tax official, the sum of $1,750.00; that an appraiser was appointed, who filed his report with the county judge of Cook County, who in turn entered an order on October 17, 1913, fixing the cash value of the several estates, gifts, transfers, etc., in the said Illinois property and assessing the total inheritance tax thereon, in the sum of $1,580.56. On October 17, 1913, the Peoples Trust & Savings Bank paid to the county treasurer of Cook County, out of said deposit, the sum of $1,691.20, being the amount of the tax fixed by the order of the county judge, with interest thereon, at six per cent for one year and two months; all the money paid to the county treasurer of Cook County was by the said county treasurer transmitted to the State Treasurer of the State of Illinois.

On December 11, 1913, an appeal was taken to the county court of Cook County, from the said order of the county judge, fixing the tax as aforesaid, and an order was entered in the county court finding that the order of the county judge approving the appraiser's report was erroneous. The court assessed the total tax to which the several interests were liable at $611.89, to which should be added interest at 6 per cent for one year and two months, amounting to $42.83.

Thereupon, claimants made application to the county treasurer of Cook County, for a refund of the amount of the inheritance tax, erroneously paid by them, and were notified that it had been paid to the State Treasurer, and on December 12, 1913, they made application to the State Treasurer for a refund, but were informed

that no appropriation was available for that purpose.

We find that claimants have paid to the State an erroneous and excessive tax; that they have in all respects complied with the law to secure the refund; and that they are entitled to have returned to them by the State the sum of $1,036.48.

We, therefore, accordingly award to claimants, the sum of one thousand thirty-six and 48-100 ($1,036.48) dollars.

THE CULVER CONSTRUCTION CO.

v.

STATE OF ILLINOIS.

Opinion filed November 19, 1914.

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

2. SAME—*Act of 1847 not repealed.* The limitation Act of 1847 has not been repealed.

3. LIQUIDATED CLAIM—*defined* (*Clark* v. *Dutton*, 69 Ill., 521, 523.)

James H. Matheny, for Claimant:

This statute—the Limitation Act of 1847—has a curious history. The latest and best compilations and editions of the statutes of Illinois do not appear to regard it as in force.

This Act is not in the official revision of 1874.
R. S. Ill. 1874, chap. 83, pages 673-676.

It is not in the compilation by Starr & Curtiss.
II Starr & Curtiss Statutes, 2d Edition, chap. 83. pages 2588 to 2645.

It is not in the very late and elaborate edition of the "Illinois Statutes Annotated" by Jones & Addington, so far as the volumes have been issued.
See Vol. iv., chap. 83, Title "Limitations."

This Act is not in Gross' Compilation of 1869.
Gross' Statutes 1869, chap. 66.

It is not in the edition compiled by Gross of the statutes as revised in 1872, 1873, and 1874, chap. 66.
Statutes of Illinois, Gross 1871-2, page 256-259; Statutes of Illinois, Gross 1872-3, page 270.

In the compilation of the statutes edited by Hurd and published by the Chicago Legal News Company, this Act was omitted in the several editions up to and including that of 1899. It appears in that of 1903 and subsequent issues. We have not had access to Hurd's edition of 1901. Its application should not be extended by construction.

Liquidated claim defined. *Trickle* v. *State*, 1 Court of Claims Rep., 103, 104; *Cooper* v. *Coates*, 21 Wall., 105.

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

"Any person 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."

Hurd's Stat. 1912, p. 1496, chap. 83, par. 31.

"Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

Hurd's Stat. 1912, p. 1494, chap. 83, par. 15.

WHAT CONSTITUTES A LIQUIDATED CLAIM—*Clark* v. *Dutton*, 69 Ill., 521, 523; 8 Words and Phrases, 7195.

The limitation law of 1847 with reference to claims against the State has not been repealed and is now in full force and effect.

Fairbanks v. *State*, 1 Ct. Cl. Rep., 1; *Schultz* v. *State*, 1 id., 19, 20; *Stilt* v. *State*, 1 id., 25; *Barton* v. *State*, 1 id., 27; *Turkington* v. *State*, 1 id., 113; *Hitt* v. *State*, 1 id., 182, 184; *Palmer* v. *State*, 1 id., 343, 345; *Reeves* v. *State*, 1 id., 346, 361, 362; *Crissey* v. *State*, 1 id., 365, 368.

Hurd's Revised Statutes 1912, pp. 2269-2271, contains the Acts of the legislature of 1847 which are repealed in the revision of 1874. The limitation Act with reference to the Court of Claims is not included in this list.

The general statutes of limitation all refer to commencing actions at law or suits in equity, while the Act of 1847 is neither an action or suit, but is with reference to bringing claims against the State.

Hurd's Stat. 1912, p. 1492, 1496, chap. 83.

The claimant in this case has filed a claim against the State to recover seven hundred twenty-five and sixty-eight hundredths ($725.68) dollars, for labor and material furnished the State in connection with certain

repairs made on the Lincoln Monument at Springfield, Illinois, during the months of October and November, A. D. 1904.

No written contract of any kind between claimant and the State is in evidence, although it appears from the records of the Lincoln Monument Commission, under date of April 22, 1903, that James S. Culver, deceased, at that time the president of the claimant company, was, together with Architect S. A. Bullard and Major Johnson, requested to recommend a plan to prevent leakage in Memorial Hall.

It is not disputed, that the repairs were needed nor is it questioned, that the services and material were furnished by claimant in a proper manner. In fact, it does appear from the evidence, that the claimant proceeded with the work with the knowledge and approval of the various members of the Lincoln Monument Commission.

After finishing the work, claimant, on November 26, 1904, notified the secretary of the commission that the work was completed and enclosed its bill for same.

On April 16, 1907, claimant addressed a further letter to the secretary of the commission, in which it enclosed copies of bills and vouchers in connection with the work, for which it now seeks to be remunerated, and at a meeting of said commission, which was held at the office of the Governor of Illinois, on the 4th day of August, 1907, it was decided to advise the claimant company to prepare a bill covering the amount due it, and submit the same to the legislature, and that the trustees of said commission would aid in securing its passage.

Not having received a settlement for the work, claimant filed its claim in this Court, and we are asked to make an award in its favor for the amount herein above set forth.

It is contended by the State, that while this may be a meritorious claim, and that claimant should be compensated, yet under the Statute of Limitations, relative to

claims of this kind, claimant is debarred from recovering an award in this Court; and in support of their contention cite (Hurd's 1912 Revised Statute, chap. 83, par. 31), which is as follows:

"Any person 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."

It is also urged by the State, that claimant is also barred from recovery by the five (5) year limitation statute, relative to actions on unwritten contracts, etc., (Hurd's Statute, 1912, page 1494, chapter 83, paragraph 15), on account of the fact that it did not file its claim in this Court until February, 1912, which was more than five years after the completion of the work.

We have given careful consideration to claimant's contention, that this is a liquidated claim and that the Statute of Limitations first above referred to, does not apply, because it has reference to, and is intended only to cover cases of unliquidated claims. While we are of the opinion, that claimant rendered valuable services to the State, for which it should be compensated, we are forced to the conclusion, that this is an unliquidated claim and is barred by the Statute of Limitations requiring claims of this character to be filed within two years from the time such claims may have arisen, and the claim is therefore denied.

However, in view of the circumstances in this case, which incline us to the firm belief, that the claimant should be remunerated to the extent of its claim, our refusal to make an award in this Court does not preclude it from seeking a recovery from the legislature.

A. C. CAMPBELL
v.
STATE OF ILLINOIS.

Opinion filed November 19, 1914.

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

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

Heydecker & Heydecker, for Claimant.

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

This claim is for the death of a horse rented by Captain A. V. Smith from claimant, for the use of Battery "C" of the Illinois National Guard, during its annual tour of duty, from July 17 to July 27, 1909.

The evidence shows that the horse in question was in fair condition when delivered to Captain Smith, and was worth about $60.00. The tour was made during the hot days of July, 1909, and several of the horses, during the journey, would lie down and were almost exhausted from the heat and the hard trip, which they were making, and when claimant's horse was returned to him, it was suffering from exhaustion, and died a few days afterwards.

We realize the law to be, that when a man hires a horse, "he is bound to pay the expense of keeping it, use it moderately, and treat it as carefully as any man of common discretion would treat his own animal, and supply it with suitable food, and if the horse when

placed into the hands of a bailee is in good condition and it is returned in a damaged state or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter and impose upon him the burden of showing that he exercised such care as was required by the bailment."

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

We hold, that under the law and the evidence in this case, that the claimant is entitled to an award, and it is the judgment of this Court, that the claimant be and is hereby awarded, the sum of sixty ($60.00) dollars.

HENRY C. ALLEN

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

NON-LIABILITY OF STATE—*State not liable for acts of third parties.* Where property of claimant is destroyed by the acts of third parties, the State cannot be held liable therefor.

Edmund P. Nischwitz, for Claimant.

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

The claimant in this case while an employee of the Game and Fish Commission of the State of Illinois, was directed by one of the officers of the commission, to use his launch in connection with the work in which he was engaged in and around Havana, Illinois.

Claimant's launch was used in this line of work for some time and when not in use was placed in a boat-house near Havana, together with several other launches belonging to the State.

On the night of August 27, 1913, the boat house was destroyed by fire and the claimant's launch, together with several other launches belonging to the State, was destroyed.

The State filed a general demurrer to claimant's declaration wherein claimant seeks to recover two hundred fifty ($250.00) dollars.

We do not believe the State was bound to exercise any greater care of claimant's property than was exercised in this case, and the State can not be held liable for the loss of claimant's property, as the record discloses, that the same was destroyed by the act of third parties, who were not in any manner under the control of the State.

We are of the opinion that the demurrer should be sustained.

CHARLES ALLING

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

NON-LIABILITY OF STATE—*State not liable for acts of third parties.* The State is not liable to respond in damages to its employees who are injured at the hands of third persons, while in the service of the State.

Thomas F. Burke, for Claimant.

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

The claimant in this case was the legal representative of the State Board of Health with office at Chicago, and in the course of his duties he instituted proceedings against one Frank Klimek, who was charged with practicing medicine without a license, in violation of the laws of this State.

He secured a judgment against the said Klimek in the municipal court at Chicago, which judgment was afterward affirmed in the Appellate Court.

While this case was pending it appears, that the said Klimek persisted in carrying on the practice of medicine in violation of the statute, and claimant caused a second suit to be instituted against him and secured a second judgment against him.

It appears from the evidence, that on December 24, 1913, the said Klimek came to the office of the claimant for the purpose of adjusting the judgments that were rendered against him, and while claimant and his assistant, Peter Schwaba, were consulting with him about the manner in which the litigation might be determined, the said Klimek, without any provocation, deliberately pulled a gun from his pocket and shot claimant and the said Schwaba.

The assailant, immediately after the shooting left the office of claimant, and committed suicide. As a re-

sult of this murderous assault, which was evidently the act of an insane mind, the sight of claimant's right eye was completely destroyed, and it was necessary for him to have an operation performed in order to protect the socket so that he might afterward be able to wear an artificial eye.

Claimant has also suffered a severe nervous shock which has rendered him incapable of transacting his usual and ordinary duties of his legal profession. He has also incurred an expense of about two thousand ($2,000.00) dollars for medical treatment and otherwise, on account of the injuries received by him.

Claimant filed his claim in this Court for $22,015.00 on account of the injuries received, and we are asked to make an award to him for this amount.

While there is no doubt in our minds, that claimant was in no way to blame for the injuries received, yet, we are unable to see wherein the State should be held liable in this case.

The State had no control over the actions of Klimek, who was neither an officer or employee, and there was nothing the State could do to prevent this unfortunate occurrence.

It is urged by counsel for claimant, that under some of the prior decisions of this Court, we would be justified in making an award in favor of claimant for the injuries sustained, and our attention has been directed to the cases of *Scanlan* v. *State,* 1 C. C., 128, and *Green* v. *State,* 1 id., 173, wherein awards were allowed persons engaged in the military service of the State.

Since these cases were decided, special statutes have been enacted covering cases of those injured while engaged in the military service of the State, and while the above cases were decided prior to the enactment of these statutes, it seems that they were based upon the theory that such statutes were in existence. We know of no statute covering cases similar to the one before us.

We do not believe the State is liable to its employees for injuries received by them on account of the acts of third persons, over which the State has no control.

The State can not be held to be an insurer of its employees, and to hold that it is liable for the acts of the assailant in this case would bind it to that extent.

This claim is accordingly rejected.

JAMES T. ANYON, SAMUEL H. LEVER, ALLEN R. SMART AND EDWARD E. GORE, A CO-PARTNERSHIP, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BARROW, WADE, GUTHRIE & CO.

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

CONTRACTS—*when law will imply promise on part of State to pay.* Where a duty is imposed by law upon an officer, and moneys insufficient in amount are appropriated for the performance of the duty, the officer is justified in performing the duty, and expenses incurred thereby, are a proper charge against the political body choosing such officer.

Glenn B. Plumb, for Claimants.

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

Claimants allege in their declaration, that on the 11th day of August, 1913, they were engaged and employed by the State of Illinois, through Paul Matthews, then acting as Department and Institution Auditor of the State of Illinois, to audit and verify the possessions, character and amount of the securities on deposit with the Superintendent of Insurance at the close of the business on the 9th day of August, 1913; and to list, inspect and report the amount of each item thereof, and to audit the disbursements of funds appropriated for the use of the office from the first day of January, 1911, to the 9th day of August, 1913, and to audit the income of the insurance department and verify the dispositions made thereof from the first day of January, 1911, to the 9th day of August, 1913, and to report to the Superintendent of Insurance the results of their work when fully completed.

Their employment was concurred in by Rufus M. Potts, then Superintendent of Insurance of the State of Illinois, and by the State Auditor through W. H. Eubanks, then chief clerk in the office of the State

Auditor, who had the authority to execute and approve contracts by and on behalf of the State Auditor. Claimants by the arrangement of employment were to receive as the consideration for their services, payment upon a per diem basis, together with their traveling and hotel expenses.

The evidence shows, that claimants duly and faithfully performed all the services as per terms of their contract, and made and rendered to the Department and Institution Auditor and the Superintendent of Insurance their audit reports and accounts in accordance with the terms of their employment, and presented their claim to the Department and Institution Auditor and to the Superintendent of Insurance for the State, for their services rendered, in the sum of $3,293.89; the same was approved by the Institution Auditor and the Superintendent of Insurance as being in accordance with the terms of their employment, and just and reasonable in all respects.

Claimants have not received any payment on account of their claim, and the reason this claim has never been paid is, that there was no appropriation available out of which it could be paid. We award claimants the sum of three thousand two hundred ninety-three dollars and eighty-nine cents ($3,293.89).

EMMA BARTHOLOMAE

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. INHERITANCE TAX—*when tax erroneously paid may be recovered.* Where the county judge fixes an inheritance tax at a certain amount, which amount is paid, after which an appeal is taken from the decision of the county judge to the county court, which court reverses the decision of the judge fixing the tax, and from which decision of the county court no appeal is taken, a recovery may be had.

2. SAME—*demand necessary.* Claimant, in order to recover an inheritance tax erroneously paid, should make demands for the return of the same from the county treasurer and State Treasurer.

Taylor and Lundahl, for Claimant.

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

George Bartholomae, a resident of Heidelberg, Germany, died testate on June 12, 1912. Letters testamentary were issued in Cook County, Illinois, to Henry Bartholomae and Rudolph Brand.

On December 12, 1912, the county judge of Cook County fixed the values of the estates of the deceased in Cook County and assessed the inheritance tax on the several estates at $7,947.75.

For the purpose of saving five per cent under the statute, the executors paid the tax less five per cent on December 12, 1912, to the county treasurer of Cook County. This payment amounted to $7,550.36, and a receipt for this amount was taken from the county treasurer, countersigned by the State Treasurer. This money, without deduction for collection charge, was transmitted by the county treasurer to the State Treasurer.

The executors appealed from the order of the county judge to the county court of Cook County, and on November 6, 1913, that court found that the inheritance

tax was improperly assessed, in that, taxes had been levied on estates which were not in fact taken by the legatees and devisees, and the tax was fixed by the county court at $2,136.29.

Demand was made upon the State Treasurer and county treasurer for the return of the difference, $5,414.07, this being the amount which the county court in its order found should be returned. This likewise, is the amount that claimant asks in this case.

For the purpose of facilitating the settlement of the affairs of the estate, the claim for refund was assigned by the executors to the widow of decedent and the estate was closed. This claim is prosecuted by the assignee.

It would seem that, inasmuch, as this erroneous tax was paid within the period whereby the five per cent discount was secured, that a like discount should be allowed upon the correct tax as fixed by the county court, this being included in the money already paid, but the county court has apparently disregarded this fact, as has also claimant, in that, in the demands made on the county treasurer and State Treasurer, the discount to which she would apparently be entitled has not been included.

Claimant has in every way fulfilled all requirements of the law to entitle her to a refund of the amount demanded, and it is the judgment of this Court, that she be awarded the sum of $5,414.07.

ARTHUR E. FOLGER

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

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

Page & Page, for Claimant.

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

The claimant in this case was a young man at the time of the accident, and was regularly enlisted in the Illinois Naval Reserve, a part of the organized military force of the State, and was under the rules and regulations covering military bodies. He was required to render obedience to all orders of his superior officers, and a part of the Naval Reserve consisted in taking cruises in small steam boats, called steam launches, to put to practical test instructions given on land.

On July 3 and 4, 1912, he was ordered by the Captain of the Fifth Division of the Illinois Naval Reserve, which he was enlisted with as a machinist, to go on one of the steam launches owned by the State, and in the capacity of a machinist, was in charge of the engine on the steam launch, while the same was in Lake Michigan near the United States Training Station bound for Chicago. There was considerable sea running on Lake Michigan, which caused the steam launch to rock and roll with considerable violence. He was required to work in close proximity to the crank shaft of the engine, and it was a part of his duties to oil certain parts of the engine. While he was so engaged, and using due care for his own safety, the launch gave an unusually heavy roll and lunge, causing his right foot to slip and be projected under the revolving crank

shaft, and as a result of which, his foot was injured to the extent that it became necessary to amputate his great toe.

At the time of his injury, he was earning $18.00 per week; he was prevented from following his business from July 4, 1912, to September 16, 1912, and was obliged to lay out the sum of $135.00 for doctor bills.

The State admits all the facts alleged in claimant's declaration, and admits that claimant under the law of the State of Illinois, as cited in the brief, is entitled to a recovery, but contends that claimant should not be awarded a large amount or the amount he claims, to-wit: three thousand dollars ($3,000.00).

Considering the injury and the amount of expense incurred by reason thereof, and the manner in which the same was sustained, we are of the opinion that claimant is entitled to an award. An award is therefore made to claimant in the sum of seven hundred dollars ($700.00).

NATHAN E. GRAY
v.
STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. NON-LIABILITY OF STATE—*when an award will be refused.* Claimant was employed as guard at the Southern Illinois Penitentiary and was injured by reason of the wilful negligence of one of the convicts. *Held*, that no award should be made.

2. RESPONDEAT SUPERIOR—*doctrine of does not apply to State.* The doctrine of *respondeat superior* is not applicable to the State, and the State in the absence of statute is not liable for the negligence of its servants.

3. JURISDICTION—*Act creating Court did not enlarge State's liability.* The Act creating the Court of Claims did not enlarge the liability of the State. (*O'Donnell* v. *State*, 1 C. of C. R., 255; *Schmidt* v. *State*, 1 C. of C. R., 76, cited by the Court.)

4. SAME—*when may allow claim.* The legislature is vested with the discretion to make allowances for the relief of individuals, whether a legal or equitable liability attaches or not, but the Court of Claims may only make an award when a legal or equitable liability is shown.

5. GOVERNMENTAL FUNCTION—*State in conducting penitentiary exercises.* The State in conducting the Southern Illinois Penitentiary exercises a governmental function.

Creighton and Thomas, for Claimant.

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

Claimant was employed as keeper at the Southern Illinois Penitentiary, and on October 26, 1912, was in charge of about fifty prisoners who were working in and about the rock quarry and crusher. He received his injury near the crusher, which was at a point about 300 feet from where rock was being quarried; a track extended from the quarry to the crusher on an incline from the quarry and with a curve near the crusher. Cars loaded with stone from the quarry were run by gravity down the incline to the crusher. There were no brakes on these cars, but the speed was controlled by convicts riding on them, and using a board or gas

pipe which they would press against the wheels over the frame of the car. A man standing on the track at the point where claimant met his injury, could not see a car, because of the curve around the crusher, until it was about 30 feet from him. On the day in question, claimant was standing on the track in front of a car which had been dumped, when another car loaded with stone came down the incline without any one upon it, and collided with the standing car and caught the right leg of the claimant between the two cars, crushing it so that eventually it required amputation.

Two prisoners, Hodges and Wilson, had been in charge of the loaded car and, instead of waiting for a signal to start it, they brought it down the track, and as it came to the curve they jumped off, allowing it to collide with the other car. Over objection, a witness testified that a prisoner had told him, that he had remonstrated with Wilson over letting the car run wild, but that Wilson had said, that he would let it go and hit claimant, at the same time using an oath directed at claimant. Claimant was not in a position to see the car coming, and because of the noise made by the crusher could not hear it. Some one in the vicinity called to him, and he tried to get out of the way but could not. Claimant has been put to an expense of about $525.00.

Claimant in his brief refers to section 19, article 2, of the Constitution as sustaining his position, to the effect that "the declared public policy of the State of Illinois is that every citizen shall have redress under its laws for every wrong suffered or injury received by him."

As an abstract statement this is correct, but it is incumbent upon us to determine whether the wrong suffered or injury received by claimant in this case, is one for which the State of Illinois is in any way responsible.

Claimant refers us to the Act creating the Court of Claims, and has very ably argued to the effect that the

Act which creates this Court enlarges the liability of the State, and has referred us to numerous instances wherein the legislature has made appropriations for the relief of persons injured. On the other hand, the State defends on the theory that the State is not bound to respond in damages for torts of those whom it employs, and much less is it bound to respond in damages for torts committed by violators of the law who are committed to institutions of the State, and that the State, when acting in its sovereign capacity, is not responsible for wrongs perpetrated by its officers, agents or employees. This Court has repeatedly held, that the Court of Claims Act does not increase or enlarge the liability of the State, but provides only a forum wherein claims are to be heard and determined. As said in *O'Donnell* v. *State*, 1 C. of C. R., 255, cited by us with approval in *Taylor* v. *State*, October Term, 1913:

"We 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."

In *Schmidt* v. *State*, 1 C. of C. R., 76, 79, 80, the then Commission of Claims, under the law creating it, which, however, was in that particular the same as the law creating the Court of Claims, said:

"The law creating this Commission does not undertake to create a new liability against the State but provides a method by which claims against the State may be heard before this Commission, and the claim rejected or an award made in favor of the claimant. The statute creating this Commission, after reciting the various classes of claims of which the Commission might have jurisdiction, among which may be said to be included claim of this petitioner, provides: 'And such Commission shall hear such claims according to its rules and established practice and determine the same according to the principles of equity and justice, except as otherwise provided in the laws of this State'."

As in the Schmidt case, so here:

"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 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."

It is our opinion that the Commission in the *Schmidt case,* correctly stated the law and we are inclined to follow the opinion in that case herein.

That the legislature has the right to make awards for the relief of individuals, whether there be a legal or equitable liability or not, is undoubted, but the legislature has not given to us the power to make awards, excepting in such cases as there is legal or equitable liability on the State, and if it in its wisdom sees fit to make an award where there is no such liability, that fact cannot affect our judgment because we are called upon to determine only whether or not liability exists.

The State in conducting the Southern Illinois Penitentiary is exercising governmental function, and there is no statute wherein the State assumes responsibility for injuries received by employees at this institution, and in consequence, we must hold that the State is not liable. This accident happened prior to the adoption of the Workmen's Compensation Law and same was not considered herein.

For the purpose, however, of determining whether or not this claim should be rejected or under the power given us by the statute rejected without prejudice, we have considered the facts in the case as shown by the evidence. There is no defect of any kind alleged in any of the machinery, cars, track or anything else that caused or contributed to cause the injury complained of. The fact that there was no brake on the car in question is not complained of, and in fact claimant shows that just as effective a way was provided for checking the speed and stopping the car. Claimant was undoubtedly injured, as his own evidence shows, through the wilful act of a convict. Claimant himself was a keeper and had this particular convict under his charge. He knew the class of men he was dealing with, and he was there to control and manage them. Of course, a parallel case wherein one standing in the position of the State, who might not assert the defense of the exercise of governmental function, would be hard to find. The case is not the same as a foreman for a manufacturing concern, we will say, injured through the wilful act of an employee. The claimant himself here was guilty of no negligence; neither can it be said that the State was. The most that can be said for claimant is, that he was injured while in the service of the State, and that the policy of the State at the present time is to care for its injured employees, but, while the policy as expressed in laws of the present day would lead us to hesitate about rejecting this claim *in toto*, at the same time, it would not justify us in holding that anything should be allowed to claimant.

Claimant has not made out such a case as would entitle him to a judgment in a court of law against an employer under similar circumstances, nor has he, in our judgment, made out such case as should entitle him to an award in this Court.

The claim is accordingly rejected.

PETER HEMMERLING, ALIAS FRED MILLER
v.
STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. STATUTE OF LIMITATIONS—*unliquidated claims must be filed within two years from accrual.* "* * * 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." Hurd's Rev. Stat., 1913, chap. 83, par. 31, p. 1578.

2. SAME—*exceptions to general statute.* "If the person entitled to bring an action, mentioned in the nine preceding sections, is, at the time of the cause of action accrued, within the age of twenty-one years, or if a female, within the age of eighteen years, or insane, or imprisoned on a criminal charge, he or she may bring the action within two years after the disability is removed." Hurd's Rev. Stat., 1913, chap. 83, par. 21, p. 1577.

3. SAME—*exceptions—none as to claims against State.* There are no exceptions to the running of the Statute of Limitations in the Court of Claims.

4. STATUTORY CONSTRUCTION—*special statute on subject will prevail over general.* The first quoted statute is special and the second general, and it is a rule of statutory construction that "the special mention of one thing, indicates that it was not intended to be covered by a general provision which would otherwise include it."

5. GOVERNMENTAL FUNCTION—*State in conducting penitentiaries exercises.* The State in conducting its penitentiaries exercises a governmental function, and is not liable for injuries sustained by convicts in such penitentiaries.

6. PRACTICE—*Court of Claims not a court of review.* The Court of Claims is not a court of review, and it cannot decide whether a commitment to the penitentiary is faulty or not.

7. NON-LIABILITY OF STATE—*State not liable for loss of time by convict.* The State is not liable for loss of time by a convict who may have been erroneously sentenced to prison.

8. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* does not apply to the State.

E. W. Austin and William Chones, for Claimant.

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

Statutes of Limitation are regarded as statutes of repose, not of presumption.

Sibert v. *Wilder*, 16 Kan., 176, 22 Am. Rep., 280; *Dwight* v. *Clark*, 7 Mass., 515; *Spuryer* v. *Hardy*, 4 Mo. App., 573.

It is within the power of the legislature to fix the period within which actions shall be brought, without making any exceptions.

Lewis v. *Pawnee Bill's Wild West Show Co.*, 6 Penn. (Del.), 316, reported in 16 Am. & Eng. Ann. Cas., 903.

Imprisonment of the claimant is not a disability unless excepted in the statute.

25 Cyc., 1264; *Bledsoe* v. *State*, 1 Baxt. (Tenn.), 312; *Tallman* v. *Mutual Fire Ins. Co.*, 27 U. C. Q. B., 100; *Turner* v. *Shearer*, 6 Gray. (Mass.), 427.

Where there are general Statutes of Limitation containing certain exceptions, and special Statutes of Limitation containing no exceptions, in construing such special statutes, the same will be construed to contain no exceptions, even though the general statutes may include the subject-matter contained in the special statute.

Lewis v. *Pawnee Bill's Wild West Show Co.*, *supra*; *Warfield* v. *Fox*, 53 Pa. St., 382; *Peterson* v. *Del. River Ferry Co.*, 190 Pa. St., 364, 42 At. Rep., 955; *Spees* v. *Boggs*, 204 Pa. St., 504, 54 Atl. Rep., 346; *Morgan* v. *Des Moines*, 60 Fed., 208, 19 U. S. App., 593, 8 C. C. A., 569; *McIver* v. *Ragan*, 2 Wheat., 25, 4 U. S. (D. Ed.), 175; *Vance* v. *Vance*, 108 U. S., 514; *Amy* v. *Watertown*, 130 U. S., 320; *Madden* v. *Lancaster Co.*, 65 Fed., 188; *Aekiss* v. *Satchell*, 104 Va., 700, 52 S. E., 378; *Walker* v. *U. S.*, 139 Fed., 409; Id., 148 Fed., 1022.

The doctrine of *respondeat superior* does not apply to the State.

Schmidt v. *State*, 1 Court of Claims Rep., 76; *Pryor* v. *State*, 1912 Court of Claims; *Alexander* v. *State*, 1 id., 214; *Brewster* v. *State*, 1 id., 215; *Ross* v. *State*, 1 id., 175; *Belt* v. *State*, 1 id., 266; *Wallace* v. *State*, 1 id., 268; *Fisher* v. *State*, 1 id., 270; *Johnson* v. *State*, 1 id., 208; *Jorgensen* v. *State*, 1911 Court of Claims; Story on Agency, sec. 319-322; *Alamango* v. *Supervisors of Albany Co.*, 25 Hun., 551; *Hill* v. *Boston*, 122 Mass., 344; *Gibbons* v. *U. S.*, 8 Wall., 269; *U. S.* v. *Kirkpatrick*, 9 Wheat, 720; *Lewis* v. *State of N. Y.*, 96 N. Y., 71; *Sippli* v. *State*, 99 N. Y., 284; *Clodfelter* v. *State*, 86 N. C., 51; *State* v. *Hill*, 54 Ala., 67.

Claimant, a resident of Chicago, was convicted on January 19, 1901, in the criminal court of Cook County, of the crime of rape and sentenced to the penitentiary at Joliet. He was paroled on August 10, 1911, and discharged on May 13, 1912.

While in the penitentiary, on December 9, 1903, he was put to work on a shaper machine used in shaping chair-seats, which he alleges was defective and out of order, as a result of which, he received an injury to his right hand, consisting of the amputation of the first finger, and stiff joints in the second and third fingers. He alleges that the State, through its agent, had knowledge of the defective condition of the machine, a failure in the duty in inspection and repair and keeping the same in safe condition; that he himself did not know of such condition, and was in the exercise of due care for his own safety at the time. In a statement, claimant claims damages for injury thus sustained in the amount of five thousand dollars. He also claims that he was improperly sentenced to the penitentiary, in that, the verdict of the jury did not fix any time of imprisonment and, that the trial judge sentenced him in accordance with the terms of the verdict, and that it was the duty of the jury to fix the term. For loss of time at seventy-five dollars per month, he claims nine thousand four hundred fifty dollars.

The State sets up as a defense, that the claim for injuries is barred by the Statute of Limitations; that the doctrine of *respondeat superior* does not apply, and also that there is no liability on the State for the alleged error in the matter of imprisonment.

It is provided in the statute that "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." Revised Statutes, 1913, chapter 83, paragraph 31. In paragraph 21 of chapter 83 it is provided, "if the person entitled to

bring an action mentioned in the nine preceding sections, is, at the time of the cause of action accrued, within the age of twenty-one years, or if a female within the age of eighteen years, or insane, or imprisoned on a criminal charge, he or she may bring the action within two years after the disability is removed." The last quoted section of the statute has reference to the general law with relation to limitation of personal actions, and would apparently by express terms exclude the first quoted section which is not included within the "nine preceding sections," but appears in an entirely independent Act of the legislature. The last quoted section is general in its terms, and the first quoted is particular. It is a rule of statutory construction that "the special mention of one thing indicates that it was not intended to be covered by a general provision which would otherwise include it," and "where there is in the same statute a particular enactment, and also a general one, which, in its most comprehensive sense would include what was embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect such cases within its general language as are not within the provisions of the particular enactment." *C. & N. W. Ry. Co.* v. *City of Chicago,* 148 Ill., 159.

We are of the opinion, that paragraph 31 of the Statute of Limitations, as above quoted, applies to the case at bar, and that the claim for personal injuries is barred.

The decision of this point disposes of the other point raised as a defense, with reference to the liability of the State for the negligence of its agents, but the question has been decided so many times in this Court adversely to the contention of claimant here, that it will suffice to say in this case, that the State, exercising governmental functions solely in the conduct of the penitentiary, as it does, can not be held to respond in damages for injuries sustained by convicts.

The decision of the former questions does not decide the remaining question, however. This Court is not a court of review in any sense, and whether or not the commitment to the penitentiary was in any way faulty, is not for this Court to decide. This was a point which could have been raised by appropriate action in a court of general jurisdiction, and we must take the finding of the circuit court as final and conclusive. Claimant himself does not urge the point seriously, however, because the proof to support it is lacking.

In addition to what has been said, it may be also stated that the State cannot be held liable for loss of time of a convict who may have been erroneously sentenced or imprisoned.

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

MARY JANE HESS, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHRISTOPHER J. HESS, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. INHERITANCE TAX—*exemptions should be deducted in determining tax rate.* The inheritance tax appraiser appointed by the county court of Cook County fixed the value of the property at $105,010.91. An exemption of $20,000.00 was allowed and the tax fixed on a two per cent basis. Within six months the tax was paid under protest, saving five per cent. On appeal to the county court, the court reduced the tax in accordance with the holding in *People* v. *Ullmann*, 263 Ill., 528. *Held*, an award should be made.

2. PRACTICE—*claims filed subsequent to May 1.* Where a claim is filed subsequent to May 1, and addressed to the following session of Court, the Court will hear the same, if the Attorney General consents to such hearing.

3. INTEREST—*State does not pay.* The State is not chargeable with interest upon moneys erroneously paid into the State treasury.

Hoag and Ullmann, for Claimant.

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

Christopher J. Hess, a resident of Cook County, died on March 29, 1913, testate, devising and bequeathing all his property to his widow, the claimant herein.

His will was probated in the probate court of Cook County on April 21, 1913, and letters testamentary were issued to claimant.

The inheritance tax appraiser appointed by the county judge of Cook County fixed the value of the property at $105,010.91. After allowance of statutory exemption, the tax was fixed by the county judge at $1,700.22, being figured on a two per cent basis. To save five per cent on payment within six months, as provided by statute, this amount, less five per cent, was paid under protest to the county treasurer, who in turn transmitted the money to the State Treasurer. The

amount paid was $1,615.21. An appeal was taken to the county court of Cook County, which court on August 21, 1914, entered an order fixing the tax at $850.00, in accordance with the opinion in the case of *In re Estate of Frederic Ullmann, deceased,* 263 Ill., 528.

Claimant contends that she should be allowed in this Court, one-half the amount paid by her to the county treasurer. Demands were made upon both the county treasurer and State Treasurer by claimant, and this claim was filed by stipulation with the Attorney General since the first of May, 1914, but made returnable at this term of Court. Claimant has done all required of her by law to secure a refund, and this Court will consider this case at this term.

For the reason stated in the claim of *Elizabeth Ullmann* v. *State,* we will not allow interest on the amount erroneously paid, but claimant is entitled to have returned to her so much of the tax as was erroneously paid, and it is accordingly the judgment of this Court that she be awarded the sum of $807.60.

SADIE JASPER, ADMINISTRATRIX OF THE ESTATE OF JOHN JASPER, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. GOVERNMENTAL FUNCTION—*State in conducting hospital exercises.* The State in conducting the Anna State Hospital exercises a governmental function, and is not liable for the death or injuries to those it employs.

2. RESPONDEAT SUPERIOR—*rule of does not apply to State.* The rule of *respondeat superior* does not apply to the State.

3. PRACTICE—*claimant not precluded.* Under the facts in this case, the Court does not preclude the claimant.

James Lingle, for Claimant.

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

John Jasper, an employee of the State in the Anna State Hospital, was killed in a dough-mixing machine in the bake-room at the hospital on May 22, 1913. Letters of administration were subsequently issued to the claimant in the county court of Union County.

The facts in evidence with reference to the accident wherein claimant's intestate met his death are as follows: He had been employed as a baker at the hospital for about seven years, and had been head baker, but at the time of the accident the bake-room was in charge of the first cook, and decedent was doing the work without an assistant. The only person present in the room at the time of the accident was a patient at the hospital, and nobody who saw the accident has testified in this case.

Decedent alone was in charge of the mixer and did all of the baking of bread, etc. Claimant charges that the force doing the work was inadequate, notwithstanding, that the work had greatly increased, and that as a result, it became necessary for the decedent to do his work in the particular way which caused his death.

Decedent was working on a dough-mixer which was about five feet ten inches high, three and one-half feet square and had a capacity of three barrels. In this mixer there were two iron arms and an iron shaft. In mixing the dough, the arms revolved about ten revolutions to the minute, and came to within about one-eighth of an inch of the sides of the mixer. The dough was thrown against the sides of the tub, and about every three or four minutes, it had to be scraped off by means of a dough knife in the hands of the operator. Decedent, to do this work, stood on an iron rod on the mixer, would hold on with one hand and scrape with the other. The mixer was run by electric power and was operated by means of a switch in front of the machine and near the floor. Claimant complains that there was no fuse by which the mixer would automatically stop when it received an overload, contending, that if such fuse had been used when decedent was caught in the mixer, the fuse would have blown out and caused the machine to stop, and decedent would have met only with an injury instead of death. It is also shown by the evidence of one witness, that it is usual for bread-mixers to be so adjusted.

On the morning that decedent met his death, one witness had just stepped from the room and upon returning five minutes later discovered that deceased was in the mixer. The mixer was not running, the patient having apparently thrown the switch. When Mr. Jasper was taken from the mixer he was dead. The dough knife was found in the mixer and it is apparent that deceased was caught in the mixer while in the act of scraping the dough from the back side of the mixer.

In addition to charging negligence in failure to furnish sufficient help, claimant charges that the State failed to use reasonable care to provide safe machinery, and also charges negligence in failing to guard the machine.

The State argues that it is not liable because it was exercising a governmental function in conducting the hospital, and that there is no proof of negligence which would warrant a recovery, were the former defense not interposed.

On the first proposition advanced by the State, in view of the repeated decisions of this Court upon the same subject, we must hold that in this case, the State cannot be held to respond in damages. In *Taylor* v. *State,* opinion filed May 22, 1914; *Jorgenson v. State,* October Session, 1911, and *Allen* v. *State,* October Session, 1906, among many other opinions filed by this Court, this question has been determined.

In the absence of a statute assuming liability by the State for damages sustained in this institution, there is no law which would warrant our making an award for the claimant in this case. Even though the State has provided this Court as a forum, wherein claims shall be heard and determined in manner as provided by law, we have uniformly held to the correct principle, that by so doing, it had not undertaken liability or increased or enlarged its liability in any particular.

Counsel for the State in this case have cited the case of *Maia* v. *Eastern State Hospital, 97* Va., 507, *47* L. R. A., 577, and the language in that case well states the reason for the defense interposed by the State:

"If a municipal corporation, which has a two-fold character, one public and the other private, is exempt from liability for the negligence of its agents when in the exercise and performance of its powers and duties as an agency of the government, a public corporation which was created and exists for no other than governmental purposes must necessarily be exempt from such liability. Otherwise, there would be this anomaly: That for such negligence a corporation created partly for governmental purposes would be exempt from liability, while one created wholly for such purposes would not

be, when the reason for such exemption is solely because it was in the exercise of governmental functions when the negligence occurred."

Of course, there is no question but that the State, in the conduct of the Anna State Hospital, was exercising solely a governmental function.

But the State has given to this Court power to reject a claim so that claimant shall be precluded from further remedy, or to reject without prejudice, so that claimant may present her claim to the legislature.

For the purpose of ascertaining whether or not this claim is of such nature that it should or should not be precluded by the judgment of this Court, we propose to investigate further.

It is shown by the evidence, that claimant's intestate could have done the work by stopping the machine and scraping off the dough and again starting the machine. This would have necessitated delay in the work without doubt, and under the circumstances would have subjected decedent at least to censure. It is not apparent from the evidence how any guard would have prevented the accident. It might be true that decedent might not have met his death, if a suitable fuse had been used, yet this goes into the realm of speculation. One of the witnesses testified, that he might have had his arm broken, but of course even this might result in death. He might also have had his neck broken. The evidence states that the insane patient probably turned off the power when decedent was caught in the machine. He did no more nor less than another employee could or would have done, and we cannot entirely reconcile this statement with the charge that there were not sufficient employees.

On the other hand, this is a case which strongly appeals to the sympathies of the Court. Were this a trial before a jury, we, as lawyers, believe we could predict what the average jury would find on these questions of fact. Shortly after the happening of this accident, the State adopted the policy of compensating

employees and dependents of deceased employees for injury or death while in the service of the State. Claimant in this case missed the benefit of this law by a very few days. Under the circumstances we would not feel justified, if by our judgment we precluded claimant from presenting her claim to the legislature, and accordingly this claim is rejected, without prejudice to the right of claimant, to present her claim to the legislature.

ALBERT L. LINCOLN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY LEWIS WILLIAMS, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

INHERITANCE TAX—*when an award will be made.* In this claim, after the inheritance tax had been paid, an appeal was prayed from the order of the county judge fixing the inheritance tax to the county court, which court reduced the tax. Demands were made on the State Treasurer and county treasurer for a refund of the tax. The claimant having complied with the law in every respect is given an award.

Stead, Lincoln and Fitch, for Claimant.

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

On the 13th day of May, 1913, the county judge of Cook County, Illinois, entered an order in the estate of Mary Lewis Williams, deceased, approving a report of the appraiser in connection with property values of said estate, and assessed an inheritance tax thereon of six hundred nineteen and twenty-seven hundredths ($619.27) dollars, with interest at the rate of six per cent from September 12, 1912.

Claimant paid this amount to the county treasurer under protest, and prosecuted an appeal from said order of the county judge to the county court of Cook County, for the purpose of having the amount of inheritance tax reduced.

Upon a hearing of this cause in the county court, a final order and judgment was entered finding that the county judge erroneously assessed a tax of six hundred nineteen and twenty-seven hundredths ($619.27) dollars, and said order further found that the sum of four hundred ($400.00) dollars, with interest amounting to sixteen ($16.00) dollars, was the correct and legal assessable tax in said estate.

Said order also decreed, that the executor had erroneously paid to the State of Illinois, the sum of two hundred twenty-eight and four hundredths ($228.04) dollars, in excess of the amount that should have been paid by him on account of said estate.

After securing the final order in the county court, claimant made a written demand upon the county treasurer and upon the State Treasurer for a refund of the taxes erroneously collected from him, but has been unable to collect same.

He has complied with the law in every respect in order to obtain the refund to which he is entitled, and we, therefore, make an award in his favor for two hundred twenty-eight and four hundredths ($228.04) dollars.

ANNA MAGAN

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

INHERITANCE TAX—*facts held to justify an award.* In this case, the tax was assessed at the two dollar rate, from which an appeal was prayed, and after the decision in the *Ullmann case*, 263 Ill., 528, the tax which had been paid was reduced by the county court of Cook County. *Held*, that an award should be made.

Stead, Lincoln and Fitch, for Claimant.

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

The claim in this case is for a refund of inheritance tax, claimed to have been erroneously and excessively paid to the county treasurer of Cook County, on the 15th day of June, 1914, and is made under the provisions of section 10 of an Act to tax gifts, legacies, inheritances, etc., June 14, 1909.

Thomas Conlin, who was a brother to claimant, died testate on the 21st day of February, 1914, a resident of the city of Chicago, State of Illinois, and claimant was duly appointed one of the executrixes with the will annexed, of the estate of said deceased, by the probate court of Cook County, and duly qualified. An inheritance tax proceeding was had under the direction of the county judge of Cook County; the appraiser filed his report with the county judge who entered an order on June 12, 1914, fixing the cash value of the several estates, gifts, transfers, etc., and assessing the total inheritance tax thereon in the sum of $1,635.35, all of which money was paid to the county treasurer of Cook County, and was transmitted by him to the State Treasurer of the State of Illinois; and afterwards, within a few weeks, claimant petitioned the county court for an appeal which was approved and allowed to the county court. A decree was entered by agreement based upon

the decision of the Supreme Court of the State of Illinois, in the case entitled *In re Estate of Fred Ullmann, deceased,* 263 Ill., 528, wherein it was decided that the exemption of $20,000.00 shall first be deducted from the total amount of the share of the beneficiary, before the rate of tax is determined. This decision resulted in reducing the taxable cash value of the share of this claimant under $100,000.00, and fixed the rate of tax at one per cent instead of two per cent, as was erroneously fixed in the order entered by the county judge July 22, 1914.

This decree found, that the total legal tax due and assessable against the claimant was $817.87, and that she had paid an excessive, illegal and erroneous tax to the county treasurer of Cook County for and on behalf of the State of Illinois of $776.99, that the same should be refunded and paid to the said claimant.

Thereupon, claimant made application to the county treasurer of Cook County for a refund of the amount of the inheritance tax erroneously paid by her, and was notified that it had been paid to the State Treasurer, whereupon, on July 22, 1914, she made application to the State Treasurer for a refund, but was informed that in the absence of an appropriation, it was impossible to entertain the demand.

We find, that the claimant has paid to the State an erroneous and excessive tax, and, that she has in all respects complied with the law to secure the refund, and, that she is entitled to have returned to her by the State the sum of $776.99. We, therefore, accordingly award claimant the sum of seven hundred seventy-six dollars and ninety-nine cents ($776.99).

CELINDA McCULLOUGH, ADMINISTRATRIX, AND JOHN McCULLOUGH, ADMINISTRATOR, OF THE ESTATE OF JAMES S. McCULLOUGH, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

CONTRACTS—*when law will imply promise to pay.* Where a State officer is obliged to lay out and expend sums of money in defending a suit brought against him, the basis of which suit is the doing of some act or acts in his official capacity, in order to safeguard the interests of the State, equity will require that he be reimbursed the amount of his necessary outlay.

Smith and Friedmeyer, for Claimants.

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

The claimants are the legal representatives of James S. McCullough, deceased, who was Auditor of Public Accounts of the State of Illinois, from January 1897, to January 1913.

Charles W. Spaulding, a former treasurer of the Board of Trustees of the University of Illinois, defaulted with a large amount of money that was turned over to him as treasurer of that institution.

The trustees of the university, in conjunction with the Attorney General of the State, endeavored to compromise the matter, and after considerable negotiations, Spaulding turned over to the trustees and one Francis W. McKay, securities, stocks and bonds of various companies, and deeded to the trustees, his interest in certain lands in Chicago, Illinois, Idaho and other places, in trust, that the same be administered so that the proceeds should be applied for the reimbursement of his defalcations.

In the year 1897, an Act was passed creating what was known as the Spaulding Commission, which consisted of the Governor, Auditor and Treasurer of the State of Illinois. The commission was empowered

and directed to handle the property turned over by the said Spaulding, and the funds realized from the sale thereof, were to be turned into the State treasury.

Spaulding was tried and convicted for his defalcation, and after his release from prison started suit against the University of Illinois and others for an accounting. This suit was dismissed, and later he commenced another suit against James S. McCullough and several other former officers of the State, in which he charged a violation of their trust relative to the property turned over to them.

This suit was finally compromised and settled by an Act of the legislature, approved June 26, 1913, in which ten thousand ($10,000.00) dollars was appropriated for the purpose of settling and adjusting Spaulding's claim.

It appears from the record in this case, that when these suits were started against James S. McCullough and others, the said McCullough retained counsel to defend said suits, and as a result, it became necessary for him to pay from his own funds, nine hundred thirty-six and sixty hundredths ($936.60) dollars for attorney fees and other expenses incident thereto.

Claimants now ask that we make an award for this amount, and insist that the money so paid out and expended by the said McCullough was not for his benefit, but that everything that was done by him in this transaction, was done as an officer of the State in his official capacity for the benefit of the State as required by law.

Equity would require that the estate of James S. McCullough, deceased, be reimbursed for the money expended by him in connection with these transactions, and we therefore make an award in claimants' favor, in the sum of nine hundred thirty-six and sixty hundredths ($936.60) dollars.

CORDOVA L. PENISTON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MAY BUCKINGHAM, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. INHERITANCE TAX—*facts held sufficient to justify an award.* In this case the executor prayed an appeal from the order of the county judge fixing the tax to the county court, which court reduced the tax; thereupon, the State appealed to the Supreme Court, and the Supreme Court, in effect, sustained the county court. (*People* v. *Peniston*, 262 Ill., 191.)

2. PRACTICE—*claims filed subsequent to May 1.* Where a claim is not filed prior to the first day of May, the Court may hear the same at the following October session, in case the State enters its appearance and consents to a hearing.

Holt, Cutting and Sidley, for Claimant.

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

Cordova L. Peniston, as executor of the last will and testament of May Buckingham, deceased, has filed in this cause a claim for refund of $4,622.96, on account of over-payment of inheritance tax. May Buckingham died testate in Chicago, on October 20, 1912. Her will was duly admitted to probate, and it contained, among others, the provision, that all inheritance and succession taxes should be paid out of the general estate, and that none of the specific legacies or bequests should be diminished by the deduction of any sum for such taxes. An inheritance tax appraiser was appointed, and he duly made report, which was confirmed and approved by the county judge of Cook County, April 17, 1913. This report found the fair market value of the real estate at $107,450.00, and of the entire estate of $425,663.24, and the total tax was fixed at $20,026.87.

For the purpose of saving five per cent discount, if payment be made within six months of decedent's

death, the executor paid this tax, less the discount, or $19,025.53, to the county treasurer of Cook County on April 18, 1913, under protest.

An appeal was taken from the order of the county judge to the county court, and on July 24, 1913, that court entered an order placing the value of the real estate at $99,450.00, but not changing the finding as to the value of personal property. The tax, however, on the several bequests and devises in the will was found by the order of the county court to be $15,587.94, instead of the amount fixed by the county judge.

The State of Illinois then appealed to the Supreme Court and the case was there reversed and remanded to the county court (*People* v. *Peniston*, 263 Ill., 191), whereupon, additional evidence being heard, the latter court entered a decree on July 22, 1914, again finding the values of the property as previously fixed and finding also that the tax of $20,026.87 fixed by the county judge, was excessive, unreasonable and unjust and finding also, that the tax that should have been paid on April 18, 1913, was $14,855.00, being the tax as fixed, $15,587.94, less five per cent. This order of the county court stands as a final order.

Claimant has in all particulars complied with all requirements of the law with reference to securing a refund of the tax erroneously paid. No appropriation has been made by the legislature to cover this case, but it is a just and valid claim against the State.

It does not appear that the county treasurer has deducted anything for collection charges, and apparently the entire amount originally paid by claimant, is now in the hands of the State Treasurer.

This suit was not begun prior to May 1, 1914, as provided by the Court of Claims Act, so that a hearing might be had at this term, but the State has entered its appearance, and as we construe the law, we have jurisdiction to hear and determine this cause.

It is the judgment of this Court, that claimant be awarded the difference between the amount erroneously paid and the amount that he should have paid on the date payment was made, and accordingly, as executor of the said estate, he is awarded the sum of $4,216.98.

EDWARD A. PYNCHON

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

DAMAGES—*facts held sufficient to justify Court in making award where employee lost property.* The claimant was employed as civil engineer by the Rivers and Lakes Commission, and while trying to save property of the State, he lost his surveying instruments in the Big Muddy River. *Held*, that he is entitled to an award for the amount of the property lost by him.

Ben. F. Glahn, for Claimant.

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

The claimant while employed by the Rivers and Lakes Commission in July, 1912, to do some work in connection with the Big Muddy River survey near DeSoto, Illinois, was instructed by the engineer in charge of their camp to take a motor boat, and proceed down the river to Murphysboro, Illinois, for the purpose of completing some unfinished work at that place.

While going down the river, the boat which was occupied by claimant and another employee, struck a snag and capsized, throwing claimant and the other occupant into the river.

It was necessary in making this trip, for claimant to carry his own personal belongings, together with several instruments belonging to the State, that were used in connection with this line of work.

When the boat capsized, it sank, and claimant did all in his power to save the property of the State, and succeeded in saving valuable property, consisting of levels, notes and memoranda that were worth about two hundred ($200.00) dollars. Due to his efforts to save the State's property, he was unable to save his own personal belongings and now seeks to recover for the loss of same.

The Rivers and Lakes Commission, after investigating this accident, realized the justice of claimant's demand, and in their annual report to the Governor of the State of Illinois, in 1912, recommended, that this claim amounting to one hundred twenty-nine and fifty hundredths ($129.50) dollars, be paid.

It is the judgment of this Court, that an award be made to claimant for one hundred twenty-nine and fifty hundredths ($129.50) dollars.

CLIFFORD REDMOND

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. NON-LIABILITY OF STATE—*Morrissey v. State ante followed.* The doctrine announced in the case of *Morrissey v. State, supra*, is applicable to this claim.

2. STATUTE OF LIMITATIONS—*two year statute bar to this claim.* This claim is unliquidated, and since the cause of action accrued on July 12, 1908, and the claim was not filed until November 29, 1910, the Statute of Limitations is a bar to the same.

James C. O'Brien, for Claimant.

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

Claimant, with a companion, was in charge of a launch and house-boat, with which they left Chicago on July 12, 1908, traveling along the Illinois-Michigan Canal. It was their intention to make a trip along the canal, stopping at various points for the purpose of doing odd jobs of repairing machinery, etc., and he had tools with him for that purpose. At about 8:45 in the evening, they reached the Jackson street bridge at Joliet, where there was a dam without light or signals. They struck the dam and the house-boat was stranded there. The next morning they were directed by the lock-tender to the lock. Subsequently, the water was lowered and the house-boat was flooded. Property of the claimant, amounting in value, as he says, to $116.00, was damaged or destroyed, and he received injuries and shock for which he claims $100.00.

Counsel for claimant, in his argument, confines himself to a discussion of the negligence on the part of the lock-tender of the canal, an agent of the State, and to the effect that claimant was free from blame. The State, in answering, contents itself with the statement, that if this Court should hold that the Illinois-Michigan Canal is a business enterprise, and not operated

in the exercise of a governmental function, that then the doctrine of *respondeat superior* applies to the State and that it has no objection to making an award.

While this case has been under consideration, the Court has also considered the case of *Morrissey* v. *State of Illinois,* opinion filed at this term of this Court, and the other so-called canal cases involving similar questions. Those claims were rejected by this Court without prejudice to the claimant, we holding, that the State in the operation of the canal exercises governmental function. This Court has also repeatedly held, that the State cannot be held responsible for the negligent acts or omissions of its agents.

In this view of the law so repeatedly followed by this Court, we cannot make an award in favor of claimant.

It remains for us to determine whether or not this claim should be rejected without prejudice. The cause of action accrued on July 12, 1908, and claim was filed herein on November 29, 1910. The Statute of Limitations providing for the filing of unliquidated claims against the State, limits the time within which such claims may be filed to two years. It had run in this case, and the claim must be rejected for that reason.

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

PETER H. SCHWABA
v.
STATE OF ILLINOIS.

Opinion filed December 17, 1914.

NON-LIABILITY OF STATE—*Alling v. State ante followed.* This claim is similar to that of *Alling v. State, supra*, and the law as applicable to that claim, applies to this claim.

Thomas F. Burke, for Claimant.
P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, for State.

The claim in this case is the same as that of *Alling v. State*, in which an opinion was rendered at the October Term, 1914, with the exception, that the injuries received by claimant in this case were not so serious.

Claimant was a clerk in the office of Alling and was injured at the same time as Alling.

For the reasons set forth in the *Alling case*, this claim is rejected.

BERTHA STILLEY

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The State, in the absence of express statute, is not liable for injuries sustained by those in its employ.

2. JURISDITCION—*Act creating Court does not enlarge.* The Act creating the Court of Claims has not enlarged or increased the liability of the State in any particular.

3. PRACTICE—*claimant not precluded.* Under the facts, as developed by the proof, the Court, while rejecting the claim, does not preclude claimant.

James Lingle, for Claimant.

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

Claimant was employed at the Lincoln State School and Colony, one of the State charitable institutions, beginning her employment in March 1911. She worked principally in the laundry from that time until June 11, 1913, the date upon which she met with the injury complained of.

On the day of the injury, her employment was in another department, but for the purpose of instructing a new employee, she and another employee were engaged in putting a clean canvas over one of the rolls of a mangle. This machine used for ironing is about 8x10 feet in size on the floor, and in the neighborhood of five feet high. On top of a metal bed, which was heated by steam, and in which were successive depressions, there were four iron rollers, each, about ten feet long and six inches in diameter. These rollers were covered first with heavy felt, over which was placed canvas, and whenever this became soiled, it was replaced with a clean piece and this was the work claimant was doing at the time of her injury. The rollers were connected with cogs at either end, and could be raised by means

of a foot lever only while revolving. At the time of the accident in question, there was a pressure of about seventy pounds of steam which heated the metal bed over which the rollers operated.

To change the canvas, the rollers were raised, the soiled canvas removed, and the roller turned so that several inches of the felt extended out; the roller was then lowered and an operator at either end with one hand kept the canvas smooth and straight, and with the other, inserted the edge of the canvas between the rollers and felt to a point where the contact of the roller with the bed caught the canvas and drew it around the roller, which was revolving. The power was electricity supplied through a switch.

In adjusting the canvas, it was necessary to stand on top of a stool and lean over to reach the rollers. The first or front roller was guarded, but the second roller upon which claimant was working was unguarded.

While claimant was engaged in making the change of the canvas and standing on a stool, in some way her left hand was caught and drawn into the machine. It is uncertain from the evidence whether the stool upon which she was standing tipped, and threw her into the machine, because she was leaning over, or was struck by an inmate of the institution and knocked out from under her, or whether her hand was caught and the stool tipped over afterwards, but for the purpose of this case it is really immaterial. After the stool had fallen down, she hung suspended from the machine and an employee held her up and an inmate turned off the power. To release her, it was necessary to again turn on the power and draw her hand still further in so that the foot pedal could be pressed down. Her hand was drawn in almost to the wrist. It was severely crushed and several bones were broken and she received very severe burns which have caused permanent disfigurement. She returned to work after about a month, but has suffered pain and inconvenience be-

cause of the breaking and crushing of the bones and the severity of the burns and likewise the unsightly condition of her hand causes her great annoyance.

Claimant alleges negligence on the part of the State, in that, the rollers should not have been heated at the time the work was done; that an insufficient number of employees were provided, and, that inmates of the institution should not have been permitted in the room. The State defends that it is not responsible for injuries to its employees prior to the enactment of the compensation law; that the evidence does not disclose how the accident occurred, and therefore negligence cannot be charged to the State.

This Court has repeatedly held, that in the absence of express statutory enactment assuming liability by the State in particular classes of cases, there can be no recovery. Claimant was employed in a charitable institution conducted by the State in the exercise of its governmental function, and in consequence, even though there were negligence in every way claimant alleges, she cannot recover from the State in this cause. And we have already repeatedly stated, that the doctrine of *respondeat superior* is not applicable to the State.

The Act creating this Court has not enlarged or increased the liability of the State in any particular, and it is only where the State assumes liability, as in the military and naval code, that this Court can award damages in a proper case for personal injuries.

O'Donnell v. *State*, 1 C. of C. R., 255; *Taylor* v. *State*, C. of C. Opinion filed May 22, 1914. .

As we said in the case of *Taylor* v. *State, supra:*

"While claimant was in the employ of the State and paid by the State, we cannot agree with his contention in our interpretation of the law that an analogy can be drawn between his relations with his employer and the relation of master and servant."

In this view of the law, we must reject this claim, but will give it further consideration for the purpose of ascertaining whether or not the rejection shall be

final or without prejudice to the claimant. An examination of the record in this case appeals strongly to sympathy. Claimant, an unmarried woman twenty-one years of age, has sustained what to her is indeed a serious injury. We can not believe from the evidence that claimant herself was in any way negligent. If the rules governing the relation of master and servant were here applicable, it might be said that she assumed the risk of employment. Had the work been done when the heat was turned off the machine, claimant undoubtedly would not have sustained what to her is the most serious feature of the injury. She was ordered to do the work while the machine was heated to a high degree, and while in a court of law an employer under like circumstances would undoubtedly have a good defense, yet, this accident happened but a few days before the Workmen's Compensation Law went into effect. It was the declared policy of the State at the time of the accident, that its employees receiving injuries should be compensated. The statute had been passed but the law was not in force. Under such circumstances, we do not believe it would be doing justice to reject this claim and thereby preclude the claimant from presenting her claim to the legislature.

Were it in our power so to do, we would undoubtedly award the claimant seven hundred fifty ($750.00) dollars.

It is the judgment of the Court that this claim be rejected but without prejudice to the rights of complainant to present her claim to the legislature.

ELIZABETH ULLMANN, IN HER OWN RIGHT, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FREDERICK ULLMANN, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed December 17, 1914.

1. INHERITANCE TAX—*Exemptions should be deducted in fixing rate.* Where the total estate amounts to $116,534.73, and there is an exemption of $20,000.00, the rate of the tax should be $1.00 on the hundred.

2. SAME—*facts held to justify an award.* In this case, the county judge fixed the tax at $1,930.69, the same being at the rate of $2.00 on the hundred. The county court on appeal affirmed the decision of the county judge, but the Supreme Court reversed the decision of the county court, remanding the cause to the county court with instructions to enter the proper order. The county court then entered an order fixing the tax at the rate of $1.00 on the hundred. (*People* v. *Ullmann*, 263 Ill., 528.) *Held*, that an award should be made.

3. SAME—*payment under protest—demand.* The tax was paid under protest and demands were served upon the State and county treasurers for the return of the same.

4. INTEREST—*State does not pay.* In the absence of a statute allowing interest on claims, the same will be disallowed.

Hoag and Ullmann, for Claimant.

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

Frederick Ullmann, a resident of Cook County, died on March 29, 1911, testate, devising and bequeathing all his property to his widow, the claimant herein.

The will was probated in the probate court of Cook County on April 7, 1911, and letters testamentary issued to the claimant.

The appraiser appointed to fix the value of the property for inheritance tax found the value to be $116,534.73, and an order was entered by the county judge of Cook County fixing the tax at $1,930.69, same being figured on a two per cent basis, after deducting the statutory exemption of $20,000.00. This tax was

paid by the claimant, to the county treasurer within six months of the death of the decedent, under protest, for the purpose of saving five per cent discount provided by statute.

Claimant appealed from the order of the county judge to the county court, and there insisted that the tax should have been levied on a one per cent basis instead of two per cent, on the theory, that after the deduction of the statutory exemption, the value of the estate was less than $100,000.00. The county court affirmed the order of the county judge, and from this judgment claimant appealed to the Supreme Court of Illinois, in which court, the judgment of the county court was reversed, on the ground, that the tax should have been levied on the one per cent basis instead of two per cent, and the cause was remanded to the county court with direction to enter an order in accordance with the order of the Supreme Court. (*People* v. *Ullmann*, 263 Ill., 528).

On July 8, 1914, the county court entered such order and found that the tax should have originally been fixed at $965.35.

On September 25, 1913, claimant served a demand upon the county treasurer of Cook County, for the repayment of $917.08, being one-half the amount originally paid by her, and on the same day served a like demand upon the State Treasurer. The original amount of tax as levied by the county court had been reduced by five per cent through the payment within six months as hereinabove stated. These applications for repayment were made within two years of the time the tax was originally paid, and as we construe section 10 of the law providing for inheritance tax, claimant complied with the provisions of the law.

Claimant also claims that under the provisions of section 25 of the inheritance tax law, she should be entitled to three per cent on the amount erroneously paid, from the date of payment. We do not believe, however, that the estate taken by the claimant under

the will is such estate as is contemplated under said section of the statute, whereby the State should be called upon to pay three per cent and even though it might appear, as claimant contends, that the State "should in equity and fairness pay for the privilege which it has enjoyed of having the use of the money," in the absence of legislation which would authorize or require the allowance of such interest, we have no authority to award same.

Claimant has in all respects complied with the provisions of the law for the securing of a refund, and it is the judgment of the Court that claimant be awarded the sum of $917.08.

WILLIAM K. PATTISON AND LUCIEN E. HARDING, EXECUTORS OF THE LAST WILL AND TESTAMENT OF SAMUEL S. FREWE, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed January 21, 1915.

1. INHERITANCE TAX—*facts held sufficient to justify an award.* In this claim certain real estate was by mistake included in the inventory and later listed for appraisement by the inheritance tax appraiser. The tax was fixed by the county judge and paid, but upon discovery of the mistake an appeal was prayed to the county court, which court reduced the amount of the tax. *Held*, that claimants were entitled to a refund of the tax erroneously paid.

2. MISTAKE OF FACT—*payment under.* Money paid voluntarily under a mistake of fact may be recovered.

Pattison & Shaw, for Claimants.

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

The claim in this case is for a refund of $190.00 inheritance tax claimed to have been erroneously paid to the county treasurer of Cook County, on the 16th day of April, 1912; and is made under the provision of section 10 of an Act to tax gifts, legacies, inheritances, etc., approved June 14, 1909.

Samuel S. Frewe died testate on the 14th day of February, 1912, a resident of the city of Chicago, State of Illinois, and claimants were duly appointed executors with the will annexed of the estate of said deceased by the probate court of Cook County and duly qualified. An inheritance tax proceeding was had under the directions of the county judge of Cook County. The appraiser filed his report with the county judge, who entered an order fixing the cash value of the several estates, gifts, transfers, etc., and assessing the total inheritance tax thereon in the sum of $3,761.54; all of which money was within six months paid to the county treasurer of Cook County, and was

transmitted by him to the State Treasurer of the State of Illinois, and afterwards, within a few weeks, claimants petitioned the county court for an appeal which was approved and allowed to the county court. The court, after having heard all the evidence, found that the inventory of the appraiser inadvertently included certain real estate as property appraisable which decedent at the time of his death had no legal or equitable title or interest in or to, and that the real estate had been appraised by the appraiser at $7,000.00, when the right and correct appraisement should have been $2,000.00. The court further found that the executors were entitled to a refund in the sum of $190.00, which had been erroneously paid as aforesaid, from which order no appeal has been prayed.

We find, that the claimants have paid to the State an erroneous and excessive tax and that they in all respects complied with the law to secure the refund, and that they are entitled to have returned by the State the sum of one hundred ninety ($190.00) dollars. We, therefore, accordingly award claimants the sum of one hundred ninety ($190.00) dollars.

CHARLES H. TAYLOR
v.
STATE OF ILLINOIS.

Opinion filed February 17, 1915.

NEGLIGENCE—*Johnson v. State ante followed.* This claim is similar to the claim of *Frank O. Johnson v. State, supra.* The law governing the *Johnson claim* covers this claim.

Brown, Hay & Creighton, and Lagger & Blatt, for Claimant.

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

Claimant is the owner of real estate in Joliet situated adjacent to the stone quarry operated in connection with the Illinois State Penitentiary.

Claimant claims to have sustained damage due to blasting operations in the stone quarry, and the facts and the law applicable thereto are essentially the same as in the case of *Johnson* v. *State of Illinois,* in which opinion was filed at the October Term, 1913, and in *McNally* v. *State of Illinois,* opinion filed at the present term of this Court, and in fact the evidence in this case and in the *McNally case* was taken at the same time. He claims that subsequent to the expenditure of about $3,000.00 by him, in the purchase of a lot and the erection of a house, that the operation of the stone quarry was begun, as a result of which, the value of his property has been depreciated. The evidence shows, that the property was mortgaged for $1,800.00; that he was unable to pay interest on his mortgage; that he endeavored to sell his property but could not because of the presence of the stone quarry; that the best offer he received was $1,200.00, and that he finally turned the property over in payment of the debt. Of course, the consideration for the sale of the property by claimant, is no criterion of its value, as it was practically a forced sale.

Claimant testified, that in his opinion, the consideration he received was more than its value, yet he also stated that the reason he had to give the property up was because of business reverses and because he was unable to keep up payments of interest. He carried $2,000.00 of insurance, so it may be well said, that claimant's own testimony with relation to value is not altogether consistent. The claimant filed his claim on May 1, 1914. He had disposed of his property in January 1914.

While this case is in other respects similar to the *Johnson* and *McNally cases*, it presents a novel question in that due to financial reverses claimant was compelled to turn over the property to his mortgagee in satisfaction of the mortgage debt. It would appear from the evidence that the existence of the nuisance in question undoubtedly had its effect upon the sale of the property and limited the possible number of purchasers. We believe that the value of this property was depreciated because of the facts as shown in the evidence, and we accordingly award the claimant the sum of five hundred dollars as his damages.

MARY BADGLEY WELLS, BRADFORD WELLS AND MILDRED WELLS CARTON

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. INHERITANCE TAX—*reversal of order of county judge by county court—effect of.* A reversal of the order of the county judge fixing an inheritance tax by the county court will support a claim for a refund of an inheritance tax.

2. SAME—*exemptions to be deducted in fixing rate.* If the total value of the property as fixed by the court, less exemptions, is less than $100,000.00, the rate should be $1.00 on the hundred.

Gardner, Carton and Thomson, for Claimants.

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

Robert M. Wells, a resident of Cook County, died testate in September 1913, and his will was duly probated in the probate court of Cook County, September 12, 1913. After several minor bequests, decedent's residuary estate was devised, one-third to his wife, Mary Badgley Wells, one-half to his son, Bradford Wells, and one-sixth to his daughter, Mildred Wells Carton, all of whom are claimants herein.

The county judge of Cook County, on December 30, 1913, entered an order fixing inheritance tax, based on the report of the appraiser previously appointed. The values placed on the shares of the various claimants were as follows: Mary Badgley Wells, $70,598.33; Bradford Wells, $105,897.53; Mildred Wells Carton, $35,299.18. These values include the valuation of fifty shares of the capital stock of the Continental & Commercial National Bank of Chicago.

After the deduction of the statutory exemption of $20,000.00 in each case, the tax of the widow was fixed on a one per cent basis at $505.98; of the son, on a two per cent basis at $1,717.95; and the daughter on a one per cent basis at $152.99. The several taxes were paid to the county treasurer of Cook County February 20,

1914, five per cent having been deducted as allowed by law and the respective amounts paid were: by Mary Badgley Wells, $480.68; Bradford Wells, $1,632.06; Mildred Wells Carton, $145.34. The money was turned over by the county treasurer to the State Treasurer.

An appeal was taken from the order of the county judge to the county court and on July 14, 1914, judgment was entered in that court finding that the fifty shares of bank stock which had been included in the valuation, was not the property of the decedent and should not have been considered in fixing the value, and finding also that the rate of two per cent of taxation on the share of Bradford Wells was erroneous and should have been one per cent. The order of the county court fixed the total value of the estate at $200,351.06, and the values of the respective shares as follows: Mary Badgley Wells, $65,681.69; Bradford Wells, $98,522.53; Mildred Wells Carton, $32,840.84. After deducting exemptions of $20,000.00, in each case and figuring the tax at the rate of one per cent, the court found the correct amount of taxes in each case was as follows: Mary Badgley Wells, $456.82; Bradford Wells, $785.23; Mildred Wells Carton, $128.41.

The five per cent discount for payment within six months, would make the amounts that each of the parties respectively should have paid, as follows:

Mary Badgley Wells, $433.98; Bradford Wells, $745.97; Mildred Wells Carton, $121.99.

These amounts, deducted from the amounts actually paid in each case, provide a basis upon which to figure the amounts that should be properly refunded.

On July 20, 1914, claimants made application to the county treasurer and State Treasurer for refund, but they have not received same.

Claimants have filed their claim since May 1, 1914, but with the consent of the Attorney General, same has been heard at this term of this Court and this Court has jurisdiction of same.

Claimants have in every particular complied with the statute to entitle them to a refund of the amounts erroneously paid and are entitled to awards.

It is the judgment of this Court, that Mary Badgley Wells be, and she is hereby awarded the sum of $46.70; that Bradford Wells be, and he is hereby awarded $886.09; and that Mildred Wells Carton be, and she is hereby awarded $23.35.

. . . .

DOROTHEA SCHAEFER

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. RESPONDEAT SUPERIOR—*rule of not applicable to State.* This rule of law does not apply to the State, and persons injured through the fault or neglect of employees of the State cannot recover damages.

2. GOVERNMENTAL FUNCTION—*State exercises in conducting hospitals.* The State, in conducting its State hospitals, exercises a governmental function solely.

3. SAFETY APPLIANCE ACT—*does not apply to State.* The Safety Appliance Act has no application to the State in its relation to its employees.

4. JURISDICTION—*Court without—of employees injured subsequent to July 1, 1913.* Employees of the State injured subsequently to July 1, 1913, may have their claims determined by the Industrial Board. The Court of Claims has no jurisdiction of claims of this character.

T. V. Gorey, for Claimant.

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

Claimant was employed in the laundry in the Elgin State Hospital, and on July 11, 1913, at about 2:30 p. m., she sustained injuries while working on a mangle. She claims that her injuries were due to the fact that there were no guards on the machine; that she was unacquainted with its use; that both hands were caught in the machine, crushed and disfigured, there being permanent injury, through burning and crushing, to the left hand, and that she was compelled to remain in the hospital for about six weeks.

Claimant argues that the Act to provide for the health, safety, comfort of employees, etc., enacted by the legislature was violated in this case by the State itself. The State argues that there is no liability because the State in the operation of the hospital exercises governmental function, that the injury to claim-

ant was due to her own negligence, and that claimant has misconceived her remedy, in that, she should have brought her action under the Workmen's Compensation Act, which became effective on July 1, 1913. No person besides claimant witnessed the accident, excepting, that immediately after claimant's hands were caught, she was seen to have her foot on the pedal which operated the machine. The attending physician testified, that the injuries to the right hand were slight. The left hand is permanently injured, the index finger anchylosed, the middle finger discolored with a joint enlarged, the tendons are not free, adhesions having taken place. The injuries are undoubtedly severe.

Unfortunately, however, for claimant in this case, granting, for the sake of argument, that she was entirely free from fault and that the fault was entirely that of the State, she cannot recover in this case.

This Court has repeatedly held, and it is uniformly so held by courts generally, that persons injured through the fault or neglect of employees of the State, engaged in the conduct of an institution that is operated by the State in its governmental capacity, cannot recover damages. The State in the conduct of the Elgin State Hospital exercises governmental function solely. This Court in the case of *Jones* v. *State*, opinion filed October Term, 1913, stated:

"The Safety Appliance Act has no application to the State in its relation to its employees," and

"There is no statute which makes the State liable to respond in damages in a case such as the one before us."

We have been shown no reason to change our opinion as stated in that case.

Claimant was injured on July 11, 1913, ten days after the Workmen's Compensation Law of 1913 became effective; section 4 of that Act defining the term employer includes the State. The Act provides that all claims for compensation shall be heard by the Industrial Board which is created by that Act. If this

case were one against a private individual instead of the State, it would not be contended that the courts of law would have any jurisdiction, that having been conferred exclusively on the Industrial Board. The same rule holds true here, and this Court, under the law as it now exists, has no jurisdiction to pass upon this case.

The claim is accordingly rejected, without prejudice, however, to the rights of claimant to prosecute her claim before the Industrial Board, or elsewhere as she may see fit.

ALBERT REUTLER

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

LACHES—*failure of claimant to demand pay.* Failure for a number of years on the part of an employee or special officer of the State to demand payment for services which he claims to have performed for the State, will cast suspicion on the genuineness of such claim.

Frank J. Wilkins, for Claimant.

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

During the month of September 1905, claimant, who is a resident of Tazewell County, Illinois, was appointed a special deputy game warden for the State and for about six months after his appointment worked as engineer on the "Dimples", a launch used by the State in connection with the State Game Department.

When he was appointed, he received a special star and commission which he retained until shortly after the filing of this claim.

While engaged as engineer on the "Dimples" he was paid at the rate of sixty ($60.00) dollars per month and expenses, but after that time he did not receive any further compensation.

Claimant contends, that he has been actively engaged in the performance of his duties as special deputy game warden from the time of his appointment until August 1, 1913; that he has not received any compensation since March 1, 1906, and that the State is indebted to him for $5,340.00, being the amount claimed from March 1, 1906, to August 1, 1913, at the rate of sixty ($60.00) dollars per month.

It is admitted that during the time claimant worked on the "Dimples" he received his monthly salary and

expenses, but the evidence fails to disclose very much work performed by claimant after he ceased working as engineer on the launch.

Claimant produced some evidence to show, that at different times he warned certain parties regarding the killing of game, but this evidence by itself is certainly not sufficient to support his claim.

If he was as diligent in working as he claims to have been, it seems to the Court that he would have very little trouble in proving it beyond question. To say the least, the evidence submitted by claimant in support of his labor is very weak and unsatisfactory.

It is claimed that on different occasions the wife of claimant wrote to the officials of the Game Department requesting that they pay him his salary, and it is also claimed that he received letters from the department at different times authorizing him to continue with his work and that he would be compensated. But these letters were not produced.

None of the officials or employees of the Game Department remembered of having received any of the letters claimed to have been written by claimant, and Dr. J. A. Wheeler, who was State Game Commissioner of Illinois at that time, states that this appointment was only "honorary" and that claimant was not to receive any salary, except when he was detailed to do special work for the department. He also states that claimant was appointed and given a special deputy's star and commission in order to protect the launch "Dimples", which was the property of the State Game Department, and he did not draw any salary as special deputy game warden but as engineer of the launch "Dimples".

The State contends, among other things, that inasmuch, as the law of 1905 with reference to the appointment of game wardens, did not contain any provision authorizing the appointment of special deputy game wardens that claimant can not recover. (Session Laws 1905, p. 276, sec. 16) It also contends that he was

appointed to act as engineer on the launch "Dimples" and that having received his compensation for services performed in that capacity there is nothing more due him.

It is apparent from the evidence, that claimant is a man of very moderate means and that his only source of income is that which he derives from his daily labor.

It is difficult to understand why he should continue working for years without making some real effort to secure what he insists is due him. He lived a short distance from the State Capitol, where the offices of the Game Department are located, and he has never made a trip to see why he was not being paid. This does not seem reasonable, and the fact that he and his former wife testified that she wrote letters to the department concerning his salary is not sufficient to overcome our suspicions that claimant well understood that he was not to receive any salary, except when detailed to do special work for the department.

From the evidence submitted to us, we are of the opinion, that at the time claimant was appointed as special deputy game warden, the appointment was made with the understanding that claimant was only to be paid when requested or detailed to do special work, and we are also of the opinion, that claimant has received full compensation for the services rendered by him.

Having reached this conclusion, it will be unnecessary to consider the other defenses interposed by the State relative to the authority of this appointment under the Act of 1905, and other subsequent Acts in relation to the appointment of special deputy game wardens.

This claim is accordingly rejected.

FRANCIS J. McNALLY

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915

1. STATUTE OF LIMITATIONS—*as applied to nuisances.* The two year statute of limitations does not apply where the nuisance is continuing.

2. JOHNSON V. STATE—*followed.* In other respects the law as announced in the claim of *Frank O. Johnson* v. *State, supra,* governs this claim.

Brown, Hay & Creighton, and Lagger & Blatt, for Claimant.

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

Claimant seeks to recover damages for depreciation in the value of certain real estate owned by him in the city of Joliet, located adjacent to the stone quarry conducted in connection with the Illinois State Penitentiary.

The evidence produced by claimant is to the effect, that he purchased the lot in 1902 for $300.00; that he expended various sums of money in improving the property, so that the entire investment represents about $2,500.00; that at the time he purchased the lot and erected the buildings, the stone quarry was not being operated; that blasting commenced in the stone quarry about the year 1907, and that since 1910 blasting has continued practically every day except Sunday, as a result of which, stones have been thrown upon his premises, making holes in the roof, the cistern has been cracked at various times, the foundation of the house has been cracked, windows broken out, plastering cracked, siding damaged, and the property has been damaged in other ways.

Mr. McNally testified as to the various times that blasting in the stone quarry had resulted in causing damage to his property, and there is no doubt but what

he has not only been seriously inconvenienced, but that he has suffered damage as well. He states as his opinion that the value of the property has been depreciated one-half because of the existence of the conditions complained of. In his opinion, the value without the presence of the neighboring stone quarry would be about $3,000.00. He clearly does not qualify himself, however, as a witness acquainted with values. On cross-examination, he stated, that if the property of his neighbor, Mr. Taylor, sold for $2,000.00, his would be worth $2,000.00, and that it would take about $1,200.00 to put his property in as good shape as when built; that the buildings were built nine years ago and have not been painted since built, and he admits a depreciation aside from that caused by the blasting in the quarry.

A witness by the name Champoux, a contractor and builder, offered by claimant, after testifying to the conditions as he found them on frequent visits to the property, stated that in his opinion the property is worth between twelve and fourteen hundred dollars; that it would cost that to build at the present time; that the house should be plastered, chimney torn out and rebuilt, house reshingled and re-sided, and that it would take six or seven hundred dollars to do the work.

John R. Herath, a witness for claimant, testified that he is a real estate dealer in Joliet; that in his opinion the property would be worth from $2,800.00 to $3,000.00, and that the damage to the property, because of conditions, would run between $800.00 and $1,000.00.

In behalf of the State, Joseph McFadden, a real estate dealer, testified that in his opinion, the depreciation was about $500.00, due to the blasting in the quarry, and William H. Clare, a real estate dealer in Joliet, testified that in his opinion, the depreciation due to causes other than natural wear and tear is $500.00.

The State contends that the damages should be limited to such as have resulted during the period of two years next prior to the filing of the claim. With this we do not agree. As we view the situation, this is a continued nuisance, to which the Statute of Limitations is no bar.

Except for the difference in degree of damage, this case is the same in its facts and in the law applicable thereto as the case of *Frank O. Johnson* v. *State of Illinois*, decided by this Court at the October Term, 1913. In that case we found for claimant, and, for the reasons stated in the opinion in that case, we find that claimant is entitled to recover in this case, and it might be said that, barring the difference in property and the particular damage, the language used in that opinion might be well adopted as the opinion of the Court in this case.

It is the judgment of the Court, that claimant be awarded, as his damages, the sum of eight hundred dollars.

GEORGE A. LEACH

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. RESPONDEAT SUPERIOR—*rule of not applicable to State.* The rule of *respondeat superior* does not apply to the State, and the State is not liable for malfeasance, misfeasance or nonfeasance of its officers, agents or employees.

2. GOVERNMENTAL FUNCTION—*State exercises in distributing antitoxin.* The State in distributing hog-cholera serum acts solely in a governmental capacity.

Julian P. Lippincott, for Claimant.

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

The declaration in this case states that the claimant was a farmer residing a short distance south of Jacksonville, Illinois; that on or about March 1, 1914, he procured from the State Biological Laboratory a supply of serum, which he caused to be administered to his hogs by a licensed veterinary surgeon of this State.

Several of the hogs died immediately after they received treatment on account of the poisonous serum, and claimant asks this Court to make an award to him for seven hundred ($700.00) dollars, to cover the loss he has sustained.

A general demurrer was filed to the declaration; also a special demurrer, which sets forth that the doctrine of *respondeat superior* is not applicable to the State, and that the State is not liable for the malfeasance, misfeasance or nonfeasance of its officers, agents or employees.

The State, in the distribution of serum and other medicines of this kind, is acting solely in a governmental capacity for the benefit of its citizens. This work must necessarily be handled through its officers, employees or servants, and if they make a mistake or

commit a wrong in the exercise of their duty, the State can not be held accountable for their acts.

It has been repeatedly held by this Court, that the doctrine of *respondeat superior* does not apply to the State, and in view of these decisions we are of the opinion that the special demurrer should be sustained.

Demurrer sustained.

S. L. JAMES, TREASURER OF THE COUNTY OF EFFINGHAM, STATE OF ILLINOIS,

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. INHERITANCE TAX—*facts held to justify an award.* Claimant, as county treasurer, paid into the State treasury inheritance taxes collected by him in the sum of $338.62. After such payment, it was ascertained that costs of appraisement to the extent of $14.40 had not been deducted. *Held*, that claimant is entitled to a return of the amount erroneously paid.

2. MISTAKE OF FACT—*payment under.* Money paid under a mistake of fact may be recovered, though not if paid under a mistake of law.

The claimant in this case is the county treasurer of Effingham County, and as such county treasurer there was paid to him by the administrator of the estate of William Abraham, an inheritance tax amounting to $345.53, on the 12th day of December, 1914. After deducting the two per cent allowed to the county treasurer for collecting the same, he remitted the balance, $338.62, to the State Treasurer. After remitting the same, he ascertained there was due as costs in the county court of Effingham County, the sum of $14.40, being the clerk's fee $5.00, O. P. Denton, for transcribing testimony $7.50 and A. L. Abraham, witness fee $1.90, which amounts should have been deducted out of the said tax before the same was remitted to the State treasury.

We have examined the authorities, and applying the same as we see them to the facts in this case which discloses that this money was paid through an oversight or a mistake of fact, and not through a mistake of law, we are of the opinion that claimant is entitled to an award.

We, therefore, award claimant, S. L. James, the sum of fourteen dollars and forty cents ($14.40).

A. C. DALE
v.
STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. NON-LIABILITY OF STATE—*not liable to persons injured at State Fair.* The State is not liable for injuries received by persons attending the State Fair, even though the officers and employees of said fair are guilty of negligence, and such negligence be the cause of the injuries. (*Minear* v. *The State Board of Agriculture*, 259 Ill., 549.)

2. JURISDICTION—*Act creating Court did not enlarge State's liability.* The law creating the Court of Claims did not create a new liability against the State, but simply provided a method by which a claim may be heard by the Court.

3. PRACTICE—*Court governed by Supreme Court decisions.* The Court of Claims will be governed as to the law as the same is declared by the Supreme Court of this State.

K. C. Ronalds, for Claimant.

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

The claimant in this case seeks to recover damages against the State for injuries sustained by him while attending the Illinois State Fair at Springfield, Illinois, in 1911.

The facts relative to this claim are partially presented to us under a stipulation which in substance recites, that the State Board of Agriculture held its annual State Fair for the year 1911 on the grounds owned by it in the city of Springfield, county of Sangamon and State of Illinois; that in addition to its various exhibits they had a program of amusements which included various contests upon their tracks or race courses; that claimant was injured while attending said fair on account of the wooden amphitheatre or bleachers collapsing and falling down; that claimant filed his suit for damages against the State Board of Agriculture in the circuit court of Saline County, Illinois; that while said suit was pending and undisposed

of, the case of *Minear* v. *The State Board of Agriculture*, 259 Ill., 549, which was a similar case, was decided by the Supreme Court of this State in favor of the State Board of Agriculture and that claimant thereafter dismissed his suit in the circuit court of Saline County.

The State has filed a demurrer to the claimant's declaration and it is only necessary for us to pass upon the legal aspect of the case thus presented without inquiring into the nature or causes of the injuries in question.

In the case of *Minear* v. *The State Board of Agriculture, supra*, the court held, that the State Board of Agriculture was not liable in an action of tort for damages received by the collapsing of the bleachers or elevated seats provided for spectators of the races at the State Fair, even though the board may have been guilty of negligence in not discovering the defective conditions of said seats or bleachers, because the board is an arm of the government, and its acts were governmental.

The law creating the Court of Claims does not create a new liability against the State but simply provides a method by which a claim may be allowed or rejected on a hearing before the Court. (*Johnson* v. *State*, 1 Ct. of C. R., p. 208.)

This being true, it is our duty to follow the established precedents of the highest court of record in this State, and in view of the holding in the *Minear case, supra*, we are of the opinion that the declaration does not present a cause of action against the State and the demurrer to the same is accordingly sustained.

WILLIAM CHILDERS AND ELI LILLIENSTEIN
v.
STATE OF ILLINOIS.

Opinion filed February 17, 1915.

DAMAGES—*facts held to justify an award.* In this claim, there is no dispute as to the law governing the same, and upon the proofs submitted, the Court awards claimants the amount of their demand.

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

The declaration in this case alleges that on or about the 28th day of May, 1913, the Board of Administration of this State purchased a team of horses from claimants for use at the Illinois Soldiers' Orphans' Home at Normal, Illinois, for the sum of $385.00; that afterwards one of the horses was returned to claimants for which a credit was allowed the State of $192.50, and that there is due to claimants $197.50.

To the declaration, the State filed the general issue and a special plea, setting up that the claimants sold to the State of Illinois, a certain team of horses for the sum of $385.00, and warranted the same to be then sound; and, thereafter, the State returned claimants one of the horses for the reason that the same was not sound, and that the other horse was not returned because of its death due to disease which it had at the time of the sale.

There is no dispute as to the law, and the case rests solely upon the facts. The evidence discloses, that but two witnesses testified, one of them a claimant, and the other a Mr. Sales, who examined the horses at the time of the sale, for the State, as to their soundness, qualification and disposition, and afterwards conferred with Mr. Whipp, who was then the purchasing agent

of the State, who recommended their purchase and was authorized to purchase the same.

The evidence further discloses, that in about five or six days after the sale and delivery one of the horses died, the other being returned to claimants, for which a credit was given the State of $192.50.

There was no evidence offered on behalf of the State in support of its special plea, and we are of the opinion that the horses were sound at the time of the sale and delivery to the State, and that claimants are entitled to an award. We, therefore, award claimants the sum of one hundred ninety-two dollars and fifty cents ($192.50).

CHARLES F. BASSETT, JOSEPH H. SUTPHIN AND FANNIE D. HULBERT, EXECUTORS, AND NEW YORK LIFE INSURANCE AND TRUST COMPANY, A CORPORATION, TRUSTEE,

v.

STATE OF ILLINOIS.

Opinion filed February 17, 1915.

1. INHERITANCE TAX—*in order to obtain refund claimant must appeal.* Claimants, in order to secure the transfer of certain shares of stock, owned by Henry C. Hulbert, deceased, a resident of New York, paid to the county treasurer of Cook County the amount of the inheritance tax as fixed by the county judge, but did not thereafter pray an appeal from the order of such judge fixing the tax. *Held*, that no recovery could be had.

2. SAME—*must obtain decision in claimant's favor.* In order for a claimant to obtain a refund of an inheritance tax erroneously paid, he must obtain a decision in his favor in some court of competent jurisdiction.

3. SAME—*order fixing tax not subject to collateral attack.* The order fixing an inheritance tax may not be attacked collaterally, as a basis of a refund of a tax erroneously paid.

4. SAME—*section 10 quoted—no appropriation.* Section 10 of the Inheritance Tax law provides, that,

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

Since no appropriation has ever been made to the State Treasurer for the purpose of refunding taxes erroneously paid, it is impossible for him to comply with the law.

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

Robert E. Turney, for Claimants.
P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, for State.

Charles F. Bassett, Joseph H. Sutphin and Fannie B. Hulbert, as executors, and New York Life Insurance and Trust Company, as trustee, all under the will of Henry C. Hulbert, deceased, have presented their claim for a refund of inheritance tax which, as they say, was erroneously paid.

Decedent was a resident of the State of New York, and died on April 24, 1912. Letters testamentary were issued to the above named executors by the surrogate court of Kings County, New York. The trust company was appointed trustee of $1,700,000.00, for purposes as set forth in the 54th paragraph of the will of the decedent.

Included in decedent's estate, were 9,625 shares of stock of the Pullman Company, an Illinois corporation, 400 shares of preferred stock of the National Biscuit Company, a New Jersey corporation, and 300 shares of common stock of said National Biscuit Company.

On October 1, 1912, an inheritance tax appraiser, previously appointed by the county judge of Cook County, Illinois, made a report to the county court, in which he assessed the value of the Pullman Company stock at $1,549,625.00, of the National Biscuit Company preferred at $5,160.00, and of the National Biscuit Company common stock at $4,488.25, and he assessed the net estate of Susan C. H. Sutphin, assessable in Illinois, after deducting exemptions, at $759,636.87, and of Caroline H. Bassett at a like amount. These two parties were daughters of the decedent. The appraiser applied a rate of two per cent, fixing the tax on each share at $15,192.74.

The Attorney General and State Treasurer had refused to consent to the transfer under section 9 of the inheritance tax law of the above described stock certificates, and the executors paid $28,866.21, being the amount of the tax less five per cent, to the county

treasurer of Cook County. This amount was duly remitted by the county treasurer to the State Treasurer.

Claimants did not appeal from the order of the county judge, but on February 26, 1914, they filed a petition in the county court of Cook County, asking that the order of the county judge be vacated and praying for a new appraisal.

On April 15, 1914, this petition was denied, but the county judge in denying same, filed a memorandum opinion stating, that the reason for the denial of the petition was, that the time designated in which the county court may review the errors complained of had passed, but he also stated, that notice had been served by the inheritance tax appraiser of hearing for the purpose of taxation upon the county treasurer of Cook County, the attorney for executors, the executors and two residuary beneficiaries, but no one else had been served. He also stated in said opinion, that the appraiser and county judge did not follow the evidence as to actual distribution of the property, but in error acted without regard to the proof made in the appraisement. The evidence submitted at the appraisement was to the effect, that the executors intended to distribute the Pullman Company stock subject to the 54th article of the will of the decedent, but the appraiser taxed same as though it were taken by the daughters, and the county judge said: "From a careful investigation of the proceedings, there is no question but what the appraiser and the county judge erred in the distribution for taxation of the property, and that an erroneous tax was assessed and that the allegations of the petition distributing said property for taxation and particularizing the same, are true." The judge further said: "There is no question but that a large part of the tax paid in this case was unlawful and erroneous, and that the said executors paid an excess and erroneous tax in the State of Illinois as alleged in the petition." But because of the fact that the statute provides remedy by appeal, the court denied the petition for re-hearing.

Claimants contend, that the Pullman Company stock passed to the trustee under the will as hereinabove stated, and, that it should pay the tax instead of the parties who did pay it, and that the appraiser arbitrarily distributed the stock to two daughters so that the tax would be high. They further claim that the order of the county judge was not submitted to them, and on the theory that the judge had followed the law, paid the tax. They further claim that after the time for appeal had elapsed, they learned of the errors, employed counsel and filed the petition for re-hearing. It is further claimed that the National Biscuit Company stock was not taxable, it appearing that it was taxed on the theory that while this company was a non-resident corporation, it was licensed to do business in Illinois, and had more than ten per cent of its property in this State. It was further shown by claimants that in the memorandum opinion of the county judge filed with the order denying a re-hearing, that the amount erroneously paid was $12,067.00, and that afterwards the executors in making distribution of the Pullman Company stock found it necessary to divert some of the stock so that the erroneous tax actually amounted to $10,268.59.

Claimants contend that under section 10 of the inheritance tax law, it is unnecessary to appeal from the county judge to the county court, and assert that this section does not specify that as a condition precedent, there must be a reversal of the order of the county judge before application shall be made for a refund.

Claimants cite the case of *In re Hoople*, 179 N. Y., 308, 72 N. E., 229, as completely establishing their right to a refund. In that case, it appears that decedent died on June 7, 1905, and an inheritance tax was fixed and paid. The estate consisted partly of United States bonds. It was subsequently held that United States bonds were not taxable, and eight years after the making of the assessment, the executor in that case petitioned the surrogate court to vacate that part of

the order which related to the taxation of United States bonds. The petition was granted and under the New York law the State Comptroller was ordered to refund $660.00. The Comptroller appealed, and finally in the Court of Appeals the order was reversed on the ground that application had been made too late, in that, the time within which such application could be made was limited by statute to five years. The Court also pointed out that a surrogate had power under the statute to reverse an order fixing a transfer tax by directing a refund.

Claimants also point out that our Supreme Court in *In re Ullmann,* 263 Ill., 528, 530, said: " * * * The most that can be said in support of the opposite side is that the language used leaves the legislative intent in some doubt. In that case the doubt would be required to be resolved in favor of appellant, for the tax sought to be collected is a special tax and the law imposing it is required to be construed strongly against the government and in favor of the tax payer."

Claimants also contend, that the proceedings before the county judge were defective, in that, all parties interested were not notified in the appraisement proceedings, and they argue that section 11 of the inheritance tax law makes it a condition precedent to the jurisdiction of the court and the appraiser, that notice be given by mail to all parties known to have or claiming an interest in such property, and claimants assert that parties interested in the Pullman Company stock were all of the beneficiaries under the 54th article of the will, and it is apparent on the face of the record that all were not served, and cite New York cases in support of their contention. Counsel for claimants contend, that an appeal was not necessary under section 10 of the law, but that the mere fact that error is apparent should suffice for this Court to order a refund. On the other hand, the State sets up that the order of the county judge was not set aside but remains in full force and effect, that the petition for rehearing was

dismissed by the county court and no appeal was prosecuted from this order; that provision for refund of inheritance tax by the State Treasurer is found in section 10, but that no appropriation has been made to the State Treasurer for this purpose; that this Court is not a court of review to pass upon the findings of another court; that claimants, not having prosecuted an appeal from the county judge and obtained a decision in their favor, may not obtain an award in this Court; that this tax was paid voluntarily; that the claimants endeavor to secure an award by collateral attack of the order of the county judge; and that this Court has previously held, during the October session of 1912, in support of the contention of the State.

It is provided in section 11 of the inheritance tax law, that an appeal may be taken from the order of the county judge fixing an inheritance tax, to the county court within sixty days of the making of the order, and section 10 of the law is as follows:

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

In the case of *United States Trust Company of New York, Executors, etc.*, v. *State of Illinois*, decided at the October Term, 1912, of this Court, this Court said:

"This Court is asked to review the proceedings in the county court, and the order of the county judge, and hold that the county court has no jurisdiction. Claimant has not followed the plain provisions of the law provided for the reviewing of the order of the county judge by an appeal to the county court. The order of the county judge consequently stands unquestioned, except by this application to this Court, and

this Court is asked to assume the power conferred upon the county court under the statute in question and reverse the order of the county judge. We are of the opinion, that this Court has no such jurisdiction conferred upon it, and that so far as this Court is concerned, the inheritance tax in question is a legal tax and was not erroneously paid, and continues to be a legal tax until such time as an appeal is prosecuted according to the statute in question and the order of the county judge reversed by a court of competent jurisdiction. This Court cannot review the order of the county judge. The statute in question provides for the manner of reviewing the order of the county judge, and it is essential and necessary that any one desiring a refund of inheritance taxes claimed to have been paid erroneously, must first have the inheritance tax declared erroneous by some court of this State in accordance with the inheritance tax law, and inasmuch as the claimant in this case has wholly neglected to take the steps provided by this law, we are compelled to dismiss its claim without a consideration of the merits of the same."

We are not disposed to hold differently now with respect to the statement made by the court in that case. The New York cases cited by counsel for claimants arose under statutes permitting appeals and application for rehearing, and the jurisdiction of this Court is not that of a court of review in any sense. We cannot arrogate unto ourselves in this case the authority which was conferred by statute on the New York Court of Appeals as in the *Hoople case,* and we are not permitted to review the erroneous order of the county judge. We are satisfied that the order was erroneous, and we are further satisfied of the truth of the facts as presented by claimants, and there is no doubt but that the State of Illinois has received from claimants $10,268.59 more than it is actually entitled to receive.

With this statement of the opinion of the Court, it will not be necessary to consider any other of the questions raised, if we were satisfied to reject this claim instead of rejecting same without prejudice. To hold otherwise, it would be necessary for us to so construe the statute that, the application to the State Treasurer alone should be considered, and an appeal would be but surplusage and unnecessary. Effect, however, must be given to all parts of the statute, if possible, and the intent of the legislature it is apparent was, that before a refund can be had of tax erroneously paid on order of the county judge, an appeal must be taken to the county court, the order of the county judge must be changed or modified, and application made to the State Treasurer for the refund based on the final order of court within two years as provided in section 10.

If then, the order of the county judge is a final order, and it is in this case, that order cannot be collaterally attacked in this Court, and it would appear that this proceeding is of that nature.

If this were a case between parties subject to the jurisdiction of a circuit court, and if the claimants had paid the tax under a mistake of fact, they would undoubtedly be entitled to some manner of equitable relief. But it does not appear that the money in this case was paid under a mistake of fact, but on the contrary it clearly appears that it was paid under a mistake of law for which there can be no such relief.

On the other hand, this case is different in its nature than one between parties subject to a circuit court's jurisdiction in that, the sovereign State of Illinois made the law under which it received this tax, and it would not seem entirely just and equitable that it should retain moneys which, if its own laws were properly administered, it would not have received. But this thought would not justify us in any manner in finding the issues for the claimants, but in the rejection of the claim, we feel that we are justified in rejecting

same without prejudice to the rights of claimants, as we are permitted to do by statute, so that the State, by its legislature, may make amends if it so sees fit.

It is the judgment of this Court, that the claim be rejected, but without prejudice to the rights of claimants to present their claim to the legislature or proceed in any other court if they may so see fit.

WELLS-LIDDELL COMPANY
v.
STATE OF ILLINOIS.

Opinion filed March 17, 1915.

1. LICENSE FEES—*failure to do business will not warrant return of.* Claimant, a South Dakota corporation, asks an award on account of a fee paid the Secretary of State of this State for filing an application to do business in this State, stating that it has done no business in this State. *Held*, that claimant is not entitled to a return of the fee so paid.

2. SAME—*retention of by State.* The statutes of this State require the payment of a fee to the Secretary of State before any papers may be filed, and the retention of the fee by the Secretary of State is in no way conditional upon any further steps being taken by the corporation or individuals.

3. SAME—*indivisible.* A fee to incorporate is indivisible.

4. PAYMENT—*voluntary—no recovery.* Money paid voluntarily and not under a mistake of fact may not be recovered.

This is a claim filed by Wells-Liddell Company, a South Dakota corporation, for thirty dollars ($30.00) paid to the Secretary of State, as a fee for filing application of this company for a license to do business in the State of Illinois.

The provision of the statute in reference to the case at bar involves the same principles as in the case of *Wm. McKinley, R. W. Hood and J. R. Ebersole* v. *State*, decided at the October Term of this Court, 1910, wherein, this Court decided that the provision of the law, chapter 53, Hurd's Revised Statute 1909, is clear, that payment of the sum of thirty ($30.00) dollars was a requirement which must be complied with, before the Secretary of State could issue any papers whatever, and that retention of the fee by the Secretary of State is in no way made conditional upon the corporation or individual taking further steps. The law does not make this fee divisible and this Court has no authority to decide this case contrary to the plain provisions of the law.

This money was voluntarily paid to the Secretary of State for the purpose of doing business in this State, and it was not by reason of a mistake of fact, and was not compulsory, and there is no evidence showing that the State has refused or prohibited this claimant from doing business in this State, and under such circumstances we feel claimant is not entitled to a return of this money, either in law or equity. Therefore the claim is rejected.

WALTER WARN
v.
STATE OF ILLINOIS.

Opinion filed March 17, 1915.

1. PARK COMMISSIONERS—*control Sherman Park.* The Board of South Park Commissioners has legal control over Sherman Park.
2. RESPONDEAT SUPERIOR—*doctrine of not applicable to State.* The doctrine of *respondeat superior* is not applicable to the State

John F. Higgins and Gallagher and Messner, for Claimant.

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

Claimant filed a declaration in which he charges that while he and a companion, on July 3, 1911, were in a row boat on the lagoon at Sherman Park, Chicago, a launch controlled by certain persons there employed ran into their boat, as a result of which claimant was injured; that the park was operated by the Board of South Park Commissioners; that the row boat was being rowed by a companion of claimant; that the employees from whom the row boat was rented and those running the launch were employed by the South Park Commissioners; that the accident was due to the negligence of the employees operating the launch; that the launch was not properly equipped with machinery to stop and reverse it; that claimant sustained injuries including a fracture of the skull and injuries to his right arm; that he was in a hospital one week and at home six weeks as a result of the injuries and the claim is for ten thousand dollars.

To this declaration the State has demurred, both generally and specially; the special causes being that the operation of boats for hire by the commissioners is not authorized by law and that the State is not responsible therefor; that the declaration fails to state that the companion of claimant, who was rowing the boat, was in the exercise of ordinary care, and that

the declaration does not preclude contributory negligence on the part of said companion of claimant.

This Court has passed upon the question raised by the first stated cause on special demurrer many times, most recently in the case of *Buszkiewicz, Admr.*, v. *State,* opinion filed this day, which was a case similar in some respects to the one under consideration. In the cited case, claimant was an employee of the Lincoln Park Commissioners, and was injured, as he claimed, through negligence of employees of the Lincoln Park Board. In that case, we quoted the opinion of this Court in *State Bank of Chicago, Admr.*, v. *State,* 1 C. of C. R., 158, on page 164, wherein we said:

"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.* Applying this rule, the South Park Commissioners being merely appointive officers, with certain statutory powers, are mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance 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." Further the Court said: "* * * It has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How, then, can it be now claimed that the State is liable for the acts of the Board of South Park Commissioners?"

It will be noted, that in passing on the point in the last cited case, that the accident in question arose within the jurisdiction of the South Park Commissioners.

We see no reason to change or modify the rule as laid down in the last cited case, and in the *Buszkiewicz case.*

In our view of the case, it will be unnecessary to consider other questions raised.

The demurrer will be sustained.

JAMES B. SMITH

v.

STATE OF ILLINOIS.

Opinion filed March 17, 1915.

1. STATUTORY CONSTRUCTION—*general rule with reference to adopted statutes.* Where an Act adopts another Act by reference, it means the law as then existing, and does not include subsequent amendments, unless there is an express or strongly implied intent to adopt such amendments.

2. SAME—*exception to general rule.* Where, however, the adopting statute makes no reference to any particular Act by its title or otherwise, but refers to the general law regulating the subject, the reference will be regarded as including, not only the law in force at the date of the adopting Act, but also the law in force when action is taken or proceedings are resorted to.

3. SAME—*all words in Act given effect.* It is a rule of statutory construction, that all the words in an Act must be given effect, if possible.

4. WORDS AND PHRASES—*meaning of phrase "now in force."* The words "now in force," which are used in section 14, *supra*, are defined by clause 18, par. 1, chap. 131 [statutes], Hurd's Rev. Stat., 1913, p. 2379, to mean: "The term, 'laws now in force,' and words of similar import, shall mean the laws in force at the time the Act containing the words, shall take effect."

W. O. Potter, and Gillespie & Fitzgerald, for Claimant:

The most important rule of statutory construction is, that the law will be so construed as to carry out the intention of the legislature.

People v. *Harrison*, 191 Ill., 257.

The courts will take into consideration the purpose for which the law was passed, the conditions then prevailing, and will give effect to its true intent, even if necessary to disregard its strict letter.

People v. *Harrison*, 191 Ill., 257; *People* v. *Kipley*, 171 Ill., 44; *People* v. *Chicago*, 152 Ill., 546; *Anderson* v. *Railroad*, 117 Ill., 26.

Absurd consequences in the application of a statute will not be imputed as a legislative intent. Courts are bound to presume that such was not the intention of the legislature, and must adopt a construction which will promote the ends of justice and avoid absurdity.

People v. *Harrison*, 191 Ill., 257; *Wabash, etc. Railroad Co.* v. *Binkert*, 106 Ill., 298; *People* v. *Marshall*, 1 Gilm., 672; *Bryan* v. *Buckmaster*, Breese, 408.

Uniform construction by officers will be given great weight by courts.

Nye v. *Foreman*, 215 Ill., 285; *Cook County* v. *Healy*, 222 Ill., 310; *People* v. *Crossley*, 261 Ill., 78.

Where the adopting statute makes no reference to a particular Act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including not only the law in force at the date of the adopting Act, but also the law in force when the action is taken or the proceedings resorted to.

People v. *Crossley*, 261 Ill., 78; *Culver* v. *People*, 161 Ill., 89; *Lawrence* v. *People*, 188 Ill., 407; *Snell* v. *City of Chicago*, 133 Ill., 413.

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

The word "now" has a settled and well-defined meaning. It signifies at the present time, at a time contemporaneous with something done.

29 Cyc., 1140; *Pike* v. *Kennedy*, 15 Ore., 420, 15 Pac., 637; *Chapman* v. *Holmes' Excrs.*, 10 N. J. L., 20, 26; *King* v. *Miller*, 53 Ore., 53, 97 Pac., 524; *Tillamook City* v. *Tillamook County*, 56 Ore., 112, 115; *Nutt* v. *U. S.*, 26 Ct. Cl., 15, 17; *In re McNabb*, 175 Fed. Rep., 511.

The expressions "now in force" and "now existing" are applicable to the present time, and do not include subsequent acts.

State v. *Smith*, 72 Ind., 549, 550; *Beard* v. *Smith*, 22 Ky. (6 Mon.), 430, 453; *Barrows* v. *Peoples' Gas Light & Coke Co. et al.*, 75 Fed. Rep., 794; *Tillamook City* v. *Tillamook County*, 56 Ore., 112, 115; Hurd's Stats., 1913, chap. 131, par. 1, 18th clause, p. 2379.

Legislative intention manifested by subsequent amendment of Act.

Lawrence v. *People*, 188 Ill., 407, bot. 413, top 414; *U. S.* v. *Freeman*, 3 How., 556.

Claimant was warden of the Southern Illinois Penitentiary at Chester from July 1, 1903, to May 1, 1913.

This penitentiary was created by an Act approved May 24, 1877, in section 14 of which Act, it was provided, that "in order that uniformity may prevail in

the penitentiary system of this State, all laws and regulations now in force, for the government and management of the penitentiary at Joliet, shall hereby, so far as practicable, apply to the government and management of said 'Southern Illinois Penitentiary,'" Revised Statutes 1912, chapter 108, paragraph 69.

The salary of the warden of the penitentiary at Joliet was $2,500.00 per annum until the year 1897, when it was increased to $4,000.00, and on July 1, 1911, it became $5,000.00.

No Act increasing the salary from $2,500.00 per annum specifically applied to the salary of the warden of the Southern Illinois Penitentiary, until the General Assembly in 1913 amended section 14 of the Act hereinabove quoted, so that the same now reads, "in order that uniformity may prevail in the penitentiary system of this State, all laws and regulations now in force or that may hereafter be enacted for the government and management of the penitentiary at Joliet, including the salaries and compensation of the officers and employees thereof, shall be and is hereby declared and construed so far as practicable, to apply to the government and management of said Southern Illinois Penitentiary."

Claimant received salary from July 1, 1911, until his resignation on May 1, 1913, at the rate of $4,000.00 per year, and prior to that time had received salary at the rate of $3,600.00 per year. Appropriations for the Southern Illinois Penitentiary were paid quarterly to the institution by the Auditor, and checks were made out signed by the warden. Mr. Smith made demand of the Commissioners of the Southern Illinois Penitentiary, that he be paid at the rate of $5,000.00 a year, and they referred the matter to the Attorney General, who gave as his opinion, that Mr. Smith was not entitled to such compensation, because of the fact, that the law made provision for such salary at Joliet, holding, too, that the law in force on July 1, 1911, fixing the salary at Joliet did not apply to the Southern Illi-

nois Penitentiary. Counsel for claimant argue, that since the law was amended in 1897, by which the salary of the warden at Joliet was increased from $2,500.00 to $4,000.00 per year, and the fact, that the warden of the Southern Illinois Penitentiary received a like amount, that this is a construction placed by the Commissioners of the Southern Illinois Penitentiary of the legislative intent. From the evidence of claimant, however, it would appear that he received a salary of $3,600.00 per year up to a time about two years prior to the date of his testimony in 1914.

Under the circumstances, we are not prepared to hold with counsel's contention regarding the construction of legislative intent. It is apparent that the warden was paid such salary as the commissioners saw fit to pay him.

The case then resolves itself into an endeavor to ascertain the proper construction of section 14 of the original Act creating the Southern Illinois Penitentiary, and of the amendatory Act, and to place proper construction on the language used.

The case has been very ably argued by counsel on both sides, and very exhaustive references have been made to the cases bearing on the subject. Unless we can clearly ascertain, that it was the legislative intent at the time the Act of 1877 was passed, that all future laws, as well as those then in existence having application to the Illinois State Penitentiary should have like application to the Southern Illinois Penitentiary, of course, there can be no recovery.

The rules with relation to the construction of a statute of this sort, are well discussed in *Culver* v. *People*, 161 Ill., at page 96, where it is said:

"The general rule is, that an Act, which adopts by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by express or strongly implied intent."

The Court then discusses exceptions to the rule and while it states, that one of the exceptions is where "the adopting statute makes no reference to any particular Act by its title or otherwise, but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting Act, but also the law in force when action is taken or proceedings are resorted to." In the case at bar, however, it would appear that while the statute under discussion does not refer to the laws governing the penitentiary at Joliet by title, yet it does refer to them as "laws now in force." Had this statute read "all laws and regulations for the government and management of the penitentiary at Joliet," we have no hesitation in saying that claimant would have been entitled to recover in this case. But, it is a rule of statutory construction, that effect must be given to all words if possible. The words "now in force" were certainly inserted for a purpose, and must have some well defined meaning, which it is our duty to ascertain.

The legislature has defined what these particular words mean by its Act of March 5, 1874, in force July 1, 1874, being chapter 131, clause 18, paragraph 1, Revised Statutes, by the following enactment:

"The term 'laws now in force' and words of similar import shall mean the laws in force at the time the Act containing the words shall take effect."

It will be observed that this Act of the legislature was law at the time the Act of 1877 creating the penitentiary at Chester became a law.

Further discussion of the cases bearing on statutory construction would undoubtedly be most interesting and to a degree illuminating, but this section of the statute last above quoted must be decisive of the point under discussion. Study of the cases cited leads us to the same conclusion as we arrive at by reading of the statute cited, and it is the opinion of this Court, that claimant is not entitled to recover in manner as he claims in his declaration.

The pleadings in the case before us are a declaration and demurrer; evidence has been taken by stipulation. In the present state of the pleadings and for the reasons above assigned, it is the judgment of this Court that the demurrer of the State be sustained.

ROSCOE L. DRENNAN

v.

STATE OF ILLINOIS.

Opinion filed March 17, 1915.

STATUTE OF LIMITATIONS—*claims barred if not filed within two-year period.* Where the cause of action accrued on August 3, 1912, and the claim was not filed with the Auditor until February 16, 1915, the Statute of Limitations is a bar to the claim.

C. B. Taylor, for Claimant.

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

Claimant, a resident of Champaign County, aged twenty-eight years, was a member of Company G, Fourth Infantry, Illinois National Guard, and from July 28 to August 3, 1912, was on duty at Camp Lincoln, Springfield. On August 9, 1912, he was taken ill and on August 12 became completely paralyzed and helpless. His ailment was diagnosed as infantile paralysis. He was confined to his bed until December 1, 1912, and since then has been able to move about only with the aid of crutches or other objects, and with great difficulty.

In the opinion of physicians who have examined him, he is permanently paralyzed and his case is incurable. The physicians who testified do not agree as to the time elapsing between exposure to the germ of this disease and the time of incubation, one saying ten to fourteen days, another that the period of incubation is from eight to ten days from the time of exposure to the time fever sets in and ten to fourteen days to paralysis.

Claimant testified that he sustained no injury while in camp. He received from the State one dollar a day for thirty days, and the medical board allowed him one dollar per day for six months more. The doctors' and nurses' bills and general expenses have been paid by the State.

merely appointive officers, with certain statutory powers, are mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance 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. * * *" Further the Court said: "* * * it has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How then can it be claimed that the State is liable for the acts of the Board of South Park Commissioners?"

In *Johnson* v. *State,* 1 C. of C. R., 208, a case wherein claimant was injured while in the employ of the Board of Park Commissioners of West Chicago, and on page 209 this Court said:

"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. * * * 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."

The above quoted cases are cited with approval in *Fowler, Admr.,* v. *State,* heretofore decided in this Court.

Claimant in this case argues that Lincoln Park Commissioners, in operating a railroad, exceeded the duties imposed by law. If that were the case, then the right of action would appear to be against the commissioners and those running the railroad as individuals. The State is not liable for the acts of its agents acting outside the scope of their authority.

the two dates. It is provided in section 4 of an Act to limit the time for persons to bring claims against the State of Illinois, approved March 1, 1847, same appearing also in chapter 84, paragraph 31 of the Revised Statutes of 1913, that "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." The rule of this Court is as follows: "If it appears on the face of a declaration that the claim is barred by Statute of Limitations, the same may be dismissed."

In this state of the case, claimant is not entitled to recover in this Court. We do not want to bar claimant's right to present his claim to the legislature, having in mind the facts as presented in this record and the serious nature of the disease from which claimant suffers. Were it not for the fact that the claim is barred by the Statute of Limitations, we would undoubtedly award the claimant the sum of eight thousand ($8,000.00) dollars. Under the circumstances, however, the claim is rejected without prejudice to the right of claimant to present his claim to the legislature.

VINCENT BUSZKIEWICZ, ADMINISTRATOR OF THE ESTATE OF KAZIMIER HALAS, DECEASED,

v.

STATE OF ILLINOIS.

Opinion filed March 17, 1915.

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

2. SAME—*does not apply where officers exceed authority.* Neither is the State liable if its officers exceed their authority.

3. PARK COMMISSIONERS—*are State officers.* The West Chicago Park Commissioners is a municipal corporation. (*Backer* v. *West Chicago Park Commissioners*, 66 Ill. App., 507; *Brown* v. *City of Decatur*, 188 Ill. App., 147), and the commissioners are State officers. (*Wilcox* v. *People*, 90 Ill., 186; *West Chicago Park Commissioners* v. *McMullen*, 134 Ill., 170.)

3. WORKMEN'S COMPENSATION ACT—*Act of 1911 did not include State.* The Workmen's Compensation Act of 1911 did not include the State within its terms.

Frank P. Sadler, for Claimant.

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

The declaration in this case charges that the State of Illinois, acting through the Lincoln Park Commissioners of Cook County, was the owner of a railway in Lemont, Cook County, upon which it was engaged on September 15, 1912, in operating a certain engine by its servants; that plaintiff's intestate was in the employ of the State acting through said commissioners; that certain servants of the State, acting through the commissioners, placed a plank along the foot board of the engine so that it extended out on both sides of the track, which plank was to be transported to an excavator used in a rock plant where certain blasting work was being done; that while the decedent was in the exercise of due care and diligence for his own safety and while he was riding on the foot board, the

State, by its servants, carelessly drove and managed the engine so that the plank came in contact with a stone box near the track, by means of which decedent was thrown in front of the wheels of the engine which ran over and killed him.

The declaration avers the heirship and deprivation of support, that the claim has not been assigned nor been presented to any one except the commissioners of Lincoln Park, who requested that it be held in abeyance for consideration by the board to be appointed by Governor Dunne; that the claim was presented to said new board and settlement demanded under the Workmen's Compensation Act in force May 1, 1912, or that a cash sum equivalent to what the petitioner would realize under the terms of said Act should be paid and that the claim was rejected by the Park Commissioners. Claimant demands ten thousand ($10,000.00) dollars as damages.

To this declaration the State has demurred specially and generally, and for special causes of demurrer states, that the doctrine of *respondeat superior* does not apply, and that the State is not liable for the torts of its officers, agents or employees; that claimant is not entitled to recover under the Workmen's Compensation Act of 1911, which did not include the State as an employer; that the statement is uncertain and indefinite and does not state a cause of action; that there is no copy of letters of administration attached to the duplicate copy of the declaration filed.

The last two special causes of demurrer are not argued by the State, nor are they good causes of demurrer. We will consider (1), the question of the applicability of the doctrine of *respondeat superior*, and, that the State is not liable for the torts of its officers, agents or employees; (2) the claim under the Workmen's Compensation Law of 1911.

The Appellate Court of the First District of Illinois in *Backer* v. *West Chicago Park Commissioners*, 66 App., 507, 510, said:

"The West Chicago Park Commissioners is a municipal corporation, having certain limited powers granted to it by the legislature. The 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 essentially political and concern the State at large, although they are to be discharged within the town of West Chicago. * * * We cannot doubt that these Park Commissioners come within the term of officers. *Wilcox* v. *People*, 90 Ill., 186; *West Chicago Park Commissioners* v. *McMullen*, 134 Ill., 170. The parks and boulevards owned and controlled by the Park Board are held for the use of the public generally, as well as for the public in their immediate vicinity. *West Chicago Park Commissioners* v. *The City of Chicago*, 152 Ill., 393."

The Appellate Court in the same case, quoting Dillon on Municipal Corporations, said:

"* * * But if, on the other hand, they [the agents or servants of the municipal corporation], are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government—if they are independent of the corporation as to the tenure of their office, and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or State officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable."

In *State Bank of Chicago, Admr., etc.*, v. *State*, 1 C. of C. R., 158, 164, this Court said:

"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*. Applying this rule, the South Park Commissioners being

merely appointive officers, with certain statutory powers, are mere subdivisions of the government. They are mere assistants to the State in the exercise of its functions; not created at their own instance 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. * * *" Further the Court said: "* * * it has been judicially decided that the Board of South Park Commissioners are not liable in their corporate capacity. How then can it be claimed that the State is liable for the acts of the Board of South Park Commissioners?"

In *Johnson* v. *State,* 1 C. of C. R., 208, a case wherein claimant was injured while in the employ of the Board of Park Commissioners of West Chicago, and on page 209 this Court said:

"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. * * * 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."

The above quoted cases are cited with approval in *Fowler, Admr.,* v. *State,* heretofore decided in this Court.

Claimant in this case argues that Lincoln Park Commissioners, in operating a railroad, exceeded the duties imposed by law. If that were the case, then the right of action would appear to be against the commissioners and those running the railroad as individuals. The State is not liable for the acts of its agents acting outside the scope of their authority.

Counsel for claimant has referred us to the case of *Holmes* v. *State*, 1 C. of C. R., 324. The opinion in the *Holmes case* has not been generally followed by the Court of Claims as an authority and in the later case of *Morrissey* v. *State of Illinois*, decided at the October Term, 1913, the rule as laid down in the *Holmes case* is discussed.

The *Morrissey case* is one practically identical in the facts with the *Holmes case*. In the *Morrissey case* we said:

"An examination of the cases leads us irresistibly to the conclusion, that the test of the capacity in which the State acts, is not what its agents may have been doing, but it is to be determined under what authority or law the agents were acting, and whether or not the State retains sole control of the agency involved. It cannot be said that the State cannot act governmentally along exactly the same lines that a private individual may act. We can readily appreciate that the leasing of privileges to cut ice or power privileges may be, in their nature, private enterprise, yet on the other hand, it cannot be said that the State, in the exercise of governmental function, cannot do these very things. * * * The State, in the discretion of its legislature, may change the official organization of the canal commission at will and the Canal Commissioners and their employees are, in every sense of the word, public servants under the complete control and direction of the State. Whatever of authority is vested in the commission or its employees is either specifically provided for by statute or is necessarily incidental thereto. * * * The *Holmes case* is practically *sui generis* with respect to the holding of this Court in the past, in holding that the State entered into private business enterprise. There are cases wherein the State has assumed responsibility for injuries sustained even when the defense of the exercise of governmental function might have been interposed, but this is done only by statute and the State clearly has the right to do

that. * * * So the State could have enacted that one injured through negligence of the State on the canal should be compensated, but the difficulty confronting the claimant is that there is no statute that so provides, and in the absence of such statute, it is the opinion of this Court that the finding in the *Holmes case* should not be followed."

In our view of the case under consideration, under the rule as laid down in the *Morrissey case*, the demurrer of the State on that point must be sustained.

With reference to the claim under the Workmen's Compensation Law of 1911, the demurrer must likewise be sustained.

The declaration does not really set up a claim under that Act, but counsel on both sides argue on the theory that it does.

The fact that the law of 1913 in the definition of the term "employer" includes the State, does not convince us that in the omission of such definition of the law of 1911, it was intended to include it in that law. If the law were applicable, then claimant is not in the proper forum, because that law provided for the appointment of the third arbitrator by the judge of a court in the county where the injured employee resided, and for appeals to the circuit court or the court that appointed the third arbitrator, of the county where the injury occurred, and in such view of the case, this Court would be without jurisdiction.

We do not believe that the law of 1911 applied to employees of the State, and the very fact that the law of 1913 did, in its definition of employer, include the State, would aid in determining that it was not the intention of the legislature to include the State in the former Act.

Counsel for claimant has referred us to the recently decided case of *Brown* v. *City of Decatur*, 188 Ill. App., 147, with the statement that "as Park Boards are a certain kind of municipal corporation, the Lincoln Park Board is included within the words 'every em-

ployer,' used in section 2 of the Act of 1911." This decision conforms with our view of the case, in that, if the board is a body subject to liabilities imposed by this law, the demurrer, based on the first two special causes assigned, will be sustained and as to the last two will be overruled.

ELLA L. BERNARD

v.

STATE OF ILLINOIS.

Opinion filed March 17, 1915.

CONTRACTS—*when law will imply promise to pay.* In this claim, the State received the benefit of certain materials purchased by claimant while she was employed at the Elgin State Hospital. *Held*, that claimant should be awarded the amount expended by her in purchasing such materials.

Ellis & Western, for Claimant.

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

The declaration in this case alleges that the claimant, Ella L. Bernard, was an employee of the State of Illinois, as superintendent of the fancy work department of the Elgin State Hospital for the insane, situated at Elgin, Illinois; that as a part of her employment it was her duty to purchase for and on behalf of the State of Illinois certain materials for use in her department by patients at the hospital, in making the fancy work.

It was decided between her and the head nurse at the institution, that a certain bed spread be prepared in the department under the management of claimant, for exhibition at a State Charities Conference held at LaSalle; that materials of extra fine quality should be procured to be used in making the bed spread.

After considerable investigation, claimant purchased certain materials for use in the manufacture of the bed spread at the store of Marshall Field and Company, Chicago, and paid therefor out of her own funds the sum of ten dollars and forty-one cents ($10.41). The purchase was made with the knowledge and consent of the chief nurse at the hospital, under whose direction and supervision the claimant was em-

ployed. The materials were used in the making of the bed spread which is the property of the State of Illinois.

After an investigation of the facts in this case, we find that the State of Illinois has received the benefit of the materials purchased by claimant in this case to the value of ten dollars and forty-one cents ($10.41) and we are of the opinion that claimant is entitled to this amount. We, therefore, accordingly award claimant the sum of ten dollars and forty-one cents ($10.41).

A. J. BEBERSTEIN
v.
STATE OF ILLINOIS.

Opinion filed March 17, 1915.

ARMORIES—*Bradford* v. *State ante followed.* This claim is similar to the claim of *Bradford* v. *State, supra,* and the law as there stated applies to this claim.

W. C. Graves, for Claimant.
P. J. Lucey, Attorney General, and Arthur R. Roy, Assistant Attorney General, for State.

The claimant in this case was contemplating building an armory at Pontiac, Illinois, which was to be used by Company F, Third Infantry, Illinois National Guard.

Negotiations for the building of same were taken up with Major Strawn of Pontiac and Adjutant General F. S. Dickson, but the building was not erected as the Adjutant General refused to sign the contract submitted by claimant.

Claimant contends that he was encouraged by the Adjutant General to prepare plans and specifications which, together with other expenses incident thereto, amounted to five hundred twenty-five ($525.00) dollars, and it is for this amount that he seeks an award.

At the present term of this Court an opinion was filed in the claim *of John P. Bradford* v. *State,* and the facts therein are similar to the facts in this case.

In the *Bradford case* we held that the State was not liable and for the reasons set forth in that opinion this claim will also be rejected.

This claim is accordingly rejected.

W. M. ALLEN, ARTHUR W. ALLEN, CHARLES J. ANGELESEA AND HERMAN KLEENE, CO-PARTNERS, DOING BUSINESS AS W. M. ALLEN & CO.,

v.

STATE OF ILLINOIS.

Opinion filed March 17, 1915.

1. MISTAKE OF FACT—*contractor making mistake in estimates.* Where a contractor in making estimates upon work to be performed by him honestly makes mistakes in such estimates, he may have his contract rescinded.

2. WAIVER—*when binding.* Where a waiver is executed, in order that the same may be binding, the party executing the same must have been apprised of his rights at the time of the execution of such waiver.

Weil & Bartley, for Claimants.

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

This claim was filed December 31, 1914, but it was agreed between the attorneys for claimants and the State, that the same should be docketed and heard at the present term of this Court.

In pursuance of certain notices sent out by the Board of Administration of this State, that sealed bids would be received by them for the erection of certain buildings to be erected at the Chicago State Hospital, Dunning, Illinois, claimants wrote to the board and received a copy of the plans and specifications for said buildings.

Having prepared estimates, they filed separate bids for the erection of the several buildings, as follows, to-wit:

"The undersigned bidder hereby proposes to furnish all materials and labor to execute the general work required by the drawings and specifications for the following sum:

The Main Bid shall include the general work required in building the Administration Building, two Receiving Buildings, two cottages $265,500.00

Separate Proposal "A" shall include the general work required in building the Administration Building .....$ 82,756.00

Separate Proposal "B" shall include the general work required in two receiving buildings $108,286.00

Separate Proposal "C" shall include the general work required in building the two cottages .....$ 78,590.00

As it was necessary to accompany each bid with a certified check for three per cent of same, claimant accompanied Separate Proposal "A", above referred to, with certified check in the amount of twenty-six hundred ($2,600.00) dollars; Separate Proposal "B" was accompanied by certified check in the amount of thirty-four hundred ($3,400.00) dollars; and Separate Proposal "C" was accompanied by a certified check in the sum of two thousand five hundred fifty ($2,550.00) dollars. No certified check accompanied the main bid of $265,500.00.

At a meeting of the board held August 18, 1914, all of the bids were opened and it was found that claimant's bids were the lowest of all submitted.

At a later meeting of the board held on the 24th of August, 1914, claimants were awarded the general contracts for all of the five (5) buildings upon their main bid of $265,500.00. After having been notified of the acceptance of their bids, they noticed that their bid was approximately $50,000.00 less than the bids submitted by the other parties. They made an investigation of their various estimates, and in checking over the same found, that they had made mistakes aggregating about $24,000.00.

W. M. Allen, one of the claimants herein, went before the Board of Administration at its office in Spring-

field, and explained that mistakes had been made in the various estimates and that they could not erect the buildings according to the proposals submitted. He also told them he would be willing to forfeit the certified check which accompanied said proposals, but it was arranged that claimants be awarded the contract for the erection of the administration building for $82,756.00, as set out in said Separate Proposal "A". Check accompanying this bid was returned to claimants.

While Mr. Allen was taking up this matter with the board, one of its members prepared an instrument in writing for him to sign, in which he agreed to forfeit the other two checks, amounting to $5,950.00.

Claimants are proceeding with the erection of the administration building, and this claim is filed to secure the refund of $5,950.00, covering the two certified checks that were declared forfeited by the board and afterward turned into the State treasury.

It is contended by claimants, that the State had no right to forfeit the checks in question on account of the mistakes that were made by them in preparing their proposed bids, and they also contend, among other things, that there was no consideration for the waiver that was signed by Mr. Allen.

The State denies that claimants are entitled to the relief sought, principally for the reason that their right to have the checks returned was waived by W. M. Allen when he signed the waiver, and that they are now estopped from claiming anything by reason of their mistakes. The amounts of the different certified checks were in excess of the three per cent required by the board, and the State concedes that claimants are entitled to an award covering this excess, which amounts to $343.72.

Counsel for claimants have cited several authorities showing the rights of a party to rescind their contracts when mistakes have been made similar to those made by claimants.

We do not question the law as announced in these cases, but the question that confronts us is, whether or not the claimants have waived their right to recover on account of the waiver signed by W. M. Allen.

That claimants made mistakes in their estimates upon which their said proposals were based is not questioned, and as a legal proposition they would be entitled to have their contracts rescinded and the checks returned unless estopped by the acts of Mr. Allen. If the waiver signed by Mr. Allen in this connection has any force, it would go to the extent of not only precluding claimants from recovering an amount equal to three per cent of their bids, but it would also preclude them from recovering any excess represented by said checks, as the waiver specifically sets out that the two checks are to be forfeited.

We are of the opinion, that the waiver signed by Mr. Allen was without consideration, and that claimants ought not to be estopped from recovering an award in this case by reason of same.

Our attention is also directed to the fact that the main bid was not accompanied by a certified check and as the Board of Administration accepted this particular bid and rejected the other separate proposals, we do not believe they had any right to declare a forfeiture of the checks accompanying the several separate proposals, when it was found that claimants could not comply with the terms as set out in their main bid. This being true, and for the further reason that we are convinced that claimants did not try to rescind their contracts for any other reason than the mistakes made by them in the preparation of their several estimates, we believe it would be unjust and inequitable to compel them to suffer a loss as would be occasioned by the forfeiture of their two checks amounting to $5,950.00.

It is quite evident that Mr. Allen was not apprised of his rights in this matter at the time he consented to the forfeiture of the two checks in question, and

from a thorough consideration of the facts presented, we are of the opinion that claimants should recover the sum of $5,950.00 as represented by the two checks that were declared forfeited by the Board of Administration.

Claimants are accordingly awarded $5,950.00.

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