REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 9

Containing cases in which Opinions were filed between July 1, 1935
and June 30, 1937, and advisory Opinions furnished
Illinois Emergency Relief Commission

SPRINGFIELD, ILLINOIS
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JUSTICES OF THE COURT OF CLAIMS

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

OTTO KERNER, *Attorney General.*

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

PREFACE

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

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

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT.

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

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

COMPLAINT.

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

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

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

IN THE COURT OF CLAIMS OF THE
STATE OF ILLINOIS,

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

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

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

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

RULE 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action was taken thereon; and, he shall further state whether or not he has received any payment on account of such claim and, if so, the amount so received.

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

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

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

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

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

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

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

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

PLEADINGS.

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

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

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

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

EVIDENCE.

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

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

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

RULE 19. If the claimant fails to file the evidence in his behalf as herein required, the Court may, in its discretion, fix a further time within which the same shall be filed and if not filed within such further time the cause may be dismissed. Upon motion of the Attorney General the Court may, in its discretion, extend the time within which evidence on behalf of the respondent shall be filed.

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

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

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

ABSTRACTS AND BRIEFS.

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

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

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

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

RULE 26. If a claimant shall fail to file either abstracts or briefs within the time prescribed by the rules, the Court may enter a rule upon him to show cause by a day certain why his claim should not be dismissed. Upon the claimant's failure to comply with such rule, the cause may be dismissed or the Court may, in its discretion, either extend the time for filing abstracts or briefs, or pass or continue the cause for the term, or determine the same upon the evidence before it.

RULE 27. If the claimant has filed abstracts and briefs, as herein provided, in apt time, and has otherwise complied with the rules, he shall not be prejudiced by the failure of the respondent to file abstracts or briefs on time, unless the time for the filing of abstracts or briefs by the respondent be extended.

EXTENSION OF TIME.

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

MOTIONS.

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

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

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

ORAL ARGUMENTS.

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

REHEARINGS.

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

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

RECORDS AND CALENDAR.

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

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

ORDER OF THE COURT.

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

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

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

COURT OF CLAIMS LAW

AN ACT *to create the Court of Claims and to prescribe its powers and duties. (Approved June 27, 1917. L. 1917, p. 325.)*

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

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

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

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

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

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

§ 6. The Court of Claims shall have power:

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 14. Repeal.

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

(Nos. 1570-1575-1576-1577, Consolidated—Claims denied.)

ROBERT F. HUNTER, No. 1570, CHARLES A. TOWNSEND, No. 1575, E. M. SORRELLS, No. 1576 AND THOMAS SWEENEY, No. 1577, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 8, 1931.
Rehearing denied, May 12, 1937.

CLAIMANTS, pro se.

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

OFFICERS OF STATE—*Power of Legislature to change status.* Legislature has power of changing status of officers of State to employee.

SAME—*change of salary of.* Salaries of Officers of State cannot be increased or diminished during their term of office.

SALARY—*when claim for will be denied.* When State Officers are paid salaries fixed for such offices and status of such officers is changed by Legislature to employees and such persons continue to perform duties as employees, for salary less than paid as officers, claim for difference between salary fixed for office and that paid as employee will be denied.

Per Curiam:

The above claims are consolidated and the facts in each case are similar. Therefore they can be considered together.

It appears that each claimant was appointed arbitrator for the Illinois Industrial Commission on Nov. 21st, 1927. From the date of their appointment until July 21st, 1929 each claimant received a salary of $5,000.00 per annum. After July 21st, 1929 each claimant received pay at the rate of $4,250.00 per annum until their services as arbitrators were terminated. The claimants contend that they were officers of the State and under the well defined rule their pay could not be altered or changed during their term of office.

The Attorney General comes in and contends that by reason of an amendment approved June 17th, 1929 and in

force July 1st, 1929 to the Civil Administrative Code of 1917 that the status of such arbitrators was changed to employees of the State of Illinois and that they were correctly paid.

This court is of the opinion that the salaries of officers of the State cannot be changed during their term of office or until their successors are appointed and qualified. However it is the further opinion of the court that the Legislature has the power of changing the status of such officers from that of officer to employee which we believe the Legislature intended to do in these cases.

Therefore this court is of the opinion that claimants were paid the proper amount under the law and it is ordered that all of said claims be disallowed.

OPINION ON REHEARING.

All in this court now pending on petition for rehearing. Petition for rehearing denied. For additional grounds see opinion in cases of Max R. Broderic, No. 2162, Samuel J. Simon, No. 2163, Aaron J. Payne, No. 2164, Sellac G. Graham, No. 2167, William H. Cruden, No. 2670 and Ernest Withall, No. 2671.

(No. 2286—Claim denied.)

GROVER EWING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1934.
Rehearing allowed January 10, 1935.
Opinion on rehearing filed September 10, 1935.

O'HARRA, O'HARRA & ROETH, for claimants.

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

WORKMEN'S COMPENSATION ACT—*farm work excepted from provisions of.* **All farm work done by farmers and others engaged in farming, tillage of the soil or stock raising, and all work done which is in its nature a part of farming, and which is done on a farm or country place, is excepted from the provisions of the Workmen's Compensation Act.**

SAME—*licensed veterinarian employed by State Department in testing cattle on farm is doing farm work and if injured while so doing, claim for compensation under will be denied.* **Where claimant, a licensed veterinarian, employed by State Department is injured while making tuberculin tests of cattle on farm, by reason of being knocked down and fallen upon by calf,**

claim for compensation under the Workmen's Compensation Act will be denied, as injured employee was engaged in doing farm work and is not within the provisions of said Act.

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

On the 24th day of March, A. D. 1933 claimant was employed by the Department of Agriculture, Division of Animal Industry, and was working with Dr. L. Campbell, a licensed veterinarian of said Department in testing cattle for tuberculosis. On said date they were working on the farm of Paul Linkemann in Hancock County, and in the course of the work, the claimant was knocked down by a calf and such calf, as well as another calf, fell upon him and as a result thereof the ligaments of his right leg were torn and the muscles wrenched, resulting thereafter in an arthritic condition of the right ankle and foot.

Notice of the accident was given, and claim for compensation made, in accordance with the requirements of the Workmen's Compensation Act, and under the terms and provisions of such Act, the claimant now seeks to recover sixteen weeks' temporary total compensation, and twenty-five weeks' specific loss, to-wit, twenty per cent (20%) of the loss of the use of the right foot and ankle, together with $25.00 paid by him for medical services.

In order to entitle the claimant to an award under the provisions of the Workmen's Compensation Act, it is necessary for him to bring himself within the provisions of such Act, and to prove, among other things, that the respondent, at the time of the accident in question, was engaged in some department of some one or more of the enterprises or businesses which are declared to be extra-hazardous by Section Three (3) of the Workmen's Compensation Act; or to show that the occupation in which he was then engaged was extra-hazardous in fact, and not otherwise excluded from the purview of the Act. No evidence whatsoever was produced by the claimant to meet such requirements.

Furthermore, the proviso contained in Paragraph eight of said Section Three of the Compensation Act is as follows:

"*Provided* nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to anyone in their

employ, or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Cahill's Revised Statutes, 1933, Chap. 48, Par. 202.

A somewhat similar question arose in the case of *Hill* vs. *Ind. Com.*, 346 Ill. 392. In that case the claimant was working for a farmer by the name of Weber who bought a threshing machine and engaged in threshing grain for his neighbors as well as for himself, and afterwards attached a clover hulling device to the separator, and agreed to hull clover for some of his neighbors. Hill assisted in running the threshing machine and operated the separator while hulling clover. While engaged in such work on the farm of a neighbor, Hill was kicked by a horse and sustained injuries for which he claimed compensation. The employer contended that the work in which they were then engaged, being work on a farm, he, as the employer did not automatically come under the Act and that consequently he was not liable to pay compensation. In that case the court, on page 396, said:

"By the usual rule of construction the words 'any work done on a farm or country place' must be limited by the context of the Act to mean work which is in its nature a part of farming. It cannot be said that plaintiff in error, while hulling clover for another for hire, was a farmer engaged in farming, tillage of the soil or stock raising, renting, demising or leasing land for any such purpose on his own behalf, and if this were the extent of the exemption we would be constrained to agree with the contention of defendant in error that the operation here were under the Act. The exemption, however, goes further and applies to any work done on a farm or country place, no matter what kind of work is being done or rendered. Even limiting this language to work which is in its nature farm work, it is apparent that the Legislature intended to exclude from the operation of the Act not only the employer and employee who are engaged in general farming operations for such employer but who are doing any farm work on a farm or country place."

and held that the injury was not compensable.

In the case of *Noverio* vs. *Ind. Com.*, 348 Ill. 157, the employee undertook a patch-tiling job on a farm, and while engaged at his home, which was a considerable distance from the farm in question, in making screens to cover the tile outlet, a piece of metal struck his eye, whereby the vision thereof was totally destroyed.

The employee contended that inasmuch as sharp-edged cutting tools were used by him in the doing of the work, the employer came under the provisions of Paragraph 7½ of Section 3 of the Act, and the employer contended that the

work was within the exception of Paragraph 8 of Section 3 of the Act. In that case the court, on page 139, said:

"Without regard to the question as to whether Corsini's business could be held to involve excavating or the use of sharp-edged cutting tools within the contemplation of the statute, it clearly was in its nature farm work. No work could be more fundamentally a part of farming than drainage to put the soil in shape for cultivation. That it was being done by one not engaged in general farming himself is immaterial. It is true that the portion of the operation in which the injury actually occurred does not appear to have been performed within the physical boundaries of the particular farm for which the tiling was being done, nor is it definitely shown to have been done on soil in the nature of a farm or country place as distinguished from other types of realty. Such, however, is not here a material consideration. The adjournment to Corsini's basement was obviously to facilitate the completion of an integral part of the drainage system that was in process of installation on the farm and the character of the work was in no sense altered thereby."

In that case the court held that the employer and the employee were engaged in work on a farm and that therefore the injury was not compensable.

Under the evidence in the record, and under the law as laid down in the cases cited, there is no liability on the part of the respondent.

Award is therefore denied and the case dismissed.

OPINION ON REHEARING.

Per Curiam:

A rehearing having been allowed on the petition of the claimant, he now contends that he is entitled to an award on the following grounds:

(1) The enterprise in which he was engaged at the time of the accident in question is one in which a "sharp-pointed instrument, namely, a hypodermic needle or syringe" is used, and he thereby automatically comes within the provisions of the Act.

(2) The work in which he was engaged at the time of the accident in question was not in its nature farm work.

We will consider the contentions in the order above set forth.

(1) The provisions of the statute upon which claimant relies to bring himself automatically under the Act is Paragraph 7½ of Section 3 of the Workmen's Compensation Act, which provides that the Compensation Act shall apply auto-

matically and without election to "any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery, except as provided in sub-paragraph 8 of this section."

It will be noted that the paragraph in question refers to "sharp-edged cutting tools" and not to "sharp-pointed instruments" as contended by claimant. It cannot be seriously contended that a hypodermic needle or syringe is a "sharp-edged cutting tool," and consequently claimant has no basis either in law or in fact upon which to base a claim under this paragraph of the statute. Furthermore, said Paragraph 71g, by the terms thereof, has no application to any case which comes within the exception mentioned in sub-paragraph 8, relative to work done on a farm.

(2) This contention was fully considered in the opinion originally filed herein, and our attention has not been called to any matters of fact or law which have caused us to change the views we originally entertained.

Award is therefore denied and the case dismissed.

(No. 2412—Claim denied.)

GEORGE IRA CURRY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 10, 1935.
Rehearing denied October 17, 1935.

BRYAN H. TIVNEN, for claimant.

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

NEGLIGENCE—*Illinois National Guard, State not liable for negligence of Officers and enlisted men of.* The State is not liable to respond in damages for personal injuries occasioned by the negligence of officers or members of the Illinois National Guard.

PERSONAL INJURIES—*negligence of members of Illinois National Guard*—claim on grounds of equity and good conscience. An award for damages for personal injuries alleged to have been sustained by reason of explosion of detonator of tear gas bomb, which officers of Illinois National Guard failed to remove from automobile of claimant which had been rented to company of said guard before returning same to claimant, is not justified under and cannot be sustained on the grounds of equity and good conscience. *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207, adhered to.

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

Claimant filed his complaint herein on June 21st, 1934, and alleges therein in substance, that prior to and on the 29th day of October, A. D. 1933 one Maurice Brunner was top sergeant of Company I, 130th Infantry, Illinois National Guard, which had its headquarters and armory at Salem, and which said Company was on active duty at Harrisburg on account of disorders in the mining region; that said Maurice Brunner was then the owner of a certain Ford automobile which he rented to the Company from October 5th to October 20th, 1933; that said Company as a part of its equipment had certain tear gas bombs consisting of a detonator and a shield or covering forming a chamber for the gas; that the detonator contained the cap or explosive used to explode the bomb; that such bombs and other equipment of the Company were carried and transported in the Ford car of said Maurice Brunner; that said car was returned to said Maurice Brunner by the officers of said Company on October 20th, 1933, being first unloaded at the Armory in Salem and checked in by the officers of said Company; that the officers of said Company carelessly and negligently failed and neglected to remove one of the detonators of said tear gas bombs from said car before returning the same to Maurice Brunner, and on the contrary, carelessly and negligently left said detonator in said car; that said officers well knew and appreciated the dangerous character of said detonator and the fact that said car was used by said Maurice Brunner for family purposes and for the transportation of invited guests; that on the 29th day of October, A. D. 1933, claimant and his wife were passengers in said car as invited guests of said Maurice Brunner; that while riding in said car claimant saw and found the detonator in question, picked it up, and handled and examined the same, having no knowledge or notice of the dangerous or explosive character thereof; that said detonator then and there exploded without any fault or neglect on the part of the claimant while he was examining the same as aforesaid; that by reason thereof claimant's thumb and the index finger of his right hand were blown off, and the second finger of his right hand was so shattered and mangled that it became necessary to amputate the same; that he was other-

wise painfully and permanently injured; that he has been put to considerable expense for necessary medical and hospital care and attention and was rendered unable to perform his business duties;—and asks for an award of $10,000.00 for the damages so sustained by him as aforesaid.

The Attorney General filed a motion to dismiss the case for the reason that the State is not liable for the negligence of the officers and enlisted men in the Illinois National Guard.

Thereafter the claimant amended his complaint by alleging that the tear gas bombs mentioned in the complaint were defective in construction, and by reason of such fact, the detonators became detached therefrom; that said detonators were likewise defective in construction and exploded prematurely by reason of such faulty and defective construction, and that the injuries sustained by the claimant were occasioned by the carelessness or negligence of the officers of said Company as aforesaid and the faulty and defective construction of said bomb and detonator.

Claimant filed suggestions in opposition to the motion to dismiss, and therein admits that there is no legal liability on the part of the respondent under the doctrine of respondeat superior, but maintains that he is entitled to an award under the so-called doctrine of equity and good conscience.

We are aware of the fact that during a certain period in the history of this court, awards were made in cases where the State was not legally liable, and which were sought to be justified on the grounds of what was known as the doctrine of equity and good conscience. However, the court as now constituted, has not seen fit to follow the decisions just referred to, but has followed the earlier decisions of the court to the effect that the provisions of Section 6 of the Court of Claims Act, and particularly Paragraph 4 thereof, which provides that this court shall have power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience, discharge and pay;—does not increase or enlarge the liability of the State, but merely provides a forum wherein claims against the State may be adjudicated.

This question was exhaustively considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, in which the authorities on

the question from the time of the creation of the court down to the date of the hearing, were analyzed and considered. After a consideration of the authorities on the question, we reached the following conclusion:

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

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

The Legislature has not enacted any law making the State liable for the negligence of the officers or enlisted men in the Illinois National Guard, consequently there is no legal liability on the part of the State in this case, and this court has no jurisdiction to enter an award.

It is therefore ordered that an award be denied and the case dismissed.

OPINION ON REHEARING.

Per Curiam:

Claimant filed a petition for rehearing herein and contends that the court has entirely overlooked claimant's amendment to his original complaint alleging in substance that the tear gas bombs or grenades, as well as the detonators in question, were defective in construction and that the injury resulted by reason of such faulty and defective construction.

The amendment was not overlooked in the original opinion, but, on the contrary, is specifically referred to and the substance thereof set forth in such opinion.

The State acts only through its officers and agents, and if there were any liability herein, it would be the result of

some act of negligence on the part of its said officers or agents. In the exercise of its governmental functions, however, the State is not liable for the negligence of its officers or agents in the absence of a statute making it so liable.

All of the questions involved in the case were fully considered by the court on the hearing of the motion to dismiss, and the facts set forth in the complaint as amended, if true, do not constitute sufficient grounds for an award against the State.

Petition for rehearing is therefore denied.

(No. 2077—Claim denied.)

WALFRED S. HALLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1935.
Rehearing denied October 17, 1935.

FREDERICK J. BERTRAM, for claimant.

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

The same question involved herein was discussed fully and decided in the case of *Mack, Administratrix, etc.* vs. *State*, No. 1944, post and the decision in that case is controlling herein.

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

Prior to and on the 1st day of August, 1931, claimant was a Private in the 202nd Coast Artillery, Illinois National Guard, and on the last mentioned date sustained certain personal injuries as the result of a collision between an army truck on which he was riding, and a civilian automobile.

The facts in the case are fully set forth in the opinion of this court in the case of *Jean A. Mack, Administratrix of the estate of Roland E. Mack*, vs. *State*, No. 1944, decided at this (January, 1935) term, to which reference is made therefor.

Claimant contends that his case differs from the Mack case in the following particulars:

1. That claimant and two other soldiers were instructed by Captain McPhail to assist in the loading and unloading of the supplies being sent from Camp Grant to Coon Creek.

2. The findings of the Military Board applied only to the case of Roland E. Mack and had no application to this case.

3. That claimant was one of the men who were told by Captain McPhail that if there was room for them to get aboard the truck and ride, it would be satisfactory to him;—while Private Roland E. Mack was not one of such men.

The contentions of claimant will be considered in the order above set forth:

1. The contention that claimant was instructed by Captain McPhail to assist in the loading and unloading of the supply truck was first made in the supplemental brief and argument filed herein on January 17th, 1935. No such contention was previously made by claimant and there is nothing in the record to sustain it. Counsel for claimant contends that claimant so testified in open court, but apparently such testimony was not reported, as it does not appear in the record. On the other hand, the stipulation of facts filed herein on July 6th, 1933 states (page 5): "The claimant, Walfred S. Haller, *while not a regularly assigned member of the truck detail,* assisted in loading the army truck."

2. It may be conceded that the finding of the Military Board has no application to this case.

3. Claimant contends that he was one of the men who were told by Captain McPhail that if there was room for them to get aboard the truck and ride, it would be satisfactory to him. This may also be conceded.

The sailent facts in this connection are as follows:—

(a) The statement of Captain McPhail was in response to an inquiry by some enlisted men.

(b) The inquiry was made because the men were seeking transportation to Coon Creek to attend a dance.

(c) The statement of Captain McPhail plainly constituted merely a permission and could not be construed as an order.

(d) The permission to go to Coon Creek in the truck was contingent upon "there being room for them to get aboard and ride."

(e) The stipulation of facts (page 6) shows, "The claimant was compelled to take a position on the left front fender, *the body of the truck being filled with provisions and*

other members of the advance detail";—hence there was no room in the truck.

(f) Just prior to and at the time of the accident, claimant was riding in an exposed position on the left front fender of the truck with his feet upon the bumper.

Upon a careful consideration of the case we fail to find any material distinction between this case and the case of Private Roland E. Mack and the conclusions at which we arrived in that case apply with equal force to this case.

Claimant also contends that an award should be made to him on the grounds of equity and good conscience. The right of any claimant to an award on that ground was exhaustively considered by this court in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, in which the court, after a consideration of the authorities on the question from the time of the creation of the court down to the time of such hearing, reached the following conclusion:

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

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

The decision in the Crabtree case has been followed by this court in numerous cases since that time, and we are not disposed to depart from the same.

Award must therefore be denied. Award denied. Case dismissed.

(No. 1944—Claim denied.)

JEAN A. MACK, ADMINISTRATRIX OF THE ETATE OF ROLAND E. MACK, ALSO KNOWN AS RAYMOND E. MACK, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1935.
Rehearing denied October 17, 1935.

RALPH L. NETTLAND and HOWARD S. NETTLAND, for claimant.

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

ILLINOIS NATIONAL GUARD—*injury to member of resulting in death—when claim for compensation under provisions of Military and Naval Code will be denied.* In claim for compensation made under provisions of the Military and Naval Code for compensation for personal injuries sustained by member of Illinois National Guard resulting in death of said member, it must be proven that such injuries were sustained while member was performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, and where it appears from the evidence that at the time that such injuries were sustained, that said member was not so performing his duty, a claim for compensation will be denied.

SAME—*Military and Naval Code—requirements of proof in claim for compensation under, for death of member that injury was sustained while performing his duty.* In order to prove that a member of Illinois National Guard was killed while performing his duty it must be shown that member was in the military service at time injury, resulting in death, was sustained; that there was a casual relation or connection between the act of duty of such member and the injuries sustained; that the death of said member was the proximate result, either mediate or immediate, of the performance of his duty; that the injuries arose out of and in the course of the duties of the member and that the military service was the cause of the injury, and not merely co-incident in time.

SAME—*injury to member—member guilty of act, not connected with Military service, intervening to cause injury, not injured as result of performance of his duty.* Where a member of Illinois National Guard is guilty of any act, not connected with the service, which intervened to cause the accident resulting in the injury, such accident and injury resulting therefrom must be held to be the result of the intervening act of the member and not as the result of the performance of his duty.

SAME—*same—contributory negligence.* Member of Illinois National Guard who voluntarily places himself in a position of danger by riding in an exposed position on the fender of a truck is guilty of contributory negligence and if killed while so doing an award for compensation for said death will be denied.

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

On or about the 15th day of July, 1931 plaintiff's intestate, Roland E. Mack, enlisted as a private in the 202nd Coast Artillery, AA, National Guard, which was to go into camp at Camp Grant, Illinois on or about August 1st, 1931. He was a member of the advance detail which was sent to Camp Grant on July 28th, 1931, to wit, three days before the arrival of the regiment, and was assigned to Battery H. The regiment had arrived at Coon Creek on August 1st, had pitched a bivouac for the night, and intended to break camp early in the morning and proceed to Camp Grant. It was necessary that additional provisions be drawn to the location from Camp Grant for the morning breakfast, and on August 1st, Captain Walter Reichardt ordered a truck to load provisions at Camp Grant, and proceed to Coon Creek in the evening.

Several members of the advance detail stated to Captain Reichardt and Captain Leonard McPhail that they desired to attend a dance at Coon Creek that evening and asked for some means of transportation to make this possible. Captain McPhail told the men that the provision truck would be loaded and sent to Coon Creek about six o'clock P. M. and that if there was room for them to get aboard and ride, it would be satisfactory to him, provided they were in uniform. Claimant's intestate, however, was not one of the men who asked Captain McPhail for transportation to Coon Creek as aforesaid.

Plaintiff's intestate and about ten others of the advance detail helped load the truck at the regimental supply house, with the expectation of obtaining a ride. When the truck left Camp Grant, there were thirteen (13) men on it, in addition to the load of provisions. There was not room for all of the men in the truck, so several of them rode on the fenders and running boards. Plaintiff's intestate was seated on the left front fender of the truck, facing the rear of the truck, with his back to Private Walter S. Heller who was also seated on the left front fender, but was facing the front of the truck, with his feet on the bumper. The truck left Camp Grant about seven o'clock P. M. and proceeded on S. B. I. Route 25. It was without lights, but Sergeant Stone, who was seated at the right of the driver, was holding a large-battery flash light type lamp to be used for lighting purposes when that became necessary. The official weather reports show that the

sun set at 7:05 P. M. that day. After leaving Cherry Valley, and about 7:35 P. M., while the truck was going around what is known as "Cassidy Curve" at a speed of about 25 miles per hour, it collided with a passenger car proceeding in the opposite direction at a speed of about forty or forty-five miles per hour, and as the result thereof, plaintiff's intestate sustained injuries from which he died on August 3d, 1931.

Said Roland E. Mack left him surviving Jean A. Mack, his widow, and Lorraine C. Mack and Richard E. Mack, his minor children, as his only heirs;—all of whom were dependent upon him for their support.

Prior to the time of his enlistment, claimant's intestate was a union carpenter whose income prior to May 1st, 1931 was approximately $4,000.00 a year.

Jean A. Mack was appointed administratrix of the estate of said decedent by the Probate Court of Cook County, and filed her claim herein on July 13th, 1932 and seeks to recover the sum of $10,000.00 as financial help or assistance under the provisions of Paragraph eleven (11) of Article (16) of the Military and Naval Code of this State.

Such administratrix commenced a suit against Richard James Luhmann, the driver of the car which collided with the army truck, and recovered a judgment for $5,000.00, but it appears that such judgment is uncollectible.

A military board of inquiry found that the injuries sustained by Private Roland E. Mack were incurred while in line of duty and not as a result of his personal misconduct. This finding was disapproved by Charles C. Dawes, Colonel Commanding, and by C. E. Black, Adjutant General of Illinois, as to being in line of duty. The report of said Charles C. Dawes, Colonel Commanding, was to the effect that the "death was not incurred in line of duty and was due to the misconduct of Private Mack, who should not have been riding on the fender of the truck."

Claimant bases her right to recover on Section eleven (11) of Article sixteen (16) of the Military and Naval Code of this State which provides in substance that when an enlisted man shall be killed "while performing his duty," his heirs shall have a claim against the State for financial help or assistance, and the Court of Claims shall act upon and adjust the same as the merits of each case may demand.

It therefore devolves upon the claimant to prove that her intestate was killed "while performing his duty" within the meaning of those words as used in said section.

The words "while performing his duty" as used in the Military and Naval Code seem to be more restricted in their meaning than the words "in the line of duty," which latter words have often been considered in cases involving pensions to disabled soldiers.

In 1855 Caleb Cushing, Attorney General of the United States, gave to the Department of the Interior an opinion regarding the meaning of the words "in line of duty," which has been quoted with approval in many cases since that time. In such opinion the Attorney General said in conclusion, "In fine, the phrase 'line of duty' is an apt one to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury or the disease producing disability or death."

In the case of Gillespie's application for a pension, 2 Dec. Dept. Int. Pensions 16, the claim was based upon an injury which claimant received in an altercation with a member of his company, in which the latter struck Gillespie upon the head with a board and injured his skull. The claim was disallowed on the ground that the injury was not received "in line of duty." In disposing of the case it was said, "but the fact that the claimant did not sustain a culpable relation to the cause of his disability does not by reason of the same, affect his title to pension. The question involved in the claim is not whether claimant was to blame for the conduct of his assailant, but whether the blow struck by the latter was a necessary, or even a reasonable incident of line of duty in the service."

In the case of Harding's application for a pension, 2 Dec. Dept. Int. Pen. 232, claimant sustained a partial paralysis of the brain as the result of a saber cut inflicted by a comrade while claimant was asleep in his bunk on a boat, being mistaken for another person. The claim was rejected upon the ground that the injury was not received while "in service and in the line of duty." In that case it was said: "The Department holds in this and all similar cases that the *wound, injury or disease must* be the natural, probable, or proximate result, either mediate or immediate, of the

soldier's military duty, and that the phrase 'line of duty' denotes that an act of duty performed in order to entitle claimant to a pension must have relation of causation, mediate or immediate, to the wounds or injury received or the disease contracted, and which produced the said disability or death. * * * The question is not whether the soldier was in line of duty at the time he received his injury, in the sense that he was not disobeying any military law, rule or regulation, or guilty of any culpable negligence, but rather, what is the quality or condition of the act which produced the injury of which complaint is made? Claimant was not wounded or disabled because he was a soldier."

In the claim of Ammerman for pension, 1 Dec. Dept. Int. Pen. 5, the claim was rejected on the ground that the cause of the disability or death giving title to pension must in some manner pertain to, and have a natural and logical connection with, the military service and to line of duty in said service.

In the case of *Hutchins* vs. *Covert*, 30 Ind. App. 382, 78 N. E. 1061, it was held that a policeman who, while on duty, committed suicide because of insanity, did not lose his life "while in the line of duty," within the meaning of that phrase as used in a statute providing for a pension for members of the family of a policeman, upon his death, "while in the line of his duty, or from natural causes," where it is not shown that the insanity was the result of the performance of any duty.

In *McAuliffe* vs. *Policemen's Pension Fund* (Ky.) 115 S. W. 808, it was held that where a policeman, while at his home, and not on duty, undertook to clean his pistol, and in so doing accidentally killed himself, his widow was not entitled to a pension under a statute providing a pension for the widow or children of any officer, member, or employee of the police department who "shall, while in the performance of his duty, be killed or die as the result of an injury received in the line of his duty."

In *Scott* vs. *Jersey City*, 68 N. J. 629, 54 Atl. 441, it was held that the widow of a fireman killed by falling from a trolley car while on his way home to supper, under leave for that purpose, was not entitled to a pension under a statute providing for the allowance of a pension to the widow of any officer or man permanently employed in the fire department,

who should be fatally injured while in the performance of, or attempting to discharge, his duty. A preceding section of the Act provided for a like pension to a fireman "whose duty requires active service in the extinguishment of fires," and who should become incapacitated for further duty as the result of injury received or sickness contracted in the discharge, or attempt to discharge, such duty. The two sections, read in conjunction, were held clearly to show that what the Legislature intended was that the principle upon which the municipal body should dispense its bounty should be the same under both sections, and that was the recognition of the extra hazard that comes to the members of the department while discharging, or attempting to discharge the duties required in the active service of extinguishing fires.

In *Gummorson* vs. *Toronto Police Benefit Fund*, 11 Ont. L. Rep. 194, it was held that an injury sustained by a policeman while vaulting over a wooden horse in a gymnasium, this being part of a manual exercise prescribed by an inspector in the police force, was received while engaged in the execution of his duty, within the meaning of a rule of a police benefit fund, providing for pensioning policemen who receive injuries in the execution of duty.

In the case of *Meyer* vs. *Dollar SS Line*, 49 Fed. (2nd) 1002, the plaintiff, a seaman, received a leg injury in a good-natured scuffle with a fellow shipmate, and the question arose as to whether the injury occurred "in service of ship." In that case the court said that the phrase "service of ship" as applied to ordinary seamen, is closely analagous to the phrase "line of duty" as applied to soldiers and sailors in the service of the United States; that an injury suffered or a disease contracted by a sailor is considered to have been in "line of duty" unless actually caused by something for which the sailor is responsible, which intervenes between his performance of duty and the injury or disease;—and held that the injury did not occur in "service of ship."

In the case of *The People ex rel Donovan* vs. *Retirement Board*, Etc., 326 Ill. 579, plaintiff's intestate was a member of the Police Department in the City of Chicago and a member of the Department band and octette, and frequently procured music for his organization upon the order of the drill master of the Police Department. He was unable to get

certain music which he desired in Chicago, and his superior officer directed him to send to New York therefor. He dictated a letter to the stenographer, and thereafter walked across the street to deposit the same in a mail box. In crossing the street he was struck by an automobile and suffered injuries from which he died. His widow sought to recover an award of compensation annuity under the provisions of an Act which authorized the payment thereof to the widow of any policeman whose death "shall result from injury incurred in the performance of any act or acts of duty."

In that case the court said, "We are of the opinion that a . . injury occurring in the course of and arising out of the work of a policeman is an injury 'incurred in the performance of any act or acts of duty.' When Donovan was killed he was performing a task assigned to him by his superior officer, and that task was in connection with his duties as a member of the band and octette of the Police Department. * * * An officer assigned to this work in the Department by his superior officer is performing his duty as a member of the Department as much as when he is assigned to walking a beat or serving a writ." The right of the claimant to the compensation annuity was sustained.

Upon consideration of the cases above referred to and other authorities on the subject, we conclude that the words "while performing his duty" require that the claimant, in order to be entitled to an award in this case, show not only that her intestate was in the military service at the time of the accident, but that there was a causal relation or connection between the act of duty of such intestate and the injuries sustained by him; that the death of said soldier was the proximate result, either mediate or immediate, of the performance of his duty; that the injuries arose out of and in the course of the duties of the soldier; that the military service was the cause of the injury, and not merely coincident in time. If the soldier was guilty of any Act not connected with the service, which intervened to cause the accident in question, such accident must be held to be the result of the intervening act of the soldier and not the result of the performance of his duty.

From a consideration of all of the evidence, we find that the claimant has not established a causal relation or connec-

tion between the duty of her intestate and the accident which caused his death; that the death of claimant's intestate was not the proximate result of the performance of his duties; that the independent act of the soldier in riding in an exposed position on the fender of the truck intervened to cause the accident in question, and would have constituted contributory negligence in an action against a private employer.

We conclude, therefore, that the claimant's intestate was not "killed while performing his duty," and that claimant therefore has no claim against the State for financial assistance under the provisions of Paragraph eleven (11) of Article sixteen (16) of the Military and Naval Code.

Case dismissed.

OPINION ON REHEARING.

Per Curiam:

Upon petition for rehearing claimant contends that inasmuch as she recovered a judgment in the Circuit Court of Boone County against Richard James Luhmann, driver of the automobile which collided with the truck, it cannot be said that her decedent was guilty of contributory negligence, for the reason that if he was guilty of contributory negligence, she could not have recovered in such suit.

It does not appear from the record whether the aforementioned case was contested or not, but even if it be conceded that claimant's decedent was free from contributory negligence, that fact alone will not entitle her to an award.

In order to entitle claimant to an award, she must show that the decedent was killed "while performing his duty," within the meaning of these words as used in Section 11, Article 16 of the Military and Naval Code. The proper construction of the words "while performing his duty" was fully considered at the time of the original hearing, and there is nothing in the petition for rehearing which causes us to change the views there expressed.

The petition for rehearing is therefore denied.

(No. 2173—Claimant awarded $442.00.)

EDWARD BROUGHAM, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 13, 1935.
Rehearing granted April 30, 1935.
Opinion on rehearing filed April 30, 1936.

MARTIN K. MILLER, for claimant.

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

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

SAME—*claim for permanent lameness and partial disability of foot—when same will be denied—burden of proof.* The general rule of law that the burden is upon the plaintiff to prove his case by a preponderance or greater weight of the evidence, is applicable to claims under the Workmen's Compensation Act and a claim for partial disability of foot of claimant under Act will be denied where claimant has failed to so prove said claim by a preponderance or greater weight of the evidence.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant filed his claim herein on May 9, 1933 representing that on March 3, 1933 while employed by the State of Illinois as a mason laborer under the Department of Public Welfare; that on that date while in the course of his employment he was riding on a construction elevator from the upper levels of a building then under construction at the State Prison at Joliet (Stateville); that the brake of such elevator failed to hold and the elevator dropped with a crash, resulting in "A fracture of the middle third of the Os Calcis and a fragment being detached from the Navicular bone of the ankle"; that a temporary disability resulted, from which claimant at the time he filed his claim expected to lose about four months work. An award in the sum of One-thousand Dollars, ($1000.00) was requested. A Transcript of the evidence taken in said matter has been filed and counsel for claimant and respondent have both waived the filing of Abstracts, Briefs and Arguments. They have also filed a Stipulation as to what the evidence indicates, but as it is the duty of the court to determine what the facts are as disclosed from the evidence, its decision is based thereon, rather than on the Stipulation.

From the testimony in the record it appears that claimant resided in Joliet, Illinois and was on the 3rd day of March, 1933, and intermittently prior to said time, employed by the Department of Public Welfare as a laborer. His wages were $6.00 per day for five and one-half days a week. On the day in question while employed in the construction of the new hospital at the Joliet Prison, and in the course of his duties, he went up to the third floor after some scaffolding on a construction elevator. One of the inmates was operating the engine—apparently the brake failed to work and the elevator hit the bottom with considerable force, throwing the claimant over backwards. According to his testimony he was carried to the hospital and a Prison Doctor, named Dr. Chmelik made an X-ray examination, then told claimant to go home and put ice on his injured right heel and ankle. Ten days later claimant went to Dr. Chmelik and asked about his fracture or dislocation, and the Doctor informed him there was none. Four weeks later he again called on the Doctor, who took a second X-ray and again told him "everything was all right." Two and one-half weeks later claimant, on advice of counsel, consulted Dr. Arthur Schreffler, at Joliet, Illinois. The report of Dr. Schreffler appears in the record as "Exhibit A" and shows that, "He sustained a fracture of the middle third of the Os Calcis, with no displacement of the fragments." The Doctor, in that same report, dated April 18, 1933, further states "It will be another eight or ten weeks before he will be able to do much work."

After Dr. Schreffler had made the X-ray examination and the above report—Dr. Chmelik, under date of April 21, 1933, made a report of his X-ray examination of March 3, 1933, appearing in the record as "Exhibit B" in which he states "There is a fracture of the Os Calcis in its middle third; there is also a fragment detached apparently from the Navicular bone. Both are in good condition. Healing is proceeding in accordance with the lapsed time. In my opinion Mr. Brougham will be disabled until about May 10, 1933." Under date of January 29, 1934 Dr. Chmelik made a further report stating the nature of the injury to be "Fracture of the Os Calcis in its middle third, fragment detached apparently from the Navicular bone, both are in fair condition. Right Knee: Evidence of Periostitis involving the shaft of the Femur eight inches above the joint. Posterior surface."

Dr. Chmelik further states in said report that "There is a permanent disability"; that "there is considerable atrophy of disuse of the small bones"; and that the case in his opinion was "*properly and adequately treated.*" The report is typewritten. Someone has also written in ink at a different time and with ink of a different color from the ink used in the signature the following "*75% of leg,*" referring doubtless to the per cent of disability.

The statement by Dr. Chmelik that the case was adequately treated is apparently denied by the claimant's testimony as above detailed. Neither does the evidence as a whole satisfactorily prove any partial permanent disability.

The claimant, according to the evidence, was unemployed because of said accident, from March 3, 1933 to July 17, 1933. He has been re-employed in the same occupation and at the same wages from the latter date. The evidence shows that he still suffers some pain in his right leg, especially in going down stairs, and that "his right leg is swollen, to a certain extent more than his left leg." Under general medical experience where there is no displacement of fragments in a break of the Os Calcis or Heel, and the latter is properly mobilized, the foot should heal with no permanent disability. In this case Dr. Schreffler reported that there was no displacement as evidenced by his X-ray examination six weeks after the date of injury.

The record discloses that claimant, at the time of the injury, was the father of three children under the age of sixteen years. Under his wage scale of Thirty Three Dollars ($33.00) per week he would be entitled to a maximum of Eighteen Dollars ($18.00) per week by virtue of the three children under sixteen years of age, such compensation extending over a period of nineteen weeks, or a total of Three Hundred Forty Two Dollars ($342.00). From the record we believe the claimant was justified in availing himself of additional medical care, the cost thereof being stated by claimant to be One Hundred Dollars ($100.00). There is no sufficient showing in the record to justify an allowance for partial permanent disability. An award is therefore made to claimant for temporary total disability for nineteen weeks in the sum of Three Hundred Forty Two Dollars ($342.00); for additional expense incurred One Hundred Dollars ($100.00)—total award Four Hundred Forty Two Dollars, ($442.00).

OPINION ON REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

On February 13, 1935 an award of Three Hundred Forty-two ($342.00) Dollars was allowed claimant for temporary total disability for nineteen (19) weeks on a maximum allowance of Eighteen ($18.00) Dollars per week, and an award for partial permanent disability was denied for lack of sufficient showing in the record to justify same. From the evidence, appearing in the record, the court held that claimant was justified in availing himself of personally selected medical care, and a further award was allowed him therefor in the sum of One Hundred ($100.00) Dollars, making a total award of Four Hundred Forty-two ($442.00) Dollars. A petition for rehearing was filed February 27, 1935. On March 13, 1935 claimant's attorney appeared in person before the court to support orally his petition for rehearing. At that time he requested leave to file an additional medical report and an x-ray picture that had been made prior to the time of the original hearing but not introduced. Allowance was given to introduce these new exhibits, and thereupon the entire record, including the two additional exhibits, were carefully considered on the petition for rehearing. On April 9, 1935 the petition for rehearing was denied and the award of Four Hundred Forty-two ($442.00) Dollars was re-affirmed. Claimant's counsel thereafter contending that he understood he was to have been given an opportunity to take still further testimony, the court in order to remove any question of misunderstanding, vacated the order denying the petition for rehearing and thereupon granted claimant leave to take further evidence. Such additional evidence was filed on May 16, 1935 and the entire record is now before the court for final consideration.

The court has carefully rechecked the record and finds that it did not in its original opinion, as contended by claimant in his petition for rehearing, disregard the stipulation of facts entered into by the parties, but did decline to be governed by the conclusions and suggestions which counsel drew from the facts in evidence; that court did not, contrary to the evidence, assume that the claimant suffered no displacement of fragments as a result of the fracture of the Oscalcis, but based its conclusion as to such fact from all the evidence in the record. Dr. Shreffler in a report dated April 18, 1933 cer-

tified to an examination of plaintiff, and therein stated as follows: "I find that he sustained a fracture of the middle third of the Oscalcis *with no displacement of the fragments.*" Since filing his petition for rehearing, counsel for plaintiff has submitted another report by Dr. Shreffler of an examination of plaintiff made on July 28, 1934, and an examination of that report shows that Dr. Shreffler was, on July 28, 1934, still in accord with the report made by him on April 18th, for in answer to Question 5 as to the location, nature and extent of injury, he states "Fracture through mid-portion of right Oscalcis." In the Sixth (6th) clause of plaintiff's petition for rehearing counsel purports to quote the court as having said "In this case Dr. Shreffler reported that there was no displacement as evidenced by his X-ray examination six weeks after the injury." Counsel mis-states the opinion. The court therein said "After Dr. Shreffler made the X-ray examination and the above report—Dr. Chmelik, under date of April 21, 1933, made a report of his X-ray examination of March 3, 1933, appearing in the record as 'Exhibit B.'" This is a correct statement of the facts in the record and the petition for rehearing confuses the same. In plaintiff's testimony (Page 4) he stated, "He (Dr. Shreffler) gave me a complete examination." Exhibit A is Dr. Shreffler's report of that examination. The next day, April 19, 1933, Dr. Shreffler examined the X-rays. On April 21, 1933 Dr. Chmelik made a report of the examination made by himself on March 3, 1933, which appears in the record as "Exhibit B." The latter report is in direct conflict with what claimant testified Dr. Chmelik had repeatedly told him, to-wit: "That there was no fracture or dislocation." In the supplemental testimony of Dr. Chmelik, filed May 16, 1935, he was asked "So far as the X-ray shows the heel bone is properly healed is it not?" Answer—"yes." Question—"With reference to the Oscalcis —Where is this other bone that was fractured, the Navicular?" Answer—"It was above the Oscalcis (looks at X-ray.) I just can't say. I am not familiar with it." Question—"Was it fractured at the near junction to the heel bone?—Can you tell by looking at the X-ray?" Answer—"Don't know whether it's the nearest part to the heel bone or farther away."

The record as now found, including the supplemental evidence contains some proof of permanent lameness and par-

tial disability of claimant's foot, but the medical evidence taken at different times is so conflicting that the court does not consider itself justified in changing the conclusion heretofore reached. As above stated, an additional award of One Hundred ($100.00) Dollars was originally allowed for medical expense, based upon claimant's testimony that he had not received adequate medical attention from the doctors furnished by respondent and the record as it now stands does not appear to justify a reversal of that award.

The award heretofore allowed is hereby affirmed in favor of claimant in the sum of Four Hundred Forty-two ($442.00) Dollars.

This award being subject to the provisions of an Act entitled, "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 2d, 1935 (Sess. Laws of 1935, p. 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the General Revenue Fund in the name provided for in such Act.

(1799 and 1806, consolidated—Claims denied.)

MARY HARMON, ADMINISTRATRIX OF THE ESTATE OF PATRICK T. HARMON, Deceased, No. 1799 AND MARY HARMON, INDIVIDUALLY, No. 1806, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1935.
Rehearing denied November 12, 1935.

ROY J. EGAN, for claimants.

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

PERSONAL INJURY, SUSTAINED ON PUBLIC HIGHWAY—*when State not liable for.* The State is not liable for personal injuries sustained on public highway alleged to have been caused by negligence of servants or agents of the State in failing to maintain highway in safe condition.

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in safe condition.

NEGLIGENCE—*respondeat superior.* The doctrine of respondeat superior does not apply to a State in the exercise of purely governmental functions.

SAME—*contributory negligence.* If one by using their faculties with ordinary and reasonable care in looking out for danger could have avoided the injury, but negligently fails to do so and thereby contributed to their injury, then no recovery can be had.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Mary Harmon, as administratrix of the estate of Patrick T. Harmon, deceased, and also on behalf of herself individually, filed her declaration in this court on July 11, 1931 and July 16, 1931 respectively. Both cases grow out of the same state of facts and for that reason are consolidated.

It appears that on the 22nd day of July, 1930, she, together with her husband and Dr. E. Thomas Brand, were on their way from Crystal Lake, Illinois to the City of Chicago, Illinois where Patrick T. Harmon was engaged in business. They were riding in a Packard automobile over a highway known as Northwest Highway, located in Main Township, County of Cook, over a concrete road built by the State of Illinois. The deceased, Patrick T. Harmon was driving.

Claimant alleges that it was the duty of the State of Illinois to keep this highway in such a state of repair that it would be safe to travel thereon but neglected its duty in this regard and negligently suffered the same to be and remain in an unsafe condition and as a direct and proximate result thereof and by means whereof, claimant's decedent who was driving the automobile, necessarily and unavoidably drove into holes in the highway which caused the automobile to turn over and capsize, and Patrick T. Harmon was so severely injured that in consequence thereof he died on the day he received the injuries, and damages in the sum of $10,000.00 is asked.

Substantially the same averments are made concerning the cause of the accident in the cause that Mary Harmon filed.

Mary Harmon testified that on the day in question her husband, Patrick T. Harmon, was driving the car, which was a new Packard, about thirty days old; that they had left their home that morning in Crystal Lake, Mr. Harmon driving, Mrs. Harmon sitting to his right and Dr. Brand was sitting in the rear of the car; that Mr. Harmon was driving about thirty-three or thirty-five miles an hour, and that she and Dr. Brand were talking casually. She testified that they seemed to strike a rut in the road; that it was a terrible jolt,

and that is about the only thing she could remember as to what happened. This occurred near Desplaines. Mrs. Harmon was rendered unconscious and "came to at quite a distance from the car in sort of a prairie, and the ambulance was there." Both she and Mr. Harmon were placed upon stretchers and taken to the Desplaines Hospital in Desplaines, Illinois. Mr. Harmon died about three hours after that. From the time of the accident until his death, Mr. Harmon was in sort of a semi-conscious condition. Mrs. Harmon testified that Mr. Harmon promoted athletics in connection with the Chicago Stadium Corporation, and Mrs. Harmon testified that he earned from $24,000.00 to $28,000.00 per year. He left an adopted son twenty-eight years old and a daughter, Patricia Harmon, three years of age. Mrs. Harmon did not remember of seeing any other traffic as they drove east on the fatal morning, and had not noticed any warning signs or red flags of any description. She received a very badly lacerated left hip and thigh, the flesh being torn almost to the bone over an area of eight or nine inches square, according to the testimony of Dr. E. Thomas Brand, who was her attending physician. He attended her from the day of the injury which was the 22nd day of July, 1930 up to the 8th or 9th of July, 1931. His bill for professional services is the sum of $1,183.00, no part of which has been paid. Mrs. Harmon also testified she incurred a bill for medicine in the sum of $483.40. She further testified that it was necessary for her to employ a nurse from the day of the injury until sometime in the following May when she tried to get along without a nurse for a week or two, but suffered a very nervous condition and called the nurse back after a few days time and kept her up until July, 1931, at a salary of $49.00 per week. One Thousand Four Hundred Dollars has been paid on her salary, out of a total of $2,451.00. There was also a charge for nurse's board of $343.00. The total amount of her expenditures was $4,459.00. Mrs. Harmon was only in the hospital a day and a night. The hospital bill, though small, was not paid because she considered it too large.

Mrs. Harmon testified that she did not think her husband lost control of the car after striking the so-called bump. It seemed that he just held on to the steering wheel and the car swerved first to the left and then to the right,—the car swerved back and forth and finally left the pavement. Mrs.

Harmon could not say whether the car travelled in this manner a city block or not, and she could not describe this so-called rut that the car struck which caused the accident. Mrs. Harmon did not suffer any fractures or broken bones because of the accident. She was confined to her bed about thirty days as the result of the accident, and then was in a wheel chair for about thirty days, and after sixty days was unable to stand up longer than five or ten minutes at a time; after that she was able to walk about on crutches. It was about the first of October, 1930 before she was able to walk alone.

Edward J. Geiger, Sporting Editor of the Chicago American also testified that he was not an eye witness to the accident, but went to the scene of the accident after he heard of it and took photographs, which were offered in evidence, he being there within two hours after the accident. Claimant's Exhibit 1 is a picture of the concrete road in question. While it shows that the road is not absolutely level, there is nothing in the picture that would indicate any dangerous condition to the road and this is true of Exhibits 2 and 3.

Dr. Brand, who was also present, testified that he was sitting directly behind Harmon; that just before the accident happened, there was a very rough spot in the highway, and it threw the front wheel off to the right, down on the ground on the side of the road off of the concrete; that he, (meaning Harmon) immediately tried to adjust the car and when he did the car shot back over the pavement and over to the opposite side, and the last that Dr. Brand could remember was the car turning over the third time before he became unconscious. He also testified that he could not see the speedometer, but was of the opinion that the car was going about thirty-five miles per hour and there was no other traffic on the road. He testified that at the place where the accident happened, there was a depression in the road where a piece of the concrete was broken out: that it was about two and a half feet long and about two feet wide. The pictures, however, taken within a couple of hours after the accident show that this had been filled in with concrete, and it appears to be ordinary material used to repair concrete highways.

This court must be both judges of the law and the facts in cases of this kind, and nowhere in the record is there such a description of the concrete rut wherein we could say that by the greater weight of the evidence it appears that the

road was in such a state of repair as to render it unsafe for an automobile to be driven over it at thirty-five miles per hour. The evidence contains no measurements that would throw any light upon the depth of the alleged rut, and from the circumstances surrounding the accident, we cannot convince ourselves that at the time of the accident and immediately prior thereto, the driver was free from contributory negligence. It appears from the testimony of Dr. Brand, that at least a part of the car got off on to the shoulder of the road and then shot across the road and turned over at least three times. Insofar as the record is concerned it was broad daylight and the road was dry and there was nothing to obscure vision, and we do not feel that the averment of the declaration, that the deceased was in the exercise of due care and caution, is borne out by the evidence, and giving this testimony the most favorable consideration to support the view of the claimant, we are unable to say that the deceased has been free from contributory negligence, which he must be before she could recover, and the claim on account of the death of Patrick J. Harmon will be dismissed.

We will now consider the claim of Mrs. Harmon who was riding with her husband.

It is the rule that the negligence of the owner and driver of a vehicle cannot be imputed to a person who is riding with him, in case of a collision between the vehicle and another, and we consider this rule as being the same in the case at bar.

Mrs. Harmon testified in substance that she was not paying attention to the road; that she was engaged in casual conservation with Dr. Brand. She did nothing. If she, by using her faculties with ordinary and reasonable care in looking out for danger, could have avoided the injury, but negligently failed to do so, and thereby contributed to her injury, then she cannot recover.

It is a fair inference from the evidence that the alleged hole in the road was 60 or 75 feet from the point where the deceased's car went off the road and into the field. This depression or hole in the pavement was on the right side of the road for traffic headed in the direction the deceased was travelling and it was about 100 feet diagonally from this depression southeast that the Harmon car left the road and went into the field to the point where it stopped. This ap-

pears from the testimony of Edward J. Geiger, and there is no direct testimony that the Harmon car struck this particular depression.

E. F. Aderman of the State Highway Department investigated on the following day. He found skid marks plainly visible, and made a sketch which is a part of the record, showing the location, direction and length of the skid marks, and the location of the rough pavement. According to his report this car turned over and rolled about eighty feet. There is no evidence of the car skidding sideways until it passed the ditch.

We have gone into the facts in this case at length. There are other reasons why there could not be a recovery in this case.

It is a well-established rule of law that the doctrine of respondeat superior does not apply to a State in the exercise of purely governmental functions. The Supreme Court of the United States in the case of *Seymour* vs. *VanSlyck*, 8 Wend. 403; 422; *United States* vs. *Kirkpatrick*, 9 Wheat. 720, 723, laid down this rule:

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

This court said in *Hinchscliff* vs. *State*, 2 C. C. R. 159, decided in November, 1931:

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

and this rule has been applied and followed by this court in so many instances where claims have arisen as the result of alleged negligence of officers or servants of the State that a citation of cases is hardly necessary. In each instance such claims were denied for the reason that the State cannot be held liable for the negligent acts of its agents.

Without unduly extending this opinion, it is sufficient to say that enough has been set forth to show that there is no liability in this case, and both claims will, therefore, be denied. Cases dismissed.

OPINION ON REHEARING.

Per Curiam:

After a careful consideration of the petition for a rehearing, and the record in the above entitled cases, we find nothing therein that was not carefully considered and passed on by the court in the original opinion in these causes.

The decision heretofore rendered is found to be in accordance with the law and the facts and is hereby affirmed, and the petition for rehearing is denied.

(No. 1995—Claim denied.)

MOWEAQUA HOME TELEPHONE COMPANY, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1935
Rehearing denied March 10, 1937.

S. S. CLAPPER, for claimant.

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

HIGHWAYS—*State has paramount authority over all public highways, and the Legislature may, in the absence of special constitutional restriction regulate or discontinue public highways or invest municipal corporations to do so.* Property damage to underground cables of utility company caused by State Highway Department erecting stop sign—when State not liable for. The State is not liable for damage to underground cables of utility company occasioned by employees of State Highway Department in erecting stop sign to prevent drivers from entering on State road without stopping, as the State is never liable for the negligence of its servants or agents, unless there is a statute making it so and in this State there is no such statute.

SAME—*negligence—when not proven.* Where underground cables of utility company are damaged by reason of State employees erecting stop sign and nothing appears upon surface of ground at place of erection indicating presence of cables underneath and no notice is given to such employees of such presence, such damage cannot be said to have resulted from the wilful or negligent acts of the agent of the State employees.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant alleges that on the 15th day of June, 1932, and before that, it had permission of the Village of Moweaqua, a municipal corporation, to construct and lay in conduits beneath the surface of South Main Street in that Village, for

certain telephone lines and wires in lead cables for the purpose of establishing a telephone system, and on that date, the Department of Public Works and Buildings, which had laid a concrete highway north and south through the Village of Moweaqua on North and South Main Street, known as State Hard Road Route No. 2, by its employees, drove an iron or steel post at the intersection of South Main Street and Wall Street at Moweaqua, for the purpose of erecting thereon a sign commonly called a stop sign to prevent drivers of vehicles from entering on to State Hard Road Route No. 2 without first stopping; that in driving the iron or steel post, the workmen for the State drove it through the lead cable containing the telephone lines of the claimant, thereby destroying the usefulness of the lines until the same could be repaired. There is also an itemized statement of the repairs which were made to the property of the claimant in the sum of $38.25.

A stipulation of facts is contained in the file and the fact that the iron or steel post was driven through the lead conduits of the claimant, is admitted.

The Attorney General while admitting the damage to the wires of the claimant company, states that while the State, in the construction, maintenance and operation of its hard road system is in the exercise of its governmental functions, there is no technical legal liability, and admits that in similar cases this court has heretofore granted awards in such cases.

It does not appear that the employees of the State knew, or should have known of the existence of the conduits beneath the surface of the ground.

The State has paramount authority over all public highways and the Legislature may, in the absence of special constitutional restriction, regulate or discontinue public highways or invest municipal corporations with authority to do so.

People ex rel. Foote v. Clark, 283 Ill., 221.

The Legislature having authorized the building of the State Highway No. 2, it impliedly at least, authorized the erection of a stop sign for the purpose of protecting the general public.

The Village of Moweaqua, apparently, for ought appears in the file, had the right to give its consent to the laying of the conduits in question, but it did not give any greater or superior right than the State had in the same highway, and

nothing having appeared upon the surface that would give the agents of the State any notice of the property of the claimant beneath the surface, it does not seem reasonable to hold that the State must first make an investigation before driving an iron or steel post into the ground for the purpose that it did in this instance.

While it is unfortunate that the property of the claimant was damaged, we cannot see that the cause of the damage was the wilful or negligent act of the agents of the State.

The claim, therefore, will be denied. Case dismissed.

(No. 2344—Claim denied.)

ROLLIN F. STREITMATTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1935.
Rehearing denied September 11, 1935.

CLARENCE W. HEYL and VERLE W. SAFFORD, for claimant.

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

PLEADING—*rule 5 of Court of Claims.* Where it appears from declaration that claimant has failed to observe rule of court requiring statement as to whether or not claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, to whom and what action was taken thereon, claim will be dismissed.

ILLINOIS NATIONAL GUARD—*when claim for injury to member of will be dismissed—Military and Naval Code.* A claim under provisions of Military and Naval Code for injuries sustained by member of Illinois National Guard, while on duty, so as to prevent him from working at his occupation must be first determined through military channels before resorting to Court of Claims and if claimant fails to do so, claim will be dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

In his Declaration filed herein on March 19, 1934 claimant seeks an award of Fifteen Thousand Dollars ($15,000.00) because of alleged permanent loss of earning capacity due to injuries received while in the course of his duties as a member of the National Guard of Illinois.

The Declaration states that he was a member of Company E of the 130th Ill. Infantry; that on the morning of July 31, 1932 he was ordered by his Captain to report at the Armory in the City of Peoria for duty and to take other mem-

bers of the Company to the Rifle Range for practice; that pursuant thereto he drove his mother's automobile to the Armory, received other members of the Company as passengers and drove toward the Rifle Range; that there were several automobiles driven to the Range, being driven about two rods apart on a gravel road; that while driving on a hill, with care and caution for his own safety and the safety of the car, his car collided with other automobiles, due to the negligence of the drivers of the other cars, and as a result thereof he suffered severe injuries to his back and head that will cause him to be a cripple for life. The Declaration further states that prior to the time of the accident he was engaged as a farm hand at Thirty Dollars ($30.00) per month and that due to his injuries he is no longer able to perform such duties.

A record of the evidence and an Abstract thereof have been filed, and plaintiff and respondent have each waived the filing of any Brief or Argument.

Any allowance of this claim would be by virtue of the provisions of the Military and Naval Code, subject to the rules applicable to the hearing of claims by this court.

Section 10, Article XVI of the Military and Naval Code provides as follows:

"Any officer or *enlisted man* of the National Guard or Naval Reserve *who may be wounded or disabled* in any way, *while on duty and lawfully performing the same, so as to prevent his working at his profession, trade, or other occupation from which he gains his living*, shall be entitled to be treated by an officer of the medical department detailed by the surgeon general, and to draw one-half his active service pay, as specified in sections 3 and 4 of this article, for not to exceed thirty days of such disability, on the certificate of the attending medical officer; if still disabled at the end of thirty days, he shall be entitled to draw pay at the same rate for such period as a board of three medical officers, duly convened by order of the Commander-in-Chief, may determine to be right and just, but not to exceed six months, unless approved by the State Court of Claims."

Rule 5(a) of the Rules of the Court of Claims provides:

"Claimant shall state whether or not his claim has been presented to any State Department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom and what action was taken thereon."

Plaintiff's declaration fails to comply with the above rule. There is no statement therein of any effort made by plaintiff to obtain relief, before filing his claim herein.

In the record of evidence (Transcript, p. 20) plaintiff testified that he had been called to Chicago and there appeared before three medical officers. If plaintiff was wounded or disabled while on duty so as to prevent his working at his trade, *Section 10, Art. XVI of the Military and Naval Code* provides for the steps that should be taken in certain cases before the matter is presented to the Court of Claims. It is evident therefrom that such matters should be first determined through military channels before invoking the services of the Court of Claims as a tribunal.

The claim is hereby dismissed, because of failure to show compliance with *Rule 5* above stated.

OPINION ON REHEARING.

After a careful consideration of the petition for rehearing in the above case we find nothing therein that would justify setting aside the Order of Dismissal heretofore entered.

Further attention is called to the fact that the petition was not filed within thirty days from the date the Order Dismissing said claim was filed, as provided in Rule 33 of the Court of Claims.

The order heretofore entered in this case is therefore affirmed and the petition for rehearing denied, without prejudice.

(No. 2489—Claim denied.)

THE AMERICAN SALES BOOK CO., LTD., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.
Rehearing denied September 11, 1935.

GILLESPIE, BURKE & GILLESPIE, for claimant.

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

PRINCIPAL AND AGENT—*authority of agent.* **Where policy of State was to purchase its merchandise from residents of the State and principal, a non-resident, desiring to obtain orders for its merchandise from the State, expressly or impliedly represents or holds out its agent, a resident of the State**

as being actual seller or real party in interest, it will not afterward be heard to complain if its representations and holding out of such agent as the principal are relied and acted upon.

SAME—*authority of agent to receive payment.* Payments made to an agent are good and obligatory upon the principal in all cases where the agent is authorized to receive payment, either by express authority, or from the particular dealings between the parties. The principal is equally bound by authority which he actually gives and by that which by his own acts he appears to give.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a claim for merchandise sold and delivered to the State of Illinois by claimant through its agent, H. C. Harris of Springfield, Illinois. Claimant states that the merchandise for which payment is claimed is set out in the bill of particulars attached and is of the aggregate value of One Thousand Five Hundred Ninety Eight and 25/100 Dollars ($1,598.25) for which sum it asks an award. The twenty-one (21) invoices which constitute and make up the bill of particulars aggregate the sum of Two Thousand Three Hundred Twenty Eight and 18/100 Dollars ($2,328.18.) No satisfactory evidence appears in the testimony of claimant as to which of these twenty-one (21) invoices go to make up the excess over the purported aggregate value of One Thousand Five Hundred Ninety Eight and 25/100 Dollars ($1,598.25), but an examination of the invoices discloses that at least two of them are apparently duplicates of other invoices included in the list. There are five of the invoices appearing in the bill of particulars that do not show any requisition number and the records show a statement by H. C. Harris, the agent of claimant, that the merchandise charged in five of the invoices i. e. that for $220.00 dated March 21, 1933; $83.50, dated April 4, 1933; $41.75, dated March 27, 1933; $20.36, dated August 10, 1932 and $5.12, dated April 14, 1933 making a total of $370.73 were not State orders and were never proper charges against the State of Illinois.

Claimant contends that payments to the amount of its claim herein were erroneously paid by the State to H. C. Harris instead of the voucher being mailed direct to the company and it bases its demand upon the fact that the invoices used by it contained the notations "Please send remittances to The American Sales Book Co., Ltd., Elmira, N. Y." and "Pay no money to Salesman." Their agent, Harris,

testified that he had been an employee of claimant since 1905 and from then until August 15, 1933; that he usually handled the orders obtained by him from the State of Illinois as follows:

"Usually requests were sent to me for quotations by the Division of Printing. Quotations were made by me individually back to the Division of Printing. The orders were then let according to the bid or quotation and sent back to my address or in some instances I was summoned on the telephone to come and get them. These were then reduced to our Springfield form of order blank for factory purposes and sent to the factory; the order being then shipped back to the State *with the invoice and bill of lading being sent to me. I mean the goods were shipped to the State and the invoice sent to me.* We reinvoiced according to the invoice that I had from the factory. In some specific cases the invoice was not given to the State but was made on a local invoice as of Springfield, Illinois. Many invoices were made that way; I could not tell the number. As many as three or four a year. *The purpose of reinvoicing at Springfield was that, it was the State's policy to buy everything they could buy in the State* and this could have been bought in the State. *Therefore, it was better to have it shown as a local proposition than coming from a foreign State.* * * * Sales and shipments to the State were usually paid by warrant. All local invoice warrants were made to me, and all those not reinvoiced locally to the American Sales Book Company and usually cleared through this office. The State would usually mail such invoices to the local office and the local office would remail them. Warrants issued in the name of the American Sales Book Company by the State of Illinois were never cashed by me. Those that had been reinvoiced at Springfield and the warrants that were made payable to me were cashed by me."

He further testified (P. 6 of record) that as a rule the requisition received by him from the Department of Printing was retained by him and not sent to the company; that he usually sent his own form.

It was stipulated between claimant and the State that the item of $753.00 appearing in claimant's statement of account was paid to H. C. Harris by warrant No. 32086 issued on November 16, 1932, and was personally endorsed by him.

That the item of $100.70 was paid to him by warrant No. 69251, dated August 25, 1932 and endorsed by him.

That the items of $23.36—$51.13—$72.01 and $474.25 were included in warrant No. 404858 in the sum of $649.00 paid to H. C. Harris and endorsed by him.

That the item of $63.15 was vouchered to H. C. Harris, voucher No. 1522, $36.00 thereof being paid to him on account of the Peoria State Hospital; that the total amount paid to H. C. Harris was $1,510.45.

In contradiction of the testimony of former Agent Harris, various requisitions or orders purporting to bear the signature of H. L. Williamson, then Supt. of the Division of Printing have been introduced as exhibits.

Claimant also denied through testimony of various office employees that after 1926 Harris was ever authorized by the company to make collections from any of its customers or any of its accounts. This, however, is negatived by examination of the record as a whole; claimant's witness, Totten, testifying that salesmen were in special instances authorized to make collections, and stated that in regard to their bills against the State for the items in question "We kept writing him concerning these items which had not been paid and his replies indicated that he was still working on them." In a letter to D. F. Totten under date of May 31, 1932 Mr. Harris stated "If you would mail me the 1st of each month a statement, not as a whole, but as each invoice, I could follow through—occasionally an invoice will go through the department in thirty to forty-five days; there are other times when they are sixty to ninety days vouchering."

There appears in the evidence a commission statement dated January 1, 1933 received by H. C. Harris and delivered by him to E. T. Rank, present Superintendent of the Division of Printing, wherein he is charged with a number of these sales aggregating with others $1,994.42 or a net charge of $1,695.26, after discounting 15% commission. His total commissions shown there to be due him and unpaid to January 1, 1933 were $2,461.09, from which the amount charged against him of $1,695.26 is deducted and a notation made of "check attached" to balance in the sum of $765.83. With the department letter of September 6th last mentioned (Exhibit 16) appears a statement of what disposition had been made in regard to a number of the items claimed by plaintiff. On the order of February 5, 1932 for $753.00 voucher No. 2076 was issued to H. C. Harris and same appears as one of the items allowed by the company in its commission statement settlement with him above referred to. The same is true of the items under date of April 19, 1932 of $23.75 and $36.90. A voucher was issued to H. C. Harris for the item of July 18, 1932 in the sum of $100.70 and was credited in the commission statement. The same is true as to the items of De-

cember 16, 1932, $23.36—December 19, 1932, $51.13 and December 21, 1932, $72.01. The item of July 22, 1932 for $63.15 was also credited against the account of Harris in the commission statement. According to the Agent Harris the charge of August 10, 1932 for $20.36 was not a State of Illinois charge but was for carbon ordered direct by Harris and was credited against his account in the commission statement. The charge of March 21, 1933 of $220.00 is also testified to as not being a State of Illinois charge, and the invoice bears no requisition number and is not billed to any officer or Department, but merely reads "State of Illinois." Neither does the invoice of $41.75 under date of March 27, 1933 carry any requisition number and neither this nor the invoice of $83.50 dated April 4, 1933 were for State orders, according to Harris. The same is true in regard to the invoice of $5.12 under date of April 14, 1933 and that of $20.36 under date of August 10, 1932.

There is additional testimony in the record of cash advances made to Harris by the company both prior and subsequent to January 1, 1933. Complaint is made of his failure to forward orders which he claimed to have at that time, and upon the possibility of obtaining which, the company advanced further funds to him, but such evidence has no material bearing upon the status of the account prior to January 1, 1933.

Claimant contends in its original and Reply Brief that the burden of proof is on the State to show the agent's authority to receive payment for the principal and that such agency is not presumed but must be proven, and further argues there is no evidence in the record that any of the items enumerated in the stipulation were ever reinvoiced or that warrants were made therefor to H. C. Harris and not to The American Sales Book Co. Ltd. The record discloses that the witness, Harris, testified repeatedly that he never cashed any warrants that were made payable to The American Sales Book Co. Ltd. The witness, Harris, had been employed by claimant for twenty-eight years and testified that he had been delivering a volume of approximately Ten Thousand Dollars ($10,000.00) worth of business a year from the State of Illinois to claimant. They apparently had confidence in him and were also willing to juggle orders through his hands so that they might appear as supplies furnished by an Illinois bidder.

CORRECTION

THIS DOCUMENT

HAS BEEN REPHOTOGRAPHED

TO ASSURE LEGIBILITY

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From a consideration of the entire record and examination of the invoices and in the absence of many requisitions from the exhibits and the commission statement showing settlement of the items therein listed, we conclude that the claimant has no just claim against the State of Illinois.

Counsel for respondent has cited the following authority:

"Payments made to an agent are good and obligatory upon the principal. In all cases where the agent is authorized to receive payment, either by express authority * * *or from the particular dealings between the parties the principal is equally bound by authority which he actually gives, and by that which by his own acts he appears to give."

Smith vs. *Peoria County*, 59 Ill. 412.
Phoenix Ins. Co. vs. *Stocks*, 149 Ill. 319.
James vs. *Conklin & Hill*, 158 Ill. App. 640, 644.

We believe the above exceptions to the general rule apply to the case at bar. Regardless of the notations on the invoices used by claimant it is apparent from the record that in-so-far as the dealings between the Division of Printing of Illinois and claimant that H. C. Harris was the American Sales Book Co. Ltd. and that he clearly was vested with more authority than to merely solicit orders. Payment of the account has been made by the State, and if we give to the commission statement the credit to which it seems to be entitled, settlement has also been made with the claimant. An award is denied and the claim dismissed.

OPINION ON REHEARING.

After a careful consideration of the petition for a rehearing in the above case we find nothing in the petition that was not carefully considered and passed on by the court in its original opinion in this case.

The decision heretofore rendered in this cause is therefore affirmed and the petition for rehearing is denied.

(No. 2503—Claim denied.)

WOLFF COMPANY, A CORPORATION. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 31, 1935.
Rehearing denied October 17, 1935.

WM. JAFFE and WM. S. COLLEN, for claimant.

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

LIMITATIONS—*jurisdiction.* Where it conclusively appears from the pleadings and evidence that claim was not filed within the Statutory limitation of five years, the court is without juridiction to make award and motion to dismiss will be allowed.

MR. JUSTICE YANTIS delivered the opinion of the court:

In its declaration claimant asks for an award of One Thousand Eight Hundred Seventeen and 79/100 Dollars ($1,817.79) but its Bill of Particulars attached shows a total claimed indebtedness of One Thousand Four Hundred Ninety-one and 96/100 Dollars ($1,491.96). Under a stipulation of facts filed herein it appears that plaintiff made a verbal contract on June 17, 1929 with Charles R. Ewing who held a contract with the State of Illinois for furnishing necessary plumbing and sewerage materials in the construction of an Armory at Randolph Street and Lake Michigan in Chicago, Illinois; that pursuant to such verbal contract claimant furnished the materials and supplies listed in its Bill of Particulars in a total sum of One Thousand Four Hundred Ninety-One and 96/100 Dollars ($1,491.96) and that said materials and supplies became a permanent part of the said Armory Building; the first of said supplies being furnished on the 17th day of June, A. D. 1929, and the final delivery on the 29th day of June, A. D. 1929; that no agreed price or time of payment was stipulated but that the said sum of One Thousand Four Hundred Ninety-one and 96/100 Dollars ($1,491.96) was a fair and reasonable value and that the said sum then and there became due and owing to claimant. It further appears from the record that an affidavit of the furnishing of said supplies was made by an authorized agent for claimant from said Ewing and in accordance with the statute in such case made and provided a copy thereof was served upon the then Auditor of Public Accounts, State Treasurer, Director of Finance and Assistant Director of the Department of Purchases and Construction of the State of Illinois, said service being on the 21st day of October, 1929. The stipulation further shows that on November 19, 1929, claimant filed its bill of complaint in the Superior Court of Cook County against Charles R. Ewing; that an order of default was entered against Charles R.

Ewing on February 29, 1930 and said cause was referred to the Master-in-Chancery. On July 15, 1932 said cause was stricken from the docket of said court and was thereafter reinstated and a decree entered on the 1st day of November, 1933, in said cause whereby the sum of One Thousand Four Hundred Ninety-one and 96/100 Dollars ($1,491.96) was found to be due plaintiff for materials delivered to said Charles R. Ewing with the further sum of Three Hundred Eighteen and 28/100 Dollars ($318.28) interest and Seven and 55/100 Dollars ($7.55) stenographer's charges, making a total of One Thousand Eight Hundred Seventeen and 79/100 Dollars ($1,817.79) for which judgment was rendered against said Charles R. Ewing; and said plaintiff being the claimant herein, was thereby given a lien against such portions of money, bonds and warrants appropriated for the construction of said Armory Building, against which no vouchers or other evidence of indebtedness had been issued to Ewing at the time of the service of the notice upon the several State officers as above referred to. The stipulation further recites that neither Charles R. Ewing or anyone in his behalf has been paid any part of the said sum; that subsequent to the decree above stated claimant attempted to effect a settlement of his claim but was advised that the appropriation covering the subject matter had lapsed.

From the foregoing it might appear that claimant was entitled to redress herein, but the stipulation further shows that Charles R. Ewing who held the contract with the State, defaulted under his contract under date of August 7, 1929 being two months prior to the service of Notice of Lien by claimant. No payments were made to Charles R. Ewing or anyone in his behalf but after his default negotiations were had with his bonding company and on September 10, 1929 a new contract with the Murphy Plumbing Company was awarded, therefore no money, bonds or warrants became due to Ewing. Claims and liens were filed against the Murphy Plumbing Company and the work was finally finished by Gormley and Company with final payment made to them on September 1, 1931.

According to the stipulation herein the debt due claimant as a sub-contractor under Ewing, matured when final delivery of supplies was made by claimant on June 29, 1929. Counsel for claimant was notified on December 13, 1933 by the

Office of the Attorney General that the only place it might seek a remedy was in the State Court of Claims. Claimant had approximately six months thereafter during which a claim might have been filed within the statutory limitation period of five years, but the claim was not filed until September 17, 1934. Both as a matter of jurisdiction and on the merits of the claim an award is denied and the claim dismissed.

OPINION ON REHEARING.

Per Curiam:

After a careful consideration of the petition for rehearing filed in the above entitled case we find nothing therein that was not carefully considered by the court in its consideration of the original record herein.

The decision heretofore rendered in this cause is affirmed and the petition for rehearing denied.

(No. 1783—Claim denied.)

JAMES H. BOOK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1935.

FRANK G. THOMPSON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when claim under will be denied.* **Where evidence in claim for compensation for accidental injuries, sustained by State employee arising out of and in the course of his employment while engaged in extra hazardous enterprise shows that State furnished necessary first aid, medical, surgical and hospital services; that no claim is made for temporary total compensation; that there is no serious or permanent disfigurement of the hand, head or face; that there is no specific loss nor claim that the claimant is completely and permanently disabled and that employee is still employed at the same employment and at the same salary, no further award for compensation will be made.**

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

Claimant filed his claim herein on the 30th day of June, A. D. 1931 for the recovery of compensation for personal injuries which he claims to have sustained on the 18th day of

March, 1931, while employed as a keeper in charge of the furniture factory at Stateville Prison. It appears from the stipulation and the evidence in the record that on the last mentioned date claimant was severely beaten, kicked, trampled upon, and abused by some of the inmates at Stateville Prison in the course of a riot which occurred there on said date; that he was taken to the prison hospital and examined by the inmate doctor, and on the next day was examined by the prison physician; that he was also examined by his family physician, and some time thereafter a number of X-ray pictures were taken.

He was laid up for several weeks and thereafter was assigned to work as keeper in charge of the hospital, which is lighter work than he previously performed, but received the same pay as he previously received. So far as the record indicates, he is still employed at the same employment and is receiving the same salary.

On account of the fact that he has continued in the same employment and at the same wages as he previously received, and on account of the fact that all doctor and hospital bills have been paid by the State, no claim is made for temporary total compensation, and no claim is made for medicinal, surgical or hospital services.

Claimant complains that he is still disabled and still suffers pain as the result of injuries sustained at the time of the riot; that he still suffers pain in the left side of the head, the left eye, and the left shoulder, as well as in the left side and spine extending up over the heart; that he has pain about the nose, has sinus trouble; that his breathing has been interfered with; that he has headaches constantly, etc.

Claimant's right to compensation for the injuries so sustained by him, must be determined in accordance with the provisions of the Workmen's Compensation Act of this State. Cahill's Revised Statutes, 1933, Chapter 37, Paragraph 467, Section 6.

The Workmen's Compensation Act provides compensation for injuries not resulting in death, as follows:

1. Necessary first aid, medical, surgical and hospital services.
2. For temporary total incapacity.
3. For serious and permanent disfigurement to the hand, head or face.

4. Partial permanent incapacity.
5. Compensation for specific injuries.
6. Complete disability.

The medical, surgical and hospital services have been furnished by the State; no claim is made for temporary total compensation; there is no serious or permanent disfigurement of the hand, head or face; there is no specific loss and it is not claimed that the claimant is completely and permanently disabled.

His claim for compensation, therefore, is limited to permanent partial disability. Section 8-d of the Compensation Act, which has reference to permanent partial incapacity, is as follows:

"If after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in Paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in Paragraphs (b) and (h) of this section, equal to 50 percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or able to earn in some suitable employment or business after the accident."

Section B referred to in Section 8-D limits the total amount of compensation to the amount which would have been payable as a death benefit, in case the accident had resulted in the death of the injured employee; and Section H limits the period over which compensation may be paid to eight years from the date of the accident.

Inasmuch as the claimant is still working for the same employer and earning the same amount now as he earned prior to the accident, there is no basis upon which a claim for compensation for partial permanent incapacity can be made at this time.

Notwithstanding that fact, it may be possible that claimant has sustained a permanent partial disability for which he will be able to establish a right to compensation at some future time within the time limited by the Compensation Act.

It is therefore ordered that an award be denied at this time, and that the case be continued on the docket for such further proceedings as may be in conformity with the provisions of the Workmen's Compensation Act.

(No. 2218—Claim denied.)

O. L. CAMPBELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1935.

CHIPERFIELD & CHIPERFIELD, for claimant.

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

WORKMEN'S COMPENSATION ACT—*farm work excepted from provisions of.* All farm work and all work done which in its nature a part of farming, and which is done on a farm or country place is excepted from the provisions of the Workmen's Compensation Act.

SAME—*licensed veterinarian employed by State Department in testing cattle on farm is doing farm work and if injured while so doing, claim for compensation will be denied.* Where claimant, a licensed veterinarian, employed by State Department is injured while making tuberculin tests of cattle on farm, by reason of being attacked by animal, claim for compensation under Workmen's Compensation must be denied, as injured employee was engaged in farm work and is not within the provisions of said Act.

Ewing *vs.* State, No. 2286, *ante*, followed.

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

Prior to and on the 4th day of March, A. D. 1933, claimant, Dr. O. L. Campbell, was licensed veterinarian in the employ of the Department of Agriculture, Division of Animal Industry, and was engaged in the testing of cattle for tuberculosis. On the last mentioned date, claimant was working on the farm of John Stoll in Walker Township, Hancock County, and while attempting to tag an animal, showing that it had been tested for tuberculosis, was attacked by the animal and thrown against the fence or corral wall, and sustained injuries to his right hand, arm and shoulder, for which he claims compensation under the terms and provisions of the Workmen's Compensation Act.

Respondent maintains that the work being done by claimant at the time of the accident was in its nature farm work and that the claimant therefore comes within the terms of the proviso contained in Paragraph eight (8) of Section three (3) of the Compensation Act which is as follows:

"*Provided* nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil or stock raising, or to those who rent, demise or lease land for any such purposes, or to anyone in their employ, or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

The question here involved was considered by this court in the case of *Grover Ewing* vs. *State*, No. 2286, decided at the January, 1935 term of this court, in which the facts were practically identical with the facts in this case, and the same contentions were made by claimant and respondent.

In that case the court after fully considering the question, held that the claimant, at the time of the accident in question, was employed in "work done on a farm" within the meaning of those words as used in the aforementioned proviso, and therefore the injuries so sustained by him were not compensable.

We see no reason for departing from the rule laid down in the Ewing case and must therefore deny the claim. Award denied.

(Nos. 2259-2260-2261, consolidated—Claims denied.)

WOOD HAYES, No. 2259, AGNES GARZA, No. 2260, JOHN DENNISON AND BLANCHE DENNISON, No. 2261, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1935.

KANE, SCOTT & LEE and K. C. RONALDS, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when one engaged in work provided by Illinois Emergency Relief Commission not entitled to benefits of.* One whose name appears on relief rolls of Illinois Emergency Relief Commission and who is assigned to and engaged in work provided by said Commission which is under exclusive supervision of officer of Municipal Corporation and not for or under direction or supervision of any State department is not an employee of State, and if injured, no award will be made under provisions of the Workmen's Compensation Act.

PERSONAL INJURY—*one engaged in work provided by Illinois Emergency Relief Commission, State not liable for—status of injured comparable to inmate of State charitable institution.* The Act creating the Illinois Emergency Relief Commission, in its wording, intent and effect was a beneficient and charitable one and the care which the State attempts to bestow thereby upon those in need is comparable to the charitable work which it accords to its citizens in State charitable institutions. There being no legal right on the part of such citizens to an award from the State for injuries suffered while confined in such institutions, the same rule applies in the case at bar.

EMPLOYER AND EMPLOYEE—*evidence insufficient to establish relation of.* The fact that names of persons are carried upon the relief rolls of the Illinois Emergency Relief Commission does not of itself make such persons employees of the State of Illinois.

MR. JUSTICE YANTIS delivered the opinion of the court:

These three claims arose out of the same accident and have been consolidated for the purpose of the hearing. From the complaints it appears that Charles Garza, husband of claimant, Agnes Garza—Hubert Dennison, the son of claimants, John Dennison and Blanche Dennison—and Wood Hayes were working in a gravel pit near Equality, Illinois when a cave-in occurred, killing Charles Garza and Hubert Dennison, and injuring Wood Hayes.

A motion to dismiss these claims was filed by respondent and same was ordered to be considered with the case. The record discloses that Charles Garza, Hubert Dennison and Wood Hayes were residents of Gallatin County and were on the relief rolls of the Illinois Emergency Relief Commission for that county on October 3, 1933. The report of Orval P. Townshend, Civil Works Administrator for Gallatin County, appearing in the record discloses, that the work involved was for the improvement of the village streets of Equality, Illinois; that the men in question were under the direct supervision of Clarence Pemberton, City Marshal of Equality, and were not under any supervision of the State Highway Department. The statement of Mr. Pemberton, City Marshal, corroborates this, his evidence being that he was in charge of some men who were working out their village auto license fees and also some men who were working out their relief orders, among the latter being the men in question; that the latter were working out at the gravel pit, which he had inspected, and about which he found nothing to indicate the danger of a slide or cave-in. A report of the Division of Highways of the State of Illinois under date of April 2, 1934 states that the work being done by these men was not a function of maintenance usually done by the State Highway Department, and that they were not engaged in maintenance work under the supervision of that department at the time of the accident; further, that the men were then working under the supervision of the City Marshal, Clarence Pemberton.

Counsel for claimants contend that the deceased and injured men should be treated as State employees within the meaning of the Workmen's Compensation Act, and that the State of Illinois should therefore enter an award in these claims. The court is of the opinion that the men were not em-

ployees of the State of Illinois within the meaning of the Workmen's Compensation Act and that this court has no authority to make an award in the premises.

Section 2 of the Illinois Emergency Relief Act approved February 6, 1932 provides—

"It shall be the duty of the Commission * * * to provide relief to residents of the State of Illinois who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. * * * For the purpose of carrying out the provisions of the Act the Commission is authorized to make use of and cooperate with counties, townships and other municipal corporations charged by law with the duty of poor relief."

The Act in its wording, intent and effect was a beneficient and charitable one and the care which the State attempts to bestow thereby upon those in need of such aid is comparable to the beneficient and charitable work which the State accords to its unfortunate citizens in the various institutions of the State. There is no legal right on the part of the latter to an award from the State for injuries suffered while confined in such charitable institutions. Unless those whose injuries and death are the basis of the claims herein can be shown to have been employees of the State within the meaning of the Workmen's Compensation Act this court is without authority to enter an award. The record discloses, as above stated, that they were not working on a State project, they were not under the supervision of the State Highway or any other State Department, but as shown by the testimony of the Civil Works Administrator for Gallatin County, the City Marshal of Equality, and the State Highway Department were, in fact, engaged in work for the improvement of the streets of the Village of Equality and were under the direct supervision of the City Marshal of that village. The fact that their names were carried upon the relief rolls of the Illinois Emergency Relief Commission did not in itself make these men employees of the State of Illinois.

The motion to dismiss each of these claims is allowed and the claims are accordingly dismissed.

(No. 2088—Claim denied.)

JAMES LITTLE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1935.

GEORGE E. DODD, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time providing, jurisdictional.* Where the record fails to show that notice of injury was given to State or claim for compensation made, or application filed for same within time provided in Section 24 of the Act, the court is without jurisdiction to proceed with hearing and motion to dismiss must be sustained.

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

Claimant filed his complaint herein on March 13th, 1933 and alleges therein that on September 7th, 1932 he was in the employ of the State of Illinois "under the Illinois Emergency Relief Commission of Springfield, Illinois"; that on said date he was unloading cinders from a State truck on South Cherry Street in the City of West Frankfort, Illinois; that while he was in the act of throwing a large clinker or cinder from such truck, his foot slipped and he fell, thereby sustaining injuries, consisting of a rupture of an old incision in his side, and tearing loose two ligaments leading from the hip to the region of the groin;—for which injuries he claims damages.

The Attorney General has moved to dismiss the case for the reason that the complaint fails to show: (1) That notice of injury was given or claim for compensation made as required by the provisions of the Workmen's Compensation Act; (2) That the respondent was in any way concerned with the cinders in question; (3) That the Illinois Emergency Relief Commission had no power to employ the claimant at or prior to the time of the injury.

It cannot be determined from the complaint whether the claimant bases his right of recovery on the Workmen's Compensation Act, or whether he seeks to recover independently of such Act. However, unless he can recover under such Act, he cannot recover at all. The mere fact that the claimant sustained personal injuries while in the employ of the State, and in the performance of his duties, which is all that the complaint alleges, does not give him a right of action against the State, in the absence of a statute making the State liable therefor.

Paragraph six (6) of Section six (6) of the Court of Claims Law provides that the court shall have jurisdiction,

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

Consequently, if the claimant is entitled to an award in this case, it must be by virtue of the provisions of the Workmen's Compensation Act, and in order to entitle him to an award under such Act, it is incumbent upon him to bring himself within the provisions of the Act.

The making of claim for compensation within the time required by Section twenty-four (24) of the Compensation Act is a condition precedent to the right to recover under such Act. *Crabtree* vs. *State*, 7 C. C. R. 207; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262; *Hailselden* vs. *Ind. Board*, 275 Ill. 114; *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386.

The complaint fails to show that notice of the accident was given or claim for compensation made within the time required by Section 24 of the Compensation Act, and consequently the same is fatally defective in that regard.

It therefore becomes unnecessary to consider the other reasons urged by the Attorney General for the dismissal of the case.

For the reasons hereinbefore set forth, the motion of the Attorney General must be sustained. Under the rules the claimant has thirty (30) days in which to file an amended complaint. Unless an amended complaint showing a right of action against the respondent is filed within thirty (30) days from the date of the entry of this order, final judgment will be entered dismissing the claim.

(No. 2558—Claim denied.)

STANDARD OIL CO. (INDIANA), Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1935.
Rehearing denied December 11, 1935.

BARR & BARR, for claimant.

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

PROPERTY DAMAGE—*construction of public improvement—measure of.* Where private property is not taken for public use, but it is claimed that same has been damaged by reason of construction of public improvement, the proper measure of such damages, if any, is the difference between the fair cash market value of the property just prior to the time of the making of the improvement and its fair cash market value just after completion of the improvement.

SAME—*when award for denied—evidence.* Claimant must prove by a preponderance of the evidence the decrease of the value of his property as the result of the public improvement, or his claim for damages alleged to have been sustained as the result thereof will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks to recover Seven Hundred Forty-three and 30/100 Dollars ($743.30) claimed to have been expended in rebuilding a concrete platform and re-setting the equipment of a filling station, incident to the improvement of a section of S. B. I. No. 4 near Joliet in Will County, Illinois.

A stipulation of facts has been filed herein whereby it appears that claimant was at the time of the alleged damage and is now the owner in fee simple of a certain tract of real estate in Will County, Illinois which is improved with a building, concrete floor and other necessary equipment for the conducting of a retail gasoline station; that some years ago the State of Illinois improved the S. B. I. road known as Route No. 4 upon, along and in front of the premises owned by claimant at the intersection of what is known as Smith Street and Broadway, by constructing thereon a twenty foot concrete roadway, and that the station of claimant was improved to conform with the grade of said Broadway and said Smith Street; that during the months of July and August, 1934 the State of Illinois acting by and through the Department of Public Works and Buildings again improved said road in front of claimant's premises by the widening of said concrete roadway to forty feet, and in so doing reconstructed said roadway and lowered the grade thereof about eighteen inches and the roadway of Smith Street in front of said premises about one foot, as a result of which, access to said gasoline station was destroyed, and in order to make it available for further use as a gas station it became necessary to and the claimant did, in fact, lower the concrete area and its equipment to conform with the new grade, and in so doing necessarily paid out Seven Hundred Forty-three and 30/100

Dollars ($743.30). The stipulation concludes that it is executed for the purpose of avoiding the necessity of taking evidence, and that if conclusions are included therein same are not intended to be binding upon the parties or the court.

It appears from the entire record that while the location of the property in question is stated to be at the intersection of Smith Street and Broadway, the property in fact is not within the corporate limits of any city, but is located near Joliet in Will County, Illinois. It further appears that when the forty foot pavement was laid by the State a strip of approximately ten feet additional concrete slab was laid by the State between the outer edge of the forty foot slab and the concrete area that was later replaced and re-built by claimant. In addition to this the State re-laid a strip of concrete 38′ x 16½′ at the north end of claimant's property and replaced a fifteen inch drain tile in said area. It is apparent that the State went to considerable effort and expense to remove any damage which claimant might have suffered in the accessability of its property by reason of the new construction work at said point, and the record does not sufficiently show the necessity for the work by plaintiff for which reimbursement is now sought, or the damage to plaintiff's property which occasioned same.

While the record discloses that after the State made a very material improvement at the corner in question, plaintiff also expended the sum of Seven Hundred Forty-three and 30/100 Dollars ($743.30), there is no proof in the record as to the decrease in the value of claimant's property from the construction of the new pavement. Because of the failure of the record to preponderate in claimant's favor as to damages being sustained, the claim is hereby dismissed.

OPINION ON REHEARING.

Per Curiam:

The court having re-examined the record in this case and having duly considered the petition for rehearing filed herein finds there is no sufficient matter to authorize a rehearing of said cause and the petition for rehearing is hereby denied.

(No. 2529—Claim denied.)

JOE BONER AND HARRISON BONER, CO-PARTNERS, DOING BUSINESS AS BONER BROTHERS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

B. R. DIAL, for claimant.

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

NEGLIGENCE—*respondeat superior.* The State is not liable for the negligence of its servants or agents unless there is a statute making it so liable and in this State there is no such statute.

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages occasioned by the negligence of its servants or agents in the construction or maintenance of same.

PROPERTY DAMAGE—*complaint asking award for—when will be dismissed.* Where complaint shows that claim is based on negligence of employee of State in maintenance of highway, no cause of action is stated and motion to dismiss will be sustained.

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

Claimants allege in their complaint that they are the owners of a certain Dodge truck; that on February 28th, 1934, about two o'clock P. M., said truck was being driven by their servant and agent in an easterly direction on S. B. I. Route No. 13, near the Village of Crab Orchard in Williamson County, at a speed of about twenty-five miles per hour; that at the same time and place one of the employees of the respondent was operating a certain snow plow owned by the respondent; that as the result of the carelessness and negligence of the employee of the respondent in charge of such snow plow, the same struck and collided with the truck of the claimants, whereby the same was damaged to the extent of $215.45, for which amount claimants ask an award.

The Attorney General has moved to dismiss the case for the reason that there is no liability on the part of the respondent under the facts set forth in the complaint; the State not being liable under the doctrine of respondeat superior.

The same question was presented in the case of *George McGready, et al.* vs. *State*, No. 2604, decided at the present term of this court, and in that case we held that the motion to dismiss should be allowed.

For the reasons set forth in the McGready case, the motion of the Attorney General to dismiss is allowed. Case dismissed.

(No. 2634—Claim denied.)

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

Opinion filed September 11, 1935.

R. W. HARRIS, for claimant.

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

RES ADJUDICATA—*when plea of will be sustained.* Where it appears that matter upon which claim filed has been fully adjudicated in court of general jurisdiction, the Court of Claims will not review the acts and judgment of said court and plea of res adjudicata will be sustained and claim dismissed.

SAME—*claim under rule of equity and good conscience.* Where claim has been fully adjudicated in court of general jurisdiction, resort to Court of Claims under doctrine of equity and good conscience is not justified and claimant, if he feels himself aggrieved is limited to his right of appeal.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Two Thousand Six Hundred Fifty Dollars ($2,650.00) for land owned by him taken and/or damaged in the course of the construction of a State Aid Road in Williamson County, Illinois.

Complaint recites that condemnation proceedings were duly had in the County Court of Williamson County wherein a portion of the lands in question were condemned for the purpose of being used in the construction of said road, for which an allowance of Four Hundred Dollars ($400.00) for damages was made by the jury in said cause; and a further allowance of Three Hundred Dollars ($300.00) being therein by them made for damages to premises adjoining said tract known as Parcel No. 6.

The complaint further recites that a motion by claimant for a new trial was overruled and exception noted, judgment entered and the verdict approved on the 19th day of July, 1934; that pursuant to the orders entered therein the said sum of Seven Hundred Dollars ($700.00) has been paid to Clara A. Riley as administratrix of the estate of Mary A. Isley, deceased, the latter being the holder of a mortgage upon said

premises. Claimant now contends that he was underpaid for the lands taken in said proceeding and for the lands damaged by said construction, and that said lands have been taken and damaged for public use without just compensation.

The Attorney General on behalf of respondent has filed a motion to dismiss the claim for the reason that said cause has heretofore been adjudicated in a court of general jurisdiction.

Claimant, in his reply brief, concedes that the contention of respondent is true as a matter of law, but urges that an award be allowed "under the rule of equity and good conscience."

Complaint is made in the pleadings that the jury in the County Court of Williamson County was prejudiced against claimant because it was represented to them by the States Attorney, in his final argument, that claimant is a foreigner and not naturalized. The trial court was in a position to consider the remarks of counsel and the trial evidence in the case. Plaintiff therein had his right of appeal. We must accord to the decision of the County Court the strength due to the judgment of a tribunal properly appointed by law for the determination of the matter involved.

"The Court of Claims will not take jurisdiction where the claimant has a remedy in law or in equity in courts of general jurisdiction and will not review the acts and conduct of courts of general jurisdiction."

The Michigan Central R. R. Co. et al., vs. State, 7 C. C. R. 133.

The motion to dismiss is allowed and the claim dismissed.

(No. 2414—Claim denied.)

NEIL C. CRAFTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.
Rehearing denied November 12, 1935.

FRANK R. EAGLETON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*failure to make application for compensation within time provided bars award.* Where it appears that no claim for compensation under provisions of Act was filed within time provided for therein, right to award for compensation is barred and claim must be dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein alleges that some time prior to August 23, 1930 claimant was employed in the Division of State Fair, Department of Agriculture, as a teamster; that on that date while lifting a track harrow, he received a double hernia; that as a result of said accident he was unable to work from the date of injury to the date complaint was filed, i. e. June 21, 1934; that respondent had notice of said injury within thirty days thereafter and that demand for compensation was made within six months; further that wages in lieu of compensation were paid from November 15, 1930 to May 14, 1933. An award for an indefinite amount is sought in the petition but in the proof and arguments counsel asks for an allowance of at least Two Thousand Two Hundred Twenty-seven and 50/100 Dollars ($2,227.50.) As above indicated, the complaint fails to allege that notice of injury was given to the employer within fifteen days, but the proof indicates that the State in fact had notice within that time.

The material objection however to further consideration of the claim by this court appears from the fact that an operation was had by claimant in September, 1930 for relief from the hernia complained of, after which he was again given employment by the State as a watchman at a salary varying from Seventy-five Dollars ($75.00) to One Hundred Dollars ($100.00) per month until May 14, 1933 when he was laid off, and at which time he was given vacation pay until May 31, 1933. Claimant testified that a further operation became necessary in the summer of 1934 for the further relief of the double hernia with which he was suffering, but states in his complaint that all doctor and hospital bills have been paid to date and no claim for either of such items is involved herein.

Section 24 of the Workmen's Compensation Act provides as follows:

"In any case unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application will be barred."

As stated by *Angerstein, Section 587* the rule has been clearly defined that where no compensation has been paid the time within which the claim must be filed dates from the injury. When compensation has been paid the time dates from

the actual date of the last payment. This period of one year is a definite limitation and where the application is not filed within that time the claim is absolutely barred.

Claimant and his counsel in some instances speak of the money that was paid to claimant following his injury in 1930 as "wages." At other times they contend such payments were made as "compensation." Regardless of whether the payments are treated as one or the other, the fact remains that his employment ceased on May 14, 1933, with a further vacation allowance to May 31, 1933. As no claim was filed herein until June 21, 1934 the record fails to warrant an award and the claim is therefore denied.

OPINION ON REHEARING.

Per Curiam:

After a careful consideration of the petition for a rehearing, and the record in the above entitled case, we find nothing therein that was not carefully considered and passed on by the court in the original opinion in this cause.

The decision heretofore rendered is found to be in accordance with the law and the facts and is hereby affirmed, and the petition for rehearing is denied.

(No. 2394—Claim denied.)

L. G. ENGLAND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

C. J. AHERN and C. J. AHERN, JR., for claimant.

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

PROPERTY DAMAGE—*personal injury—State not liable for.* While individuals and private corporations are liable for damages caused by the negligence of their employees and agents, the rule does not apply to the State nor to sub-divisions of it created for governmental purposes, the rule of respondeat superior not being applicable.

SAME—*same—claim for on grounds of equity and good conscience.* Before a claimant can have an award against the State he must show he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to some law giving him the right to an award, he cannot invoke the principle of equity to secure the award.

MR. JUSTICE VANTIS delivered the opinion of the court:

Claimant herein seeks to recover damages to his automobile and for injuries to his person, occasioned by a collision between the automobile owned and driven by claimant, and an automobile owned by the State of Illinois, and then and there operated by one Sue Fischer, an employee of the State in the Department of Conservation, it being alleged that such collision was the result of the careless, negligent and wrongful driving of the said State employee, while engaged in the performance of her duties.

The Attorney General has filed a motion to dismiss the claim for the reason that no right to an award is set forth in the complaint.

As suggested by the Attorney General:

"The rule is universal that the State is not liable for the negligence of its agents and employees, unless there is a statute making it so liable and in this State there is no such statute, and unless a claimant can show a legal or equitable liability on the part of the State for damages sustained as a result of the negligence of its employee or agent, the court has no authority to make an award."

Derby vs. *State*, 7 C. C. R. 145.

The position of the court upon claims so made has been repeatedly set forth in decisions to be found in *Volume 8* of the *Court of Claims Reports* and is further stated in *Crabtree* vs. *State*, 7 C. C. R. at Page 219, where it is stated:

"Before a claimant can have an award against the State, he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point out any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one. Equity is not the court's sense of moral right; it is not the power of the court to decide a case according to the high standard of abstract right, regardless of the law. * * *

"To give this statute the construction contended for by claimant would result in giving this court power to hold the State liable for the misfeasance and malfeasance of all its officers, the torts of all its servants and agents, and all damages caused by the wrongful exercise of their powers by such officers and agents. We do not believe the Legislature intended any such radical and far-reaching change in the law when it enacted the statute creating this court."

No award could properly be made by the court under the statements contained in the complaint, and the motion by the Attorney General to dismiss is therefore allowed and the claim dismissed.

(No. 2655—Claim denied.)

M. I. LEVITON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

JACOB GOODMAN, for claimant.

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

NEGLIGENCE—*member of Illinois National Guard—State is not liable for.* The State is not liable to respond in damages for damages to property alleged to have been occasioned by the negligence of members of the Illinois National Guard, as in organizing training and military camps the State is exercising a governmental function and acting in its sovereign capacity.

SAME—*same—respondeat.* The doctrine of respondeat superior is not applicable to the State.

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

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover Three Hundred Seventy-two and 30/100 Dollars ($372.30), alleged to be the amount of damages to a Buick sedan as the result of an automobile collision on November 14, 1934. Claim was filed April 16, 1935 and it is alleged that on the day in question claimant was driving his automobile in a westerly direction on Diversey Parkway in Chicago; that one Elwing Carlson, a first-class Private in the 33rd Signal Company, Illinois National Guard, was then and there driving a State owned Chevrolet truck in a westerly direction on said highway and was driving at a speed of approximately fifteen (15) miles per hour; that claimant attempted to pass the truck but that the driver of the latter negligently, recklessly and carelessly and without giving a warning signal of any kind to indicate an intention of turning, suddenly swung and drove the truck toward the left thereby striking claimant's automobile in the center of the right rear fender; that claimant's automobile was thereby caused to collide with the curb and extensive damages resulted to the car, as set out in the bill of particulars attached to the complaint, whereby claimant was caused to expend the amount of Three Hundred Seventy-two and 30/100 Dollars ($372.30) in repairs.

Claimant recites that claim was presented to the Hon. Carlos Black, Adjutant General, and the latter denied liability, whereupon claim was filed herein.

A motion to dismiss the claim has been filed by the Attorney General on behalf of respondent for the reason that the damage, if any, is alleged to have been by reason of the negligence of the servant or agent of respondent, for which the State cannot legally be asked to respond for the reason that the State is not liable under the doctrine of *respondeat superior* for the negligence or torts of its servants.

As suggested by the Attorney General:

"The rule is universal that the State is not liable for the negligence of its agents and employees, unless there is a statute making it so liable and in this State there is no such statute, and unless a claimant can show a legal or equitable liability on the part of the State for damages sustained as a result of the negligence of its employee or agent, the court has no authority to make an award."

Derby vs. *State*, 7 C. C. R. 145.

Counsel for claimant in his brief upon the motion to dismiss contends that an award should be made regardless of legal liability, *on the grounds of social justice and equity.*

The position of the court upon claims so made has been repeatedly set forth in decisions to be found in Volume 8 of the Court of Claims Reports and is further stated in *Crabtree* vs. *State*, 7 C. C. R. at Page 219, where it is stated:

"Before a claimant can have an award against the State, he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point out any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one. Equity is not the court's sense of moral right; it is not the power of the court to decide a case according to the high standard of abstract right, regardless of the law. * * *

"To give this statute the construction contended for by claimant would result in giving this court power to hold the State liable for the misfeasance and malfeasance of all its officers, the torts of all its servants and agents, and all damages caused by the wrongful exercise of their powers by such officers and agents. We do not believe the Legislature intended any such radical and far-reaching change in the law when it enacted the statute creating this court."

No award could properly be made by the court under the statements contained in the complaint, and the motion by the Attorney General to dismiss is therefore allowed and the claim dismissed.

(No. 2604—Claim denied.)

GEORGE McGREADY AND JOHN DELUISE, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

ALOIS S. KNAPP, for claimant.

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

NEGLIGENCE—*respondeat superior.* The State is not liable for the negligence of its servants or agents, unless there is a statute making it so liable and in this State there is no such statute.

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages occasioned by the negligence of its servants or agents in the construction or maintenance of same.

PERSONAL INJURY—*property damage—negligence of State employee—remedy for.* Where complaint alleges that damages were sustained as the result of the negligence of an employee of the State he has his remedy against said employee in courts of general jurisdiction.

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

The complaint herein alleges that on December 23d, 1934, about six o'clock A. M., claimants were traveling in the automobile of the claimant, George McGready, in a westerly direction on U. S. Highway No. 20, between the cities of Chicago and Elgin; that it was dark and the road was icy and slippery; that one of the highway trucks of the respondent was standing on said highway near the foot of a hill; that as claimants drove over such hill they could not see the aforementioned truck; that no light, lantern or flare was placed on or about such truck; that although claimants were in the exercise of all due care and caution, they could not prevent the car in which they were riding from running, skidding and sliding into the truck of the respondent; that as the result of such collision, the automobile of the claimant McGready was damaged and the claimant John DeLuise sustained personal injuries; for which compensation is sought in this proceeding.

Claimants base their right of action on the negligence of the employees of the State Highway Department in charge of such truck.

The Attorney General has filed a motion to dismiss on the ground that the doctrine of respondeat superior has no application to the State under the facts alleged in the complaint.

In the maintenance of its durable hard-surfaced roads, the State of Illinois is engaged in a governmental function. *Elsie Baumgart* vs. *State*, decided at the November Term, 1934, of this court; *Goldie Ryan* vs. *State*, decided at the January Term, 1935 of this court; *Bucholz* vs. *State*, 7 C. C. R. 241; *Braun* vs. *State*, 6 C. C. R. 104; *Chambler* vs. *State*, 6 C. C. R. 138.

In the exercise of its governmental functions, there is no liability on the part of the State for the negligence of its servants and agents, in the absence of a statute making it so liable. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; 25 R. C. L., p. 407, Sec. 43.

There is no statute in this State making the respondent liable under the facts alleged in the complaint, and the motion of the Attorney General must therefore be sustained. The liability, if any there be, rests upon the employee in charge of the truck in question, and not upon the State.

The motion to dismiss will be allowed. Case dismissed.

(No. 2640—Claim denied.)

FRANK J. PENICK AND NEVA D. PENICK, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1937.

PAUL G. WEISENHORN, for claimant.

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

The facts herein are practically identical with those in the case of *Royal* vs. *State*, No. 2597, post and the decision of the court in said case is controlling herein.

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

Claimants filed their complaint herein on March 22d, 1935, and allege therein that on the 4th day of November, A. D. 1934, at six o'clock P. M., the claimant Frank J. Penick was driving the automobile of the claimant Neva L. Penick in a southeasterly direction on S. B. I. Route No. 36 between Quincy and Payson in this State; that at the same time and place one of the servants and agents of the respondent who was in charge of a certain highway truck of the respondent, permitted such truck to be stopped on such highway, headed in a southeasterly direction, and also permitted the same to stand on said highway in such position that there was not room for two vehicles to pass upon said road, in violation of the statutes of this State; that the servant or agent of the State having charge of such truck carelessly and negligently failed to place any warning signals on said highway, and that as a result thereof the automobile of the claimant Neva L. Penick was caused to and did collide with said motor truck, and thereby the said automobile was damaged and the claimant Frank J. Penick was seriously and permanently injured.

The Attorney General has filed a motion to dismiss for the reason that there is no liability on the part of the respondent under the facts set forth in the complaint, the State not being liable under the doctrine of respondeat superior.

Claimants contend that even if the State is not liable under the doctrine of respondeat superior, still an award should be allowed on the grounds of equity and good conscience.

The same contention was made in the case of *Lester A. Royal* vs. *State*, No. 2597, decided at the present term of this court. In that case the court sustained the motion of the Attorney General and dismissed the case.

For the reasons there set forth the same ruling must be made in this case.

Motion to dismiss allowed. Case dismissed.

(No. 2606—Claim denied.)

DEAN L. RIDER, M. D., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

O'BRIEN & HANRAHAN, for claimant.

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

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

SAME—*same—claim on grounds of equity and good conscience denied.* Under the facts in this case and the authority of *Crabtree* vs. *State*, 7 Court of Claims Reports, page 207 and cases subsequently decided, an award on the grounds of equity and good conscience must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant alleges that on December 7, 1934 he was driving an automobile then owned by him in a westerly direction on 67th Street in Chicago then and there being in the exercise of ordinary care for the safety of himself and property; that an agent or servant of the respondent was then and there operating a motor truck owned by the State of Illinois bearing License Number 1164M—1934; that the driver of said truck failed to stop at a stop signal located at the intersection of 67th Street and Crawford Avenue and that as a result of the negligent and careless operation of said motor truck same collided with claimant's automobile and the latter was damaged to the extent of One Hundred Nineteen Dollars ($119.00).

A motion to dismiss the claim has been filed by the Attorney General on behalf of respondent for the reason that the damage, if any, is alleged to have been by reason of the negligence of the servant or agent of respondent, for which the State cannot legally be asked to respond for the reason that the State is not liable under the doctrine of respondeat superior for the negligence or torts of its servants.

As suggested by the Attorney General:

"The rule is universal that the State is not liable for the negligence of its agents and employees, unless there is a statute making it so liable and in this State there is no such statute, and unless a claimant can show a legal or equitable liability on the part of the State for damages sustained as a result of the negligence of its employee or agent, the court has no authority to make an award."

Derby vs. *State*, 7 C. C. R. 145.

The position of the court upon claims so made has been repeatedly set forth in decisions to be found in Volume 8 of the Court of Claims Reports and is further stated in *Crabtree* vs. *State*, 7 C. C. R. at Page 219, where it is stated:

"Before a claimant can have an award against the State, he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point out any law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one. Equity is not the court's sense of moral right; it is not the power of the court to decide a case according to the high standard of abstract right, regardless of the law. * * *

"To give this statute the construction contended for by claimant would result in giving this court power to hold the State liable for the misfeasance and malfeasance of all its officers, the torts of all its servants and agents, and all damages caused by the wrongful exercise of their powers by such officers and agents. We do not believe the Legislature intended any such radical and far-reaching change in the law when it enacted the statute creating this court."

No award could properly be made by the court under the statements contained in the complaint, and the motion by the Attorney General to dismiss is therefore allowed and the claim dismissed.

(No. 2597—Claim denied.)

LESTER A. ROYAL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.

KELLY & PRATT, for claimant.

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

PROPERTY DAMAGE—*highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.* In the maintenance of a public highway the State is acting in a governmental capacity and is not liable for the negligence of its servants and agents in connection therewith.

NEGLIGENCE—*respondeat superior, not applicable to the State.* The State is never liable for the negligence of its servants or agents, unless there is a statute making it so liable and in this State there is no such statute.

PROPERTY DAMAGE—*negligence of employee of State—claim on grounds of equity and good conscience denied.* Under the facts in this case and the authority of *Crabtree* vs. *State*, 7 Court of Claims Reports, Page 207 and numerous cases subsequently decided by this court an award under the doctrine of equity and good conscience is not justified and must be denied.

SAME—*Pleading.* Where complaint on its face shows that claim is based on negligence of employee of State engaged in maintaining public highway, motion to dismiss will be sustained.

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

Claimant filed his complaint herein on February 7th, 1935 and alleges therein that on the 24th day of September, A. D. 1934, about nine o'clock A. M., he was driving his automobile on a public highway about one and one-half miles west of Somonauk, in this State; that at the same time a motor truck of the respondent in the service of the Highway Department was being driven in the same direction, just ahead of claimant's automobile; that as claimant approached said truck he sounded his horn, and proceeded to pass the truck on the left side of the road; that just as claimant's car was abreast of the truck, the driver thereof, without any warning to the claimant, turned said truck to the left, across the left traffic lane and in front of claimant's car, striking the same and forcing it from the road, whereby it was damaged to the extent of $150.00. The complaint alleges that the claimant was at all times in the exercise of all due care and caution, and that the accident in question resulted from the careless and negligent manner in which the driver of the respondent's truck drove and operated the same.

The Attorney General has filed a motion to dismiss for the reason that the State is not liable for the negligence of its servants and agents under the doctrine of respondeat superior.

This court has held in numerous cases that in the maintenance of its durable hard-surfaced roads, the State is engaged in a governmental function. *Goldie Ryan* vs. *State*, decided at the January Term, 1935 of this court; *Elsie Baumgart* vs. *State*, decided at the November Term, 1934 of this court; *Chumbler* vs. *State*, 6 C. C. R. 138; *Bucholz* vs. *State*, 7 C. C. R. 241; *Braun* vs. *State*, 6 C. C. R. 104.

The law is well settled that in the exercise of its governmental functions the State is not liable for the acts of its servants and agents, in the absence of a statute making it so liable. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; 25 R. C. L., p. 407, Sec. 43.

Claimant contends that even if the State is not liable under the doctrine of respondeat superior, this court should allow an award on the grounds of equity and good conscience. The jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the

State either at law or in equity, if the State were suable. Unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Johanna Morrissey* vs. *State*, decided at the January Term, 1934, of this Court; *Andrew Rehman* vs. *State*, decided at the January Term, 1935 of this court; *Peterson* vs. *State*, 6 C. C. R. 77; *Perry* vs. *State*, 6 C. C. R. 81.

There being no statute making the State liable for the acts of its servants and agents under the facts of this case, the motion of the Attorney General must be sustained. The liability, if any, rests upon the driver of the truck, and not upon the State.

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

(No. 2329—Claim denied.)

CHARLES F. MILLS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 11, 1935.
Rehearing denied November 12, 1935.
Motion to set aside order denied May 12, 1935.

FRANK R. EAGLETON, for claimant.

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

INDUSTRIAL OFFICER—*in the Department of Labor appointed after date Civil Administrative Code became effective—claim for difference in salary between amount fixed by said Code and that fixed in Workmen's Compensation Act—when award for denied.* **One appointed as an Industrial Officer in the Department of Labor on April 29, 1930 and continuing to serve as such officer until February 1, 1933 is governed by provisions of Civil Administrative Code, and if such officer has received the salary as fixed by said Code he has been paid the full salary as fixed by law and a claim for the difference between said amount of salary received and amount of salary fixed for such officer under provisions of Section 14 of Workmen's Compensation Act will be denied.**

SAME—*Section 9 of the Civil Administrative Code (laws of 1929, page 751) controls and fixes salaries of and not Section 14 of Workmen's Compensation Act.* **The Civil Administrative Code which became effective July 1, 1917, providing for the appointment of Industrial Officer in the Department of Labor and fixing salaries of such officer at $5,000.00 per annum thereafter is controlling and not Section 14 of the Workmen's Compensation Act.**

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein was appointed an "Industrial Officer in the Department of Labor" of the State of Illinois on April 29, 1930, and continued to serve as such until his successor was appointed and qualified on February 1, 1933. During his service as such industrial officer he received payment of his salary at regular intervals on the basis of Five Thousand Dollars ($5,000.00) per year. He now claims that as such officer he was entitled to a salary of Six Thousand Dollars ($6,000.00) per year, and he seeks an award for such alleged unpaid deficiency in the sum of Two Thousand Seven Hundred Fifty Dollars ($2,750.00.) Claimant contends that he is justified in his demand by reason of the fact that the salary of all industrial commisisoners was fixed by Section 14 of the Workmen's Compensation Act at Six Thousand Dollars ($6,000.00) per year at the time of his appointment, and that it was due to the fact that the 56th General Assembly appropriated only Five Thousand Dollars ($5,000.00) per annum. (Session Laws 1931, Page 131 and Session Laws 1933, Page 134); and that he was paid on the latter basis.

The Civil Administrative Code became effective July 1, 1917, and thereafter the Code, and not the Workmen's Compensation Act, controlled as to the salary of members of the Industrial Commission. The Code as in force at the time of claimant's appointment on April 29, 1930 became effective as to such appointment.

Section 5 of the *Code* (Laws of 1929, p. 749) provides as follows:

"In addition to the Directors of Departments the following * * * shall hold offices, hereby created and designated as follows: * * *

"In the Department of Labor * * *

"The Industrial Commission, which shall consist of five Industrial Officers, one of whom shall be designated as Chairman."

Section 9 of the *Civil Code* (Laws of 1929, p. 751) provides as follows:

"The Executive and Administrative Officers, whose offices are created by this Act shall receive salaries, payable in equal monthly installments as follows:

"In the Department of Labor * * * each Industrial Officer shall receive $5,000.00 except the Chairman who shall receive $6,000.00."

The Civil Code and not the Workmen's Compensation Act apparently controls and fixes the salaries of Industrial

Officers, and the salaries are there fixed at Five Thousand Dollars ($5,000.00) per year. As claimant has received the full sum of Five Thousand Dollars ($5,000.00) per year for his service as an Industrial Officer, and has apparently been paid the full amount of salary fixed by law, an award herein must be denied; an award is denied and the claim dismissed accordingly.

OPINION ON REHEARING.

Per Curiam:

After a careful consideration of the petition for a rehearing and the record, in the above entitled case, we find nothing therein that was not carefully considered and passed on by the court in the original opinion in this cause.

The decision heretofore rendered is found to be in accordance with the law and the facts and is hereby affirmed, and the petition for rehearing is denied.

OPINION DENYING MOTION TO SET ASIDE ORDER DENYING PETITION FOR REHEARING.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed February 19, 1934 for Two Thousand Seven Hundred Fifty ($2,750.00) Dollars, alleged by claimant to be due him for the difference in salary received by him and that which he claims to have been due, as an Industrial Officer in the Department of Labor. An award was denied herein on September 11, 1935. A petition for rehearing was filed, and on November 12, 1935 said petition for rehearing was denied. On September 8, 1936 claimant filed his motion to vacate the order denying a rehearing.

Under Rule 34 of the Court of Claims neither the claimant nor the respondent is permitted to file more than one application or petition for rehearing. Objection by the Attorney General is urged to the pending motion, on the ground that in effect it is an evasion of the above rule. The court is inclined to agree with counsel for respondent, but prefers to rule directly upon the motion.

Claimant was appointed an Industrial Officer in the Department of Labor on April 29, 1930, and qualified on May 1, 1930, and continued to serve until February 1, 1933, during

which term of office he was paid a salary at the rate of Five Thousand ($5,000.00) Dollars per year. In his complaint he bases his claim under a contention that the Workmen's Compensation Act fixed the salary for such office at Six Thousand ($6,000.00) Dollars per annum, but that notwithstanding this, the Legislature only appropriated the sum of Five Thousand ($5,000.00) Dollars per annum for such salary. Prior to July 1, 1929 the Civil Administrative Code fixed the salary of Industrial Officers at Six Thousand ($6,000.00) Dollars, and the salary of the Chairman thereof at Seven Thousand ($7,000.00) Dollars per annum. The statute further provided that such Commissioners should hold office for a term of two years from the 3rd Monday in January of each odd numbered year, and until his successor was appointed and qualified. (Cahill Ill. Rev. Statutes, 1927—Chap. 24 (a), Secs. 9 and 13.) This statute was amended, effective July 1, 1929 to provide that the salary should be Five Thousand ($5,000.00) Dollars for Commissioners and Six Thousand ($6,000.00) Dollars per annum for the Chairman and that the terms of such Commissioners should expire July 1, 1929 and when their successors were appointed and qualified, and that such successors should hold office until the third Monday in January, 1931—and until their respective successors are appointed and qualified. (Cahill Ill. Rev. Statutes, 1929, Chap. 24 (a), Secs. 9 and 13.) Claimant contends that he began his service as a part of that term of office which commenced on the third Monday in January, 1929; that that term did not expire until the third Monday in January, 1931, and since he was not reappointed at the latter date, but continued in office until February, 1933 that such service was one continuous term from the third Monday in January, 1929, and that the change in salary, effective July 1, 1929 would not affect him, as it would constitute a reduction of salary during his term of office.

As above recited, the terms of Commissioners who were serving prior to July 1, 1929, were made to terminate at the latter date, or when their successors were appointed and qualified. The record does not disclose whether claimant's predecessor terminated his service July 1, 1929 or continued to serve until claimant was appointed on April 29, 1930, but in either event the Legislative enactment, effective July 1, 1929, fixing the future salary of Commissioners at Five Thou-

sand ($5,000.00) Dollars would not be a reduction of salary "during the term of office" of one who was appointed on or subsequent to July 1, 1929. The "term" of plaintiff, by the amended statute began July 1, 1929. The rules concerning a continuation of salary payments at established rates to officers during a period of "holding over" do not warrant such payments to claimant in this case, under the wording of Section 13 of the Civil Administrative Code above referred to. Claimant's official term began July 1, 1929, and by the statute effective as of that date the Commissioners' salary was fixed at Five Thousand ($5,000.00) Dollars.

Claimant's motion will be denied not only because of the foregoing, but for the further reason that it is apparent from the record he accepted his salary from month to month as issued to him by monthly warrants of the State of Illinois, which on their face cover the period of service for which salary was thereby paid. The *State Finance Act of Illinois* contains the following provisions:

"Amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purposes or any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed and for which remuneration had already been made."

Item 3, Sec. 9, State Finance Laws as Amended, 1923.

"When an appropriation is made for personal service for specific positions at a fixed rate or at a rate not to exceed a certain amount the incumbents of such positions at the time the appropriation law goes into effect shall be paid at such rate in full and a smaller rate may be paid to persons entering upon the duties of such positions after such appropriation law goes into effect."

Item 5, Sec. 9, State Finance.

We believe this statute to be effective and that claimant cannot accept salary warrants, purporting to cover the full amount due him for services during stated periods, and thereafter when his active service has ended, legally claim an award from the State for an additional amount for those periods for which he has apparently been paid for services in full. The motion is denied and cause stricken.

(No. 2186—Claim denied.)

W. W. HILEMAN, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

W. W. HILEMAN, pro se.

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

WORKMEN'S COMPENSATION ACT—*filing claim for compensation under within time fixed in, jurisdictional.* Where it appears from face of record that no claim for compensation under Workmen's Compensation Act was made within the time fixed in the Act, the court is without jurisdiction in the cause and motion to dismiss must be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On September 5, 1931, the claimant was employed by the State as a patrolman, and was using a motorcycle furnished by the State in the performance of his duty, and while so engaged, at a point between East Moline and Geneseo, he ran into and struck an abandoned truck which was owned by P. Liebowitz, and sustained somewhat serious injuries, and claims to have never fully recovered.

It appears from the claim that the doctor, hospital and medical bills were paid by the State, and he received his salary during the time he was unable to perform his duties because of the injury, and he asks the sum of $3,000.00.

The claim was filed June 5, 1933.

The motion was made by the Attorney General to dismiss this claim because it was not brought within the year, as provided by Section 24 of the Compensation Act. The complaint shows no amount of salary paid nor does it show the amount of his medical or hospital bills which were paid, or whether or not suit was ever commenced against the person who was guilty of the negligence which caused the injuries.

If this court has jurisdiction of such matters, it is by virtue of the Act creating the Court of Claims and the provisions thereof with reference to the Workmen's Compensation Act. The Act provides that such cases must be determined in accordance with the provisions of the Workmen's Compensation Act.

The Supreme Court of this State, in the case of *Lewis vs. Industrial Commission*, 357 Ill., page 309, held that claims

under the Compensation Act must be commenced within a year from the time of the injury, and unless proper claim is brought, the Industrial Commission has no jurisdiction in such cases.

We feel we are bound by the reason in that case, and, therefore, the motion of the Attorney General to dismiss this case will be sustained.

(No. 2183—Claim denied.)

FRED A. JOHNSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

TERRY, GUELTIG & POWELL, for claimant.

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

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

SAME—*payment of wages during illness, not payment of compensation—promise of employer to pay for medical services rendered to employee not admission of liability for payment of compensation.* Payment of the employee's wages during his illness is not the payment of compensation within the meaning of the statute allowing claim for compensation to be made within six months thereafter where such wages were paid and accepted without reference to any claim for compensation, nor does the employer's promise to pay for medical services during illness constitute an admission of liability for payment of compensation.

SAME—*burden of proof.* Employee making claim for compensation under Workmen's Compensation Act has the burden of proof of showing that such claim was made within time fixed in Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that the claimant was during the year 1932 an employee of the State of Illinois, engaged as a maintenance patrolman on State Highways in Madison County, Illinois, and while so employed on or about the 27th day of June, 1932, while cutting weeds on the right of way of State Highway No. 159, he contracted ivy poisoning, as a result of which he was confined to the Veterans Administration Hospital at Jefferson Barracks, Missouri where he was treated for some weeks; that his health has been seriously

and permanently impaired, and as a result of said ivy poisoning, he is now totally disabled and unable to work.

He avers that for the year previous to the time of the alleged injury, his wages amounted to the sum of $1,500.00. He also avers that he was paid his full wages up to and including January 28, 1933, and since that time he has been paid nothing except $20.00 for services in breaking in new men on his work.

He also avers that he prepared and mailed to the State Highway Department at Springfield, on or about June 27, 1932, *an accident report showing that his injury occurred* as above stated, and gave notice of his disability as aforesaid; that he has been paid nothing on account of medical care and attendance occasioned by the said injury, but has been informed by the Division of Highways that the bill of one physician had been or would be allowed. He further states that he was a married man at the time of the injury and had five children under sixteen years of age, all residing with him, and makes claim under the Workmen's Compensation Act for the sum of $15.00 per week for each week during the continuation of his total disability, as stated in his declaration. This declaration was filed on May 27, 1933, just 11 months after he suffered from the alleged injury. There is considerable proof in the case, much of it being medical testimony, but in the view we take of this case it will be unnecessary to take into consideration this testimony, except to determine whether or not there is anything in the record tending to show that the claimant complied with Section 24 of the Workmen's Compensation Act.

Item 6 of Section 6 of the Act creating the Court of Claims makes it the duty of this court to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act."

Section 24 of the Compensation Act in part provides

"No proceedings for compensation under the Act shall be maintained unless claim has been made within six months after the accident."

There is no question but what the State had notice of the accident, and the claimant alleges he received his full compensation of $125.00 per month from the time that he received

the injury on July 27, 1932 up to and including January 28, 1933. He, therefore, received a considerable amount more than he was entitled to under the Compensation Act. Other provisions of Section 24 of the Workmen's Compensation Act provide that:

"In any case, unless written claim for compensation is filed within one year after the date of the last payment of compensation, the right to file an application therefor shall be barred."

Nothing contained in the declaration or the proof shows that claim was made for compensation by the claimant in this case. Under the statute, no proceedings for compensation shall be maintained unless claim for compensation has been made within six months after the accident, and the employee has the burden of proof that the claim was so made. The making of a claim is jurisdictional, and, unless there is proof of claim, this court is without jurisdiction. (*Inland Rubber Co. vs. Industrial Commission,* 309 Ill. 43.) In other decisions of the Supreme Court of this State, it appears that the making of a claim for compensation is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute; (*Ideal Fuel Co.* vs. *Industrial Commission,* 298 Ill. 463) and in other cases the court has said that the statute is mandatory, and must be complied with to give the Industrial Commission jurisdiction. This court has heretofore held that it had no more jurisdiction of a compensation case of the State of Illinois than the Industrial Commission has against private employers.

Another question which arises is the fact that the claimant received his entire wages at $125.00 per month from the time of his injury up to and including January 28, 1933 payment of compensation. That is to say, was the fact that he was paid by the State more than he was legally entitled to as compensation under the Compensation Act, such a payment as would bind the State now, and also the fact because the State had paid at least a part of his medical bills such a payment as would bind the State? To both of these questions we must answer in the negative. The statute specifically provides that the payment of doctor bills and hospital bills shall not bind the *employer under the Compensation* Act, and in a comparatively recent case, *Lewis* vs. *Industrial Commission, et al.*, 357 Ill., 309, the Supreme Court again reiterated its former holdings, and held that the making of a claim for

compensation within the statutory period is jurisdictional, and a condition precedent to the right to maintain a proceeding under the Compensation Act, and also further held that a claim for compensation is not made within six months as required by Section 24 of the Compensation Act, where the employee returned to work after his injury, worked for several months before he became ill of spinal meningitis, of which he died one month later, no claim for compensation being made during the six months following the injury, and payment of the employee's wages to his wife during his illness and up to the time of his death is not the payment of compensation within the meaning of the statute allowing claim to be made within six months thereafter, where such wages were paid and accepted as wages without reference to any claim for compensation; nor does the employer's promise to pay for medical services during said illness constitute an admission of liability for or the payment of compensation, where the statute at the time of the injury provided the contrary.

We, therefore, conclude that we have no jurisdiction in this case. Claim denied.

(No. 2058—Claim denied.)

WALTER BORTOWSKI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

JOHN R. MCSWEENEY, for claimant.

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

The facts in this case are the same as those in the case of *Joseph Schultz* vs. *State*, No. 2059, post and the decision of this court in said case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case is based upon the same set of facts as set forth in the case of *Joseph Schultz* vs. *State of Illinois*, No. 2059, except that in this case the claimant was a passenger, which, in our opinion, does not change the legal situation.

The Attorney General also made a motion to dismiss this case, and the motion will be sustained for the same reasons as set forth in *Schultz* vs. *State of Illinois*, No. 2059.

(No. 1979—Claim denied.)

ESTHER MAY BOYD, A MINOR, BY SARAH BOYD, HER MOTHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

MANCEL L. WISEMAN and BROWN, HAY & STEPHENS, for claimant.

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

PERSONAL INJURY—*caused by negligence of State employee—State not liable for.* The State is not liable for personal injuries sustained as the result of the negligent acts of its employees, agents or servants in the exercise of governmental functions, the doctrine of respondeat superior, not being applicable to it.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Esther May Boyd, a minor, by Sarah Boyd, her mother and next friend, filed her declaration with the clerk of this court on September 6, 1932, alleging that on March 21, 1932, Esther May Boyd, then ten years of age, was standing on the sidewalk on College Avenue in the City of Alton, when a Ford truck driven by Harry H. Hawkins, an employee of the State of Illinois at the Alton State Hospital at Alton, Illinois, drove by the place where Esther May Boyd was standing talking to a former minister.

This truck had a stake body and a crow-bar about four feet long was sticking out over the side of the truck and as it drove by it struck this child knocking her down to the sidewalk and breaking the right pelvis.

She was taken to a hospital owned by the State and treatments were given her by State doctors.

Damages in the sum of $10,000.00 are asked.

No question arises as to how the accident occurred. After being taken to the hospital, X-rays were taken and good results were obtained by the setting of the fracture and there are no deformities. She was in a hospital approximately four weeks. She responded readily to treatment and Dr. Stuart of the State Hospital testified that she had fully recovered.

An attempt was made to show that she was not keeping up with her classes because of nervousness but the testimony as to that was that she had passed in her classes in school

but apparently, as to arithmetic she was on trial. This had also happened once or twice prior to the accident.

Dr. Groves B. Smith, who resides at Alton, testified that he was a Neuropsychiatrist and Physician, and that at the time he testified he was Superintendent of Beverly Farm, Inc., a school for nervous and backward children, located at Godfrey, Illinois. In his opinion, the claimant was a child who was markedly under an increased nervous tension and emotional. There was no tenderness or rigidity over pelvis neck or along the spinal column. The mental examination was made by use of the Yerkes Bridges Point Scale, which gave a mental age life of 9¾ years, and this was checked with the Binet Simon Test, Standard revision, which showed a mental age life of 9¼ years. It was his opinion that her nervous condition would need some six months further treatment of once every two or three weeks.

The child's mother or friend was permitted to stay at the hospital with her nights during the entire time she was confined there.

The State doctors also had the similar professional training of Dr. Smith.

From all the evidence, it is quite apparent that this child has fully recovered from her injury.

Dr. Smith's claim for services is $93.00, but this included a charge of $50.00 for his appearance in court, which could not be allowed by the court in such cases.

This court has repeatedly held that the State is not liable for injuries resulting from the negligent acts of its employees, agents or servants in the exercise of governmental functions. That doctrine is so firmly established that it requires no citation of authority.

We must, therefore, deny any award in this case.

(No. 2066—Claim denied.)

CONSOLIDATED INDUSTRIES, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

CONSOLIDATED INDUSTRIES, INC., pro se.

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

FRANCHISE TAX—*When claim for refund will be denied.* Where it appears that franchise tax of corporation was voluntarily paid by claimant and that amount so paid was correct under the law an award for refund of part alleged to have been paid in excess of that due will be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This was a claim filed on February 1, 1933 to recover the sum of $52.10, a franchise tax which was assessed and paid on a sworn report required by law made by the claimant to the Secretary of State, which report, it is alleged was erroneous. It is claimed that the Secretary assessed this corporation on issued capital stock of $3,097,500.00 a tax in the sum of $1,548.75, while it is claimed that the correct amount of issued capital stock, per the Certificate of Issuance filed with the Secretary of State on July 26, 1932 is $2,993,300.00, and they should be assessed a tax in the sum of $1,496.65, making a difference of $52.10.

From letters written when the claimant filed their claim, it is apparent that the error, if any, was claimant's. On November 28, 1932, Secretary of State Stratton, in reply to a letter from claimant under date of November 22, 1932, said:

"In reply to your letter of Nov. 22, it appears that an amendment was filed Dec. 31, 1931, indicating $3,097,500.00 of issued stock, and this is the amount upon which the 1932 franchise tax was based."

It appears from the file that a Certificate of Insurance was filed July 26, 1932, showing $2,993,300.00 of issued capital stock. The 1932 franchise tax was paid on July 23rd, and that was based on the greater capital stock. The basis for the annual franchise tax payable by a domestic corporation shall be the amount represented in this State, determined in accordance with the provisions of the statute, of the sum of its stated capital and paid-in surplus on the thirty-first day of December of the preceding calendar year as disclosed by its last annual report, or, in case no annual report has been filed, as disclosed by any other report or document filed by it with the Secretary of State.

The above is taken from Section 132, Chapter 32 of the capital law then in effect.

It would appear that the trouble in this case is a mistake over dates. The claim is based on the theory that the franchise tax for the year 1932 was assessed on an erroneous valuation, while the claim of claimant contains a statement

to the effect that the correct amount of the capital stock "per the Certificate of Issuance filed with the Secretary of State on July 26, 1932 is $2,993,300.00." Assuming that that statement is true, the tax involved in this claim would not be changed, as this claim was for the taxable year from July 1, 1931 to July 1, 1932. Nothing appears in the records to show when the capital stock was reduced, if at all, from the larger amount on which the tax had been formerly paid.

The claim will, therefore, be denied.

(No. 2305—Claim denied.)

ORVILLE D. DENNISON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

E. P. FIELD, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time provided in, jurisdictional.* Where the record discloses that no claim for compensation was made, nor any application filed for same within time fixed in the Act, the court is without jurisdiction to proceed with a hearing and motion to dismiss must be sustained.

EQUITY AND GOOD CONSCIENCE—*when claim for compensation on grounds of must be denied.* Paragraph 4 of Section 6 of the Court of Claims Act, with reference to equity and good conscience, merely defines the jurisdiction of the court and does not create a new liability against the State, nor increase or enlarge any existing liability, and limits the jurisdiction of the court to claims under which the State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

From the declaration filed, it appears that on March 18, 1931 the claimant, who was employed by the Highway Division of the State of Illinois, was using a team in leveling off the gravel road on Route 94-B from Little York, Illinois, south to the intersection of Routes 94-B with 94-A. He was operating what was known as a one-man grader or drag with horse power, and while in the performance of his duty, and without any fault of his own, one Dell McGaffin, drove an automobile against the rear end of the grader upon which

claimant was riding, with such force as to knock the claimant to the ground, and he suffered injuries which necessitated him being idle from his work about 11 days, and did some damage to his harness and horses.

Claim was not filed until December 21, 1933. A claim is made in the sum of $1,000.00.

It would appear that the State had notice of this accident, but no claim in writing was made to the State in six months, and no application in writing was filed within the year, as provided by statute, and the Attorney General contends that this court has no jurisdiction to hear the case. It is true that the claimant did sustain some injuries. He settled his case with the party who was the cause of the accident, and took his note for $250.00. Fifty dollars was paid on that note. It now appears that the maker of the note, who also had a third party as a signer thereof, is insolvent.

Whatever power or authority this court has to settle matters of this kind is by virtue of the Workmen's Compensation Act and Section 24 of that Act provides: "No proceeding for compensation under the Act shall be maintained unless claim for compensation has been made within six months of the date of the accident," and provides further, that any case, unless written claim for compensation paid is filed within one year after the date of the last payment of compensation, the right to file such application shall be barred." In the case of *Crabtree* vs. *State*, we held we were bound by the limitations of the compensation Act. In the case of *Lewis* vs. *Industrial Commission*, 357 Ill. 309, the Supreme Court of this State held that the making of a claim for compensation within the prescribed period is jurisdictional, and a condition precedent to the right to maintain a proceeding under the statute. In that case, the court, on page 312 of the opinion, further held that Section 24 of the compensation Act declared no proceedings for compensation shall be maintained unless claim has been made within six months after the accident, or in the event that payments have been made under the provisions of the Act, unless written claim has been made within six months after such payments have ceased, and further held that this provision of the statute meant that unless written claim for compensation is filed within one year after date of the injury, or within one year after the date of the last payment of

compensation, the right to file application therefor shall be barred, and cites numerous other authorities to that effect.

The counsel for claimant refers to the equity and good conscience provisions of the Act creating the Court of Claims. We have heretofore had occasion to discuss this feature of the law, and in the case of *Crabtree* vs. *State*, supra, we held the provisions of Paragraph 4 of Section 6 of the Court of Claims Act, with reference to equity and good conscience, merely defines the jurisdiction of the court and does not create a new liability against the State, nor increase or enlarge any existing liability, and limits the jurisdiction of the court to claims under which the State would be liable, in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

An award in this case will, therefore, be denied.

(No. 2052—Claim denied.)

JAMES A. GARDNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

BARR & BARR, for claimant.

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

WORKMEN'S COMPENSATION ACT—*claimant against state for compensation under, must prove employment by.* Where it appears from the testimony of claimant who was injured while working on construction of Illinois Deep Waterway, that he was at the time of such injury employed by private corporation or individual, he cannot be heard to say that he was an employee of State and no award for compensation against State can be made.

SAME—*making claim for compensation within time provided in, jurisdictional.* Where the record discloses that no claim for compensation was made, nor any application filed for same within time fixed in the Act, the court is without jurisdiction to proceed with hearing and motion to dismiss must be sustained.

SAME—*limitations—Section 10 of Court of Claims Act—Section 24 of Workmen's Compensation Act.* Section 10 of Court of Claims Act, providing that every claim against State shall be forever barred unless filed within five years after same first accrues is a general enactment and has no application to claims by State employees for compensation for accidental injuries arising out of and in the course of their employment and such claims are governed by Section 24 of the Workmen's Compensation Act, a special enactment having reference only to same.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on January 19, 1933 and avers that James A. Gardner, on the 15th day of January, A. D. 1929 and for some time prior thereto had been employed as a rock driller by the State of Illinois, acting by and through the Division of Waterways of the Department of Purchases and Construction of said State, and employed in connection with the construction of the Illinois Deep Waterway as such rock driller for the purpose of blasting rock; and on the 15th day of January, 1929, while engaged in the performance of his duties, on the north side of the lock at Brandon's Road, and on the west side of the Desplaines River, while removing the drill from the hole that had just been completed, the drill became lodged in the hole, and in attempting to prevent the drill from slipping back into the hole, claimant fractured his right wrist. Sufficient facts are averred to show the claimant did come within the provisions of the Workmen's Compensation Act of the State of Illinois, and claimant alleges that he suffered damages to the extent of $5,000.00.

The testimony was taken and an abstract of that testimony filed. On cross-examination on page 10 of the abstract, the claimant testified: "I was employed by Green and Sons Company at the time of the injury."

The Attorney General filed a motion to dismiss this claim for two reasons. One, because the claimant was not in the employ of the State at that time, and second, because claim was not filed at the right time. Either of these reasons is sufficient. Manifestly, the State should not be required to pay a claim under the compensation Act when such injured person was not in the employ of the State at the time he received the alleged injury. We do not see how there could be a mistake as to who employed the claimant. He should know, and his evidence on that should be convincing. Claimant states that he was injured sometime between the 15th of January and the 25th of January, 1929. Suit was not filed or proper claim was not made under the compensation Act for approximately four years later. Section 24 of the Workmen's Compensation Act provides, as far as material here, as follows:

" * * * *provided*, no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident, *provided* that in any case, unless application for

compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

To meet this argument, the claimant directs attention of the court to Sections 23 and 25 of "An Act in relation to the construction, operation and maintenance of a deep waterway from the water power plant of the Sanitary District of Chicago, at or near Lockport to a point in the Illinois River at or near Utica, and for the development and utilization of the water power thereof. This Act is commonly called the "Illinois Waterway Act." Section 23 provides that the State should be liable for all damages to persons caused by the construction, maintenance or operation of the Illinois Waterway, and its appurtenances, such damages to persons who are employees to be ascertained, determined and fixed as provided in the Act. Without determining whether or not this provision of statute applies to injured workmen, we pass to Section 25 of the Act, also cited by claimant. This statute clearly provides that the Department of Purchases and Construction shall construct the waterway services by the direct employment of labor, services and equipment, and the State shall be liable for accidental injuries or death suffered by any employee arising out of and in the course of his employment, the amount of such liability to be ascertained by reference to the provisions of the Act commonly called the Workmen's Compensation Act. The Court of Claims shall have and exercise jurisdiction over all claims for compensation hereunder and shall make and file its finding and determination in each case. It must be conceded that the Court of Claims has jurisdiction over this case on account of accidental injuries or death suffered by any employee arising out of and in the course of his employment, the amount of such liability to be determined by provisions of the Act commonly called the Workmen's Compensation Act, and it is argued that this claim is brought under the provisions of the Illinois Waterway Act, Sections 23 and 25; that the language of these two sections is unambiguous, and that the Court of Claims shall refer to the Workmen's Compensation Act only in determining the amount of the liability, and that Section 10 of the Court of Claims Act provides that every claim against the State, cognizable by the Court of Claims, shall be forever

barred unless the claim is filed within five years after it first occurred. It is our opinion that the Legislature intended to give an employee of the State of Illinois the benefit of the Workmen's Compensation Act to the same extent and in the same way that benefit is extended to other employees of the State, doing similar or equally hazardous work. The Act creating the Court of Claims and determining its jurisdiction in compensation cases, gives the court power "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made according to the rules prescribed in the Act commonly called the Workmen's Compensation Act, the Industrial Commission being hereby relieved of any duty relative thereto."

In the case of *Crabtree* vs. *State of Illinois*, 7, Court of Claims report, page 207, we had occasion to construe this same provision, and we there held that the time which claims for compensation for accidental injuries sustained by State employees must be filed is governed by Section 24 of the Workmen's Compensation Act and not by Section 10 of the Court of Claims Act, and that the determination of the provisions of the Workmen's Compensation Act, as far as the same are applicable, are considered the same as though they were incorporated in the Court of Claims Act.

For these reasons, the motion of the Attorney General will be sustained.

(No. 2104—Claimant awarded $47.00.)

J. H. McINTYRE & CO., A CORPORATION OF ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

HELMER HANSEN, for claimant.

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

FRANCHISE TAX—*paid under mutual mistake of fact—award will be made for.* Where it clearly appears that franchise tax, in excess of amount lawfully due was paid through mutual mistake of fact, an award for refund of such excess will be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

J. H. McIntyre & Co., a corporation, organized under the laws of the State of Illinois, filed its declaration for the return of a franchise tax unlawfully demanded by the Secretary of State for the years of 1928, 1929, 1930, 1931 and 1932, and asked damages of $100.00. The file contains a stipulation between the parties as follows:

"It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following represents a true statement of the facts with respect to the claim of the plaintiff in the above named suit:

1. That plaintiff was incorporated under the laws of the State of Illinois in November of 1919, with an authorized capital stock of $40,000, consisting of 400 shares of common stock of the par value of $100 each.

2. That during the year 1919 there was issued $21,200 of such capital stock, all of which stock remained outstanding during the period from 1919 down to and including December 30, 1932, at which time, through the voluntary surrender by the stockholders of a part thereof, in accordance with the statute in such case made and provided, the issued capital stock was reduced from $21,200 to $10,000; that for each of the years 1928, 1929, 1930, 1931 and 1932 the plaintiff filed with the Secretary of State of Illinois its annual reports, as required by law; that following the filing of such reports, the Secretary of State of Illinois mailed to the plaintiff notices in writing to the effect that there was due to the State of Illinois for the year next ensuing, commencing, respectively on July 1, 1928, 1929, 1930, 1931 and 1932, the sum of $20.00, with the statement that such franchise tax of $20.00 was based upon all of plaintiff's authorized capitalization; that such statements should have been in the amount of $10.60 each, based upon the issued capital stock of $21,200.

3. That upon receipt of the notices mentioned in paragraph 2 above, defendant made payment of the amounts shown as due, in the aggregate of $100, or $47.00 in excess of the amount which should have been charged against and paid by the plaintiff as a franchise tax to the State of Illinois, under the laws in effect with respect to the assessment and collection of franchise taxes for each of the years in question."

This court has in numerous cases held:

"Where it appears from undisputed facts that franchise tax, in excess of amount due was made through mutual mistake of fact, an award will be made."

Commercial Nat'l Bank & Trust Co., vs. *State*, 7 C. C. R. 122;
Bates Valve Bag Corp. vs. *State*, 7 C. C. R. 64;
Cairo Water Co. vs. *State*, 7 C. C. R. 6.

It appears in the stipulation that the claimant has overpaid the State the sum of $47.00.

We, therefore, make an award in the sum of $47.00 in favor of J. H. McIntyre & Co. against the State.

(No. 2024—Claim denied.)

J. MAXWELL MILLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

GARIEPY & GARIEPY, for claimant.

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

WORKMEN'S COMPENSATION ACT—*filing claim for compensation within time required by Act, a condition precedent to jurisdiction.* Making claim for compensation and filing application for same within time fixed by Act is a condition precedent, without which, court is without jurisdiction to proceed with hearing.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Petition was originally filed for claimant by the clerk of this court on December 5, 1932 and an amended petition was filed October 25, 1933. The petition states that the claimant was employed by the State of Illinois as a foreman of the St. Charles School for Boys at St. Charles, Illinois, at a weekly wage of $71.50 per week; that on May 4, 1931 he sustained accidental injuries which arose out of and in the course of his employment, by falling a distance of 18 or 20 feet, sustaining injuries to his back and left leg, and the petitioner avers: "although sick, sore and lame, he returned to his supervising post, which required no physical labor."

Permanent disability is claimed for the left leg and back, and a disability to the right leg. Compensation as provided by Section 8 of the Workmen's Compensation Act of this State is requested.

The motion is made by the Attorney General to dismiss for the reason that the claim was not filed within the time fixed by Section 24 of the Workmen's Compensation Act. Section 24 of the Workmen's Compensation Act provides, as far as material here:

"* * * *provided*, no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident, *provided* that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

No claim is made that compensation was ever paid in this case. Under the Court of Claims Act we are bound to follow the Workmen's Compensation Act in a case of this kind.

Under the decision of the Supreme Court of this State, the above quoted part of the statute is jurisdictional. No claim for compensation having been made within six months after the accident, or within one year after the date of the injury, this court has no jurisdiction.

Claim will, therefore, be denied.

(No. 2057—Claim denied.)

TONY MONACO, ADMINISTRATOR OF THE ESTATE OF JOHN MONACO, Deceased, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

CIRESE & CIRESE, for claimant.

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

MUNICIPAL CORPORATIONS—*negligence of—State not liable for—court without jurisdiction in suits against.* The State is not liable for the acts or omissions of the servants or agents of Municipal Corporations. Such corporations are not arms or agencies of the State government and the Court of Claims is without jurisdiction to entertain suits against them and such suits must be brought in courts of general jurisdiction.

SAME—*West Chicago Park Commissioners is.* The West Chicago Park Commissioners is a Municipal Corporation, capable of suing and being sued and if one seeks to recover damages against it for the negligence of its servants or agents he must bring his action against such corporation in a court of general jurisdiction.

PERSONAL INJURY—*pleading—when motion to dismiss will be sustained.* Where it appears from complaint that claim for damages for the death of claimant's intestate is based on the alleged negligence of the servants and agents of a Municipal Corporation, a motion to dismiss for want of jurisdiction in the court will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The facts alleged in this case are as follows: That on the 9th day of January, 1932, the respondent, the State of

Illinois, through its agents, the West Chicago Park Commissioners, was in control of a certain public park known as Columbus Park, situated in the Town of West Chicago, in the City of Chicago, County of Cook, and State of Illinois; That the West Chicago Park Commissioners, seven in number, were appointed by the Governor of the State of Illinois, and the Board had been given power to manage and direct all parks authorized by statute, to lay out, regulate and improve the same, and to pass ordinances for the government thereof, the total cost of the parks to be assessed on the property benefited, to appoint a police force, etc.; that the respondent, by and through its agents, the said Commissioners, had directed and maintained various conveniences, comforts and means for diversion for the convenience of the general public, and among other things, appeared a small body of water, commonly known as a lagoon or pond, to be used for boating and swimming in summer and skating during the winter.

It was then averred that it became and was the duty of the respondent to take all precautionary measures required by reasonable prudence to guard against dangers which might arise because of insufficient thickness of the ice, and to warn the public against such danger by proper signs; that it disregarded its duty in this behalf, and that claimant's decedent, an infant of, to-wit 12 years of age, was in the park, seeking diversion and amusement, and while in the exercise of care and caution for his own safety, was attracted by the ice for purpose of skating upon it, and did go upon it, and it gave way and broke, and decedent was thrown into the water and was drowned. The declaration consists of two counts, both setting forth the same cause of action in a little different way.

A general and special demurrer was filed to the declaration, and later, when the new Practice Act of this State became effective, that was changed to a motion to dismiss.

We are further compelled to take judicial notice of the fact that the Commissioners are officers of a municipal corporation, capable of suing and being sued. This court has repeatedly held that it has no jurisdiction under "An Act to create the Court of Claims and prescribe its powers and duties," to entertain suits filed by individuals against municipal corporations as such individuals must seek their legal remedy in courts of record in this State. Further, that such

municipal corporations as the Board of Park Commissioners of Lincoln Park, the West Chicago Park Commissioners, and the South Park Board of the City of Chicago, and Boards of Education of cities or school districts, are not arms or agencies of the State government so as to bring them within the jurisdiction of the Court of Claims. (See *Perkins, Fellows & Hamilton* vs. *State*, 4 C. C. R. 197; *Mary O'Brien* vs. *State*, 5 C. C. R. 30; *William Dawson* vs. *State*, 5 C. C. R. 41; *Otto Stein, Admr.* vs. *State*, 6 C. C. R. 329; *Union Bank of Chicago, Admr.* vs. *State*, 6 C. C. R. 370; *Joe Williams* vs. *State*, 6 C. C. R. 456; *Ella Kirkpatrick, et al*, vs. *State*, 6 C. C. R. 480, and several other opinions all to the same effect.

The motion to dismiss will, therefore, be sustained.

(No. 2072—Claim denied.)

JAMES MORLOCK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

CHARLES J. MCKEOWN, for claimant.

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

DAMAGES TO PROPERTY NOT TAKEN FOR PUBLIC USE—*alleged to be as result of construction of public improvement—loss of or inconvenience to business not damage to property.* Inconvenience to, or loss of business suffered by owners of abutting property during the progress of work in the construction of a public improvement, do not constitute damage to property, within the meaning of the Constitution, but constitute a burden incidentally imposed upon private property adjacent to public work and no cause of action therefore arises against the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

James Morlock, claimant, was the proprietor of a gasoline filling station located at 401 South Chicago Street, in the city of Joliet, Illinois, that location being on the southwest corner of the intersection of East Marion Street with said South Chicago Street, both streets being public highways. He sold the usual grades of fuel oils and various automobile accessories and supplies. He did car greasing, and servicing cars, repairing tires, etc., and from this business he received a fair and reasonable profit, and was entitled to

the enjoyment of free and unobstructed ingress and egress to and from his said place of business, both for himself and patrons, access being had to the said premises by means of South Chicago Street.

The declaration further charges that on October 5, 1932, South Chicago Street was closed to all traffic by the Division of Highways of the Department of Public Works and Buildings of the State of Illinois, from the south line of the intersection of East Washington Street to the north line of the intersection of Fifth Avenue, which blocked off the claimant's place of business, and that the said South Chicago Street remained closed from the Fifth day of October, 1932 to the Eighth day of December, 1932.

It is charged that the closing off of the streets herein mentioned caused the claimant damage in the sum of $750.00. A Bill of Particulars was filed showing the profit that accrued to the claimant for preceding months.

The Attorney General has moved to dismiss.

It is not claimed that the State unreasonably delayed the work being done. The declaration charges that the closing of this street was done by the Division of Highways of the Department of Public Works and Buildings of the State of Illinois, and was done for the purpose of improving the public highway. It is not claimed that any of the claimant's property was taken, but only that he suffered loss of profits while this improvement was being constructed. It is not contended that the action of the State was without warrant of authority.

In the construction of such improvements for the benefit of the public, that some citizens should suffer inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work in cases of this character, is unavoidable, but this would not give a cause of action against a municipality under the same circumstances. (See *Peck* vs. *Chicago Rys. Co.*, 270 Ill. 35, 40, and cases therein cited.)

For the same reason, the same circumstances would give no cause of action against the State. The case above referred to and the cases cited therein are in point in this case.

Therefore, the motion of the Attorney General in this case will be sustained.

(No. 1968—Claim denied.)

WILLIAM R. SCHAFFER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

SAMUEL M. FRIEDLANDER, for claimant.

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

WORKMEN'S COMPENSATION ACT—*one not considered employee of State under.* One lawfully confined in State Penitentiary where he is required to perform certain labor is not an employee of the State and if injured while so performing such labor is not entitled to compensation *for such injuries*.

NEGLIGENCE—*claim for damages on account of negligence of Officers of Penal Institution by inmate thereof—when award for denied.* The maintenance and conduct of penal institutions is a purely governmental function to which the rule of respondeat superior does not apply and the State is not liable to an inmate of such institution for injuries sustained by him as the result of the negligence of the employees thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The declaration is based upon an action of trespass on the case, and alleges that on or about the 1st day of April, 1926, the claimant plead guilty to the crime of larceny in the Circuit Court of Peoria County, Illinois, and thereafter, on or about the 1st day of December, 1926, he was taken into custody charged with violating his parole and was sentenced to serve a term of one to ten years in the Joliet penitentiary, and while confined in this institution, he was required to perform certain labor; that on or about the 1st day of August, 1927, at and under the directions of the warden and his subordinates and officers, the claimant was working with twelve other inmates of said institution in a stone quarry, and while in the performance of his duties that were required of him, and while in the exercise of due care and caution for his own safety and the safety of others, a great quantity of rock weighing about eight tons fell upon him striking his left lower limb and causing him great and severe pains, requiring him to be confined in the hospital of that institution for a period of thirteen months; that these injuries necessitated three major operations, and incapacitated him from the further use of said limb and leg and marred and disfigured the said limb in such a condition that the said limb is wholly useless.

It is also alleged that on the 29th day of July, 1927, the claimant, while in the exercise of due care and caution for his own safety, sustained a broken toe and injury to the same foot while in the course of his labors while confined in this institution, and that on the 1st day of August, 1927, the date on which the rock fell on his leg, he was forced to work in the stone quarry by the orders of the warden and his subordinates and officers, in a condition which warranted his care and confinement in the hospital of the institution; that he informed the officers in charge that the rock which later fell was in a dangerous position and about to fall, and that unless the circumstances were changed, the claimant and other inmates were refusing to perform their duties in the stone quarry, but disregarding these warnings, the officer in charge, forced the claimant and his fellow inmates to continue with their duties in the stone quarry; that the stone did fall and crushed and injured claimant's leg and it became necessary to remove the bone of the major portion of the lower left limb, and that the injuries were permanent, and damages in the sum of $25,000.00 are asked.

The Attorney General has filed a motion to dismiss on the grounds that claimant is seeking to recover for an injury received by him while an inmate at the Joliet penitentiary and, therefore, the State is not liable, and also on the grounds that the declaration was filed July 30, 1932 and alleges that the injuries for which the claim was filed occurred on August 1, 1927, and no showing is made in the declaration that the requirements of Section 24 of the Compensation Act were complied with.

Our view of this case is that the claimant is not an employee of the State of Illinois so as to bring him within the terms and conditions of the Workmen's Compensation Act.

In the absence of statute, the State is not liable to a convict for injuries sustained by him as a result of the negligence of a prison employee, whether the convict is working outside or inside the place of imprisonment.

Clodfelter vs. *State*, 86 N. C. 51; *Lewis* vs. *State*, 96 N. Y. 71.

The reason for the rule is that the maintenance and conduct of such institution is a purely governmental function, to which the rule of respondeat superior does not apply.

It is said that if a prisoner has sustained injury as the result of the negligence of an officer charged with his custody, the injury must be attributed to the cause which occasioned his confinement.

Lewis vs. *State*, supra.

Therefore to enable a prisoner to maintain an action against the State or a governmental agency exercising the functions of a State in regard to a penal institution, the authority to sue them must be expressly given by the statute.

Curran vs. *Boston*, 151 Mass. 505.

The claim will, therefore, be denied.

(No. 2059—Claim denied.)

JOSEPH SCHULTZ, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

JOHN R. MCSWEENEY, for claimant.

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

HIGHWAYS—*construction and maintenance of, governmental function.* In the construction and maintenance of public highways the State exercises a governmental function.

PERSONAL INJURY—*when State not liable for personal injuries sustained by reason of accident on State Highway.* The State is not liable for damages caused by either a defect in the construction or failure to maintain its highways in a safe condition for travel, nor for the negligence of its servants or agents in such construction or maintenance.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a suit at law, filed by the claimant through his counsel, and alleges that on the 19th day of March, A. D. 1931, the State was operating a snow plow in a westerly direction on Ogden Avenue, a public highway in the County of Cook and State of Illinois, near the intersection of Wolf Road, and the claimant, while exercising due care and caution, was driving an automobile in an easterly direction on Ogden Avenue. It is charged that it became the duty of the State, through its agents, to so manage, operate, control, propel and drive its snow plow so as not to injure the claimant, but notwithstanding that duty, the agents of the State carelessly drove the snow plow so as to throw a large amount of snow with great force and violence against the automobile driven by claimant, by means whereof the claimant was injured.

The declaration consists of two counts, both counts practically charging the same thing and asking damages in the sum of $5,000.00.

A motion to dismiss was filed by the Attorney General for the reason that the claimant seeks to recover from an injury alleged to have been caused by the negligence of the agent of the State in the operation of a snow plow, and the State is not liable for such injuries.

The declaration was filed on January 20, 1933.

Braun vs. *State*, 6 C. C. R. 104, provides as follows:

"The maintenance of a State highway is a governmental function which the State exercises through its officers and employees. If in the discharge of his duties, an employee is negligent and such negligence causes injury or damage to the person or property of another, the negligence is then an act of the employee and cannot be regarded as the act of the State."

It is stated in the case of *Bucholz, Admrx.* vs. *State*, 7 C. C. R. 241, as follows:

"In the construction and maintenance of the roads, the State acts in the governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. Such has been the settled decision of this court for many years."

The motion of the Attorney General to dismiss will, therefore, be sustained.

(No. 2144—Claim denied.)

SAMUEL S. THOMPSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

C. S. MILLER, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time required by Act condition precedent to jurisdiction.* Making claim for compensation and filing application for same within time fixed by Act is a condition precedent, without which the court is without jurisdiction to proceed with hearing.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Samuel S. Thompson, had been in the employ of the State of Illinois under the Department of Public

Works and Buildings, Division of Highways, and was engaged in the repair and maintenance of State Bond Route No. 2 near Ullin, in Pulaski County, and while engaged in that employment on the 14th day of August, 1929, while assisting in lifting a steel drum of asphalt from the ground and loading it onto a State truck, the third and fourth fingers of his right hand were caught between the drum and the steel butt of the truck, crushing and mangling them so that the fingers had to be amputated. Notice was immediately given to his superior officer and he was continued in the employ of the State at the rate of $125.00 per month until the 26th day of January, 1933, when he was discharged as an employee of the State.

The State paid all medical bills arising from the injuries, but never paid compensation for loss of two fingers. They filed this claim on April 6, 1933. The Attorney General filed a motion to dismiss this claim, because claimant did not comply with the terms and provisions of Section 24 of the Workmen's Compensation Act of 1911, as amended, because no claim or demand was made upon the State for compensation within six months after the date of the accident, and no application for compensation or declaration of claim was made within one year after this injury or within one year after date of the last payment made by the State to the claimant of any temporary total compensation payable under the Act. The claim was originally filed for $720.00. A subsequent affidavit appears in the file that the claim is $675.00.

The Attorney General makes objection here on the grounds that this court has no jurisdiction to make an award, in this case, and the same should be dismissed for the reason that the record and proof submitted by the claimant fails to show that claimant has complied with the terms and provisions of Section 24 of the Workmen's Compensation Act. Under the statute giving this court jurisdiction in compensation cases, we are bound to determine such cases in accordance with "the rules prescribed in the Act commonly called the Workmen's Compensation Act." We, therefore, have only such powers and jurisdiction as the Industrial Commission would have, were a private employer and not the State involved.

In a very recent case, that of *Lewis* vs. *Industrial Commission, et al*, 357 Ill., 309, the Supreme Court held that the

making of a claim for compensation within the statutory period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute.

No claim having been filed in this case for approximately three years and nine months after the date of the injuries, we must hold that we have no jurisdiction in the matter.

Motion to dismiss this claim will, therefore, be sustained.

(No. 1897—Claim denied.)

ROY L. WATSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

BARR & BARR, for claimant.

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

MEDICAL SERVICES—*when claim for denied.* Where physician makes claim for value of services rendered to injured person, who was not at the time an employee of the State at the request of certain alleged employees of the State, whose identity he makes no attempt to establish, he has failed to prove his claim by a preponderance or greater weight of the evidence and an award will be denied.

SAME—*rendered at request of employee of State—principal and agent.* Where physician seeks to recover from State the value of medical services rendered to injured person at request of employee of State and does not show that said employee had any power or authority to hire claimant no recovery can be had as one dealing with an agent is bound to know the extent of authority that that agent has to bind his principal.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed April 28, 1932, averring that the claimant, who is a practicing physician and surgeon in Joliet, Illinois, had been requested by a representative of the Department of Purchases and Construction, Division of Waterways of the State of Illinois, on or about April 18, 1929 to treat one James A. Gardner, who was at that time employed as a laborer by the same Department; that he did treat the said James A. Gardner for a vertical fracture through the right carpal semi lunar with slight separation, and that $125.00 is the usual customary fee for this service.

The Attorney General moved to dismiss this case.

It appears from the evidence that Dr. Watson had submitted a bill to the assistant director of this Department on

November 27, 1931, for his services in the sum of $75.00. Dr. Watson's testimony is to the effect that he was requested on or about April 18, 1929 by a representative of the Department of Purchases and Construction to treat Gardner. That Dr. Watson did perform the services for James A. Gardner is not denied. He did not recall what foreman sent Gardner to him and someone told him to send the bill to the State. This conversation was had over the telephone.

We held in the case of *James A. Gardner* vs. *The State of Illinois*, No. 2052, that Gardner was barred from recovering from the State of Illinois, because he was not in the employ of the State at the time he received his injuries, according to his own testimony.

It is the universal rule that before a plaintiff is entitled to recover damages in any court he must prove his case by greater weight or preponderance of the evidence. The claimant in this case does not attempt to fix the identity of the alleged employees of the State who hired him to take care of Gardner. It is not shown that this employee of the State had any power or authority to hire him. One dealing with an agent is bound to know the extent of authority that that agent has to bind his principal.

Claim will, therefore, be denied.

(No. 1981—Claim denied.)

JACOB H. WRIGHT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 15, 1935.

JOHN M. PEFFERS, for claimant.

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

TORTS—*when State not liable for personal injuries and property damage—negligence of State Highway employees.* **The State is not liable for damages caused by either a defect in the construction of, or failure to maintain its highways in a safe condition for travel, nor for the negligence of its servants or agents in such construction or maintenance.**

HIGHWAYS—*construction and maintenance of, governmental function.* **In the construction and maintenance of public highways the State exercises a governmental function and it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability, and in this State there is no such statute.**

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim at law against the State which was filed on September 8, 1932. On the 8th day of March, A. D. 1931, about one o'clock in the morning, the State of Illinois was, through its agents, operating a motor truck driving a snow plow, clearing off the State highway on Route No. 4 between Williamsville and Lincoln, and at that time the claimant was driving a Model T Ford automobile over the same highway in a southerly direction, and claimant avers that it became and was the duty of the State, by its agents, not to allow or permit or cause a motor truck or snow plow to stand and remain upon a public highway during the period of one hour after sunset until sunrise of any day without exhibiting therefrom lighted lamps, as required by the statute.

It is further averred that the claimant, without fault or negligence on his part, and while in the exercise of due care and caution for his own safety, was driving along said highway; that the State, by its agents, wilfully and carelessly disregarded its duty and caused a motor truck and snow plow to stand and remain on a public highway without lights, as provided by statute; that due to lack of lights on said motor truck and snow plow, claimant drove his automobile against and upon said motor truck operating the snow plow, and as a result thereof, his automobile was damaged beyond repair and he received serious injuries, and has been compelled to pay out the sum of $1,395.00 for the services of physicians, surgeons and for medicines in endeavoring to be healed of the said injuries.

There are four counts in the declaration. As to the declaration and all the counts thereof, the Attorney General has made a motion to dismiss, on the grounds that the State, in the construction and maintenance of its roads, acts in the governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. Such has been the settled decision of this court for many years. (See *Morrissey* vs. *State of Illinois*, C. C. R. 2, 454; *Bucholz, Admrx.* vs. *State*, 7 C. C. R. 241, 243, and *Minear* vs. *State Board of Agriculture*, 259 Ill. 549.)

The motion of the Attorney General will, therefore, be sustained.

(No. 2437—Claim denied.)

A. G. FLEMING, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 16, 1935.

JAMES O. MILLER, for claimant.

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

WORKMEN'S COMPENSATION ACT—*jurisdiction of court in claims under.* The jurisdiction of the Court of Claims in actions for compensation by State employees for accidental injuries is derived from Paragraph 6 of Section 6 of Act creating court, and is the same in such actions as Industrial Commission has in other cases and the court in consideration of such cases must be governed by provisions of Workmen's Compensation Act.

SAME—*making claim for compensation within time required by Act, a condition precedent to jurisdiction of court.* Making claim for compensation within time fixed by Act is a condition precedent, without which court is without jurisdiction to proceed with hearing.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On December 30, 1930 claimant was an employee of the State of Illinois at the Chester State Hospital for the care of convicts. In the course of the performance of his duties, it was necessary for claimant to remove a convict named Schultz. When the claimant entered Schultz' cell, he was struck on the head with a receptacle, inflicting a scalp wound on the top of the head, extending over the left ear of claimant to the corner of his left eye, causing a slight brain concussion, and requiring several stitches to close the wound. After a short absence he went back to his position and continued employment until May, 1933, when he was no longer able to do the work.

This claim was not filed until July 18, 1934. Apparently, this claim has some merit, but we must hold that we have no jurisdiction in the matter. In the Court of Claims we are bound within the provisions of the Workmen's Compensation Act, and unless a claim is filed within the time limited by Section 24 of the Compensation Act, we have no jurisdiction.

The Attorney General has made a motion to dismiss for the reason that the claim is barred by the statute. The reason for this ruling is apparent in this case. The records of the institution disclose nothing concerning the case. No report appears to be on file at the hospital.

In the recent case of *Lewis* vs. *Industrial Commission*, 357 Ill. 309, it is held that the making of a claim for compensation within the statutory period is jurisdictional, and a condition precedent to the right to maintain a proceeding under the Compensation Act.

We have repeatedly held that this court is bounded by the provisions of the Compensation Act.

The motion of the Attorney General will, therefore, be sustained.

(No. 1817—Claim denied.)

LAWRENCE BAIE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 17, 1935.

DENNIS J. COLLINS, for claimant.

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

BAILMENTS—*mutual benefit of bailor and bailee—loss of bailed property.* **Where claimant rented team of horses to patrolman employed by State Highway Department for mowing weeds and one of the horses slipped on an enbankment sustaining injuries necessitating its destruction the transaction is a bailment for the mutual benefit of the parties and the bailee is only bound to use ordinary care in the use of the bailed article, and if same is lost or destroyed without his fault the loss must fall on the owner.**

PROPERTY DAMAGE—*loss of property rented by State employee—when State not liable for.* **The State is not liable for loss or destruction of property rented by claimant to employee of State, the State not having contracted for the use of same and there is no theory under which court could justify an award in such case.**

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant alleges that on July 12, 1930, a team of horses rented of him by one Henry Ederer, a patrolman employed by the State Highway Department of the State of Illinois on Route No. 71, was then and there being used by Ederer in mowing weeds; that one of the horses slipped on the embankment, fell, broke its leg and had to be shot. Claim is filed for payment of $125.00 alleged to be the value of the horse.

There is no theory under which this court could justify an award in this case. The team was rented by Ederer from Baie, for mutual benefit, and was not contracted for by the State. The injury to the horse was due to no outside agency or action.

"In bailments for mutual benefit the bailee is bound to use but ordinary care, and if the thing bailed is lost or destroyed without his fault the loss must fall on the owner."

Standard Brewery vs. Bemis & Curtis Malting Co., 171 Ill. 602.

Saunders vs. Hartsook, 85 Ill. App. 55.

There being no statute making the State liable for claims of this character, and no ground of legal liability existing, this court is without authority to make an award for the damages claimed. Motion to dismiss is allowed and as no amendment could enhance the rights of plaintiff to an award, the claim is dismissed.

(No. 2730—Claimant awarded $8.00.)

W. F. FOLEY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 12, 1935.

W. F. FOLEY, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—when award for refund will be made.* Where motor vehicle license fee is paid under mistake of fact an award for refund will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a refund of Eight Dollars ($8.00) for overpayment of auto license fees by mistake of fact. From the complaint and the records of the Secretary of State's office it appears that claimant is the owner of a Buick coupe No. 186-980, engine No. 1-922-626. In applying for auto license for the years 1932 and 1933 through a mistake in information furnished by him to the Secretary of State the horse power was given as 29.04 upon which a license fee of Twelve Dollars ($12.00) was charged and paid. The correct horse power for said motor was 23.04, for which the correct license fee should have been Eight Dollars ($8.00) per year. It further appears that adjustment of the difference has been made for the license fees for the years 1934 and 1935 and claimant therefore seeks an award for the over-payment of Four Dollars ($4.00) per year for the years 1932 and 1933 or a total of Eight Dollars ($8.00).

Each of these payments made by claimant was seemingly the result of a mistake of fact and under the law as set forth in the case of *Moorman Mfg. Co. vs. State*, No. 1886 and *John Read vs. State*, No. 2175 claimant is entitled to a return of the amount thus over-paid through said mistake.

Award is therefore hereby entered in favor of claimant for the sum of Eight Dollars ($8.00).

(No. 2232—Claimant awarded $18.00.)

WALTER P. ROSSITER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 12, 1935.

GEORGE V. B. WEEKS, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation under within time fixed therein, a condition precedent to jurisdiction.* Making claim for compensation under provisions of Workmen's Compensation Act within time fixed therein is a condition precedent, without which, court is without jurisdiction to proceed with hearing.

SAME—*claim for services in rendering first aid and medical treatment not claim for compensation—not governed by Section 24 of Act but by general five year limitation statute.* Claim for necessary first aid and medical treatment rendered injured employee is not claim for compensation under Workmen's Compensation Act and same is not required to be filed within the six months or one year fixed in Section 24 of the Act, but may be filed within period of general limitation statute of the Court of Claims.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant filed his claim on August 11, 1933, alleging that on September 21, 1932 while employed by the Division of Highways of Illinois and while engaged in work on Highway No. 17 in helping to operate a mud-jack the latter was thrown into gear without warning and the knives and blades of same struck the right hand of claimant, whereby he suffered certain injuries and the loss of use of said right hand. Complaint further alleged that claimant's wages were $4.50 per day; that no compensation has been received for the said injury; that the claim has never been presented to any department or officer of the State and he files his Bill of Particulars as follows:

Services of Dr. Barackman	$ 13.00
St. Mary's Hospital	5.00
Loss of use of hand since Sept. 21, 1932	1,482.00

The Attorney General has filed a motion to strike from the Bill of Particulars Item No. 3, for the reason that same fails to show that any claim for compensation was made within six months after the date of the accident, as required by "Section 24" under the "Workmen's Compensation Act."

The injury, for which claim was filed, was received on September 21, 1932, and the records do not show that any claim for compensation was made until the claim was filed on August 11, 1933. Such being the situation, the claim of $1,482.00 for compensation cannot be maintained.

"No proceeding for compensation under this Act shall be maintained unless a claim for compensation has been made within six months after the accident."

Section 24 W. C. A. Ill. Revised Statutes.

"The making of a claim for compensation is jurisdictional and is a condition precedent to the right to maintain a proceeding under the Workmen's Compensation Act."

City of Rochelle vs. *Industrial Comm.*, 332 Ill. 386.

The above rules would not apply to the rendering of first aid and medical treatment and an award in settlement of the bill of Dr. Barackman for $13.00 and St. Mary's Hospital for $5.00 may be properly made.

The motion to strike from Bill of Particulars Item No. 3, for compensation for loss of use of hand, is allowed, and an award is hereby entered in favor of claimant, Walter P. Rossiter, for use of Dr. Barackman, $13.00, and for the use of St. Mary's Hospital, $5.00, being a total of $18.00.

This award is made under the terms of the Workmen's Compensation Act of Illinois, and is payable, upon approval by the Governor, from the road fund appropriation, authorized under House Bill No. 1139, approved July 2, 1935.

(No. 2650—Claim denied)

JESSE R. WAGNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 12, 1935.

M. F. ABRAHAMSON, for claimant.

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

PROPERTY DAMAGE—*when no award can be made for.* Where property damage results from the negligence of a State employee, no award can be made for such damage, as the doctrine of respondeat superior is not applicable to the State.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of One Hundred Twelve and 30/100 Dollars ($112.30) for damages to his automobile and expense incurred therewith as the result of an automobile collision with a State truck operated by one Joe Witteker. The complainant alleges that he was driving his automobile in a northerly direction on U. S. Highway No. 66, on March 5, 1935, approaching the intersection of State Highway No. 116; that Joe Witteker of Cullom, Illinois was driving State truck No. 527, as an employee of the Division of Highways; that Witteker negligently and carelessly drove the State truck across the path of claimant's car striking and damaging it and causing him incidental expense thereto in the total sum of One Hundred Twelve and 30/100 Dollars ($112.30.)

The Attorney General on behalf of respondent has filed a motion to dismiss the claim for the reason that there is no legal basis of liability by which the State can be held liable for the negligence of its agents and employees. Such is the rule unless there is a statute making the State liable. This rule has been announced in many cases. See *Derby* vs. *State* 7 C. C. R. 145 and *Chumbler* vs. *State* 6 C. C. R. 138.

The motion is sustained and the claim dismissed.

(No. 2678—Claim denied.)

GUST CASLYN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1935.

THOMAS H. TAYLOR, for claimant.

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

PROPERTY DAMAGE—*horse used and owned by claimant while in employ of State—no award can be made for—possibility of loss or damage, a risk incident to employment.* Where claimant was employed by State in cutting weeds and grass along State highway and in the performance of such duties used his horse, which was injured, reducing its value, there can be no recovery against the State for such decrease in value as there is no rule of law

by which it can be held to insure property of an employee. The possibility of such loss or damage to such property is a risk incident to the employment and assumed by employee.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of One Hundred Fifty Dollars ($150.00) for damage to a horse owned and used by claimant while in the employ of respondent in cutting weeds and grass growing along State Route No. 81 near Cambridge, Illinois. The claim alleges that while so working one of the horses slipped and was cut by the blade of the mower on the right rear leg, leaving the horse in a lame condition and reducing his value from One Hundred Seventy Five Dollars ($175.00) to Twenty Five Dollars ($25.00).

The Attorney General on behalf of respondent moves to dismiss the claim for the reason that there is no existing law or statute authorizing an allowance of such claim.

Even negligence on the part of respondent, though none is alleged here, could not authorize an award in this case. The right of redress by an injured employee is fixed by the terms of the Workmen's Compensation Act but there is no rule of law by which the State can be held to insure the property of an employee that is being used by such employee as appears in the complaint herein. The possibility of such loss or damage to the property is a risk incident to the employment, and this risk was assumed by claimant when he accepted the employment in question.

The motion of the Attorney General is allowed and the claim dismissed.

(No. 2684—Claimant awarded $85.73.)

THE KERBER PACKING CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1935.

BARBER & BARBER and R. L. KEMLER, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation of facts has been filed herein whereby it appears that an order was placed with claimant by the State through the Division of Purchases, for supplies to be furnished to the Kankakee State Hospital; that pursuant to such order shipments were duly made on April 11, 1933, April 25, 1933, May 8, 1933, May 23, 1933, June 5, 1933 and June 19, 1933 of the merchandise specified in the purchase order. The supplies were duly received and paid for except the first shipment of April 11, 1933. No voucher for payment for said item was issued prior to September 30, 1933 and same remains unpaid due to the fact that the appropriation from which it might have been paid lapsed September 30, 1933.

A report from the Managing Officer of the Kankakee State Hospital states that the merchandise was duly received and used and is unpaid for because of the above facts.

"Where the facts are undisputed that the State received supplies as ordered and that the bill therefor was not presented for payment before the lapse of the appropriation out of which it could be paid, an award for the amount due will be made in the absence of the showing of laches upon the part of claimant."

Shell Petroleum Corp. vs. *State*, 7 C. C. R. 224;
Grant Tire Co. vs. *State*, 7 C. C. R. 183.

The claim is hereby allowed and an award made in the sum of Eighty Five and 73/100 Dollars ($85.73).

(No. 2564—Claim denied.)

EDWARD G. MORGAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1935.

EDWARD G. MORGAN, pro se.

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

PROPERTY DAMAGE—*negligence of employee of State—State not liable for.* There is no legal basis of liability by which the State can be held liable for the negligence of its agents and employees, unless there is a statute making it liable and there is no such statute in this State.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Thirty Five Dollars ($35.00) for damages resulting from an accident in the City of Wauke-

gan, Illinois on May 4, 1934. Claimant represents that he was driving westward on Liberty Street; that he stopped his automobile at the intersection of McAlester Avenue and Belvidere Street, which latter street at the time was closed to traffic; that one Edward Manoian, an employee of the State Highway Department, was driving a State truck in an easterly direction on Belvidere Street, approaching the intersection of same with McAlester Avenue and Liberty Street; that the driver of the State truck was driving at a reckless rate of speed and failed to exercise reasonable and ordinary care, disregarded the obstruction, lost control of the truck and skidded about forty feet into claimant's automobile where the latter stood at the stop sign at Belvidere Street.

The Attorney General on behalf of the State has filed a motion to dismiss the claim for the reason that there is no legal basis of liability by which the State can be held liable for the negligence of its agents and employees. Such is the rule unless there is a statute making the State liable. There is no such statute in this State and the motion of the Attorney General is granted. See *Derby* vs. *State*, 7 C. C. R. 145 and *Chambler, etc.* vs. *State*, 6 C. C. R. 138.

The court is reluctant to deny the claim because, if the facts are as represented in the complaint, the driver of the State truck should be held responsible. This however does not authorize this court to grant an award against the State in settlement of damages resulting from the negligent acts of such employee, and the claim is therefore dismissed.

(No. 2737—Claim denied.)

MARY E. WIDICK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1935.

CHARLES E. LEE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*failure of injured employee to file claim for compensation under within time provided in deprives court of jurisdiction to proceed with hearing.* Making claim for compensation and filing application for same within time fixed by Act is a condition precedent, without which, court is without jurisdiction to hear claim.

MR. JUSTICE YANTIS delivered the opinion of the court:

On September 1, 1934, claimant was employed as a cook at the Lincoln State School and Colony at Lincoln, Illinois. Her complaint represents that on said date she fell while in the course of her employment and seriously fractured her left wrist and arm. Her claim for an award in the sum of Eleven Dollars ($11.00) per week on the basis of a permanent injury, was filed October 9, 1935.

A motion to dismiss the claim has been filed by the Attorney General for the reason that same was not filed within one year after occurrence of the alleged injury, and further that there is no allegation in the complaint that notice of claim was given within six months after such injury. In considering claims for compensation to injured employees the Court of Claims is limited and governed by the provisions of the Workmen's Compensation Act of Illinois. Section 24 of the Act provides:

"No proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident; *provided*, that in any case, unless application for compensation is filed with the Industrial Commission (Court of Claims) within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

Under existing statutes the motion of the Attorney General to dismiss must be allowed, and the claim is hereby dismissed.

(No. 2740—Claim denied.)

K. H. WATERSTREET, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1935.

K. H. WATERSTREET, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.* In the maintenance of a public highway the State is acting in its governmental capacity and is not liable for the negligence of its servants and agents in connection therewith.

SAME—*same—same—pleading.* Where complaint on its face shows that claim is based on negligence of State employee engaged in constructing or maintaining State highway motion to dismiss will be sustained and award denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Twenty Six and 55/100 Dollars ($26.55) for damages to claimant's automobile on August 28, 1935 by reason, as he alleges, of being struck by a State highway maintenance truck No. 361 at Elburn, Illinois, driven by one Charles Nelson.

The Attorney General has filed a motion on behalf of respondent to dismiss the claim on the ground that the State cannot be held to respond for the torts or negligent acts of its employees. If the facts are as represented in the complaint the employee in question should be compelled to pay for the damages caused, but this court has not jurisdiction to make such an order, and neither can an order be properly entered against the State as the rule of respondeat superior does not apply thereto. Similiarly as stated in *Minear* vs. *State Board of Agriculture*, 259 Ill. 549 and in *Bucholz, Admrx.* vs. *State*, 7 C. C. R. 241.

"In the construction and maintenance of its roads the State acts in a governmental capacity and in the exercise thereof does not become liable for the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability."

The motion of the Attorney General is allowed and the claim is dismissed.

(No. 2613—Claim denied.)

NELSON G. ALEXANDER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.

MONROE & ALLEN, for claimant.

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

PROPERTY DAMAGE—*personal injuries—highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.*

SAME—*same—claim on grounds of equity and good conscience denied.*

The claim in this case is based on facts similar to those in the case of *Royal* vs. *State*, No. 2597 *ante* and what was said in that case applies with equal force here.

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

The complaint filed in this case alleges in substance that on November 17th, 1934, at 6:10 P. M., claimant was driving his automobile at a speed of about forty-five (45) miles per hour in an easterly direction on S. B. I. Route 121 at a point about eight (8) miles west of Newman, Illinois, and was using due care for his own safety; that he suddenly came upon an unlighted barrier placed across the right half of said highway by the maintenance department of the Division of Highways of the respondent in connection with certain repair work then being done by said respondent; that in attempting to avoid striking such barrier, claimant turned sharply to the left side of the road; that the left wheels of his automobile slipped off the concrete roadway; that in attempting to turn back on such roadway, his automobile turned over on its side, and was thereby damaged, and claimant sustained injuries resulting in a loss of time and wages; for all of which he claims damages in the sum of Five Hundred Ten Dollars and Sixty Cents ($510.60).

The Attorney General has entered a motion to dismiss the case on the ground that the respondent in the exercise of its governmental functions is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

The claimant contends that he is entitled to an award on the grounds of "equity and good conscience" based upon the provisions of Paragraph four (4) of Section six (6) of the Court of Claims Act, which provides that this court shall have power "to hear and determine all claims * * * which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

The same contention was made in the case of *Lois Bass* vs. *State*, No. 2679, and *Sam Schnell* vs. *State*, No. 2610, both of which were decided at the present term of this court, as well as in numerous other cases recently decided. In all of such cases, we held adversely to the contentions of the claimant.

The reasons for such decisions and some of the many authorities in support of the position taken by the court are set forth in the case of *Lester A. Royal* vs. *State*, No. 2597, and in the case of *George McGready* vs. *State*, No. 2604, decided at the September, 1935 term of this court, and a repe-

tition thereof at this time will serve no good purpose. For the reasons set forth in the last mentioned cases, the motion of the Attorney General will be sustained.

Motion allowed. Case dismissed.

(No. 2639—Claim denied.)

ALAN C. ATCHISON ET AL., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.

PAUL G. WEISENHORN, for claimant.

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

PERSONAL INJURIES—*property damage—highways—negligence of State employees engaged in construction or maintenance of—State not liable for.*

SAME—*same—claim on grounds of equity and good conscience denied.*

The claim in this case is based on facts similar to those in the case of *Royal vs. State*, No. 2597, ante, and what was said by the court in that case applies with equal force here.

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

Claimants allege in their complaint herein that on November 29th, 1933, claimant Alan A. Atchison was driving his automobile in a southerly direction on S. B. I. Route 4, about five (5) miles south of the city of Pontiac; that the claimant Cecile E. Atchison was a passenger in said automobile; that for a long time prior to said November 29th, the respondent knowingly and negligently permitted a girder on one of its bridges which formed a part of said S. B. I. Route 4 to project over the concrete highway, thereby preventing a free passage over said bridge; that as a result of the negligence of the respondent as aforesaid, the front wheel of said automobile collided with said steel girder, damaging said automobile to the extent of One Hundred Seventy-five Dollars ($175.00) and causing serious personal injuries to claimant Cecile E. Atchison;—for all of which claimants ask an award in the amount of Three Thousand Dollars ($3,000.00).

The Attorney General has moved to dismiss the case on the ground that the respondent is not liable for the negligence charged in the complaint.

In opposing the motion of the Attorney General, claimants contend that they are entitled to an award on the grounds of equity and good conscience, and ask that the motion of the Attorney General be over-ruled and that they be given an opportunity to produce evidence in support of their claim.

This court has held in numerous cases that in the maintenance of its durable hard-surfaced roads, the State is acting in a governmental capacity; that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity if the State were suable, and that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award.

Numerous citations supporting the foregoing propositions are set forth in the case of *Lester A. Royal* vs. *State*, No. 2597, and in the case of *George McGready* and *John DeLuise* vs. *State*, No. 2604, both decided at the September, A. D. 1935 term of this court, and it is needless to repeat them here.

If all of the allegations of the complaint were proven on the trial, we would have no authority to allow an award under the repeated decisions of this court, and it would therefore be useless to make such proof.

The motion of the Attorney General must therefore be sustained.

Motion allowed. Case dismissed.

(No. 2221—Claim denied.)

FRED BABER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.
Rehearing denied February 9, 1937.

GULLETT & EAGLETON and WILBUR H. HICKMAN, for claimant.

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

DEDICATION OF PROPERTY FOR PUBLIC USE—*effect of deed of.* Where property for public use is acquired by deed of dedication instead of by condemnation, the payment of the consideration agreed upon, has the same effect as the assessment of damages in condemnation and includes damages to property not taken, the same as in condemnation proceedings.

PROPERTY DAMAGE—*part not acquired by State in deed of dedication for public use—claimed as result of construction of public improvement—when award for denied.* Where claimant conveyed a portion of his land to State for public use by deed of dedication for use as public highway and same is constructed thereon by State, the conveyance will be held to be a release of all damages which would be presumed to be included in the amount of damages if the property had been condemned and the grantor cannot recover for any damages to the remainder of his land which result from the proper construction of the highway or the maintenance of same and an award for same must be denied.

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

The claimant, Fred Baber, is now, and for more than fifteen years last past has been the owner of the Southeast Quarter (SE¼) of Section Twenty (20) and the Southwest Quarter (SW¼) of Section Twenty-one (21), all in Township Thirteen (13) North, Range Thirteen (13) West of the Third Principal Meridian, in Edgar County, Illinois.

By deed of dedication dated August 23rd, 1923, for the consideration of $1,077.00, claimant and others granted, conveyed and dedicated to the People of the State of Illinois, for the purposes of a public highway, a strip of land containing 4.23 acres, along the south side of the above described premises.

Work on the construction of said highway was commenced on or about April 24th, 1924, and the same was completed on or about April 4th, 1925; said highway being a part of S. B. I. Route No. 16. Prior to the time of the construction of such highway, the tract of land so conveyed for highway purposes as aforesaid was farm land, and no part thereof had been previously used for highway purposes.

Prior to the construction of the highway in question there was but one open ditch on claimant's property, the same being on the east half thereof and extending in a northwesterly direction across the same. Now there are three other ditches or draws on claimant's property, being on the west half of such property. The land in question is all low land, and prior to 1892 was grass land. In 1892 it was tile drained for farm

purposes, and after tiling, it was all tillable. Before tiling there were ponds on the premises. The tile used were ten, eight and seven-inch tile, and they were placed in the approximate location of the ditches hereinbefore referred to.

The general course of drainage of the surface water to and over claimant's land is from the south to the north. In the construction of S. B. I. Route 16, culverts were placed across the same immediately south of the aforementioned ditches or draws, being at the low points on the land.

Prior to the construction of the highway in question, it was possible to plow over all of claimant's land from the east to the west, except over the ditch on the east half of the property. At the present time the proper cultivation of the land is also interfered with by the ditches on the west half of the property.

Witnesses for the claimant testified that before S. B. I. Route 16 was constructed, claimant's property suffered no damage by reason of surface water; but after such highway constructed, and commencing about 1928, there was damage to the land by reason of the surface water which came through the several culverts under the highway in question; and that such damage increased with each succeeding year.

Claimant filed his complaint herein on July 25th, 1933 and charges therein in substance that the respondent improperly and wrongfully constructed said highway, whereby the property of the claimant was damaged, and also alleges in said complaint the following:—

> "All of the damages herein claimed is a direct result of the improper and wrongful construction of said S. B. I. Road Route No. 16 in that it changed the watercourses, and watersheds on the premises of the claimant," etc.

Prior to the construction of such highway, there was a hedge fence along the south side of the west half of claimant's property, and a rail fence along the south side of the east half of said property. These fences were located on the strip of land which was conveyed and dedicated to the State, and in the construction of the said highway both fences were removed. Claimant contends that said fences had a tendency to retard the flow of water from the dominant land to the servient estate; and that after the removal of such fences the flow of the water into the ditches hereinbefore referred to was

increased and accelerated, and resulted in the damage complained of.

Claimant's right of action, as set forth in the complaint, is based upon the contention that the highway in question was improperly and wrongfully constructed by the respondent, and that as a result thereof watercourses and watersheds on said property were changed, to the resulting damage of the claimant.

The Attorney General contends that the claimant has no right to recover in this case, and urges among other reasons, that the aforementioned conveyance and dedication to respondent has the same effect as a judgment in a condemnation proceeding, and bars the claimant from a recovery.

The question raised by the Attorney General has been before the courts of this State in a number of cases involving conveyances for railroad rights-of-way, and our courts have uniformly held that the legal effect of such a conveyance is the same as a judgment in condemnation; that the consideration paid for the conveyance constitutes a release of all damages, including damages to property not conveyed, which result from the proper construction of the road in question.

If the property conveyed by the claimant's deed of dedication as aforesaid had been condemned for highway purposes, the damages assessed would have been not only for the property taken, but also for the remaining property if any, which was damaged but not taken. Consequently, where property is acquired by deed of dedication instead of by condemnation, the payment of the consideration agreed upon, has the same effect as the assessment of damages in condemnation, and includes damages to property not taken, the same as in condemnation proceedings.

In considering the legal effect of a similar deed made to a railroad company, the Supreme Court of this State, in the case of *C. R. I. & P. Ry. Co.* vs. *Smith*, Ill. 363, said:

"We regard the deed from Burcky, for the public use this railroad, as having the same effect upon the rights of the parties, with respect to Lot 11, that a condemnation of the same land for such public use would have had, —the one being a voluntary conveyance made for a public use, and the other amounting to a statutory conveyance for such use. Had this right-of-way been acquired by condemnation, Burcky would have had made to him compensation for the value of the strip of land one hundred feet wide taken, and also an assessment of all the damages to the residue of Lot 11 to result from the operation of the railroad. The rule is, that the appraisement of

damages in a case of condemnation embraces all past, present and future damages which the improvement may thereafter reasonably produce. Mills on Eminent Domain, Sec. 216, and cases cited; *Chicago and Alton R. R. Co. vs. Springfield and Northwestern R. R. Co.*, 67 Ill. 142; *Keithsburg and Eastern R. R. Co. vs. Henry*, 79 id. 290.

"It follows, that had the railroad company condemned this right-of-way as against Burcky, who was the owner of the whole tract, no recovery could have been had for the damages here sued for. They would have been included in the assessment of damages made on the condemnation, and whether in fact included or not, they would be conclusively presumed to have been included. The same result, we conceive, follows from Burcky's voluntary conveyance of the right-of-way. It is to be presumed that the contingent damages to the residue of the lot which might arise from the prudent operation of the railroad, were taken into account in fixing the price."

In the case of *Atterbury* vs. *C. I. & St. L. Ry. Co.*, 134 Ill. App. 330, the court, on page 332, said:

"Where a right-of-way for a railroad is conveyed by deed it will be *conclusively presumed* that all damages resulting to the balance of the grantor's land from the proper construction and operation of the railroad were included in the consideration paid therefor."

A similar question was before this court in the case of *Lampp* vs. *State of Illinois*, 6 C. C. R. 349. In that case the court, on page 352, said:

"Claimants Pyle and Finney executed deeds conveying to the State the right-of-way required for the road in 1923. Where a person conveys a right-of-way over his land it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance the same as an assessment of damages on a condemnation would be presumed to embrace. The conveyance of the right-of-way to the State by Pyle and Finney had the same effect upon the parties to the deeds that a condemnation for the same lands would have had. If the right-of-way conveyed by them had been acquired by condemnation not only would the compensation for such right-of-way have been determined in that proceeding but the damages to their other lands caused by the construction of the road would also have been assessed. It follows that had the State condemned this right-of-way no recovery could be had by these claimants for the damages here sued for. They would have been included in the assessment of damages made on the condemnation, and whether in fact included or not, they would be conclusively presumed to have been included. The same result follows from the voluntary conveyance by them of the right-of-way to the State."

In 2 Lewis Eminent Domain, 2d Edition, page 702, Section 293, the rule is set forth as follows:

"Conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation. The conveyance will be held to be a release of all damages which

would be presumed to be included in the award of damages if the property had been condemned. The grantor, therefore, cannot recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed."

It seems well settled from the foregoing authorities, that any damages to the claimant's property which result from a proper construction, use and operation of the highway in question, are conclusively presumed to have been compensated for by the consideration paid for the deed of dedication.

However, under the authorities quoted, and other authorities on the question, the consideration paid for the deed of dedication covers only such damages as result from the proper construction, use and operation of the highway in question. The complaint herein is based upon the improper and wrongful construction of said highway, but no evidence was produced or offered in support of the charge made in the complaint, and the record does not contain a particle of evidence to indicate that the highway was wrongfully or improperly constructed. Claimant produced a number of witnesses who testified that his property had been damaged, but there was no testimony whatsoever to show that such damages resulted from any negligence or any improper or wrongful act on the part of the respondent in the construction of such highway.

We cannot base an award on supposition or conjecture, and on the record before us, we have no authority to enter an award.

The Attorney General has urged several other grounds for the dismissal of the case, but from the view we take of the matter, it becomes unnecessary to consider the same.

For the reasons above set forth, award is denied and the case dismissed.

(No. 2679—Claim denied.)

LOIS BASS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.

SNAVELY & MILLER, for claimant.

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

PERSONAL INJURIES—*property damage—highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.*

SAME—*same—same—same—claim on grounds of equity and good conscience denied.* The claim in this case is based on facts similar to those in the case of *Royal vs. State*, No. 2597, *ante*, and the decision of the court in said case is controlling herein.

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

On November 17th, 1934 claimant Lois Bass was driving her automobile in an easterly direction on S. B. I. Route 11 at a point about four (4) miles west of Marshall in Clark County, and her minor daughter Jacqueline was a passenger in said automobile. At the time and place aforementioned one Francis Twigg who was then and there in the employ of the respondent, was driving a State truck in a westerly direction. In trying to pass another vehicle on a rather steep grade, said employee of the respondent drove and operated such truck in such a careless and negligent manner that it collided with the automobile of the claimant, and as the result thereof the claimant and her daughter suffered severe but not permanent injuries, and claimant's automobile was damaged to the extent of Two Hundred Seventy-five Dollars ($275.00). Claimant asks an award in the amount of Four Hundred Ninety-seven Dollars ($497.00) for the damages so sustained as aforesaid.

The Attorney General has entered a motion to dismiss the case on the ground that the State is not liable for the negligence of its servants and agents under the doctrine of respondent superior in the absence of a statute making it so liable.

Claimant contends that Paragraph four (4) of the Court of Claims Act which provides that the Court of Claims shall have power "to hear and determine all claims * * * * * which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay" constitutes statutory authority under which the respondent is liable in this case.

The same contention has been made in numerous recent cases and we have repeatedly held that the State in the maintenance of its durable hard-surfaced roads is engaged in a governmental function; that in the exercise of such functions, it is not liable for the negligent acts of its servants and agents in the absence of a statute making it so liable; that the claim-

ant cannot invoke the principles of equity and good conscience to secure an award unless she can bring herself within the provisions of a law giving her the right to such an award; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity if the State were suable.

Some of the numerous authorities supporting the propositions above set forth are cited in the case of *Lester A. Royal* vs. *State*, No. 2597, and in the case of *George McGready, et al.* vs. *State*, No. 2604, both decided at the September, A. D. 1935 term of this court, and a repetition thereof at this time is therefore unnecessary. The liability, if any, rests upon the negligent employee and not upon the State.

For the reasons suggested, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2428—Claimant awarded $4,000.00.)

MARIE McCABE, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF JOHN L. McCABE, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.
Supplemental opinion filed October 14, 1936.

BRYANT, ROBERTS, HWASS & LEWE, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award will be made for injury resulting in death of State employee.* Where it is apparent that claimant's intestate, a State highway maintenance policeman, sustained accidental injuries, causing his death, arising out of and in the course of his employment, an award will be made for compensation and amount computed under provisions of the Act.

SAME—*duties of State highway maintenance policeman, extra hazardous employment.* The duties of a State highway maintenance policeman are extra hazardous in fact, and of such a nature as to be properly classified as such under the Workmen's Compensation Act.

SAME—*marriage of surviving wife of State employee, having no children, who has been awarded compensation extinguishes further rights to same.* Under Section 7 of the Workmen's Compensation Act, any right of a widow of a State employee, without children to receive compensation payments

under said Act is extinguished by the remarriage of such widow, and payments due on any award for such compensation will be discontinued from the date of such marriage.

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

Marie McCabe, individually, and as administratrix of the estate of John L. McCabe, deceased, filed her claim herein on July 6th, 1934 to recover compensation for the death of her husband, John L. McCabe.

For a long time prior to August 12th, 1933 said John L. McCabe was a State highway maintenance patrolman in the employ of the respondent, and his average annual wages were $1,920.00 per annum, payable at the rate of $160.00 per month.

On August 12th, 1933 said John L. McCabe in the course of his duties was driving a motorcycle in a westerly direction upon Roosevelt Road in Chicago, about one and one-half miles east of the County Line Road, and was driving in the westbound traffic lane of said road. At the same time one Tad Martell, aged 19, was driving a Ford coupe owned by his brother Lumina Martell, in an easterly direction on said road and without any warning, turned directly across the westbound traffic lane immediately in front of the said John L. McCabe; as a result of which the motorcycle driven by said John L. McCabe collided with the aforementioned Ford coupe and the said John L. McCabe sustained injuries from which he died on the same day.

Neither the driver nor the owner of the Ford coupe is financially responsible and neither of them owns any property out of which a judgment might be satisfied.

There is evidence in the record that actual knowledge of the death of the deceased was had by one T. A. Svoboda, a sergeant of the State Highway Police and superior of said decedent, and a report thereof was given by said sergeant to the proper State officer; also that claim for compensation was made within the time required by Section 24 of the Compensation Act.

This court has held in numerous cases that in the maintenance and policing of its hard-surfaced highways, the respondent is engaged in an extra-hazardous enterprise within the meaning of those words as used in Section 3 of the Workmen's Compensation Act; and the claimant is therefore entitled to

compensation on account of the death of said decedent, under the provisions of such Act.

Said decedent left him surviving the claimant, Marie McCabe, his widow, and no child or children. Under the provisions of Section 7a of the Compensation Act the claimant Marie McCabe, individually, is therefore entitled to receive compensation in the amount of Four Thousand Dollars ($4,000.00) payable in monthly installments in accordance with the provisions of such Act.

Award is therefore entered in favor of the claimant Marie McCabe individually, for the sum of Four Thousand Dollars ($4,000.00), payable in sixty-one (61) monthly installments of Sixty-five Dollars ($65.00) each, commencing on September 13th, 1933, and one final installment of Thirty-five Dollars ($35.00).

Claimant is now entitled to have and receive from the respondent the sum of Seventeen Hundred Fifty-five Dollars ($1,755.00), being the amount of compensation that has accrued from August 13th, 1933 to November 13th, 1935, and the remainder of said award, to wit, Twenty-two Hundred Forty-five Dollars ($2,245.00), will be paid by said respondent in thirty-four (34) monthly installments of Sixty-five Dollars ($65.00) each, commencing on December 13th, 1935, and one final installment of Thirty-five Dollars ($35.00).

This award being for the death of a State employee is subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees, and providing for the method of payment thereof,*" approved July 2d, 1935.

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the Road Fund in the manner provided by such Act.

SUPPLEMENTAL ORDER.

Per Curiam:

This cause now again coming before the court upon a report by claimant, under date of October 8, 1936, of her remarriage on the 16th day of September, 1936, and it appearing to the court that under provision of Section 7 of the Workmen's Compensation Act of this State, any right of the

claimant to receive compensation payments under such Act is extinguished by the remarriage of the claimant;

THEREFORE, it is hereby ordered that the compensation payments heretofore awarded to the claimant in this behalf be and the same are hereby extinguished as of the 16th day of September A. D. 1936.

It is further ordered that a certified copy of this order be forwarded forthwith to the Auditor of Public Accounts, to the Finance Department and to the claimant.

(No. 2420—Claimant awarded $3,816.00.)

MINNIE PERRY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.

ADAIR & GROVES, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award for compensation under will be made.* Where it clearly appears that State employee sustained accidental personal injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation will be made to those entitled under the provisions of the Act.

SAME—*petition for lump sum settlement of compensation awarded under —when denied.* Where no showing is made which would justify a lump sum settlement of compensation awarded under provisions of Workmen's Compensation Act such petition will be denied.

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

On October 10th, 1933, and for several years prior thereto, Aaron K. Perry was employed as a laborer at the Illinois Soldiers' and Sailors' Home at Quincy; on the last mentioned date, while engaged with several other men in cutting out and removing the tops of some trees on the grounds of the Home, he sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the next succeeding day.

It appears from the record that both claimant and respondent at the time of the accident were operating under the provisions of the Workmen's Compensation Act; and

that notice of the accident was given and claim for compensation made in accordance with the requirements of Section twenty-four (24) of such Act.

Said Aaron K. Perry left him surviving the claimant, Minnie Perry, his widow, whom he was under legal obligation to support at the time he was injured as aforesaid, and Roy Perry, his son, whose age does not appear in the record. The earnings of the decedent during the year next preceding the injury were $954.00, and were payable monthly; the average monthly wage being $79.50.

Under the terms of the Workmen's Compensation Act, the claimant, Minnie Perry, is entitled to receive compensation in an amount equal to four times the average annual earnings of said Aaron K. Perry, to-wit, $3,816.00, payable in monthly installments of $39.75.

Award is therefore entered in favor of the claimant, Minnie Perry, for the sum of Thirty-eight Hundred Sixteen Dollars ($3,816.00), payable in ninety-six (96) monthly installments of Thirty-nine Dollars and Seventy-five cents ($39.75), commencing on the 11th day of November, A. D. 1933.

Claimant is now entitled to have and receive from the respondent the sum of One Thousand Thirty-three Dollars and Fifty Cents ($1,033.50), being the amount of compensation that has accrued from October 11th, 1933 to December 11th, 1935, and the remainder of said award, to-wit, Twenty-seven Hundred Eighty-two Dollars and Fifty Cents ($2,782.50), will be paid by said respondent in seventy (70) equal monthly payments of Thirty-nine Dollars and Seventy-five Cents ($39.75) commencing on January 11th, 1936.

This award being for the death of a State employee, is subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees, and providing for the method of payment thereof,*" approved July 2d, 1935.

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the General Revenue Fund, in the manner provided in such Act.

Claimant has filed her petition herein for a lump sum settlement, pursuant to the provisions of Section nine (9) of the Workmen's Compensation Act. No showing is made

which would justify a lump sum settlement under the facts in this case, and the petition for a lump sum settlement is therefore denied.

(No. 2610—Claim denied.)

SAM SCHNELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.

COTTON & NICHOLS, for claimant.

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

The claim in this case is based on facts similar to those in the case of *Royal* vs. *State*, No. 2597, *ante*, and the decision of the court in said case is applicable and controlling herein.

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

The complaint filed in this cause alleges that prior to and on the 17th day of November, A. D. 1934 the respondent, through its Department of Public Works and Buildings, was engaged in repairing a portion of S. B. I. Route 121, between the Village of Camargo and the Village of Murdock in Douglas County; that in the progress of said work, half of the road, longitudinally, was broken up and replaced by fresh concrete, and the other half of the road was kept open for traffic; that barriers two and one-half feet in height were placed at each end of the portion of the road being repaired, but that no warning signs, lights on said barriers, or other notice of the existence of such barriers was given to the traveling public; that on the date aforementioned, about 6:30 P. M., and after dark, claimant was driving his automobile in an easterly direction on said road at a reasonable rate of speed; that he was not familiar with said road, and was in the exercise of all due care and caution; that he came upon said barriers without any notice or warning of the existence thereof; that in order to avoid collision with the same and with another car coming from the opposite direction, he swerved and ran into one end of such barriers, as a result of which, his automobile turned over several times and was totally wrecked, and claimant sustained serious and permanent injuries; for

all of which he claims damages in the sum of Three Thousand Dollars ($3,000.00).

The Attorney General has entered a motion to dismiss the case for the reason that in the exercise of its governmental functions, the respondent is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

The claimant agrees with the proposition of law advanced by the Attorney General, but contends that he is entitled to an award by virtue of the provisions of Paragraph four (4) of Section six (6) of the Court of Claims Act which provides that the Court of Claims shall have power "to hear and determine all claims * * * * which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay."

The same contention was made in the case of *Lois Bass* vs. *State*, No. 2679, decided at the present term of this court, and in the case of *Lester A. Royal* vs. *State*, No. 2597, decided at the September, 1935, term of this court. In both of such cases, as in numerous previous cases, we held adversely to the contention of the claimant.

For the reasons and under the authorities set forth in the aforementioned case of *Lester A. Royal* vs. *State*, the motion of the Attorney General must be sustained.

Motion allowed. Case dismissed.

(No. 2526—Claimant awarded $3,000.00.)

EDWARD KLEPPISCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1936.

PERRY HILES, for claimant.

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

COURT OF CLAIMS—*jurisdiction in claims for damages to property not taken for public use—construction of public improvement causing damage.* **By virtue of Section 13 of Article 2 of the Constitution of Illinois and the statute creating the Court of Claims, said court has jurisdiction to hear and determine actions for damages to land not taken for public use, by reason of construction of public improvement.**

PROPERTY DAMAGE—*property not taken for public use—caused by construction of public improvement—measure of.* **Where private property is not**

taken for public use but is damaged by reason of the construction of a public improvement, the proper measure of damages is the difference between the fair cash market value of the property, unaffected by the improvement and its fair cash market value as affected by it.

CONSTRUCTION OF PUBLIC IMPROVEMENT—*damage to portion property not taken for public use caused by—benefit to balance accruing from, outweighing damages bars award.* Where it is claimed that by reason of the construction of a public improvement, a certain portion of private property not taken for public use is damaged and it can be fairly assumed that by reason of such construction that certain benefits or convenience accrue to balance of said land outweighing damages claimed to said portion there can be no award. Property damage caused by construction of public improvement—property not taken for public use—interference with ingress to and egress from constitutes. Where ingress to and egress from private property, not taken for public use is interfered with by reason of construction of public improvement, same constitutes direct damage and an award may be made therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

By this proceeding claimant seeks to recover damages alleged to have been caused by the State of Illinois to the premises owned by him, because of the construction by respondent of S. B. I. Route No. 157 along the east side of claimant's premises. Claimant's property is a twenty-five (25) acre tract located on the south side of S. B. I. Route No. 11, a short distance west of Collinsville, Illinois. Prior to the construction of Route No. 157 there was a city addition just east of claimant's property known as the Collinsville West End Addition; the west boundary of which, called Grand View Drive, separated said Addition from claimant's property. Route No. 157 was constructed on this roadway, known as Grand View Drive and a by-pass or elevated bridge was placed at the intersection of No. 157 with S. B. I. Route No. 11. The latter road at the point in question runs practically east and west, and claimant's property faces the same. His improvements consist of an eight room modern house, with bath, electric lights, water, gas and furnace; a basement under the entire building; a large barn; chicken house; garage and large hog barn. The house and outbuildings comprise about one and one-half acres, and there are twenty-five (25) acres in the tract. The property abuts Route No. 157 along the east side for a distance of eight hundred seventy-one (871) feet. There is then a jog to the west in claimant's eastern boundary line of twenty-seven (27) feet three (3) inches and his east line

then extends south a further distance of seven hundred twenty-three (723) feet eight (8) inches along Route No. 157, leaving a space of twenty-seven (27) feet between that portion of his property line and the road. Claimant contends that prior to the construction in question he had ready and available access from said premises and each and every part thereof adjoining said highway or street, to and from said highway; that by the construction of the highway and the embankment complained of, the State changed the grade of said highway adjoining said premises; that the embankment so constructed extends from the north line of the premises southerly along the east line for a distance of three hundred twenty-seven (327) feet; that such embankment consists of a concrete wall from the level of the ground up to a height of eight feet and of an earthen embankment from the top of such wall an additional seven feet to the concrete slab, making an embankment fifteen feet in height at the northeast corner of claimant's premises and with a gradual slope to grade line at the southern end; that claimant's premises were thereby closed off from access to the street known as Grand View Drive, and separated from the property that lies to the east thereof known as Collinsville West End Addition; that back of the barns and other buildings there was available a tract fronting upon said Grand View Drive sufficient to make about seven, 50-foot, lots facing on said roadway or street and that access to all of said premises from the east was cut off by said embankment. Claimant further complains that the drainage of said premises had been interfered with not only by stopping the drainage which flowed eastward from said premises and along the roadway, but that much additional surface water is thrown on said premises from said embankment.

Damages are further sought because of depreciation in the value of the premises on account of the interference with the scenic view, dust from the highway and the cutting off of air and breeze from the dwelling house by the high embankment. Damages are asked in the sum of Nine Thousand Six Hundred Dollars ($9,600.00).

The proof shows that prior to the construction of the embankment in question, claimant had a beautiful home site, from which one could see far up the roadway on Route No. 11 to the east, with an attractive view from that side of the house toward the Sub-division mentioned; that now the em-

bankment is twenty (20) feet from the house line and shuts out the entire view from both lower and upper windows, and the exhibits and testimony in evidence establish that access to the property from the east and the frontage of said premises on the east side thereof is entirely destroyed.

Respondent's testimony discloses that a temporary grade crossing for Route No. 157 was built across Route No. 11 in 1931, and that the present elevated approach and embankment were constructed in the spring of 1934. A number of culverts have been constructed; one about one hundred ten (110) feet south of Route No. 11; another is about seven hundred (700) feet south of Route No. 11; the water from it goes down across the Kleppisch land. The water that falls on Route No. 157 flows in a southerly direction to a point about three hundred fifty (350) feet south of Route No. 11 and leaves the pavement and flows back in a northerly direction to a 12-inch tile that is along the westerly edge of the retaining wall. This tile connects with the culvert along the southerly side of Route No. 11. This drainage is intended to take care of the water that drains from the pavement for a distance of approximately four hundred fifty (450) feet south of Route No. 11; from that point south the water that falls on the westerly half of the slab drains directly to the Kleppisch land. There is no ditch along the westerly side of the right-of-way anywhere along the Kleppisch land; the retaining wall extends upward about one foot above the point where the earth fill begins, and the evidence is uncertain as to whether the dirt that washes down from the fill would wash over the top of the fill onto the Kleppisch land or not; but the proof seems to indicate that continued attention would have to be given by the highway maintenance crew to prevent such wash.

Evidence has been introduced from a number of witnesses as to the value of the premises before and after the construction of Route No. 157. The Kleppisch land had never been subdivided and from the evidence it appears that the best use for which the premises are adapted at this time is that for which they are in fact being used, i. e. residential and truck gardening purposes.

It has been held by this court that in the building and maintenance of highways and hard surface roads, the State is exercising a governmental function and therein acts in its

sovereign capacity and therefore free from liability for injuries resulting.

Section 13 of Article 2 of the Constitution however provides as follows:

"Private property shall not be taken or damaged for public use, without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law."

As previously held by this court, we regard this provision of the Constitution as being fundamental. Under the legislative act creating this court and under the foregoing provision of the Constitution, this court has taken the position that it had jurisdiction to fairly determine what damage, if any, claimant has in connection with a complaint of this character. Claimant does not contend that the State has taken any of his property, but he asks for consequential damage on account of the construction of the embankment complained of.

Injury or damage to property not taken, in the construction of an improvement, for which compensation is to be made, must be a direct physical injury or disturbance of a right which the owner enjoys in connection with the property or which causes damage in excess of that sustained by the public in general. If the convenience of the road to the balance of a tract will outweigh the inconvenience suffered by a certain selected portion, there can be no award. In the present case it does not appear that the construction of Route No. 157 is of any material benefit to that portion of the Kleppisch land lying west of his dwelling, for such land already had a frontage on S. B. I. Route No. 11. That portion of his land which lies south of the point where the embankment begins is quite apparently benefited by having a hard road extending across the front thereof. That portion which now faces the embankment in question has quite apparently lost the freedom of access on a direct frontage basis.

It has been repeatedly held by our Supreme Court that inconvenience or annoyance necessarily occasioned to the owners of abutting property during the progress of the work by the construction of an improvement, does not constitute damage to the property not taken, within the meaning of the Constitution, but is merely a burden incidentally imposed upon private property adjacent to a public work, without which, such improvements can seldom be made and which

therefore give no cause of action. *Chicago Flour Co.* vs. *City of Chicago*, 243, Ill. 218; *Osgood* vs. *City of Chicago*, 154 Ill. 194; *Grassle* vs. *State*, C. of C. No. 2339.

Where a property owner's right of access to his property has been destroyed or interfered with, he is entitled to compensation for the damages thereby sustained. *Rigney* vs. *City of Chicago*, 102 Ill. 64; *Edward Nance, Admr., etc.* vs. *State, C. of C.*, No. 2012.

The proper measure of damages where property is not taken but is damaged for public use, is the difference between the fair cash market value of the property prior to the construction of the improvement and unaffected by it, and its fair cash market value after the construction of the improvement and as thereby affected, taking into account that benefits to lands not taken may be set off against damages to land not taken and that such damages must be direct and proximate and not merely speculative or remotely contingent. *Dept. of Public Works* vs. *Caldwell*, 301, Ill. 342; *Dept. of Public Works* vs. *McBride*, 338 Ill. 347.

The evidence herein concerning values, as might be expected, is conflicting. One witness, Arthur Cohn, testified that in his opinion the value of the premises prior to the construction was Eighteen Thousand Five Hundred Dollars ($18,500.00), being Ten Thousand Dollars ($10,000.00) for the one and one-half acres and Eight Thousand Dollars ($8,000.00) for the balance; that the total damage was Nine Thousand Dolars ($9,000.00). This same witness testified to a sale of a tract of nine (9) acres near the Kleppisch land that was improved with three or four cottages and a four room house and restaurant for Four Thousand Two Hundred Dollars ($4,200.00) in 1931. Some of the witnesses testified that in their opinion the ground west of the house, equivalent to twelve (12) lots of fifty (50) feet each, fronting on Route No. 11, were damaged to the extent of One Hundred Fifty Dollars ($150.00) each, and that the one and one-half or two acres of grounds on which the buildings stood was damaged Four Thousand Dollars ($4,000.00) and that the balance of the land was not affected by the construction. Another witness, Charles Gronau, testifying for complainant, stated that in his opinion there was the equivalent of three (3) lots of fifty (50) feet each south of the building on Route No. 157 which were dam-

aged to the amount of One Hundred Dollars ($100.00) per lot and that the one and one-half acres on which the building stood had suffered a depreciation of Six Thousand Five Hundred Dollars ($6,500.00). Another witness, N. C. McLean, testified that in his opinion the entire premises had been increased in value by reason of the construction.

Considering the record as a whole, the court is of the opinion that there has been a direct damage because of interference of ingress and egress to said premises which affects a limited portion of said premises and the damages are fixed at a sum of Three Thousand Dollars ($3,000.00).

An award is hereby entered in favor of claimant, Edward Kleppisch, of the sum of Three Thousand Dollars ($3,000.00.)

(No. 2160—Claim denied.)

WILLIAM J. SHORT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1936.

JINKINS & JINKINS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PERSONAL INJURY—*inmate of State institution—negligence of employees of State not liable for.* In the conduct of the Quincy State Home for Soldiers and Sailors, the State exercises a governmental function and is not liable to respond in damages to an inmate thereof on account of the negligence of its agents, officers or employees therein or thereof.

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

Prior to and on April 26th, 1931, claimant William J. Short was an inmate of the Quincy State Home for Soldiers and Sailors. On the last mentioned date he fell and sustained injuries to his jaw, and was taken to the hospital of such institution for attention and treatment.

Claimant alleges that the physicians, surgeons and nurses at such hospital failed, neglected and refused to give him proper care and attention, and failed and neglected to use proper skill in the treatment of his jaw, and continued in such failure, refusal and neglect for the period of one week; that thereafter he was taken to the Speedway Hospital in Chicago for treatment, and remained there for the period

of nine weeks; that he has been permanently injured and deformed as the result of the carelessness, negligence and improper conduct of the physicians, surgeons and nurses at said hospital as above set forth, and asks for damages in the amount of $10,000.00.

The Attorney General contends that there is no liablity on the part of the State, under the facts set forth in the declaration.

The rule is well established that the State, in the maintenance of its charitable institutions, is engaged in a governmental function, and that the State, in the exercise of its governmental functions, is not liable for the negligence of its servants and agents, in the absence of a statute making it so liable.

In 13 R. C. L. 944, Section 8, the rule is stated as follows:

"Strictly public institutions created, owned and controlled by the State or its subdivisions, such as State asylums for the insane, city hospitals, reformatories, etc., are not liable for the negligence of their agents. The doctrine of respondeat superior does not apply. They are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from the individual unfortunate or incompetent in mind, body or morals, and the rules applicable to municipal corporations and public offices generally are applied."

The rule above set forth is recognized and applied in the case of *Tollefson* vs. *City of Ottawa*, 228 Ill. 134, as well as in the case of *Lilly Bell Jones* vs. *State*, 8 C. C. R. 77, and *Lillian Pelli* vs. *State*, 8 C. C. R. 324.

Even if the respondent were a private corporation, there would be no liability on the facts set forth in the complaint.

Parks vs. *Northwestern University*, 218 Ill. 381.
Hogan vs. *Chicago Lying-in Hospital*, 335 Ill. 42.
Simon vs. *Pelouse*, 263 Ill. App. 177.

There is no statute making the State liable under the facts in this case, and award must therefore be denied.

Award denied. Case dismissed.

(No. 2714—Claimant awarded $26.73.)

THE ALTON RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

WILLIAM L. PATTON and SILAS H. STRAWN, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FREIGHT CHARGES—*when award will be made for.* Where facts are undisputed that claimant rendered services to the State in carrying freight and that charges for same were the established rate for the kind of merchandise carried and that State received same an award for amount due will be made.

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

Claimant demands the sum of $26.73 for freight charges on certain shipments of merchandise transported over its lines from the Southern Illinois Penitentiary at Menard, Illinois and from the Illinois State Penitentiary at Joliet, Illinois to the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. All shipments were carried at the established traffic rate for such merchandise and the freight charges therefor remain wholly unpaid.

It is admitted that the merchandise was received by the consignee, and Mr. A. L. Bowen, Director of the Department of Public Welfare, in his report on the claim, stated that the same should be paid.

Award is therefore entered in favor of the claimant for the amount claimed, to-wit, Twenty-six Dollars and Seventy-three Cents ($26.73).

(No. 2686—Claimant awarded $15.84.)

THE BALTIMORE & OHIO RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

GRAHAM & GRAHAM, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FREIGHT CHARGES—*when award will be made for.* Where facts are undisputed that claimant rendered services to State in carrying freight, but that bill for charges therefor was not presented for payment before lapse of appropriation out of which it could be paid and there was no unreasonable delay on part of claimant in presenting claim, an award for amount due will be made.

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

Between March 28th, 1933 and June 10th, 1933 claimant transported six shipments of merchandise to and from Springfield, Illinois for the Division of Highways of the respondent. The several shipments were received and carried on the credit of the respondent, and the total charges therefor were $15.84. On December 22d, 1933 freight bills so due were presented to the Department of Public Works and Buildings, Division of Highways, but payment was refused on account of the fact that the appropriation therefor had lapsed.

There was no unreasonable delay on the part of the claimant in presenting the claim; no question is raised as to the amount charged; and Mr. Ernst Leiberman, Chief Highway Engineer, in his report on the claim, states that the same should be allowed.

Award is therefore entered in favor of the claimant for the amount claimed, to-wit, Fifteen Dollars and Eighty-four Cents ($15.84).

(No. 2731—Claim denied.)

JAMES CLARK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

JAMES CLARK, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State employee—State not liable for.* While individuals and private corporations are liable for damages caused by the negligence of their employees and agents, this rule does not apply to the State nor to sub-divisions of it created for governmental purposes, the rule of respondeat superior not being applicable to the State.

SAME—*same—remedy for.* Where one suffers damages as the result of the negligence of an employee of the State he has his remedy against said employee in courts of general jurisdiction.

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

Claimant, in his complaint filed herein on September 27th, 1935, alleges in substance that on August 12th, 1935 he parked his Packard sedan automobile at 111 North Madison Street in Rockford, Illinois; that while his automobile was

so parked, the driver of State truck No. M-9 carelessly, negligently, wilfully and wantonly backed said State truck into and against said Packard sedan, and that the same was thereby damaged to the extent of $23.00, for which amount claimant seeks to be recompensed in this proceeding.

We have repeatedly held that the State in the exercise of its governmental functions, is not liable for the negligence of its employees and agents under the doctrine of respondeat superior in the absence of a statute making it so liable. The liability, if any, rests upon the driver of the truck, and not upon the State. This has been held in so many cases that the citation of authorities is unnecessary.

There is no statute making the State liable for the negligence of the driver of the State truck involved in the accident in question, and award must therefore be denied.

Award denied. Case dismissed.

(No. 2747—Claimant awarded $26.77.)

C. L. FRAME DENTAL SUPPLY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

C. L. FRAME DENTAL SUPPLY COMPANY, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where facts are undisputed that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid and no question is raised as to amount claimed or reasonableness of charges, an award for price thereof will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is an Illinois corporation engaged in the sale of dental supplies. On May 18, 1933 it received a purchase requisition in the regular course of business from the Kankakee State Hospital for merchandise as set out in the claim herein filed in the sum of Twenty-six and 77/100 Dollars ($26.77). The merchandise in question was duly received by the State Hospital but in some manner the invoice was mislaid, and claimant asks an award in the sum of Twenty-six

and 77/100 Dollars ($26.77). Apparently the only reason that the claim has not been paid is that the appropriation for the period during which the purchase was made has lapsed.

As stated in the case of *Shell Petroleum Corporation* vs. *State*, 7 C. C. R. 224 and numerous other cases, "Where it clearly appears that materials have been legally sold, delivered to, and used by a State Department and have not been paid for, an award will be made therefor on a claim filed in apt time."

An award is therefore made in favor of claimant in the sum of Twenty-six and 77/100 Dollars ($26.77) in settlement of said claim.

(No. 2690—Claimant awarded $4.00.)

LOUIS C. MILLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

LOUIS C. MILLER, pro se.

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

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—award for refund will be made.* Where it appears from the undisputed facts that a tax in excess of the amount lawfully due has been paid through a mutual mistake of fact an award for refund will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a refund of Eight Dollars ($8.00) for overpayment of Four Dollars ($4.00) per year auto license fees in the years 1932 and 1933. Claimant was the owner of an Auburn automobile built in 1929, Motor No. 2784. The correct H. P. rating is 24.20, which requires a fee of Eight Dollars ($8.00). Claimant's contention that he paid Twelve Dollars ($12.00) for the year 1933 is not supported by the record which shows that he paid the correct fee of Eight Dollars ($8.00) for 1933 License No. 835-314, for the car in question. In 1932 however an incorrect H. P. rating of "30" was used for which a fee of Twelve Dollars ($12.00) was collected by the Secretary of State and a refund of Four Dollars ($4.00) is due claimant under the previous rulings that, where it ap-

pears from the undisputed facts that a tax in excess of the amount due has been paid through a mutual mistake of fact an award will be made.

An award is therefore made in favor of claimant in the sum of Four Dollars ($4.00).

(No. 2596—Claimant awarded $12.00.)

CHARLES PARRISH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

CHARLES PARRISH, pro se.

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

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—award for refund will be made.* A payment made under a mistake of fact, and which the payor was under no legal obligation to make may be recovered.

MR. JUSTICE YANTIS delivered the opinion of the court:

On February 6, 1935 claimant filed his application for refund for over-payment of auto license fees made by him under a mistake of fact. From the complaint and records of the Secretary of State's Office it appears that claimant paid Twelve Dollars ($12.00) per year license fees for Dodge 1930 sedan for the years 1931, 1932 and 1933, the horse power being 23.4 and claimant having paid on the H. P. basis of 27.3. The correct license fee would have been Eight Dollars ($8.00) per year instead of Twelve Dollars ($12.00), and claimant seeks a refund of Twelve Dollars ($12.00) so over-paid by him.

Each of the payments so made by claimant were seemingly the result of a mistake of fact, and under the law as set forth in the case of *Moorman Mfg. Company* vs. *State*, Court of Claims No. 1886, claimant is entitled to a refund of the amount thus over-paid through such mistake.

An award is therefore hereby entered in favor of claimant for the sum of Twelve Dollars ($12.00).

(No. 2426—Claimant awarded $56.70.)

SHELL PETROLEUM CORPORATION, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.

W. W. YEAGER, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award will be made for.* Where it clearly appears that merchandise has been ordered by and delivered to the State, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, and no question is raised as to reasonableness of charges, an award for price thereof will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Fifty-six and 70/100 Dollars ($56.70) for gasoline sold to the Department of Public Welfare. The invoice has been verified and approved by that department and in the ordinary course of business has been vouchered from the permanent appropriation of that office. That appropriation having lapsed the claim was filed with the Court of Claims at the suggestion of A. L. Bowen, Director of the Department of Public Welfare.

As stated in *Franklin County Coal Company* vs. *State*, 7 C. C. R. 114 and numerous other cases, "Where it clearly appears that materials have been delivered to, and used by the State Department and not been paid for, an award will be made therefor for a claim filed in apt time."

This claim seeming to come within the rule an award is hereby made in favor of claimant in the sum of Fifty-six and 70/100 Dollars ($56.70.)

(No. 2612—Claim denied.)

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 15, 1936.
Rehearing denied May 12, 1936.

CARL N. WEILEPP, for claimant.

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

MORTGAGOR AND MORTGAGEE—*rights of mortgagor in property mortgaged—right to create easement in.* Mortgagor of property remaining in full possession thereof after execution of mortgage retains all legal rights thereto except to have same applied by sale, in event of default, to the payment of the indebtedness secured by said mortgage and except for mortgagee's right to receive payment in full for such indebtedness, has a right to create easement in property mortgaged.

MORTGAGE—*sale under foreclosure thereof—full amount of mortgage debt, interest and costs realized from—effect of.* Where a mortgagee by proper legal proceeding in a court of competent jurisdiction causes his mortgage to be foreclosed and at the sale had thereunder purchases property for amount less than full mortgage debt, interest and costs and a receiver is appointed in said proceeding for said property who collects sufficient funds therefrom to pay full balance of such mortgage debt, interest and costs, the debt due such mortgagee under said mortgage is paid in full and he has no further claim against said mortgagor on account of such mortgage.

MORTGAGE ON PROPERTY, PART OF WHICH IS CONVEYED BY DEED OF DEDICATION FOR PUBLIC USE WITHOUT RELEASE FROM MORTGAGEE—*claim by mortgagee for consideration paid for portion conveyed, after foreclosure of mortgage and sale under—when denied.* Where owner of property subject to mortgage of record conveys a portion thereof to State by deed of dedication for public use, without notice to mortgagee and consideration for such portion so conveyed is paid by State to such owner without notice to or release from mortgagee, and mortgagee thereafter forecloses his mortgage and at sale thereunder purchases property at price less than mortgage debt, interest and costs and receiver is appointed for same who collects therefrom full balance of such mortgage debt, interest and costs, such mortgagee has been paid in full and has no claim against State for amount paid to mortgagor for portion of property conveyed and an award for same will be denied.

JUDICIAL SALES—*purchaser at chargeable with notice of rights of parties in possession of land sold under—rule of caveat emptor applies.* The purchaser at a Judicial sale must take notice of the rights of those in actual possession of the land sold thereunder and the rule of caveat emptor applies to such sales unless fraud or mistake has entered into the transaction whereby the purchaser has been deceived and defrauded, and where purchaser at such sale could have by the slightest inquiry ascertained the rights of parties in possession of a portion of such land he cannot claim to be a bona fide purchaser thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Complainant herein alleges that on August 1, 1924 one Morgan S. Thurston and wife, Nellie C. Thurston, being then the owners of the real estate described in said complaint, containing One Hundred Seventeen and One-half (117½) Acres more or less in Macon County, Illinois, conveyed the said real estate by mortgage deed to the Dighton-Dilatush Loan Com

pany to secure a note for Eleven Thousand Dollars ($11,000.00); said mortgage and note were thereafter on August 6, 1924 assigned to the claimant; that on June 7, 1928 said Morgan S. Thurston and Nellie U. Thurston, his wife, made a dedication of right-of-way for public road purposes in and by which they conveyed and dedicated to the people of the State of Illinois for the purpose of a public highway a portion of said real estate, described by metes and bounds and containing Three and Fifty-nine One-hundredths (3.59) Acres more or less; that the State of Illinois went upon said land and constructed a road over same known as S. B. I. Route No. 48 and that the State of Illinois is now using said Three and Fifty-nine Hundredths (3.59) Acres as a public highway; that thereafter Morgan S. Thurston and Nellie U. Thurston defaulted in payment of said mortgage note and claimant by virtue of its rights under the statute foreclosed said mortgage in the Circuit Court of Macon County, Illinois; that a sale was duly had thereunder at which claimant became the purchaser, and thereafter on October 30, 1934 received a deed from the Master-in-Chancery and by virtue thereof became and is the owner of said One Hundred Seventeen and One-half (117½) Acres as described in said mortgage including the land dedicated for highway purposes; that the State or its agents paid to Morgan S. Thurston and wife the sum of One Thousand Four Hundred Dollars ($1,400.00) for the dedication deed and that such dedication not having been made until June 7, 1928, claimant's rights are prior to and superior to those of the State of Illinois, as the mortgage deed by and through which claimant obtained title was dated August 9, 1924.

Claimant complains that all the rights held by Morgan S. Thurston and wife in said premises have ceased; that claimant holds title to said Three and Fifty-nine One-hundredths (3.59) Acres, and that the State of Illinois is using same for highway purposes contrary to the rights of claimant and without compensation to it and it herein seeks an award for One Thousand Four Hundred Dollars ($1,400.00) for the land occupied by said section of road.

It appears from the record that the *foreclosure* suit was regularly instituted and the sale of real estate thereunder made pursuant to statute. The real estate offered for sale was

that described in the mortgage without any reference to the dedication for highway purposes made subsequent to the mortgage and prior to said foreclosure. The State of Illinois was not made a party defendant in said foreclosure, due no doubt to the fact that under our constitutional provisions the State cannot be properly made a party defendant in such case. The record does not show that any notice was given to the holders of the mortgage of the fact that the State was taking a dedication from the owners for road purposes; no release was obtained from the holders of the existing mortgage at that time, and settlement for the land taken was made by payment to Morgan S. Thurston and wife of the full consideration of One Thousand Four Hundred Dollars ($1,400.00). Why a release was not obtained from mortgagees or its assignee does not appear.

The foreclosure sale resulted in a bid from claimant of Eleven Thousand Three Hundred Eighty Seven and 45/100 Dollars ($11,387.45), which was Eight Hundred Ten and 42/100 Dollars ($810.42) less than the full amount of the debt, interest and costs and a Deficiency Decree was rendered against Morgan S. Thurston and Nellie U. Thurston in favor of the holder of the mortgage for said sum of Eight Hundred Ten and 42/100 Dollars ($810.42.) A receiver was appointed and he thereafter paid the full amount of such deficiency.

The Attorney General contends on behalf of respondent that because the claimant herein received the full amount of his debt, interest and costs no further award of any kind could inure to him, for the reason that if any additional sum should come into his hands in connection with such mortgage transaction, such additional sum would belong to the original mortgagors, and that the latter having already been paid by the State could have no such claim for an additional payment.

Claimant contends that its claim for an award from the State is not based upon its rights as the mortgagee in said transaction, but that such right exists by reason of the fact that it stands as the purchaser of One Hundred Seventeen and One-half (117½) acres of land described in a mortgage on land on which no other lien existed at the time such mortgage deed was executed.

We do not believe that claimant is entitled to be regarded entirely in the light of an innocent third person as purchaser herein. The purchaser at a Judicial Sale is chargeable with notice of the facts disclosed by the record of the proceedings in the case which result in the judgment under which the sale is being held but is not bound to look beyond the decree or judgment where facts necessary to give jurisdiction appear on the face of the record.

As held in *Bybee* vs. *Ashby*, 2 Gilm, 151, "Although innocent purchasers will be protected where process is voidable only yet the same reasons of policy do not exist where a judgment creditor is the purchaser."

The rule that a purchaser at a judicial sale takes notice of the rights of those in actual possession of the land sold is particularly applicable to the claimant herein. "The rule of caveat emptor applies to judicial sales unless fraud or mistake has entered into the transaction whereby the purchaser has been deceived and induced to make the purchase." (*Meinshausen* vs. *Hannah*, 219 A. 278.)

After Thurston, the owner of the real estate here involved, had executed and delivered his mortgage thereon, he remained in full possession of the One Hundred Seventeen and One-half (117½) Acres and retained all legal rights thereto except to have the same applied by sale to the payment of the indebtedness secured by said mortgage; and except for the mortgagee's right to receive payment in full for the indebtedness secured by such mortgage, Thurston had a right to create the road easement.

If claimant desires to be considered herein as purchaser, as distinguished from its position as mortgagee, then the rules applicable to a disinterested purchaser would apply. In *Rock Island and Peoria Ry. Co.* vs. *Dimick*, No. 144-628, plaintiff sought to enjoin the closing of two cattle-ways under appellant's railroad. Plaintiff claimed to have originally had a written contract from the Peoria and Rock Island Railroad Co. granting to him the use of said passage-ways, but such contract was disputed and was not an evidence. However, plaintiff had maintained the passage-ways in an open, visible and apparent manner for many years. Defendant railroad had acquired title to the right-of-way fran-

chise and property of the Peoria and Rock Island Railroad Co. by purchase at foreclosure sale and denied that the passage-ways were left by virtue of any contract but existed for the purpose of permitting drainage, and averred that its purchase at said foreclosure sale was made in good faith and for value without notice of the equities set up by plaintiff. The court said: "A purchaser—seeing the mode in which the land was fenced and the use of openings, etc. would be put upon inquiry as to the rights and title by and under which they were so held—if the facts and circumstances apparent were sufficient to put defendant upon inquiry defendant is chargeable with notice of all that such inquiry would have shown." In a further quotation appearing in the same case, the court says: "The occupancy of the passage-way by the plantiff was sufficient to charge the defendant (the purchaser at judicial sale), with notice of the plaintiff's rights thereto arising from the agreement."

The claimant herein cannot claim that at the foreclosure sale it intentionally bought a claim against the State of Illinois in addition to whatever land the Master-in-Chancery was then and there able to convey under the decree of foreclosure. As held in the case of *Sands* vs. *Wawaser*, 149 530, "Possession by a railroad company of land is notice to a purchaser that the company was there under a claim of right, and he cannot claim as a bonafide purchaser where the slightest inquiry either of his grantor or of the railroad would have advised him of the extent and nature of that right, and that the possession was under an agreement for a deed."

We are of the opinion that the facts here shown constitute a legal defense to plaintiff's claim, and that the application for an award should be denied. The claim is therefore denied and dismissed.

OPINION ON REHEARING.

Per Curiam:

The above cause now coming before the court upon claimant's petition for a rehearing and the court having duly considered said petition and examined the record herein, finds that there is nothing appearing in said petition or in a con-

sideration of the record in chief which causes the court to change or modify the views previously held in the original opinion heretofore filed in this cause, and the petition for a rehearing is therefore denied.

(No. 2572—Claimant awarded $525.00.)

WRAY CALL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

F. A. ORTMAN and STEVENS & HERNDON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award for compensation may be made under.* Where it is conceded that State employee sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation for such injuries will be made in accordance with the provisions of the Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein was employed by respondent as superintendent of carpentering at the Pontiac Reformatory and was injured in the course of his employment on January 10, 1934, the injury resulting in the loss of the first phalange of the fourth finger on his left hand, injuries to the third finger resulting in a total and permanent loss of its use. The complaint and record herein show that the work shop where claimant was employed was equipped with power-driven machinery and claimant was operating a power-driven jointer which consists of a cylinder with four knives about twenty inches long. Proper notices are shown to have been given and the claim filed within one year from the date of the accident, as provided by the Workmen's Compensation Act.

Under a stipulation of facts filed herein it appears that claimant was provided the necessary first aid and all medical and surgical services thereafter which were reasonably required to relieve him from the effects of the injury, and that he has been paid compensation during the period of his temporary total incapacity by reason of said injury. His wages were Thirty Dollars ($30.00) per week.

The injury arose in the course of and out of the employment in question and claimant is entitled to compensation for

the loss of the third finger on the basis of one-half (½) the weekly wage for twenty-five (25) weeks, and for the loss of the first phalange of the fourth finger on the basis of ten (10) weeks.

An award is therefore made on the total basis of thirty-five (35) weeks at one-half (½) the weekly wage or Fifteen Dollars ($15.00), making a total award of Five Hundred Twenty-five Dollars ($525.00) for the specific loss herein claimed.

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2d, 1935 (Session Laws of 1935, p. 49), and, by the terms of such Act, being subject to the approval of the Governor, upon such approval is payable from the General Revenue Fund in the manner provided by such Act.

(No. 2764—Claimant awarded $40.35.)

JOHN H. CAMLIN CO., INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

JOHN H. CAMLIN CO., INC., pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award made for.* Where State leased premises for Armory purposes and in lease agreed to pay for all water used during term of lease and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount conceded to be due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

On July 1, 1933 claimant herein, John Camlin Company, Inc., entered into a lease with the State of Illinois for certain premises to be used for Armory purposes. Under the terms of the lease the State was to pay to the City of Rockford water rent for all water used on the premises. The complaint recites that the water rent has not been paid for the period from March 8, 1935 to June 17, 1935 and remains due and unpaid

in the sum of Forty and 35/100 Dollars ($40.35), for which claimant seeks an award.

A report from the Adjutant General's Office, appearing in the record, states that the claim is a just one; that the terms of the lease are correctly set forth and that said water rental accrued in fact, and that the reason for non-payment heretofore is due to the fact that the Adjutant General's Department did not receive the bill until after September 30, 1935, at which time the appropriation made by the 58th General Assembly to cover ordinary expenses for the Illinois National Guard had lapsed, leaving no funds on hand from which this claim could then be paid.

As in the case of *Shell Petroleum Corporation* vs. *State*, 7 C. C. R. 224, "Where the facts are undisputed that the State has received supplies, legally contracted for by it, and payment has not been made because of the lapse of an appropriation an award will be made." There is nothing in the record, however, to show that the claimant has advanced the water rent in question to the City of Rockford, and under the terms of the lease and the statements contained in the complaint, the latter is the one to whom such payments are due.

An award is therefore made in the sum of Forty and 35/100 Dollars ($40.35) in favor of John H. Camlin Company, Inc. for the use of the City of Rockford, Illinois.

(No. 2710—Claim denied.)

FREEPORT FLORAL COMPANY, J. E. STEFFEN FLOWER SHOP, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

CLAIMANT, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*claim for refund when use of vehicle discontinued during part of year for which license issued—must be denied.* The statute providing for the licensing of motor vehicles contains no provision for a refund for any proportionate part of the year for which paid, during which the holder of such license may voluntarily or involuntarily discontinue the use of the vehicle for which such license was obtained and an award for any such refund must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks a refund of Twelve Dollars ($12.00) for truck license. The complaint recites that the license was purchased in April, 1935 and that the truck for which it was bought was only used about six days when same (a 1926 Model) "went completely to pieces." Not being able to longer make use of the truck claimant conceived the idea that he should have a refund of the license fee.

The Attorney General has filed a motion to dismiss the claim for the reason that same was a legal fee lawfully collected and that the statute contains no provision for a refund for any proportionate part of the year during which the holder thereof may voluntarily or involuntarily discontinue the use of the vehicle for which such license was obtained. The position of the Attorney General is well taken and the motion is hereby allowed and the claim dismissed.

(No. 2765—Claimant awarded $8.00.)

W. S. HENNESSEY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

W. S. HENNESSEY COMPANY, pro se.

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

FRANCHISE TAX—*paid under mistake of fact—may be recovered.* Where it appears claimant paid franchise tax in excess of amount due, under mistake of fact, award for refund of same may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a refund of Eight and 50/100 Dollars ($8.50) for initial license fee on issue of stock. On June 12, 1935 claimant paid to the Secretary of State the sum of Eighteen and 50/100 Dollars ($18.50) in settlement of franchise tax,

Franchise Tax	$10.00
Initial License Fee on $17,000.00 additional stock	8.50
Total	$18.50

Said payment was made pursuant to notice from the Secretary of State's Office under date of May 10, 1935 based on an error in claimant's annual report. Under the existing law the W. S. Hennessey Company was permitted to file an amended annual report. Under Paragraph 96, Chapter 32 of the Illinois Revised Statute on Corporations if such report is returned for correction prior to April 1st the penalties therein provided for shall not apply. Paragraph 100 provides that if the franchise tax is adjusted, the amount of the penalty shall be adjusted to ten per cent (10%) of the adjusted tax; provided, however, if the corporation fails to apply to the Secretary of State for an adjustment before or on June 25th, an additional penalty of five per cent (5%) shall be paid.

As proper application for adjustment was herein made a refund is due claimant but as such adjustment was not made until after June 25th, the five per cent (5%) penalty, being Fifty Cents (50c) on the Ten Dollars ($10.00) correctly assessed, became effective. Deducting the Fifty Cents (50c) from the Eight and 50/100 Dollars ($8.50) erroneously assessed, leaves the net amount due claimant Eight Dollars ($8.00).

An award is therefore hereby made in favor of claimant in the sum of Eight Dollars ($8.00.)

(No. 2480—Claim denied.)

HARRY P. KELLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

JOHN P. SNIGG, for claimant.

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

CIVIL SERVICE EMPLOYEE—*discharge of—claim for salary between date of service upon of notice discharge and filing of same with Civil Service Commission—when denied.* **Where Civil Service employee makes claim for salary between date of service upon him of his discharge as such employee and date of filing of notice with Civil Service Commission on the ground that his discharge was not effective until the latter date, he must establish by the greater weight of the evidence, not only that he was in the employ of the State but also that he either performed the duties of his position during the time for which he seeks payment, or that he tendered the performance thereof and such tender was refused.**

CIVIL SERVICE ACT—*Sections 29 and 30 thereof—effect of on Court of Claims in claims of employees for salaries or wages, where services not performed or tendered.* Sections 29 and 30 of Civil Service Act prohibits Auditor from approving payment and Treasurer from paying any person any salary or wages for services as an officer or employee of the State unless such person is occupying an office or place of employment according to the provisions of law and is actually performing the duties thereof and is entitled to payment therefor and this court is without authority by reason thereof to make awards in such cases.

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

For some time prior to January 31st, 1934 claimant was a Civil Service employee of the respondent, and was working as a carpenter at the Jacksonville State Hospital under the Department of Public Welfare. His wages were $6.00 a day and he worked five days a week.

On January 31st, 1931 he was served with a notice of discharge, together with a statement of the cause therefor, to-wit, the reduction of institutional expenditures. On February 28th, 1931 a copy of such statement was filed in the office of the Civil Service Commission with a notation thereon showing proof of service of a copy of said statement upon the claimant.

Claimant contends that his discharge was not effective until February 28th, 1931, and that therefore he is entitled to his wages during the period which elapsed from January 31st, 1931 to February 28th, 1931, to-wit, $126.00; and bases his contention on the second paragraph of Section 12 of an Act entitled "An Act to Regulate the Civil Service of the State of Illinois", commonly known as the State Civil Service Act, Smith-Hurd Revised Statutes, 1933, Chapter 24½, which reads as follows:

"In every case of removal, discharge or reduction, a statement of the cause therefor shall be set forth in writing, which statement shall be in duplicate, and shall be signed by the appointing officer. One copy of said statement shall be delivered personally to the employee and the other copy of said statement shall be filed in the office of the Civil Service Commission, with a notation thereon showing proof of service of a copy of said statement upon the employee. Upon the filing of a copy of said statement with the notation aforesaid, in the office of the Civil Service Commission, the removal, discharge or reduction shall immediately become effective."

The Attorney General contends that under the provisions of said Section 12 of the Civil Service Act, claimant's discharge was effective immediately upon service of notice thereof upon him, and that he is not entitled to recover anything whatsoever in this proceeding. However, from the view we take of the case, it is unnecessary to determine the effective date of claimant's discharge.

By agreement of parties, the claim is submitted on the complaint and the report of A. L. Bowen, Director of the Department of Public Welfare. The complaint alleges that claimant tendered his services on divers occasions between January 31st and February 28th, 1934 and that he stood ready and willing at all times to render such services.

The report of the Director of Public Welfare sets forth that claimant "accepted the notice of January 31st, 1934, and left the service of the State of Illinois. At no time between January 31st and February 28th, did he tender his services."

Sections 29 and 30 of the Civil Service Act read as follows:

"Sec. 29. No treasurer, paying, fiscal or auditing officer of State shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services, as an officer or employee in the service of the State, unless such person is occupying an office or place of employment according to the provisions of law, and is actually performing the duties thereof, and is entitled to payment therefor.

"Sec. 30. No paymaster, treasurer, or other officer or agent of the State shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employee of the State, unless such person is occupying an office or place of employment according to the provisions of law, and is actually performing the duties thereof, and is entitled to payment therefor."

We have no authority to allow any claim which the Auditor is prohibited from approving or the Treasurer from paying. Consequently it was incumbent upon the claimant under his own view of the case, to establish by the greater weight of the evidence, not only that he was in the employ of the respondent, but also that he either performed the duties of his position during the time for which he seeks payment, or that he tendered the performance thereof and such tender was refused. Claimant has failed to make the necessary proof in that behalf, and therefore we have no authority to enter an award. Award denied. Case dismissed.

(No. 2733—Claimant awarded $45.50.)

NEW ERA OPTICAL COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

BENJAMIN WEINBERG, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where State receives supplies as ordered by it, and bill therefor is not presented before lapse of appropriation out of which same could be paid, an award for amount due may be made on claim filed within a reasonable time.

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

Claimant seeks to recover the sum of $45.50 for merchandise ordered by Chicago State Hospital, Department of Public Welfare, on April 11th, 1933 and delivered by claimant to such hospital on April 12th, 1933. Invoice was presented on the date of delivery, and was vouchered by the Chicago State Hospital and sent to the Department of Public Welfare at Springfield for payment. It does not appear why the bill was not paid at that time. When the attention of the Department of Public Welfare was again called to the matter, the appropriation from which payment should have been made had lapsed.

It is admitted that the merchandise in question was received by the Chicago State Hospital and no objection is made as to the amount of the claim. There was no delay on the part of the claimant in presenting its claim, and the failure to make payment seems to have resulted from some oversight on the part of the representatives of the respondent.

Award is therefore entered in favor of the claimant for the sum of Forty-five Dollars and Fifty Cents ($45.50).

(No. 2742—Claimant awarded $336.00.)

WALTER ORTGEISEN, COUNTY TREASURER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

EDWARD A. JONES, for claimant.

OTTO KERNER, Attorney General; John Kasserman, Assistant Attorney General, for respondent.

FEES—*coroner—inquests, deaths of inmates of State Charitable Institutions when award may be made for.* Where coroner of proper county conducted inquests, as provided by law on bodies of deceased inmates of State institution, and it appears that lawful fees could not be collected out of the estates of said inmates, an award for such fees advanced by County Treasurer, may be made under provisions of the statutes of the State of Illinois.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff herein as County Treasurer of Lee County has filed his claim for Four Hundred Thirty-two Dollars ($432.00) for coroner's fees heretofore advanced by that county for inquests and inquiries held in connection with the death of inmates of the Dixon State Hospital. The itemized list includes twenty-two cases where inquests were held at a charge of Sixteen Dollars ($16.00) each and sixteen "inquiries" at Five Dollars ($5.00) each over a period from July 1, 1931 to July 1, 1933. Proper effort appears to have been made by the coroner to collect his fees from the estates of the deceased persons. A revised list or claim was later filed. In and by same it appears that the name of Dominick J. Brunett should not be included in the list of inquests and that the award now sought is restricted to the remaining twenty-one inquests included in the original claim.

The claim as amended is a proper charge against the State, under the provisions of Sec. 26, Chap. 53 and Sec. 27 of Chap. 85 of the Ill. Revised Statutes, and an award is therefore hereby made for twenty-one cases at Sixteen Dollars ($16.00) each or a total of Three Hundred Thirty-six Dollars ($336.00).

(No. 2776—Claimant awarded $50.69.)

PANTAGRAPH PRINTING & STATIONERY COMPANY, A CORPORATION, Claimant *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

CLAIMANT, pro se.

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

SUPPLIES—*when award may be made for.* Where State orders and receives supplies, and bill therefor is not presented before lapse of appropriation out of which same could be paid, and no question is raised as to amount of charges therefor, an award for amount due may be made on claim filed within a reasonable time.

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

On April 19th, 1935 the respondent, through the Illinois School for the Deaf at Jacksonville, ordered from the claimant Eighteen (18) diplomas at a cost of $50.69. The diplomas were delivered by claimant, and respondent was duly billed therefor. Through an error on the part of the Department of Public Welfare, the bill was filed too late to be paid out of the appropriation of the current biennium.

There was no negligence on the part of the claimant in presenting its bill and no question is raised as to the amount thereof.

Under the facts presented the claim should be allowed. Award is therefore entered in favor of the claimant for the sum of Fifty Dollars and Sixty-nine Cents ($50.69).

(No. 2706—Claim denied.)

A. C. ROBB, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

DONOVAN D. MCCARTY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL ACT—*license issued under—claim for refund of fee paid for where licensee discontinued sale of beer, after procuring.* Under the terms and provisions of the Illinois Liquor Control Act, provision is made for refund of license fees issued thereunder, in the following cases: Where the application for license is denied; in case of the death, insolvency or bankruptcy of the licensee, where the unexpired term exceeds the allowable operating period provided under the statute and where the political subdivision, district, precinct or group of precincts in which the licensed premises are situated becomes prohibition territory during the terms of the license, and the foregoing are the only contingencies in which refunds are authorized by the said Act.

SAME—*interpretation.* It is a general principle of statutory interpretation that the enumeration of certain specified things implies the exclusion of all others not therein mentioned.

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

For ten years prior to the filing of the complaint herein, claimant was engaged in the restaurant business in the City of Olney, Illinois. Just prior to May 1st, A. D. 1935 claimant sold beer in his said restaurant under a retailer's license issued by the Illinois Liquor Control Commission of this State, which said license expired April 30th, 1935.

On April 23d, 1935 claimant made application to said Commission for a renewal of his said license for the year commencing May 1st, 1935, and forwarded said application together with the required fee of $50.00, to said Commission. Said application was approved for license by said Commission on May 1st, 1935, and formal receipt therefor was duly issued and forwarded to claimant under date of May 9th, 1935.

Thereafter, to-wit, on May 22nd, 1935, license was duly issued to claimant in accordance with his previous application and the aforementioned approval thereof by said Commission.

On May 1st, 1935 claimant ceased selling beer in his restaurant on account of the fact that a review of his previous year's business showed no profit from handling the same, and has not sold any since that date.

Prior to the issuance of said license by the Liquor Control Commission as aforesaid, and on, to-wit, May 11th, 1935, claimant applied to said Commission for a refund of the license fee theretofore paid by him. Such application for refund was denied by the Commission for the reason that, under the facts in this case, it had no authority pursuant to the statute to make such refund.

Under the terms and provisions of the Illinois Liquor Control Act (State Bar Association Revised Statutes of 1935, Chapter 43), provision is made for a refund in the following cases, to-wit:

(1) Where the application is denied. (Art. 7, Sec. 2.).

(2) In case of the death, insolvency or bankruptcy of the licensee, where the unexpired term exceeds the allowable operating period provided for under the statute (Art. 6, Sec. 1).

(3) Where the political subdivision, district, precinct or group of precincts in which the licensed premises are situated

becomes prohibition territory during the term of the license (Art. 9, Sec. 16).

The foregoing are the only contingencies in which refunds are authorized by the Liquor Control Act. We must assume, therefore, that it was the intention of the Legislature that refunds should not be made in any other cases. If the Legislature had intended to authorize refunds in any cases other than those above mentioned, we must assume that specific provision therefor would have been made in the Act.

It is a general principle of statutory interpretation that the enumeration of certain specified things implies the exclusion of all others not therein mentioned. *People* vs. *Collins*, 351 Ill. 551-555; *Consolidated Coal Co.* vs. *Miller*, 236 Ill. 149-152; *People's Loan and Homestead Assn.* vs. *Keith*, 153 Ill. 609-618.

Furthermore, the general rule of law appears to be that a licensee, upon the voluntary surrender of his license or certificate, is not entitled to a rebate or refund of the license fee paid by him in the absence of a statute expressly authorizing such rebate or such refund. The rule is set forth in 33 Corpus Juris, page 572, Section 180, as follows:

"A licensee or holder of a liquor tax certificate, upon the voluntary surrender of his license or certificate, is not, in the absence of a statute, entitled to a rebate for the unexpired portion of his license or certificate. But in some jurisdictions provision has been made by statute for a rebate in such cases."

And in 37 Corpus Juris, page 255, Section 130:

"Where the fee or tax which has been paid was not illegal or unauthorized, it cannot be recovered back irrespective of whether its payment was voluntary or involuntary, and although the method of its collection was irregular."

In 15 R. C. L., p. 315, Sec. 76, the rule is stated in the following language:

"It seems to be well settled that ordinarily a licensee does not on the voluntary surrender of his license, become entitled to the return of the license fee, in proportion to the unexpired term, in the absence of a statutory enactment to the contrary."

The statute does not authorize a refund under the facts in this case, and under the law as above set forth, we have no authority to allow an award.

Award denied. Case dismissed.

(No. 2754 - Claimant awarded $21.00.)

MAURICE P. ROGERS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

MAURICE P. ROGERS, pro se.

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

WORKMEN'S COMPENSATION ACT—*medical services—when award may be made for.* Where claimant furnished necessary first aid and medical treatment for State employee who sustained accidental injuries arising out of and in the course of his employment while engaged in extra hazardous employment and no contention is made that charges therefor are unreasonable, an award for the value thereof may be made.

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

Claimant is duly licensed as a practicing physician and surgeon, and filed his claim herein on November 7th, 1935 for the sum of $21.00, for first aid and subsequent medical services rendered to one Charles Daly, between May 23d, and June 17th, 1933, both dates inclusive.

It appears that on May 22nd, 1933 Daly was an employee of the respondent as a highway policeman; that on said date he sustained accidental injuries which arose out of and in *the course of his employment;* that claimant treated him professionally for such injuries; that Daly attempted to make collection of the amount of claimant's bill from the parties responsible for the accident, but was unable to do so, and was thereby delayed in filing his claim against the State.

Under the provisions of Section 8-a of the Workmen's Compensation Act, *respondent is liable for* the services rendered by the claimant as aforesaid. It is not contended that the charges are unreasonable and no reason is suggested why the claim should not be paid.

Award is therefore entered in favor of the claimant for the sum of Twenty-one Dollars ($21.00).

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2d, 1935 (Session Laws of 1935, p. 49), and, by the terms of such act, being subject

to the approval of the Governor, upon such approval is payable from the Road Fund in the manner provided in such Act.

(No. 2642—Claimant awarded $20.50.)

DR. J. L. ROSENGARD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

HARRY LEVITON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*medical services rendered injured employee—when award may be made for.* Where claimant furnished necessary first aid and medical treatment to State employee who sustained accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made for the reasonable value thereof.

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

Claimant filed his claim herein on March 29th, 1935 to recover the sum of $20.50 for first aid and subsequent medical services rendered to Robert Jaros, a State employee, between June 2d and June 13th, 1933, both dates inclusive.

It appears from the stipulation on file that on June 2d, 1933 Jaros was an employee of the Division of Highways; that on said date he sustained accidental injuries which arose out of and in the course of his employment; that he was taken to the office of claimant for treatment; and that claimant rendered professional services to said Jaros in the amount of $20.50.

Under the provisions of Section 8-a of the Workmen's Compensation Act, respondent is liable for such services and award is therefore entered in favor of the claimant for the sum of Twenty Dollars and Fifty Cents ($20.50).

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2d, 1935 (Session Laws of 1935, p. 49), and, by the terms of such act, being subject to the approval of the Governor, upon such approval is payable from the Road Fund in the manner provided by such Act.

(No. 2280—Claim denied.)

LOUIS SHANKS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

JOHN W. FRIBLEY, for claimant.

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

PROPERTY DAMAGE—*highways—negligence of employees of State engaged in construction or maintenance of—State not liable for.* In the construction or maintenance of its public highways the State acts in a governmental capacity and is not liable for the negligence of its servants and agents in connection therewith.

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

Claimant filed his complaint herein on November 29th, 1933 and alleges therein that on August 27th, 1932 about 3:15 P. M., he was driving a team of horses hitched to a wagon, in an easterly direction on S. B. I. Route No. 24, about a mile east of the City of Taylorville; that he was observing the rules of the road and exercising all due care and caution for the safety of himself and others; that one George Greash, a member of the State Highway Police, who was driving a Ford roadster, in the performance of his duties, then and there negligently drove his said car into and against the wagon in which claimant was riding, with great force and violence, whereby said wagon was demolished, claimant was injured, and one of the horses was so seriously injured that it had to be shot; for all of which damages claimant asks an award in the amount of $238.00.

The Attorney General has moved to dismiss the case on the ground that the respondent is not liable for the negligence of its said agent.

We have held in numerous cases that the State in the maintenance and policing of its hard-surfaced roads is exercising a governmental function. We have also repeatedly held that the State in the exercise of its governmental functions is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *Peterson* vs. *State*, 6 C. C. R. 77; *Chumbler* vs. *State*, 6 C. C. R. 138; *Braun* vs. *State*, 6 C. C. R. 104; *Derby* vs. *State*, 7 C. C. R. 145; *Bucholz* vs. *State*, 7 C. C. R. 241; *Ryan* vs. *State*, 8 C. C. R. 361.

This rule is supported by numerous decisions of the Supreme Court of this State. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

There is no statute making the State liable under the facts in this case and award must therefore be denied. The liability, if any, rests upon the servant or agent whose negligence was responsible for the damages sustained.

Award denied.

(No. 2285—Claimant awarded $36.00.)

RUDOLPH SINCULA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

DANIEL D. GLASSER, for claimant.

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

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for.* An award may be made to member of Illinois National Guard for compensation for personal injuries sustained by him while in the performance of his duties as such under authority of the Military and Naval Code.

SAME—*same—amount of award not governed by provisions of Workmen's Compensation Act.* The court in determining the amount of compensation of a member of the Illinois National Guard for personal injuries sustained by him while in the performance of his duties as such is not governed by the provisions of the Workmen's Compensation Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff filed his claim herein on December 7, 1933 for an award of One Hundred Fifty Dollars ($150.00) alleging that on August 3, 1933 while engaged as a private in the Illinois National Guard in the performance of his duty at Camp Grant he received an injury to his knee resulting in incapacity from doing any work for a period of seven (7) weeks and causing him to incur various items of expense including railroad fare to and from Ft. Sheridan, Illinois. On April 5, 1934 a stipulation of fact was filed where it was agreed that claimant on August 3, 1933 was a private in Company L, 132nd Infantry; that on that date he fell from a truck going to the

rifle range at Camp Grant, thereby suffering an injury to his knee while in the line of duty; that he is entitled to the minimum allowance under the Workmen's Compensation Act of Seven and 50/100 Dollars ($7.50) per week for seven (7) weeks and an additional sum of Seven and 50/100 Dollars ($7.50) to cover expense incurred in curing himself of the injuries suffered.

The statement of facts cannot bind the court, as the question of what, if any, award is due must be determined by an explanation of the whole record and the facts therein disclosed.

It appears from the record that claimant was at the time of his injury engaged in the performance of his duties as a member of the Illinois National Guard, and the court therefore holds that whatever right to an award exists in his favor is by virtue of the provisions of the Military and Naval Code of Illinois and not under the terms of the Workmen's Compensation Act. It further appears that enlisted men of the National Guard shall receive per day, etc. the sum of Four Dollars ($4.00) per day and under Section 10, Article 16, Chap. 129, Ill. Revised Statute, an enlisted man who may be disabled while on duty and lawfully performing the same so as to prevent his working at his profession, trade or other occupation from which he gains his living is entitled to draw one-half his active service pay for not to exceed thirty (30) days. The provisions for payment for the longer disability are not applicable, for it appears that while claimant was injured on August 3, 1933 and was immediately given hospital care, his pay as a soldier in training was to include August 12th. At the close of the period of field training in Rockford hospitalization was authorized for him at Fort Sheridan from which he was discharged on August 30, 1933 as "cured." The records further show that transportation from Chicago to Fort Sheridan was authorized for him, but he chose to go immediately rather than wait for same, and was at that time informed that if he did so it would be at his own expense and that he would not be reimbursed for such railroad fare, to which he then agreed. From an examination of the entire record it appears that claimant is entitled to compensation from the time his pay ceased on August 12, 1933 to the end of his disability, i. e. August 30, 1933, or a period of 18 days. Under the Military Code he would therefore be entitled

to one-half active service pay or Two Dollars ($2.00) per day, which for the eighteen (18) days, would be Thirty Six Dollars ($36.00). An award it therefore hereby entered in favor of claimant in the sum of Thirty Six Dollars ($36.00).

(No. 2631—Claim denied.)

ROY TITUS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 12, 1936.

PAUL MACGUFFIN, for claimant.

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

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

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks to recover damages to a car owned by him on account of being struck by a State-owned truck. The claim was filed March 15, 1935 for Three Hundred Dollars ($300.00) and recites that claimant's wife with claimant's consent and authority was driving his automobile westward on Church Street in Libertyville on February 5, 1935; that one Felix Sedar was driving a large dump truck northward on Brainard Avenue; that the streets were covered with ice and that due to the reckless, negligent and careless manner in which the driver of the truck was handling same the latter skidded when the driver turned eastward on Church Street and the rear part of the truck collided with claimant's car to the damage of claimant in the sum of Three Hundred Dollars ($300.00).

Respondent has filed a motion to dismiss the claim under the rule that the State is not liable for the negligence of its agents and employees, unless there is a statute making it so liable; that in this State there is no such statute, and therefore there being no basis of liability on the part of the State for damages sustained that the court is without authority to make an award. In support of said contention the Attorney General cites *Derby* vs. *State* 7 C. C. R. 145 and *Chambler* vs. *State,* 6 C. C. R. 138.

A report by R. T. Cash, District Engineer, appearing in the files absolves the driver of the truck from negligence but states that the collision was entirely due to the skidding of the truck and the very icy surface of the pavement. The sworn statement of claim shows the lowest estimate of property damage to be Two Hundred Twelve Dollars ($212.00) and it is unfortunate for claimant to suffer such loss when he was entirely guiltless of any contributory part in such accident. It is also unfortunate that the District Engineer was not familiar with the absence of authority of this court to grant an award in a matter of this kind and that he advised Mr. Titus to file his claim in this court.

As stated in *Wetherholt* vs. *State*, 8 C. C. R. 100 and in *Trompeter* vs. *State*, 8 C. C. R. 141, "That the State is not liable for the negligence of its servants and its agents while in the exercise of its governmental functions," and "Before a claimant can have an award against the State he must show that he comes within the provisions of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award he cannot invoke the principle of equity to secure the award."

It does not appear in the record whether claimant has been reimbursed through insurance for any part of his loss but regardless of that, and being limited to a consideration of the rights involved from the standpoint of the legal liability of the State the court is of the opinion that the motion to dismiss should be allowed. The motion is allowed and the claim dismissed.

(No. 2486—Claimant awarded $187.50.)

AIR REDUCTION SALES CO., A CORPORATION, *vs.* STATE OF ILLINOIS. Respondent.

Opinion filed March 10, 1936.

ROY GEIBE HILL, for claimant.

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

SUPPLIES—*contracts—sale of goods in containers providing return thereof—when award may be made for value of containers not returned.* Where merchandise in containers is sold to and received by State, and under contract of sale said containers are to be returned State will be liable for value thereof upon failure to return, and an award for same may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks payment in the sum of One Hundred Eighty Seven and 50/100 ($187.50) Dollars for five oxygen-acetylene gas cylinders. The statement of claim and the proof herein shows that the five cylinders in question and contents were furnished to the Illinois State Penitentiary of Joliet; that as soon as the gas was used the cylinders were supposed to be returned to the owners, as the State paid only for the service and the containers remained the property of claimant herein. Claimant contends that the five cylinders in question were never returned to them and investigation by the Department of Public Welfare discloses no record of any return having been made. The transaction occurred during the incumbency of Frank D. Whipp, Warden, and no record of what became of the cylinders can be found.

Under the circumstances claimant is entitled to payment for the actual cost price of the cylinders in question, which under the proof is shown to be Thirty Seven and 50/100 ($37.50) Dollars each. An award is therefore allowed in favor of claimant in the sum of One Hundred Eighty Seven and 50/100 ($187.50) Dollars.

(No. 1955—Claim denied.)

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

Opinion filed March 10, 1936.

SAM LATHAM, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim for compensation under within time provided is a condition precedent to jurisdiction of court.* Making claim for compensation and filing application for same within time fixed by Workmen's Compensation Act is a condition precedent, without which court is without jurisdiction to proceed with hearing.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant asks an award of Five Thousand ($5,000.00) Dollars for injuries received by him while employed as an attendant at the Elgin State Hospital on November 13, 1931.

Objection is made by the Attorney General that there is no allegation or proof of a claim having been made for compensation within six months after the date of the injury, as required by Section 24 of the Workmen's Compensation Act.

A stipulation of facts was filed herein, showing that on said date while engaged in the performance of his duty in taking care of patients, one of the latter grabbed plaintiff's hand and bit him on the left hand, lacerating the skin. A condition of osteomyelitis developed and plaintiff was confined in the Elgin Hospital for thirty days and thereafter in the Research Hospital in Chicago for two months. Plaintiff's finger became almost rigid and a complete loss of motion has resulted in the second left metacarpal phalangeal joint and distal interphalangeal joint of the index finger; also a restriction of the extension of the elbow of about twenty percent (20%); said condition according to the medical testimony and stipulation constituting a partial permanent disabilty. The stipulation further recites that plaintiff's hospital expenses and salary during the period of his temporary disability were paid by the State of Illinois. A report by Dr. George A. Wiltrakis, State Physician, under date of November 11, 1935, states that he has that day examined plaintiff; that motion in the left elbow is limited to an angle of about one hundred twenty (120) degrees instead of one hundred eighty (180) degrees; that there is a deformity of the left index finger causing this finger to overlap the middle and ring fingers; that the loss of power of this finger makes it worthless so far as the power to grip is concerned and that such finger is a hindrance rather than a value to the hand.

Dr. John R. Tobin of Elgin, Illinois examined plaintiff on November 15, 1934 and states that the infection of the first finger caused osteomyelitis of the bones in the finger and elbow resulting in a partial ankylosis of both, with a resultant disability of "About 50% of his former usefulness."

There is no statement in the complaint, stipulation or other evidence as to the rate of wages or pay that plaintiff was receiving in the employment in question. Counsel for plaintiff and respondent discuss in their respective statements and arguments what *they believe* the wage scale should

be. Counsel for respondent in his argument quotes from a letter received by the Attorney General's Office from the Department of Public Welfare as to the general rule of computing maintenance allowance in connection with salaries of institutional employees.

Because of absence of proof that a claim for compensation was made within six months after the date of injury and because of a lack of other adequate evidence in the record as above noted, the claim is denied and cause dismissed.

(No. 2201—Claimants awarded $208.50.)

MARY HENNESSEY, ET AL., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1936.

Claimants, pro se.

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

SOLDIER'S BONUS—*when award for same will be made after death of soldier entitled to.* Where claim for soldier's bonus was filed and approved, and warrant issued for amount of same, but soldier dies before issuance of same and warrant is returned and cancelled and no one has received the amount thereof, an award may be made for same to those lawfully entitled thereto.

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

John Hoare who was in the military service of the United States from May 31st, 1918 to July 21st, 1919, filed his claim with the Service Recognition Board on January 18th, 1925 for compensation under the provisions of the Illinois Bonus Act. The claim was approved and a warrant in the amount of $208.50 was drawn in his favor on October 30th, 1923 and forwarded to his address. However, John Hoare had died prior to the issuance of said warrant, which was thereafter returned to the Auditor of Public Accounts, and on his order was cancelled on December 4th, 1929.

Said John Hoare left him surviving Mary Hennessey, Patrick Hoare, Maggie Campus, Martin Hoare, and Nellie Fathke, his brothers and sisters, as his only heirs at law.

In 1927 the Legislature terminated the Service Recognition Board by an Act entitled "An Act Terminating the Service Recognition Board, and making provisions for the payment of certain claims for compensation" (Smith-Hurd Revised Statutes, 1935, Chap. 126½, Sec. 15-I).

Section three (3) of such Act provides as follows:—

"In all cases where claims for compensation have been heretofore or are hereafter allowed by the service recognition board but payment of compensation has not been made either because the claimant or his heirs have not been found, or any other reason, it is the duty of The Adjutant General, as soon as satisfactory proof is furnished to him, locating or identifying the claimant or his heirs or as soon as the disability preventing payment is removed, to certify such fact to the State Treasurer who shall make payment from the Soldiers' Compensation Fund, in the sum allowed by the Service Recognition Board to the person entitled thereto."

Section four (4) of such Act appropriates the sum of $140,647.50 for the payment of compensation in accordance with the provisions of Section Three (3) thereof.

On May 21st, 1932 the heirs of said John Hoare filed their application with Adjutant General C. E. Black pursuant to the provisions of said Section 3 hereinbefore set forth, and on October 13th, 1932 such application was approved by the Adjutant General. The appropriation made by the aforementioned Act of the *General Assembly*, however, lapsed on September 30th, 1929, and consequently there was no fund from which a new warrant could have been drawn in payment of the claim, and claimants' only recourse is to this court.

Since the approval of said claim by the Adjutant General as aforesaid, the said Maggie Campus died intestate leaving her surviving Richard Campus, her husband, and Thomas Campus, her son, as her only heirs at law; and the said Mary Hennessey died intestate leaving her surviving James Hennessey, her husband, and Father James Hennessey and Mamie Meegan, her children, as her only heirs at law.

The facts in this case are very similar to the facts in the case of *Knarr* vs. *State* 8 C. C. R. 565, in which an award was allowed, and no reason is suggested why an award should not be allowed in this case.

Award is therefore entered in favor of the several heirs at law of John Hoare, deceased, for the respective amounts due them in accordance with the foregoing, to wit:

Patrick Hoare	$ 11.70
Martin Loare	11.70
Nellie Fathke	11.70
James Hennessey, Father James Hennessey, and Mamie Heegan	11.70
Richard Campus and Thomas Campus	11.70
Total	$208.50

(No. 2546. Claimant awarded $731.25.)

LEONARD H. MIELE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1936.

J. W. KOUCKY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

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

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

Prior to and on December 29th, 1933 claimant was employed by respondent as an attendant at the Chicago State Hospital. On the last mentioned date, while attempting to assist a patient, he fell and sustained injuries to his right hand and arm. Upon consideration of the record the court finds:

1. That claimant and respondent were, on the 29th day of December, A. D. 1933, operating under the provisions of the Workmen's Compensation Act.

2. That on said day the claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given to said respondent, and claim for compensation made within the time required by the provisions of said Act.

4. That claimant was in the employ of respondent for less than one year; that the annual earnings of persons of the same class in the same employment and same location, during

the year preceding the accident, were $734.40;—and the average weekly wage was $14.85.

5. That claimant at the time of the injury was 49 years of age, and had three children under the age of sixteen years.

6. That necessary first aid, medical, surgical and hospital services have been provided by respondent.

7. That claimant was temporarily totally disabled from the date of his injury as aforesaid, to February 8th, 1934, and has been paid in full for such temporary total disability.

8. That claimant sustained the loss of 25% of the use of his right arm.

9. That claimant is therefore entitled to have and receive from the respondent the sum of $13.00 per week for 56¼ weeks, as provided by Section 8-e of the Workmen's Compensation Act, as amended.

10. That all of such compensation has accrued prior to this date.

Award is therefore entered in favor of the claimant for the sum of $731.25.

This award being subject to the provisions of an Act entitled "*An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof,*" approved July 2d, 1935 (Session Laws of 1935, p. 40), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval is payable from the General Revenue Fund in the manner provided by such Act.

(No. 2431—Claim denied.)

J. BENJAMIN STOUT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1936.

O. L. BROWDER, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time fixed in, a condition precedent to jurisdiction of Court to hear claim.* Unless claim for compensation for injuries is filed within time provided in Workmen's Compensation Act, Court is without jurisdiction to proceed with any hearing on claim.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed July 11, 1934 against the State of Illinois, as respondent, claiming compensation under the Workmen's Compensation Act. It appears from the complaint that the claimant on November 21, 1933 was employed by the Illinois Emergency Relief Commission of Work Relief Division in the cities of Champaign and Urbana, Illinois, and was on that date working on a truck owned by the State of Illinois, and was assisting other workmen in delivering sacked flour, and was standing on the rear part of the truck, which was loaded with flour in paper sacks of approximately twenty-five pounds weight per sack; that the driver of the truck caused it to lurch forward with sudden force, which in turn caused a large number of said sacks of flour to slip backward against the claimant, forcing him off the truck and down upon the pavement, and many sacks of flour were piled on top of the claimant.

It appears from the complaint that the claimant did receive serious injury because of this accident, and he alleges that he was not advised at the time of his employment that he was being employed by the Illinois Emergency Relief Commission, being under the impression that he was employed by the Federal Government under what is known as the Civil Works Administration Act and was not advised that he was an employee of the State, but did comply with the provisions of the Act in that he notified his employer, that is, the one who had placed him at work, of his accident at the time of the accident. He was unmarried and had no dependents.

Motion was made by the Attorney General to dismiss on the grounds that the Emergency Relief Commission did not authorize the employment and on the grounds that the claim was not filed within the statutory period. Under the view that we take of the case, it will only be necessary to take in the latter ground.

Section 24 of the Workmen's Compensation Act provides that no proceeding for compensation shall be maintained unless claim has been made within six months after the accident.

Section 6 of the Court of Claims Act gives this court the power to hear and determine the liability of the State for accidental injuries or death suffered in the course of employ-

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

Therefore, the provisions of Section 24 of the Compensation Act are pertinent; and it has been frequently held by the Supreme Court of Illinois that the making of a claim for compensation within the prescribed period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute. (See *Lewis* vs. *Industrial Com.*, 357 Ill. 309 and cases cited therein.)

It is not claimed that the claimant was mentally incapacitated or a minor. Whether or not a claim for compensation has been made as required is a question of fact to be determined like any other similar question, and the fact that he did not know who employed him, would not be grounds upon which we could set aside this statutory requirement, and nothing appears in the complaint to the effect that he ever gave notice to the effect that he intended to make a claim for compensation.

Motion to dismiss will, therefore, be sustained.

(No. 2200—Claim denied.)

FRANK STYKA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1936.

WACHOWSKI & WACHOWSKI, for claimant.

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

PERSONAL INJURY—*negligence of State Highway employee—State not liable for.* In the construction and maintenance of its public highways the State exercises a governmental function and is not liable for damages for personal injuries or damage to property caused by the negligence of its employees in the construction or maintenance thereof or failure to maintain.

SAME—*breaking underground gas main by State Highway employee in erecting sign at public highway—when not evidence of negligence.* Where employees of State, in erecting stop sign at public highway broke underground gas main and it is not averred nor shown that said employees knew or by the exercise of due care and caution should have known that said gas main was underneath place where sign was erected, no negligence is proven.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint charges that on the 18th day of November, 1932, the claimant was the owner and occupant of the premises commonly known and described as No. 15439 South Halsted Street in the Village of Phoenix and State of Illinois; that said premises were supplied with illuminating gas by mains and pipes running underground from a point approximately 20 feet South of said building, and from thereon Northerly through the foundation of said building and into the basement and continuing in said basement to a meter and various other parts of said building. It is charged that Halsted Street is a State Highway, and is being maintained by the State. It is also charged that the said illuminating gas was poisonous and when inhaled in sufficient quantities by human beings will cause serious injury or death, and it is charged that it was the duty of this State to erect and maintain a standard set of warning signs and direction posts of uniform design throughout Halsted Street and at the intersection of the street adjacent to claimant's premises. It is also alleged that it was the duty of the State to erect those signs so as not to damage property or do damage to or injury to life, but notwithstanding this duty, it so negligently and carelessly erected a sign at the North-East corner of 155th Street and Halsted Street that it broke one of the gas pipes leading to the basement of claimant's premises, and that this was done on or about the 18th day of November, 1932.

It is also alleged that at the time, the ground surrounding the place where the said sign was erected, was frozen and there was an impenetrable coat of ice, over and upon the surface of the earth at and near the place of the erection of said sign, and that prevented the gas from escaping through the surface of the ground at any point nearer than the basement of the claimant's premises, and because of this, the plaintiff was badly poisoned and has suffered damages in the sum of $10,000.00.

A motion was made by the Attorney General to dismiss this because the State is not responsible for the negligent and careless acts of its servants in the erection of the sign.

It is not averred or charged that the State knew, or by the exercise of due care and caution should have known, that

there was a gas pipe containing poisonous gas immediately under the sign that was erected, or that by the placing of the sign the State knew or should have known of the existence of the gas pipes and it would seem from authorities that even if the knowledge was possessed by the State that there could be no recovery from the State for the reason that in the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions for tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. This court has long been committed to that view of the law. *Morrissey* vs. *State*, 2 C. C. R. 454; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Chumbler* vs. *State*, 6 C. C. R. 138; *Buchole, Admrx.* vs. *State*, 7 C. C. R. 241, 243; *Derby* vs. *State*, 7 C. C. R. 145; *Braun* vs. *State*, 6 C. C. R. 104.

The motion of the Attorney General to dismiss will, therefore, be sustained.

(No. 2681—Claim denied.)

ALPHA DISTRIBUTORS, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

ECKERT & PETERSON, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

ILLINOIS SECURITIES LAW—*application for qualification of Securities in Class D under—claim for refund of fees paid Secretary of State—when award for denied.* Where claimant, a foreign corporation, filed its application with Secretary of State for the qualification of certain shares of its stock as Class D securities under the Illinois Securities Act and submitted the statements and documents required under Act, and at the time of such filing paid the fees therefor as required under Act, which were in accordance therewith paid into State Treasury, no award for refund thereof will be made when the qualification statements submitted with said application were not accepted by Secretary of State, on the ground that same disclosed a violation of law, in that said statements purported to qualify stock of a foreign corporation which denies stockholders the privilege of voting for stockholders, as such fees are required to be paid at time of submitting such statements and not at time of filing same.

SAME—*fees of Secretary of State—no provision for refund of in Act.* There is no provision in the Illinois Securities Act for the refund of fees paid to the Secretary of State by one seeking to qualify its securities in Class

C or D, at the time of submitting statements for such qualification, even though such statements are not accepted by the Secretary of State, as such fees are required by Act to be paid into State Treasury, and therefore no award for such refund can be made by the Court of Claims.

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

On December 2nd, 1933 claimant, Alpha Distributors, Inc., a Delaware corporation, pursuant to a previous agreement with Alpha Shares, Inc., a Maryland corporation, submitted to the Secretary of State of this State its application for the qualification of the participating shares of said Alpha Shares, Inc., as Class D securities under the provisions of the Illinois Securities Law. With such application the claimant presented the "statements and documents" required by Section 9 of the Securities Law and its check for $300.00 to cover the fees required by Section 26 of such law. The check was sent through for clearing and the proceeds deposited in the State Treasury.

One of the provisions of the articles of incorporation of Alpha Shares, Inc., provided in effect that the participating stock of such corporation should not have any voting rights.

On December 12th, 1933 the Honorable Otto Kerner, Attorney General, advised the Secretary of State that he should not accept for qualification statements which purport to qualify stock of a foreign corporation which denies to stockholders the privilege of voting for directors. (Opinions of Attorney General, 1933, p. 746.)

A copy of such opinion was forwarded to the attorneys for claimant, and on December 26th, 1933 the Secretary of State advised such attorneys that the aforementioned opinion made it impossible for the Securities Department to pass upon the matter, and the original application was therefore returned and the files closed.

Subsequently the general corporate scheme was changed, and on January 21st, 1934, claimant submitted the application of Alpha Shares, Inc., to qualify such participating stock as a semi-fixed type of investment trust under Section 7-a of the Securities Law, and accompanied such application with the required exhibits. The fee fixed by the statute for such application was $100.00, and the application having been filed, the Secretary of State permitted $100.00 of the $300.00

fee previously paid, to be credited to the filing fee of the last application.

No further action relative to the remaining $200.00 of the $300.00 fee originally paid was taken until July 17th, 1935, on which date the claimant filed its claim herein for the recovery of such sum of $200.00.

Section 26 of the Illinois Securities Law, (Smith-Hurd's Revised Statutes, 1933, chap. 121½) provides as follows:

"The following fees shall be paid to the Secretary of State at the time of submitting any statement for the qualification of securities in Class 'C' or 'D' and amendments thereto * * *:

"(1) For Class 'C' or Class 'D' statement a fee of one-twentieth of one per cent of the amount of securities to be offered for sale in this State, but in no case shall the fee be less than $25.00 or more than $300.00.

* * * * * * *

"All such fees shall be paid into the State Treasury even though such statements or inventories and appraisements are not filed by the Secretary of State."

Counsel for claimant and for respondent agree that the fee required by the statute, is for the purpose of compensating the Secretary of State for the examination of the "statements and documents" which are required to be filed pursuant to the provisions of Section 9 of the Securities Law, but counsel for claimant contends that the Secretary of State did not make such examination, but returned the application without examination on account of the aforementioned opinion of the Attorney General, and base their contention on the following statement in the letter of the Secretary of State returning the application, to wit:

"This opinion makes it impossible for the Securities Department to pass upon the above matter, and the Department is returning to you the original application and exhibits submitted by your office and is marking the files closed."

However, there is nothing in such letter to indicate that the Secretary of State did not examine the documents submitted; in fact, he necessarily had to examine them, or some of them, before he could determine that the shares which claimant sought to qualify did not have voting rights. The documents in question were in the hands of the Secretary of State for ten days before the opinion of the Attorney General was written, and there is nothing in the record to indicate that an examination of such documents was not made.

The Secretary of State in his letter above quoted said: "This opinion makes it impossible for the Securities Depart-

ment to *pass upon the above matter*"; that is, the matter of the qualification of the shares as Class D securities. Although the Securities Department was barred from passing on the question of the qualification of the shares, as previously stated, it necessarily had to examine the documents submitted, or some of them, before it could determine that the shares in question denied to the holders thereof the right to vote for directors.

Under the provisions of Section 26 of the Securities Law, the fee is required to be paid "at the time of submitting" and not at the time of filing. Said section also provides that "all such fees shall be paid into the State Treasury even though such statements or inventories and appraisements are not filed by the Secretary of State."

No provision has been made by the Legislature for the return of any such fees so paid into the State Treasury, and on the record before us, we see no legal justification for an award. Award must therefore be denied. Award denied. Case dismissed.

(No. 2795—Claimants awarded $24,268.90.

BENZOLINE MOTOR FUEL COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936

KIRKLAND, FLEMING, GREEN & MARTIN, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

MOTOR FUEL TAX—*paid under protest—when may be recovered.* Where Motor Fuel Tax is paid under protest and proceedings are instituted in competent court of general jurisdiction within time required by statute to restrain payment of same into State Treasury, upon which temporary injunction is issued, an award for refund will be made, upon judgment of the Supreme Court of Illinois, to which proceeding was appealed, that moneys so paid under protest for such Motor Fuel Tax be repaid to payor thereof, where State officer in violation of such injunction pays such funds so paid under protest into State Treasury.

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

From the stipulation of facts filed in this cause it appears:

1. That pursuant to the provisions of the Motor Fuel Tax Act of 1927, the claimant, as a distributor of motor fuels, collected from certain of its customers, a tax of two cents per gallon for the motor fuel sold to them during the month of January, 1928; that the name and address of each person from whom the tax was collected, the number of gallons sold to, and the amount collected from each such person, is as follows, to wit:

Name	Address	Gallons	Tax Collected
Beloit Dairy Co.	218 W. Chestnut St.	3,379	$ 67.58
N. L. Litchfield	1419 N. Wells St.	6,706	134.12
Pellar Pie Co.	3659 W. Harrison St.	8,295	165.90
Parmelee Co.	730 Quincy St.	26,951	539.02
Deppe Baking Co.	1015 Willow St.	2,478	49.56
General Motors Truck Co.	1700 Pershing Rd.	1,559	31.18
Edmonson Bock Co.	2855 N. Halsted St.	1,141	22.82
Johanna M. Gray	6759 Bennett Ave.	135	2.70
Benjamin Heller	3925 Calumet Ave.	100	2.00
J. Hodgkinson	4926 Kimbark Ave.	315	6.30
J. L. Llewellyn	4932 Kimbark Ave.	180	3.60
E. D. Weary	5620 Blackstone Ave.	175	3.50
Chas. Weinfeld	6746 Kimbark Ave.	250	5.00
Sheridan Laundry	5035 N. Kedzie Ave.	750	15.00
Blue Seal Food Products	6415 Wentworth Ave.	280	5.60
T. C. Drake	51 E. Chicago Ave.	120	2.40
Contractors Service Co.	900 W. Division St.	1,141	22.82
Hertz Drivurself	5801 Dickens Ave.	25,867	517.34
Chicago Motor Coach	4711 Ravenswood Ave.	273,695	5,473.90
Yellow Cab Co.	57 E. 21st St.	852,643	17,052.86
Wm. Cooper & Nephews	1909 Clifton Ave.	5,827	116.54
		1,211,987	$24,239.74

2. That the amount of the tax so collected, to wit, $24,239.74, together with the sum of $29.16 covering the tax on fuel used by claimant's own filling station, making a total of $24,268.90, was remitted under protest by claimant to the Department of Finance of the respondent.

3. That such money was received by A. C. Bollinger, as Director of the Department of Finance of the respondent, subject to the provisions of Section 2a of "An Act in Relation to the Payment of Public Money of the State into the State Treasury."

4. That within thirty days after making such payment to the Director of the Department of Finance as aforesaid, claimant filed its bill in the Circuit Court of Sangamon County, in accordance with the provisions of the aforementioned Act of the General Assembly, to restrain said Bollinger as Director of Finance from depositing such money with the State Treasurer.

5. That a temporary injunction was duly issued in accordance with the prayer of such bill, and said Director of Finance was restrained from disposing of said sum, or any part thereof, and from paying the same, or any part thereof, into the State Treasury; and was further required to hold the same pending the further order of said court.

6. That upon the hearing in said cause, in said Circuit Court, a decree was entered dismissing the bill for want of equity; that claimant perfected an appeal from such order to the Supreme Court of Illinois; that the aforementioned injunctional order remained in force pending the final disposition of the case upon such appeal.

7. That the Supreme Court of Illinois reversed the decree of said Circuit Court of Sangamon County and remanded the cause to such court with directions to ascertain the character of the fund litigated, and in whose custody it then reposed, to determine the extent of the liability therefor of the Director of Finance, and his successors in office, and to make such other findings and orders in relation thereto as the circumstances might require and to the court should seem proper, including a final decree ordering repayment to the claimant of the sum to which it was entitled.

8. That at the time of the payment of said tax by the claimant to the Department of Finance as aforesaid, the Department of Finance maintained two banking accounts in which it deposited motor fuel tax receipts before the transmittal thereof to the State Treasurer; that one of such accounts was in the First Trust and Savings Bank of Kankakee (hereinafter referred to as "First Trust") and the other was in the Ridgely-Farmers State Bank of Springfield, Illinois (hereinafter referred to as "Ridgely Bank.")

9. That on February 24th, 1928 said Director of Finance deposited in said First Trust, the aforementioned sum of $24,268.90 so paid to him by claimant as aforesaid, together with the further sum of $144,544.81, being the amount of

fuel tax paid by six other distributors; that the amount of the fuel tax so paid by the claimant to the Director of Finance as aforesaid, remained on deposit in said First Trust until July 5th, 1932.

10. That certain other distributors whose motor fuel tax was deposited in said First Trust as aforesaid also obtained injunctions restraining the deposit into the State Treasury of the tax so paid by them.

11. That at the time of the deposit in the First Trust, of the amount of the tax paid by the claimant as hereinbefore set forth, the Director of Finance had on deposit in the Ridgely Bank the sum of $454,341.03, being motor fuel tax collections received from various distributors, and held by him, pursuant to injunctional orders similar to the order procured by the claimant; that said balance remained intact in said Ridgely Bank until September 17th, 1930.

12. That in January, 1929 said A. C. Bollinger was succeeded as Director of Finance by Garrett DeF. Kinney who was thereupon substituted in place and stead of said Bollinger on said bank accounts.

13. That between July 23d, 1930 and July 9th, 1932, all of the aforementioned injunction proceedings except the suit of this claimant, were either dismissed or determined in favor of the respondent; that as said several injunction proceedings were dismissed or determined in favor of the respondent, the several amounts of money involved therein, were withdrawn and paid into the State Treasury; that in making such payments into the State Treasury as aforesaid, the said Garrett DeF. Kinney, then Director of Finance, withdrew funds from said First Trust and from said Ridgely Bank indiscriminately, instead of withdrawing from said First Trust the funds which had been deposited therein, and which were thereafter released pursuant to the order of court; and withdrawing from said Ridgely Bank the funds which had been deposited therein, and were thereafter released pursuant to the order of court; that as a result of such action on the part of the Director of Finance, all of the money which had been deposited in said First Trust was withdrawn by said Director of Finance and deposited in the State Treasury; and the amount of the fuel tax paid by the claimant herein, to wit, $24,268.90, remained on deposit in the Ridgely Bank.

14. That on December 29th, 1932 said Ridgely Bank was closed by the Auditor of Public Accounts of the State of

Illinois; that said bank is now in process of liquidation, and William L. O'Connell, is the present receiver for said bank.

15. That on September 6th, 1933 respondent filed a claim for preference in payment of said deposit of $24,268.90; that thereafter an order was entered in the Circuit Court of Sangamon County allowing said claim as a preferred claim in the amount of $24,268.90, and ordering said receiver to pay the same in due course of administration.

16. That on August 23d, 1935 the Circuit Court of Sangamon County entered an order in the aforementioned cause of this claimant against the respondent herein, finding that the funds of the claimant in the amount of $24,268.90 had been paid into the Treasury of the State of Illinois by said Garrett DeF. Kinney as Director of Finance, in violation of the injunctional order of said court, and further finding that claimant is entitled to repayment of said money from the respondent herein.

17. That thereafter, to wit, on December 14th, 1935, said receiver paid to the respondent the said sum of $24,268.90.

From the foregoing stipulation of facts, it appears that the motor fuel tax so paid by the claimant as aforesaid was paid under protest; that within thirty days after the making of such payment, claimant filed a bill in chancery to restrain the payment of such money into the State Treasury, in accordance with the requirements of the statutes of this State; that a restraining order was issued on said bill; that the Director of Finance of the respondent violated the terms of such injunctional order by removing said funds from said First Trust; that if said funds had been permitted to remain in said First Trust until the final termination of the injunction proceedings commenced by the claimant in the Circuit Court of Sangamon County, as aforesaid, such funds would have been returned directly to the claimant pursuant to the order of the Circuit Court of Sangamon County; that as the result of the preference claimed and obtained by the respondent as a creditor of the Ridgely Bank, the respondent has obtained the sum of $24,268.90 to which it is not entitled, and which rightfully belongs to the claimant.

Claimant has not been guilty of any delay in connection with the matter, but on the contrary has been most prompt and energetic in asserting its rights; it has prosecuted its

injunction proceedings with effect, and the only reason it has not received its money is because the Director of the Department of Finance of the respondent violated the injunctional order of the Circuit Court of Sangamon County, and withdrew the money on deposit in said First Trust without any authority therefor.

Under the facts and the law, claimant is clearly entitled to a refund of the motor fuel tax so paid by it as aforesaid.

The tax in question was collected by claimant from its aforementioned customers upon an agreement to the effect that claimant would pay such tax under protest to the Director of Finance, and would thereafter seek to recover the amount so paid;—and in the event of such recovery, would refund to said customers the amount so paid by them.

Award is therefore entered in favor of the following persons, firms and corporations, and in the following amounts, to wit:

Benzoline Motor Fuel Company, for the use of Beloit Dairy Co..	$ 67.58
Benzoline Motor Fuel Company, for the use of N. L. Litchfield..	134.12
Benzoline Motor Fuel Company, for the use of Pellar Pie Co.....	165.90
Benzoline Motor Fuel Company, for the use of Parmelee Co.....	539.02
Benzoline Motor Fuel Company, for the use of Deppe Baking Co.	49.56
Benzoline Motor Fuel Company, for the use of General Motors Truck Co.....	31.18
Benzoline Motor Fuel Company, for the use of Edmonson Bock Co.	22.82
Benzoline Motor Fuel Company, for the use of Johanna M. Gray.	2.70
Benzoline Motor Fuel Company, for the use of Benjamin Heller.	2.00
Benzoline Motor Fuel Company, for the use of J. Hodgkinson...	6.30
Benzoline Motor Fuel Company, for the use of J. L. Llewellyn...	3.60
Benzoline Motor Fuel Company, for the use of E. D. Weary.....	3.50
Benzoline Motor Fuel Company, for the use of Chas. Weinfeld...	5.00
Benzoline Motor Fuel Company, for the use of Sheridan Laundry.	15.00
Benzoline Motor Fuel Company, for the use of Blue Seal Food Products	5.60
Benzoline Motor Fuel Company, for the use of T. C. Drake.....	2.40
Benzoline Motor Fuel Company, for the use of Contractors Service Co.....	22.82
Benzoline Motor Fuel Company, for the use of Hertz Drivurself..	517.34
Benzoline Motor Fuel Company, for the use of Chicago Motor Coach	5,473.90
Benzoline Motor Fuel Company, for the use of Yellow Cab Co....	17,052.86
Benzoline Motor Fuel Company, for the use of Wm. Cooper & Nephews	116.54
Benzoline Motor Fuel Company	29.16
Total	$24,268.90

(No. 2778—Claimant awarded $26.18.)

THE CUDAHY PACKING CO., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

HOFF & HOFF, for claimant.

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

SUPPLIES—*when award for may be made.* Where the facts are undisputed that the State has received supplies lawfully ordered by it, and that payment was not made before the lapse of the appropriation out of which it could have been paid, and no question is raised as to amount due, an award for price of same will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

On or about May 4, 1935 claimant received an order for certain meats, as described in the Bill of Particulars, to be shipped to Hope Hall, one of the Public Welfare Institutions of the State of Illinois, located at 6036 Ravenswood Avenue, Chicago, in the amount of Twenty-Six and 18/100 ($26.18) Dollars. It appears from the record that when the Statement of Account was submitted on October 16, 1935, payment was not made because the appropriation out of which payment might have been made had lapsed. It further appears that the invoice for such merchandise was duly approved by George T. Scully, Supt. of the institution; that the merchandise in question was duly received and used at said institution and the statement of account was correct.

No opposition is offered to the payment of the claim and this claim seems to be within the rule that where the facts are undisputed that the State has received supplies lawfully ordered by it, and that payment was not made before the lapse of the appropriation out of which it could have been paid, and no question is raised as to the amount due, an award is proper.

The claim is therefore allowed and an award entered in favor of claimant in the sum of Twenty-Six and 18/100 ($26.18) Dollars.

(No. 2252—Claimant awarded $4,500.00.)

JULIA GYENES, ADMX. OF THE ESTATE OF ANDREW GYENES, Deceased, AND JULIA GYENES, INDIVIDUALLY, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

JOHN W. PREHS AND CARL PREHS, for claimants: JOHN W. FRIBLEY, of counsel.

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

ILLINOIS NATIONAL GUARD—*maintenance and conduct of, governmental function—killing of citizen by member of—exception to rule that State not liable for.* It is generally well settled that in organizing training and military camps the State is exercising a governmental function and acting in its sovereign capacity.

While the general rule is that the State is not liable to respond in damages for the acts of members of Illinois National Guard, such rule may be departed from, where a member of said Illinois National Guard, on active service, in a zone where martial law had not been declared, but acting as a peace officer, in an unlawful attempt to arrest a citizen, not then engaged in any breach of the peace nor guilty of any criminal offense, nor whom against any complaint charging commission of a criminal offense had been filed, without any warrant or other process for such arrest, wilfully and wantonly kills the citizen on private property and the statutes of the State of Illinois, as a matter of public policy completely absolves such member from any criminal or civil liability for such act. To adhere to such rule would, in such case, violate Section 2, Article II, of the Constitution of the State of Illinois: "No person shall be deprived of life, liberty or property without due process of law."

SAME—*personal injury, killing of citizen by member of—when award for damages may be made against State.* Where State relies on its sovereignty to escape liability for damages for acts of members of Illinois National Guard, and also by law adopted as a matter of public policy completely absolves such members, while on active service, from any criminal or civil liability for any of their acts, so that persons sustaining damages by reason of the unlawful, wilful and wanton killing of a citizen by a member of the Illinois National Guard are without any remedy or redress therefor, the constitutional guaranty against one being deprived of life, liberty or property without due process of law can be said to be violated and an award against the State for damages for such killing may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

On September 18, 1932 Louis L. Emmerson, as Governor of the State of Illinois, in compliance with the request of the Sheriff of Christian County directed the mobilization of

Company E, 130th Infantry of the Militia of Illinois, to go into Christian County to aid in preserving order. Under orders from Adjutant General Black, the Company, under command of Capt. Carl H. Meacham, went to Christian County, with instructions to report to the Sheriff of that County. The Company was in command of Capt. Carl H. Meacham. The latter reported to the Sheriff, no martial law was declared, but the Sheriff directed Capt. Meacham, as such commanding officer, to assist in maintaining order in said county and for that purpose to patrol any part of the county in such manner, as such commanding officer might deem proper.

Between 5:30 and 6:00 o'clock on the afternoon of October 13, 1932 Corporal Russell M. Myers, and two other members of the Ill. National Guard were on active duty and were patrolling the streets in the Village of Tovey in said county when their car was signalled to stop by a Mr. and Mrs. Miller in front of the Miller home. Andrew Gyenes was standing in the front yard at the residence of a Mr. Fordor who lived next door to the Miller home. There was a fence across the front of the Fordor property between Gyenes and the street and he was standing some five or six feet inside the yard, the gate to which was closed. Mr. Miller had had a dispute with Gyenes several days previously. Miller informed the guardsmen of this dispute and that Gyenes had called him a "scab," and he requested that the militiamen arrest Gyenes. Corporal Myers then walked over near the gate of the fence which surrounded the yard in which Gyenes was standing and ordered him to consider himself under arrest. The gate was closed and Gyenes was standing four or five feet from the fence. Gyenes refused to consider himself under arrest and informed Corporal Myers that the latter had no right to arrest him without a warrant and that he would not go with Corporal Myers, whereupon Myers said "I told him if he refused again I was going to shoot—that I would count three—that I did count three—and about the time of the third count Gyenes took a step forward and raised his arm toward me and I fired." The bullet from Corporal Myers' rifle entered the body of Andrew Gyenes and from that bullet wound the latter soon thereafter died.

Andrew Gyenes was an able-bodied man, about forty-five (45) years of age, by occupation a coal miner, and lived

with and contributed his earnings to the support of his wife and children. He left surviving him, Julia Gyenes who files this claim as his surviving widow and as administratrix of his estate—Marie Gyenes, a daughter, aged nineteen (19) years—Elizabeth Gyenes, a daughter, aged seventeen (17) years—and Andrew Gyenes, a son, aged nine (9) years, all of whom, according to the stipulation herein filed, were dependent upon their father for support.

No martial law had been declared in Christian County prior to or at the time Corporal Myers shot and killed Andrew Gyenes. Corporal Myers had no warrant for the arrest of Gyenes and there was at the time of the shooting no complaint for a warrant filed with any court. It is further stipulated in the record that the deceased had violated no law in the presence of the Military Patrol or Corporal Myers and that the deceased was within his authority in demanding that no arrest be made without a warrant.

Claimant seeks an award of Ten Thousand ($10.000.00) Dollars as the surviving wife of Andrew Gyenes, because of his unlawful and unwarranted killing, and seeks the further sum of Ten Thousand ($10,000.00) Dollars as administratrix of the estate of Andrew Gyenes for the support, care and education of Elizabeth Gyenes and Andrew Gyenes, his surviving children.

The Attorney General has filed a motion to dismiss the case, claiming respondent is not liable under the Doctrine of *Respondeat Superior* for the negligence of its servants and agents. He further contends on behalf of respondent that no award should be allowed under the doctrine of 'equity and good conscience' or 'social justice.' In answer to this, claimants contend that time after time where no legal liability on the part of the State for damages exists that awards have been made as a matter of equity and good conscience. This court as now constituted has reached the conclusion that it has no authority under the provisions of the Court of Claims Act to allow any claim solely on what is known as the doctrine of 'equity and good conscience.' This view is fully set forth in the case of *Crabtree* vs. *State*, 7 C. C. R. 207 and in numerous other cases appearing in the subsequent reports of this court.

Claimants contend however, that the facts in this case distinguish it from the other cases in which the doctrine of

'equity and good conscience' have been invoked, for the reason that the legislature, pursuant to the provisions of Section 11 of Article 20 of the *Military and Naval Code* have deprived them of any right of action against Corporal Myers and that unless this court takes cognizance of the claim, Andrew Gyenes, the deceased, would have been deprived of his life, and claimants would be deprived of their property and right to support, without due process of law, contrary to the Constitution. This Section (*Hurd's Rev. Statute* 1933, Ch. 129) provides in part as follows:

"Should any member of the National Guard—while in the discharge of his duty on active service in pursuance of orders from a superior authority, take life, or injure any person or persons or property in such discharge of his duty, the act or acts upon the part of such enlisted man—shall be deemed to be justifiable and lawful and he shall not be prosecuted therefor in any court or incur any civil liability by reason thereof."

By the provisions of this Act the legislature has expressly exempted Corporal Myers from any liability to the claimants in this case. At the time he shot Andrew Gyenes, Corporal Myers was in fact merely acting as a Peace-Officer, engaged in aiding the Sheriff of Christian County to maintain order. Were it not for the fact that he was an enlisted member of the National Guard in the discharge of his duties on active service pursuant to orders from a superior authority, he and his bondsman would have been subject to civil suit for the unwarranted killing of deceased. Under existing statutes the Civil Courts are not open to claimants for such purpose.

One of the first objects of Government is to protect the life, liberty and property of its citizens to the end that a Constitutional Government may exist. The Constitution of Illinois is the organic law of this State, and its bill of rights should be accepted as an imperative voice when considering the relationship and dealings between the civilian citizenship and the military power of the State.

The Constitution of the State of Illinois in the bill of rights provides:

"Section 2, Article II. No person shall be deprived of life, liberty or property without due process of law.

"Section 6, Article II. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause etc."

"Section 15. The military shall be in strict subordination to the civil power."

The provisions above stated cannot be abrogated by statute nor legally violated by the militia or any court or citizen of the State. No fair minded citizen or student of our form of Government can rightly contend that it is in accordance with the spirit of these provisions to permit a member of the National Guard while engaged in the performance of his duties, not in a zone where martial law has been declared, but acting only as a Peace-Officer and as an aid to the civilian authority in maintaining order, to arrogantly, wantonly and without process and without any charge of crime having been legally preferred against a citizen, and where no violation of law has been committed in the presence of such militiamen, shoot and kill such citizen on private property while such citizen is in the peace of the people.

In the case of *Johnson* vs. *Jones, et. al.* 44 Ill. 142 the court expresses itself in this regard in the following language:

"The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty and property. The more certainly to attain this end, the framers of our Constitution not only proclaimed certain great principles in the bill of rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of a citizen may be taken from him, to the judicial department to determine the existence of such causes in any given case, and to the executive to enforce the sentence of the court. If a citizen can be arrested, except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two, and the whole theory of our government, so far as it relates to the protection of private rights, is overthrown."

Corporal Myers had no right or authority to make the attempted arrest or commit the wilful and deliberate act of shooting Andrew Gyenes. Martial law had not been declared; no proclamation suspending habeas corpus in the State of Illinois or Christian County had been issued; the civil law was still in full force and effect and it was as improper to make the attempted arrest without a warrant, under all the facts appearing in this record as it would have been to have visited upon Andrew Gyenes a trial by court martial instead of according to him a Civil Court hearing. As stated in *Johnson* vs. *Jones, supra,* "Military law, as distinguished from martial law, consists of the rules prescribed for the

government and discipline of troops, which applies only to persons in the Military or Naval service of the government; whereas martial law, when once established, applies alike to citizen and soldier."

A military court martial has seen fit to visit no penalty upon Corporal Myers for the killing of Andrew Gyenes but regardless of whether he was or was not held responsible to the Military Court we do not believe that the State of Illinois can justify a dismissal of this claim and in effect say to the world that although no martial law has been declared, the Militia of the State may wantonly shoot down and kill one of its citizens then in the peace of the people and that the State would disavow all responsibility therefor. By statute, as a measure of proper public policy, the State has closed the door of the Civil Courts to claimants herein. While the killing of Andrew Gyenes as disclosed by the record herein seems unprecedented, yet we must believe that it is such a cause as was included in the minds of the Legislators of Illinois when they enacted the law creating the Court of Claims, and provided that among other things it should have power "To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a Sovereign Commonwealth, should, in equity and good conscience, discharge and pay." (Sec. 6, Par. 4, *Court of Claims Act.*)

For the State to deny such redress as it can offer to the widow and children of Andrew Gyenes for the latter's death under the circumstances disclosed in this record would not be in keeping we believe with our constitutional precepts and the law. We believe an award to be legally justified.

At the time of his death Andrew Gyenes was survived by his widow and three children, one of whom was nine years of age and the others over sixteen year of age. He was forty-five years of age and a coal-miner by occupation.

An award of Four Thousand Five Hundred ($4,500.00) Dollars is justified under the record.

IT IS THEREFORE ORDERED that an award is hereby recommended in favor of Julia Gyenes as administratrix and as surviving widow of Andrew Gyenes, deceased, in the sum of Four Thousand Five Hundred ($4,500.00) Dollars.

CHIEF JUSTICE HOLLERICH dissenting:—

I cannot concur in the majority opinion.

Claimant contends that she is entitled to an award on the following grounds:

1) Equity and good conscience.

2) For the reason that she was deprived of her property without due process of law.

By the provisions of Section 11 of Article 20 of the Military and Naval Code of this State, Corporal Myers was relieved of all civil liability for the killing of Andrew Gyenes. In the absence of such enactment, the personal representative of said decedent would have been entitled to maintain an action against Corporal Myers under the "Injuries Act" of this State, for wrongfully causing the death of said decedent. Claimant takes the position that the Legislature in enacting Section 11 of Article 20 of the Military and Naval Code, deprived her and her children of a right of action which otherwise could have been maintained under the "Injuries Act", and that therefore she has been deprived of her property without due process of law, in violation of Section 2 of Article 2 of the Constitution of this State.

The majority opinion recognizes that claimant has no right to an award on the grounds of equity and good conscience, but holds that she was deprived of her property without due process of law, in violation of the aforementioned constitutional provision.

The constitutionality of the provisions of Section 11 of Article 20 of the Military and Naval Code has not been raised in this case, and that question is not now before the court.

The sole question for determination is whether the *claimant has been deprived* of her property without due process of law, within the meaning of those words as used in the Constitution. Does the deprivation of the right of action which the personal representative of said decedent otherwise might have maintained, constitute the taking of property, within the meaning of the constitutional provision? In other words, does *the right of action which is given* under the provisions of the "Injuries Act" constitute "property" within the meaning of that word as *used in the Constitution?*

At common law, no right of action existed for the recovery of damages for negligent injury resulting in the death

of the person injured. *Dougherty* vs. *American-McKenna Co.*, 255 Ill. 369; *Mississippi River Power Co.* vs. *Ind. Com.*, 289 Ill. 353; *Sims* vs. *Moline*, 222 Ill. App. 540.

In the case of *Keeran* vs. *Peoria, Bloomington and Champaign Traction Co.*, 277 Ill. 413, our Supreme Court, in passing upon the constitutionality of Sections 6 and 29 of the Workmen's Compensation Act of this State, used the following language:

"No right to compensation for an injury resulting in death existed at common law. Such right was given by statute, and being wholly statutory, is subject to legislative control. It may be given upon such terms and to such extent as the Legislature sees fit, and may be taken away or limited, in its discretion."

In the case of *Cones* vs. *Fisher*, 286 Ill. 606, the court, in considering a similar question, after referring to the Keeran case and other cases, used the following language:

"Neither an employee, his personal representative nor next of kin has any vested right to recover damages for personal injuries to the employee that the Legislature could not at any time do away with by a public enactment."

As previously stated, no right of action existed at common law for the recovery of damages for negligent injury resulting in the death of the person injured. The right to recover damages in such case depends wholly upon the provisions of the "Injuries Act" of this State. The Legislature having created the right, has equal authority to abolish the same, as no one has a vested right therein. Consequently, if such right of action is abolished, there is no deprivation of property within the meaning of such words as used in the Constitution. The law in this regard is set forth in 6 R. C. L. p. 309, sec. 296, as follows:

"There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate on a particular subject."

In considering a similar question our Supreme Court, in the case of *Arnold & Murdock Co.* vs. *Ind. Com.*, 314 Ill. 251, said:

"No one has a vested right in a public law, but the Legislature may repeal or amend all legislative acts not in the nature of contracts or private grants."

From a consideration of the foregoing authorities, it appears to me that there was, in this case, no deprivation of

property within the meaning of such words as used in the Constitution.

Furthermore, the question of the liability of the State for damages resulting from negligent acts or conduct on the part of enlisted men or officers in the military service of this State, has been before this court in numerous cases. Claimant has cited two of such cases in which awards were allowed, to wit: *Hanson, et al.* vs. *State*, 6 C. C. R. 548, and *Wood* vs. *State*, 7 C. C. R. 161. In each of such cases, however, it was specifically stated that there was no legal liability on the part of the State, but an award was made on the grounds of equity and good conscience. As stated in the majority opinion, this court as now constituted, has repeatedly held that it has no authority to allow an award on the grounds of equity and good conscience unless there is a legal liability on the part of the State to pay such award.

In each of the following cases an award was sought on the ground that the State was liable for the negligent acts or conduct on the part of enlisted men or officers in the military service, and in each case award was denied on the ground that there is no liability on the part of the State in such cases. *Viola Ogan* vs. *State*, 4 C. C. R. 346; *Kershaw* vs. *State*, 6 C. C. R. 387; *Peterson* vs. *State*, 6 C. C. R. 578; *Winnebago County Forest Preserve District* vs. *State*, 7 C. C. R. 95; and *Peterson* vs. *State*, 8 C. C. R. 9.

There being no legal liability on the part of the State in this case, I feel that we have no jurisdiction to allow an award.

(No. 2567—Claimant awarded $3,000.00.)

ETHEL HACKL, WIDOW AND JOSEPH HACKL, A SON, BENEFICIARIES OF EDWARD H. HACKL, DECEASED AND JOSEPH HACKL, BY ETHEL HACKL, HIS NEXT FRIEND, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

SAM GILBERT, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where it appears that employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous work and due notice is given employer of such injuries and claim, and application for compensation is made within time provided in Act, an award for compensation may be made to those entitled in accordance with the provisions of such Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The petition in this case alleges that on the 30th day of August, 1934, Edward H. Hackl received an injury by reason of an accident arising out of and in the course of his employment by the State of Illinois, which resulted in his death on the 12th day of October, 1934. On the date aforesaid and prior thereto, claimant's intestate was employed by the Illinois Emergency Relief Commission for the Department of Public Works and Buildings in the Division of Highways of the State of Illinois, and was working on State Route 4 about 3 miles north of the village of Chatham in Sangamon County.

He was a common laborer and at the time he received the injuries he was wheeling a wheel-barrow loaded with dirt. His foot slipped on the somewhat wet ground and he fell forward, striking the upper abdomen upon the wheel-barrow. He immediately complained of pain and told one of his fellow employees, who advised him to quit wheeling and take up a rake and putter around until he felt better. He notified his foreman on the date of the injury, who notified him as to where to go for medical treatment. The accident had resulted in a ventral hernia. Doctor Don Deal, a physician and surgeon in Springfield, operated upon Hackl for the hernia on the 8th or 9th day of October, 1934 and Hackl died as a result of embolism on October 12, 1934. Hackl was receiving $4.00 a day and working 3 days per week. He left surviving a widow and one child, Joseph Hackl, who was 13 years of age, and claim is made under the Compensation Act for the sum of $4,450.00.

From an examination of the testimony, it appears that claimant's intestate received an injury that arose out of and in the course of the employment, and that proper notice was given. Claim was filed in this case on January 7, 1935. The question to be determined is whether or not the hernia was an old one or a new one, and the amount of compensation.

On September 1, 1934, Edward Hackl called at the office of H. B. Jay, Superintendent of Day Labor, Centennial Building, Springfield, and talked with Mr. Emery of that office, and reported that on August 30, 1934 (his work for the Illinois Emergency Relief Commission consisted of raking, shoveling and using a wheelbarrow) while using a wheelbarrow, he was injured, and he reported to Doctor Don Deal on August 31, 1934, at which time Doctor Deal informed him an operation was necessary. He wanted the State to pay for this operation and he was directed to take the matter up with Major White, Superintendent of Work Relief for Sangamon County. Hackl was reported to the Medical Relief by his visitor on September 24, 1934. Hackl visited the office of the Medical Relief on that last mentioned date, and stated he had suffered a rupture while on relief work; that he had had a similar injury in 1923 while working in a mine at Divernon, Illinois, and was operated on in 1923. Hackl was told to go home and rest as much as possible and stay off of his feet, until he could get in touch with Doctor Deal. Doctor Deal gives practically the same history of the hernia case in 1923 as Hackl did and stated this was a recurrence of the old hernia and a new one; in other words, an operation was necessary according to Doctor Deal and should be done in the near future.

Under date of August 31, 1934, a report of the accident was made by Harold Bartlett, the foreman, to the Department of Public Works and Buildings. The Illinois Emergency Relief paid Doctor Deal $50.00 for the operation and the St. John's Hospital bill amounting to $32.00.

At the time of his death, Hackl was 51 years old. He was taken to St. John's Hospital on Monday, October 8th, about 3 o'clock in the afternoon. He was operated on and died about 8:15 in the evening on Friday, October 12th, at St. John's Hospital.

Claim for compensation was made on the 20th day of November, 1934. That claim was filed with the Industrial Commission of Illinois, and thereafter a claim was filed with the Clerk of this court on the 7th day of January, 1935.

Hackl had been assigned to work on a project for the State of Illinois on S. B. I. Route 4, and was doing common labor. At the time of his injury he was pushing a wheelbarrow

on wet ground when his foot slipped, causing him to strike the wheelbarrow and receive a ventral hernia.

The record does not disclose when he commenced work, but discloses that the respondent had proper notice; that the accident arose out of and in the course of the employment, and the work he was doing was within the terms and provisions of the Compensation Act; that he left a widow, Ethel Hackl, and a son, Joseph Hackl, who was 13 years at the time of his father's death, having been born on August 30, 1921.

It appears that the deceased underwent an operation in 1922 for a ventral hernia; again in 1928 he had a recurrence and he was operated on in 1930 for the same thing, and it would seem that he was peculiarly subject to this ailment. He had two hernias in 1934; a recurrence of the old one and a fresh one in the same location but another opening, all within an area of two, three or four inches. There is no contention that his death was not the result of an operation for a hernia. The respondent contends that because of other hernias, that the one that caused his death was a pre-existing one at the time of the accident. This is not sustained by the evidence.

There were definite objective symptoms-pain accompanied the hernia. A notice was properly given and the employer had prompt notice and it was of very recent origin. There is proof that this particular hernia did not exist prior to the injury.

Under the statute, his widow is entitled to recover four times his average annual earnings, but not less than $2,500.00 or more than $4,000.00. The kind of work he was doing was not intended to be permanent, but only temporary. As a matter of fact, it was relief work, and we believe that the amount to be recovered in this case should be $2,500.00, and on account of the child being under sixteen years of age, to-wit: thirteen years at the time of the death of his father, that an award should be recommended in this case in the sum of $3,000.00. It is the understanding of this court that this sum will be paid out of the Illinois Emergency Relief Commission funds, and it is accordingly recommended that payment be made by said Illinois Emergency Relief Commission in the above amount in full settlement of this claim.

(No. 1999—Claim denied.)

THE INDEPENDENT EASTERN TORPEDO COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

Claimant, pro se.

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

FOREIGN CORPORATION—*franchise tax—refund of in case of withdrawal from State—when denied.* Where foreign corporation paid franchise tax on June 30, 1932, which was due on July 1, 1932 for privilege of doing business in State for one year, commencing July 1, 1932 and thereafter on July 11, 1932 filed in office of Secretary of State its certificate of withdrawal from State, it is not entitled to refund of such franchise tax, as its right to withdraw from State is contingent upon previous payment of all fees due and said franchise tax so paid on June 30, 1932 was due at time of filing certificate of withdrawal.

SAME—*voluntarily paid cannot be recovered.* Taxes voluntarily paid cannot be recovered unless there is a statute authorizing such recovery.

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

Claimant is an Ohio corporation, and filed its claim herein on October 12th, 1932 seeking a refund of $50.00, being the amount of the franchise tax paid by it for the year commencing July 1st, 1932.

The rights of the parties hereto are governed by the provisions of "An Act in Relation to Corporations for Pecuniary Profit," approved June 28th, 1919, as amended, commonly known as The General Corporation Act; being the law in force at the time of the transaction involved herein. Under the terms of such law all foreign corporations doing business in this State were required to make a report in writing to the Secretary of State, between the 1st day of February and the 1st day of March of each year, and pay a franchise tax which was assessed upon the basis of such report. The franchise tax was due and payable the following July 1st, but did not become delinquent until July 31st, and was for the year commencing on the first day of July in which it was due, and ending on the 30th day of June next thereafter.

Under date of May 7th, 1932 the Secretary of State forwarded a statement to claimant advising that under the pro-

visions of the General Corporation Act of this State claimant owed the State a franchise tax of $50.00, and that the same was due and payable on the 1st day of July of that year.

Under date of June 30th, 1932 claimant forwarded to the Secretary of State its check for $50.00 in accordance with the aforementioned statement of May 7th, and asked if it was possible to get a refund of such item, for the reason that it had previously ceased doing business in this State. The Secretary of State made reply under date of July 8th, 1932 that the only way a foreign corporation could be absolved from payment of the tax was by filing a certificate of withdrawal, and further advising that if such certificate were filed in his office before July 31st, he would give the matter of making a refund of $50.00 further consideration.

Under date of July 11th, 1932 claimant returned to the Secretary of State the formal certificate of withdrawal, and asked for favorable consideration of its previous request for a refund. Having heard nothing from the Secretary of State regarding the matter, claimant again wrote him on September 8th regarding the refund, and on September 14th, 1932 the Secretary of State advised that inasmuch as more than thirty days had elapsed since the payment of the franchise tax, he was unable to make a refund, and that claimant's only recourse, if any, was to file a claim with this court.

The franchise tax in question was for the privilege of doing business in this State for the year commencing July 1st, 1932, and was due July 1st, 1932, but would not be delinquent until July 31st, 1932. Claimant had ceased doing business in the State prior to July 1st, 1932, but formal certificate of withdrawal was not filed until on or about July 12th, 1932. In his report on the matter the then Secretary of State stated:

"It has been the policy of this department to file certificates of dissolution of domestic corporations, and certificates of withdrawal of foreign corporations up to the time such corporations become delinquent without the payment of the franchise tax for the ensuing year, since such corporations are not deemed to be delinquent until after the last day of July.

"If the claimant in this case had not paid the franchise tax, the certificate of withdrawal would have been accepted by this department any time up to the last day of July of the year in which it was paid, at which time such corporation would have been deemed to be delinquent and no certificate of withdrawal would have been accepted until all the required fees were paid."

If, under the policy of the then Secretary of State, claimant was entitled to a refund, the same should have been made by such Secretary prior to July 31st, 1932.

However, we cannot be governed by the policy of the then Secretary of State. Our inquiry must be as to whether under the law claimant is entitled to a refund.

Section 90 of the General Corporation Act in force at the time in question, provided that "Any foreign corporation that has paid all fees due and has otherwise complied with the laws of Illinois, may withdraw from the State by surrendering its license and filing with the Secretary of State an affidavit of the President or Vice President and Secretary or an assistant Secretary of the corporation to the effect that no amount of the capital stock of the corporation is represented by property located and business transacted in this State," etc. etc. The right of the claimant to withdraw from the State is contingent upon the previous payment of "*all fees due.*" The franchise tax assessed against the claimant was *due* July 1st, and consequently under the statute it was necessary that such tax be paid before the claimant was entitled to withdraw. Claimant, having delayed the filing of its affidavit for withdrawal until after the tax was due, is not entitled to refund of the tax paid.

Furthermore, the franchise tax in question was paid by the claimant voluntarily, with a full knowledge of the facts, and it is the well settled law of this State that a tax voluntarily paid cannot be recovered back in the absence of a statute providing for such recovery.

Cooley in his work on Taxation (2d ed. p. 809), states the rule as follows:

"That a tax voluntarily paid cannot be recovered back, the authorities are generally agreed. And it is immaterial, in such a case, that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the State should furnish him with legal remedies to recover it back."

In Dillon's Municipal Corporations, 3d edition, section 944, the rule is set forth as follows:

"Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license or fine, cannot,

there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law, be recovered back from the corporation, either at law or in equity, even though such tax, license, fee or fine could not have been legally demanded and enforced." Section 946 of the same work reads as follows: "Where there is no mistake or fraud, a voluntary payment cannot be recovered on the mere ground that the one party was under no legal obligation to pay and the other had no right to receive. Where the party would recover back taxes which he is under no legal obligation to pay, the payment must be compulsory."

The foregoing statements of the law have been approved by our Supreme Court in many cases. *Yates* vs. *Royal Insurance Co.*, 200 Ill. 202; *Board of Education* vs. *Toennings*, 297 Ill. 469; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122.

Under the well settled principles of law applicable to this case, we have no authority to allow a refund. Award is therefore denied and the case dismissed.

(No. 2694—Claimant awarded $1,800.00.)

FRANCES T. TUCKER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1936.

WILLIAM H. KAILES, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* **Where it appears that employee sustained accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, and due notice is given employer of such injuries and claim and application for compensation is made within time provided in Act, an award for compensation may be made to those legally entitled thereto, in accordance with the provisions of the Workmen's Compensation Act.**

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Four Thousand Eight Hundred ($4,800.00) Dollars under the terms of the Workmen's Compensation Act. From a stipulation of facts filed herein it appears that Ralph F. Tucker was employed as a Maintenance Patrolman in the Highway Department of the State of Illinois from February, 1933 to February 25, 1935; that on the latter date while in the discharge of his duties he was driving a truck a short distance North of Des Plaines,

Illinois. It was snowing and sleeting and visibility was very poor. While crossing the tracks of the Soo Line the truck was struck by a passenger train and Ralph F. Tucker was killed. He died intestate leaving surviving, Frances T. Tucker, his wife, the claimant herein and three minor children, to-wit: Ralph G. Tucker, Andrew H. Tucker and James E. Tucker all under sixteen (16) years of age at the time of the accident. His earnings or wages were One Thousand Two Hundred ($1,200.00) Dollars per year.

A suit is now pending in the name of claimant herein, as administratrix of the estate of Ralph F. Tucker vs. the Minneapolis, St. Paul and Saulte Ste. Marie Railway Company in the Superior Court of Cook County, Case No. 358—14490, seeking damages in the sum of Two Thousand Nine Hundred Ninety Nine ($2,999.00) Dollars, the case being limited to that amount in order to avoid Federal jurisdictional questions.

The death of claimant's husband was due to the accident and arose out of and in the course of his employment.

The amount of compensation is fixed by Section 7 (a) of the Workmen's Compensation Act, under which it is provided that the payment shall be equal to four times the average annual earnings of the employee but not more in any event than Four Thousand ($4,000.00) Dollars; Under Sec. 7-h-3 said provision is subject to the further increase to a maximum of Five Thousand Five Hundred ($5,500.00) Dollars in case of three or more children under the age of sixteen (16) years at the time of the death of said employee. As construed by the Supreme Court in the case of *Moweaqua Coal Corporation* vs. *Industrial Commission*, 360 Ill. 194 such increased maximum shall not however in any event exceed four times the annual earnings of the deceased employee. The annual earnings of claimant's husband were One Thousand Two Hundred ($1,200.00) Dollars and the maximum award herein is therefore limited to a total of Four Thousand Eight Hundred ($4,800.00) Dollars.

Claimant has filed a petition for a lump sum settlement but it does not appear to the court to the best interests of the parties herein that such compensation be so paid and the court is of the opinion that payment should be made in accordance with the provisions of the Compensation Act, in monthly payments.

As hereinabove stated a suit is now pending against the Railroad Company in connection with the death claim, and the State, as the employer, would be entitled to subrogation in the event of a recovery therein. In view of the amounts involved however and the facts in evidence, the court finds that it is to the best interests of the parties to make the award payable at the present time and an award is hereby entered in favor of claimant in the sum of Four Thousand Eight Hundred ($4,800.00) Dollars, payable as hereinafter provided:

The weekly wages of deceased would be Twenty Three and 08/100 ($23.08) Dollars. By reason of three children under the age of sixteen (16) years, weekly payments of Thirteen ($13.00) Dollars from February 25, 1935 to March 10, 1936, or fifty-four (54) weeks, or Seven Hundred Two ($702.00) Dollars shall be made immediately due and payable. The further sum of Four Thousand Ninety Eight ($4,098.00) Dollars shall be payable at the rate of Thirteen ($13.00) Dollars per week payable in monthly installments commencing April 10, 1936 subject to the further provision of the Illinois Workmen's Compensation Act.

This award being subject to the provisions of an Act entitled, "*An Act Making an Appropriation to pay Compensation claims of State Employees and Providing for the Method of Payment Thereof,*" Approved July 2, 1935 (Session Laws of 1935, Page 49), and being, by the terms of such Act, subject to the approval of the Governor is hereby, if and when such approval is given made payable from the Road Fund in the manner provided for in such Act.

(No. 2643—Claimant awarded $220.00.)

ARTHUR HART, Claimant. *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

BRYAN H. TIVNEN, for claimant.

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

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—award will be made for.* Where motor vehicle license fee is paid under mistake of fact, an award for refund may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

During the years 1933 and 1934 claimant herein, Arthur Hart, was the owner of three motor trucks specially designed and constructed for oiling roads and used exclusively for such purposes in Coles County, Illinois. In the year 1933 claimant applied to the Secretary of State for the registration of said oil trucks and paid for such registration a license fee of Seventy Five ($75.00) Dollars for Federal Truck, Engine No. 1400, for which License No. E 5650 was issued—for Federal Oil Truck, Engine No. 2076 a registration fee of Thirty Five ($35.00) Dollars, for which License No. D 11587 was issued, and for Indiana Truck, Engine No. 8065 a registration fee of Thirty Five ($35.00) Dollars, for which License No. D 115850 was issued; and for the year 1934 a registration fee of Seventy Five ($75.00) Dollars was paid for Federal Truck, Engine No. 1400, for which License No. A4466 F was issued. Claimant now seeks an award of Two Hundred Twenty ($220.00) Dollars as a refund for the reason that said three motor vehicles are exempt from registration under the provisions of Subdivision E of Section 9 of the Motor Vehicle Act of the State of Illinois, whereby oil trucks specially designed and owned and used exclusively for spreading oil on the public roads are exempt from the payment of such license fees. Claimant contends that said license fees were paid under a misapprehension of fact as to said road-oiling trucks being such vehicles as are included in the phraseology of said Section.

A stipulation of facts has been entered into. The Attorney General contends that the mistake was purely one of law. Claimant paid the registration fees in question under a mistaken belief that the particular trucks involved were subject to registration as ordinary trucks. The type of construction of the trucks and the use to which they were put were questions of fact. The law exempts certain types of vehicles from the payment of a license fee, and whether or not this exemption applied in any particular case depends entirely upon the question of fact as to whether the particular truck or vehicle is of the kind and character classified by the law as "exempt." Such question of facts had to be determined in the first instance by the owner of the truck or vehicle and upon the determination of that fact depends the question of whether or not a license fee is required.

The court is of the opinion that where a tax is paid under a mistake of fact, as evidenced in this case, an award is legally justified for a refund of such amount. (*Fowler Mfg. Co. vs. State*, 8 C. C. R. 160.)

An award is therefore allowed to claimant in the sum of Two Hundred Twenty ($220.00) Dollars.

(No. 2757—Claimant awarded $144.94.)

GEORGE F. HARDING AND MARTIN H. KENNELLY, TRUSTEES, ETC., Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

L. M. BOWDEN, for claimant.

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

SUPPLIES—*when award for price of may be made.* Where the facts are undisputed that the State received supplies, as ordered by it, and that bill therefor which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for the price thereof may be made, upon claim made within reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under their claim filed November 15, 1935 plaintiffs ask payment of One Hundred Forty Four and 94/100 ($144.94) Dollars for one car of crushed stone shipped to Arlington Heights, Illinois April 22, 1935 and one car of stone shipped to Des Plaines, Illinois on said date; both sold and shipped pursuant to bid, and purchase order from the State Highway Department. It appears from the record that claimants were duly appointed trustees for Consumers Company; that the debt in question was lawfully incurred; that the material was duly received and used by the Division of Highways of the State of Illinois. Due to various causes the invoices were not cleared for payment until after the appropriation covering said purchase order had been closed with the expiration of the fiscal year of respondent.

No contention is raised as to the validity of the claim. As stated in *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165,

"Where it is conceded that claimant furnished supplies to a department of the State on a legal and proper order therefor, and it appears

that the only reason payment has not been made is because the bill therefor was not presented until the lapse of the appropriation out of which payment could have been made, an award will be entered for the amount due."

An award is therefore allowed in favor of claimant in the sum of One Hundred Forty Four and 94/100 ($144.94) Dollars.

(No. 2692—Claimant awarded $95.00.)

W. H. MAZE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

Claimant, pro se.

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

FRANCHISE TAX—*paid under mistake of fact—award for refund may be made.* Where the facts are undisputed that money for which claim for is made was paid to State as the result of mutual mistake of fact, award for refund may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Ninety Five ($95.00) Dollars because of a mistake in fact in the payment of franchise tax. It appears that on February 28, 1934 claimant reported to the Secretary of State showing its organization on October 10, 1912; that it had three hundred (300) shares of common stock of a par value of One Hundred ($100.00) Dollars, and then erroneously, for some reason unknown plaintiff inserted, the sum of One Hundred Twenty Five Thousand ($125,000.00) Dollars as stated capital. Thereupon the respondent through the Secretary of State's Office assessed the claimant a franchise tax of One Hundred Ten ($110.00) Dollars, which claimant paid in full on June 29, 1934. The misstatement of the amount of capital stock at One Hundred Twenty Five Thousand ($125,000.00) Dollars instead of Thirty Thousand ($30,000.00) Dollars was discovered shortly after November 15, 1934, and thereafter plaintiff filed its claim for Ninety Five ($95.00) Dollars for the difference between the franchise tax that it should have paid on a stated capital of Thirty Thousand ($30,000.00) Dollars and the amount actually paid by it on the erroneously

stated capital of One Hundred Twenty Five Thousand ($125,000.00) Dollars.

Under the General Corporation Act of Illinois the franchise tax of the corporation is assessed on the information given in the annual report, and as claimant's annual report for 1934 shows three hundred (300) shares of stock with a par value of One Hundred ($100.00) Dollars, a correct computation of the stated capital could only be Thirty Thousand ($30,000.00) Dollars, being the amount on which the franchise tax should have been computed. The figures used to show the computation of the amount of such stated capital, in the sum of One Hundred Twenty Five Thousand ($125,000.00) Dollars, was a mistake of fact and not of law. No contrary contention is raised by the Attorney General in behalf of respondent, and in keeping with the decision heretofore reached in *Andersen* vs. *State*, 8 C. C. R. 157 and other cases cited,

"Where the facts are undisputed that money for which the claim is made was paid to the State as the result of a mutual mistake of fact, an award for the refund will be made."

An award is therefore made in favor of claimant herein in the sum of Ninety Five ($95.00) Dollars.

(No. 2557—Claimant awarded $35.00.)

V. J. McDEVITT, ETC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

INGHRAM & INGHRAM, for claimant.

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

SUPPLIES—*when award for price of may be made.* Where it clearly appears that State received supplies, as ordered by it, and that bill therefor, which is not questioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for amount due may be made on claim filed within reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Some time prior to November 1, 1932 claimant contracted with the Department of Agriculture through the Division of Poultry Husbandry to furnish and deliver to that Department seventy-one (71) bronze plaques to be awarded as

trophies in poultry exhibits conducted by said Department. These plaques were duly delivered and on November 5, 1932 paid for by Voucher No. 666 of said Department and Division. Afterwards, on or about December 20, 1932 a further order for ten (10) additional plaques at an agreed price of Thirty Five ($35.00) Dollars was placed with claimant by said Department, and claimant thereafter performed and completed its contract and said additional plaques were duly delivered and used by said Department. The bill therefor has never been paid and the only reply thereto is one received from the Administrative Auditor stating, "As the plaques were ordered in 1932 they should have been paid out of the appropriation from the biennium which elapsed on July 1, 1933."

Under Paragraph 92, Chap. 5, Agriculture and Horticulture, Illinois State Bar Statutes, 1935, the Department of Agriculture through the Board of Poultry Husbandry is authorized "To conduct poultry educational exhibits, etc." An appropriation was duly made to said Department covering the period during which this claim was incurred "For State poultry shows, $3,000.00."

The court is of the opinion that the item of expense involved in this claim was a legitimate incident of the power of the Poultry Division in the holding of its poultry exhibits. As the only reason for the non-payment of the claim appears to be that the appropriation out of which same could have been paid has lapsed, an award for the payment thereof is hereby made in favor of claimant in the sum of Thirty Five ($35.00) Dollars.

(No. 2792—Claimant awarded $529.20.)

MYERS BROTHERS, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

BARBER & BARBER, for claimant.

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

SUPPLIES—*when award for price of may be made.* Where facts are undisputed that State received supplies, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which

it could be paid and no question is raised as to amount claimed or reasonableness of charges, an award for price thereof may be made on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein alleges that on November 8, 1934 respondent, through its Division of Purchases and Supplies of the Department of Finance, purchased through claimant certain merchandise consisting of six dozen coats at an agreed price of Eighty Eight and 20/100 ($88.20) Dollars per dozen, delivery to be made at the State Training School for Girls at Geneva, Illinois. In a report from Miss Florence Monahan, Managing Officer of said Institution, under date of February 6, 1936 she states "The coats were received at our Institution on or about November 20, 1934 and the amount of $529.20 covering this shipment is rightfully due Myers Brothers." Due to the fact that a replacement of one coat was necessary, some confusion resulted in the due filing of the bill, and the appropriation from which it might have been paid lapsed before the bill was properly vouchered. The claim is apparently legal and just. No contention otherwise is raised by the respondent. A stated in *Schreiber Lbr. Co.* vs. *State*, 8 C. C. R. 381,

"Where the facts are undisputed that the State has received supplies legally ordered by it and payment therefor has not been made due to the lapse of the appropriation out of which it could have been paid, and no other objection to the bill appears, an award therefor will be allowed."

An award is therefore made in favor of claimant for said claim in the sum of Five Hundred Twenty Nine and 20/100 ($529.20) Dollars.

(No. 2580—Claimant awarded $30.00.)

OSCAR PETERSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

OSCAR PETERSON, pro se.

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

MOTOR VEHICLE ACT—*truck to which attached permanently a feed grinding mill within exemptions in Section 9 of—exempt from registration.* Truck having attached to it in a permanent manner a feed grinding mill, used primarily in the agricultural pursuits of the owner and in connection

with the agricultural pursuits of others is within the terms of the exemptions of Section 9 of Motor Vehicle Act and exempt from registration.

MOTOR VEHICLE LICENSE FEE—*paid under mistake of fact—award for refund of may be made.* Where motor vehicle license fee is paid under mistake of fact, an award for refund may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein, Oscar Peterson, was the owner in December, 1931 of a portable feed-grinding mill permanently erected on and attached to a one and one-half (1½) ton International Truck, Engine No. 291401. On the 12th day of that month he made application to the Secretary of State for a license for said truck and paid therefor a license fee of Six ($6.00) Dollars. On April 15, 1932 he made application for a license for said motor vehicle and paid the fee therefor in the sum of Twelve ($12.00) Dollars, and was thereafter issued a license for said year. In April, 1933 he again made application for license for said truck for the latter year and paid as a fee the sum of Twelve ($12.00) Dollars. He now seeks a refund of Thirty ($30.00) Dollars, claiming that said motor vehicle was exempt from the payment of a registration fee under provisions of *Section 9, Chapter 95a, Cahill's Ill. Revised Statutes.* Claimant contends that said license fees were paid under a misapprehension of facts as to said truck being such a vehicle as is included in the phraseology of said Section.

Two amendments of the exemptions of certain vehicles from registration as required by Section 9 of the Motor Vehicle Act were made by the Legislature, applicable to the truck in question (1931-1933 biennium) as follows:

"(1) *Provided*, that none of the provisions of this Act prescribing or requiring registration shall be construed to include tractors, traction engines, threshing machines, clover hullers, ensilage cutters, corn shredders, corn shellers, hay presses, portable saw mills or other similar vehicles or trailers or semi-trailers used in connection therewith which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, or used by residents of this State in any kind of road work or vehicles used exclusively for moving well-drilling outfits, but this exception in the proviso shall not exclude from registration trucks, trailers or semi-trailers engaged in transporting agricultural products. Effective July 1, 1931.

"(2) *Provided*, that nothing in this Act shall be construed to include tractors, traction engines or other similar vehicles used exclusively in agricultural pursuits, or used by residents of this State, in any kind of road work. Effective January 1, 1932."

The truck on which the license fees in question were paid had attached to it in a permanent manner a feed-grinding mill which, we believe, brought the vehicle within the terms of the exemption above indicated, as said motor vehicle was, from its description, used primarily in the agricultural pursuits of the owner and in connection with the agricultural pursuits of others.

The Attorney General contends that the mistake was purely one of law. Claimant paid the registration fees in question under a mistaken belief that the particular truck involved was subject to registration as an ordinary truck. The type of construction of the truck and the use to which it was put were questions of fact. The law exempts certain types of vehicles from the payment of a license fee, and whether or not this exemption applied in any particular case depends entirely upon the question of fact as to whether the particular truck or vehicle is of the kind and character classified by the law as "exempt." Such question of fact had to be determined in the first instance by the owner of the truck or vehicle and upon the determination of that fact depends the question of whether or not a license fee is required.

The court is of the opinion that where a tax is paid under a mistake of fact, as evidenced in this case, an award is legally justified for a refund of such amount. (*Fowler Mfg. Co. vs. State*, 8 C. C. R. 160.)

An award is therefore allowed to claimant in the sum of Thirty ($30.00) Dollars.

(No. 2861—Claimant awarded $37.47.)

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

K. J. OWENS, for claimant.

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

SERVICES—*supplies—when award for may be made.* Where it clearly appears that electric service was rendered to the State, at the lawful price therefor, and that bill therefor was not presented for payment before lapse

of appropriation out of which it could be paid, and no question is raised as to amount claimed, an award may be made for price thereof on claim made within reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeeks an award for electric service rendered respondent through the Highway Department at the State Bond Issue No. 19 and Chicago and Northwestern Railroad grade separation crossing between the Village of Gary and the City of Crystal Lake in McHenry County, Illinois, for the sum of Thirty Seven and 47/100 ($37.47) Dollars.

According to the claim filed herein such service was commenced on or about the 8th day of September, A. D. 1932 and bills were thereafter submitted to the Department of Public Works and Buildings for such service as follows:

Service Dates	*Net Bill*
12-18-33 to 3-16-34	$14.25
1-17-35 to 4-17-35	12.45
4-17-35 to 7-18-35	10.77

No payment having been made, claimant made inquiry in November, 1935 and was informed by said Department through its duly authorized agent at Elgin, Illinois that the bills were not received in the Elgin Office and that as such bills were incurred prior to June 30, 1935, and the appropriation out of which same might have been paid had lapsed, no payment could be made except on an award by the Court of Claims. A report from C. H. Apple, District Engineer, under date of April 3, 1936 states "The services were rendered and the bills are just."

"Where it is conceded that the claimant legally rendered services or furnished supplies to the State and that the only reason for same not having been paid is because the appropriation out of which such payment could have been made has lapsed, an award for the payment of said account is proper."

Schreiber Lbr. Co. vs. State, 8 C. C. R. 381.

This claim seems to come within the rule above cited and an award is therefore made in favor of claimant in satisfaction of said claim in the sum of Thirty Seven and 47/100 ($37.47) Dollars.

(No. 2745—Claimant awarded $70.16.)

UHLEMANN OPTICAL CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

MAURICE S. WEINZELBAUM, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award for value of may be made.* Where it appears that State received supplies as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid and no question is raised as to amount claimed, an award for price thereof may be made on claim filed within a reasonable time.

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

On October 28th, 1935 the claimant filed its complaint herein, in which it asks for an award in the amount of $190.16 for merchandise which it claims to have sold and delivered to the respondent.

From the facts in the record and from the stipulation on file, it appears that the claimant furnished certain lenses and other merchandise of a like character, for certain inmates of the State Penitentiary at Joliet, upon the order and at the request of the proper authorities of such institution. It further appears that the merchandise in question was furnished on diverse dates between January 11th, 1931 and June 1st, 1933; that the fair and reasonable value of the merchandise so furnished was $70.16, and that the claimant has not been paid therefor.

The claim was not presented in time for payment out of the current appropriation, and thereafter there was further delay on the part of the respondent in verifying the same, on account of the fact that the predecessor to the present optometrist destroyed all records upon his release from duty.

There is nothing in the record to indicate that claimant has been guilty of any unreasonable delay, and no reason appears why an award should not be made.

Award is therefore entered in favor of the claimant for the sum of Seventy Dollars and Sixteen Cents, ($70.16.)

(No. 2849—Claimant awarded $59.98.)

VAN CAMP HARDWARE & IRON COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

BROWN, HAY & STEPHENS, for claimant.

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

SUPPLIES—*when award may be made for price thereof.* The facts in this case are almost identical with those in *Myers Bros. vs. State*, No. 2792, *ante*, and what was said in that case applies with equal force herein.

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

Claimant filed its complaint herein on February 21st, 1936 to recover the sum of $59.98 for goods and merchandise sold by it to respondent.

It appears from the record that the Division of Highways of the respondent purchased from the claimant certain hardware and other merchandise of a like character, during the period from April 6th, 1934 to June 12th, 1934. It is admitted that the merchandise in question was received by the respondent; that a statement therefor was presented to the Division of Highways, and that the same was not paid for the reason that the claim was not presented until after the current appropriation had lapsed.

It has been repeatedly held by this court that where merchandise has been sold to the respondent, and claim therefor was not presented in time for payment out of the current appropriation, an award will be allowed by this court, unless it appears that the claimant has delayed unreasonably in presenting its claim. There is nothing in the record to indicate any unreasonable delay on the part of the claimant in this case, and an award is therefore entered in favor of the claimant for the sum of Fifty-nine Dollars and Ninety-eight Cents ($59.98.)

(No. 2817—Claimant awarded $12.00.)

THE WESTERN UNION TELEGRAPH COMPANY, INC., Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

Claimant, pro se.

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

SERVICES—*supplies—when award may be made for price of.* The facts in this case are almost identical with those in *Public Service Company of Northern Illinois* vs. *State*, No. 2861, *ante*, and the opinion in that case applies with equal force herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed Pro Se January 29, 1936 for Fifteen ($15.00) Dollars and was later reduced to Twelve ($12.00) Dollars. Claimant alleges that at the special request of the Division of Highways and upon agreement to pay the usual charges, the former furnished time service for April, May and June, 1935 for four clocks, the value of such service being Twelve ($12.00) Dollars; that said claim remains unpaid for the reason that the appropriation out of which it might have been paid had lapsed before presentation thereof. A report appears from J. M. McCoy, Chief Clerk of the Division of Highways, under date of February 19, 1936, stating that the State received the service in question and that it is indebted to the Company for the amount stated.

"Where it is conceded that claimant legally rendered services and furnished supplies to the State and has not been paid therefor because of the lapse of the appropriation out of which such payment could have been made, and the amount is unquestioned, an award will be made for such services or supplies."

Journal Printing Co. vs. *State*, 8 C. C. R. 673.
Schreiber Lbr. Co. vs. *State*, 8 C. C. R. 381.

A further request for interest has been included, but as interest can be collected only in such instances where payment has been unreasonably and vexatiously delayed, and no such delay appearing in this record, no interest will be included in the award.

The claim is allowed in the sum of Twelve ($12.00) Dollars.

(No. 2626—Claimant awarded $222.25.)

MARIE PIPER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 29, 1936.

MARIE PIPER, pro se.

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

WORKMEN'S COMPENSATION ACT—*medical and nursing services—when award may be made to injured employee for.* Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in *extra hazardous* employment, an award may be made for amount expended for necessary medical, surgical and nursing services, incurred as a result of such injuries.

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

Prior to and on January 28th, 1934, claimant was an employee of the respondent in the office of the Secretary of State, and was working as an elevator operator in the Centennial Building in the City of Springfield, at a salary of $110.00 per month.

On the last mentioned date, claimant slipped and fell while returning from the rest room in said Centennial Building to the elevator, and injured her left elbow, wrist and knee.

It appears from the record that both claimant and respondent were operating under and subject to the provisions of the Workmen's Compensation Act, and the only question involved is the nature and extent of the injury sustained by the claimant, and the amount of compensation to be paid therefor, if any.

After the accident the condition of claimant's knee improved, but her wrist continued to pain her more and more from day to day. She continued in her employment to February 27th, 1934, when the pain became so severe that she consulted Dr. Charles L. Patton of Springfield. An X-ray picture of her arm was taken on that date, which showed a fracture of the head of the left radius without displacement of the fragments. The arm was placed in a cast which was finally removed on March 28th, 1934. She was given diathermy treatments from March 29th to April 20th, and on April 20th another X-ray was taken and it was then ascer-

tained that the wrist bone was infected. The arm was placed in a steel brace which was not removed until May 16th, 1934.

Claimant was off duty until July 6th, 1934, but was paid her salary in full from the date of the accident to the date she returned to work on July 6th, as aforesaid. She continued to work until December 12th, 1934, on which date she was taken sick while at work. On leaving her place of work on that date she went to see Dr. Trainor, an osteopath. She states that Dr. Trainor at that time "found two or three vertebrae out in the back of my neck." She remained under the care of Dr. Trainor until December 17th when she resumed work, and continued to work until December 20th, 1934. On that date while at work she took a chill and went home, fever followed, then the flu, resulting, finally in sinus trouble involving both ears. She was treated by Dr. Albert C. Aschauer of Springfield who gave her fifteen or twenty treatments. She claims that she still has the sinus trouble and that the same is the result of the injuries she sustained when she slipped and fell as aforesaid. However, the evidence fails to establish any connection between the injury of January 28th, 1934 and the illness of December 12th, 1934 and thereafter.

Dr. Patton who treated claimant for the injury to her wrist, testified that she now has good motion in her elbow, wrist and shoulder and has hypertrophic arthritis in the small joints of the hand; that there has been a complete healing of the elbow, but that she still has a soreness in her hand from her arthritis.

She incurred expenses for medical, surgical and nursing services and for incidental expenses in connection therewith between the date of the accident and July 6th, 1934, in the total amount of $222.25, and incurred similar expenses between December 6th, 1934 and February 15th, 1935, in the total amount of $50.00.

Claimant was paid her regular wages during all of the time from the date of the accident until the 1st day of January, A. D. 1935, and therefore is not in position to make claim for temporary total compensation. The evidence does not disclose any specific loss nor any partial permanent disability, resulting from the accident in question, for which she is entitled to compensation under the provisions of the Work-

men's Compensation Act, and the claim for compensation for injuries sustained must therefore be denied.

Under the evidence and the provisions of Section 8a of the Compensation Act, claimant is entitled to an award for the medical and surgical expenses, etc. incurred between the date of the accident and the 6th day of July, A. D. 1934, as aforesaid, but not for the expenses incurred by her on and subsequent to December 6th, 1934.

Award is therefore entered in favor of the claimant for the sum of Two Hundred Twenty-two Dollars and Twenty-five Cents ($222.25.)

This award being subject to the provisions of an Act entitled *"An Act Making an Appropriation to Pay Compensation Claims of State Employees and providing for the Method of Payment Thereof,"* approved July 2d, 1935 (Session Laws of 1935, p. 49), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval, is payable from the General Revenue Fund in the manner provided by such Act.

(No. 2555—Claimant awarded $40.29.)

SHELL PETROLEUM CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 28, 1936.

W. W. YEAGER, for claimant.

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

SUPPLIES—*when award may be made for price of.* **The facts in this case are the same as those in *Myers Brothers* vs. *State*, No. 2792, *ante*, and the opinion therein is applicable here.**

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

On December 17th, 1934 claimant filed its complaint herein, in which it asks for an award in the amount of $40.29 for merchandise sold and delivered to the respondent. It appears from the record that on numerous occasions during the period from March 27th, 1933 to June 28th, 1933 the claimant sold and delivered to proper officers of the Division of Highways of the respondent gasoline and other merchandise

of a similar character; that claimant has filed herein photostatic copies of purchase orders or tickets for each item of merchandise so sold; and that the claim therefor was not presented in time to be paid out of the current appropriation.

No question is raised as to the sale or delivery of the merchandise in question, or as to the reasonableness of the prices charged therefor; it does not appear that claimant has been guilty of any unreasonable delay in presenting its claim; and no reason is suggested why the account should not be paid.

Award is therefore entered in favor of the claimant for the amount claimed, to wit, Forty Dollars and Twenty-nine Cents ($40.29.)

(No. 2038—Claim denied.)

GREEN & SONS COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 29, 1936.
Rehearing denied May 12, 1937.

MICHAEL L. IGOE, A. W. DILLING AND CASSIDY & KNOBLOCH, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

ILLINOIS WATERWAY ACT—*Section 12 of, mandatory.* Section 12 of the Illinois Waterway Act constitutes an express restriction and limitation on the Department of Public Works and Buildings in the construction of said waterway and also constitutes an implied prohibition of the right or authority of said department to act in any way, other than that authorized by said section.

SAME—*Section 13 of, mandatory—contract made in violation of void.* Section 13 of the Illinois Waterway Act, providing, among other things, that before any contract entailing the expenditure of five thousand dollars or more is entered into by the Department of Public Works and Buildings, public notice shall be given of the time and place at which proposals shall be received for entering into contracts was enacted for the benefit of the public and is a mandatory provision and any contract made in violation thereof is void.

CONTRACTS PROHIBITED BY LAW—*services rendered thereunder—no recovery can be had for—claim for reasonable value of on quantum meruit—no contract implied to pay for—when award for denied.* There can be no

recovery of amount fixed in express contract for services rendered thereunder, where the said contract is prohibited by law and a subsequent action will not lie to recover on quantum meruit for reasonable value of said services rendered under said contract on an implied contract to pay for same as no contract will be implied in a case where an express contract is forbidden and an award based on such claim must be denied.

ESTOPPEL—*claim for services rendered under contract prohibited by law—State not estopped from denying liability for payment of.* The State is not estopped from denying liability for payment of reasonable value of services rendered and accepted by it under contract entered into in express violation of law.

RES ADJUDICATA—*when plea of relied on as an absolute bar to subsequent action—requisites of—when not bar.* Where former action was for recovery of moneys for services rendered under contract in writing and judgment of court was that contract was invalid, in that same was entered into in violation of mandatory provisions of statutes and that no recovery could be had under said contract, and subsequent action is based on quantum meruit for reasonable value of said services on an implied contract to pay for same, the latter action is upon a different claim and there is no identity of cause of action and plea of res adjudicata will not be sustained.

Per Curiam:

Claimant filed its complaint herein on December 31st, 1932 and seeks to recover the sum of $75,000.00 as the reasonable value of certain services rendered during the period from November 1st, 1927 to September 1st, 1928, as superintendent of construction on contracts Nos. 5 and 6 of the Illinois Waterway, otherwise known as the retaining wall, lock and dam for the Brandon Road Pool.

Claimant had previously filed its claim herein, to wit, on July 12th, 1928 (Case No. 1339 reported 6 C. C. R. 373) seeking to recover for the services involved in the present claim, but based upon a contract in writing made and entered into by and between said claimant and the respondent, through its Department of Purchases and Construction, which said contract was approved and accepted by said respondent on October 27th, 1927. In its original claim filed on July 12th, 1928 as aforesaid, claimant sought to recover the sum of $50,692.49 for services rendered during the months of November and December, 1927 and from January to July, 1928. Thereafter, pursuant to leave of court, claimant increased the amount of its original claim from $50,692.49 to $78,095.90, the additional sum of $27,403.41 being for similar services claimed to have been rendered during the months of July and August, 1928.

Previous to November, 1927 claimants had entered into a contract with the respondent for the construction of a portion of the Illinois Waterway. About November 1st, 1927 the Department itself took over the construction of the work on such Waterway, pursuant to the provisions of the Illinois Waterway Act hereinafter referred to.

The provisions of the Illinois Waterway Act particularly involved in the claim now under consideration (as well as in the previous claim) are sections 12 and 13 of the Illinois Waterway Act — State Bar Association Revised Statutes 1935—Chapter 19, Paragraphs 102 and 103, which are as follows, to-wit:

"Sec. 12. In the construction of such waterway, its appurtenances and appliances, the Department of Public Works and Buildings may, in its judgment and discretion, proceed in either of the following ways:

(1) It may let the same or any part or portion thereof to the lowest responsible bidder; or

(2) It may do the same or any part or portion thereof, by the direct employment of services, labor, materials and equipment, and may procure and employ for such purpose the necessary superintendents, agents, office force, laborers, workmen, implements, tools, machinery and all other employees, equipment and services necessary or incidental to such construction.

Sec. 13. Before any contract entailing the expenditure of five thousand dollars or more is entered into, public notice shall be given of the time and place at which proposals shall be received for entering into contracts, which notices shall be previously published for at least once a week for four weeks in two daily newspapers printed in the city of Chicago, in two engineering and contracting journals of general circulation in the United States, and in such other publication as may be deemed proper."

When the work was taken over by the Department of Purchases and Construction as aforesaid, such Department entered into the aforementioned contract of October 27th, 1927 with the claimant, for the superintendence of the work and the use of its machinery and its equipment in the doing of such work. Such contract provided that the claimant should receive ten per cent (10%) of the "Fee Cost" as therein defined, as compensation for its services as superintendent, and was made without any compliance with the aforementioned provisions of the Illinois Waterway Act with reference to advertising for competitive bids where the amount of the contract is in excess of $5,000.00.

Thereafter a question as to the validity of the contract was raised by the Auditor of Public Accounts, and the matter

was submitted to Oscar Carlstrom, then Attorney General, for an opinion thereon. He advised (Attorney General's Report 1929, p. 227) that the contract was invalid.

Thereafter a public letting was held, and claimant was awarded the contract for the completion of the work on substantially the same terms as the previous contract which had been declared invalid.

The claim originally filed by the claimant on July 12th, 1928 as aforesaid, was for the recovery of the amount claimed to be due it under its aforementioned contract of October 27th, 1927.

The then Attorney General contested the allowance of the claim upon the hearing thereof, this court held—6 C. C. R. 373—that the contract in question was in violation of the aforementioned sections of the Waterway Act, and therefore invalid, and refused to allow an award. Petition for rehearing was filed and denied.

Thereafter, to-wit, on December 31st, 1932, claimant filed its aforementioned complaint in this cause to recover the reasonable value of the services rendered by it pursuant to the aforementioned contract of October 27th, 1927.

The present complaint, however, is not based upon the contract, but is based upon the *quantum meruit;* for the recovery of the reasonable value of the services rendered.

The Attorney General makes the following contentions in this case, to-wit:

1. That the former decision of this court, reported in 6 C. C. R. 373, in which the contract of October 27th, 1927 was held invalid, is *res adjudicata* and constitutes an absolute bar to the present claim.

2. That even though the former decision of this court is not a bar to the present claim, claimant is not entitled to recover on the *quantum meruit* for the services rendered.

3. That in any event, this court has no jurisdiction in this case.

We will consider the questions raised by the Attorney General in the order above stated.

I.

The question as to when the doctrine of res adjudicata may be applied has been considered by the courts of this State

in many, many cases. The general principles of law with reference thereto seem to be well established, but the application of such principles is not always free from difficulty.

We will refer only to a few of the more recent decisions, as we feel that such decisions set forth the principles of law which must govern us in the determination of the question here involved.

In the case of *Hoffman* vs. *Hoffman*, 330 Ill. 413, the facts were entirely different from the case at bar, but the court had occasion to consider the general principles of law which must govern in cases where a previous adjudication is relied upon as an absolute bar to a subsequent claim. In that case the court, on pages 417 and 418, said:

"Where a former adjudication is relied upon as an absolute bar, there must be, as between the actions, identity of parties, of subject matter and of cause of action. When the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question whether the cause of action is the same in both suits or not. This is sometimes denominated as an estoppel by verdict. (*Public Utilities Com.* vs. *Smith*, 298 Ill. 151.) The rule in respect to the conclusiveness of the verdict and former trial between the same parties, when the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se*, is, that it must appear by the record of the prior suit that the particular controversy sought to be construed was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter it will be considered as having settled that matter as to all further actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence aliunde consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination it will not be concluded. (*Sawyer* vs. *Nelson*, 160 Ill. 629; *Rhoades* vs. *City of Metropolis*, 111 id. 580; *Geary* vs. *Bangs*, 138 id. 77).

"To operate as an estoppel by verdict it is abolutely necessary that there shall have been a finding of a specific fact in the former judgment or record that is material and controlling in that case and also material

and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar by reason of such estoppel. If there is any uncertainty on the point that more than one distinct issue of fact is presented to the court the estoppel will not be applied, for the reason that the court may have decided upon one of the other issues of fact."

In the case of *The People* vs. *Hart*, 332 Ill. 467, the court again had occasion to consider this question and quoted with approval the foregoing extract from the opinion in the case of *Hoffman* vs. *Hoffman*.

The law as laid down in the two cases just referred to has been followed and applied in numerous cases since that time and must be taken as well settled.

The People vs. *C. & E. I. Ry. Co.*, 336 Ill. 506.
Healea vs. *Verne*, 343 Ill. 325.
Crowder Seed Co. vs. *Ind. Com.*, 347 Ill. 86.
Harding Co. vs. *Harding*, 352 Ill. 417.
Coon vs. *McGrath*, 273 Ill. App. 300.

The question involved in the original claim was as to the validity of the contract of October 27th, 1927, and the court there held that the contract was invalid. So far as the question of the validity of the contract is concerned, the previous decision of this court is *res adjudicata*, and is an absolute bar to any further proceedings on such contract.

In the present claim, however, claimant does not base its right to recover upon the contract in question, but seeks to recover on the *quantum meruit*, independent of the contract. The contention of the claimant in this case is simply this: *Conceding that the contract in question is invalid*, nevertheless the respondent has received the benefit of the services rendered, and we are therefore entitled to recover the reasonable value of such services.

The question as to the right of the claimant to recover for the services rendered on the *quantum meruit* was not raised, considered or decided upon the original hearing. The only question there raised or considered was the question as to the validity of the contract. No question having been raised or considered by the court regarding the right of the claimant to recover on the *quantum meruit*, it cannot now be contended that plaintiff is barred from asserting such claim by the previous decision of this court.

II.

Is the claimant entitled to recover on the *quantum meruit*, for the reasonable value of services rendered pursuant to a contract which has heretofore been declared to be in violation of Sections 12 and 13 of the Illinois Waterway Act and therefore invalid?

The question has been very ably and thoroughly presented by counsel for claimant who have cited a large number of decisions in support of their contention, all but two of which, however, are decisions of courts of other jurisdictions.

Much confusion has arisen in decided cases on account of the failure to distinguish between two general classes of cases, to wit: 1) Those involving contracts which although irregular, are within the authority of the political subdivision to make; and 2) Those involving contracts which are either in excess of certain limited powers of such political subdivision, or are against public policy, or are in violation of mandatory provisions of law.

In the consideration of this case, two outstanding facts must constantly be kept in mind, to wit:

1. The authority of the Department to construct the Illinois Waterway is limited by Section 12 of the Waterway Act to two methods of procedure, to wit, either by contract to the lowest responsible bidder, or by the direct employment of services, labor, machinery, etc.

2. Section 13 of the Waterway Act requires that before *any contract* involving the expenditure of $5,000.00 or more is entered into, *public notice of the proposed letting shall be* advertised as set forth in the Act.

The legal effect of a contract made in violation of mandatory provisions of law, is set forth in an annotation appearing in 84 A. L. R., page 954, as follows:

"By the weight of authority, where by statute, charter, or constitutional provision, the power of a municipality, or other political subdivision, to make a contract, is limited, particularly where it is limited to a certain mode or manner of contracting, and any other manner of entering into a contract, and any other manner of entering into a contract or obligation is expressly or impliedly forbidden, no implied liability arises against a municipality for benefits received under a contract entered into in violation of those mandatory provisions, for no liability can result as a matter of implication where the express provisions of the statute or Constitution negative its existence.

The legal effect of a requirement that public notice of the letting be given, and that the contract be let to the lowest bidder is set forth in 19 R. C. L. p. 1068, Section 356, as follows:

"A statutory provision that all contracts of a municipal corporation above a certain amount shall be advertised in a designated manner and awarded to the lowest bidder is mandatory, and a contract of the designated amount cannot lawfully be made by a municipal corporation in any other way. If the municipal authorities disregard the statute and fail to publish the advertisement as required by law, or award the contract to other than the lowest bidder, a taxpayer of the municipality may have their action enjoined, and the contract although duly executed and signed, cannot be enforced by the other party thereto. Nor can recovery be had on a quantum meruit."

The question under consideration has arisen in practically every State in the Union, and the decisions of the different States, and in many cases the decisions of the different courts of the same State are not entirely in harmony. The authorities on the question are reviewed in an exhaustive annotation to the case of *Johnson County Savings Bank, et al.* vs. *City of Creston,* (212 Iowa 929) reported in 84 A. L. R. 926, in which case the facts were quite similar to the present case.

In that case suit was commenced by a paving contractor and its assignee against the City of Creston to recover the contract price for repairing certain pavements. Code provisions required that all contracts for street improvements be let to the lowest bidder after publication as set forth in the Code. No publication was made and it was contended that the contract was illegal. Plaintiffs then amended by adding another count in which they sought to recover the equivalent of the contract price as the reasonable value of the labor and material furnished. In that case the court said:

"The statute is peremptory that, "All contracts for the construction or repair of street improvements and for sewers shall be let in the name of the city to the lowest bidder by sealed proposals upon giving" prescribed notice. The statute is a prohibition upon letting such contracts in any other mode. * * * The city undertook to have the repairs in question made by contract. Having undertaken to have them made by contract, it was required to let the contract on competitive bidding. * * * It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy, is not merely voidable but void * * * and that no contract for services rendered or goods furnished pursuant thereto can be implied, nor may the acceptance of benefits thereunder be made the basis of a liability by estoppel.

* * * A municipal contract let without competitive bidding, when the statute requires competitive bidding, is void, and no recovery may be had either upon the purported express contract or upon an implied contract to pay the reasonable value of the services or material furnished thereunder. * * * Manifestly the making of a contract may not be implied in a case in which an express contract is forbidden. * * *

"To sustain the plaintiff's contention would be to permit one to obtain from a municipality an illegal contract for doing work impossible of return and by performing it enable him to recover the reasonable value of the services and materials furnished—to nullify the law by evasion and indirection and to recover the value of the work done under a contract which the law prohibits."

The aforementioned annotation reviews cases from many States, some of which are cited by counsel for claimant. The decisions of our Supreme Court are in accordance with the weight of authority as set forth in such annotation, and inasmuch as our courts have passed upon the question, it will not be necessary to rely upon the decisions of the courts of other States. Some of the early cases in this State seem to support the contention of the claimant, but some of such cases have been expressly repudiated by the Supreme Court in the case of *DeKam* vs. *City of Streator*, hereinafter referred to; others have been impliedly overruled by such decisions; and still others, upon careful analysis are distinguishable upon the facts from the later cases. In any event, if there is now any conflict between the earlier and the later decisions of our Supreme Court, the later decisions are controlling and must be taken to be the law of this State.

In the case of *Hope* vs. *City of Alton*, 214 Ill. 102, the city had adopted an ordinance creating a legal department, which provided for a corporation counsel, and also provided that the city should not be liable in any case for the services of any attorney except the corporation counsel. Thereafter the counsel passed a resolution authorizing the employment of a certain attorney other than the corporation counsel, in connection with a number of damage suits then pending. Such attorney rendered legal services in such cases and afterwards commenced suit against the city to recover the value thereof. In that case the court held that the ordinance had the effect of a law within the corporate limits, that the contract made by the City Council was prohibited by such law and therefore void, and that the city was not estopped from denying

its liability thereon by reason of the fact that it had received the benefit of the services rendered. In the course of its opinion the court said:

"Counsel say, however, that plaintiff might recover on the ground that when a city has power to make a contract in one way and exercises the power in a different mode, it will be estopped from setting up the illegal exercise of power when called upon to pay for what it has received under the contract. In other words, the proposition is that when a city gets what it had authority to get in some way, it should pay for what it gets, whether it exercised the power in the prescribed way or not. The obvious answer is, that this contract was prohibited by a valid ordinance, and that the City Council had no right to make it in some other way or by some other method. The City Council had no authority, by any method or process, to agree that the city should pay for legal services to be rendered by the plaintiff, who was neither city attorney nor corporation counsel. The ordinance prohibiting such a contract was in full force and effect, and its operation as a law was in no manner affected by the resolutions. *People* vs. *Latham*, 203 Ill.9.

"It is further contended that the city is estopped to deny its liability by the acts of the city council and its officers. The doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations. (1 Smith on Mun. Corp. Sec. 661.) Persons dealing with a municipal corporation are chargeable with notice of its powers to contract, and plaintiff was chargeable with notice of the ordinance in question. A municipal corporation is not estopped from denying the validity of a contract when there was no authority for making it. To hold otherwise would be to expose the taxpayer to all the evils which statutes or ordinances passed for his protection were designed to prevent. Cases where municipal corporations have been held to be estopped when acting in a private capacity in the performance of duties enjoined upon them are not in point in this case, both because the city had performed the duty by providing a law department, with officers to discharge its duties, and also because the contract was directly prohibited by the ordinance."

In the case of *May* vs. *City of Chicago*, 222 Ill. 595, one of the clerks in the Collector's Office was asked to do extra work after his regular office hours under a promise that he would be paid for the same. The services were rendered and suit was commenced to recover the value thereof. No appropriation had been made for the payment of extra wages and the court held that no valid contract could be made in the absence of a previous appropriation, and that in the absence of such appropriation it was impossible by any act of the city officials to create a liability against the city for such services. In arriving at its conclusion the court, on page 599, said:

"It is contended that the city was bound by the city collector's promise to pay for the extra work. Section 91 of the City and Village Act (Hurd's Stat. 1905, p. 398,) provides that no contract shall be made by the city council or any committee or member, and no expense incurred by any of the officers or departments of the corporation, unless an appropriation shall have been proviously made. No appropriation having been made for this extra work of the plaintiff, it is impossible by any act of the city officials to create a liability against the city for the work. * * * A person dealing with a municipal corporation is charged with the knowledge of the limitations of the power of that corporation for any contract attempts to be entered into by any of its officials."

The same question was raised and the same conclusion reached in the case of *Gathemann* vs. *City of Chicago*, 263 Ill. 292.

The question here involved was very thoroughly considered by our Supreme Court in the case of *DeKam* vs. *City of Streator*, 316 Ill. 123. The complainants in that case filed their bill against the City of Streator to restrain such city and its officers from paying further money to one G. L. Clausen, pursuant to the terms of certain contracts theretofore made between the city and Clausen whereby he undertook to design a sewer system for the city. No appropriation had previously been made by the City Council for the payment of such work.

Upon completion of the work Clausen presented to the Board of Local Improvements his bill for his services amounting to $34,263.00, of which he had previously been paid $3,000.00. Thereafter the Council ordered payment of the bill. In that case the court held that the contract was void because it was prohibited by law, and in consideration of the questions there involved, said:

"A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it. The prohibition of the Legislature cannot be disregarded by the courts. * * *

"In many other cases contracts not prohibited by the express words of a statute but in violation of its terms have been held void, and it is a well established rule that where, from a consideration of all the provisions of the statute, the legislative intention clearly appears to declare an act unlawful no contract for the performance of that act can be enforced, and the rule applies to a contract to do an act contrary to the public policy of the State. * * *

"In the absence of an appropriation there was no liability, and if it should be held that there was a liability, the provision which the statute intended for the protection of taxpayers would be nugatory and of no avail."

In the consideration of such case the Supreme Court discussed the case of *Village of Harvey* vs. *Wilson*, 79 Ill. App. 544, and the case of *Westbrook* vs. *Middlecoff*, 99 Ill. App. 327, in which the Appellate Court had taken a contrary view, and held that such cases had been erroneously decided. In speaking of the decision of the Appellate Court in the Middlecoff case, the Supreme Court in the DeKam case said:

"The opinion is based on the theory that the statute authorized the city to contract for the erection of the building, and, as we have seen, the statute expressly prohibited the city from making the contract. Section 2 of Article 7 of the Cities and Villages Act is not a regulation of the mode in which the city may exercise its power to contract, but is a denial of the power and a prohibition of making any contract unless an appropriation shall have been previously made for the purpose. There was no attempt on the part of the municipal officers to override the regulations for the exercise of a power, but there was an attempt to override the law which prohibits the exercise of the power. The case was erroneously decided, *for this error goes to the root of the whole matter.*"

In the DeKam case, in speaking of the question of estoppel in connection with the question there involved, the court said:

"The city cannot be estopped to dispute the validity of a contract which it had no power to make, for the reason that it has received the consideration. "Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for. *Stevens* vs. *St. Mary's Training School*, 144 Ill. 336; *Hope* vs. *City of Alton*, 214 id. 102; *May* vs. *City of Chicago*, 222 id. 595; *People* vs. *Parker*, 231 id. 478." *Eastern Illinois Normal School* vs. *City of Charleston*, 271 Ill. 602."

Upon consideration of the entire case, the court held that "there was no power in the council to do the particular thing because it was not included in the appropriation ordinance, and the power was therefore expressly denied them by statute."

As we view the present case in the light of the authorities cited, Section 12 of the Waterway Act constitutes an express restriction and limitation on the power of the Department to act and also constitutes an implied prohibition of the right or authority of the Department to act in any way other than that authorized by such section. Section 13 is an express limitation on the right of the Department to enter into a contract without first giving notice of the proposed letting. Both of the aforementioned statutory provisions are for the benefit

of the public and must be considered mandatory. Consequently, any contract made in violation thereof is void, and no recovery may be had thereunder, or upon an implied contract to pay for the reasonable value of the services rendered. As stated by the Supreme Court of Iowa in the Johnson County Saving Bank case, the making of a contract may not be implied in a case in which an express contract is forbidden.

An award for the claimant in this case would amount to a nullification of the aforementioned Sections 12 and 13; and would enable the plaintiff to accomplish by evasion and indirection what it was unable to accomplish directly.

We cannot consent to such an interpretation of the law. Under the record and the decisions of our Supreme Court, the claimant is not entitled to recover.

In the light of the conclusion at which we have arrived on this question, it becomes unnecessary to consider the further point urged by the Attorney General to the effect that the court has no jurisdiction of this claim.

Award will be denied and the case dismissed.

OPINION ON REHEARING.

Per Curiam:

Claimant filed a petition for rehearing herein, based upon the following grounds, to wit:

1. The court misapprehended the state of the record as respects the pleadings.

2. The court overlooked the fact that Paragraph 2 of Section 12 of the Waterway Act authorizes the Department of Public Works and Buildings to construct waterways by the direct employment of services, labor, materials, and equipment; and in the event the Department proceeds by direct employment, the provisions of Section 13 with reference to the publishing of notice for proposals prior to the letting of the contract, has no application.

We will consider such points in the order above set forth.

I.

The respondent filed no pleadings and under Rule 15 of this court, a general traverse or denial of the facts set forth in the complaint was considered filed.

Counsel for claimant seems to be under the impression that there was no evidence before the court, and that the case was disposed of on the complaint and the general traverse. On page 1 of the petition for rehearing, counsel state: "This court has dismissed the complaint herein without any pleadings having been filed by the respondent and without any evidence having been offered by either party."

Apparently counsel for claimant are not familiar with the record. This is readily understandable, as the present counsel for the claimant did not appear in the cause until February 12th, 1936;—numerous other counsel having represented the claimants prior to that date.

A reference to the record shows that on December 31st, 1932 a stipulation of facts was filed herein, the first paragraph of which reads as follows:

"It is hereby stipulated by and between *Green & Sons Company*, a corporation, claimant, by *John P. Loughnane*, its attorney, and the *State of Illinois*, respondent by *Oscar E. Carlstrom*, Attorney General, that the following is a true and correct statement of facts on which said claim is based."

The record also shows that on April 28th, 1933 a further stipulation was filed herein, the first paragraph of which reads as follows:

"IT IS HEREBY STIPULATED by and between the State of Illinois by Otto Kerner, Attorney General, and Green & Sons Company, claimant, by *John P. Loughnane*, its Attorney, that the following records and exhibits shall be admitted in evidence in said cause as bearing on issues involved."

The last mentioned stipulation, with the exhibits attached thereto, comprises 29 typewritten pages. Obviously, there is no merit to claimant's first contention.

II.

A reading of the opinion will disclose that the court quoted and considered both Sections 12 and 13 of the Illinois Waterway Act.

Attention is called to the following, which appears on pages 6 and 7 of the opinion of the court, to wit:

"In the consideration of this case, two outstanding facts must constantly be kept in mind, to wit:

"1. The authority of the Department to construct the Illinois Waterway is limited by Section 12 of the Waterway Act to two methods of procedure, to wit, either by contract to the lowest responsible bidder, or by the direct employment of services, labor, machinery, etc.

"2. Section 13 of the Waterway Act requires that before *any contract* involving the expenditure of $5,000.00 or more is entered into, public notice of the proposed letting shall be advertised as set forth in the Act."

Sections 12 and 13 were enacted for the benefit of the public. If claimant's contention were upheld it would not be necessary in any case to advertise for bids, or let any contract to the lowest responsible bidder. The Department could take the position that it would do the work by direct employment, and could then arrange for the doing of such work by a favored contractor on a "cost plus" or "fee cost" basis; and thereby accomplish just what said Sections 12 and 13 were intended to prevent.

We can see no merit to either point raised by the claimant and petition for rehearing will therefore be denied.

(No. 2717—Claimant awarded $709.98.)

ALUMINUM ORE COMPANY, A CORPORATION, ASSIGNEE OF FRANKLIN FLUORSPAR COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 3, 1936.

KRAMER, CAMPBELL, COSTELLO & WEICHERT, for claimant.

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

FRANCHISE TAX, LICENSE FEE—*foreign corporation—claim for refund of franchise tax when corporation withdraws from State before commencement of year for which paid—when award for may be made.* Where foreign corporation pays franchise tax on May 28, 1935 for year commencing July 1, 1935 and on June 26, 1935 filed its application for withdrawal from State and on same date Secretary of State issues said corporation a certificate of withdrawal, an award for refund of such franchise tax may be made.

SAME—*same—same—section 139 of Business Corporation Act not applicable to.* Section 139 of Business Corporation Act has no application to claim for refund by foreign corporation for franchise tax paid for year commencing July 1, 1935, where corporation withdraws from State on June 26, 1935, being before commencement of year for which paid, as such section has reference only to the amount of the tax due in cases where there has been a reduction in the stated capital or paid in surplus between the dates therein stated, and has no application whatsoever to a case where the question involved is the withdrawal of a corporation from the State.

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

Franklin Fluorspar Company, a foreign corporation authorized to do business in this State, filed its complaint herein on August 17th, 1935, in which it asked for an award in the amount of $709.98, being the amount of the franchise tax paid by said Franklin Fluorspar Company for the year beginning July 1st, 1935.

From the stipulation on file it appears that during the month of February, A. D. 1935, the Franklin Fluorspar Company filed its annual report with the Secretary of State, from which report it appeared that there was due from said Company the sum of $25.52 as additional initial license fee, and the sum of $709.98 as a franchise tax for the year beginning July 1st, 1935; that upon receipt of such report the Secretary of State made an assessment of additional initial license fee and franchise tax in accordance with such report, and forwarded same to said Company; that on May 28th, 1935 said Franklin Fluorspar Company paid to the Secretary of State the sum of $735.50 in payment of the additional initial license fee and franchise tax so assessed against it as aforesaid; that on June 25th, 1935 said Franklin Fluorspar Company executed its application for withdrawal from this State and final report as required by the provisions of the Business Corporation Act, and on June 26th, 1935 filed such application and final report in the office of the Secretary of State; that on said 26th day of June, A. D. 1935, the Secretary of State issued to said Franklin Fluorspar Company a certificate of withdrawal in due form as required by law; that thereupon said Franklin Fluorspar Company ceased to do business in this State and withdrew therefrom; that after the payment of said franchise tax and after the issuance of the aforementioned certificate of withdrawal by the Secretary of State as aforesaid, said Franklin Fluorspar Company requested the Secretary of State to refund to it the sum of $709.98 so paid by it as a franchise tax as aforesaid; that the Secretary of State advised said Franklin Fluorspar Company that he had no authority to refund said tax, and that the only recourse of said Company was to file its claim in this court; that on August 17th, 1935 said Franklin Fluorspar Company filed its claim herein for the recovery of the franchise tax in the amount of $709.98 so paid by it as aforesaid; that on September 4th, 1935 the Franklin Fluorspar Company, being about

to dissolve, and desiring to close up its business and dispose of its assets, assigned to Aluminum Ore Company the claim theretofore filed by it against the State of Illinois as aforesaid, together with all of the proceeds arising therefrom; that on September 18th, 1935 the original complaint herein was amended by substituting as claimant the Aluminum Ore Company as Assignee of Franklin Flourspar Company.

Claimant contends that the payment of the franchise tax by the Franklin Flourspar Company on May 28th, 1935 was through inadvertence and mistake on the part of the agent of said company charged with the payment of such tax, and that inasmuch as such tax was for the year commencing July 1st, 1935, and the Company had withdrawn from the State prior to that time, and the Secretary of State had duly issued a certificate of withdrawal prior to that date, it is entitled to a refund of the franchise tax so paid by said Franklin Fluorspar Company as aforesaid.

The Attorney General contends that the claimant is not entitled to such refund and bases his contention on Section 139 of the Business Corporation Act of this State, which provides in part as follows:

"The basis for the annual franchise tax of a foreign corporation shall be the amount represented in this State, determined in accordance with the provisions of this section, of the sum of its stated capital and paid-in surplus on the thirty-first day of December of the preceding calendar year, minus the amount by which the sum of the stated capital and paid-in surplus may have been reduced after the thirty-first day of December of the preceding calendar year and prior to the 25th day of June of the current calendar year, as disclosed by any report or document filed by it with the Secretary of State."

The Attorney General takes the position that inasmuch as there was no reduction in the amount of the stated capital and paid-in surplus between December 31st, 1934 and June 25th, 1935, claimant is not entitled to a refund.

As we view the matter, the section of the statute referred to by the Attorney General has no application in this case. Such section has reference only to the amount of the tax due in cases where there has been a reduction in the stated capital or paid-in surplus between the dates therein stated, and has no application whatsoever to a case where the question involved is the withdrawal of a corporation from the State.

From the stipulation on file, it clearly appears that the tax in question was for the year commencing July 1st, 1935;

that a certificate of withdrawal in due form of law had been properly issued to the Franklin Fluorspar Company prior to said July 1st, 1935; that Franklin Fluorspar Company was not authorized to and was not doing business in this State on or after July 1st, 1935 and was therefore not subject to a franchise tax; that the franchise tax in question was paid by Franklin Fluorspar Company as the result of a mistake of fact on the part of the agent of the Company having charge of its tax matters.

The rule appears to be well established, that where a tax is paid as the result of a mistake of fact, the party paying the tax is entitled to a refund thereof. 21 R. C. L. 164-166; 48 Corpus Juris, 759.

Such rule has been repeatedly recognized and applied by this Court. *Moorman Mfg. Co.* vs. *State*, 8 C. C. R. 106; *Rossia Insurance Co.* vs. *State*, 8 C. C. R. 203; *Bates Valve Bag Corporation* vs. *State*, 7 C. C. R. 64; *Black Star Coal Co.* vs. *State*, 6 C. C. R. 379; *Importers, Etc. Insurance Co.* vs. *State*, 5 C. C. R. 1; *Big Four Wilmington Coal Co.* vs. *State*, 4 C. C. R. 279; *Fireman's Insurance Co.* vs. *State*, 2 C. C. R. 220.

Award is therefore entered in favor of claimant for the sum of $709.98.

(No. 2653—Claimant awarded $798.84.)

EARL KURTZ, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1936.

CHARLES E. LEE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where employee sustains accidental personal injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made on claim filed within time provided in Act.

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

From October 1st, 1934 to January 8th, 1935 claimant was employed as an engineer in the Illinois National Guard Armory in the City of Decatur. On the last mentioned date,

while in the performance of his duties, claimant slipped and fell, thereby sustaining injuries to his left arm and shoulder, for which he seeks an award in this proceeding.

Prior to the time of his employment by the respondent, claimant worked as a locomotive fireman for the Wabash Railway; but had done very little work for such railway since May 11th, 1932. On March 2d or 3d, 1935 he was called back to work for the railroad, and worked a total of eighteen days in March and April. He stated that he would work a day or two and then lay off, thinking his strength would come back, but the more he worked the worse his condition became.

Claimant at the time of the accident was forty-one years of age, and had two children under the age of sixteen years. The annual earnings of persons in the same class in the same employment and same location, during the year preceding the accident, were $1,344.00; and the average weekly wage was $25.85. On account of the fact that claimant had two children under the age of sixteen years at the time of the accident, the compensation, if any, must be computed at the rate of $15.51 per week.

Claimant filed his complaint herein on April 12th, 1935, and the only question raised by the Attorney General is as to the nature and extent of the injury and the amount of compensation to be paid.

The evidence is very conflicting, but from the facts in the record it appears that claimant is entitled to 23-3/7 weeks' compensation at the rate of $15.51 per week for temporary total disability from January 9th, 1935 to July 10th, 1935, (exclusive of the eighteen days on which he worked as aforesaid); and in addition thereto is entitled to 33-3/4 weeks' compensation at the rate of $15.51 per week for loss of 15% of the use of his left arm, to wit, the total sum of $886.84, all of which has accrued prior to this date.

However, claimant was paid his salary in full for the month of January, 1935. Inasmuch as he is not entitled to both salary and compensation for the same period of time, a deduction must be made of the amount of salary paid claimant for the period from January 9th to February 1st, to-wit, $88.00.

Award is therefore entered in favor of the claimant for the sum of Seven Hundred Ninety-eight Dollars and Eighty-four Cents ($798.84).

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof*", approved July 2d, 1935 (Session Laws of 1935, p. 49), is, by the terms of such Act, subject to the approval of the Governor, and upon such approval is payable from the General Revenue Fund in the manner provided by such Act.

(No. 2780—Claimant awarded $4,458.00.)

BONITA SWAFFORD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 30, 1936.

ISAAC K. LEVY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim for compensation under may be made.* Where employee sustains accidental injuries, resulting in his death, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation will be made on compliance with terms of Act to those entitled thereunder.

SAME—*when claim for funeral expenses not allowed.* Where award for compensation is made for death of employee to widow and dependent, no award for funeral expenses can be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is the surviving widow of one Clifton Swafford who was employed by respondent under the Department of Public Works and Buildings, Division of Highways, as a mud jack foreman in performing repair work on the public highways of Illinois. Said employee began working for the State about February 3, 1933 and continued until the day of his fatal injury, the 12th day of November, 1935. On the latter date while in the course of his labors on Route No. 143 near Harrisburg, Illinois, he was run into and struck by an automobile driven by one Herman Malone, thereby receiving injuries from which he died the following day.

A stipulation of facts has been entered into between the parties and from same it appears that nothing is to be gained by attempting to determine the liability of Herman Malone, or his financial responsibility for same, as the record shows

that he is a coal miner, employed in Saline County at the Horco mine, owns no property, and was driving an automobile, owned by his brother, for his own individual pleasure and convenience at the time; that neither he nor the owner of the car carried any public liability, and that he is insolvent, and that a judgment against him would be of no value. It further appears that from November 1, 1934 to October 1, 1935 Clifton Swafford received wages of One Hundred Ten ($110.00) Dollars per month and from October 1, 1935 to the date of his death his wages were One Hundred Twenty ($120.00) Dollars per month. He was thirty-two (32) years of age, a resident of the City of Murphysboro, Illinois, and left surviving, his widow, the claimant herein, Bonita Swafford, now thirty-one (31) years of age; Clifton Swafford, Jr., aged eight (8) years at the time of his father's death; also Helen Swafford, his widowed mother, all of whom were dependent upon him for support and maintenance. Deceased carried two policies of life insurance, one policy naming claimant as the beneficiary and the other naming his mother as beneficiary, each policy being for One Thousand ($1,000.00) Dollars, with double indemnity in case of accidental death; both of which policies are now being collected on.

Claimant seeks an award of Four Thousand Four Hundred Fifty ($4,450.00) Dollars on account of the death of her husband, together with the sum of Eight ($8.00) Dollars paid by her for medical, surgical and hospital services for the deceased, and also asks reimbursement for Four Hundred Forty One ($441.00) Dollars expended by her for funeral expenses and the Coroner's inquest.

The record shows that deceased was employed by the State at the time of his death and that the injuries causing same were accidental and arose out of and in the course of his employment. Under the provisions of the Workmen's Compensation Act and the Court of Claims Act claimant is entitled to an award. The earnings of deceased for the year preceding his death were One Thousand Three Hundred Thirty ($1,330.00) Dollars and the amount of the award would therefore be the maximum of Four Thousand ($4,000.00) Dollars plus the additional sum of Four Hundred Fifty ($450.00) Dollars due by reason of the one child, Clifton

Swafford, Jr., plus the further sum of Eight ($8.00) Dollars expense incurred for medical, surgical and hospital service, making a total of Four Thousand Four Hundred Fifty Eight ($4,458.00) Dollars. (See *Hesler* vs. *State*, 8 C. C. R. 594, Sec. 7, Sub-Secs. (a), (h-3), Ill. Workmen's Compensation Act.)

No provision exists for payment of funeral expenses and no award is made for that part of plaintiff's claim. (See *Brittin* vs. *State*, 8 C. C. R. 614.)

An award is therefore made to claimant in the sum of Four Thousand Four Hundred Fifty Eight ($4,458.00) Dollars, Four Thousand Eight ($4,008.00) Dollars of which is awarded to claimant, Bonita Swafford, in her own right and Four Hundred Fifty ($450.00) Dollars thereof being awarded to Bonita Swafford next friend for the use of Clifton Swafford, Jr., said award being payable as hereinafter provided:

Under the rules of the Workmen's Compensation Act the award is made payable in weekly installments at the rate of Twelve and 78/100 ($12.78) Dollars per week. The time that has elapsed from the date of the death of deceased until June 1, 1936, when it is assumed the first payment will be made to claimant, will be twenty-nine (29) weeks. Claimant will therefore be entitled to receive on June 1, 1936 the sum of Eight ($8.00) Dollars expense of last illness and Three Hundred Seventy and 62/100 ($370.62) Dollars for payments on compensation due to that time, leaving a balance of Four Thousand Seventy Nine and 38/100 ($4,079.38) Dollars to be thereafter paid at the rate of Twelve and 78/100 ($12.78) Dollars per week, payable in monthly installments, subject to the further provisions of the Illinois Workmen's Compensation Act.

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2, 1935 (Sess. Laws of 1935, Page 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the Road Fund in the manner provided for in such Act.

(No. 1971—Claim denied.)

DANIEL S. WENTWORTH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1936.

BENJAMIN S. ADAMOWSKI, for claimant.

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

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

NEGLIGENCE—*property damage—respondeat superior*—The State is never liable for the negligence of its servants or agents, in the absence of a statute creating such liability and in this State there is no such statute.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover One Thousand Two Hundred ($1,200.00) Dollars automobile damage, Fifty ($50.00) Dollars for clothing damage and Twenty Five ($25.00) Dollars for loss of tools and equipment resulting from an automobile accident on June 14, 1931 on Route No. 4 between Bloomington and Funks Grove, Illinois.

A motion to dismiss by respondent was filed and taken with the case. A stipulation of facts has been entered into. From the stipulation it appears that the highway in question was of cement construction, built under State contract in 1923. At that time it was not the practice to construct expansion joints in the pavement, but since that time the necessity for providing for expansion joints has been generally recognized. The highway in question was at the time and is now under the control and jurisdiction of the State and is a part of the General Hard Road System of Illinois. On June 14, 1931 plaintiff was riding southwesterly over said road in a Chrysler 77 sedan then and there being driven by his son, Daniel S. Wentworth, Jr. It is stipulated that just northeast of Funk's Grove as claimant's car rounded a bend in the road, they were confronted without any warning with a blowup in the pavement, approximately two (2) feet high in the right lane of traffic along which claimant was proceeding; that because of the bulge and the downward slant toward the left side of the

road, plaintiff's automobile, after coming against the said ridge or elevation, was thrown or bounced over toward the left side of the road and into the path of an oncoming northbound automobile; that in order to avoid a head-on collision the driver of plaintiff's car attempted to hold claimant's automobile on his own side of the road but same was thrown into a ditch on the righthand side thereof, where it rolled over and was immediately destroyed by fire. It is further stipulated that representatives of the State of Illinois immediately took charge of the traffic and made emergency repairs of said highway and established and maintained warnings to automobile traffic, pending permanent repairs; further that claimant's automobile had been purchased new on August 31, 1929 and was in first-class mechanical condition at the time of the accident. It further appears from the record that the explosion or eruption in the pavement was in a seam of the highway and occurred within forty (40) feet in front of said automobile. Nothing appears in the record as to the rate of speed at which claimant's car was being driven or to what rate of speed his car should have been reduced from the time the pavement bulged, blew up, or exploded, forty (40) feet in front of claimant's car. Claimant contends that inasmuch as he has waived any claim for personal injuries, this court should, in equity and good conscience, compensate him for the actual property damages sustained.

In his Brief and Argument the Attorney General relies upon the rule which has been generally held to be applicable to claims based upon questions of highway construction, wherein it has been held, that "in the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability." This rule is stated in *Bucholz, Admx.* vs. *State,* 7 C. C. R. 241, and *Chumbler, Admx.* vs. *State,* 6 C. C. R. 138. The Legislature of Illinois has not seen fit to pass any statute that would create such liability in the case at bar.

Counsel for claimant has submitted a comprehensive Brief and Argument, citing cases in which municipalities in Illinois, and other States have been held to respond to dam-

ages where the negligence of the officers thereof was either the approximate cause of the injury, or concurring with the Act of God became the approximate cause.

The basis for plaintiff's claim herein is that the pavement in question was constructed without expansion joints and that also the explosion that occurred on June 14, 1931 was one of many such that occurred under the heat of mid-summer suns; that the approximate cause of such explosion was the absence of expansion joints and that the action of nature and the excessive heat of mid-summer were not such Acts of God as would excuse the State from the result of such alleged negligent construction. Claimant concedes on page 11 of his Argument that in cases of a controversial nature where evidence of contributory negligence exists the State should refuse to award compensation to the claimant; but claimant further contends that in the instant claim no charge of contributory negligence exists and an award should therefore be made.

In a report from Fred Tarrant, Engineer of Maintenance, under date of September 27, 1932, he states that the pavement in question was in his opinion properly designed and of the same construction as thousands of miles of pavement in other parts of the State.

In a report under date of February 14, 1933 Mr. Tarrant states:

"At the time (1923) when this Route (No. 4) was built it was not the practice or the policy of the department to incorporate or construct expansion joins in the pavement * * * The department was making quite an extensive study of expansion joints and it finally became the practice to recognize the necessity for a provision for expansion joints * * * The construction of expansion joints does not by any means eliminate blow-ups but it does minimize them and tends to locate the probable point of the blow-up to one particular spot * * * In my opinion this defect in the concrete pavement is purely an Act of God and may be considered as one of the hazards which may occur to anyone using the highway system."

Claimant attaches to his Brief a copy of his Exhibit "B", being a statement by a special staff correspondent of one of the Chicago papers in which he says under date of July 20, 1931:

"Pavements exploding under the heat of mid-summer suns have become a menace to high speed automobile traffic * * * thousands of explosions of concrete and brick pavements throughout the State during the last month have kept maintenance crews of the State Highway Department working over-

time * * * Most of the explosions reported are on concrete pavements. However, reports also have been received of brick pavements throughout the State erupting."

From an examination of the entire record we are brought to the conclusion that the use or non-use of expansion joints and the location thereof is a controversial matter; that in arriving at the present methods of hard-road construction, highway engineers have been compelled to test by actual experiment and use what form of construction will best withstand traffic and weather conditions, and we further conclude from the record that the use of expansion joints in hard-road construction does not eliminate pavement explosions in extremely hot weather, but minimizes and tends to localize such explosions to a probable point. It further appears from the record that such explosions occur in brick pavements, where a large amount of expansion area must necessarily be present.

The court therefore concludes that the record does not disclose such negligence in construction of the highway in question as would in any event justify an award in the case at bar. The court further reaffirms its previous holding that, "In the construction and maintenance of its roads the State acts in a governmental capacity and in the exercise of such governmental function it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability." (*Bucholz, Admx.* vs. *State*, 7 C. C. R. 241, and *Chumbler, Admx.* vs. *State*, 6 C. C. R. 138.)

Respondent's motion to dismiss the complaint is allowed and the cause is hereby dismissed.

(No. 2552—Claim denied.)

BUTLER BROTHERS, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

C. VICTOR CARDOSE, for claimant.

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

SUPPLIES—*when award for price will be denied.* Where claimant has no signed order for purchase of supplies showing that same were purchased by authorized person, and the record fails to show that same were actually

delivered to State, the court is without authority to authorize payment for price thereof.

SAME—*what must be shown to charge State for.* To charge the State with the cost of goods, alleged to have been sold to it, it is essential that such sale be shown to have been made upon authority of someone duly authorized to make such purchase, or it must appear without question that the merchandise was actually received by some State department or institution, purchased in the regular and legal course of its operation.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein alleges that claimant, on January 24, 1933, sold and shipped to the Kankakee State Hospital, 609 yards of muslin at a price of Twenty Five and 12/100 ($25.12) Dollars plus freight of Fifty-two Cents (52c) or a total of Twenty Five and 64/100 ($25.64) Dollars; that said sale was made at the request of the Kankakee State Hospital through its Managing Director; that shipment was made from Chicago, as evidenced by Way Bill No. 20247 via Illinois Central Railroad Company, arriving at Kankakee January 26, 1933, and that the merchandise was delivered and signed for by R. Webb, an agent or employee of the Hospital. According to the Hospital records, Richard Webb was a truck driver for the Hospital at that time and one of his duties was to call for freight at the Illinois Central Depot. Due to the fact that the Hospital, through apparent error and omission, failed to have any record of the authorization for this purchase or its having been received by the Institution, the claim when presented was not paid. However the Hospital records further show that in going over the store's perpetual inventory records, there was inventoried into the store stock on August 11, 1933, as a correction of inventory, 589 yards of 36" unbleached sheeting.

Due to the change in the management of the Institution more definite information is lacking in the record. Butler Bros. have no signed order for the merchandise in question showing that it was purchased by the authority of some responsible person, and in the absence of any record that it was actually delivered to the Institution in question and used by it, the court is without authority to authorize payment for such merchandise. It is strange that the Institution records are entirely silent as to the merchandise having been received and the only indication that such might have been the fact is that a shipping receipt was signed by one R. Webb. To

charge the State with the cost of goods sold, it is essential that such sale be shown to have been made upon authority of someone duly authorized to make such purchase, or it must appear without question that the merchandise was actually received by *some State Department* or Institution, purchased in the regular and legal course of its operation. Under the record appearing in this case such an award cannot be made, and the claim is hereby dismissed.

(No. 2802—Claim denied.)

JOSEPH CAVATAIO, A MINOR, BY WILLIAM J. CAVATAIO, HIS FATHER AND NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

WM. C. DUNHAM, for claimant.

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

PERSONAL INJURY—*negligence of State highway employees.* The State is not liable for damages for the negligence of its servants or agents.

SAME—*claim on grounds of equity and good conscience—when award for cannot be made.* Where claim is based on the negligence of employees of State engaged in constructing or maintaining State highway, an award on the grounds of equity and good conscience cannot be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks damages "in such sum as in equity and good conscience should be awarded." At the time the claim was filed on January 20, 1936, claimant was six years of age. The claim, filed through the father and next friend, recites that on September 19, 1932 the State Highway Department employees were engaged in filling joints in the concrete slab on State Route No. 157; that a combination of hot tar and other materials were being used for the purpose of such maintenance and repair work. According to the complaint, the child, Joseph Cavataio, then four years of age, was walking near the easterly side of the slab at or near the intersection of said S. B. I. Route No. 157 with 88th Street, in East St. Louis, Illinois; that highway employees had carelessly and negligently permitted a pool of the hot tar to accumulate on the edge of the concrete slab and on the dirt shoulder immediately adjacent thereto; that no barrier or warning as to

the dangerous condition of the said pool of hot tar was provided, and that Joseph Cavataio stepped into the pool of hot tar and received injuries which resulted in the amputation of one of his toes and various burns to the hands, feet and body.

The Attorney General has filed a motion to dismiss the claim on behalf of respondent, and in support thereof contends that, in the construction and maintenance of public highways, the State is engaged in a governmental function and is not liable for damages caused because of the failure to maintain same in a safe condition, and further that the State is not liable for the negligence of its servants or employees unless there is a statute making it so liable, and further that no such statute exists in the State of Illinois. The latter rule has been often announced by this and other courts.

As stated in *Crabtree* vs. *State*, 7 C. C. R. 207,

"Unless a claimant can show a legal or equitable liability of the State to pay a claim filed, the court has no power to make such award."

The forum in which the claim is entered is not a bureau of charities but a court existing by statute, and under the law creating it, it must determine all claims in accordance with legal principles. As there is no statute in Illinois by which the State is made liable for the negligence of its employees, it follows that claimant is not entitled to an award against the State for the unfortunate injury suffered.

The motion of the Attorney General is allowed and the claim is dismissed.

(No. 2851—Claimant awarded $35,533.11.)

CHICAGO PARK DISTRICT, A BODY POLITIC AND CORPORATE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

JAMES M. SLATTERY, for claimant.

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

HIGHWAYS—*maintenance of part of State highway located in municipal corporation under contract with State, authorized by statute—when award for services rendered under will be made.* Where it appears that State in

accordance with provisions of statute entered into contract with municipal corporation for maintenance by said corporation, of part of State highway within said municipal corporation and it performs the services undertaken by it therein, and amount due thereunder is stipulated between parties, an award for same will be made, when amount is not in excess of that provided for in said contract.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Thirty Five Thousand Five Hundred Thirty Three and 11/100 ($35,533.11) Dollars. The complaint, filed February 26, 1936, alleges that on November 28, 1934 claimant entered into contracts with respondent through its Department of Public Works and Buildings, Division of Highways, to maintain certain routes or streets within the territory formerly under the control of the South Park Commissioners, the Commissioners of Lincoln Park, the North Shore Park District and the West Chicago Park Commissioners for a period not later than June 30, 1935; that all of the said districts and group were superseded under the law by the Chicago Park District, claimant herein.

The contract in question was made under the apparent authority of the following statutory provisions:

"In all cases where State or through traffic upon a State highway runs through a city, town or village, the Department of Public Works and Buildings shall locate a route upon existing streets or other thoroughfares or upon a new street or thoroughfare to be laid out through such municipality as an extension of such State highway so as to form a continuous route to serve the needs of through or State traffic upon such highway."

Par. 204 (1), Chap. 121, Roads and Bridges, I. S. B. S. 1935.

"The department is authorized when it appears to be expedient to enter into contracts with the particular municipal corporation terminable in the discretion of the department for the municipal corporation to maintain the improvement or portion under the control of the State located within such municipal corporation, any part thereof, such maintenance to be under the supervision of the department and at the expense of the State."

Par. 204 (4) Chap. 121, Roads and Bridges, I. S. B. S. 1935.

The contract in question relative to the streets or territory formerly under the control of the South Park Commissioners contained the following:

"The total amount to be paid by the department including the cost of repairs, snow removal, street cleaning and all maintenance and allowances for overhead shall in no event exceed $80,225.18 for the year ending June 20, 1934."

A similar provision with reference to the territory under the former jurisdiction of the Lincoln Park Commissioners is included, except that it is provided the total therefor shall not exceed $30,753.94 for the year ending June 20, 1934.

A similar provision with reference to the territory under the former jurisdiction of North Shore Park District is included, except the total allowance therein shall not exceed $4,395.30.

A similar provision with reference to the territory under the former jurisdiction of West Park Commissioners is included, except the total allowance therein shall not exceed $30,857.20.

The record discloses that claimant repaired, cleaned and maintained the aforesaid routes or streets and removed snow therefrom as provided for under the terms of said contract, as shown by invoices, submitted as Exhibits as follows:

Ex. 1, itemized total	$18,537.84	—S. Park Commrs.
Ex. 2, itemized total	7,945.10	—W. Chi. Park Commrs.
Ex. 3, itemized total	7,918.52	—Commrs. of Lincoln Park
Ex. 4, itemized total	1,131.65	—N. Shore Park District
Grand total	$35,533.11	

Invoices submitted by claimant to the Highway Department on August 3, 1935 were not received by the latter. Under an agreed statement of fact there appears to be due the claimant the sum of Thirty Five Thousand Five Hundred Thirty Three and 11/100 ($35,533.11) Dollars. Following the filing of invoices by claimant with the Highway Department on October 21, 1935, claimant was notified by Kendrick Harger, District Engineer of said Department, to file their demand with the Court of Claims. In a report dated March 4, 1936, from E. W. Ross, Engineer of Maintenance, he states:

"This Contract Agreement covered the period of July 1, 1934 to June 30, 1935, inclusive, at which time it was discontinued.

"Statements for the first three quarterly periods were received and scheduled for payment as required by the Contract Agreement, but the statement for the final period was not received for payment until the appropriation under which the Agreement was made had lapsed * * * The expense for maintenance is correct * * * their claim is justified and I recommend that it be paid."

In a report dated March 12, 1936 Edward J. Barrett, Auditor of Public Accounts, states:

"With reference to your letter of March 10, regarding Claim Number 2851, please be advised that our records show that there was a balance of $966,643.94, at the time the appropriation for City Highway and Belt Line Maintenance lapsed on September 30, 1935."

Counsel for claimant and the Attorney General both concede that payments were made by the Highway Department for all quarters except the last. This being true and the contract having been legally entered into and the services having been properly incurred and the State having received the services, an award is due. It further appears that such award will not bring the total payments to an amount in excess of the contract limit.

An award is therefore made in favor of claimant in the sum of Thirty Five Thousand Five Hundred Thirty Three and 11/100 ($35,533.11) Dollars, payable from the Road Fund of the Motor Fuel Tax Funds.

(No. 2875—Claimant awarded $228.61.)

T. McBRIDE & SON, INC., AN ILLINOIS CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

McCARTHY & McCARTHY, for claimant.

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

SUPPLIES—*when award for price of may be made.* Where it clearly appears that State received supplies, as ordered by it, and that bill therefor was not presented for payment before lapse of appropriation out of which it could be paid, and no question is raised as to amount claimed, an award for price thereof will be made on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for Two Hundred Twenty-eight and 61/100 ($228.61) Dollars for merchandise itemized in its claim and sold and furnished to the State of Illinois Highway Department, Elgin District, Elgin, Illinois, during the period from January 3, 1934 to June 28, 1936, for which respondent had agreed to pay the sum stated. On December 16, 1935 payment of the claim was declined by Charles H. Apple, District Engineer, for the reason that the appropriation under which this bill could have been paid had lapsed. The claim

recites that the appropriation had been exhausted, but the reports of the Department show that this was not correct but that the appropriation had lapsed. We have heretofore held that where materials have been received by the State on orders legally made therefor and the goods have been furnished, and payment has failed only because of the lapsing of the appropriation, an award will be made for the amount due. *Schreiber Lbr. Co.* vs. *State*, 8 C. C. R. 381. This claim coming within the above rule, an award is hereby allowed in favor of claimant in the sum of Two Hundred Twenty-eight and 61/100 ($228.61) Dollars.

(No. 2535—Claim denied.)

MARY W. SCHAFFENACKER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

TRAPP & TRAPP and FRED I. EDGELL, for claimant.

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

WORKMEN'S COMPENSATION ACT—*necessary proof in claims for compensation under.* In order to obtain award under Act it must be proven by preponderance or greater weight of the evidence that injuries for which compensation is sought arose out of and in the course of the employment of the injured employee while engaged in extra hazardous employment.

SAME—*farm work excepted from provisions of—when award under will be denied.* Manager of farm, constituting part of State Institution, whose duties consist of overseeing the farm, and the managing thereof, including the dairy, barns, fields and the growing and harvesting of grain raised thereon is engaged in farm work, and if injured while so doing no award for compensation under Workmen's Compensation Act can be made for such injuries as farm work is expressly excepted in said Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

On October 16, 1933 William G. Schaffenacker, husband of claimant, was employed by respondent through the Department of Public Welfare, at the Lincoln State School and Colony. According to the complaint filed herein, his employment was as farm manager at the farm that constituted a part of the Lincoln State School and Colony and his duties consisted in the overseeing of the farm and the managing thereof, including the dairy, hog and horse barns, fields,

truck gardens, the preservation and use of farm properties, and the growing and the harvesting of grain and all other products raised on said farm; that in the performance of his duties he daily inspected the barns, pastures, gardens, fields and offices of the farm, and that on the said date of October 16, 1933 while in the course of his duties in such inspection work, in attempting to climb over a wire fence he tripped and fell on his left side and received injuries from and as a result of which he died on the 2nd day of November, A. D. 1933. Claimant files her suit as the legally dependent wife of deceased.

Wages in full were paid to William G. Schaffenacker for the full period of his employment and up until the time of his death on November 2, 1933. Claim for compensation under the Workmen's Compensation Act for Four Thousand ($4,000.00) Dollars was filed November 2, 1934.

The Attorney General contends on behalf of respondent that the death of claimant did not result from an accident which arose out of and in the course of his employment; further the claim shows on its face that the application for compensation was not made within one year after the accident and is therefore in conflict with Section 24 of the Workmen's Compensation Act. In connection with this objection the court finds that the payment of the amount due deceased for wages in full up to the time of his death on November 2nd does not constitute a payment of compensation as defined under the Workmen's Compensation Act. This being the case, the claim is subject to dismissal as not having been filed within one year after the accident complained of.

In Claimant's Statement, Brief and Argument, counsel contend that this court should not take cognizance of the limitation of the Workmen's Compensation Act but should give regard to the latter only so far as it relates to matters of procedure. We believe counsel have misconstrued the meaning of the wording used in *Menestrina* vs. *St. Louis National Stock Yard*, 278 Ill. App. 342, p. 346, where it states:

> "It is apparent that the Legislature designed that such demands were only cognizable before, and by, the Court of Claims, and that the procedure therein should be as near as might be, that employed under the Workmen's Compensation Act, which should not otherwise apply."

The words, "which should not otherwise apply" refer to the "Workmen's Compensation Act" as a whole, meaning

that except for the action by the Legislature the Act would not otherwise apply to State employees; and second, making it cognizable by the Court of Claims instead of by the Industrial Commission.

This court has definitely held that in its consideration of claims by State employees for injuries suffered in the course of their employment, the determination thereof, as prescribed under *Section 6* of the *Court of Claims Act* will be made in accordance with the rules prescribed in the Act commonly called the *Workmen's Compensation Act*. In thus determining the rights of the parties, the court does not consider that it has discretionary power to say that it will observe a portion of the rules laid down by the Workmen's Compensation Act, and ignore others, but will, in determining such rights, be controlled by all of the rules set forth in that Act; insofar as possible.

A careful examination of the record raises serious doubt as to whether the death of William G. Schaffenacker on November 2nd can be attributed to or connected with the accidental fall that he suffered on October 16th. One of the witnesses, William Sanders, testified that he was one of the herdsmen and was with deceased at the time he received his fall on October 16th; that in his opinion he received no injury about the head; that deceased had caught his toe in the wire and fell over backwards and "kinda sat down, and said that he hurt one of his testicles." Dr. Armstrong, a veterinarian who was with Schaffenacker at the time of his fall, stated that the latter fell on his side; that he did not fall on his head and that after his fall he indicated the pain he had incurred by putting his hands on the umbilical region of the abdomen.

Dr. Frank M. Hagans testified that he was Mr. Schaffenacker's family physician, and that in his opinion the cause of his death was cerebral embolism or a clot on the brain. "Probably the result of the fall, breaking the vegetation from the valves of the heart; that he weighs about 240 or 250 pounds; that he had previously had chronic endocarditis, causing vegetation to be formed about the valves of the heart and that the blood clot on the brain could have been a sequence of a fall."

Dr. George E. Rooney was the staff doctor at the Lincoln State School and Colony and in a report dated March 28,

1936, also stated that the cause of death was given as cerebral thrombosis and that as the stroke did not occur for several days after Mr. Schaffenacker's fall, he did not consider it had anything to do with the latter's death.

Dr. P. S. Waters in a report under date of November 19, 1934, stated that he visited Mr. Schaffenacker each day during his illness; that after his fall he stated he was not injured and was able to ride home, and that he went about his work the balance of the day and on October 17th, 18th and 19th and that he, Dr. Waters, did not know that Mr. Schaffenacker was suffering to any extent from the result of his fall; that on the evening of October 20th Mr. Schaffenacker suffered a stroke and was at that time treated by Dr. George Rooney.

The court does not believe that claimant has sustained the burden of proof of showing that the death of Mr. Schaffenacker arose out of and in the course of his employment.

Further than this, Sub-section 8 of Section 3 of the Workmen's Compensation Act excludes from participation in awards under the Act, those engaged in any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising—or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered. The activities of Mr. Schaffenacker, as head farmer, as disclosed by the record, all indicate that he would fall within the excepted class.

From a consideration of the entire record, petitioner's claim is rejected, award denied and the claim dismissed.

(No. 2848—Claimant awarded $25.00.)

RICHARD SEIBERT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

Claimant, pro se.

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

MISTAKE OF FACT—*moneys paid under—may be recovered.* Where it is not disputed that moneys paid to State were made through a mutual mistake of fact an award for refund of same will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed by Richard Seibert as the father and apparent next friend of Norma Seibert, a minor, for the refund of Twenty-five ($25.00) Dollars tuition fee paid to the Southern Illinois Normal University of Carbondale, Illinois. It appears that tuition fees were paid for the school year 1934-1935 and for the first term of the school year 1935-1936, notwithstanding the fact that when Miss Seibert entered the Normal School she was entitled to a County Scholarship which entitled her to free tuition. Reports appearing in the record from John J. Hallihan, Director of the Department of Registration and Education, and from Roscoe Pulliam of the Normal School, concur in claimant's statements, and no opposition is interposed by the Attorney General to the payment of said claim.

This court has repeatedly held that where it appears an erroneous tax payment has been made through a mutual mistake of fact and the Attorney General concedes that claimant is entitled to an award, an award will be made. *The Scudder-Gale Grocery Co. vs. State*, 8 C. C. R. 719.

Miss Seibert was apparently entitled to free tuition. The fact that she held a Scholarship, entitling her to free tuition was overlooked by Miss Seibert and the management of said school. An award is therefore allowed in favor of Richard Seibert for the use of Norma Seibert in the sum of Twenty Five ($25.00) Dollars.

(No. 2843—Claimant awarded $88.00.)

DICK TADEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

A. FRED KENDALL, for claimant.

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

WORKMEN'S COMPENSATION ACT—*claim for medical service not claim for compensation.* Claim of employee for expenses incurred in procuring medical treatment for injuries sustained arising out of and in the course of his employment, while engaged in extra hazardous employment is not claim for compensation under Act.

SAME—*same—time within which same filed not governed by Section 24 of Workmen's Compensation Act.* Section 24 of Workmen's Compensation

Act, fixing time within which claim for compensation must be filed does not govern claims for medical services.

MR. JUSTICE YANTIS delivered the opinion of the court:

For some time prior to and on September 27, 1934 claimant was employed by respondent in the Department of Public Works and Buildings, Division of Highways. On the latter date while unloading gravel the dipper of the crane crushed claimant's index finger on the left hand against the door of a freight car.

It appears from the record that notice of the accident was given respondent within thirty (30) days thereafter and that claimant was totally disabled for a period of sixteen (16) weeks, partially disabled for a period of eight (8) weeks and that it became necessary to amputate his left index finger at the second joint, thereby losing the first two joints of said finger. Claimant incurred a Doctor's bill with Dr. F. F. *Buckner of Watseka, Ill.* in the amount of Eighty Eight ($88.00) Dollars, no portion of which has been paid.

Claimant's earnings at the time of the injury were Three and 20/100 ($3.20) Dollars per day, and he had two children—Evelyn, aged fourteen (14) years and Weldon, aged eight years.

The complaint was filed with the clerk of this court on February 15, 1936, and the Attorney General has filed a motion to strike compensation items by reason of the fact that the accident is alleged to have occurred September 27, 1934 and that the claim is therefore barred, under the terms of *Section 24* of the *Workmen's Compensation Act*, for not having been filed within one year from the date of the accident. The complaint recites that the claim was presented to the Industrial Commission and was dismissed for want of jurisdiction. There is no recital as to when it was filed with the Industrial Commission or when it was dismissed, but presumably it was filed with said Commission within one year after the accident. Claimant contends that inasmuch as the Industrial Commission and the Court of Claims are both State agencies, the State had due notice of the claim having been filed with the Industrial Commission, and that therefore when the latter dismissed the claim for want of jurisdiction, claimant should be entitled to file the claim with the

Court of Claims at any time within the limitation period of five years prescribed by our rules, and that the limitation of *Section 24* of the *Workmen's Compensation Act* should not apply.

The Act creating the Court of Claims and prescribing its powers (Approved June 25, 1917, as amended), grants to the Court of Claims the power "To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination *to be made in accordance with the rules* prescribed in the Act commonly called the Workmen's Compensation Act; the Industrial Commission being hereby relieved of any duty relative thereto, (Par. 6, Sub-Sec. 6.)"

This court has held repeatedly that in the consideration of claims filed under the Workmen's Compensation Act it has no authority to pick out certain rules or provisions of the latter Act by which the court will be governed in determining the rights of claimant and respondent and ignore certain other rules and provisions of said Act in arriving at its conclusions. *Section 24* of that Act provides, "That in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred." The wording of the Court of Claims Law (supra), stating that the Industrial Commission is hereby relieved of any duty relative to the claims of State employees, and transferring such jurisdiction to the Court of Claims, is clear and certain. It therefore naturally follows that claims for compensation to be considered by this court must be filed with this court under the provisions of *Section 24* of the *Workmen's Compensation Act* within the same time that claims of private employees are required to be filed by them with the Industrial Commission. The latter is a tribunal created by the State for the hearing of claims of private litigants, and the fact that plaintiff filed his claim with that Commission does not bring him within the jurisdiction of this court any more than if his claim had been filed in one of the County or Circuit Courts of our State. The Workmen's Compensation Act gives to claimants certain privileges, but it also prescribes certain limitations. It is not the province of the Court of

Claims to depart from the limitations prescribed by such legislation. The motion of the Attorney General, to strike and dismiss all of said claim except the item of Eighty Eight ($88.00) Dollars for medical expense incurred by claimant and due Dr. W. F. Buckner, is allowed. As the claim for medical service is not classed as compensation under existing decisions, it does not have to be filed within the limitation period of one year. An award is therefore allowed in favor of claimant, Dick Taden, for the use of Dr. W. F. Buckner in the sum of Eighty Eight ($88.00) Dollars.

(No. 2519—Claim denied.)

VETERANS OF FOREIGN WAR, LA FORE LOCK NO. 755 DRUM & BUGLE CORPS, OF SPRINGFIELD, ILLINOIS, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

WILLIAM J. LAWLER, for claimant.

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

BAILMENTS FOR SOLE BENEFIT OF BAILOR—*loss of bailed property—bailee only liable for when guilty of gross negligence.* Where property of claimant, was by permission of State stored in State building, without any payment being made for such storage, such transaction is a bailment for sole benefit of bailor and State if it were suable would only become liable for such property if guilty of gross negligence. In such case where building and property is destroyed by fire and no allegation or proof of any negligence on part of bailor is made, no recovery can be had of bailor for the value of such property.

GOVERNMENTAL FUNCTIONS—*maintenance of State Arsenal is—State not liable for negligence of its servants or agents.* In the maintenance of the State Arsenal the State is engaged in a governmental function and is not liable for the negligence of its servants or agents in the conduct of same.

MR. JUSTICE YANTIS delivered the opinion of the court:

In a complaint filed October 17, 1934 claimant alleges that in the month of March, A. D. 1934 it was the owner of various Drum and Bugle Corps equipment of the value of One Thousand Four Hundred Eleven and 48/100 ($1,411.48) Dollars. This equipment and property, by permission of the

State of Illinois, was stored in the State Arsenal Building at Springfield and was destroyed at the time the Arsenal burned, in the Spring of 1934. The complaint alleges that this fire occurred in March but the fire in fact was on Sunday, February 18, 1934.

Claimant seeks an award from the State in reimbursement of such loss. The Attorney General has filed a motion to dismiss the claim on behalf of respondent, contending that the permissive storing of said equipment in the building of respondent was a voluntary bailment and that there is no theory of law thereunder which would justify respondent in answering in damages for the loss of the property in question.

As disclosed by the claim, it appears that claimant's property was left in the Arsenal by the claimant for its own convenience and without charge, and the transaction therefore constituted a bailment for the sole benefit of the bailor. Under the ordinary rule of bailments where same is for the sole benefit of the bailor, the bailee is only liable for bailed property when he is guilty of gross negligence. No allegation of such negligence appears in the present complaint.

In addition to this, the State, in the conduct and maintenance of the Arsenal was engaged in a governmental function, and in the exercise thereof would not be liable for the negligence of any servant or employee in the absence of a statute making it so liable. *Minear* vs. *State Board of Agriculture*, 259 Ill. 549. *Bucholz, etc.* vs. *State*, 7 C. C. R. 241.

The motion of the Attorney General is allowed and the claim dismissed.

(No. 2879—Claimant awarded $11.32.)

THE WESTERN UNION TELEGRAPH CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

RALPH H. OVERBAUGH and HOMER BROCKETT, for claimant.

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

SERVICES—*supplies—when award may be made for.* The facts in this case are the same as those in *Western Union Telegraph Co.* vs. *State*, No. 2817, *ante*, and the opinion of the court in that case is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a claim filed April 8, 1936 claimant seeks an award of Eleven and 32/100 ($11.32) Dollars for transmitting and delivering messages at the Chester State Hospital in the months of July and August, 1933 and January and August, 1934. The record supports the claim that the services were in fact rendered but there is little excuse appearing in the record to justify the delay of claimant in presenting its demand to the institution before the lapsing of the appropriation out of which such account should have been paid; however the claim is not opposed by respondent and under the rule that, where it is conceded that claimant rendered services to the State that had been legally contracted, and has not been paid therefor because of the lapse of the appropriation out of which payment could have been made, and there is no dispute as to the amount due, an award will be made. *Journal Printing Co. vs. State*, 8 C. C. R. 673. *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165.

IT IS THEREFORE ORDERED that an award be entered in favor of claimant in the sum of Eleven and 32/100 ($11.32) Dollars.

(No. 2859—Claim denied.)

THOMAS R. WHITE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 16, 1936.

CHARLES C. MCBRIAN, for claimant.

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

PERSONAL INJURY—*inmate of State penal institution—negligence of employees of.* In the conduct of State penal institutions the State exercises a governmental function and is not liable to respond in damages for personal injuries sustained by inmate thereof as the result of the use by him of a defective tool furnished by the officers, agents or employees thereof.

SAME—*same—not employee of State.* Inmate of State penal institution is not employee of State, even though assigned to work while such inmate.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks to recover an award of Two Thousand Four Hundred Fifty-four ($2,454.00) Dollars for injuries which he received on July 2, 1935 while confined as a

prisoner at the State Penal Farm at Vandalia, Illinois. Claimant's contention is based upon the allegation that the injury was caused by the use of a defective carpenter tool which he was then using.

The Attorney General has filed a motion to dismiss the claim for the reason that the complaint shows that claimant at the time of the injury was an inmate of a State Penal Institution and not an employee therein, and that the State is not liable for injuries resulting to such inmate while engaged in some task assigned to him in such penal institution. This and other courts have consistently held that in the conduct of its penal and charitable institutions the State exercises a governmental function and that in the operation thereof it is not liable for injuries resulting to inmates while engaged in their various tasks and labors. *Parks* vs. *State*, 8 C. C. R. 535. *Pelli* vs. *State*, 8 C. C. R. 324. The motion of the Attorney General is allowed and the claim dismissed.

(No. 1819—Claim denied.)

ELLA H. BRADEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 7, 1936.

JOHN H. SEARING, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time fixed therein, a condition precedent to jurisdiction.* Making claim for compensation and filing application for same within time provided in Workmen's Compensation Act is a condition precedent, without which, court is without jurisdiction to proceed with hearing.

SAME—*question whether claim for compensation made in apt time, one of fact.* Where claimant attaches exhibit to her claim filed in this court, as her original claim for compensation, bearing date of September 8, 1931, but the date of acknowledgment of receipt thereof by State officer, appears thereon as September 19, 1931, such latter date will be assumed to have been date compensation was claimed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed with the Clerk of the Court of Claims on October 22, 1931, and alleges that on February 23, 1931, the claimant was employed at the East Moline State

Hospital at East Moline, Rock Island County, Illinois, a charitable institution, as an attendant, and while so employed on February 23, 1931, and while in the performance of her duties, she was bitten on the little finger on the right hand by a patient known as Bertha Beloy; that the finger so bitten became infected and amputation became necessary, and the right hand has become permanently disfigured, and a claim is filed for the sum of $5,000.00.

The Attorney General filed a motion to dismiss for the reason that no claim for compensation was made until more than six months had elapsed from the time of the injury.

It appears from the files that notice was given in apt time, but attached to the claim is "Exhibit A" which is a notice for a claim for compensation. That claim is dated September 8, 1931; was directed to the Hon. Louis L. Emmerson, Governor of the State of Illinois, and upon the notice is the following language: "Received a copy of the above notice on the 19th day of September, 1931." Although the claim is dated on September 8, 1931, we must hold that the Governor did not receive the notice of claim until the date of his receipt therefor which was the 19th day of September, 1931.

It has been repeatedly held by the Supreme Court of Illinois that the making of a claim for compensation within the prescribed period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute. (See *American Car and Foundry Co.* vs. *Industrial Com.*, 335 Ill. 322.) Supplement to Angerstein on The Employer and the Workmen's Compensation Act of Illinois, page 675 and cases therein cited.

Whether or not a claim has been made as required, is a question of fact to determine like any other similar question. No special form of claim for compensation is prescribed. The claimant in this case has attached "Exhibit A" as her claim for compensation, and we must assume the date therein mentioned to have been the date that compensation was claimed.

It appears from the petition that petitioner has filed herein, that no claim for compensation was made within six (6) months from the time of the injury, and this court is, therefore, as a matter of law, without jurisdiction, and the motion of the Attorney General must be sustained.

(No. 2333 - Claim denied.)

FRANCES S. COOLIDGE, FRANCIS S. COOLIDGE, ADMINISTRATRIX OF THE ESTATE OF CLIFFORD H. COOLIDGE, Deceased, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 7, 1936.

CLIFFORD N. COOLIDGE, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application for same within time fixed therein, a condition precedent to jurisdiction.* Where it appears from face of complaint for allowance of compensation under provisions of Workmen's Compensation Act that application for compensation was not filed within time fixed in Act, court has no power to proceed with hearing, filing of such application being a condition precedent to jurisdiction of court.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claim was filed in this court on February 28, 1934, alleging that on the 1st day of October, 1931, C. H. Coolidge was employed to work in the laundry of the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois, that his wages were Ninety Dollars ($90.00) per month; that his duties were that of a laundryman, that is, he washed the clothes of the inmates of the institution and used certain soaps, corrosive acids, lyes and chemicals for the cleaning of said clothes that were harmful to the human skin and body; that his hands became chapped and the skin cracked; that on the 19th day of February, 1933, the right hand became infected with blood poisoning from the use of the water, lyes, acids, soaps and chemicals, and that decedent died on the 28th day of February, 1933; that notice was given on the 28th day of March, 1933; that the deceased left him surviving, Frances S. Coolidge, his wife, Barbara Coolidge, his daughter, Robert Heketh Coolidge, his son, Clifford N. Coolidge, his son and Beatrice Cole, his daughter. Claimant further alleges that Frances S. Coolidge and Barbara Coolidge were dependent upon the said Clifford H. Coolidge, and that they are now without means of support, and that they relied solely upon said Clifford H. Coolidge for the furnishing and supplying of the necessities of life. Damages in the sum of Four Thousand Dollars ($4,000.00) are claimed.

The ages of the different children are not averred.

An amendment to the declaration was filed on June 15, 1934, averring that the infection occured on the 13th day of February, 1933 and not on the 19th day of February.

The Attorney General has moved to dismiss and sets up two grounds. (1) That no claim for compensation was made within six months as required by law. (2) Application for compensation was not filed within one year, pursuant to Section 24 of the Compensation Act. Other grounds are also alleged, but under the view we take of this case, it will be unnecessary to discuss them.

It has been repeatedly held that the making of a claim for compensation within six months and the filing of an application within one year from the date of the accident, are jurisdictional. It appearing from the face of the declaration in this case, which we have treated as an application for compensation, that the application was not filed within one year, we must hold that we have no jurisdiction. For further discussion of the law as we view it, see *William Hopkins* vs. *State of Illinois*, No. 2097, recently decided by this court.

We must, therefore, decide the motion of the Attorney General in the affirmative, and dismiss the case.

(No. 2097—Claim denied.)

WILLIAM HOPKINS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 7, 1936.

CLARENCE T. SMITH, for claimant.

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

WORKMEN'S COMPENSATION—*failure to make claim for compensation under within time fixed in deprives court of jurisdiction to hear claim.* The making of a claim for compensation under Workmen's Compensation Act within the period prescribed in the Act is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute.

SAME—*payment of wages and hospital and medical bills not waiver of requirements as to making claim for compensation.* The fact that State paid injured employee his wages for six months following injury and all hospital and medical bills is not waiver of requirement that claim for compensation be made within time prescribed in Act and such payments do not constitute payments of compensation under Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, William Hopkins, filed his claim in great detail in this court on March 28, 1933. In brief, the claim for compensation alleges that he was duly appointed a member of the State Highway Maintenance Police on the 3rd day of October, 1929, and faithfully performed all the duties of his office up to the time of his injury, which was on the 11th day of July, 1930, when he was acting pursuant to instructions of his superior officer in removing a motorcycle from Springfield, Illinois, where it had undergone repairs, to the Village of Clay City, Illinois; that he was in company with another officer; that while enroute from Springfield to Clay City, and between the cities of Effingham and Flora and near a small Village known as Hord, they stopped for the purpose of obtaining a drink of water, and the claimant while endeavoring to start his motorcycle again to complete his journey, and while in the exercise of due care and caution, the claimant fell with the motorcycle, and fell beneath it and as a result thereof, the claimant received a permanent injury to his left knee, as well as other injuries.

It is stipulated that the claimant suffered a permanent disability to the extent of thirty-five per cent (35%) loss of the use of the left limb. It is averred and stipulated that the State had due notice of the injury, and the extent of the injury is not questioned by the Attorney General.

The claimant received the sum of One Hundred Seventy-five Dollars ($175.00) per month during the time of his total disability, and all doctor, hospital and medical bills were paid by the State of Illinois, but no settlement was made with the claimant for the permanent injury sustained.

It appears in the stipulation that claimant was the father of one child, who was dependent upon him, but it does not appear that he had a wife who was living at the time of the injury.

It also appears in the stipulation, that he was unable to continue in that line of employment. His salary apparently was paid to him from the time of the injury, July 11, 1930, up until December 1, 1930 when he was again replaced in the service, but was unable to continue the work.

On November 2, 1930, he wrote Mr. Walter L. Moody, Superintendent of State Highway Maintenance Police. In

this letter he described how the accident occurred; his injuries; stated that his knee was showing improvement in strength and movement and that he hoped to be able to perform his duties soon, and he also enclosed bills that he incurred on account of the accident. On November 24th of the same year, he wrote and stated that he had a broken knee cap and a badly sprained left arm. In neither letter, did he make any claim for compensation. On April 10, 1933, he wrote Mr. L. M. Taylor, Superintendent of State Police, describing his physical condition, and quoted F. J. Webber concerning X-ray pictures that had been taken, but did not make a claim for compensation.

Section 6 of the Court of Claims Act provides that this court must hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act." In a brief filed by the Attorney General, our attention is directed to Section 24 of the Workmen's Compensation Act, which provides that no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident, provided that in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation the right to file such application shall be barred.

The sole issue presented is: Whether a claim for compensation was made in conformity with the provisions of the Workmen's Compensation Act.

It has been repeatedly held that the making of a claim for compensation within the prescribed period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute. (See *American Car and Foundry Co.* vs. *Industrial Com.*, 335 Ill. 322; *City of Rochelle* vs. *Industrial Com.*, 332 Ill. 386; *Inland Rubber Co.* vs. *Industrial Com.*, 309 Ill. 43, and there are many other cases to the same effect.) No special form of claim for compensation is prescribed and the claim need not be in writing, but it must apprise the employer that the employee has sustained in-

juries of such a character as to entitle him to compensation and that a claim therefor will be made.

There is no evidence in the record that the employer was apprised of any claim for compensation prior to the filing of the application for its adjustment on March 28, 1933.

Would the fact that the State had paid claimant's wages up until December 1, 1930, be a waiver on the part of the State that a claim for compensation was not made? And can it be said that the State lulled the claimant into the belief that he would be paid compensation by reason of the fact that the State paid all hospital and medical bills and paid his wages for a period of six months? We feel that the Supreme Court has decided this case in the negative. (See *Lewis* vs. *Industrial Com.*, 357 Ill. 309.)

We must, therefore, hold that we have no jurisdiction in this case, and must deny the claim.

(No. 2041—Claimant awarded $4,021.16.)

CARL H. LITTLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 8, 1936

HAROLD J. TAYLOR, PAUL TAYLOR and G. P. DENTON, for claimant.

OTTO KERNER, Attorney General; GLENN TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for partial permanent disability.* Where an employee of State sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in partially incapacitating him from pursuing his usual and customary line of employment, an award may be made for sum equal to fifty per centum of the difference between the average amount earned by such employee before the injuries and the average amount which he is able to earn or is earning in some suitable employment thereafter.

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

For over twenty years prior to April 1st, A. D. 1931 claimant was an employee of the respondent in the Division of Highways. On the last mentioned date, while employed as maintenance foreman near Effingham, Illinois, he sustained

accidental injuries which arose out of and in the course of his employment. He was helping some men under his charge load a heavy tar kettle into a truck when the kettle slipped and was thrown against him, whereby he was seriously injured, sustaining a fracture of the twelfth dorsal and first and second lumbar vertebrae, which have since become anchylosed. He was taken to St. Anthony's Hospital at Effingham, where he remained for seventeen days; he was then placed in a cast and removed to his home. He was confined to his bed at home for over two months; thereafter he moved about in a wheel chair for about two months, and was then permitted to move about on crutches. About March 1st, A. D. 1932 his condition had improved to such an extent that he went back to work for respondent but at lighter work than he previously performed, although he received the same salary as he received in his previous position, to wit, $160.00 per month. His new employment was as foreman of beautification projects, which did not require any heavy manual labor on his part. He performed all of the duties of such position until September 3d, 1932. On the last mentioned date, while lifting a lawn mower into the back of his automobile coupe, in the performance of the duties of his position, he again injured his back and fell to the ground unconscious. He revived after a short time and was able to drive home. He remained at home about two weeks and then reported back for work, and although he was physically able to perform but few of the duties of his position, he was continued on the payroll until January 30th, 1933, at which time he was discharged. During the time from September 3d, 1932 to January 30th, 1933 claimant was paid his full salary of $160.00 per month.

Claimant had only a common school education, and was fifty-one years of age at the time of the accident. He had two children under sixteen years of age at the time of the accident on September 3d, 1932.

On January 5th, 1933 claimant filed his claim in this court to recover the bill of St. Anthony's Hospital in the amount of $83.85 and the bill of Dr. Damron in the amount of $371.00 for hospital and medical services rendered him on account of his said injuries. Thereafter Dr. Damron filed a claim (No. 2180) on his own behalf, and on behalf of St. Anthony's Hospital for the same services, which said claim was allowed on May 31st, 1935 and has since been paid.

On February 13th, 1933 claimant filed an amendment to his complaint in which he asks for compensation for the injuries sustained by him as aforesaid.

In his complaint as amended, although claimant set forth both the accidents of April 1st, 1931 and September 3d, 1932, he apparently based his right of recovery on the accident of April 1st, 1931. The Attorney General urged that the complaint should be dismissed on account of claimant's failure to make claim for compensation within six months after the accident and to file his complaint within one year after the date of the injury or the last payment of compensation as required by Section 24 of the Workmen's Compensation Act. Claimant now takes the position that his present physical condition is the result of the accident of September 3d, 1932. If he is correct in his position, there is no merit to the contention of the Attorney General, for the reason that the amended complaint was filed within six months after the date of said accident.

As the result of the injury of April 1st, 1931 claimant was rendered more susceptible to his second injury than he otherwise would have been. Prior to September 3d, 1932 he was able to perform all of the duties required of him as foreman of beautification projects, but after such injury he was unable to do such work or any other work which required lifting, bending or heavy manual labor. As said by the Supreme Court in the case of *Powers Storage Co.* vs. *Ind. Com.*, 340 Ill. 504, "His employer accepted him as an employee in the physical condition in which he was and is liable for any accidental injury occurring to him arising out of and in the course of his employment."

In the case of *Rittler* vs. *Ind. Com.*, 351 Ill. 353, the Supreme Court said: "Mere predisposing physical condition does not affect the right to compensation. If an accident results in a lesion, or a new condition of which it is the proximate cause, there may be a recovery of compensation for the same, regardless of predisposing conditions making the employee more susceptible to the injury."

Claimant had recovered from his first injury sufficiently to return to work as a foreman of beautification projects, and was performing all the duties required of him in connection with such work, until the time of the second accident. He is

now unable to do the work which he previously performed, or any other work which requires lifting or bending. His very limited education prevents him from procuring any work of a clerical nature. There is nothing in the record to dispute claimant's contention that his present condition is the result of the accident on September 3d, 1932 and we therefore find that the claimant's present condition is the result of such accident.

It is conceded that at the time of both accidents, the claimant and the respondent were operating under the terms and provisions of the Workmen's Compensation Act, and that both accidents arose out of and in the course of claimant's employment. The only questions to be determined are the nature and extent of claimant's injuries, and the amount of compensation to be paid therefor.

Claimant contends that he is completely and permanently disabled. There is no question but what claimant's condition is permanent, but the evidence does not sustain his claim of complete disability.

During the time which elapsed between the second injury and the date of his discharge, that is, from September 3d, 1932 to January 30th, 1933, claimant performed some of the duties of his position, and received his full salary of $160.00 per month; and claimant concedes that the amount paid him as salary as aforesaid should be deducted in determining the amount of compensation to which he is entitled.

The testimony in the record shows that between January 30th, 1933 and June 17th, 1936 claimant earned the sum of $218.50 in different employments, to wit: as a laborer for the CWA; foreman for CWA; weighing tomatoes; selling school supplies; as election judge; as court bailiff; and for jury service. There is nothing in the evidence to indicate that he was able to earn anything over and above the amount last stated. Prior to his injury the average amount which he earned was $1,920.00 per year. Under the evidence he is entitled to an award for partial permanent disability.

Under the provisions of Section 8D of the Workmen's Compensation Act a person who is partially incapacitated from pursuing his usual and customary line of employment is entitled to a sum "equal to fifty per centum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is

able to earn in some suitable employment or business after the accident."

Under the provisions of Section 7H3 of the Act, the amount of the respondent's liability is limited to Forty-eight Hundred Dollars ($4,800.00), and under Section 8J3 claimant's compensation is payable in weekly installments of Sixteen Dollars ($16.00) per week.

Under the evidence, claimant is entitled to recover the limit permitted by the Workmen's Compensation Act, to wit, the sum of $4,800.00. From this amount, however, there must be deducted as aforesaid the amount paid claimant for his salary between September 3d, 1932 and January 30th, 1933, to wit, Seven Hundred Seventy-eight Dollars and Eighty-four Cents ($778.84), leaving the net amount of the award Four Thousand Twenty-one Dollars and Sixteen Cents ($4,021.16).

Compensation has accrued from September 4th, 1932 to July 6th, 1936, to wit, Two Hundred (200) weeks, at $16.00 per week, to wit, the sum of Thirty-two Hundred Dollars ($3,200.00). Deducting the sum of $778.84 paid to claimant as his salary from September 3d, 1932 to January 30th, 1933 as aforesaid, leaves Twenty-four Hundred Twenty-one Dollars and Sixteen Cents ($2,421.16) as the amount payable to July 6th, 1936. The balance of said award, to wit, Sixteen Hundred Dollars ($1,600.00), is payable in One Hundred (100) weekly installments of $16.00 per week commencing on July 13th, 1936.

Award is therefore entered in favor of the claimant for the sum of $4,021.16, payable as follows: $2,421.16 forthwith; and the balance of $1,600.00 in 100 weekly installments of $16.00 per week, commencing July 13th, 1936.

This award being for personal injuries of a State employee is subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof*", approved July 2d, 1935 (Session Laws of 1935, p. 49).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the Road Fund, in the manner provided by such Act.

(Nos. 2774-2781-2783-2785-2787-2789-2793-2799-2813-2822, Consolidated—Claimants awarded $2,650.00.)

C. LOMBARDO, ET AL., No. 2774, CALIFORNIA WINE CO., No. 2781. GOLDEN MIST WINE CO., No. 2783, LAPERLA VINEYARD CO., No. 2785, PACIFIC WINE CO., No. 2787, FRANK CIMINO, No. 2789, FRUIT INDUSTRIES, LTD., No. 2793, VINCENT BONDI, No. 2799, JOE GREIN AND H. PAHLS, INC., No. 2813 AND E. G. LYONS AND RAAS CO., No. 2822, Claimants *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 8, 1936.

ALLEN H. SCHULZ, for claimants.

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

LICENSE FEES—*when deemed to have been paid under mutual mistake of fact—when award for refund of will be made.* Where claimants, in order to continue conduct of their business, paid license fees required under regulation of Liquor Control Commission, which were admitted by said commission to be in excess of amounts provided in statute, upon express promise of said commission that it would recommend a refund of such excess amounts so paid, as soon as said regulation under which paid could be rescinded, and records of such commission shows making of such promise and that such regulation was rescinded to conform to statute, payments of such excess amounts willl be treated as payments made under a mutual mistake of fact and an award made for refund thereof.

ILLINOIS LIQUOR CONTROL COMMISSION—*regulations of in conflict with statute—statute prevails.* Where regulations of State Commission created under statute are in conflict with expressed provisions of same, latter will prevail.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation has been filed in the above entitled cases that inasmuch as the above claims involve the same questions of fact and law and the claimants are represented by the same Attorney, all of said matters may be considered under the one stipulation of facts. Under each claim a refund of license fees previously paid under the direction of the Illinois Liquor Control Commission is requested.

The respective amounts of the several claims are as follows:

C. Lombardo, et al.	No. 2774	$400.00
California Wine Co.	2781	250.00
Golden Mist Wine Co.	2783	250.00
La Perla Vineyard Co.	2785	250.00
Pacific Wine Co.	2787	250.00

Frank Cimino	2789	250.00
Fruit Industries, Ltd.	2793	250.00
Vincent Bondi	2799	250.00
Joe Grein and H. Pahls, Inc.	2813	250.00
E. G. Lyons and Raas Co.	2822	250.00

Claimants are all engaged in the business of bottling bulk wines for resale in the City of Chicago. Two classes of distributors are provided for in the wording of the statute, i. e.

"A distributor who receives bulk wines from licensees in Illinois; and an importing distributor who may bring bulk wines into Illinois from other states. The fee for an importing distributor's license is $250.00. The fee for a distributor's license is $100.00. The license fee for the manufacture of wine and beer is $500.00."

Par. 25, Sec. 4, Art. 5, Chap. 43, Dram Shops Article 5, Section 1 of said Chapter 43 provides as follows:

"Licenses issued by the Department of Finance upon the direction of the Illinois Liquor Control Commission shall be in the following classes:

(a) Manufacturer's license
(b) Importing distributor's license
(c) Distributor's license
(d) Retailer's license

* * * *

(a) A manufacturer's license shall allow the manufacture, storage and wholesale distribution and sale of alcoholic liquors to licensees in the State and to persons without the State as may be permitted by law.

(b) An importing distributor's license shall allow the wholesale purchase, importation and storage of alcoholic liquors to licensees in this State and to persons without the state as may be permitted by law; and shall permit the purchase of alcoholic liquor in barrels, casks or other bulk containers and the bottling of such alcoholic liquors before resale thereof, but all bottles or containers so filled shall be sealed, labeled, stamped and otherwise made to comply with all provisions, rules and regulations governing manufacturers in the preparation and bottling of alcoholic liquors.

(c) A distributor's license shall allow the licensee to do all the things provided for in paragraph (b) of this section for an importing distributor's license, except the importation of alcoholic liquors."

Under the provisions of Article 3, Section 12, Par. 15, Chap. 43 of the Dram Shop Statute the Illinois Liquor Control Commission is given the following powers:

"(2) To fix by regulation the standards of manufacture of alcoholic liquors not inconsistent with Federal law in order to insure the use of proper ingredients and methods in the manufacture and distribution thereof, and to establish rules, not inconsistent with Federal laws, for the proper labeling of containers or barrels, casks or other bulk containers or bottles of alcoholic liquor manufactured or sold in this State."

Under what the Commission understood to be its power it adopted the following regulation:

"Any person who acquires any acoholic liquors and bottles or changes the containers of such alcoholic liquor, either in its original condition or after having rectified, blended or fortified the same, is deemed to be a manufacturer and is required to obtain a manufacturer's license."

Regulation 6(a) Joint Rules and Regulations of Illinois Liquor Control Commission and Department of Finance, effective February 1, 1934 and issued in pamphlet form. (Rescinded May 31, 1935.)

As originally promulgated, regulation 6(a) of the Joint Rules and Regulations of the Illinois Liquor Control Commission and the Department of Finance, would have required each claimant to procure a license to manfacture wine and beer, such license fee being Five Hundred ($500.00) Dollars. Prior to the first day of May, 1935, when the fiscal license period commenced, claimants objected to the payment of a license fee on the basis of Five Hundred ($500.00) Dollars, contending that under the statute they were not manufacturers but were distributors and that as such, each of claimants, other than C. Lombardo (Claimant No. 2774), were importing distributors and therefore subject to a license payment of only Two Hundred Fifty ($250.00) Dollars each, and that C. Lombardo was a distributor only and as such was subject only to the payment of a license fee of One Hundred ($100.00) Dollars.

The question of the construction of the Dram Shop Act and the regulation of the Commission and of the apparent conflict between the two was brought to the attention of the Commission prior to May 1, 1935. Claimants in each instance objected to the payment of a manufacturer's license of Five Hundred ($500.00) Dollars but was of necessity compelled to be licensed under the Illinois Law on May 1, 1935 or discontinue their business. Each of said claimants therefore paid the sum of Five Hundred ($500.00) Dollars for a Class B manufacturer's license; such payment being made under a written protest. The record shows that the Illinois Liqyor Control Commission at that time stated that it would recommend a refund as soon as the regulation could be rescinded to conform to the statute, and that the Department of Finance stated that it would not be necessary for claimants to

go through any legal procedure to obtain same. Claimants relied upon such instructions and filed no suits for temporary injunctions in regard to said funds. On May 31, 1935 Regulation 6(a) as above set forth, was duly rescinded by the unanimous vote of the Commission and a recommendation for the refund of the amount due the several claimants was sent to the Department of Finance, the Commission then stating that, "An importing distributor is given the right to bottle wine; that a Class C license is sufficient license to cover the applicant." An inquiry was directed by the Finance Department to the Attorney General's Office as to the power of the Department to make such refunds. Noting no specific provision in the statute authorizing a refund in a case of this kind, the Attorney General ruled that the Finance Department could not comply with the recommendation of the Liquor Control Commission. The claims were thereupon filed in the Court of Claims.

The court does not regard these claims as analogous to those in which a franchise tax has been paid under the terms of a statute then existing and which was later declared unconstitutional, in which cases as indicated in *The Arundel Corporation* vs. *State*, 8 C. C. R. 506, an award will be denied. The statute under which claimant was required to obtain his license was plain and specific. An importing distributor's license was stated to be Two Hundred Fifty ($250.00) Dollars, and a distributor's license One Hundred ($100.00) Dollars. The privilege which each was to enjoy by reason of said license was also clearly set forth under Paragraphs (b) and (c) of Article 5, Section 1, Chapter 43. We believe the overpayments made by claimants should be treated in each instance as a mistake of fact and that as such, a refund of the amount overpaid should be due.

"Where payment of a Franchise Tax is made under a mutual mistake of fact a refund will be made.

Comm. Nat. Bank & Trust Co. vs. *State*, 7 C. C. R. 122.

Fowler Mfg. Co., Ltd. vs. *State*, 8 C. C. R. 160.

"Claimant having inadvertently paid more than it was legally required to pay without any fault on its part, claimant should be reimbursed in the amount of such excess payment."

Automatic Recording Safe Co. vs. *State*, 8 C. C. R. 366.

We do not regard the conflicting regulations of the Illinois Liquor Control Commission as controlling, when in con-

flict with the expressed provisions of the statute, and it is apparent that the Commission was of the like opinion, for the conflicting regulation was promptly rescinded. An award is hereby recommended to the several claimants as follows:

C. Lombardo, J. Finocchiaro and J. Cumbo, operating as Lombardo Wine Co., No. 2774	$400.00
California Wine Co., Inc., No. 2781	250.00
Golden Mist Wine Co., Inc., No. 2783	250.00
LaPerla Vineyard Co., Inc., No. 2785	250.00
Pacific Wine Co., Inc., No. 2787	250.00
Fruit Industries, Ltd., No. 2793	250.00
Vincent Bondi, No. 2799	250.00
Joe Grein and H. Pahls, Inc., No. 2813	250.00
E. G. Lyons and Raas Co., Inc., No. 2822	250.00

It appears from the record that claimant Frank Cimino, No. 2789 is indebted to the State of Illinois in the sum of Five Hundred Fifty ($550.00) Dollars. An award is therefore made in favor of Frank Cimino in the sum of Two Hundred Fifty ($250.00) Dollars for the use of the State of Illinois; same to be credited by the Department of Finance upon the said indebtedness of Five Hundred Fifty ($550.00) Dollars due and owing by the said Frank Cimino to respondent.

(No. 2756—Claimant awarded $120.70.)

CLAUDE BAKER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

N. E. HUTSON, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for medical services under.* When State employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment and requires and is given medical treatment as a result thereof, the State becomes liable for the reasonable value thereof.

SAME—*claim for medical services—time within same must be filed not governed by Section 24 of.* Section 24 of Workmen's Compensation Act fixing time within which claim for compensation must be filed does not apply to claims filed for value of medical services rendered employee.

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

Prior to and on October 16th, 1934 claimant was an employee of the Illinois Emergency Relief Commission and was working for such employer at the canning center in Monticello, Illinois.

On the last mentioned date, claimant sustained accidental injuries to his thumb, which arose out of and in the course of his employment, and on November 15th, 1935 filed his complaint herein asking for compensation for the injuries so sustained, as well as for money paid and advanced for medical care, hospitalization, etc.

It is not questioned that both employer and employee on the date of the accident were operating under and bound by the terms and provisions of the Workmen's Compensation Act of this State.

The Attorney General moved to dismiss the case for the reason that application for adjustment of claim was not filed within the time required by Section 24 of the Workmen's Compensation Act.

Thereafter the Attorney General requested that his motion be considered as applicable only to the claim for compensation, as distinguished from the claim for medical and hospital services, and admitted that claimant was entitled to recover the sum of $120.70 for medical and hospital services incurred and paid by him.

Thereafter the claimant agreed that his claim might be dismissed as to all matters except the claim for medical and hospital services in the amount of $120.70.

Under the provisions of Section 8A of the Workmen's Compensation Act, the employer is required to furnish the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. The employer having failed to furnish such services, claimant was authorized to procure and pay for the same, and having done so, is entitled to be reimbursed therefor.

Under the previous decisions of this court the requirements of Section 24 of the Workmen's Compensation Act do not apply to a claim for medical, surgical or hospital services, as distinguished from compensation.

Under the stipulation in the record, claimant is entitled to an award in the amount of $120.70 for medical, surgical

and hospital bills incurred and paid by him in connection with the injuries so sustained by him as aforesaid.

The employer in this case being the Illinois Emergency Relief Commission, such award should be paid from the funds of such Commission hereto appropriated and set apart for the payment of compensation awards for injuries or death sustained or suffered by employees of such Commission, and not from the Road Fund or the General Fund of the State of Illinois.

We therefore recommend that payment be made by the Illinois Emergency Relief Commission to the claimant in the sum of One Hundred Twenty Dollars and Seventy Cents ($120.70), in the manner provided by law.

(No. 2913—Claimant awarded $6.12.)

H. CHANNON COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

A. L. SULLIVAN, for claimant.

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

SUPPLIES—*when award will be made for price of.* Where facts are undisputed that State received supplies, as ordered by it, and that bill therefor, which is unquestioned, was, due to error of employee of State institution not cleared before lapse of appropriation out of which same could be paid, an award for price thereof will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

From the record herein it appears that on March 19, 1934 claimant sold and delivered to respondent one dozen Bernard nippers or nail cutters at an agreed price of Six and 12/100 ($6.12) Dollars, for use at the Lincoln State School and Colony at Lincoln, Illinois. In a report under date of March 27, 1936, P. J. Waters, Managing Officer of said institution, states that said merchandise was received and that it was due to an error upon the part of one of the institution's employees that the invoice was not cleared for payment before the appropriation therefor had lapsed. Under such circumstances, as heretofore held in *Rock Island*

Sand and Gravel Co. vs. *State*, 8 C. C. R. 165 and other cases, claimant is clearly entitled to payment.

An award is therefore made in favor of claimant in the sum of Six and 12/100 ($6.12) Dollars.

(No. 2890—Claimant awarded $4.00.)

ADAM CONDER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

CLAIMANT, pro se.

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

MOTOR VEHICLE LICENSE FEE—*overpayment under mistake of fact—may be recovered.* Where it appears that motor vehicle license fee, in excess of amount lawfully due was made through mutual mistake of fact, an award for refund of such excess may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a return of Four ($4.00) Dollars on account of excess payment made by him for an automobile license for a Dodge sedan for the year 1934. The record shows that the horse power of said car was erroneously listed as 27.4 when it should have been 23.4. A report dated May 14, 1936 from the Secretary of State shows that the statement upon which the claim is based is correct and that claimant paid an excess fee of Four ($4.00) Dollars through said mistake.

Under the ruling heretofore followed, that excess license or franchise payments made by claimant under a mistake of fact will be refunded, claimant is entitled to an award in the present instance. (*Martin* vs. *State*, 8 C. C. R. 200.)

An award is therefore made in favor of claimant in the sum of Four ($4.00) Dollars.

(No. 2353—Claimant awarded $4,000.)

IZORA GREEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

CARL H. PREHS, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award for compensation under will be made.* Where State employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in his death, an award for compensation in accordance with the provisions of the Act, will be made to those entitled thereto under provisions thereof upon claim and application therefor being made within time fixed therein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed in this court on March 30, 1934, alleging that on November 14, 1933, the deceased, Charles R. Green received an injury by reason of an accident arising out of and in the course of his employment by the State of Illinois, which injury resulted in the death of the deceased on the 23rd day of December, 1933. The claimant is the wife of the deceased. Deceased was employed at the time of the accident as Captain of the Guards of the Illinois State Penitentiary located at Stateville, Illinois. He received $144.00 per month, and worked under the direct supervision of the Warden of the penitentiary. At the penitentiary, it is conceded, that employees and inmates are engaged in the manufacture of goods, manufacture of auto license plates, etc. in which power driven machines are used; that excavation and landscape work was being done in and about said institution and grounds and that there was a quarry at the penitentiary for the blasting of stone in which dynamite was used, which work the deceased supervised and personally directed.

The claimant further alleges that on the morning of November 14, 1933, the deceased had arrived at the institution to do his daily work, and was on the grounds of the penitentiary, and had given the witness, Andrew J. Patrick, another employee, instructions as to the nature of his work for the day in the license plate factory, and while proceeding along the roadway in front of the institution, he was struck and run down by an automobile driven by one Frank G. Parker. He was carried on the bumper for some fifty yards. Deceased was taken to the prison hospital.

Dr. Louis H. Miller in answer to written interrogatories stated that he was a physician and surgeon at Pana, and had given particular reference to the treatment of traumatic

injuries. He had graduated in 1909 and had hospital experience at St. Mary's at Chicago, and practiced at Pana, Illinois, since graduation, except for one year when he served as a ward surgeon at Embarkation Hospital, Newport News, Virginia. He is local surgeon for the B. & O. Railway Company and the Chicago & Eastern Illinois Railway Company, and had acted in such capacity for a number of years. He is also a surgeon for a number of local industries, such as coal mines, lumber yards, creameries, ice and cold storage plants, etc., and at that time had been doing surgical work for eight or ten doctors. After reciting his injuries, the doctor was of the opinion that death was directly due to an embolus, as the result of the injuries which occurred to deceased approximately six weeks prior to his death.

Dr. Frank J. Chmelik was also called as a witness. His qualifications were admitted by the Attorney General. He had been prison physician for the last seven years, and was still employed there. With reference to deceased's injuries, Dr. Chmelik testified that when he first saw him at the hospital, he was in terrible agony and shock; that he found both legs broken, a back injury, and a fracture of the left third transverse lumbar process. He stated that he had an opinion based upon a reasonable degree of medical certainty from those facts and from his observation and treatment and the injuries which he observed, that the cause of his death was the result of the injuries which he sustained, that is, a blood clot had become loose and either lodged in the brain or the heart.

Under the facts in this case, we are of the opinion that the deceased died as the result of injuries arising out of and in the course of his employment.

Testimony shows that the deceased left no children under sixteen years of age, and received a salary of $1,728.00 per year. No question arises as to notice or claim for compensation within six months or filing of application within one year. Award is therefore entered in favor of the claimant for the sum of $4,000.00.

From the date of the injury, which caused his death, up to the present time, September 8, 1936, 147 weeks has elapsed, and claimant is now entitled to $15.00 per week for said 147 weeks, or the sum of $2,205.00; the balance of said

award of $4,000.00, i. e., $1,795.00, should be paid at the rate of $15.00 per week.

This award being for the death of a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," approved July 2nd, 1935.

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval is payable from the appropriation from the general fund, in the manner provided by such Act.

(No. 2889—Claimant awarded $362.47.)

ILLINOIS CENTRAL RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

GRAHAM & GRAHAM, for claimant.

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

SERVICES—*rendered under contract with State—when award may be made for.* Where claimant rendered services under contract with State and payment has been refused solely on account of the lapse of the appropriation out of which payment should have been made, and amount of claim is unquestioned, an award for amount due therefor will be made.

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

On or about the 9th day of December, A. D. 1913 the Illinois Central Railroad Company and the Board of Administration of the State of Illinois (controlling the Lincoln State School and Colony) entered into a written contract covering the construction and maintenance of a certain railroad track serving the Lincoln State School and Colony at Lincoln, Illinois.

Pursuant to the terms and provisions of such contract the respondent is required to keep and maintain said track in good condition so long as it is used for the benefit or accommodation of the respondent. Such contract also provides that in case the respondent fails and neglects to maintain said track in good condition for a period of five days

after being notified of the necessity for repairs, the respondent shall be required to reimburse said claimant for all expenses so incurred, including ten per cent on labor to cover supervision and use of tools, and fifteen per cent on material to cover freight and cost of handling.

During the months of January and February, 1935, and again in the month of May, 1935, it became necessary to make certain repairs on said tracks in order to keep the same in good condition. Such repairs were made by the claimant in accordance with the aforementioned contract and a statement of the cost thereof was rendered to the respondent. The cost of such repairs so made in January and February, 1935, as aforesaid, aggregated the sum of $352.81; and the cost of such repairs so made in the month of May, 1935, as aforesaid, aggregated the sum of $9.67.

Itemized statement of the amount due the claimant for the repairs made in January and February, 1935, as aforesaid, was presented to the respondent on April 15th, 1935. It seems that such statement was lost or mislaid, and thereafter other statements covering the amount claimed for the repairs made during January and February, 1935, as well as for the repairs made during May, 1935, were presented to the respondent. Payment was then refused on the ground that the appropriation out of which such payment should have been made had lapsed.

The claim has been checked and investigated by the acting chief clerk of the Lincoln State School and Colony and found to be correct, and no reason is suggested why the same should not be paid.

Where services have been rendered or supplies furnished to the State, and payment therefor has been refused solely on account of the lapse of the approprition out of which payment should have been made, and where the amount of the claim is not questioned, an award will be made for the amount due for such services and supplies. *Journal Printing Co.* vs. *State*, 8 C. C. R. 673; *Schreiber Lumber Co.* vs. *State*, 8 C. C. R. 381; *Rock Island Sand and Gravel Co.* vs. *State*, 8 C. C. R. 165.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Sixty-two Dollars and Forty-seven Cents ($362.47).

(No. 2651—Claimant awarded $2,500.00.)

AMORA ELLEN JONES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

JAMES J. MCCAULEY and L. B. PALMER, for claimant.

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

WORKMEN'S COMPENSATION ACT—*when award for compensation under will be made.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in his death, an award for compensation will be made to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the terms thereof.

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

Claimant is the widow of Charles I. Jones who, on the 7th day of December, A. D. 1934, was an employee of the Illinois Emergency Relief Commission. Mr. Jones had been assigned by the Emergency Relief Commission to the State Highway Department and was working under the supervision of George A. Whipple, Highway Maintenance Supervisor of the respondent, at or near the intersection of S. B. I. Routes 23 and 19 near Harvard, Illinois. About 9:30 a. m. on December 7th, 1934 Mr. Jones was acting as a flagman, flagging traffic for other members of the gang who were then working on the highway. While in the performance of his duties, he was struck by an automobile driven by one Claire W. Floyd, and sustained injuries which resulted in his death on the same day.

Under the evidence in the record we find as follows:

1. That on December 7th, 1934 said employer and said employee were operating under and bound by the terms and provisions of the Workmen's Compensation Act of this State.

2. That on said date claimant's intestate sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same date.

3. That notice of the accident was given and claim for compensation on account thereof was made in accordance with the requirements of Section 24 of the Workmen's Compensation Act.

4. That said decedent left him surviving the claimant, Adora Ellen Jones, his widow, whom he was under legal obligation to support, and no child or children under the age of sixteen years.

5. That the wages of claimant's intestate at and prior to the time of the accident were Thirty-five Cents (35c) per hour, and counsel for claimant concede that she is entitled only to the minimum award under Section 7A of the Act.

6. That under the provisions of Section 7A of the Workmen's Compensation Act, claimant is entitled to an award in the amount of $2,500.00.

The employer in this case being the Illinois Emergency Relief Commission, such award should be paid from the funds of such Commission heretofore appropriated and set apart for the payment of compensation awards for injuries or death sustained or suffered by employees of such Commission, and not from the Road Fund or the General Fund of the State of Illinois.

We therefore recommend that payment be made by the Illinois Emergency Relief Commission to the claimant in the sum of Twenty-five Hundred Dollars ($2,500.00), in the manner provided by law.

(No. 2491—Claimant awarded $2,055.60.)

LOUIS A. KARCHER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

WILLIAM H. SCHUWERK, for claimant.

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

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

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

Prior to and on September 2d, 1933 claimant was employed by the respondent as a steward at the Southern Illi-

nois Penitentiary located at Menard. On the last mentioned date, while in the performance of his duties, claimant was passing from the officers' kitchen to the kitchen for convicts at a time when an institution truck passed within four feet of him, by reason whereof some foreign substance was thrown into his left eye. He immediately went into the office and had such foreign substance removed, and also applied argarol to such eye. It continued to bother him, and on September 4th he went to his home at McLeansboro where he consulted Dr. Hall. During the time which intervened between September 2d and September 24th he was also treated by Dr. Burnett, the institutional doctor at Menard. On September 24th he went to the Haley Eye Infirmary at Centralia for treatment. The condition of the eye continued to grow worse, and it was finally determined that it would have to be removed. The eye was therefore removed on February 21st, 1934.

Claimant was paid $90.00 for temporary total disability, and has specifically waived all claim for compensation for such disability.

Upon consideration of the record in this case we find as follows:

1. That on September 2d, 1933 said employer and said employee were operating under and bound by the terms and provisions of the Workmen's Compensation Act of this State.

2. That on said date said employee sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given and claim for compensation on account thereof was made in accordance with the requirements of Section 24 of the Workmen's Compensation Act.

4. That the earnings of the claimant during the year next preceding the injury were $1,368.00, and that the average weekly wage was $26.30.

5. That at the time of the accident in question, claimant had two children under the age of sixteen years, to wit, Dorris May Karcher, 10, and Louis William Karcher, 8.

6. That necessary medical, surgical and hospital services were not provided by the respondent; that the claimant secured such services at his own expense, and became indebted therefor in the total amount of $162.00.

7. That claimant is entitled to have and receive from said respondent the following sums, to wit:

a) $15.78 per week for a period of 120 weeks commencing on September 3d, 1933, to wit, the sum of $1,893.60, for the loss of the sight of the left eye.

b) $162.00, being the amount of medical, surgical and hospital bills necessarily incurred by claimant.

8. That the total amount of the compensation to which claimant is entitled as above set forth has accrued prior to the date of this hearing.

Award is therefore hereby entered in favor of the claimant in the sum of Two Thousand Fifty-Five Dollars and Sixty Cents ($2,055.60), payable as follows:—

To Louis A. Karcher the sum of Eighteen Hundred Ninty-Three Dollars and Sixty Cents ($1,893.60);

To Louis A. Karcher, for the use of Haley Eye Infirmary, the sum of One Hundred Sixty-Two Dollars ($162.00);

Total, Two Thousand Fifty-Five Dollars and Sixty Cents ($2,055.60.)

This award being for injuries sustained by a State employee, is subject to the provisions of an Act entitled "*An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof,*" approved July 2d, 1935.

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval is payable from the General Fund, in the manner provided by such Act.

(No. 2603—Claimant awarded $397.40.)

SOPHIE LAGERHAUSEN, EXECUTRIX OF THE ESTATE OF MARTHA ROSEN, DECEASED, WIDOW OF ERNEST ROSEN, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

HAMLIN & CLEARY, for claimant.

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

WORKMEN'S COMPENSATION ACT—*Section 21 of—death of party to whom compensation due before award made—extinguishes right to payments due after death of beneficiary—administrator of beneficiary leaving no depend-*

ents entitled to payments from death of employee to death of beneficiary. Under Section 21 of the Workmen's Compensation Act the death of a beneficiary who leaves no dependents does not preclude all right to compensation but only extinguishes the right to receive payments which become due after death of beneficiary and executor of beneficiary, who dies without leaving dependents is entitled to the weekly payments of the award from the death of the employee to the death of beneficiary, even though the beneficiary died before the award was made.

SAME—*Section 7 of—determination of annual earnings of employee employed on hourly basis where record fails to disclose number of hours per day or days per week worked.* Where employee is paid at hourly rate and evidence fails to disclose number of hours per day, or number of days per week, but the custom was operate work in which he was employed throughout entire year, the court is justified, especially in view of Paragraph 23, Chapter 48 of Revised Statutes of Illinois, 1935, in determining the annual earnings of such employee, in assuming that such employment was for eight hours per day for three hundred days per year.

SAME—*when award for funeral expenses cannot be made.* When an award for compensation for death of employee is made and for expenses incurred for medical treatment furnished such employee, required as result of injury, resulting in his death, no award can be made for funeral expenses of employee.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The original claim in this matter was filed February 16, 1935, setting up that on the 12th day of June, 1934, Ernest Rosen received an injury by reason of an accident arising out of and in the course of his employment, which injury resulted in his death on the 14th day of June, 1934; that Martha Rosen was his widow, and at the time of his death, he was past 65 years of age.

It is stipulated that he was working on Lake Street, the same being a State Highway, approximately one and one-half miles West of Addison, Illinois, in DuPage County, at the time of his accident, cutting the weeds and grass on the shoulders of the State Highway, with a mower drawn by a team of horses.

He left no children under sixteen years of age and no one dependent upon him for support, except his wife.

After the original complaint was filed, his widow, Martha Rosen, died on the 9th day of March, 1935, and Sophie Lagerhausen was appointed executrix of her last will and testament.

A stipulation appears in the record wherein it is agreed by and between the Attorny General and counsel for the claimant, that the deceased, Ernest Rosen, died as the result

of an injury which arose out of, and in the course of his employment. The record does not disclose how long he had been in the employ of the State, nor the number of days each year that he worked. It does appear that he received as compensation, $0.45 per hour, but the record does not disclose the number of hours per day that he worked nor the number of days per week.

The following is an itemized list of expenses that were incurred with the accident and the burial of the deceased:

G. F. Schroeder, M. D., Itasca, Illinois	$11.00
E. W. Marquardt, 185 S. York St., Elmhurst, Illinois	15.00
Helen Marquardt, nurse, Elmhurst, Illinois	8.00
Vivian Johnson, R. N., 417 Main St., Glen Ellyn, Ill.	5.00
Dolores Fox, R. N., 417 Main St., Glen Ellyn, Ill.	8.00
Elmhurst Hospital, Elmhurst, Illinois	43.75
Dzur & Karstens, undertakers, Roselle, Illinois	560.00
Rev. Zersen, minister at funeral, Itasca, Illinois	10.00
Mr. Elberts, Itasca, Illinois	2.00
Emil Westphal, Sr., Church Sexton	2.00

It appears that the Highway Department had notice of Mr. Rosen's injury on the date that it occured and of his death, shortly thereafter.

Under Section 7 of the Workmen's Compensation Act, the amount of compensation which shall be paid for an injury to the employee resulting in death shall be:

(a) If the employee leaves any widow, child or children whom he was under legal obligations to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less than $2,500.00 nor more than $4,000.00.

Section 10

(d) As to employees in employment in which it is the custom to operate throughout the working days of the year, the annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(e) As to employees in employment in which it is the custom to operate for a part of the whole number of working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of three hundred as a basis for computing the annual earnings: *Provided*, the minimum number of days which shall be so used for the basis of the year's work shall be not less than two hundred.

(g) Earnings for the purpose of this section shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings.

(i) To determine the amount of compensation for each installment period, the amount per annum shall be ascertained pursuant thereto, and such amount divided by the number of installments per annum.

Under Section 21 of the Workmen's Compensation Act.

Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto.

It is admitted that the deceased was receiving $0.45 per hour, but the number of hours he worked per day and the number of days he was employed during the year, is not in the record. The court will, therefore, consider eight (8) hours as a day's work, pursuant to Paragraph 23, Chapter 48, Revised Illinois Statutes for 1935. Work on roads, keeping them in repair, free from obstructions, ice, etc. is carried on during the entire year. Therefore, we consider this employment as being one in which it is a custom to operate throughout the working days of the year. The employment being for eight (8) hours per day and three hundred (300) days per year, at $0.45 per hour, as we figure it, the weekly wage would be $20.76, and one-half thereof is $10.38.

In the case of the *Board of Education* vs. *Industrial Commission*, 298 Illinois 61, it was held that:

' Under Section 21 of the Workmen's Compensation Act the death of a beneficiary who leaves no dependents does not preclude all right to compensation but said section only extinguishes the right to receive payments which become due after the death of the beneficiary, and hence the administrator of a beneficiary who dies without leaving dependents is entitled to the weekly payments of the award from the death of the employee to the death of the beneficiary, even though the beneficiary died before the award was made.

From June 14, 1934 to March 9, 1935, the time of the death of the deceased's widow, is a total of thirty-eight and two-sevenths weeks.

We, therefore, recommend an award in favor of claimant's intestate, in the sum of Three Hundred Ninety-Seven Dollars and Forty Cents ($397.40.)

Claimant also asked for expenses on account of the doctor, nurse hire, hospital and funeral bills, including a $10.00 fee for the minister, service for the church sexton, undertaker and other expenses that are not itemized amounting to the sum of $694.75. We find no authority in law for the allowance of funeral expenses in cases of this kind. We do, however, allow, $41.00 for Dr. G. F. Schroeder; $15.00 for Dr. E. W. Marquardt; $8.00 for Helen Marquardt, Nurse; $5.00 for Vivian Johnson, Nurse; $8.00 for Dolores Fox and $43.75 for Elmhurst Hospital for medical and nursing service or the further sum of $120.75.

The total amount of such award is now past due.

This award being for the death of a State employee, is subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the method of payment thereof," approved July 2nd, 1935.

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval is payable from the Road Fund, in the manner provided by such Act.

(No. 2575—Claimant awarded $1,950.62.)

DOROTHY C. LYNCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

WHITTY & MCGAH, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation within time fixed in, condition precedent to jurisdiction of court.* Where the record fails to show that application for compensation was filed within one year after the date of the injury for which same is sought, the court is without jurisdiction to proceed with hearing.

SAME—*furnishing medical services not compensation—claim for medical services not claim for compensation—not governed by Section 24 of Act—when award may be made for.* Furnishing medical, surgical, nursing and hospital services by employer cannot be considered as payment of compensation and claim for moneys expended for such services by employee, where employer failed to furnish same, cannot be considered as claim for compensation and is not governed by Section 24 of Act requiring claims for compensation to be made within six months after accident and application filed for same within one year thereafter, and an award may be made for same upon claim made within period of general statute of limitations.

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

Prior to and on the 17th day of February, A. D. 1934, claimant was in the employ of the respondent as a stenographer and file clerk in the Automobile License Department of the Secretary of State, located at 120 South Ashland Boulevard, Chicago, Illinois. The office in which she was working was a room approximately 100x80 feet in dimensions

with a 16-foot ceiling. There was a balcony about ten feet above the floor, on which the records were kept. The office was equipped with an electrically-driven paper-cutting machine, which was about three feet high, three feet wide, and three feet deep; an electrically-driven photostatic machine about four or five feet high, two or three feet wide, and about five feet in length; also an electrically-driven multigraphing machine.

There was an iron stairway leading from the main floor to the balcony, which stairway was about three feet wide, and was constructed at an angle of about sixty degrees.

Claimant, in the performance of her work, had certain duties to perform in connection with the aforementioned photostatic machine which was located on the balcony. On the morning of February 17th, 1934 she was carrying some photostatic prints from the balcony to the floor below. In descending the stairway, the heel of one of her shoes caught in one of the stair treads when she about seven feet above the floor, and she fell forward. The side of her body struck the guard rail at the side of said stairway, and she fell head foremost to the terraza floor. She was rendered unconscious and was bleeding from the nose and ears, and was immediately taken to the University Hospital where it was found that she had sustained a basal skull fracture, concussion of the brain, a lacerated mouth, and loosening of the teeth; multiple contusions on both legs; and a severe cut on her left hip. She remained in a semi-conscious condition for a week, and continued at the hospital until April 9th, 1934 under the care of Dr. Karl A. Meyer who continued to treat her after she left the hospital. On December 14th, 1934 she was referred by Dr. Meyer to Dr. Theodore T. Stone, a specialist in diseases of the nervous system, who treated her until April 23d, 1935, at which time he discharged her as much improved. During all of the time from the date of the accident to the date of taking testimony herein, to wit, on June 3d, 1936, she continued to remain under the care of Dr. Meyer, and is still under his care. During the interval between the time she left the hospital and June 3d, 1936, she was also treated by several other physicians.

On August 1st, 1934 she reported back to work, and has continued in the employ of the respondent to this date. Although she has been able to perform only a part of the

duties she previously performed, she has received her wages in full during all of the time from the date of the accident to the date of the hearing herein.

Claimant filed her original complaint herein on January 14th, 1935, setting forth the facts and circumstances connected with the accident, and setting forth also that she has received her salary regularly from the Secretary of State from February 17th, 1934 to October 1st, 1934, in the amount of $800.00. The prayer for relief as set forth in the original petition is as follows:

"Claimant therefore asks for an award in the sum of $3,417.52 *for medical expenses as per bill of particulars attached herewith.*"

The Bill of Particulars sets forth numerous items of medical, surgical, nursing and hospital expenses, together with an estimate of future expenses of the same kind, but does not purport to make any claim for compensation for the injuries sustained by the claimant.

On May 12th, 1936, pursuant to leave of court theretofore had and obtained, claimant filed her amended complaint herein in which she asks for compensation for the injuries sustained by her as aforesaid. Such amended complaint sets forth that inasmuch as claimant has received her salary, no claim is made for temporary disability. She asks, however, for compensation for permanent disability, as well as for medical, surgical and hospital expenses incurred to the date of filing such amended complaint, in the amount of $2,052.62.

If the claimant has any right to an award, it is by virtue of the Workmen's Compensation Act of this State, and the Attorney General has raised the following questions with reference to such right of recovery:

1. Were the claimant and respondent operating under the Workmen's Compensation Act at the time of the accident in question?

2. If so, did the claimant make claim for compensation and file her application for compensation within the time required by Section 24 of the Workmen's Compensation Act?

3. If claimant and respondent were operating under the Compensation Act, and claim for compensation was made, and application for compensation was filed within the time required by such Act, is the claimant entitled at this time to compensation for the injuries so sustained by her?

The questions raised by the Attorney General will be considered in the order above set forth.

I.

Were the claimant and respondent operating under the provisions of the Workmen's Compensation Act at the time of the accident in question?

The answer to this question depends upon whether the respondent at the time of the accident was engaged in an extra-hazardous business or enterprise within the meaning of those words as used in Section Three of the Compensation Act. Section Three of such Act states that the provisions of the Act shall apply automatically "to all employers and all their employees engaged in any department of the following enterprises or businesses which are declared to be extra-hazardous, namely:" * * *

"7½. Any enterprise in which sharp-edged cutting tools, grinders implements are used", etc. * * *

"8. Any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein * * * each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous", etc.

It appears from the record that the office of the respondent in which claimant was working at the time of the accident was equipped with an electrically-driven paper-cutting machine; an electrically-driven photostatic machine; and an electrically-driven multigraphing machine; that such machines were subject to municipal ordinance regulation, to wit, the provisions of the Electrical Code of the City of Chicago with reference to the installation, alteration, use and inspection of electrical equipment; and were also subject to statutory regulation, to wit, the provisions of the Health, Safety and Comfort Act of this State (Hurd's Revised Statutes, 1933, Ch. 48, Par. 103, Sec. 1). The record also shows that the paper-cutting machine is equipped with a knife or blade thirty inches in length.

In the case of *Hahnemann Hospital* vs. *Ind. Com.*, 282 Ill. 316, it was held that the respondent was engaged in an extra-

hazardous business or enterprise on account of the fact that the building in which the hospital was conducted was subject to municipal ordinance regulation with reference to the inspection of the building, and the boilers and electric wiring therein.

In the case of *Board of Education* vs. *Ind. Com.*, 298 Ill. 61, it was held that a school district was engaged in an extra-hazardous enterprise on account of the fact that the school building (a two-story structure) was heated by a steam boiler, which was subject to municipal ordinance regulation. In that case the employee was a janitor who was injured while washing windows.

In the case of *Board of Education* vs. *Ind. Com.*, 301 Ill. 611, it was held that a high school district which was conducting a manual training department was engaged in an extra-hazardous business or enterprise on account of the fact that some of the machinery in the manual training school was subject to statutory regulation for the protection of the public, to wit, the provisions of the aforementioned Health, Safety and Comfort Act.

In the case of *Ascher Bros.* vs. *Ind. Com.*, 311 Ill. 258, it was held that a moving picture theatre was an extra-hazardous business or enterprise on account of the fact that the projecting machine in use at the theatre was subject to municipal ordinance regulation for the protection of employees and the public. In that case the employee was an usher who was injured by striking his leg against a seat.

In the case of *Forest Preserve District* vs. *Ind. Com.*, 357 Ill. 389, it was held that the Forest Preserve District was engaged in an extra-hazardous business or enterprise because, in the work of maintaining such district, picks, shovels, axes, and other sharp-edged tools were used in connection with the work.

The record herein clearly shows that the enterprise in which the claimant was engaged at 120 South Ashland Boulevard as aforesaid was an enterprise in which statutory or municipal ordinance regulations are imposed for the protection and safeguarding of employees or the public therein, and in which sharp-edged cutting tools or implements are used.

It appears, therefore, that the enterprise in which claimant was employed at the time of the accident in question was

an extra-hazardous enterprise within the meaning of those words as used in Section Three of the Act.

Such enterprise in question being extra-hazardous, every employee of the respondent engaged therein, regardless of the nature of the duties of such employee, is brought within the terms of the Act. *Ascher Bros.* vs. *Ind. Com.*, 311 Ill. 258; *Illinois Publishing and Printing Co.* vs. *Ind. Com.*, 299 Ill. 189; *Porter* vs. *Ind. Com.*, 301 Ill. 76; *Stevens* vs. *Ind. Com.*, 346 Ill. 495; *Forest Preserve District* vs. *Ind. Com.*, 346 Ill. 389.

Angerstein, in his work *"The Employer and the Workmen's Compensation Act"*, in referring to this question, says (p. 36):

> "There is no doubt that the rule has been established in this State by the Supreme Court's decision that where the employer's business or enterprise is under the Compensation Act, then all employees of such employer in any department of such business or enterprise are under the Act."

We therefore conclude that the claimant and respondent at the time of the accident were operating under and bound by the provisions of the Workmen's Compensation Act.

II.

Did the claimant make claim for compensation and file her application for compensation within the time required by Section twenty-four of the Workmen's Compensation Act?

Section 24 of the Workmen's Compensation Act provides that "no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident; provided that, in any case, unless application for compensation is filed with the Industrial Commission within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file such application shall be barred."

There is no question but what notice of the accident was given as required by said Section 24. There is some testimony in the record with reference to claim for compensation having been made, but no application for compensation was filed within one year as required by said Section 24. The only application filed by the claimant within the time required by the Act was the original application herein, which was filed

on January 14th, 1935. Such application by the terms thereof, specifically asks for an award "in the sum of $3,417.52 *for medical expenses as per Bill of Particulars attached herewith.*" The Bill of Particulars contains an itemized statement showing different items of charges for medical, surgical, nursing and hospital services, but makes no claim whatsoever for compensation for the injuries sustained.

On May 12th, 1936 claimant filed her amended complaint herein in which she makes claim for compensation as well as for medical, surgical and hospital expenses. The only *application for compensation* which was filed by the claimant, therefore, was filed on May 12th, 1936, which was over two years after the date of the injury. There is nothing in the record to show that any compensation was paid to the claimant and consequently there is nothing to show compliance with Section 24 of the Act. The original complaint herein sets forth that claimant had been paid her salary in full by the Secretary of State from the date of the accident to October 1st, 1934, and apparently that was the reason no claim for compensation was then made. Our Supreme Court has held in numerous cases that compliance with the aforementioned requirements of Section 24 of the Workmen's Compensation Act is jurisdictional. *Haiselden* vs. *Ind. Com.*, 275 Ill. 114; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262; *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *Chicago Board of Underwriters* vs. *Ind. Com.*, 322 Ill. 511; *Duquoin School District* vs. *Ind. Com.*, 329 Ill. 543; *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386.

The filing of the original complaint herein was not in compliance with the requirements of Section 24, for the reason that such complaint was for medical, surgical, nursing and hospital services only, and did not ask for compensation for the injuries sustained by the claimant. Section 8 of the Compensation Act provides that the furnishing of medical, surgical and hospital services by the employer shall not be construed as the payment of compensation. If the furnishing of such services cannot be considered as compensation, surely claim for payment for such services cannot be considered as a claim for compensation.

Application for compensation not having been filed within the time required by Section 24 of the Act, we have no jurisdiction to allow an award therefor.

However, we have heretofore held that inasmuch as Section 8 of the Act provides that the furnishing by the employer of medical, surgical or hospital services shall not be construed as the payment of compensation, the requirements of Section 24 do not apply to cases within the Act which have reference only to claims for medical, surgical or hospital services as distinguished from claims for compensation for injuries. *Lester Wolfe* vs. *State*, 8 C. C. R. 333; *I. L. Elmendorf* vs. *State*, 8 C. C. R. 548; *Dick Taden* vs. *State*, No. 2843, decided at the June, 1936, term of this court.

Under Section 8 of the Compensation Act, the employer is required to provide the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited however, to that which is reasonably required to cure or relieve from the effects of the injury.

The respondent having failed to furnish the necessary first aid, medical, surgical and hospital services, the claimant was authorized to procure the same, and the reasonable cost and expense thereof is a legitimate charge against the respondent.

It appears from the record that the claimant was very seriously injured and that she has incurred medical, surgical and hospital bills to a large amount in being cured of the effects of the injury, and that she is still under the care of Dr. Meyer therefor. The record shows that the expenses incurred by the claimant in this behalf, to the date of the hearing herein, to wit, June 3d, 1936, are as follows:

Miss Gertrude Kidder, professional nurse, 51 days		$408.00
Miss Johnson, professional nurse, 2 nights		12.00
University Hospital:		
Hospital room fee, February 17 to April 9, 1934	$357.00	
Nurses' board from February 17 to April	104.00	
Skull and pelvis examination on February 17, 1934	25.00	
Laboratory fees	6.00	
Prescriptions	6.97	
Telephones	2.20	
		501.17
Dow Optical Company, one pair glasses		17.35
Dr. L. C. Hoffman, professional services		10.00
Dr. Ambrose C. Brown, D.D.S., professional services		250.00
Dr. W. T. Carlisle, professional services		9.00
Dr. Scupham, professional services		10.00
Dr. Karl Meyers, professional services		531.00

Dr. Francis Gerty, professional services	25.00
Dr. Theodore T. Stone, professional services	150.00
W. E. Barnes & Sons, Druggists; medicine etc.	12.10
Dr. Nathaniel H. Adams, professional services	5.00
Dr. James P. Fitzgerald, professional services	10.00
Total	$1,950.62

There is nothing in the record which indicates that any of such bills are unreasonable.

In view of the conclusion we have reached, it is unnecessary to discuss the third point raised by the Attorney General.

An award is therefore entered in favor of the claimant for the use of the persons hereinafter set forth, and in the following amounts, to wit:

Dorothy C. Lynch, for use of Gertrude Kidder	$ 408.00
Dorothy C. Lynch, for use of Miss Johnson	12.00
Dorothy C. Lynch, for use of University Hospital	501.17
Dorothy C. Lynch, for use of Dow Optical Company	17.35
Dorothy C. Lynch, for use of Dr. L. C. Hoffman	10.00
Dorothy C. Lynch, for use of Dr. Ambrose C. Brown	250.00
Dorothy C. Lynch, for use of Dr. W. T. Carlisle	9.00
Dorothy C. Lynch, for use of Dr. Scupham	10.00
Dorothy C. Lynch, for use of Dr. Karl Meyer	531.00
Dorothy C. Lynch, for use of Dr. Francis Gerty	25.00
Dorothy C. Lynch, for use of Dr. Theodore T. Stone	150.00
Dorothy C. Lynch, for use of W. E. Barnes and Sons	12.10
Dorothy C. Lynch, for use of Dr. Nathaniel H. Adams	5.00
Dorothy C. Lynch, for use of Dr. James P. Fitzgerald	10.00

The evidence shows that claimant's condition is gradually improving, and that she is still under the care of Dr. Meyer. It is therefore ordered that the court retain jurisdiction of this case and that the same be continued generally for the purpose of making such other or further orders herein with reference to such future medical, surgical or hospital services, if any, as may be reasonably required to cure or relieve from the effects of the injury;—in accordance with the provisions of the Workmen's Compensation Act of this State.

(No. 2847—Claimant awarded $97.21.)

MATERIAL SERVICE CORPORATION, a Corporation, claimant, vs. STATE OF ILLINOIS, respondent.

Opinion filed September 10, 1936.

D'ANCONA, PFLAUM & KOHNSAAT, for claimant.

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

SUPPLIES—*when award may be made for.* Where facts are undisputed that State received supplies, as ordered by it, and that bill therefor which is not questioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award will be made for the price thereof on claim filed within reasonable time.

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

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for One Hundred Thirty Eight and 34/100 ($138.34) Dollars for a balance due on orders for sand, stone and cement, bought by respondent through the Division of Highways. The account consists of three items, the first being for a balance of Twenty Six and 52/100 ($26.52) Dollars arising out of a conflict in two purchase orders dated May 10, 1929. As plaintiff's claim was not filed in the Court of Claims until February 20, 1936 and a period of five years has elapsed since the claim first accrued, no award can be made therefor as the Act creating the Court of Claims provides,

"Every claim against the State, cognizable by the Court of Claims shall be forever barred unless the claim is filed with the secretary of the court within five years after the claim first accrues."

Sec. 10, Act creating Court of Claims, etc., approved June 25, 1917.

It further appears that on July 22, 1933 and on July 25, 1933 claimant sold and delivered to respondent at the Illinois State Penitentiary at Joliet 41.37 yards of sand at an agreed price of Forty Seven and 25/100 ($47.25) Dollars, being invoice No. 71533. Payment therefor has not been made, but credit memoranda of Fourteen and 61/100 ($14.61) Dollars are admittedly due leaving a balance due claimant in the sum of Thirty Two and 64/100 ($32.64) Dollars.

On May 31, 1935 a further order for sand was placed with claimant at an agreed price of Sixty Four and 57/100 ($64.57) Dollars.

A letter dated April 30, 1936 from the Warden to Director Bowen states that the State records show receipt of the material in question. It further appears that said bills were not paid because they were not cleared before the appropriation out of which they might have been paid had lapsed.

Where the State has received material or supplies delivered on valid orders therefor and payment has not been made because of the lapse of the appropriation out of which payment could have been made, an award for the amount due will be made. (*Rock Island Sand & Gravel* vs. *State*, 8 C. C. R. 165.)

AN AWARD IS THEREFORE MADE in favor of claimant in the sum of Ninety Seven and 21/100 ($97.21) Dollars, in full discharge of its claim.

(No. 2474—Claimant awarded $4,450.00.)

JENNIE MEYER AND LAURA MEYER MOORE, BY JENNIE MEYER, HER NEXT FRIEND, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.
Subsequent order filed April 13, 1937.

TRAPP & TRAPP, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under will be made.* Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in his death, an award for compensation will be made to those entitled, in accordance with the provisions of such Act, upon claim made and application for same being filed within time provided therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

On February 15, 1934 Oran H. Meyer was employed by respondent as a maintenance patrolman, Division of Highways, Department of Public Works and Buildings, and on the day in question was dragging the shoulders on S. B. I. Route No. 121 several miles south of Hartsburg, Illinois. He was driving a State-owned truck which he kept at his home and which was assigned to him for such duties as might require his attention. As Mr. Meyer was driving the truck across the right-of-way of the Illinois Central Railroad Company about 4:30 p. m., on the day in question, he was struck by a freight train and received injuries, as a result of which he instantly died. He left surviving him, Jennie Meyer, his widow, and Laura Meyer, his daughter, who was then fifteen years of age and residing at home with her parents. The

record discloses that the daughter, Laura Meyer, was thereafter married on the 19th day of May, A. D. 1934. Claim was filed on August 1, 1934 by the surviving widow and the said daughter for an award under the terms of the Workmen's Compensation Act, for the sum of Four Thousand Four Hundred Fifty ($4,450.00) Dollars. A further application was filed on May 4, 1936 that any allowance herein made be made payable as a lump sum award.

There seems no dispute of fact or law involved. The deceased employee entered the employ of the State August 23, 1933 and his death occurred in an accident which arose out of and in the course of his employment. An unsuccessful suit was brought against the Illinois Central Railroad Company in connection with said accident. His wages are shown to have been One Hundred ($100.00) Dollars per month or One Thousand Two Hundred ($1,200.00) Dollars per year. A certified birth certificate discloses that the daughter, Laura Meyer, was born February 22, 1919 and was therefore fifteen years of age at the time of her father's death. She was thereafter married as above indicated on the 19th day of May, 1934.

Under the provisions of Sec. 7 of the Workmen's Compensation Act, Chap. 48, Rev. Statutes of the State of Ill., 1933, claimant, Jennie Meyer, is entitled to receive from respondent as compensation for her husband's death, the sum of Four Thousand ($4,000.00) Dollars.

This amount is increased to Four Thousand Four Hundred Fifty ($4,450.00) Dollars by reason of the daughter, Laura Meyer, being under the age of sixteen (16) years at the time of her father's death.

Section 7, Par. (a) of the Workmen's Compensation Act further provides,

"That when an award has been made under this paragraph, where the deceased left at the time of his death a widow and one child under sixteen years of age, the compensation payments and death benefits to the extent the same were increased because of the existence of said child, insofar as same have not been paid, shall cease and become extinguished when said child arrives at the age of eighteen years, if said child is physically and mentally competent at that time."

The salary of deceased being One Hundred ($100.00) Dollars per month, his weekly salary would figure Twenty Three and 07/100 ($23.07) Dollars per week, of which claim-

ants are entitled to fifty-five (55) per cent until such time as Laura Meyer Moore becomes eighteen (18) years of age, when the payments should be reduced to fifty (50) percent as provided by statute, and such part of the Four Hundred Fifty ($450.00) Dollars as then remains unpaid should be withheld.

IT IS THEREFORE ORDERED that an award of Four Thousand Four Hundred Fifty ($4,450.00) Dollars is hereby entered and recommended, Four Thousand ($4,000.00) Dollars of which is in favor of Jennie Meyer and Four Hundred Fifty ($450.00) Dollars is in favor of Laura Meyer Moore, payment of said award to be made in the following manner to wit:

Fifty (50) per cent of the weekly wage would be Eleven and 53/100 ($11.53) Dollars. Five (5) per cent of such weekly wage would be One and 16/100 ($1.16) Dollars. By July 25, 1936 payment for one hundred twenty seven (127) weeks will have accrued. Immediate payment therefore in favor of Jennie Meyer is hereby authorized in the sum of One Thousand Four Hundred Sixty Four and 31/100 ($1,464.31) Dollars, and monthly payments thereafter on the basis of Eleven and 53/100 ($11.53) Dollars per week until the remaining sum of Two Thousand Five Hundred Thirty Five and 69/100 ($2,535.69) has been paid; that there shall also be paid to Laura Meyer Moore at the present time the sum of One Hundred Forty Seven and 32/100 ($147.32) for the amount due her up to July 25, 1936, and monthly payments thereafter on the basis of One and 16/100 ($1.16) Dollars per week until the further sum of Three Hundred Two and 68/100 ($302.68) Dollars has been paid to her, subject, however, to the further provision that said payment to Laura Meyer Moore shall cease on February 22, 1937, subject to the provisions of Sec. 7, Par. (a) of the Workmen's Compensation Act of Illinois; said Laura Meyer Moore at which time arrives at the age of eighteen (18) years. Jurisdiction of this cause is retained until that time by reason of the statute in such case made and provided.

Due consideration has been given to the application filed herein, asking that a commutation of the award be made to an equivalent lump sum. The court deems the award as herein made to be to the best interests of claimant and respondent and in keeping with the spirit of the Workmen's Compensation Act, and the application for a lump sum award is hereby denied. This award being subject to the provisions of an

Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2, 1935 (Sess. Laws 1935, p. 49) and being, by the terms of such Act, subject to the approval of the Governor is hereby, if and when, such approval is given, made payable from the Road Fund in the manner provided for in such Act.

ORDER.

This cause again coming on to be heard upon notice to show cause, under date of February 9, 1937, why payments of $1.16 per week should not be discontinued after February 22, 1937, and no cause now appearing, it is hereby ordered that payments heretofore authorized in the sum of $1.16 per week to Laura Meyer Moore are hereby ordered discontinued as of February 22, 1937, in accordance with the terms of the original award herein made.

(No. 2921—Claimant awarded $341.81.)

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF WABASH RAILWAY COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

N. S. BROWN and L. H. STRASSER, for claimant.

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

SUPPLIES—*services—when award for value of may be made.* Where it is conceded that services were rendered State and supplies furnished to it, on the order of a duly authorized State department, and that bill therefor, which is not questioned, was not presented for payment before lapse of appropriation out of which same could be paid, an award will be made for amount of, on claim filed within reasonable time.

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

During the year 1934 the Division of Highways of the respondent entered upon a project for the widening of S. B. I. Route 16 (Union Street) in the City of Litchfield, in Montgomery County, at the point of intersection of said S. B. I.

Route 16 with the right-of-way of the Wabash Railway Company. Such project contemplated the widening of such highway from twenty-four feet to thirty-six feet.

In carrying out the details of said project and to make it effective, it became and was necessary to change the location of certain electric signals then being maintained and operated by claimants at said grade crossing. At the request of said Division of Highways, the claimants agreed to furnish the necessary materials and labor and to make the necessary changes in the location of said signals but at the sole cost and expense of the State of Illinois, which cost and expense the said Division of Highways on behalf of the respondent agreed to assume and pay. The work in question was completed by claimants to the entire satisfaction and approval of the Division of Highways, and a bill for the actual cost of said work and materials, to wit, $341.81, was duly presented to the Division of Highways on September 25th, 1935. The Division of Highways found the bill to be correct in every particular, but the claim was not paid on account of the fact that the appropriation out of which payment should have been made had lapsed prior to the time the bill was presented.

It is admitted by the Division of Highways that the materials were furnished and services rendered by the claimants, in accordance with the aforementioned agreement, and no objection is made to the prices charged therefor.

The claim was presented within a reasonable time, and no reason is suggested why the claim should not be paid.

Where services have been rendered or supplies furnished to the State, and payment therefor has been refused solely on account of the lapse of the appropriation out of which payment should have been made, and where the amount of the claim is not questioned, an award will be made for the amount due for such services and supplies. *Journal Printing Co. vs. State*, 8 C. C. R. 673; *Schreiber Lumber Co. vs. State*, 8 C. C. R. 381; *Rock Island Sand and Gravel Co. vs. State*, 8 C. C. R. 165.

Award is therefore entered in favor of the claimant for the amount of its claim, to wit, Three Hundred Forty-One Dollars and Eighty-One Cents ($341.81.)

This award being for materials and labor furnished for the improvement of a State Bond Issue Route, payment should be made from the Road Fund.

(No. 2900—Claimants awarded $250.00.)

DAVID RECHER AND ERNEST RECHER, DOING BUSINESS AS D. RECHER & COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1936.

Claimants, pro se.

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

LICENSE FEE—*when deemed to have been paid under mutual mistake of fact—when award for refund of will be made—Illinois Liquor Control Commission—regulations of in conflict with statute—statute prevails.* The facts in this case are the same as those in *C. Lombardo, et al., vs. State*, 2774, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein alleges that claimants are engaged in the bottling of bulk wines for resale, and in the operation of such business, purchase wines in bulk from licensees in Illinois and other states and then bottle the same for resale to licensed retailers or distributors in Illinois and elsewhere.

Under the provisions of the Illinois statute existing at the time license was issued to claimants an importing distributor's license fee was Two Hundred Fifty ($250.00) Dollars. The license fee under the statute at that time for the manufacture of wine and beer was Five Hundred ($500.00) Dollars. (Par. 25, Sec. 4, Art. 5, Chap. 43, Ill. Rev. Statutes.)

Under the ruling made at the date in question by the Illinois Liquor Control Commission, claimants were compelled to pay Five Hundred ($500.00) Dollars for a license. The status and nature of claimants' business was a question of fact. The statute in regard to the amount of license required was explicit. The fact that the Illinois Liquor Control Commission temporarily announced a ruling in conflict therewith did not supercede the statute. This case is similar to the case of *C. Lombardo, et al*, vs. *State*, C. of C. No. 2774 and cases consolidated therewith, in which an award has heretofore been entered.

It appearing from the record that the claimants herein are entitled to a refund of the excess fee complained of, an award is hereby made in favor of claimants in the sum of Two Hundred Fifty ($250.00) Dollars.

(No. 2421—Claimant awarded $266.67.)

SOUTHERN KRAFT CORPORATION, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 13, 1936.

PAUL O'DONNELL, for claimant.

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

FRANCHISE TAX—*paid under protest—when award for refund of may be made, even through amount paid into State treasury.* Where franchise tax is paid under protest and appropriate proceedings are instituted in court of general jurisdiction to restrain Secretary of State from paying same into State treasury, upon which injuction so restraining payment is issued, an award for refund will be made, where law under which said tax was paid is declared unconstitutional, where said State officer, having notice of such injunction pays amount of same into State treasury.

COSTS—*interest—State not liable for payment of.* The State is not liable for the payment of costs or interest, in the absence of a statute subjecting it to such liability and in this State there is no such statute.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed for the sum of Three Hundred Dollars ($300.00.) The claimant alleges that on April 8, 1933, it filed in the Circuit Court of Sangamon County, Illinois, a suit against Edward J. Hughes, Secretary of State for the State of Illinois, alleging that the claimant had been assessed by the defendant, Secretary of State, the sum of $266.67 as franchise taxes for one and one-third years covering the period from March 18, 1933 to July 1, 1934; that the law under which said assessment was made was unconstitutional and void, and that the claimant did not owe any tax for that period. It also alleged that it had paid to said defendant the sum of $266.67 under protest pending the determination of the constitutional question involved.

The Circuit Court of Sangamon County, Illinois, entered a restraining order in accordance with the prayer of the bill, commanding the defendant, the Secretary of State, to hold said money until the further order of court, and to refrain from paying the same over to the Treasurer of the State of Illinois.

On April 9, 1933, a certified copy of said order was served upon the Secretary of State, but through mistake and error,

the copy of order was misplaced or misfiled, and did not receive the attention of the proper employees, and the said sum of $266.67 was wrongfully and contrary to the order of the court paid over to the Treasurer of the State of Illinois, and claimant requests that an award be entered in its favor in the sum of $266.67 principal, and $16.00 interest from May 1, 1934 to May 1, 1935, at the rate of 6 per cent per annum, and the sum of $12.00, being the court costs taxed against the defendant in the case which claimant filed in the Circuit Court of Sangamon County, Illinois, or a total of $294.67.

In the case of *Stratton, etc.* vs. *St. Louis Southwestern Railway Co.*, 353 Ill. 273, and *Stratton, etc.* vs. *United States Pipe & Foundry Co.*, 353 Ill. 516, it was held by the Supreme Court of this State that that part of the law imposing said tax upon which this claim was filed, was unconstitutional and void.

In the case of *People* vs. *Pierce*, 6 Ill. 553, it was held that the State never pays costs except where particularly required to do so by statute.

It appears from the record that the franchise tax in question, in the sum of $266.67 was paid by claimant under protest. It had been decided by the Circuit Court of Sangamon County, Illinois, that the Secretary of State should be enjoined from collecting the tax in question. Through inadvertence the sum was paid to the State Treasurer. Clearly, the claimant is entitled to a refund of this money actually paid over in the sum of $266.67.

There is, however, no statute which permits the payment of costs and interest. It is the law of this State that creditors may be allowed to receive interest at the rate of five (5) per cent per annum on all moneys after they become due or where money has been withheld by an unreasonable and vexatious delay of payment. After money has been turned over to the State Treasurer, it cannot be withdrawn from the State Treasury unless a proper appropriation be made by the State Legislature. Under the statutes, the Legislature will not make appropriations for claims against the State unless an award has been made by the State Court of Claims. There being no authority for us to award court costs and interest, that part of the claim will be denied and we recommend that the Legislature make an appropriation in favor of the Southern Kraft Corporation, in the sum of $266.67.

(No. 2937. Claimant awarded $3,398.60.)

ANNA TULL, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 14, 1936.

R. I. DOVE, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under will be made.* Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, resulting in his death, an award for compensation will be made to those entitled, in accordance with the provisions of such Act, upon claim made and application filed within time provided therein.

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

Claimant is the widow of Oscar Tull, who, on the 6th day of May, A. D. 1936, was employed by respondent as patrolman's first helper in the Maintenance Department, Division of Highways, Department of Public Works and Buildings. About 2:10 p. m. on May 6th, 1936, Mr. Tull was engaged in repairing S. B. I. Route No. 16, three and one-half miles east of the city of Shelbyville, and while so employed, and while in the course of his employment, was struck by an automobile driven by one Norman Seifkin of Decatur, Illinois, and sustained injuries which resulted in his death the same day.

Under the stipulation in the record and the law, we find as follows:

1. That on May 6th, 1936, said employer and said employee were operating under and bound by the terms and provisions of the Workmen's Compensation Act of this State.

2. That on said date claimant's intestate sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same date.

3. That the respondent had actual notice of the accident the day it occurred, and claim for compensation was made by filing the application therefor within six months after the accident, in accordance with Section 24 of the Workmen's Compensation Act.

4. That said decedent left him surviving the claimant, Anna Tull, his widow, whom he was under legal obligation to support, and no child or children under the age of sixteen years.

5. That said employee was not engaged in the employment of the respondent for the full year immediately preceding the accident; that the annual earnings of persons of the same class as claimant's intestate, in the same employment and same location during the year next preceding the injury, were Eight Hundred Forty-nine Dollars and Sixty-five Cents ($849.65); and that the average weekly wage of such persons during such period was Sixteen Dollars and Thirty-four Cents ($16.34).

6. That under the provisions of Section 7A of the Act, claimant is entitled to an award in the amount of Thirty-three Hundred Ninety-eight Dollars and Sixty Cents ($3,398.60), payable in weekly installments, in accordance with the provisions of such Act.

IT IS THEREFORE ORDERED that an award be and the same is hereby entered in favor of the claimant, Anna Tull, for the sum of Thirty-three Hundred Ninety-eight Dollars and Sixty Cents ($3,398.60), payable in Four Hundred Fifteen (415) weekly installments of Eight Dollars and Seventeen Cents ($8.17) each commencing on May 7th, A. D. 1936, and one final installment of Eight Dollars and Five Cents ($8.05).

Claimant is now entitled to have and receive from the respondent the sum of One Hundred Seventy-nine Dollars and Seventy-four Cents ($179.74), being the amount of compensation which has accrued from May 7th, A. D. 1936 to October 8th, A. D. 1936; and the remainder of said award, to wit, Thirty-two Hundred Eighteen Dollars and Eighty-six Cents ($3,218.86), will be paid by said respondent in Three Hundred Ninety-three (393) weekly installments of Eight Dollars and Seventeen Cents ($8.17) each commencing on October 15th, A. D. 1936, and one final installment of Eight Dollars and Five Cents ($8.05).

This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof*", approved July 2, 1935 (Session Laws 1935, p. 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such

approval is given, made payable from the Road Fund in the manner provided by such Act.

The personal representative of the decedent may have a right of action against the owner or driver of the car which struck the decedent. If such right of action exists, and a judgment is obtained by such personal representative, the rights of the State of Illinois to be reimbursed for the amount paid by it in accordance with this award, are fixed by the terms and provisions of the Workmen's Compensation Act.

In order that the rights of the State in that behalf may be fully protected, it is ordered that this cause be and the same be continued generally, and that this court retain jurisdiction thereof for the purpose of making such further orders herein as may be justified by future developments, and as may be in accordance with law.

(No. 2904—Claim denied.)

ARTHUR ANDERSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

Claimant, pro se.

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

COURT OF CLAIMS—*jurisdiction.* The Court of Claims has no jurisdiction where the claimant has or has had a proper remedy in courts of general jurisdiction.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant, Arthur Anderson, of 7600 S. Halsted Street, Chicago, Illinois, seeks an award of Two Hundred Fifty Thousand ($250,000.00) Dollars as he avers in his complaint "against the Supreme Court of Illinois and the Appellate Court and the State of Illinois, for the miscarriage of justice in the case known as *Anderson* vs. *Anderson*, 339 Ill. p. 400." The Attorney General has filed a motion to dismiss on the ground that the Court of Claims has no jurisdiction where the claimant has or has had a proper remedy in the courts of law.

The above case of *Anderson* vs. *Anderson* was begun as a partition suit in the Superior Court of Cook County in

which the defendant Arthur Anderson filed a cross-bill, asking for a divorce on the ground of cruelty. The Supreme Court on appeal, reversed the judgment of the lower court in part and remanded the cause with directions. Whatever transpired in that case and regardless of what differences may have arisen therein between the claimant Arthur Anderson and the various ones who represented him as counsel, and regardless of the outcome of that litigation, the Court of Claims does not have jurisdiction for the hearing of his complaint in regard thereto. The method of appeal in civil litigation from one court to another until the final tribunal which has jurisdiction of such action is reached, is definitely provided for by our laws. The Court of Claims is not such an appellate tribunal.

The motion of the Attorney General is allowed and the case dismissed.

(No. 2883—Claim denied.)

JOHN F. BARNIER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

CHAS. G. PALMER, for claimant.

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

CIVILIAN CONSERVATION CORPS—*not a State institution—employees of not employees of State.* The Civilian Conservation Corps is not a State institution nor are the persons enrolled therein employees of the State of Illinois.

WORKMEN'S COMPENSATION ACT—*Civilian Conservation Corps—person enrolled therein not to be entitled to compensation under—essentials of claim for compensation.* It is essential as the basis of a right to compensation for accidental injuries that the employee allege and prove that the relation of employer and employee existed at time of accident in question and where there is nothing in the complaint to indicate that the claimant was at any time in the employ of the State, nor anything to indicate that he was performing any work for the State or that he was being paid by the State, no award can be made.

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

Claimant filed his complaint herein on April 15th, 1936 and alleges therein that on July 19th, 1934 he was enrolled in the Civilian Conservation Corps at Camp St. Charles, West

Chicago, Illinois; "that on September 3d, 1935 claimant was assigned to road work under Mr. Charles F. Selby, Project Superintendent of 1673 Company CCC, doing manual labor on soil erosion control;" that on September 3d, 1935 while in the course of his employment and while getting out of a dump truck, he slipped and fell, landing on the ground "stiff-legged and flat-footed, and fell face forward, causing severe spinal impaction", which has resulted in a partial paralysis which has progressively become worse.

Claimant remained in bed in his quarters under the care of the camp doctor until October 12th, 1935, at which time he was removed to Fort Sheridan. He remained at the Fort Sheridan Hospital until December 9th, 1935, at which time he was removed to Edward Hines, Jr. Hospital, Hines, Illinois, where he is still confined.

Claimant in his complaint alleges that he is completely and permanently disabled.

The Attorney General has moved to dismiss the case on the ground that there is no liability on the part of the respondent under the facts alleged in the complaint.

It is essential as the basis of a right to compensation, that the employee allege and prove that the relation of employer and employee existed at the time of the accident in question. Angerstein "The Employer and the Workmen's Compensation Act of Illinois", 1935 Supplement, p. 289.

There is nothing in the complaint to indicate that the claimant was at any time in the employ of the State of Illinois, nor is there anything to indicate that he was performing any work for the State of Illinois, or that he was being paid by the State.

The Civilian Conservation Corps is not a State institution, nor are the persons enrolled therein employees of the State of Illinois.

As to whether the claimant is entitled to compensation under any Federal law, we express no opinion, as that matter is not before us.

Under the facts set forth in the complaint herein, we have no authority to allow an award, and the motion of the Attorney General must therefore be sustained.

Motion sustained. Case dismissed.

(No. 2418—Claim denied.)

MATTIE B. JONES, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

JOHN R. MCSWEENEY, for claimant.

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

HIGHWAYS—*maintenance of, governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

NEGLIGENCE—*personal injury.* The State is never liable for the negligence of its servants or agents, in the absence of a statute making it so liable and where complaint shows that claim is based on such negligence there can be no award.

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

On June 25th, 1932 claimant was driving an automobile in a northerly direction on S. B. I. Route 44. At a point just southeast of the corporate limits of the city of Manhattan, she lost control of the car on account of wet pavement there, and the car skidded onto the shoulder of the highway, and toppled into a drainage ditch located on said highway at a distance of about eleven feet from the concrete slab.

Claimant alleges that as a result of such accident she sustained severe and permanent injuries, and on August 28th, 1934 filed her complaint in this court in which she asks for an award in the amount of $10,000.00 for the injuries so sustained.

Claimant bases her right of recovery upon the alleged negligence of the respondent in the maintenance of its said highway, and particularly with reference to the shoulder thereof, and the drainage ditch immediately adjacent thereto.

The Attorney General has moved to dismiss the case on the ground that there is no liability on the part of the respondent under the facts set forth in the complaint.

In the maintenance of its hard-surfaced roads, the State is engaged in the exercise of a governmental function.

Chumbler vs. *State,* 6 C. C. R. 138.
Stoddard vs. *State,* 6 C. C. R. 27.
Bucholz vs. *State,* 7 C. C. R. 241.
Baumgart vs. *State,* 8 C. C. R. 220.

The law is well settled that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents under the doctrine of *respondeat superior*, in the absence of a statute making it so liable.

City of Chicago vs. *Williams*, 182 Ill. 135.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
Gebhardt vs. *Village of LaGrange Park*, 354 Ill. 234.
Braun vs. *State*, 6 C. C. R. 104.
Chumbler vs. *State*, 6 C. C. R. 138.
Bucholz vs. *State*, 7 C. C. R. 241.
Baumgart vs. *State*, 8 C. C. R. 220.
Ryan vs. *State*, 8 C. C. R. 361.

There is no statute making the State liable in cases of this kind, and the motion of the Attorney General must therefore be sustained.

Motion sustained. Case dismissed.

(No. 2316—Claim denied.)

JAMES L. POWELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

JOHN R. MCSWEENEY, for claimant.

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

NEGLIGENCE—*personal injury—respondant superior.* The facts in this case are similar to those in *Jones* vs. *State*, No. 2418, *ante*, and the opinion in that case is applicable here.

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

Claimant filed his complaint herein on January 18th, 1934 and alleges therein that on August 8th, 1933 he was crossing Michigan Avenue at the intersection thereof with 44th Street, in the City of Chicago, crossing from the southwest to the southeast corner of said intersection; that while he was crossing said street as aforesaid, and while he was in the exercise of all due care and caution, he was struck by an automobile owned by respondent, and driven by its agent, Thomas Phillips, an oil inspector of said respondent; and that as a result thereof claimant sustained serious and permanent in-

juries;—for which he claims damages in the amount of $5,000.00.

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

The law is well settled that the State in the exercise of its governmental functions, is not liable for the negligence of its servants and agents under the doctrine of *respondeat superior*, in the absence of a statute making it so liable. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; *Braun* vs. *State*, 6 C. C. R. 104; *Chumbler* vs. *State*, 6 C. C. R. 138; *Bucholz* vs. *State*, 7 C. C. R. 241; *Baumgart* vs. *State*, 8 C. C. R. 220; *Childress* vs. *State*, 8 C. C. R. 223; *Ryan* vs. *State*, 8 C. C. R. 361.

There is no statute imposing a liability upon the respondent in cases of this kind, and the motion of the Attorney General must therefore be sustained. Motion sustained. Case dismissed.

(No. 2199—Claim denied.)

HARRY POSTLEWAIT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

GROSSMAN, GROSSMAN & SISSMAN, for claimant.

OTTO KERNER, Attorney General; JOHN KASSERMAN and CARL DIETZ, Assistant Attorney Generals, for respondent.

WORKMEN'S COMPENSATION ACT—*burden of proof in claims under.* The general rule of law that the burden of proof is upon the plaintiff to prove his case by a preponderance or greater weight of the evidence is applicable to claims under the Workmen's Compensation Act.

SAME—*when claim for compensation under cannot be sustained.* Where complaint charges loss of vision of eye, the claimant must prove that such loss was due to accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment and if evidence adduced is insufficient to do so, no award can be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

In a complaint filed June 29, 1933 claimant alleges that while he was employed as an attendant at the Chicago State Hospital at Dunning, Illinois on February 16, 1933, he was

assaulted by a negro inmate who struck him violently in the left eye, causing claimant to immediately lose the sight thereof and resulting in the complete loss of vision in said eye. Claimant avers that he received compensation for two weeks after said assault and he seeks an award for whatever amount of compensation for loss of time and loss of vision he may be entitled to, under the Workmen's Compensation Laws provided by the statutes of the State of Illinois.

Respondent denies that claimant has suffered any serious impairment of vision in any accident arising out of and in the course of his employment and denies that claimant is entitled to any award herein.

Claimant testified that on February 16, 1933 while in the course of his duties as an attendant at said hospital about 3 o'clock in the morning, he was struck in the left eye by the patient, one William Thomas; that he was immediately taken by a Mrs. Lochy from that portion of the institution to the hospital division, and an ice pack was put on his eye; that the hospital doctors called on him and that he remained in the hospital for about two weeks; that about the 1st day of March he called on Dr. Noble. No other witnesses were examined as to the accident itself or the circumstances surrounding same, but four doctors testified as to examinations made by them of claimant's eyes; two, i. e. Dr. Nathan H. Fox and Dr. Samuel Brown testifying on behalf of respondent, and Dr. Wm. L. Noble and Dr. Daniel W. Eiss being called by claimant.

After his accident claimant remained at the State Institution at Dunning until the 27th day of February, 1933 when he was sent to the Illinois Eye and Ear Infirmary, where he was examined by Dr. Fox. He was again examined by Dr. Fox on March 8, 1933. He was also examined by Dr. Samuel Brown at the Infirmary on December 19, 1933. Claimant was for some reason not satisfied with the examination by Dr. Fox and was examined by Dr. William L. Noble the fore part of March, 1933 and on two or three other occasions thereafter. Dr. Daniel W. Eiss of Chicago examined claimant in consultation with Dr. Noble on the 15th day of March, 1933. He again made an examination about December 17, 1933 just prior to becoming a witness at the hearing. Dr. Noble testified that at his first examination in March he made the routine

examination of patient to see whether he had any vision in the eye or not and that the patient returned two or three times thereafter; that the right eye had practically normal vision, but that the inside of the left eye was cloudy and that he could hardly make out the lines of the macula or the center part of the retina; that in his opinion the claimant is without the faculty of vision in the left eye in the sense of distinguishing objects; that the loss of eye sight in the left eye is permanent and that in his judgement the eye ball itself is progressively degenerating. Dr. Noble further testified on cross-examination that the cloudiness and also the wiping out of the lines of the macula could be explained by trauma and that it could also be explained by other conditions; that he would not say that it was trauma but that it could be caused by trauma. Dr. Noble subjected the patient to malingering tests without producing any evidence of increase of vision of the left eye.

Dr. Daniel W. Eiss testified that he examined the claimant for the first time, in consultation with Dr. Noble, about the 15th of March, 1933. He obtained a history of the case from the claimant and then made an objective examination of patient's left eye. At that time he said he found the temple side of the eye discolored due to some previous subcutaneous hemorrhage; that this condition later disappeared. A further examination was made of the interior of the eye ball, the cornea, the macula and the optic nerve or optic disc. This witness stated that the patient could apparently see only about five feet away with the left eye but could not distinguish objects; that the witness then resorted to the malingering test by obscuring first the right eye and giving the patient the idea that he was seeing with the right eye when in fact he was seeing with his left, then reversed the lenses and that he found the patient was not malingering. Dr. Eiss testified that there is a softness to the left eye ball; that the degenerative process is a very slow one, but that same may in a few years extend to and affect the good eye; that the patient can see light but cannot distinguish objects and that from an industrial viewpoint there is a total loss of use of the left eye.

Dr. Nathan H. Fox, who has been connected with the Illinois Eye and Ear Infirmary in Chicago since 1921, testified that in his first examination of plaintiff on February 27, 1933

he received the statement of plaintiff that he could see only shadows with his left eye; that he then made a physical examination of both eyes; found no evidence of external injury to the left eye, the cornea and tension were normal and the pupil was of normal size and shape, reacting normally to light and accommodation; that he could find no pathology to explain the loss of sight in the left eye and that there was no evidence of trauma at that time. That the patient was insistent upon receiving a certificate at that time that he had lost the sight of the left eye; that he declined to give such letter and requested the patient to return for further examination; that the patient later returned on March 8, 1933; that another physical examination was made of his eyes at that time and same were found to be normal; that at that time, having become suspicious of the patient, a malingering test was given by apparently testing the lenses which he was then using in glasses that he was then wearing; that a plus 16 lens was placed before the right eye and a minus 1/4 lens was placed before the left eye. The lens placed on this test before the right eye is a very powerful lens having plus 16 diopters. A lens of that nature when placed before a normal eye will practically abolish sight at a distance of twenty (20) feet in-so-far as the reading of chart letters is concerned. The minus 1/4 lens placed before plaintiff's left eye is practically like a window glass and would not interfere with the eye sight at all; that the patient was apparently not aware of the type of lenses that were being used. This test was given a second time and was again repeated by an Interne, Dr. F. M. Whitsell. The patient read the chart at 20/30 which is close to normal; such reading of necessity being done with the left eye, and that as a result of such examination the witness was of the opinion that the patient was malingering, and that he had sustained no loss of vision from the injury complained of. Dr. Fox further testified that the retina was normal and the tension of the eye was normal on the occasion of his first examination, and that on the second examination the eye ball was found to be normal.

Dr. Samuel Brown, a resident Ophthalmologist at the Illinois Eye and Ear Infirmary, testified that he examined plaintiff on December 19, 1933; that he gave him a subjective and then an objective test; that the glasses which plaintiff

was then wearing indicated some fault in vision and corrected his unaided vision somewhat; that tension of both eyes was normal; that the right pupil was four millimeters in size and the left pupil was seven and one-half by eight millimeters in size; that this condition of the left pupil indicated to him that some drug might have been used in that eye to dialate the pupil; that the latter reacted sluggishly to light, and that he then subjected the patient to a malingering test, the description of same showing it to be similar to that employed by Dr. Fox; that the patient was apparently unaware of the change that had been made in the lenses used in the test and that he was able to read the chart 20/50, thereby indicating to the witness that the patient was a malingerer; that there was no indication of trauma to the eye ball or eye socket at the time of his examination. This witness further testified that the sluggishness of the pupil of the patient's eye could have been due to the use of drugs. Dr. Brown testified that he found no degenerative or inflammatory process of any kind.

It is impossible to reconcile the testimony of the several doctors. Their examinations, however, were not made in unison, but at different times, and they have testified as to plaintiff's condition as they observed it on the occasion of their respective examinations. If one reputable witness testifies to having seen and observed a definite thing occur it is immaterial how many others may not have seen or observed such occurrence. In the present case two reputable responsible eye specialists have testified positively to the fact that the claimant, when subjected to malingering tests, was found to be able to read with no uncertainty, and that in their opinion the patient was malingering and that the eye in question had not suffered loss of vision due to any trauma. The fact that on other occasions plaintiff submitted himself to examination by other physicians, and under his condition at such times such other physicians were unable to detect any signs of malingering does not sufficiently negative the proof that exists against him.

The burden is upon the plaintiff to establish proof that the loss of vision of his eye was due to an accident which occurred in the course of and growing out of his employment. The record is not sufficient to support such claim and an award is denied and the claim dismissed.

(No. 2493—Claim denied.)

JAMES M. PURCELL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

McFARLAND, MORGAN & McFARLAND, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application for same within time fixed therein, a condition precedent to jurisdiction.* Where it appears from face of complaint for allowance of compensation under provisions of Workmen's Compensation Act that application for compensation was not filed within time fixed in Act, court is without jurisdiction to proceed with hearing, making claim and filing application for compensation being a condition precedent to jurisdiction of court.

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

Prior to and on April 20th, 1932 claimant was employed by the respondent as an attendant in the psychiatric ward of the Research and Educational Hospital located at 1819 West Polk Street, Chicago, Illinois.

On the last mentioned date, while in the performance of his duties, and while standing on a chair for the purpose of closing and sealing a transom in the fumigating clothes room, claimant slipped and fell, and thereby sustained a fracture of the upper end of the right humerus.

Claimant was treated at the hospital for four days and then went to his home, where he remained until June 29th, 1932, at which time he returned to his former employment.

On August 27th, 1934 claimant filed his complaint herein, in which he seeks to recover compensation for the injuries so sustained by him as aforesaid.

The Attorney General contends that the claim should be dismissed for the reason that claim for compensation was not made within six months after the accident, and application for compensation was not filed within one year after the date of the injury, or within one year after the date of the last payment of compensation.

If claimant has any right to an award, it is by virtue of the terms and provisions of the Workmen's Compensation Act of this State, and in order to be entitled to an award, he must bring himself within the provisions of such Act.

The record clearly shows that claim for compensation was not made and application for compensation was not filed within the time required by the Compensation Act. Our Supreme Court has held in numerous cases that the making of claim for compensation and the filing of application therefor within the time required by the Workmen's Compensation Act is jurisdictional. *Haiselden* vs. *Ind. Com.*, 275 Ill. 114; *Bushnell* vs. *Ind. Com.*, 276 Ill. 262; *Inland Rubber Co.* vs. *Ind. Com.*, 309 Ill. 43; *Chicago Board of Underwriters* vs. *Ind. Com.*, 322 Ill. 511; *Duquoin School District* vs. *Ind. Com.*, 329 Ill. 543; *City of Rochelle* vs. *Ind. Com.*, 332 Ill. 386.

Under the facts appearing in the record we have no authority to allow an award, and the case is therefore dismissed.

(No. 2907—Claim denied.)

DONALD K. SIMPSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 10, 1936.

ELLIS & HAMILTON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim and filing application for compensation within time required by Act, a condition precedent to jurisdiction of court.* Making claim and filing application for compensation within time fixed by Workmen's Compensation Act is a condition precedent without which court is without jurisdiction to proceed with hearing.

EQUITY AND GOOD CONSCIENCE—*when award on grounds of cannot be made.* The provisions of Paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely define the jurisdiction of the court and do not create a new liability against the State nor increase or enlarge an existing liability and limit jurisdiction of Court of Claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

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

Prior to and on the 10th day of May, A. D. 1935 claimant was in the employ of the respondent as an assistant recreational supervisor at St. Charles School for Boys at St. Charles, Illinois. On the last mentioned date, while in the

course of his employment, claimant was assaulted with a shovel by two inmates who were then and there in his charge, and who were attempting to escape from such institution.

Claimant filed his complaint herein on May 21st, 1936, in which he alleges that he sustained serious and permanent injuries as the result of the aforementioned assault upon him, and in which he asks for an award in the sum of $10,000.00 as compensation for such injuries.

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

Claimant in his reply brief states that it was not his purpose or intention to apply for compensation under the Compensation Act, and states that he relies for his recovery on Paragraph four of Section six of the Court of Claims Act, which provides that this court is authorized "to hear and determine all claims and demands, legal and equitable, liquidated or unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience, discharge and pay."

The meaning and effect of this provision of the Court of Claims Act was considered in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, where this court, after an exhaustive review of the previous cases on the subject, said (p. 221):

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

The law as laid down in the Crabtree case has been followed by this court in numerous cases decided since that time.

It therefore becomes necessary for the claimant to bring himself within the provisions of a law giving him the right to an award, before we are authorized to allow such award.

In the conduct and maintenance of its penal institutions the State is engaged in a governmental function. It is a well settled rule of law that the State in the exercise of its governmental functions is not liable for the negligence of its servants or agents in the absence of a statute making it so liable.

Hollenbeck vs. *County of Winnebago*, 95 Ill. 148.
City of Chicago vs. *Williams*, 182 Ill. 135.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
Gebhardt vs. *Village of LaGrange Park*, 354 Ill. 234.
25 R. C. L. p. 407, Sec. 43.

This rule has been applied by this court in numerous cases.

Peterson vs. *State*, 6 C. C. R. 77.
Perry vs. *State*, 6 C. C. R. 81.
Braun vs. *State*, 6 C. C. R. 104.
Chumbler vs. *State*, 6 C. C. R. 138.
Crabtree vs. *State*, 7 C. C. R. 207.
Bucholz vs. *State*, 7 C. C. R. 241.
Morrissey vs. *State*, 8 C. C. R. 40.
Baumgart vs. *State*, 8 C. C. R. 220.
Pelli vs. *State*, 8 C. C. R. 324.
Ryan vs. *State*, 8 C. C. R. 361.
Rheman vs. *State*, 8 C. C. R. 556.

Consequently, there is no liability on the part of the State in this case in the absence of a statute making it so liable. The only statute imposing a liability for injuries to State employees is the Workmen's Compensation Act of this State. However, even if the claimant based his right to recover on the provisions of the Workmen's Compensation Act, he still would not be entitled to recover under the allegations of his complaint, for the reason that the complaint on its face shows that no claim for compensation was made within six months after the accident; that no compensation was paid to the claimant, and that application for compensation was not filed

within one year after the date of the injury, as required by Section 24 of the Workmen's Compensation Act.

Compliance with the aforementioned requirements of the Workmen's Compensation Act is jurisdictional, and is a condition precedent to a right to maintain an action under the Workmen's Compensation Act.

Inland Rubber Co. vs. *Ind. Com.*, 309 Ill. 43.
DuQuoin School District vs. *Ind. Com.*, 329 Ill. 543.
Chicago Board of Underwriters vs. *Ind. Com.*, 332 Ill. 511.
City of Rochelle vs. *Ind. Com.*, 332 Ill. 386.

This court, therefore, has no authority to allow an award, and the motion of the Attorney General must be sustained.

Motion sustained. Case dismissed.

(No. 2287—Claim denied.)

CITY OF WOOD RIVER, ILLINOIS, A MUNICIPAL CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

FRANCIS J. MANNING, for claimant.

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

HIGHWAY—*when public—test to determine.* The test of a public highway is not as to the limited use to which the road may be subjected nor as to the number of people that may use it, but rather as to the right of the public to use it as a road when they have occasion to do so.

DAMAGES—*claimed to have been caused to public streets in Municipal Corporation by reason of State routing traffic over—no award can be made for.* A claim will not lie against State for damages alleged to have been caused to pavement of public streets in Municipal Corporation, by reason of unusually large number of people using same for travel, as result of State temporarily routing travel over same, as said streets were public highways, and when improved such improvement must be for use of all who have occasion to use them.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The amended complaint was filed in this cause on February 15, 1934, and charges that the City of Wood River, Illinois, is organized under the provisions of the "City and Village Act" and is located in Wood River Township, Madi-

son County, Illinois, and was so organized on the 5th day of March, 1923, being formerly a village with a population of approximately 8,500; that on or about the 17th day of November, 1921, the Highway Department in the State of Illinois, routed all traffic traveling along Route No. 3, over certain public streets within the corporation limits of Wood River, Illinois, and alleged that such streets, naming them in detail, have been improved by the City of Wood River, in accordance with the specifications of the State Highway Department and pursuant to law.

Claimant further charges that the State Highway Department had erected signs, designating said streets as the official Route No. 3, and further charges: "Claimant further represents unto the court that during the year 1929 said city was advised that refunds from the State of Illinois were being given the various cities for certain portions of the pavement constructed under State specifications for a certain portion of the center of the highway; and that said city requested a refund, but as there was no appropriation to pay same, the refund was never received."

It is further alleged that on March 3, 1931, the Honorable James O. Monroe, State Senator from the 47th District, introduced Senate Bill No. 178 in the 57th General Assembly, which bill was for the purpose of making a refund on account of the construction of pavement along Route No. 3 in the City of Wood River; that said proposed bill contemplated an appropriation in the sum of $50,513.15; that said bill was referred to the Committee on Appropriations, and a hearing was had upon the bill, but the committee to which the bill had been referred had never made a report thereon.

It is further averred that on or about the 12th day of April, 1933, said Honorable James O. Monroe, State Senator from the 47th District, introduced Senate Bill No. 488, in the 58th General Assembly, which bill was for the purpose of making a refund on account of the construction of pavement along Route No. 3 in the City of Wood River; that this bill called for an appropriation of $57,575.80.

It is further set forth in the complaint that the claimant had been informed by the officials of the Highway Department of the State of Illinois, that Wood River was not en-

titled to a refund for the reason that the routing through the city was only temporary and the official route, when constructed, would not be constructed within this portion of the city limits.

It is further charged that on or about November 20, 1922, the Highway Department of the State of Illinois, routed all traffic along Route No. 159 over certain public streets, within the corporate limits of and controlled and maintained by the City of Wood River.

It is also charged that signs bearing the route number were erected along this portion of the highway, or numbers bearing the route number were painted upon poles, etc., but the Highway Department at all times maintained that the route was only temporary, and it is further charged that the city has been damaged by the routing of traffic over the aforesaid Routes No. 3 and No. 159 because of the proximity of the said City of Wood River to St. Louis, Missouri, there has been caused abnormally heavy traffic to travel over said streets, from Alton, and all other points beyond or connecting between, traveling to the City of St. Louis, Missouri, and all other points beyond or connecting between, and claimant prays that this court will enter an order recommending to the State Legislature that an appropriation be made in the sum of $100,000.00 on the two above mentioned routes, said amount being equal to the cost of the pavement of the same width and type built by the State of Illinois, outside the corporate limits, and it is charged that said money would be so distributed to each person who, at the time such distribution is made, owns property which was assessed for the construction of said pavement, in proportion to the amount so assessed against such property.

The Attorney General has made a motion to dismiss this claim. The gist of the charge of this case is that the State has caused more traffic to be routed over the route mentioned than the citizens of Wood River would have had had such routes not been so designated, thereby causing damages to the abutting property owners. No authorities are cited, and we do not believe that any could be cited, upholding such a proposition of law. No private property has been taken, and manifestly, when streets are improved in the city, the improvement must be done for the use of all who have an occa-

sion to use the streets. It seems clear that these improvements were not made at the request of the State Highway Department, nor does it seem that the State contemplates their permanent use. Apparently, these were public highways before the improvement, and consequently, the public would be entitled to use them. The fact that an unusual large number of people use the highway, in common, does not give a cause of action by a municipality for such use.

In the case of *Law* vs. *Neola Elevator Co.*, 281 Ill. 143, the Supreme Court said: "The test of a public highway is not as to the limited use to which the road may be subjected nor as to the number of people that may use it, but rather as to the right of the public to use it as a road when they have occasion to do so."

Apparently, there have been two bills introduced in the Legislature to provide funds for the purpose averred in the complaint but in neither instance has the Legislature made the appropriation requested.

No questions of law are involved and no private rights have been invaded of which this court has any jurisdiction. We must, therefore, sustain the motion of the Attorney General and the complaint is hereby dismissed.

(No. 1763—Claim denied.)

GRACE E. FINNEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

FRANK L. TRUTTER, for claimant.

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

PERSONAL INJURY—*when award for on grounds of equity and good conscience cannot be made.* An award cannot be made on grounds of equity and good conscience, in claim for damages for personal injuries alleged to have been sustained by person visiting State Centennial Building, as result of alleged negligence of State employee in operating elevator therein.

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

Claimant filed her claim in this court on May 1, 1931, and seeks to recover the sum of Fifteen Hundred Dollars ($1,500.00), for personal injuries, which she claims to have

sustained while riding in a passenger elevator in the Centennial Building at Springfield, on Sunday, September 21st, 1930.

It appears that the Centennial Building was open to visitors on the date in question, and that claimant with her son and her brother, went to such building for the purpose of viewing exhibits in the State museum. They first went to the fifth floor to view the exhibits there, and afterwards entered the elevator to go to the basement for the purpose of viewing the exhibits on that floor. Claimant contends that the elevator was overcrowded and was improperly operated, and that by reason of carelessness and negligence of the servants and agents of respondent in that behalf, the elevator landed in the basement with a great impact, and thereby the plaintiff sustained severe bodily injuries.

The Attorney General contends that the State is not liable under the doctrine of "*respondeat superior*"; that there is no liability on the part of the State for the negligence of any of its servants or agents, in the absence of a statute making it so liable.

The claimant admits that the principle of law contended for by the Attorney General is correct but takes the position that she is entitled to an award, on what has come to be known as the doctrine of equity and good conscience, and relies on some of the earlier decisions of this court on which awards were made on that ground.

The question of the liability of the State on the grounds of equity and good conscience, in a case where there would be no legal liability on the part of the State if it were suable, was fully considered by this court in the case of *Crabtree vs. the State*, 7 C. C. R., 207, where the earlier decisions of the court were reviewed, and where after a full consideration of the matter, the following rule was announced:

"That Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to-wit: The Court of Claims shall have power: 'to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay'; merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the

jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The rule as laid down in the Crabtree case has been followed by this court in numerous cases since that time.

Kramer vs. *State*, 8 C. C. R. 31.
Lay vs. *State*, 8 C. C. R. 33.
Morrisey vs. *State*, 8 C. C. R. 40.
Shumway vs. *State*, 8 C. C. R. 43.
Jones vs. *State*, 8 C. C. R. 77.
Leckbee vs. *State*, 8 C. C. R. 82.
Butler vs. *State*, 8 C. C. R. 102.
Trompeter vs. *State*, 8 C. C. R. 141.
Huff vs. *State*, 8 C. C. R. 178.
Reinhardt vs. *State*, 8 C. C. R. 202.
Rutledge vs. *State*, 8 C. C. R. 206.
Parks vs. *State*, 8 C. C. R. 535.
Rehman vs. *State*, 8 C. C. R. 556.

There is no statute making the State liable under the facts in this case, and in the absence of such statute we have no authority to allow an award.

Award must therefore be denied. Award denied; case dismissed.

(No. 1663—Claimant awarded $323.20.)

GENERAL FIBRE CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

HARLINGTON WOOD, for claimant.

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

CONTRACT—*cancellation of—when breach of.* Where State orders merchandise, part to be delivered at once, and balance as ordered, and such part is delivered and State without any legal justification cancels contract

and refuses to accept said balance, such cancellation constitutes breach of contract and an action will lie for damages for such breach.

SAME—*same—same—measure of damages—Uniform Sales Act.* In claim for damages for breach of contract against State, where it, without any legal justification therefor cancels contract entered into by it for the purchase of merchandise and refuses to accept same, the proper measure of such damages, under the provisions of the Uniform Sales Act is the difference between the contract price and the market or current price of such merchandise at the time of the refusal to accept same.

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

On August fifteenth, 1929 the claimant company, which was then a wholesale dealer in various fibre materials, received from the respondent, through its Department of Purchases and Construction, a request for a price on twenty thousand (20,000) yards of a certain quality of burlap, f. o. b. Pontiac, for the Illinois State Reformatory, four thousand (4,000) yards to be delivered at once and the balance as ordered by the institution.

On August nineteenth, 1929 claimant quoted a price of Nine and Three-fourths Cents ($.09¾) per yard on twenty thousand (20,000) yards, to be shipped in bale lots of two thousand (2,000) yards,—four thousand (4,000) yards at once, balance as required.

On August twenty-ninth, 1929 respondent forwarded to claimant a purchase order for twenty thousand (20,000) yards of burlap in accordance with claimant's proposition;—"four thousand (4,000) yards to be shipped at once, balance as ordered."

Claimant thereupon purchased in the open market twenty thousand (20,000) yards of burlap for the fulfillment of said contract, and shipped four thousand (4,000) yards to respondent, which was duly received and paid for.

On October twenty-ninth, 1929 claimant requested of the Department of Purchases and Construction further shipping instructions on the remaining sixteen thousand (16,000) yards. Thereupon the Department of Purchases and Construction requested the Illinois State Reformatory to advise claimant when shipment was to be made.

On November fourteenth, 1929 claimant was advised by F. D. Whipp, Acting General Superintendent of the Illinois State Reformatory, that they were unable to use the material

at that time, due to the fact that the furniture factory was not operating, and that shipping instructions would be forwarded at a later date.

On December fourth, 1929 Mr. W. H. Gehm, acting Factory Superintendent of the Illinois State Reformatory, advised claimant to make no shipment unless advised later to do so. Claimant thereupon advised the Acting General Superintendent of said Illinois State Reformatory that the order in question was not subject to cancellation, and asked for disposition of the remaining goods.

On December twenty-third, 1929 said Acting General Superintendent of the Illinois State Reformatory advised claimant to consider the order cancelled, and that any shipments against the same would be refused.

No sufficient justification for the cancellation of the contract or the refusal to accept the goods appears from the record, and the claimant is therefore entitled to maintain its action for non-acceptance of the merchandise in question.

Under the provisions of the Uniform Sales Act of this State, the proper measure of damages under the facts in this case is the difference between the contract price and the market or current price at the time of the refusal to accept. The contract price was Nine and Three-fourths Cents ($.09¾) per yard and the market or current price on the date of the refusal to accept, to-wit: December twenty-third, 1929, was 7.73 cents per yard. Claimant is therefore entitled to receive damages in the sum of $323.20.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Twenty-three Dollars and Twenty Cents ($323.20).

(No. 2924—Claimant awarded $14.10.)

OHIO OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

R. H. FLETCHER, for claimant.

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

SUPPLIES—*when award may be made for price of.* Where facts are undisputed that State received and used supplies as ordered by it and that bill therefor, in triplicate, as required, was not presented for payment before

lapse of appropriation out of which same could be paid, and no question is raised as to amount of charge, an award will be made for price of same, on claim filed within reasonable time.

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

On or about the fifth day of June, A. D. 1935, the claimant delivered one hundred and fifty (150) gallons of kerosene oil to the Lincoln State School and Colony at Lincoln, Illinois, pursuant to the order of the Department of Public Welfare of the respondent.

In September of 1935, the claimant submitted to the Lincoln State School and Colony, a statement for the merchandise so sold and delivered, in the total amount of Fourteen Dollars and Ten Cents ($14.10), plus Twenty-nine Cents ($.29) sales tax; with the request that the same be paid.

Such statement was not passed for payment for the reason that the same was not furnished in triplicate. By the time triplicate copies of the statement were obtained and presented, the appropriation out of which the claim should have been paid, had lapsed, and it therefore became necessary for the claimant to file its claim in this court, which it did on June 29, 1936.

There was no unreasonable delay on the part of the claimant in presenting its claim. No objection is made to the reasonableness of the charge made for the merchandise, and no reason is suggested why the respondent should not pay for the same. However, the item of Twenty-nine Cents ($.29) for so called "Sales Tax" cannot be allowed. The tax in question is a Retailers' Occupational Tax, and is not a tax on merchandise sold, and such item must therefore be rejected.

Award is therefore entered in favor of the claimant for the sum of Fourteen Dollars and Ten Cents ($14.10).

(No. 2927—Claim denied.)

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

Opinion filed December 8, 1936.

EDWARD M. BURKE, for claimant.

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

HIGHWAYS—*maintenance of governmental function.* The State exercises a governmental function in the construction and maintenance of public highways and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition.

PROPERTY DAMAGE—*negligence of State employees—doctrine of respondeat superior not applicable to State.* The State is never liable for the negligence of its servants or agents, unless there is a statute making it so and where complaint alleges that property damage was sustained as the result of such negligence, no cause of action is stated and an award cannot be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of One Thousand Five Hundred ($1,500.00) Dollars for damages suffered by him on January 16, 1936 when he ran his automobile against an upright support in a viaduct on a portion of one of the State-aid highways. The basis of the claim is that the State Highway Department was guilty of negligence in the approval of plans and specifications for said highway, and thereby created a condition that was dangerous to the traveling public. The place where the accident occurred was on 26th Street in the Town of Cicero, Illinois. The highway is forty (40) feet in width at 52nd Street where it passes under the bridge or viaduct which spans the highway in question. The upright support about which complaint is made is approximately twenty-eight (28) feet from the north edge of the highway and approximately twelve (12) feet to the south edge of said highway. Claimant avers that it was the duty of the State Highway Engineer or his assistant to cause proper surveys to be made; that they were guilty of negligence in not so doing, and that as a result thereof a public nuisance was created at the point in question, and that it was the duty of the Department of Public Works and Buildings to approve plans, etc., and that they were guilty of failing to exercise ordinary care in approving the plans in question. Claimant further avers that it was the duty of the State to place adequate lights and warning signals wherever dangerous conditions were likely to exist, and that the State failed to place lights and warning signals so as to properly warn the public of the dangerous condition of the highway in question.

The Attorney General has moved to dismiss said complaint for the reason that, in the construction and maintenance of its highways the State acts in its governmental capacity, and is not to be held to respond in damages for the

negligent acts of its agents or employees in the construction or maintenance thereof.

The objection of the Attorney General is well taken. This court in conformity with the accepted law in such matters has repeatedly held:

"In the construction and maintenance of roads the State acts in its governmental capacity, it is exercising its sovereign powers, and it does not permit these powers to be questioned by any tribunal. It can only act through its officers and employees, and if these officers perform their duties in a negligent manner the negligence is the negligence of the officers, and not of the State."

Chumbler vs. *State*, 6 C. C. R. 138.
Martin & Kellerman vs. *State*, 8 C. C. R. 417.
Walen vs. *State*, 8 C. C. R. 501.
Rehman vs. *State*, 8 C. C. R. 556.
Wentworth vs. *State*, No. 1971.

The motion to dismiss the claim is allowed and the cause is dismissed.

(No. 2920—Claim denied.)

REV. D. FRANCIS RYAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

Z. H. KADOW, for claimant.

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

HIGHWAYS—*maintenance of, governmental function—property damage—negligence of State employees—doctrine of respondeat superior not applicable to State.* The facts in this case are similar to those in *Roberts* vs. *State*, No. 2927, *ante*, and the opinion therein is applicable here.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On June 23, 1936, claimant filed his claim with the clerk of this court, alleging that on November 15, 1935, at 7:15 p. m., he was properly driving his Ford V8 coupe, in a northerly direction on North Elston Avenue in the City of Chicago, and while driving along, in the exercise of due care and caution for his own safety, and the safety of his property, he was compelled to drive to the left side of the northbound roadway to allow a siren-equipped police car which was traveling at a high rate of speed, to-wit: 40 miles per hour, to pass him; that while driving back into the right lane

of the northbound roadway, claimant's automobile struck certain debris, which had been piled there, causing the left rear side of his car to strike the abutment of the viaduct; that the place was not lighted and contained no danger signals; that the automobile was turned over and damaged to the sum of $322.50, and the claimant himself was considerably bruised and hurt; that the total claim for damage to the automobile and medical expenses, amounts to the sum of $447.50.

The Attorney General has filed a motion to dismiss on the grounds that in the construction and maintenance of roads, the State acts in its governmental capacity, that is, the State is exercising its sovereign powers. The State can act only through its officers and employees, and if such officers and employees perform their duties in a negligent manner, the negligence is the negligence of the officer, and not of the State.

We have held many times that under such circumstances, the State is not liable. These principles of law are so thoroughly established that citation of law would seem unnecessary.

Chumbler vs. *State*, 6 C. C. R. 138.
Martin & Kellerman vs. *State*, 8 C. C. R. 417.
Walen vs. *State*, 8 C. C. R. 501.
Rehman vs. *State*, 8 C. C. R. 556.

For that reason, this claim must be dismissed.

(No. 2381—Claim denied.)

WILHELMENA SCHULTZ, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

CLAIMANT, pro se.

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

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

SAME—*when nurse not within provisions of—when award for injuries to denied.* Where nurse employed by State in checking up scarlet fever was injured when alighting from automobile, that had commenced to steam,

furnished by county to nurse whom she was assisting, no award for compensation for such injuries can be made under provisions of Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The application for compensation in this case was filed May 4, 1934. It alleges that claimant was, during the month of February, 1934, a graduate registered nurse; that she registered for work under the C. W. S. of the State of Illinois, and was assigned to work on Project No. 6376 to help Miss Mary Jane Fee, the Champaign County school nurse, in work over the county; that she started work on January 29, 1934. She was furnished no means of transportation and no expense money for transportation. Miss Fee took the claimant with her in an automobile furnished to her by Champaign County; that on Monday, February 5, 1934 while traveling with Miss Fee in said automobile and under her direction to Broadlands, Illinois, for the purpose of checking up on the scarlet fever situation there, at about 9:00 a. m. and about three miles east of said Broadlands on the public road, the car in which claimant was riding became overheated and apparently commenced to smoke. The occupants of the car became frightened and got out. While alighting from the car, the claimant fell, breaking her left arm near the shoulder.

Claimant received medical care and was confined to a hospital for fourteen days, totally incapacitated. Her compensation was fixed at the rate of $35.00 for a thirty hour week. She has received no compensation for the time she was incapacitated; neither were her doctor and hospital bills paid.

The Attorney General has made a motion to dismiss the claim for the reason that she seeks to recover for injuries sustained by getting out of an automobile while she was assigned to work for the Civil Works Service, and, therefore, the State is not liable.

The Workmen's Compensation Act applies to the State of Illinois. She was not driving the car but was being transported along with an employee, of Champaign County, to Broadlands, Illinois. The danger feared by the car steaming was no real danger whatsoever.

In order to obtain a recovery under the Compensation Act, the claimant must bring herself within the provisions of the Act. There is nothing averred in the complaint which would bring the claimant within the provisions of the Compensation Act, except the fact that she was riding in an automobile which was apparently furnished by the State, but nothing is averred to show what her duties were, or to bring her within Section 3 of the Compensation Act. There is nothing about this claim that would bring it under the Compensation Act of this State. The conditions prescribed by Section 3 of the Workmen's Compensation Act as necessary to the right to compensation are, that the employer and the employee shall be engaged in some department of an enterprise or business which the Act declares to be extra-hazardous. While the Workmen's Compensation Act will be liberally construed to give effect to its purpose, a strained construction to include an occupation or employment, permanent or temporary, not fairly within the Act cannot be supported.

The motion of the Attorney General to dismiss will, therefore, be sustained.

(No. 2910—Claim denied.)

RALPH YOCUM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.

MARTIN J. GANNON, for claimant.

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

HIGHWAYS—*maintenance of, governmental function—property damage—personal injuries—negligence of State employees—doctrine of respondeat superior not applicable* to State.

The facts in this case are similar to those in *Roberts* vs. *State*, No. 2927, *ante*, and the opinion in that case is applicable here.

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

Claimant filed his complaint herein on June 2nd, 1936, and alleges therein that on February 6th, 1936, he was driving his motor vehicle in a southerly direction on S. B. I. Route No. 2 near the Village of Grand Detour in Lee County,

Illinois; that as he approached the Grand Detour bridge over the Rock River, and while he was in the exercise of all due care and caution, and while he was driving on his own proper side of the road, his motor vehicle collided with a truck owned by the respondent, and controlled and operated by its servants and agents; that said truck was carelessly and negligently parked on said highway without any signals of any kind to warn travelers thereof; that by reason of the carelessness and negligence of the servants and agents of the respondent as aforesaid, the motor vehicle of the claimant was damaged, and he sustained personal injuries, for which he asks an award.

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

We have held in numerous cases that the State, in the maintenance of its hard surfaced highways, is engaged in a governmental function.

Chumbler vs. *State*, 6 C. C. R. 136.
Highland vs. *State*, 6 C. C. R. 384.
Bucholz vs. *State*, 7 C. C. R. 241.
Wilson vs. *State*, 8 C. C. R. 72.
Wetherholt vs. *State*, 8 C. C. R. 100.

We have also repeatedly held that the State, in the exercise of its governmental functions, is not liable for the negligence of its servants and agents in the absence of a statute making it so liable.

Braun vs. *State*, 6 C. C. R. 104.
Chumbler vs. *State*, 6 C. C. R. 138.
Bucholz vs. *State*, 7 C. C. R. 241.
Baumgart vs. *State*, 8 C. C. R. 220.
Childress vs. *State*, 8 C. C. R. 223.
Ryan vs. *State*, 8 C. C. R. 361.
Kramer vs. *State*, 8 C. C. R. 31.
Johnson vs. *State*, 8 C. C. R. 67.
Wilson vs. *State*, 8 C. C. R. 72.

The law as above set forth is recognized in numerous decisions of our Supreme Court.

Hollenbeck vs. *County of Winnebago*, 95 Ill. 148.
City of Chicago vs. *Williams*, 182 Ill. 135.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
Gebhardt vs. *Village of LaGrange Park*, 354 Ill. 234.

There is no statute making the State liable under the facts set forth in the complaint, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss sustained. Case dismissed.

(No. 2475—Claim denied.)

OLIVIA KELLY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 8, 1936.
Rehearing denied February 10, 1937.

THOS. S. SAWYER, for claimant.

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

PERSONAL INJURY—*negligence of employee of State—when award on grounds of equity and good conscience cannot be made.* Regardless of the merits of a claim of a person for damages for personal injuries, sustained as the result of the negligence of an employee of the State, or the extent or seriousness of such injuries, or the degree of negligence of such employee, an award cannot be made on the grounds of equity and good conscience, and as the doctrine of respondeat superior is not applicable to the State, the claimant is limited to his remedy against person causing the injuries. *Sprague* vs. *State*, 7 Court of Claims Reports, Page 227 overruled.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Ten Thousand ($10,000.00) Dollars for injuries alleged to have occurred on December 7, 1933 when the car in which she was an occupant was struck by a truck owned by respondent, used in the Highway Department and then and there driven by one Charles Mullin, an employee of respondent in said Department. A motion by respondent for a dismissal of said complaint will be considered with the evidence.

From the evidence it appears that claimant was a guest of George Smith of Kirkwood, Illinois, and with other passengers was riding in his automobile about 7 o'clock p. m. on said date on S. B. I. Route No. 8; that Smith's car was being managed and driven in a safe and sane manner and at a reasonable rate of speed, and that both he and claimant were in the exercise of due care and caution for their own safety and the safety of others; that as they approached a curve near Kirkwood, Illinois the truck operated by the said

State employee came from the opposite direction, on claimant's side of said highway; that the driver of the car in which claimant was a passenger attempted to attract the attention of the driver of the truck to induce the latter to return to his own proper side of said highway, i. e. the west or righthand side of said road, but that the latter failed to do so and struck the right rear end of the Smith car. The truck was carrying a steel brace in front for use in attaching a snow-plow and the crash demolished the rear end of the Smith car, knocked claimant Olivia Kelly unconscious and resulted in serious injuries and fractures to her back and pelvis. Besides permanent injury and deformity of the pelvis, claimant has necessarily expended substantial sums in medical bills. The proof shows that Mullins, driver of the State truck, made no attempt to avoid the accident. George Smith testified that Mullins came to him the next morning and said "I will fix your car and let's keep it as quiet as possible." Owen Kelly, husband of claimant, testified that four days after the accident Mullins came to the former's home and inquired about Mrs. Kelly's injuries and then said "Well, you are a pretty good fellow and if you will not report this I will help you on the doctor bills." Witness also quoted him as saying, "If I did not act in accordance with his wishes it would be no use for me to sue him as he did not have any money. He wanted to know if I had heard that he had been drinking; that he had some denatured alcohol in the back of his car and probably had got some on his hands and gloves."

Another witness, J. Earl Gray of Kirkwood, who had been a mechanic and service station employee for a number of years, testified that he had known Mullins since 1917 or 1918 and was quite familiar with the latter's habits and ability to drive an automobile; that Mullins has had several accidents and in the opinion of witness, Mullins is not a very good driver.

According to the testimony of the attending physician, claimant suffered a fifty (50) per cent permanent disability and will be under a physician's care for the rest of her life because of the deformity resulting from this accident.

Because of the inexcusable nature of this accident the court is reluctant to grant the motion filed herein by respond-

ot for a dismissal of this cause. The motion is based however upon the ground that no legal liability can be laid at respondent's door for the negligent and careless action of its employee. The general rule is well established that the doctrine of *respondeat superior* does not apply to the State in the exercise of its governmental functions. *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148.

Claimants base their right to recovery "upon a custom, rather than a rule of law founded in justice and mercy."

It is true that this court has in rare intervals departed from the rule of non-liability by the State for the negligence of its employees, as noted in the case of *Sprague Dairy* vs. *State*, 7 C. C. R. 227, but such departure is apparently not justified under existing statutes. For many years Illinois has been in the forefront in attempting to grant redress to its citizens upon just demands held by them. In determining the extent to which this court may justifiably go in granting such claims, and considering the so-called doctrine of equity and social justice, this court held in the case of *Crabtree* vs. *State*, 7 C. C. R. 207:

"That when the Legislature created this court and clothed it with power to hear claims against the State, we believe that it did not thereby intend to waive the right of the State to interpose any legal or equitable defense it might have to the demands of claimants."

The case of *Murdock Grate Co.* vs. *Commonwealth*, a Massachusetts case, was referred to in the Crabtree case wherein the court said:

"The Act * * * discloses no intention to create against the State a new and heretofore unrecognized class of liabilities, but only an intention to provide a Judicial Tribunal where well recognized, existing liabilities can be adjudicated." * * *

"Before a claimant can have an award against the State, he must show that he comes within the provision of some law making the State liable to him for the amount claimed. If he cannot point to any law giving him the right to an award he cannot invoke the principle of equity to secure such award."

In the absence of a statute making the State liable for damages caused by the negligence of its employees in the performance of their duties, this court has no authority to legally make an award in the present case. We recognize the meritorious nature of the claim. Two people have been seriously injured through the negligence of the employee in

question. By his action he has brought suffering and expense to the injured parties and has reflected discredit upon the good name of his employer, the State of Illinois. It is to be hoped that claimant will find other avenues of redress for the injuries suffered. Respondent's motion to dismiss is granted and the claim is hereby dismissed.

(No. 2607—Claimant awarded $233.50.)

MICHAEL RABATINE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 9, 1936.

R. A. POWERS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award under may be made.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made in accordance with provisions of Act, upon claim made and application filed therefor within time fixed in Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Prior to and on August 18, 1934 claimant was in the employ of respondent as a guard at the Illinois State Penitentiary, Pontiac Division. A riot started among the inmates on that day during a baseball game. Claimant in the performance of his duties attempted to stop the disorder, and in so doing was struck, kicked and beaten by a number of the inmates, and suffered injuries which required immediate treatment at the prison hospital.

One of his fellow-guards testified at the hearing that claimant was about fifty (50) yards from him when the rioting started; that when witness first saw him, he was fighting his way out of a gang of inmates with blood streaming from his head, and that his trouser legs and other parts of his clothing were torn off.

Dr. E. G. Beatty, who was employed as a physician at the Illinois State Reformatory Hospital in Pontiac at the time, testified that he examined claimant on August 18, 1934 immediately following the riot, and that at that time claimant was suffering from a lacerated wound on his scalp about one

inch long, and a sprain and contusion of the left shoulder, ruptured ligaments, and contusions of the left leg and right foot. He was given treatment at the institution hospital for five days, then went to his home in Streator and returned to work on September 24th where he continued working until discharged for cause on November 30, 1934. Bills for medical treatment have been paid by respondent and claimant received full pay until the time of his discharge. His claim was filed herein February 18, 1935 for Four Thousand Three Hundred Twenty ($4,320.00) Dollars permanent disability, but in the final presentation of his claim his counsel rest upon a demand for a permanent loss of ten (10) per cent use of the claimant's left arm, and seek an award therefor in the sum of Two Hundred Thirty-three and 50/100 ($233.50) Dollars.

Claimant was treated and examined by several physicians at the prison. Dr. Beatty testified that the injury to the shoulder is hard to classify; that it might thereafter interfere with the patient doing manual labor, but that he has no way of estimating the period of time. Dr. Beatty examined the claimant on or about November 30, 1934; and testified that the injured ligaments of claimant's shoulder had not resumed their normal functions, and that there was some subluxation and stretching of the ligaments.

Dr. L. D. Howe, claimant's family physician at Streator, Illinois, testified that he had treated patient since the time of his injury and has seen him every three or four weeks; that his last examination was about September 23, 1936; that there is a permanent loss of use to the claimant of the entire left arm as a result of the injury in question, of ten (10) per cent; that such injury and loss is the result of injury to the nerve in claimant's left shoulder, and that claimant is unable to do any lifting or any manipulating of tools with that arm. Claimant and respondent were both operating within the provisions of the Workmen's Compensation Act. The accident occurred on August 18, 1934. The State had immediate notice of the same, and the claim was filed on February 18, 1935, within six months thereafter. Claimant was receiving wages at the rate of Ninety ($90.00) Dollars per month. *Sec. 8 of the Workmen's Compensation Act* provides:

(e) For injuries in the following schedule the employee shall receive * * *

13. For the loss of an arm or the permanent and complete loss of its use 50% of the average weekly wage during 225 weeks.

His average weekly wage was Twenty and 76/100 ($20.76) Dollars. Fifty (50) per cent thereof for two hundred twenty-five (225) weeks would be Two Thousand Three Hundred Thirty-five and 50/100 ($2,335.50) Dollars, and ten (10) per cent thereof would be Two Hundred Thirty-three and 55/100 ($233.55) Dollars.

The court finds from the record that claimant suffered an injury from an accident which arose out of and in the course of his employment; that the same is compensable under the Workmen's Compensation Act, and that he has suffered a total permanent disability of ten (10) per cent of the loss of the use of the left arm. An award of Two Hundred Thirty-three and 55/100 ($233.55) Dollars is allowed in favor of the claimant. As the payments heretofore due would aggregate the full amount, the total award is found to be now due and payable. This award being subject to the provisions of an Act entitled "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof*", approved July 2, 1935 (Sess. Laws 1935, p. 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when, such approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for in such Act.

(No. 2635—Claim denied.)

FRANK RUSSO, ADMINISTRATOR OF THE ESTATE OF CARMEN F. RUSSO, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 9, 1936.

ROLAND V. LIBONATI, for claimant.

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

SALARY—*when claim for while on leave of absence denied.* Where claimant seeks to recover salary of his intestate, a physician employed at Peoria State Hospital, while he was on leave of absence and fails to show that said intestate had been working under the provisions of the Civil Service Commission Law, and that in so working, such leave of absence had been granted with pay, an award must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

According to the complaint filed herein claimant's intestate, Carmen F. Russo, was employed as a physician at the Peoria State Hospital; that Dr. Russo was in perfect health when employed there, but that due to the alleged failure and neglect of respondent to provide reasonable means and methods for the prevention of disease incident to the work performed by Dr. Russo, and because of the latter's exposure to illness and disease existing in said hospital, Dr. Russo became afflicted with tuberculosis.

The claim further recites that he was given leave of absence from April 16, 1933 to April 16, 1934 but that he continued to spend the greater portion of his time at the hospital, and at the request of the authorities continued to perform professional duties, for which he received no compensation during said period of twelve months; that as a result of the disease thus acquired Dr. Russo died May 25, 1934. Claimant files his suit as an action in assumpsit.

The Attorney General moves a dismissal of the complaint on the ground that same seeks the recovery of a salary allegedly due for a period while the employee in question was on leave of absence, without failing to show that such employee was then and there working under the provisions of the Civil Service Commission law and that in so working such leave of absence had been granted "with pay."

The complaint does not set forth sufficient grounds upon which to pay an award. The contentions of the Attorney General are sustained, the motion allowed and the claim dismissed.

(No. 2636—Claim denied.)

FRANK RUSSO, ADMINISTRATOR OF THE ESTATE OF CARMEN F. RUSSO, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 9, 1936.

ROLAND V. LIBONATI, for claimant.

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

NEGLIGENCE—*respondeat superior*. The State is never liable for the negligence of its servants or agents, unless there is a statute making it so liable, and in this State there is no such statute.

WORKMEN'S COMPENSATION ACT—*making claim and filing application for compensation within time required in, condition precedent to jurisdiction of* court. Where no claim for compensation is made within time fixed in Act, court is without jurisdiction to proceed with hearing.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a companion case to the case under the same title filed herein as No. 2635; the latter case being filed as an action in assumpsit, and the complaint in this case being apparently drawn with the desire that it might be considered as an action based upon rights under the common-law or under the provisions of the Workmen's Compensation Act, although no reference is made to the latter Act by word or title. The facts set up are the same as in case No. 2635.

The Attorney General has filed a motion to dismiss this action, for the reason that if considered as an action at common-law, the claim is predicated upon the purported negligence of the agents and servants of respondent in not providing proper working conditions where deceased was employed, and that if such complaint is considered as based upon the Workmen's Compensation Act said complaint is not sufficient for the reason that there is no allegation that any claim for compensation was made within six months after the claim accrued as required by Section 24 of the Workmen's Compensation Act.

This court has repeatedly held:

"That the State is not liable for damages caused by the negligence, misfeasance, or non-feasance of its servants, agents or officers, unless there is a statute expressly making it so liable."

Braun vs. *State*, 6 C. C. R. 104.
Walen vs. *State*, 8 C. C. R. 501.

Section 24 of the Workmen's Compensation Act reads as follows:

"No proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident."

The objections are properly raised by the Attorney General and the motion to dismiss the complaint is allowed and the cause dismissed.

(No. 2860—Claim denied.)

ARTHUR F. THOME, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 9, 1936.

MAURICE A. FRANK, for claimant.

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

LIMITATIONS—*when plea of will be sustained.* Where it appears from face of claim that same was not filed with the Secretary of the Court of Claims within five years after the claim first accrues, same is barred and plea of Statute of Limitations will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award for an unpaid bonus from the State of Illinois in the sum of Three Hundred ($300.00) Dollars alleged to be due him for military service while a resident of the City of Chicago from November 19, 1917 until the date of his discharge, June 20, 1919, at which latter date he received his honorable discharge from service. Claimant alleges that he filed an application with the Service Recognition Board of Illinois, May 7, 1921, and at several times thereafter, and that on March 22, 1928 he filed an application for delayed compensation with the Adjutant General of Illinois, under Section 1 and 2 of the Act of July 7, 1927, Laws of Illinois, 1927, p. 42. That Act provides among other things in Section 1,

"Any person who was entitled to compensation under the provisions of an Act to provide payment of compensation to certain persons who served with the military or naval forces of the United States * * * and who * * *inadvertently * * * was prevented from receiving compensation * * * shall be paid * * * if such person makes application *therefor within one year* from the time this Act takes effect. Application for delayed compensation under the provisions of this Act shall be made to the Adjutant General of Illinois."

Section 2 of said Act of July 7, 1927 makes it the duty of the Adjutant General

"To receive and pass upon the merits of all applications made under the provisions of said Act."

Respondent has filed a motion to dismiss said complaint because the latter does not contain any allegation as to what action has been taken by the Adjutant General upon said application; and further that as the Legislature in said Act

has made it the duty of the Adjutant General of Illinois to pass upon the merits of such application, that this court would have no right to review his decision or to consider a claim based upon the terms of said Act. The motion to dismiss is further made on the ground that the claim was not filed within five years from the time the purported cause of action accrued; the contention of respondent being, that any rights which claimant might have, accrued July 7, 1927, and that the claim was not filed with the Court of Claims until March 16, 1936. The statute creating the Court of Claims provides as follows:

> "Every claim against the State, cognizable by the Court of Claims shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrued. * * *
>
> *Sec. 10, Act Creating Court of Claims—Approved June 25, 1917, L. 1917, p. 325.*

The first two objections by respondent are not regarded as sufficient for a dismissal of the complaint, but as the latter was not filed within the required period of five years from the time the claim accrued, the Court of Claims is without jurisdiction, and the motion to dismiss the complaint is allowed and the cause dismissed.

(No. 2574—Claimant awarded $5,500.00.)

ERNA WILBUR, AS ADMINISTRATRIX OF THE ESTATE OF SPENCER L. WILBUR, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 9, 1936.

E. D. HARDY, for claimant.

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

PERSONAL INJURY—*death of member of Illinois National Guard—when award may be made for.* An award may be made to dependents of member of Illinois National Guard for financial help or assistance, where said member sustained personal injuries, resulting in his death, while in the performance of his duties as such member, under authority of Section 11 of Article 16 of Military and Naval Code.

SAME—*same—resort to Workmen's Compensation Act in determining amount of award, not required by law.* There is nothing in the Workmen's Compensation Act or the Military and Naval Code, providing that the Court of Claims shall be governed by the provisions of the Workmen's Compensation Act in determining amount of award in cases arising under the Military

and Naval Code, or which prevents it from using any proper and legal basis in arriving at amount thereof, justified under the evidence in each particular case.

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

Claimant filed her complaint herein on January 12th, 1935 and seeks to recover the sum of Twenty-Five Thousand Dollars ($25,000.00), as financial help or assistance on account of the death of her husband while in line of duty as a member of the Illinois National Guard;—in accordance with the provisions of the Military Code of this State.

From the record in this case the following facts appear:—

That on August 11th, 1934 claimant's intestate, Spencer L. Wilbur, was an enlisted member of Battery A, 123d Field Artillery, Illinois Nation Guard, having a rating of first-class private and fifth-class cook.

That said Spencer L. Wilbur originally enlisted in Company C, 6th Infantry, Illinois National Guard, from March 22d, 1911 to March 21st, 1914; that he re-enlisted in said Company on April 22d, 1914, and remained a member of said Company until April 16th, 1917, at which time he was discharged by reason of dependents; that he re-enlisted in Battery A, 123d Field Artillery, on October 12th, 1928, and remained an enlisted member of said Company to the time of his death.

That on August 11th, 1934 said Battery A was attending the annual encampment at Camp Grant; that on said date said Spencer L. Wilbur, while returning to camp from Rockford, by automobile, to attend muster at four o'clock p. m., sustained accidental injuries as the result of an automobile accident occurring within the boundaries of said Camp Grant; that he died as the result of such injuries on October 12th, 1934 at St. Anthony's Hospital, Rockford, Illinois.

That the Military Board which investigated the matter found that Spencer L. Wilbur at the time of the accident was "in line of duty."

That said Spencer L. Wilbur left him surviving Erna Wilbur, his widow, and three daughters, aged two, five and ten years respectively.

That said Spencer L. Wilbur at the time of his death was 43 years of age; that his widow was 33 years of age; that

said Spencer L. Wilbur left no real estate and no personal property aside from a small amount of household furniture and furnishings of a value not in excess of $200.00; that he left a policy of insurance in the amount of $1,000.00, of which $200.00 was required to settle up the debts and claims against his estate, and the further sum of $200.00 was required to pay the expense of an operation on the oldest child; that said Erna Wilbur has no relatives who are able to provide for her support and maintenance or who are able to render financial assistance to her or to her children.

That Spencer L. Wilbur prior to the accident in question, was in perfect health; that at the age of eighteen years he was employed by the Chicago, Burlington and Quincy Railroad Company and continued in the employ of said Company until about two years prior to the date of his death; that during the last few years he worked for said Railroad Company he was employed as an electrician and earned from $70.00 to $80.00 every two weeks; that, subsequently, by reason of the seniority rule, he was demoted on account of the number of men seeking employment, and just prior to the time he was laid off, was earning about $40.00 every two weeks; that between the time he was laid off by the Railroad Company and the time of his death, he had been unable to find any regular employment, except that for about a year prior to his death he was employed as a part time cook at a cafe in Galesburg, for which he was paid $12.00 per week; that in addition to such part time work he performed such other odd jobs as he could obtain, and at one time was employed by the Federal relief agency as an electrician.

Section Eleven (11) of Article Sixteen (16) of the Military and Naval Code of this State provides as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the commander in chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand."

The Military Board which was convened in accordance with law, found that the claimant's intestate at the time of the accident which caused his death, was "in line of duty," and we see no reason for departing from the conclusion reached by such Board.

The only question involved, therefore, is the question of the amount which the claimant, as Administratrix of the estate of said decedent, is entitled to recover in the way of financial help and assistance, in accordance with the provisions of the aforementioned section of the Military Code.

The Attorney General takes the position that the amount should be fixed in accordance with the provisions of the Workmen's Compensation Act of this State, which, under the facts stipulated, would be Thirty-Two Hundred Dollars ($3,200.00.)

A similar question has arisen in several other cases which have come before this court, and on some occasions the provisions of the Workmen's Compensation Act of this State were accepted as a guide in determining the amount to be allowed under the facts in evidence in those particular cases. In each of such cases, however, the amount awarded was recognized as being in accordance with the merits of such case.

There is nothing in the Workmen's Compensation Act or in the Military Code which provides that this court shall be governed by the provisions of the Workmen's Compensation Act in fixing the amount of the award in cases of this kind. The statute provides that the amount shall be "as the merits of each case may demand."

Considering the age of the claimant's intestate, the age of his widow, the number of his children and their respective ages, the financial worth of the decedent, the financial worth of his widow and the relatives from whom she might expect to receive financial aid, and all of the facts and circumstances appearing in the record, we feel that an award of Fifty-Five Hundred Dollars ($5,500.00) would be fair and reasonable, and would be in accordance with the merits of the case.

Award is therefore entered in favor of the claimant for the sum of Fifty-Five Hundred Dollars ($5,500.00).

(No. 3017—Claimant awarded $166.67.)

AMERICAN LIQUOR DISTRIBUTING CORP., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1937.

ALLEN H. SCHULTZ, for claimant.

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

LICENSE FEE—*when award for refund may be made.* Where claimant filed application and paid fee therefor, for license under Illinois Liquor Control Law, which required that application be accompanied by bond, and claimant was unable to obtain or file same and thereby complete application and never engaged in business for which license was applied, an award for refund may be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a refund of One Hundred Sixty Six and 67/10 ($166.67) Dollars. On September 4, 1935 it filed an application with the Illinois Liquor Control Commission for an Importing Distributor's License, pursuant to the provisions of the Illinois Liquor Control Law; and accompanied such application with the payment of One Hundred Sixty Six and 67/100 ($166.67) Dollars, being the pro rata portion of license fee required for a license to expire April 30, 1936. Article 7, Section 2 of the Illinois Liquor Control Law, approved January 31, 1934 provides, that such an application should be accompanied by a joint and several bond, etc. conditioned upon the true and faithful compliance by the licensee with all provisions of such Act.

The application in question was not accompanied by such bond, but on August 30, 1935 claimant had applied for such bond from the firm of Touhy and Sain of Chicago, Illinois, and had paid the premium therefor in the sum of Eighty ($80.00) Dollars, said firm being agents for The Seaboard Surety Company. The latter declined to issue the bond and a refund of the premium was made to claimant, and claimant was thereafter unable to procure an Importing Distributor's License because it had failed to complete its application, in that it had failed to file the required bond as required by the Illinois Liquor Control Act.

No contention exists as to the facts, but the Attorney General has filed a motion to dismiss the complaint, contending that one who voluntarily pays a fee for a license cannot thereafter recover it back when such license is not issued in consequence of applicant's failure to comply with other conditions.

There is no showing that the applicant ever engaged in the business for which such license was applied, and the application for such license was never in fact completed, because in order to be complete the application must have been ac-

companied by the license fee and the bond in question. The application, not having been sufficient upon which to issue a license, should have been returned to the applicant, together with the fee accompanying same, and there is no authority, in the opinion of the court for the State to retain the license fee thus proffered by the applicant.

It is therefore ordered that the motion to dismiss be and the same is hereby denied, and an award is hereby entered in favor of claimant in the sum of One Hundred Sixty Six and 67/100 ($166.67) Dollars.

(No. 2992—Claimant awarded $50.00.)

JOSEPH AUGUSTYN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1937.

UNGARO & SHERWOOD, for claimant.

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

LICENSE FEE—*duplicate payment—when award for refund may be made.* An award may be made for refund of fee paid to Illinois Liquor Control Commission for retailer's liquor license, where said license had already been issued and fee paid therefor, but had not been forwarded to or received by claimant and he, on demand of inspector for said commission, for production of same, three days after date of issuance of said license, again paid fee for same period and premises as license already issued.

MR. JUSTICE YANTIS delivered the opinion of the court:

On May 1, 1935 claimant paid to the Illinois Liquor Control Commission the sum of Fifty ($50.00) Dollars for a retail liquor license for the premises at 1259 Cornell Street, Chicago, Illinois, and received receipt No. 576 therefor. A retailer's liquor license was thereafter issued to him on May 28, 1935. Three days later, i. e. on May 31, 1935, an inspector from the office of said commission called on claimant and demanded that he then and there produce such license. Claimant was unable to produce same, and as he recites in his complaint, to avoid trouble, thereupon under protest paid to the inspector Fifty ($50.00) Dollars for a retail liquor license for said premises. On the 20th day of August, 1935 a second retail liquor license was issued to claimant covering the same premises as that covered by the original license.

Claimant presented his claim to the Illinois Liquor Control Commission for a refund of the duplicate payment, and the commission authorized a refund but payment thereof was refused by the Department of Finance under an opinion from the Attorney General that neither the commission nor the Department of Finance had authority to make such refund.

Giving due allowance to the time required for transmittal of the license in question, and in the absence of any showing to the contrary, it is not strange that the license in question issued on May 28, 1935 was not in the hands of the licensee three days later on May 31st when the inspector demanded to see the same. There is no contention that the fee had not been paid for such license, and that such license had not in fact been issued or that it was not thereafter received by claimant, and there is no showing to justify the collection of the additional Fifty ($50.00) Dollars, collected from claimant on May 31st.

It is therefore ordered that an award be entered in favor of claimant in the sum of Fifty ($50.00) Dollars.

(No. 1788—Claim denied.)

W. JEFF HORNEY AND FRANCES PARKE HORNEY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1937.

SCHLAGENHAUF & SCHLAGENHAUF, for claimants.

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

PROPERTY DAMAGE—*negligence of servants or agents of State—State not liable for.* **There is no liability on the part of the State for damages in tort where the doctrine of respondent superior must be invoked.**

SAME—*liability of State for taking or damaging private property for public use, only under Section 13 of Article 2 of Constitution—provisions of self-executing.* **The only liability of the State for taking or damaging private property for public use, is under Section 13 of Article 2 of the Constitution of Illinois and the provisions of such section are self executing.**

SAME—*property not taken for public use—construction of public improvement alleged to have caused—measure of.* **Where private property is not taken for public use but it is alleged that same has been damaged by reason of the construction of a public improvement, the proper measure of damages, where same are recoverable, is the difference between the fair cash market value of the property, unaffected by the improvement and its fair cash market value as affected by it.**

SAME—*same—same—not continuing nuisance permitting successive actions—only one recovery and includes all damages resulting from, past, present or future.* In all cases based upon the constitutional provision that private property shall not be taken or damaged for public use, there can be but one recovery and such recovery includes all damages resulting from the improvement, past, present or future.

SAME—*same—same—when cause of action accrues—limitations.* A claim for the recovery of damages to private property not taken for public use, alleged to have been caused by reason of construction of public improvement, accrues when the improvement in question is made, and if claim therefor is not made within five years after the making of same the claim is barred by limitations provided in Section 10 of the Act creating the Court of Claims.

SAME—*same—same—right of action for does not pass to subsequent grantee.* A right of action for damages to private property, not taken for public use, but alleged to have been damaged by reason of construction of public improvement is in the owner of the property at the time of the making of the improvement and a subsequent alienee of the property takes the same as it existed at the time of the conveyance, and has no right of action for damages resulting from the prior improvement, and accruing after the conveyance.

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

During the year 1924 the respondent constructed a hard-surfaced road known as S. B. I. Route No. 36, which extended in a northerly and southerly direction through Hancock County. At the time of the construction of such road, W. Jeff Horney was the owner of a tract of land containing 153 acres, more or less, situated on the west side of said roadway, just north of the south line of said Hancock County. On April 16th, 1929 said W. Jeff Horney conveyed said premises to the co-claimant, Frances Parke Horney, who now owns the same. Since the filing of the complaint herein, W. Jeff Horney died. His death has been suggested of record, and the cause proceeds with Frances Parke Horney as the sole claimant.

The property in question is improved with the usual farm buildings, and adjoins the west line of said roadway for a distance of approximately 210 rods. The land is low and level, and is not tile-drained. The natural drainage of claimant's land is to the north and east, and ultimately into a large drainage ditch 6,682 feet north of the south county line.

The highway in question has been maintained as a public highway for many years, first as an ordinary public highway, then as a State Aid Road, and finally as a hard-surfaced road. Prior to the construction of the hard-surfaced road, there were two right-angled jogs in the road at the southeast corner of the Horney land, but in constructing the hard road, a reverse curve was made at that point, and the jogs thereby eliminated. The crown elevation of the hard-surfaced roadway is substantially the same as in the previous roadway. There were four culverts with earth bottoms under the old roadway, and when such roadway was hard-surfaced, such culverts were replaced by new culverts of substantially the same size, placed in substantially the same locations, and with substantially the same elevations, but with concrete bottoms.

Prior to the construction of the hard-surfaced roadway, there was a small ditch along the west side of the roadway, and a larger ditch on the east side of such roadway to provide for surface drainage.

Claimant contends that by reason of the making of the reverse curve at the southeast corner of her land to replace two right-angled jogs, the roadway was moved to the east, and thereby encroached on the large ditch on the east side of the road; whereby such ditch was partially filled and narrowed, and its carrying capacity materially reduced; that the new culverts have concrete bottoms, which tend to hinder the flow of water through the same; that as the result of these changes, the water does not run off her land as quickly as it previously did, whereby she has sustained damages. The damage claimed in the complaint and Bill of Particulars attached thereto is for loss of crops during the period of five years prior to the filing of the complaint herein, to wit, July 6th, 1931.

In claimant's original Brief and Argument, as well as in the Reply Brief, the right of recovery is based on the provisions of Section 13 of Article 2 of the Constitution of 1870, which section provides that private property shall not be taken or damaged for public use without just compensation.

Counsel for respondent contends that the State, in the construction and maintenance of its highways, is engaged in a governmental function, and is not liable for the wrongs, conduct or negligence of its officers or agents.

If the contention made on behalf of the respondent is correct, it is decisive of the case, and the complaint will have to be dismissed.

If, on the other hand, such contention is not correct, it will be necessary to determine whether, under the aforementioned constitutional provision, the State is liable for the taking or damaging of private property for a public use, and if so, the nature and extent of such liability.

The contentions of counsel, both for claimant and for respondent, have been considered by our Supreme and Appellate Courts in a number of recent cases.

In the case of *Roe* vs. *County of Cook*, 358 Ill. 568, plaintiff was the owner of certain unimproved real estate in the village of Homewood, adjoining the Dixie Highway. Defendant constructed a subway under said highway in such manner that the eastern entrance thereto was on the plaintiff's property, and access to and from such property was cut off. Plaintiff in that case contended, as does the claimant here, that his property was taken and damaged for public use without compensation, in violation of the Constitution of this State.

In affirming a judgment in favor of the plaintiff, the court said:

"Section 13 of Article 2 of the Constitution, principally relied upon in support of the judgment, is as follows: Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law," etc. It is contended by plaintiff in error that the Constitution does not point out a remedy and that no express remedy is afforded by statute. From this it is argued that the parties damaged are left to the common law for relief, and that no liability exists at common law against an involuntary municipal corporation (such as the county of Cook) to respond in damages for a tort, in the absence of a statute creating such a liability. (*Board of Trustees of Odell* vs. *Schroeder*, 58 Ill. 353; *County of Cook* vs. *City of Chicago*, 311 id. 234.) On the other hand, the defendants in error argue that the constitutional provisions above quoted are self-executing, and that a county may not take or damage the property of an individual for public use without eminent domain proceedings and without compensation and then escape liability for its act by saying that it cannot be sued. We are impressed with the justice and soundness of the latter view. The constitutional right of all property owners to compensation when their property has been damaged or taken for public use is one of the most salient provisions of our bill of rights. * * *

"When the Constitution forbids the taking or damaging of private property without just compensation and points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the

common law, which affords a remedy for every wrong, will furnish the appropriate action for the redress of such grievance. 12 *Corpus Juris*, 732.

"We now turn to a consideration of the form of action in this case to ascertain whether the county of Cook is exempted from liability at common law because it is an involuntary municipal corporation. The liability of a county to respond in an action at law for damages resulting to an abutting property owner no part of whose land was physically taken in an eminent domain proceeding was directly involved in the *County of Mercer* vs. *Wolff*, 237 Ill. 74, where the cross-petition was stricken and petitioner "remitted to his action at law for his damages". The same doctrine was approved in the more recent case of *Illinois Power and Light Corp.* vs. *Talbott*, 321 Ill. 538, where it was said: "The Constitution, in prohibiting the taking or damaging of private property for public use without just compensation, recognizes the right of the owner of property damaged by a public work to recover the amount of such damages. This right may be asserted by the owner as a plaintiff in an action at law where none of his property is actually taken, or as a defendant to an eminent domain proceeding for the condemnation of property actually taken. (*County of Mercer* vs. *Wolff*, 237 Ill. 74.) In either case the right to the damages is the same, and its basis is the constitutional prohibition mentioned. * * *"

"The constitutional provision itself, without remedial legislation, is basic law, which not only confers a right but presupposes a remedy. Standing alone, Section 13 is self-executing and forms the basis for recovery at common law by an action on the case. This is the rule announced in the two Illinois cases last cited, and is also the view taken, under the same or similar constitutional provisions, in Pennsylvania, California, Georgia, Alabama, Nebraska, and Colorado." * * *

"Counties may sue and be sued in Illinois, * * * and while they may not be held liable for damages in tort actions, where the doctrine of respondeat superior must be invoked, they are nevertheless liable for the value of property appropriated to their own use and for damages done to abutting property by reason of public improvements made in pursuance of their corporate powers."

The Roe case was thereafter cited with approval in the case of *People* vs. *Kelly*, 361 Ill. 54.

In the case of *Holm* vs. *County of Cook*, 283 Ill. App. 190, plaintiffs brought an action of trespass to recover damages for injuries to their lands and the destruction of their crops by sewage from Oak Forest Infirmary, a public institution owned and maintained by the defendant. The declaration alleged that the plaintiff was the owner of the premises in question for five years preceding the commencement of the said proceeding; that Oak Forest Infirmary was maintained by the defendant on a tract of land near the premises of the plaintiff; that said infirmary had accommodations for 6,000 inmates; that during all of the time complained of, the defendant allowed noxious sewage from such institution to flow

in great volume upon the land of the plaintiff, whereby the growing crops were destroyed and whereby the plaintiff's premises were appropriated and damaged for a public purpose without the consent of the plaintiff, and without any compensation being paid therefor, contrary to the rights of the plaintiff as guaranteed by the Constitution of this State.

The defendant filed a plea of the general issue and a special plea to the effect that in the year 1915 the plaintiffs had sued the defendant in the same court in a plea of trespass on the case on promises for taking and using the same land mentioned and described in the declaration; that in said suit the plaintiffs recovered judgment against the defendant for the sum of $12,500.00 damages and costs of suit; and prayed judgment if the plaintiffs ought to have their aforesaid action.

The evidence showed that sewage from the defendant's Institution overflowed a portion of the plaintiff's farm, destroyed 20 acres of his yearly crop for the five years alleged, with resulting damage to the plaintiff of nearly twice the amount of the jury's verdict.

The jury returned a vedict in favor of the plaintiff for the sum of $1,750.00. Thereafter, on motion of attorneys for defendant, the trial court entered judgment for the defendant and against the plaintiff, notwithstanding the verdict, based on the former judgment and the satisfaction thereof. An appeal was perfected to the Appellate Court, First District. In that case the Appellate Court said:

"Plaintiff contends that a former recovery in an action of trespass against the county is not a bar to his recovery for a second trespass.

"Defendant's theory is "that, since it is liable in a tort action only when it has taken or damaged land, then when it has taken or damagedd land and paid for such appropriation, it thereby acquires an absolute right to continue to dominate the land for the same uses and purposes forever afterward."

"Plaintiff urges that "it would be very disastrous and far-reaching if it were the law that a trespasser, by reason of his trespass upon the property of another, obtained a legal right or title or interest in the property of the owner by reason of his wrongful and unlawful act, and the aggrieved owner could not thereafter recover for any subsequent trespass."

"*It is sufficient* answer to this argument to state that plaintiff predicates and he must predicate the county's liability entirely and solely on the constitutional provision that, "Private property shall not be taken or damaged for public use without just compensation." (Sec. 13, Art. 2, Constitution of the State of Illinois), which contemplates only one recovery for all past, present and future damages.

"Plaintiff's argument as above set forth would possess merit and force if his former suit and the instant action were against a private individual or corporation and for damages caused by a temporary nuisance. However, his former action not only was brought under the above constitutional provision, but he alleged permanent injury"; etc.

In conclusion, the court said:

"The county's liability for damaging private property for public use exists only under the Constitution and there can be only one recovery as has been shown. Since plaintiff has already recovered in his former action for the appropriation of the land involved in the instant case for the conduct of the sewage from the Infirmary across and through it, he is barred from another recovery for the continued use of the land for the same purpose."

The defendant in the cases cited was the County of Cook, but there can be no question but what the law as there laid down with reference to counties, applies with equal force and effect to the State.

The State being liable under the constitutional provision for the damaging of private property for public use, it becomes necessary to consider and determine the nature and extent of such liability, and the facts in this case with reference thereto.

The important facts in the case, from the standpoint of the legal principles here involved, are as follows:

The hard-surfaced highway in question was constructed during the year 1924. At the time of such construction the premises in question were owned by W. Jeff Horney. Thereafter, to wit, on April 16th, 1929, he conveyed said premises to the claimant Frances Parke Horney. On July 6th, 1931 complaint was filed herein jointly by W. Jeff Horney and Frances Parke Horney. Thereafter W. Jeff Horney died.

The complaint alleges damage to, or loss of crops during the period of five years prior to the filing of such complaint, but does not allege that the premises in question were permanently damaged. Evidence was produced on behalf of the claimant, in support of the averments of the complaint as to loss of crops, but no evidence was offered to show any permanent injury to the premises in question.

The evidence, however, shows beyond any doubt that the improvement of the highway in question was a permanent improvement. Furthermore, claimant bases her right of recovery on the aforementioned constitutional provision.

Claimant apparently takes the position that the highway in question as now constructed, is in the nature of a continuing nuisance or trespass, and that therefore she may maintain successive actions for damages, and recover in each case the damages sustained since the commencement of the preceding action, provided not more than five years have intervened.

Such, however, is not the law. The question has been before the courts of this State in many cases, and there are numerous decisions of our Supreme Court to the effect that where private property has been damaged for public use, and the owner seeks compensation for such damage pursuant to the aforementioned constitutional provision, there can be but one recovery for the damages sustained, and such recovery includes all damages past, present and future.

In the case of *Chicago & E. I. Ry. Co.* vs. *Loeb*, 118 Ill. 203, the plaintiff sought to recover damages claimed to have been sustained by the throwing of smoke, cinders and ashes upon his premises, in the operation of defendant's railroad. In that case the court said:

"Before adoption of the latter Constitution (1870) where there was land taken for public use, there was provision for compensation. But where there was other disconnected land not touched by the improvement, but merely damaged, as complained of in this case, no compensation was provided. To meet this want the clause of the Constitution restrictive of the exercise of the power of eminent domain provides that private property shall not be taken or damaged for public use without just compensation.

"We think it to be within the true intent and meaning of this provision as to damage, that there should be but one proceeding for recovery of damage, in which there should be recovery for the entire damage, past, present and future; that it should be similarly regarded, in this respect, as the provision in regard to the taking of property, where there is but one proceeding, and an assessment of compensation and damages once for all. The two provisions are coupled together and are both in restriction of the exercise of the power of eminent domain."

In the case of *C. & E. I. R. R. Co.* vs. *McAuley*, 121 Ill. 160, in which the facts were similar to the Loeb case, the court, in speaking of the decision in the Loeb case, said:

"We there expressly held, that upon the construction and putting in operation of a railroad, all damages which would be sustained as the necessary result of the operation of the road can be immediately estimated, and must be recovered in one action. The only logical conclusion to be drawn from that decision is, that unless an action is brought to recover the damages after they accrue, within the period provided by the statute, the cause of action will be barred."

In the case of *North Shore Ry. Co. vs. Payne*, 192 Ill. 239, the plaintiff sued for damages claimed to have been sustained by reason of the erection and operation by the defendant, on the premises adjoining plaintiff's dwelling house, of an electric power house for the operation of its railroad. In that case the court, on page 243, said:

"The defendant, acting within its charter, had a legal right to maintain its power house at that place, and plaintiff had no lawful right to interfere or compel a change. In such a case, in legal contemplation all damages which will be sustained as the effect of the Act are sustained immediately, and the measure of damages is the depreciation in market value";

In the case of *Miller vs. Sanitary District*, 242 Ill. 321, the court said:

"No doubt the payment of this judgment will justify the sanitary district in continuing to flow these lands without any danger of being harassed with other suits for damages. In such cases the recovery is held to be in full compensation for all present and future damages and one recovery will bar any subsequent action for the same cause."

In the case of *Holm vs. County of Cook, ante*, the court said, p. 198:

"The county's liability for damaging private property for public use exists only under the Constitution, and there can be only one recovery as has been shown."

In the case of *Roe vs. County of Cook*, heretofore mentioned, the court said (p. 575):

"While the judgment may be somewhat excessive, we are powerless to afford any relief under the record. Its payment will secure the public right to continue to use the premises, as it will be considered as full compensation for all present and future damages and bar any subsequent action for the same cause."

As to the damages recoverable in cases where private property is damaged but not taken, the law is well settled. In the case of *Dept. of Public Works vs. Caldwell*, 301 Ill. 42, and in the case of *Dept. of Public Works vs. McBride*, 338 Ill. 347, and in numerous other cases, our Supreme Court has held that the true measure of damages for land not taken is the difference between the fair cash value of the property unaffected by the improvement and its fair cash market value as affected by it.

This court has applied the rule thus stated in the case of *Grassle vs. State of Illinois*, 8 C. C. R. 150, and in the combined cases of *Sadie Stein, et al vs. State of Illinois*, 8 C. C. R. 251-265.

The only evidence in the record on the question of damages is the testimony as to damage to or loss of crops, and there is no evidence whatsoever as to the fair cash value of the premises, either before or after the making of the improvement.

Inasmuch as there can be but one recovery, the question arises as to when the cause of action stated in the complaint accrued, and whether the same is now barred; also as to the effect of the conveyance by W. Jeff Horney to Frances Parke Horney as hereinbefore set forth.

Section 10 of the Act creating the Court of Claims (State Bar Assn. Stat. 1935, Chap. 37, Sec. 471) provides that "every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues", etc.

In the case of *C. & A. R. R. Co.* vs. *Sarah Maher*, 91 Ill. 312, defendant sought to recover damages for injuries claimed to have been sustained to her land by a pier constructed by defendant in the river near her property. It appeared from the evidence that Hugh Maher was the owner of the property in question prior to and at the time of the construction of the pier; that some time after the construction thereof, he deeded the property to his wife, Sarah Maher, who thereafter commenced a proceeding against the defendant for damages.

After a review of the authorities upon the question, the court, page 317, said:

"These authorities establish the doctrine that Maher might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time or in the future; that he could have sued and recovered for the depreciation in the value of the property caused by the erection of this protection. This being true, the right of action was in him for a recovery of all damages that were or might be caused by the structure, and as the right has not nor can be transferred to the appellee, she has shown no legal right of recovery."

In the case of *C. & E. I. R. R. Co.* vs. *Loeb*, *ante*, the court held that the damage in question was of a permanent character and only one recovery could be had for the entire damage, and in conclusion, in passing upon the question as to the right of recovery claimed by one who had purchased the property subsequent to the construction of the improvement in question, said:

"The conclusion is that as the former owner could have sued and recovered for the depreciation in value of the property caused by the railroad, the right of action was in him for a recovery of all damages that were or might be caused in the operation of the railroad, and that there is no right of recovery in his alienee, appellee."

In the case of *North Shore Ry. Co.* vs. *Payne, ante*, the court, on page 247, said:

"Where the suit is not for negligent or improper construction or operation, and is for damages accruing from a construction of a permanent character, all damages in law, accrue when the cause of the injury is created, and the recovery must be for the whole damage, of which depreciation in market value is the measure. * * * In this case, the damages, in contemplation of law, were sustained when the power house was established and its operation commenced."

The cause of action here sued upon, therefore, accrued in 1924. Complaint was not filed until July 6th, 1931. Consequently the claim is barred under the statute. Furthermore, under the authority of the Maher case, and the Loeb case, the claimant, Frances Parke Horney, having acquired title after the completion of the improvement in question, has no right of action on account thereof.

From the decisions cited and referred to, we reach the following conclusions:

1. There is no liability on the part of the State for damages in tort where the doctrine of *respondeat superior* must be invoked.

2. *The only liability of the State for taking or damaging* private property for public use, is under Section 13 of Article 2 of the Constitution.

3. The provisions of such section of the Constitution are self-executing.

4. Where damages are recoverable, the proper measure of damages for property damaged but not taken, is the difference between the fair cash value of the property unaffected by the improvement and the fair cash value of the property as affected by it.

5. In cases based upon the constitutional provision that private property shall not be taken or damaged for public use without just compensation, there can be but one recovery, and such recovery includes all damages resulting from the improvement, past, present or future.

6. In such cases the right of action accrues when the improvement in question is made, and if claim therefor is

not filed within five years after the making of the improvement, the claim is barred.

7. In such cases the right of action is in the owner of the property at the time of the making of the improvement, and a subsequent alienee of the property takes the same as it existed at the time of the conveyance, and has no right of action for damages resulting from the prior improvement, *and accruing after the conveyance.*

Based upon the foregoing conclusions, and the record before us, claimant has no right to an award, and the same must therefore be denied.

Award denied. Case dismissed.

(No. 1812—Claim denied.)

ADOLPH NIERSTHEIMER, JR., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 12, 1937.

J. M. POWERS, for claimant.

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

PROPERTY DAMAGE—*property not taken for public use—construction of public improvement alleged to have caused—when cause of action for accrues—limitations.* A claim for the recovery of damages to private property, not taken for public use, alleged to have been caused by reason of construction of public improvement, accrues when the improvement in question is made, and if claim therefor is not made within five years after the making of same, the claim is forever barred under limitations provided in Section 10 of the Act creating the Court of Claims.

SAME—*same—same—not continuing trespass permitting successive actions—only one recovery and includes all damages resulting from, past, present or future.* In claim for damages to private property not taken for public use, but alleged to have been caused by reason of construction of public improvement, under Section 13 of Article 2 of the Constitution of Illinois, there can be but one recovery and such recovery includes all damages resulting from the improvement, past, present or future, as such improvement does not constitute continuing trespass or nuisance permitting successive actions.

MR. JUSTICE YANTIS delivered the opinion of the court:

The declaration herein alleges that claimant in the spring and summer of 1926 was the owner of certain real estate described in the complaint, adjoining S. B. I. Route No. 9;

that for fifty years a natural water course has run across the lands of claimant from southeast to northwest and thence up to and across said highway, and thence northwesterly one and one-half miles to the Illinois River; that the water escaped across said highway through two bridges east of the C. & A. Railway Company right-of-way and in times of freshet by running over said highway which had a low embankment; that in the spring and summer of 1926 the respondent removed one of said bridges and raised the grade of the highway from three (3) to five (5) feet throughout its length and thereby obstructed the lawful flow of the water and failed to place adequate bridges and culverts to take care of the rainfall and freshets, and by reason thereof on the morning of September 1, 1926, the water from a heavy rain storm was unable to escape across said highway embankment, resulting in the loss of claimant's crops and damages to his soil from gravel and silt deposits; that such damages were again repeated by overflows in the fall of 1926; all to the total amount of One Thousand Six Hundred Eighty-eight and 40/100 ($1,688.40) Dollars.

The State has filed a motion to dismiss the claim by reason of the fact that same is based upon alleged negligent construction of the hard road in question, for which negligence upon the part of the employees and agents of the State the latter is not legally liable.

This question of negligence by the employees of the State, in the construction or maintenance of its highways, has frequently been before the court, and awards therein have been denied when such claims are based upon the theory that the State is liable for the negligence of its employees. There is no provision of law or statute by which the State is legally held liable for damages caused by the failure or negligence of any employee or officer in repairing or constructing any highway, and in the absence of a statute making the State thus liable the Court of Claims has no authority to make an award. The State therein acts in its governmental and sovereign capacity. (*Sullivan* vs. *State*, 8 C. C. R. 140.)

The present claim however, seems to be predicated not upon the theory of negligence by employees of the State, but is apparently based upon the theory that the State is liable

for lands *not taken but damaged* in the general construction of a highway.

"The constitutional provision forbidding the taking or damaging of private property without just compensation is a basic law, which not only confers a right but presupposes a remedy, and although it makes no provision for remedial legislation and none is provided by statute the constitutional provision (Sec. 13 of Art. 2, Ill. Const.), itself is self-executing and forms the basis for recovery at common-law."

Roe vs. *County of Cook*, 358 Ill. 568.

In the above case no unauthorized act or negligence of the commissioners, in the construction of the subway in question, was charged, but the question of the district's liability to pay for property damaged in the regular construction of the work in question, was directly involved.

In *People* vs. *Kelly*, 361 Ill. 54, the City of Chicago, without condemnation or warrant of law, so raised the grade of Monroe Street as to damage the adjacent property. The court there said:

"Disregarding all inappropriate arguments and side issues, the record before us amounts simply to this: The appellant's property was damaged for a public use within the meaning of Sec. 13 of Art. 2 of the Constitution. That provision is self-executing, and the appellant has not been paid just compensation. * * * Neither the Legislature nor any Executive or Judicial Officer may disregard the provisions of the Constitution even in case of a great emergency."

The Constitution of 1848 provided that private property should not be taken for public use without just compensation. No provision was made for *property damaged,* but not taken, and numerous cases arose in which a decided hardship was worked upon certain property-owners whose property was seriously damaged but not taken, and who were therefore denied any compensation therefor. To remedy this situation a change was made in the Constitution of 1870, and *Sec. 13 of Art. 2 of the Constitution* now provides that, "Private property shall not be taken or damaged for public use without just compensation."

This question was reviewed in *Moore, et al* vs. *State*, 8 C. C. R. 686, wherein the court held that when in the course of construction of a State highway, lands which previously drained through its natural ditches is thereafter, by the construction of a highway, subjected to an increased amount of water to which it was not previously subjected so that surface water cannot be carried off and an adjoining property-owner is damaged thereby, the latter is entitled to an award.

Where private property is not taken but is damaged for public use, the property-owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such cases is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it. (*Dept. of Public Works* vs. *McBride*, 338 Ill. 347.)

Where the taking or damaging does not arise by virtue of condemnation proceedings the damage is determined by the difference between the fair cash market value of the property just prior to the time the making of the improvement commenced, and its fair cash market value just after the improvement is completed. (*Ross* vs. *City of Chicago*, 91 Ill. App. 416.)

While the complaint herein recites in some detail the loss in September, 1926 of corn then growing on the premises described, any claim which plaintiff might have would have to be for damages to the real estate in question for property damaged but not taken in the course of the construction or improvement of the highway in question, i. e. a part of S. B. I. Route No. 9.

In the case of *Holm* vs. *County of Cook*, 283 Ill. App. 190, where plaintiffs brought an action of trespass to recover damages for injuries to their lands and for the destruction of their crops, the court held, "Plaintiffs predicate and must predicate the county's liability entirely and solely on the constitutional provision, that 'private property shall not be taken or damaged for public use without just compensation' (*Sec. 13, Art. 2, Const. State of Ill.*), which contemplates only one recovery for all past, present and future damages." The same rule of law that was applied in the above case as regards the County of Cook, applies in the same measure in a claim against the State. As there could be but one recovery it becomes necessary to determine when that right of recovery first accrued. The complaint herein recites that the construction work which caused the alleged damage to plaintiff's property was in the spring and summer of 1926. Plaintiff's right of action therefore accrued at that time.

The claim herein was not filed until August 29, 1931, being on its face more than five years subsequent to the time such right of action matured. *Section 10* of the Act creating

the Court of Claims (*Ill. State Bar Statutes, Chap. 37, Sec. 471*) provides that "Every claim against the State cognizable by the Court of Claims shall be forever barred unless the claim * * * is filed within five years after the claim first accrues." The motion of the Attorney General to dismiss the claim is therefore allowed for the reason that the claim is barred by the statute of limitations. Claim dismissed.

(No. 2525—Claim denied.)

HARRY GOLDSON, DOING BUSINESS AS PLAZA THEATER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 9, 1937.
Rehearing denied May 12, 1937.

WOLF & LOVE, for claimant.

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

STREETS—*dedicated for public use—power of Municipal Corporation regarding.* The streets of a city are dedicated for public use, and for these purposes the city council may improve and control them and adopt needful rules for their management and use.

SAME—*same—Municipal Corporation without power to alien or otherwise encumber.* A city council has no power to alien or otherwise encumber streets, so long as they are public streets but must hold them in trust for public uses only and no easement or right therein, not of a public character can be granted by a municipality, or acquired by any individual or corporation for exclusive private use to the exclusion of the public.

SAME—*title to—duty of Municipal Corporation regarding—ordinance authorizing exclusive private use, invalid.* The title to public streets within a Municipal Corporation is in such municipality, from side to side and end to end and it has the conservation, control, management and supervision of such as trust property and it is its duty to defend and protect the title to such trust estate and must hold and control possession thereof for public use for purposes of travel and the like, and any ordinance enacted by said municipality, attempting or purporting to grant exclusive use of its streets or any part thereof to any private person or for any private purposes is invalid and no rights can be acquired by reason thereof.

SAME—*permanent encroachment on for private use—under permission of Municipality—a purpresture and in law a nuisance—such permission not irrevocable—Municipality not estopped from requiring that be open in entirety.* A permanent encroachment upon public streets for a private use is a purpresture and is in law a nuisance, and when such encroachment is under permission of Municipality same is not binding on it and it is not

irrevocable. The Municipality having no power to grant such permanent use there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the Municipal authorities done without authority of law.

SAME—*City and Village Act, Article V—one occupying portion of public street for private purpose under permit of department of Municipality, chargeable with notice of limitations of power of Municipality over.* Private person occupying portion of public street for private purpose under permit of department of Municipality is chargeable with notice of rights of public in street and the right of the Municipality under Article V of the general City and Village Act to open, alter, widen, or otherwise improve same at any time and is also chargeable with notice of the limitations on the power of the Municipality with reference to streets.

SAME—*Section 13 of Article 2 of Constitution, taking or damaging private property without just compensation—Municipality compelling removal of canopy, occupying portion of public street, by private person for private use, under permit of one of its departments, without payment of cost of removal or replacement, not violation of.* The rights of a private person under the provisions of Section 13 of Article 2 of the Constitution of Illinois, providing that private property shall not be taken or damaged for public use without just compensation are not violated where such person erected a canopy, occupying portion of public street for private purpose under permit of department of Municipality and is compelled by said Municipality to remove same from street, without payment of any compensation for such removal or replacement.

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

Claimant is the owner of the Plaza Theatre located at 308-310 West North Avenue, in the City of Chicago.

In 1929 he constructed a canopy the full width of the theatre entrance, extending over the sidewalk from the front wall of the theatre building to a line perpendicular to the curb, which canopy had electrical signs on the exposed portions thereof with changeable letters, constructed to display, in electric lighting, the title of the motion picture, and the names of the stars appearing therein.

During the month of May, 1934 the Division of Highways of the Department of Public Works and Buildings of the respondent reconstructed and widened a portion of the roadway of said North Avenue, being S. B. I. Route 54, including the block in which the Plaza Theatre is located.

Such roadway was widened approximately five and one half feet on each side of the street, and the sidewalk narrowed to the same extent. As a result thereof, the aforemen-

tioned canopy as then constructed, extended out over the curb into the roadway for a distance of approximately five feet.

The work of widening such roadway was completed on September 5th, 1934, and on September 15th, 1934 claimant received a notice from the City of Chicago requiring him either to tear down the canopy, or to so alter the same that it would not project into the street beyond the curb.

Claimant removed the old canopy and installed a new one, in accordance with the requirements of the Electrical Code of the City of Chicago, at a total cost of $3,340.00.

The canopy was originally constructed in 1929 pursuant to a permit issued by the City of Chicago in accordance with the Electrical Code of said city, which provides that no illuminated sign shall be erected or maintained over any sidewalk, street or public way except upon permit first issued by the Electrical Inspection Bureau, and further provides that such permit shall be for the period of one year, and that a renewal certificate must be obtained annually. Such Code further provides (Art. 3) that if, upon inspection, such sign is found to comply with the provisions of such article, a renewal certificate shall be issued for one year from the date of expiration of the previous certificate; and also, that no sign erected under the authority of such article shall project beyond the curb line, and that it shall be the duty of the Electrical Inspection Bureau to remove or cause the removal of any sign not in accordance with the provisions of such article.

In his original complaint claimant asked for damages in the total amount of $25,000.00, to wit, the cost of replacing the old canopy with a new one, and in addition thereto, damages on account of a reduction in the space in the electrical display signs which appeared on said canopy. Thereafter claimant waived all claim to damages except as to the amount paid for the construction of the new sign, to wit, $3,340.00.

The principles of law involved in this case have been before our Supreme Court many times, and the holdings of such court with reference thereto have been uniform. Consequently it will be necessary to refer to only a few of such decisions.

The case of *Snyder* vs. *City of Mt. Pulaski*, 176 Ill. 397, involved the right to use a well in the public streets of the

City of Mt. Pulaski, which right had been granted by said City to one Snyder by ordinance;—the well in question having been maintained in said street for a long time prior to the date of the adoption of such ordinance. In that case, in considering the validity of such ordinance, and the rights of Snyder thereunder, the court said:

"The streets of a city are dedicated for public use, and for these purposes the city council may improve and control them and adopt needful rules for their management and use. But that body has no power to alien or otherwise encumber such streets so long as they are public streets, but must hold them in trust for public uses only, and hence no easement or right therein not of a public character can be granted by a municipality, or acquired by any individual or corporation for exclusive private use to the exclusion of the public. * * * A permanent encroachment upon public streets for a private use is a purpresture, and is in law a nuisance. * * * Such permission to so use the street is not binding upon the city, and is not irrevocable. The municipality having no power to grant such permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law. * * * Appellant acquired no right * * * against the municipality by estoppel, nor by any right conferred by the ordinance, because the right conferred was a mere private use, and that private use created a purpresture."

In the case of *Pennsylvania Co.* vs. *City of Chicago*, 181 Ill. 289, the court, on page 296, said:

"The title of the streets is vested in the city, and it has the conservation, control, management and supervision of such trust property, and it is its duty to defend and protect the title to such trust estate. The city has no power or authority to grant the exclusive use of its streets to any private person, or for any private purposes, but must hold and control the possession exclusively for public use, for purposes of travel and the like. * * * The rule is, that all public highways, from side to side and from end to end, are held for the use of the public, and no other safe rule can be adopted."

The case of *Gerstley* vs. *Globe Wernicke Co.*, 340 Ill. 270, involved the question of the validity of an ordinance of the City of Chicago which authorized the construction of certain bridges across a public alley for the purpose of connecting several buildings of the defendant. One of the contentions of the defendant was that the ordinance in question was authorized by a statute which provides as follows, to wit: "The City Council may also regulate the use of space over the streets, alleys and public places of the city, and upon payment of proper compensation, to be fixed by ordinance, may permit use of the space more than twelve feet above the level thereof."

In that case the court held that the City of Chicago had no authority to enact the ordinance in question and that Globe Wernicke Co. acquired no rights by virtue thereof.

In the case of *People* vs. *Wolper*, 350 Ill. 461, the principles involved were identical with those involved in this case. In that case the defendant Harold Wolper had constructed and maintained for many years two curb pumps securely fastened upon a cement base located in the parkway space in front of his garage on the south side of West Lake Street in Chicago. The base was fifteen feet long and two and one-half feet wide, and five inches in height on the street side and three inches in height on the sidewalk. The street at that point is forty-seven feet in width. The south six feet thereof was occupied by a cement sidewalk adjacent to the lot line, and a six-foot parkway in which defendant's pumps were maintained, was between the sidewalk and the curb.

As in this case, the gasoline pumps were installed pursuant to a permit issued by the City of Chicago which was limited to one year, with renewal privilege as in this case. The question involved in the case was as to the validity of the ordinance authorizing and permitting the installation and operation of such gasoline pumps. The defendant urged that the City of Chicago had authority to adopt such ordinance and that such authority was derived from a combination of numerous grants of power in Article V of the Cities and Villages Act. In that case the court said:

"The authority for the passage of an ordinance need not be wholly derived from a single grant of power by the Legislature but may be derived from one or any combination of such grants. * * * Yet implied powers of a city are those, only, which are necessarily incident to powers expressly granted. * * * A statute of this State since the first enactment on the subject in 1845, has declared obstructions or encroachments upon public highways, private ways, streets, alleys, commons, landing places and ways to burying places to be public nuisances, * * * and, as we have seen, by Section 10 of Article 5 of the Cities and Villages Act there is imposed upon the city the duty to prevent and remove encroachments and obstructions from the public streets.

"With these statements of the general rules we come to the questions whether the pumps operated by Wolper constitute a purpresture and public nuisance within the meaning of the statute, and if so, whether the city may by ordinance authorize the maintenance thereof. A permanent encroachment upon streets for private use in a purpresture and is in the law a nuisance. * * *

"Power of a city to authorize the use of public streets for private purposes has been uniformly denied by this court. When a public street is

once established all beneficial uses vest in the public. These include the uninterrupted and unobstructed use of any portion or part of such public highway. These rights of the public are inconsistent with the right of a private citizen to encroach upon the streets by the erection of a permanent structure. Streets are held in trust by the municipality for the benefit of the public and may not be given away by ordinance.

* * * * * * *

"Counsel for appellants earnestly argue that since the permit to Wolper is revocable at the will of the mayor for any cause, the pumps and base do not constitute a permanent obstruction. It is true, the permits are revocable and run for a period of one year, but they are renewable, and once issued are revocable only for cause. It is a fair conclusion that a permit having once been issued will continue by renewal so long as the holder complies with the provisions of the ordinance, and the structure permitted will become, in fact, permanent. Under such facts these pumps cannot be said to come within the rule permitting merely temporary obstructions."

* * * * * * *

"The Legislature has neither expressly nor by necessary implication granted to the cities power to permit the erection and maintenance of gasoline pumps in the streets. The city does not possess the power to authorize them. The ordinance is void, and the circuit court did not err in granting the writ."

Claimant contends that his property has been taken or damaged by the respondent without just compensation, in violation of the constitutional provisions. Under the facts in the record, and the law applicable thereto, as above set forth, there is no basis for such contention. Claimant was chargeable with notice of the rights of the public in the street, and the right of the city under Article 5 of the General City and Village Act to open, alter, widen, or otherwise improve the same at any time, and was also chargeable with notice of the limitations on the power of the city with reference to such streets. Even if the Electrical Code was a valid enactment of the City of Chicago, claimant could not accept the benefits thereof without being bound by its obligations.

The original permit was issued September 20th, 1929. Under the Code, renewals were issued for one year from the date of expiration of the previous permit. The permit under which claimant was operating at the time of the widening of North Avenue therefore expired September 20th, 1934. The roadway in question was completed September 5th, 1934, and claimant was notified to remove or alter the sign on September 15th, 1934. Inasmuch as the sign projected over the curb on September 20th, 1934 (the date of the expiration of claimant's permit) in violation of the Electrical Code, he was not

then entitled to a renewal permit under the provisions of such Code and it was the duty of the Electrical Inspection Bureau to remove or cause the removal of such sign.

Viewed in the light most favorable to the claimant, he had no right, as against the public, to maintain a canopy which at any time extended over the curb line, and consequently even if he were required to remove the same within a short time after the erection thereof, he had no legal ground of complaint.

Under the facts in the record and the law applicable thereto, we have no authority to allow an award.

Award denied. Case dismissed.

OPINION ON REHEARING.

Per Curiam:

Claimant filed a petition for rehearing herein on March 10th, 1937.

We find nothing in such petition which was not fully and carefully considered by the court in arriving at its original decision, and the petition for rehearing will therefore be denied.

(No. 2648—Claimant awarded $142.63.)

ARMOUR & COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

T. C. TORRENCE, for claimant.

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

SUPPLIES—*when award may be made for.* Where it clearly appears that State received supplies, as ordered by it, and that bill therefor, which is not questioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for the price thereof will be made on claim filed within reasonable time.

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

Claimant seeks an award in the amount of $178.70 for merchandise sold to the respondent and delivered to the St.

Charles School for Boys, St. Charles, Illinois, during the period from July 14th, 1932 to September 26th, 1933.

It appears that complete receiving records were not kept at such State Institution at the time the merchandise in question was delivered, and the authorities at such institution are now unable to check the receipt thereof from their records.

However, it appears from the affidavit of claimant's District Credit Manager that the merchandise in question was sold to respondent and delivered to the St. Charles School for Boys; and the respondent makes no denial thereof.

It also appears that the respondent is entitled to a credit in the amount of $36.07 for merchandise returned, leaving a net balance due claimant of $142.63.

It is not claimed that the prices charged are unreasonable, and no good reason is suggested why the claim should not be allowed. Award is therefore entered in favor of the claimant for the sum of One Hundred Forty-Two and 63/100 Dollars ($142.63.)

(No. 2820—Claimant awarded $336.67.)

ARMOUR & COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

T. C. TORRENCE, for claimant.

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

SUPPLIES—*when award may be made for.* The facts in this case are the same as those in *Armour & Company*, No. 2648, *ante*, and what said in that case applies here.

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

Claimant filed its complaint herein on January 30th, 1936, and therein asked an award in the amount of $347.94 for merchandise sold to the respondent and delivered to the Lincoln State School and Colony at Lincoln, Illinois, on divers dates between July 7th, 1933 and December 14th, 1933.

The claim was checked by the Managing Officer of the Lincoln State School and Colony, who found the amount due to be $336.67. Claimant was notified of the error in its state-

ment of account, and thereafter authorized the reduction of its claim to the sum of $336.67.

There is no question but what the account as so reduced is true and correct, and that the same remains unpaid.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Thirty-Six Dollars and Sixty-Seven Cents ($336.67.)

(No. 2812—Claim denied.)

GEORGE CALVERT AND ROBLES MILLER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

ASA J. WILBOURN, for claimant.

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

NEGLIGENCE—*respondeat superior—not applicable to State.* In the exercise of governmental functions the State is not liable for the negligence of its servants or agents, in the absence of a statute making it so liable and in this State there is no such statute.

HIGHWAYS—*construction and maintenance of, governmental function.* In the construction and maintenance of public highways the State exercises a governmental function and is not liable for damages caused by either a defect in contruction or failure to maintain same in a safe condition for travel.

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

Claimants filed their complaint herein on January 22d, 1936 and allege therein substantially as follows:

That shortly prior to November 10th, 1936 respondent was engaged in widening the concrete slab on S. B. I. Route 2, at a point about one and one-half miles south of the intersection thereof with S. B. I. Route 150, and just north of the City of Cairo; that upon completion of such work, the forms which had been used in connection therewith were removed from the slab and placed on the east side of said highway; that as a result of the removal of said forms, a trench was left between the east edge of said concrete slab and the dirt shoulder, said trench being of varying depths from eight to twelve inches, and of a width of from twelve to fifteen inches.

That at this point in the highway there was a row of trees along the east side thereof, at distances varying from one and one-half feet to four feet from the east edge of the concrete slab.

That on said 10th day of November, about twelve o'clock midnight, the claimant George Calvert was driving his automobile in a northerly direction on said S. B. I. Route 2, and the claimant Robles Miller was riding with him; that at the point aforesaid they met another automobile which was proceeding in a southerly direction; that the claimant George Calvert in passing said car drove his car to the east edge of said slab; that in so doing, the front wheel of his car went off the slab into the trench caused by the removal of said forms; that said Calvert attempted to turn his car back upon the slab but was unable to do so on account of the aforementioned trench, which caused said car to turn to the right, where it struck violently against a tree, and was completely demolished.

That as the result of such accident, claimants herein sustained personal injuries for which the said George Calvert claims damages in the amount of $1,500.00, and the said Robles Miller claims damages in the amount of $3,223.00.

The Attorney General has moved to dismiss the claims for the reason that the respondent is not liable under the facts set forth in the complaint.

This court has repeatedly held that the State, in the construction and maintenance of its hard-surfaced highways is engaged in a governmental function.

Chumbler vs. *State*, 6 C. C. R. 136;
Highland vs. *State*, 6 C. C. R. 384;
Bucholz vs. *State*, 7 C. C. R. 241;
Wilson vs. *State*, 8 C. C. R. 72;
Wetherholt vs. *State*, 8 C. C. R. 100.

Also that in the exercise of such governmental functions, it is not liable for the negligence of its servants or agents, in the absence of a statute making it so liable.

Braun vs. *State*, 6 C. C. R. 104;
Chumbler vs. *State*, 6 C. C. R. 138;
Bucholz vs. *State*, 7 C. C. R. 241;
Baumgart vs. *State*, 8 C. C. R. 220;
Childress vs. *State*, 8 C. C. R. 223;

Ryan vs. *State*, 8 C. C. R. 361;
Kramer vs. *State*, 8 C. C. R. 67;
Johnson vs. *State*, 8 C. C. R. 67;
Wilson vs. *State*, 8 C. C. R. 72.

Such decisions of this court are in harmony with repeated decisions of our Supreme Court.

Hollenbeck vs. *County of Winnebago*, 95 Ill. 148;
City of Chicago vs. *Williams*, 182 Ill. 135;
Minear vs. *State Board of Agriculture*, 259 Ill. 549;
Gebhardt vs. *Village of LaGrange Park*, 354 Ill. 234.

Under the facts set forth in the complaint, we have no authority to allow an award. The motion of the Attorney General is therefore sustained and the case dismissed.

(No. 2868—Claim denied.)

AUDIE CRANK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

CHARLES DURFEE, for claimant.

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

PERSONAL INJURY—*negligence of employees of State—State not liable for.* The rule is universal that the State is never liable for the negligence of its servants and agents, unless there is a statute making it so liable and in this State there is no such statute, and an award cannot be made for damages for personal injuries sustained as the result of such negligence.

SAME—*same—claim on grounds of equity and good conscience denied.* A claim for damages for personal injuries sustained as the result of the negligence of an employee of the State cannot be predicated on the grounds of equity and good conscience nor can an award on such grounds be granted.

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

Claimant filed her complaint herein on March 24th, 1936, and alleges therein that on August 1st, 1935 her husband, Albert Crank, was riding as a passenger in an automobile on one of the public streets in the Village of Vienna, Illinois; that while he was so riding, and while he was in the exercise of all due care and caution for his own safety, the automobile in which he was riding was struck by a truck which was then being driven by one of the servants and agents of the

respondent in the performance of his duties; that as the result of such collision the said Albert Crank sustained injuries from which he died on August 6th, 1935; that said Albert Crank left him surviving the claimant Audie Crank, his widow, and that as the result of the death of said Albert Crank as aforesaid, she has sustained damages in the amount of $10,000.00.

The Attorney General has moved to dismiss the case on the ground that the respondent is not liable for the negligent or wrongful acts of its servants and agents.

This court has held in numerous cases that the State is not liable for the negligent or wrongful acts of its servants and agents, in the absence of a statute making it so liable. A few of the more recent of such cases are the following: *George McCready, et al* vs. *State*, No. 2604, decided at the September Term, 1935; *Lester A. Royal* vs. *State*, No. 2597, decided at the September Term, 1935; *Frank J. Penick, et al* vs. *State*, No. 2640, decided at the September Term, 1935; *L. G. England* vs. *State*, No. 2394, decided at the September Term, 1935; *Lois Bass* vs. *State*, No. 2679, decided at the December Term, 1935; *K. B. Waterstreet* vs. *State*, No. 2740, decided at the December Term, 1935; and *Ralph Yocum* vs. *State*, No. 2910, decided at the November Term, 1936.

Such holding is in accordance with numerous decisions of our Supreme Court. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

Claimant contends, however, that notwithstanding this rule of law, she is entitled to an award on the grounds of equity and good conscience. The right of a claimant to an award solely on the grounds of equity and good conscience was considered by this court in the case of *Crabtree* vs. *State*, 7. C. C. R. 207, in which case the court, after an exhaustive review of the previous authorities on the subject, reached the following conclusion (p. 221):

"We conclude, therefore, that Section four (4) of Paragraph six (6) of the Court of Claims Act, which provides as follows, to wit: The Court of Claims shall have power: "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should in equity and good conscience, discharge and pay;" merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge

any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provision of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The law as laid down in the Crabtree case has been followed by this court in numerous cases decided since that time.

In the recent case of *Rocco Titone, et al* vs. *State*, No. 2473, decided at the present term of court, this question was again thoroughly considered and the previous conclusion adhered to.

There is no statute authorizing an award against the State in this case, and therefore we have no authority to allow such award.

If claimant has a right of action, it is against the driver of the truck, and not against the State.

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

(No. 2436—Claim denied.)

ANNA JOHNSTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 11, 1935.
Opinion on amended complaint filed February 10, 1937.

F. P. CONLON, for claimant.

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

NEGLIGENCE—*personal injuries—sustained as result of negligence of employees of State Charitable Institution—State not liable for.* Where claim is made for damages for personal injuries sustained by one while visiting State Charitable Institution, alleged to have been caused by the employees thereof, an award must be denied, as in the maintenance of its Charitable Institutions the State exercises a governmental function and is not liable for the negligence of its servants or agents while exercising such function, in the absence of a statute making it so liable.

SAME—*same—same—claim on grounds of equity and good conscience denied.* The power of the court to allow awards on the grounds of equity and good conscience has been heretofore fully discussed, defined and decided in the case of *Crabtree* vs. *State*, 7 Court of Claims reports, page 207 and in

numerous cases decided since that time and under the authority of such cases no award can be made for damages for personal injuries, alleged to have been sustained as the result of the negligence of an employee of the State.

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

Claimant filed her complaint herein on July 17th, 1934, and alleges therein in substance that on the 7th day of November, A. D. 1933 her son, Hugh Johnston, was a patient at the Illinois Charitable Eye and Ear Infirmary, a charitable corporation created and operated by the State of Illinois and located at 904 West Adams Street, Chicago; that the original building of such institution is located on Adams Street, and a new addition thereto, on Sangamon Street; that on the last mentioned date, claimant visited her son at said institution; that at the termination of said visit, she was instructed by an employee and agent of the institution to leave the building by way of the Sangamon Street doorway of the new addition; that claimant had never previously been in said building and was not familiar with the character of the inside structure thereof; that pursuant to the instructions given her by such servant and agent as aforesaid, and about eight-thirty P. M. of said day, claimant proceeded from the Adams Street building to the Sangamon Street building by way of an adjoining corridor connecting the second floors of each building; that she took the elevator from the second to the main floor; that from this point she proceeded down the corridor to the Sangamon Street exit which was customarily used by visitors on leaving the building, proceeding out into the vestibule leading to the doorway; that she was at all times in the exercise of all due care and caution; that there was no light burning in such vestibule or reflected therein; that on account of the absence of any light in such vestibule, claimant failed to notice two stairs which led to the doorway; that such steps were slippery and not covered with any substance used for the purpose of insuring a firm foothold on the tread of the steps; that if there was any railing along the side wall of such vestibule, it could not be seen on account of the absence of light; that because of the absence of light, she failed to notice the steps, and because of their slippery texture she slipped and fell to the bottom of the steps and

thereby sustained serious and permanent injuries for which she seeks to recover herein.

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

In the maintenance of its charitable institutions, the State exercises a governmental function. It is the well-established law of this State and other States that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *Hollenbeck, admx.* vs. *Winnebago County,* 95 Ill. 148; *Minear* vs. *State Board of Agriculture,* 259 Ill. 549; *Tollefson* vs. *City of Ottawa,* 228 Ill. 134; *Kinnare* vs. *City of Chicago,* 171 Ill. 332; *City of Chicago* vs. *Williams,* 182 Ill. 135; *Gebhardt* vs. *Village of LaGrange Park,* 354 Ill. 234; 25 R. C. L. p. 407, sec. 43; R. C. L. p. 944, sec. 8; 8 R. C. L. Supp. p. 5580, sec. 43.

An action against a State agency or instrumentality is an action against the State, and when such agency or instrumentality is engaged in a governmental function, the State is not liable for its torts in the absence of a statute making it liable. 59 C. J. p. 196, sec. 340; *Minear* vs. *State Board of Agriculture,* 259 Ill. 549.

A similar question was presented in the case of Jeanette VanDerLaan, No. 2324, decided at the October term, 1934, of this court, in which case the facts were very similar to the case at bar. In that case the Attorney General also made a motion to dismiss upon the same grounds as in this case, and the motion was sustained for the reasons above set forth. Numerous other decisions of this court recognize and apply the rule of law above set forth. *Sturrock* vs. *State,* 7 C. C. R. p. 157; *Pelka, Admr.* vs. *State,* 6 C. C. R. 390; *Burghardt* vs. *State,* 5 C. C. R. 221.

This court has no authority to allow an award in any case unless there would be a legal liability on the part of the State if the State were suable. *Crabtree* vs. *State,* 7 C. C. R. 207; *Morrissey* vs. *State,* No. 2233, decided at the January term, 1934, of this court.

There being no liability on the part of the State if the State were suable, the motion of the Attorney General must be sustained and the case dismissed.

Award denied. Case dismissed.

OPINION ON AMENDED COMPLAINT.

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

The above entitled cause was dismissed on December 11th, 1935, for the reason that under the facts set forth in the complaint, this court has no authority to allow an award.

On January 9th, 1936 claimant filed her amended complaint herein, pursuant to the provisions of Rule 31 of this court.

The amended complaint sets forth no new facts whatsoever, but sets forth that at the time of the injury to claimant there was in force in this State an Act of the General Assembly entitled "An Act to Create the Court of Claims and to prescribe its powers and duties"; that Section 4 of Paragraph 6 of said Act provides that the Court of Claims shall have power "to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should, in equity and good conscience discharge and pay"; that under the provisions of such Act claimant is entitled to an award herein.

The same contention has been made in numerous cases heretofore heard in this court. An exhaustive review of the authorities on the question is contained in the case of *Crabtree* vs. *State*, 7 C. C. R. 207, (decided May, 1933) in which we held (p. 222) that said Paragraph 4 of Section 6 "merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure such an award."

The decision in the Crabtree case has been followed by this court in numerous cases decided since that time. A fur-

ther discussion of this question is found in the case of *Rocco Titone, et al* vs. *State*, No. 2473, decided at the present term of this court, in which the decision in the Crabtree case is approved and followed.

The Attorney General has moved to dismiss the amended complaint, and such motion must be allowed.

Motion allowed. Case dismissed.

(No. 2863—Claim denied.)

CATHERINE LUGAR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

CHARLES G. SEIDEL, for claimant.

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

NEGLIGENCE—*personal injuries—sustained as result of negligence of employees of State Charitable Institution—State not liable for.* The facts in this case are similar to those in *Johnston vs. State, No. 2436, ante*, and what was said by the court in that case applies with equal force herein.

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

Claimant filed her complaint herein on March 20th, 1936 and alleges therein that on December 23d, 1935 she was visiting a patient at Annex I of the Elgin State Hospital, Elgin, Illinois; that in leaving said building she fell from a certain platform or stairway at the entrance thereto, and fractured her right leg; that the action of the respondent in permitting the use of said entrance, platform and stairway without a proper handrail constituted carelessness and negligence on the part of such respondent; that said claimant at the time was in the exercise of due care and caution for her own safety; and that as the result of such accident she has sustained severe and permanent injuries, and has been compelled to expend approximately $500.00 for medical and hospital services.

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

The facts in this case are very similar to the facts in the case of *Anna Johnston vs. State*, No. 2436, decided at the November Term, 1935 of this court, and what we said in that case applies with equal force to this case.

In the maintenance of its charitable institutions the State exercises a governmental function, and in the exercise of such functions it is not liable for the negligence of its servants *and agents in the absence of a statute making it so liable.*

Under the facts set forth in the complaint, we have no authority to allow an award.

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

(No. 2892—Claimant awarded $17.72.)

MALLINCKRODT CHEMICAL WORKS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

Claimant, pro se.

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

SUPPLIES—*when award may be made for.* Where it is conceded that State received supplies, as ordered by it, and that bill therefor which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be made, an award for the price thereof will be made on claim filed within reasonable time.

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

Claimant asks an award in the amount of $17.72 for merchandise sold to the respondent and delivered to Lincoln State School and Colony at Lincoln, Illinois on January 14th, 1935 and February 19th, 1935.

Invoices for the merchandise in question were duly submitted by the claimant to Lincoln State School and Colony, but payment therefor was delayed on account of a change in the personnel at such institution. By the time the invoices were checked, the appropriation out of which payment should have been made had lapsed, and it therefore became necessary for claimant to file its claim in this court.

It is admitted that the merchandise in question was received at the Lincoln State School and Colony. It is not contended that the prices charged therefor are unreasonable, and no reason is suggested why the same should not be paid.

Award is therefore entered in favor of the claimant for the sum of Seventeen Dollars and Seventy-two Cents ($17.72).

(No. 2265—Claimant awarded $4,000.00.)

MACK THOMAS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim for compensation under will* be made. Where employee sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra hazardous employment, an award for compensation will be made in accordance with the provisions of the Act, upon claim made and application filed for same within time required by said Act.

Per Curiam:

On July 8th, 1936 an award was entered in this cause subject to the approval of the Governor, as required by the provisions of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof", approved July 2d, 1935. The Governor having failed to approve the same, the cause was returned to this court for further proceedings.

And the court having heard further evidence, both on the part of the claimant and on the part of the respondent, and the cause again coming on for consideration, IT IS HEREBY ORDERED that the award heretofore made and entered herein on July 8th, 1936 as aforesaid be and the same is hereby vacated and set aside.

And upon consideration of the cause upon the present record, the court doth find as follows:

That on the 6th day of September, A. D. 1932, both claimant and respondent were operating under and bound by the terms and provisions of the Workmen's Compensation Act of this State.

That on said date claimant was employed by the respondent as a day laborer in the Division of Highways; that in the course of his employment he was attempting to place some pictures upon the wall in one of the offices of the Division of Highways, and for that purpose was standing on top of a twelve-foot ladder; that the ladder slipped and claimant fell to the floor and sustained a compression fracture of the first lumbar vertebra with a tearing of the ligaments at the fifth lumbar vertebra, which ligaments had become calcified; that such injuries arose out of and in the course of claimant's employment; that he was removed to St. John's Hospital in Springfield where he remained until November 13th, 1932, and was then returned to his home.

That notice of the accident was given, and claim for compensation made, in accordance with the provisions of the Workmen's Compensation Act.

That the annual wages of said claimant during the year preceding the accident were $1,287.00, to wit, $24.75 per week.

That claimant at the time of the accident was a married man but had no children under the age of sixteen years.

That medical, surgical and hospital bills in the amount of $441.70 were paid by the respondent.

That as the result of the injuries so sustained, claimant was temporarily totally disabled from September 7th, 1932 to September 23d, 1933, to wit, for the period of 54 weeks, and thereafter was partially incapacitated from pursuing his usual and customary line of employment.

That the average amount which claimant earned before the accident was $24.75 per week, and that the average amount which he is earning or is able to earn in some suitable employment after the accident is $6.19 per week.

That under Section 8, paragraphs B and D of the Workmen's Compensation Act, the rate of claimant's compensation for temporary total disability is $12.37½ per week, and the rate for permanent partial disability is $9.28 per week; that the total compensation to which claimant is entitled is limited to 416 weeks in time and $4,000.00 in amount; that compensation for the full period of 416 weeks at the rates aforesaid, would be in excess of $4,000.00, and the total amount of the compensation to which claimant is entitled is therefore fixed at $4,000.00.

Payments have been made to claimant in the total amount of $529.15. The amount of compensation which has accrued from September 7th, 1932 to February 6th, 1937 at the rates above set forth, is $2,301.53. Deducting the sum of $529.15 heretofore paid as aforesaid, leaves the sum of $1,772.38 which is payable at this time, and the balance of said compensation, to wit, the sum of $1,698.47, is payable in 183 weekly installments of $9.28 per week commencing February 13th, 1937 and one final installment of 23c.

Award is therefore entered in favor of the claimant for the sum of Thirty-four Hundred Seventy Dollars and Eighty-five Cents ($3,470.85) being Four Thousand Dollars ($4,000.00) less the amount heretofore paid, to wit, Five Hundred Twenty-nine Dollars and Fifteen Cents ($529.15), payable as follows, to wit: Seventeen Hundred Seventy-two Dollars and Thirty-eight Cents ($1,772.38) forthwith, and the balance of Sixteen Hundred Ninety-eight Dollars and Forty-seven Cents ($1,698.47) in One Hundred Eighty-three (183) weekly installments of Nine Dollars and Twenty-eight Cents ($9.28) per week commencing February 13th, 1937, and one final installment of Twenty-three Cents (23c).

This award being for personal injuries of a State employee, is subject to the provisions of an Act entitled "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 2d, 1935 (Session Laws of 1935, p. 49).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 2473—Claim denied.)

ROCCO TITONE AND JOSE TITONE, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 10, 1937.

GILBERT & GILBERT, for claimant.

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

HIGHWAYS—*cutting and burning grass and dry weeds along is maintaining governmental function.* The cutting and burning of grass and dry weeds that grow along a State highway is maintaining same and is a governmental function.

PROPERTY DAMAGE—*caused by fire started by employees of State in burning grass and dry weeds along highway—State not liable for.* In the maintenance of public highways the State exercises a governmental function and is not liable for damages to property alleged to have been caused to property of claimant, by reason of the negligence of employees of State engaged in burning grass and dry weeds along public highway, in failing to properly control fire.

SAME—*same—claim on grounds of equity and good conscience—when award on grounds of must be denied.* The provisions of Paragraph 4 of Section 6 of Court of Claims Act, with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of Court of Claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one. *Crabtree* vs. *State* 7 Court of Claims Reports, Page 207 adhered to.

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

Claimants are the owners of a small tract of land located adjacent to and along the east side of S. B. I. Route 37, about three-fourths of a mile south of the City of Mt. Vernon, in Jefferson County, which premises are improved by a vineyard containing approximately 1,000 grape vines with the necessary posts and wires to support the same.

On November 22d, 1933 employees of the Department of Public Works and Buildings of the respondent were burning dry weeds and grass along said highway, near the premises of the claimants. Such employees failed to properly control said fire and as the result thereof the same spread to the premises and vineyard of claimants, whereby claimants allege that their vineyard has been damaged in the amount of $2,500.00.

The Attorney General contends that there is no liability on the part of the respondent for the reason that said respondent is not liable for the carelessness and negligence of its employees, in the absence of a statute making it so liable; —and that there is no such statute.

Claimants contend that there is a statute making the State liable in this case, and base their contention on Para-

graph 4 of Section 6 of the Court of Claims Law which provides that:

"The Court of Claims shall have power * * * to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth should in equity and good conscience discharge and pay."

The construction of this provision of the Court of Claims Law, and similar provisions in previous laws relating to the Commission of Claims, has been before such Commission and before this court in many cases, from the time of the creation of the Commission of Claims in 1877, down to the present time. The history of such legislation was traced, and the construction of such provisions of law was fully considered in the case of *Crabtree* vs. *State of Illinois* (decided 1933), 7 C. C. R. 207. In that case, after considering the previous authorities upon the subject, the court reached the following conclusion, to wit (p. 222): that said Section 4 of Paragraph 6 of the Court of Claims Act "merely defines the jurisdiction of the court, and does not create a new liability against the State, nor increase or enlarge any existing liability; that the jurisdiction of this court is limited to claims in respect of which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable; that this court has no authority to allow any claim unless there is a legal or equitable obligation on the part of the State to pay the same, however much the claim might appeal to the sympathies of the court; that unless the claimant can bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to such an award."

The decision in the Crabtree case has been followed by this court in many cases decided since that time.

Claimants have referred to a number of cases in which this court has allowed awards on the grounds of equity and good conscience. A similar reference was made by claimant in the Crabtree case and in considering the same, this court there said, page 218:

"We are cognizant of the fact that some time after the decision of the court in the Ryan Case, *supra* (4 C. C. R. 57), in a number of decisions which apparently held a strong appeal to the sympathy of the court, it departed from the strict rule laid down in the cases hereinbefore referred to, and thereafter allowed certain claims on which there was no legal liability against the State, on grounds which were characterized, first, as

social justice, then as social justice and equity, and afterwards as equity and good conscience.

"This continued for some time, and thereafter the court evidently becoming aware of the dangerous tendency of its decisions and the extent to which they were being carried, and apparently recognizing that there was no legal warrant or authority therefor, began gradually to get back to the original holdings of the court to the effect that this court has no authority or power to allow any claim presented for consideration, unless the same is based upon a legal or equitable right."

In this connection it is worthy of note that during the time awards were being made by the court on the grounds of equity and good conscience as aforesaid, Mr. Justice Thomas, one of the members thereof, consistently held to the position taken by the present court in the Crabtree case, as will appear from his opinions in the following cases, to wit: *Mercer* vs. *State*, 6 C. C. R. 20; *Peterson* vs. *State*, 6 C. C. R. 70; *Perry* vs. *State*, 6 C. C. R. 81; *Braun* vs. *State*, 6 C. C. R. 104; *Paschen* vs. *State*, 6 C. C. R. 33; *Lampp* vs. *State*, 6 C. C. R. 349; and *Dirby* vs. *State*, 7 C. C. R. 145.

In the case of *Smith* vs. *State*, 227 N. Y. 405, the New York Court of Appeals held that the provision of the Code of the State with reference to the jurisdiction of the Court of Claims was not enacted "for the purpose of extending or enlarging the liability of the State, but solely for the purpose of declaring the jurisdiction of the Court of Claims, before which questions of liability might be tried," and in the course of its opinion said:

"It is true, as urged, that the section confers upon the Court of Claims jurisdiction of the broadest character. The State, under the terms of the section, must be treated as having waived its immunity against actions as to all private claims. * * * But it is thoroughly established that by consenting to be sued the State waives its immunity from action, and nothing more. It does not thereby concede its liability in favor of the claimant, or create a cause of action in his favor which did not theretofore exist. It merely gives a remedy to enforce a liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense. *Roberts* vs. *State*, 160 N. Y. 217, 54 N. E. 678. Immunity from an action is one thing. Immunity from liability for the torts of its officers and agents is another."

In the case of *Burroughs* vs. *Commonwealth*, 224 Mass. 28, the plaintiff sought to recover damages to his property by reason of fire set and negligently permitted to escape from their control by men employed by the State Forester. The Massachusetts statutes gave the Superior Court "juris-

diction of all claims against the Commonwealth whether at law or in equity". In that case the court said, page 39:

"It has been held that while the terms of the statute now embodies in R. L. C. 201 are "full and comprehensive, it is not to be interpreted as imposing any new obligation upon the Commonwealth, or as creating a new class of claims for which a sovereignty never has been held responsible, but * * * 'to provide a convenient tribunal for the determination of claims of the character which civilized governments have always recognized, although the satisfaction of them have been usually sought by direct appeal to the sovereign, or, in our system of government, through the Legislature'." *Nash* vs. *Com.*, 174 Mass. 335, 54 N. E. 865. In view of this decision, the statute cannot be stretched to include damages for an ordinary tort committed by an officer or employee of the Commonwealth in the performance of duties prescribed by law."

The question has also been exhaustively annotated in 13 A. L. R. page 1276, in which the following general provision of law is set forth and supported by decisions in Alabama, Idaho, Massachusetts, New York, North Carolina, Tennessee, Washington, and Wisconsin, to wit:

"A general statute authorizing suits against the State does not permit a recovery for torts of its agents or servants."

A further annotation on the same subject is found in 42 A. L. R. page 1492, where the following general rule is set forth, to wit:

"Ordinarily the consent of the State simply waives immunity from suit and does not concede the cause of action."

A consideration of the foregoing authorities, and the cases cited and referred to therein, shows beyond any doubt that the decision of this court in the Crabtree case is in accordance with the great weight of authority, and we must therefore adhere to the same.

The question of the liability of the State for damages to property by fire resulting from the carelessness and negligence of employees of the State was before this court in the case of *W. H. Loges* vs. *State*, 8 C. C. R. 53, and in the case of *Unverfehrt* vs. *State*, 8 C. C. R. 577, and in each case award was denied.

In the case of *Symonds* vs. *Clay County*, 71 Ill. 555, the plaintiff sought to recover damages sustained by means of a fire which had spread from the poor farm belonging to defendant. The court held that the poor farm was held and managed by the defendant as a matter of state rather than a

local concern; that the doctrine of *respondeat superior* did not apply to the county in that regard, and that the county was not liable for the wrongful neglect of duty or wrongful act of its agents.

We have held in numerous cases that the State in maintaining its durable hard-surfaced highways, is engaged in a governmental function. *Chambler* vs. *State*, 6 C. C. R. 136; *Highland* vs. *State*, 6 C. C. R. 384; *Bucholz* vs. *State*, 7 C. C. R. 241; *Wilson* vs. *State*, 8 C. C. R. 72; and *Wetherhold* vs. *State*, 8 C. C. R. 100.

Our Supreme Court has held in numerous cases that there is no liability on the part of the State for the negligence of its servants and agents in the exercise of its governmental functions, in the absence of a statute making it so liable. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago* vs. *Williams*, 182 Ill. 135; *Minier* vs. *State Board of Agriculture*, 259 Ill. 549; *Love* vs. *Glencoe Park District*, 270 Ill. App. 117; *Stein* vs. *West Chicago Park Commission*, 247 Ill. App. 479; *Hendrick* vs. *Urbana Park District*, 265 Ill. 102; *Gebhardt* vs. *Village of LaGrange Park*, 254 Ill. 235.

Under the law as laid down by our Supreme Court and concurred in by the courts of numerous other jurisdictions, we have no authority to allow an award in this case. If the employees of the State were guilty of negligence which resulted in injury and damage to the claimant, they are personally liable therefor, but there is no liability on the part of the State.

Award denied. Case dismissed.

(No. 2702—Claim denied.)

B. G. BUMGARDNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1937.

TOWNLEY & HALL, for claimant.

OTTO KERNER, Attorney General; GLENN A. TRIVOR, Assistant Attorney General, for respondent.

RESPONDEAT SUPERIOR—*not applicable to State.* The State is not liable under the doctrine of *respondeat superior* for the wrongful acts of its employees in performance of governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on July 17, 1936, for alleged damages sustained by the claimant, who was engaged in the wholesale fish business with his principal office at Waterville, Minnesota. Claimant alleges that he was making weekly deliveries of fish into the State of Illinois, and that on the 8th day of May, 1935, at Pekin, Illinois, one Willard Peterson, who was at said time in the employ of claimant, was arrested by Guy G. Derry of Peoria, for the alleged violation of the game laws of Illinois, pertaining to the wholesaling of fish; that at the time of making the arrest, Derry seized and confiscated 360 pounds of dressed bullheads of the value of 14c per pound and 1,000 pounds of live snapping turtles, of the value of 4c per pound, the property of claimant and in the possession of said Peterson.

Claimant further avers that he shipped the said fish and turtles to Peterson from the State of Minnesota and that they were of the total value of $90.40.

Claimant further avers that Peterson was arrested and taken into court at Peoria, Illinois, before Judge Joseph Day, where he was assessed a fine in the sum of $15.00, and costs of $2.50, or a total of $17.50, and that Peterson paid the same, and that the claimant refunded that amount to Peterson.

Claimant further alleges that he is informed and believes that said arrest was made on the alleged grounds that neither claimant nor Peterson had a license to sell and deliver fish in the State of Illinois; and claimant further alleges that after said arrest, he made an application to the Illinois Game and Fish Department for the necessary license and tendered his check for $25.00 in payment of the same, which check was returned to him with a letter advising him that the fish which he handled were from waters entirely outside the jurisdiction of the State of Illinois, and their identity could be established, and that he would not be required to take out a license to ship fish so taken outside of the State; that the license law only applied to wholesale fish dealers who were selling, shipping and otherwise handling fish from waters under the jurisdiction of the State of Illinois. Claimant then avers that the arrest and confiscation were *illegal and* unlawful, and that he was not required to take out a license to sell and deliver fish in the State of Illinois.

Motion to dismiss was made by the Attorney General, and assuming all the facts to be true, the motion must be sustained for the reason that the State is not liable under the doctrine of *respondeat superior* for the wrongful acts of its employees in the performance of governmental functions. (*Minear* vs. *State Board of Agriculture*, 259 Ill. page 549.) This doctrine is so well established that it does not require any further citation of authority.

(Nos. 2884-2885-2894-2895, consolidated—Claimants awarded $518.05.)

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY, No. 2884, OSCAR F. BAKER AND HARRY A. GEHLBACK, No. 2885, FRANK J. PEAU, JR., No. 2894 AND CHARLES HOELSCHER, ETC., No. 2895, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1937.

COVEY & WOODS, for claimant.

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

SUPPLIES—*when award may be made for.* Where it clearly appears that State received supplies, as ordered by it, and that bill therefor which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for the price thereof will be made on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Because the above entitled claims all present the same questions of law, and were all filed by the same attorneys, the Attorney General has moved to consolidate the cases, and has filed one brief, the court has consolidated the cases.

The first claim, that of the *Central Illinois Electric and Gas Co., a Corporation* vs. *State of Illinois*, No. 2884, was filed April 20, 1936, for the sum of $493.25. It appears that during the years 1933 and 1934, claimant sold and delivered to respondent at Lincoln State School and Colony, Lincoln, Illinois, quantities of coke, and also coal tar. A Bill of Particulars was filed, a copy of the purchase order was attached and no question arises as to facts. The agreed price was the sum of $444.58, including $5.00 for coal tar. The sum was not paid. In a report dated May 22, 1936, from P. S. Waters,

managing officer, by W. F. Meyer, an auditor, to Mr. E. B. Bentley, traveling auditor, it is said: "As you know, the chief clerk who was in charge at the time these obligations were incurred, is no longer with us. The only knowledge of this claim that we have is that the merchandise was delivered to us and that the claim is in order and should be paid by the State."

In No. 2885, that of Oscar F. Baker and Harry A. Gehlbach, partners doing business under the firm name of *Baker & Gehlbach* vs. *State of Illinois,* it appears that the claim was filed April 20, 1936, for the sum of $23.45. The complaint alleges that in June, 1935, the claimants sold and delivered to the respondent at the Lincoln State School and Colony, certain merchandise set forth in Exhibit "A". This merchandise consisted of numerous small items, including two pump leathers, mower repairs, Moline bean drill gear, wrist pin and nut, 6 slats, 1 pitman, 1 box rivets, 2 boxes of rivets of different sizes, 6 reel arms, 50 sections, 6 reel slats, 1 knife, 1-VF677 complete, 24 bolts, all of which were furnished in June, 1935, and totalling $23.45. The bill was presented to the officers of said State School and Colony on several occasions and on some occasions it was ignored and on other occasions said officers promised that it would be taken care of and on the last occasion said officers informed claimants that the fund from which payment should have been made had lapsed. A similar report was made by the managing officers as was made in No. 2884.

In No. 2894, that of Frank J. Pfau, Jr., doing business under the firm name and style of *Pfau's Drug Store* vs. *State of Illinois,* it appears that the claim was filed May 12, 1936, for the sum of $9.62. The complaint alleges that during June, 1935, the claimant sold and delivered to the respondent at the Lincoln State School and Colony certain merchandise consisting of drug supplies. Proper statement of account is attached to the complaint, and the managers of this School and Colony admit that the merchandise was furnished, but that the fund out of which this merchandise should have been paid, had lapsed, and therefore this suit was filed.

In No. 2895, that of Charles Hoelscher, doing business under the name and style of *Hoelscher Bros. Garage* vs. *State of Illinois,* it appears that the claim was filed on May 12, 1936,

for the sum of $21.73. The complaint alleges that during the month of December, 1934, February, March, April and June, 1935, claimant sold and delivered to the respondent at the Lincoln State School and Colony, certain merchandise as shown in Exhibit "A". The same charges were made in this complaint, and the receipt thereof by the school is admitted.

It has been the holding of this court that where it is conceded that the claimants rendered services and furnished supplies to the State, and have not been paid therefor, and the amount is unquestioned, an award will be made for such services and supplies. *Journal Printing Co.* vs. *State*, 8 C. C. R. 673; *Schreiber Lumber Co.* vs. *State*, 8 C. C. R. 381, and *Rock Island Sand & Gravel Co.* vs. *State*, 8 C. C. R. 165.

It appears that the Attorney General has carefully investigated these claims because the person who was chief clerk at the time these claims arose, is no longer in the employ of the respondent, but Mr. W. F. Meyer, an auditor for the Department, was assigned to acting chief clerk of the school, and it was on an investigation made by him and in reports made by him in the name of Dr. Waters to Mr. Bentley that the statements were made that the merchandise mentioned in each of the claims "was delivered to us, and the claim is in order and should be paid by the State."

We, therefore, make an award in No. 2884, that of *Central Illinois Electric and Gas Co.* vs. *State of Illinois*, in the sum of $493.25; in No. 2885, that of *Oscar F. Baker and Harry A. Gehlbach* vs. *State of Illinois*, in the sum of $23.45; in No. 2894, that of *Frank J. Pfau, Jr.* vs. *State of Illinois*, in the sum of $9.62; in No. 2895, that of Charles Hoelscher, doing business under the name and style of *Hoelscher Bros. Garage* vs. *State of Illinois*, in the sum of $21.73.

(No. 2864—Claim denied.)

EDWARD CLIFTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1937.

E. W. COLLORD, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim and filing application for compensation under within time fixed in, condition precedent to jurisdiction of court.* Making claim for compensation and filing application for same within time fixed in Act is a condition precedent, without which court lacks jurisdiction to proceed with hearing.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On March 21, 1936, the claimant filed his petition with the clerk of this court, averring that on the 29th day of October, 1934, while in employ of the Department of Public Works and Buildings of the State of Illinois, in the State Highway Department, making repairs to certain fences along the right of way of Route No. 131 in Douglas County, he was injured by the overturning of a truck upon which he was riding, and that the truck was overturned on account of the negligence of his fellow employees and that as the result of the negligence of the State, through its agents and servants, he suffered divers injuries, consisting of a fracture of the right arm, and that the vertebrae of his neck and back were dislocated, his back being severely wrenched and his head severely injured, all of which caused him great pain and suffering.

Claimant also avers that he had been on relief up to that time, and avers that at the time of the injury, he was earning $15.00 per week, and he filed a Bill of Particulars claiming loss of earnings from October 29, 1934 to February 2, 1935, being 14 weeks at $15.00 per week, or $210.00, and also claims $1,790.00 for pain and suffering.

The Attorney General has made a motion to dismiss this claim for the reason that claimant seeks to recover on account of the alleged negligence of the respondent as at common law, and that he cannot recover under the Workman's Compensation Act for the reason that no claim for compensation was made within six months or filed within one year after the date of the alleged accidental injury.

By an enactment of the Legislature, the State of Illinois is liable under the Workmen's Compensation Act when the injuries sustained come within the employment mentioned in the Compensation Act. It has been repeatedly held by this court that the State is not liable for negligence. A private employer is not liable for negligence when his business is such that it comes under the Compensation Act. See Section 6 of the Workmen's Compensation Act of this State. In no

instance can damages be allowed under the Compensation Act for pain and suffering. We cannot treat this as a claim for compensation.

Section 24 of the Workmen's Compensation Act declares that no proceeding for compensation shall be maintained unless claim has been made within six months after the accident. This section concludes with the proviso that, in any case, unless application for compensation is filed within one year after the date of the injury or within one year after the date of the last payment of compensation, the right to file an application therefor shall be barred.

The making of a claim for compensation within the prescribed period is jurisdictional and a condition precedent to the right to maintain a proceeding under the statute. (*American Car and Foundry Co.* vs. *Industrial Com.*, 335 Ill. 322; *City of Rochelle* vs. *Industrial Com.*, 332 Ill. 386; *Inland Rubber Co.* vs. *Industrial Com.*, 309 Ill. 43; *Ideal Fuel Co.* vs. *Industrial Com.*, 298 Ill. 463; *Ohio Oil Co.* vs. *Industrial Com.*, 293 Ill. 461; *Central Car Works* vs. *Industrial Com.*, 290 Ill. 436; *Bushnell* vs. *Industrial Board*, 276 Ill. 262; *Haiselden* vs. *Industrial Board*, 275 Ill. 114.)

It does not appear that any compensation was paid, or any claim made or notice given by the claimant to the respondent, and, therefore, the motion of the Attorney General must be sustained.

(No. 2359—Claim denied.)

SAMUEL M. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 9, 1937.

A. C. and B. F. ANDERSON, for claimant.

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

WORKMEN'S COMPENSATION ACT—*Paragraph (i) of Section 8 of—purpose of enactment—proof of past or existing objective conditions or symptoms of injury, is necessary in order to obtain payment of compensation under.* The purpose of Paragraph (i) of Section 8 of the Workmen's Compensation Act was to make a legislative declaration that compensation should be payable only where the injury, for which same is sought, is established by competent evidence of which there are or have been objective conditions or symptoms, notwithstanding the physical or mental control of the injured employee himself.

SAME—*same—evidence inadmissible in claim made under Paragraph (f) of.* The testimony of a medical witness in claim for compensation for complete disability under Paragraph (f) of Section 8 of Workmen's Compensation Act, given after examination of claimant with view toward testifying and based wholly upon witnesses' observation of outward manifestations within claimant's control, or based partly upon his own observations and partly upon the statements of claimant, does not establish that they were or are objective symptoms or conditions of the injury for which compensation is sought and is not admissible.

SAME—*proof of actual earnings of claimant for substantial period prior to and after accident is necessary to support claim under Paragraph (d) of Section 8 of.* On a hearing under Paragraph (d) of Section 8 of Workmen's Compensation Act, it is necessary to submit proof of the actual earnings of claimant for a substantial period before the accident and of his actual earnings for a substantial period after his return to work after the accident, or in the event that he has not returned to work since the accident, proof of what he is able to earn in some suitable employment or business, and the finding of a difference in earning capacity must find support in the evidence, and where the evidence not only fails to show the earnings of claimant before the accident, but also of his capacity to earn thereafter, the court is without any basis upon which to determine half of the difference in such earnings as provided in said Paragraph (d) of said Section 8 of the Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This is a claim filed under the Workmen's Compensation Act and alleges that the claimant, while an employee of the State, under the Division of Highways, was injured on September 19, 1933; that at the time of the injury he was pushing a cement cart, used in road repairs, about three miles southeast of Charleston, Illinois; that the injury was caused by one J. W. Hardway, not an employee of the State, running a truck against the claimant.

The claimant received a fracture of the fifth sacral vertebra, and a fracture of the lower ramus of the pelvis.

It appears from the file that Hardway, at the time of the injury to claimant, was operating his own truck and was insolvent. Claimant was struck at the lower end of the spine and undoubtedly received a severe injury, and he claims that he has not been able to engage in any occupation since the injury.

It is stipulated that all parties are under the Act and that the injury arose out of, and in the course of claimant's employment.

At the time of claimant's injury, he was thirty-six years of age, and resided with his wife and four children, under

the age of sixteen years. Since that time two more children have been born, and the question for this court to determine is the extent of the injuries and the amount that claimant should receive.

It appears that the State has paid medical expenses in the amount of $115.00, of a bill of $143.50, to the attending physician, leaving a balance unpaid in the sum of $28.50, which is due to the estate of Dr. C. H. Harwood. Dr. Harwood having died since claimant's injury.

At the time of the injury, claimant was earning $12.00 per week, and compensation has been paid to April 1, 1934, in the amount of $159.00.

Claimant contends that prior to the injury he was in good health and had not had any illness of any nature, and as the result of the injury, he was confined to his bed about six weeks, and to his home for several months, and always has an ache across his back, and that the ache continues in the back of his head; that he has a limp in the right leg, but that does not pain him; that he has endeavored to work and has worked some in his garden and washing. The record does not state what was meant by the word "washing", but we assume it means washing dishes and clothes. He further testified that when he works to amount to anything, he has an ache that comes up his back on the left side into the back of his head and makes him very sick; that he can lie down an hour or so and he will get relief; that he then will work more and lie down a while, and so on. He states that since the injury, he has pulled brush and chopped saplings, but the ache comes up his back and into his head; that when he laid down for an hour or half an hour or two hours that the ache would leave. In more recent testimony, he says that he does not take any medicine, and says that he has to go in a half stooped position "in order to hold the ache down". He testified that last fall he cut some broom corn when he was able, and that he had the same ache, and would have to lie down in the broom corn field for an hour or so; that then he could get up and continue to work and then was required to lie down an hour again; that since the accident, he has not been able to do any continuous physical labor; that during the last year or two, he has earned fifteen or twenty dollars from labor.

Claimant further testified that since Dr. Harwood's death, he has employed Dr. Alexander. He further testified that his head hurt him the same as his back; that he had a pain in the back of his head. Claimant testified that he did not get sick in the stomach: "I just get sick, my flesh. When I have an ache in my back from stooping why it makes me sick, just like I was sick to the stomach only it is in my flesh, makes me deathly sick. I have to go lay down. I go and lay down and lay there until it wears off, probably an hour or half hour." He was then asked: "How many times have you had to rest during the week from attempting to perform labor since the last hearing to the best of your remembrance?" To that he did answer: "I would say three times a week, because I wash twice." He further testified that he helped with the housework and that the weakness above referred to would last probably an hour, but when he would lie down, it would wear off, but he said "That pain in the back that always stays there." He further testified that when he got up and moved around the pain would come back again.

Claimant further testified that when he worked he got nervous; that he couldn't sleep nights; that he had nervous spells; that when he would go to bed he couldn't lie there; that he had to get up and move around; that he had never been able to sleep on his back or left side; that he could sleep on his right side, and always has, meaning since the accident.

This testimony was taken about two years or a little more after the accident.

On cross examination claimant testified that he went to his neighbors and pulled weeds out of the strawberry gardens, but was not paid by the day. He received whatever compensation the owner of the strawberry patch saw fit to pay him.

Claimant further testified that his left leg was not affected, and neither was his arms nor shoulders; that he had a limp caused by a little stiffness in the knee.

Dr. Swickard testified that he was engaged in the general practice of medicine and surgery in Charleston, Illinois, and had been so engaged for about twenty years. He testified that he had been in court and heard all of Smith's testimony,

and several hypothetical questions were put to the doctor, based upon that testimony. He further testified that he had examined the claimant a day prior for the purpose of qualifying himself to testify: that there is no fixation of the knee joint, but whenever claimant walks rapidly he stiffens his knee and it appears that there may be some tilting of the pelvis as he walks, but he could not explain why it was that way; that he examined the X-ray pictures taken of the claimant's hips, and the pictures disclose a fracture across the fifth sacral vertebra, and a fracture of the right lower ramus of the pubis; that there was a large amount of callus on the right side of the fracture, and that the fracture of the sacrum had healed; that he palpated over the area which had been painful at the previous examination and that he could only elicit pain over the lower part of the back; that the region around the pubis was non-painful at this examination; that he had the claimant do some bending and that he could bend fairly well, and in the opinion of the doctor, the twisting of the pelvis when he bends, was the result of the crushing injury to his pelvis; that all other examinations of the heart and lungs were negative. This doctor also testified that there was no nerve running directly from the lower part of the spine up to the head; that the feeling claimant had in the back of his head was because of the pain lower down in the back going into the nervous center up to the base of the brain, and that the claimant only thought that the pain went through the back but that was impossible, but that would be true of any individual who had an injury such as the claimant had.

It is strenuously contended in this case that the claimant has suffered total and complete disability arising from the accident. The same physician testified that he had examined the claimant on March 5, 1936, at his office; that that was the day before the testimony was taken. The physician was asked several hypothetical questions, which were improper. The first question was as follows:

"Assuming that the injury happened as related here by Mr. Smith and his pelvis was crushed and injuries were made to the bones in that region as testified to at a former hearing by you, from your examination of the X-rays and from what testimony you have heard Mr. Smith relate here

this morning with reference to this injury, have you an opinion what causes this pain that has been related by him, what is that?"

It will be noted that the question referred to the testimony by Mr. Smith, the claimant, which has in part been hereinabove set forth. In answer to the question the doctor testified that he believed that the pain and consequential disability is due to and resulting from the crushing injury which caused these fractures and the pressure upon the surrounding tissues, surrounding muscles and nerves. Again he was asked on direct examination:

"Assuming that all the testimony that has been given here this morning by Mr. Smith is true and assuming that his injuries are or have been sustained as narrated by him and assuming that his pelvis bone has been broken and one of the vertebra as shown in the X-ray pictures heretofore introduced in evidence in this cause, and assuming all these facts to be true, have you an opinion whether or not, based on a reasonable degree of medical certainty, this man's present physical condition results from the injury assumed in the question?"

To this he stated that he had an opinion and believed that his condition was a direct result of the injury. Again reference is made to the testimony of Mr. Smith, which included his testimony concerning aches, pains and sickness, etc. Again the physician was asked:

"Have you any opinion about when this man, assuming that the facts are true, would be able to do any labor that he is physically or trained to do?"

The witness answered that he had such an opinion, and when asked what it was he replied:

"I don't believe he will ever be able to do the work that he did previously."

He was then asked:

"Not from your separate investigation, but from what you have heard here from Mr. Smith, assuming those facts are true and connecting with your examination of the exhibits, is your opinion that you have given here been based on that only?"

The witness answered:

"Based on the whole picture as I understand it".

On cross examination he testified that in his opinion the right pelvis was tilted, and inclined a little to the right side. The doctor stated that when the patient walked slowly everything apparently shows just all right; that when he goes a little fast he gives down. He then stated that the left side appears to be a little higher; that the fractures that the claimant suffered were straight fractures. He was further asked on cross examination:

"In your opinion what was the cause of that tilting if simple fractures that have healed or knitted perfectly?"

The witness answered:

"I could not explain that to my own mind. I don't know exactly just why. You have a feeling when you watch him walk that there might be a little shortness of that limb, but when he stops and stands up straight there isn't. I am not quite certain why he gives down on that side."

He was further asked on cross examination:

"Just what, in your opinion, is that permanent disability around the pelvis?"

The witness answered:

"That is what I could not satisfy my own mind. I can not tell just exactly what causes it. I do know it is the result of the soft tissues being injured at the time he was hurt, and those ligaments torn across the back. At the time he was told the ligaments were torn across the lower part of his back. I feel sure they must have been. The muscles and nerves must have been actually bruised and that is what he has not recovered from. The fractures have healed with an overproduction of callus where the right remus of the pelvis was fractured. Usually nature absorbs this callus. This excessive callus which formed during the healing causes pressure over this area, and explains the pain and trouble he has in his lower back."

The witness also testified that in his opinion Mr. Smith's suffering is the result of the injury to the soft parts rather than the bone itself. When he was asked if he could be more specific as to what muscles or tendons, tissues and nerves were injured, he answered:

"It is hard to tell just how many, but I believe the larger part of the muscles, nerves and tendons around the regions of both fractures were injured to such an extent that nature

will never be able to repair them so that the man can go ahead as he normally did. I could not specify any one special group of muscles or nerves. The injury was clear across the lower part of the spine, clear across the fifth sacral vertebra."

The doctor was then asked:

"Doctor, have you an opinion as to why the pain apparently is only on one side of the back, that is the left side?"

To this he answered:

"What I really thought about it I thought that probably due to the fact that there had been some injury to the left sacral iliac joint, that is where the pain originates and the soreness travels from that clear across the whole area, which does happen so many times with back injuries. That this pain that comes in his head is just a nervous reaction from his general nervous system because of the trouble in his back."

Paragraph (i) of Section 8 of the Compensation Act in part provides as follows:

"Provided, further, that all compensation payments named and provided for in paragraphs (b), (c), (d), (e) and (f) of this section, shall mean and be defined to be for injuries and only such injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself."

This was an amendment made to the Act of 1925 and its objects and purposes are obvious.

The Supreme Court of this State in the case of *Madison Coal Corporation* vs. *Industrial Commission*, 320 Ill. 65, said at page 68:

"It was also error to permit the medical witnesses to detail complaints of the patient in his manifestations of pain, which were within his control, and then express an opinion as to the patient's condition based thereon. *Wells Bros. Co.* vs. *Industrial Com.*, 306 Ill. 191".

The accident in the Madison Coal Corporation case, supra, occurred March 23, 1923.

In *Wells Bros. Construction Co.* vs. *Industrial Com.*, 306 Ill. 191, a nerve specialist testified that on examination the applicant related to him facts of the accident and the condition of which he complained, as to pains in the back of the head and neck, nervousness, dizziness, noises in his ears,

soreness in the head, weakness in the legs, and that he stumbled at times in walking. The doctor testified he found scars on the side of the head, a slight curvature of the spine, tenderness over certain vertebrae, a limited motion of the neck, that on bending the head backward the patient falls, that bending of the body forward caused dizziness, that the grip of the hand was impaired, and there were sensory disturbances, etc. There were objections that testimony was based upon subjective rather than objective conditions. The court said on page 199:

"This court has more than once held that the testimony of physicians is incompetent which is made after examination of the applicant with a view to testifying and is based wholly upon the physician's observation of outward manifestations within the applicant's control, such as pressure or twisting of the hands or turning in of the toes, (*Greinke* vs. *Chicago City Railway Co.*, 234 Ill. 564; *Casey* vs. *Chicago City Railway Co.*, 237 id. 140.) This court has also held that when the physician's statement is based partly upon his own observation and partly upon the statement of the case made by the injured person such evidence is not admissible. (*Chicago Union Traction Co.* vs. *Giese*, 229 Ill. 260). Therefore it is clear that the testimony of Dr. Comes, so far as he testified it was based 'only of his (Lydon's) actions and statements,' was inadmissible. It seems also clear from the reading of Dr. Rydin's testimony that he based his conclusion partly upon the statements of the subjective symptoms made to him by his applicant. What was said by this court in *Schmidt* vs. *Chicago City Railway Co.*, 339 Ill. 499, *International Coal Co.* vs. *Industrial Com.*, 293 id. 524, *McKenna* vs. *Chicago City Railway Co.*, 296 id. 314 and *Central Illinois Service Co.* vs. *Industrial Com.*, 302 id. 27, does not in any way modify the conclusions reached by this court in the decisions already cited, as to the physician not being authorized to base his conclusions as to the person's injury in part upon objective symptoms and in part upon subjective symptoms derived from the patient's statements to the physician."

These decisions were prior to the amendment of 1925 above referred to and it is fair to conclude that the purpose was to stop an evil that was developing in the administration of the Compensation Act and to make a legislative declaration that compensation should be payable only in cases where the injury was established by competent evidence of which there are or have been objective conditions or symptoms proven, notwithstanding the physical or mental control of the injured employee himself. There have been numerous cases in which the court reversed awards of permanent total disability as being contrary to the manifest weight of the evidence and even on the ground that there was no evidence to support the award but in which the applicant had testified

to great pain, inability to eat or sleep or to lift as much as a bucket of coal and in which there was competent evidence that there was no objective indication of any disability.

From an examination of the claimant himself, it is obvious to the fair-minded that he made exaggerated statements and groundless assertions that have no foundation, in fact are not the character of evidence which the law recognizes as worthy to support any legal finding.

Certainly this court would be lacking in experience if we closed our eyes to give cases that have come under our personal observation where an applicant, with little or no indication of injury testifies in substance to pain and condition of disability or of total inability to work and in which medical experts in answer to hypothetical questions express opinions of permanent total disability but shortly after the settlement is made they return to work and earn full wages. Such conditions are contrary to the intents and purposes of the Act and are a fraud not only upon the State, but necessarily upon the taxpayers who bear the costs.

Dr. John R. Alexander also testified for the claimant. He testified that he had examined the claimant recently, and that there was a very slight improvement. He was asked directly what claimant had told him with reference to his pain and suffering, and he answered:

"He says he has the same symptoms that he had at the time of the previous examination."

He was then asked if he knew what those symptoms are, and he answered:

"He says that his back aches and that when he bends over or does any work in which he uses his back and bends over that the pain shoots up his back into his head and that he then has to lie down for probably thirty minutes to an hour, then he will get all right and get up and try it again. He repeats this process once or twice and then is laid up a day or couple of days."

Q. That is what he told you?

A. Yes.

Claimant also told the prior witness that he could take long walks and enjoy them without suffering. Dr. Alexander stated that his opinion concerning the claimant was practically the same as Dr. Swickard's, and that he knew from his observations and the claimant's complaints that he must have

had some very severe traumatisms to the ligaments and tissues at the site of the fractures. He was asked if in his opinion the same condition now exists with reference to pain and suffering from his observation and from what he told you, and he replied that the initial injuries have healed, but when you have traumatisms of the tissues they heal with scars; that you have those scar tissues left which cause the trouble. He further testified that claimant's legs were practically the same; that there was a negligible amount of atrophy of the muscles. He was again asked:

"Now, doctor, based upon your examination of Sam Smith and the X-rays that were taken and heretofore introduced in evidence and from what he has told you as his physician, have you an opinion now as to what the nature and extent of this man's injuries are now at the present time?"

To this he answered that he had an opinion and that it was based on a reasonable degree of medical certainty; that he has healed fractures over his fifth sacral vertebra and pelvic bone along with pain on pressure over these areas, over these sites of the fractures; that is about the only objective symptom that he could elicit other than the limp he has when he walks or tries to climb stairs.

Other similar questions embracing like matters were asked and it is unnecessary to go further in this behalf, and what is said in this regard pertaining to the testimony of Dr. Swickard, applies with equal force to the testimony of Dr. Alexander.

A stipulation in this case was also entered into, which is as follows:

"It is hereby stipulated and agreed by and between the above claimant, Samuel M. Smith, by A. C. and Ben F. Anderson, his attorneys, and the above respondent, by Otto Kerner, its Attorney General that:

1. Dr. H. B. Thomas is a resident of Cook County, State of Illinois and a practicing physician and surgeon in the City of Chicago.

2. That Dr. H. B. Thomas is professor and head of the Department of Orthopaedic Surgery, University of Illinois, College of Medicine and Senior Orthopaedic Surgeon of St. Luke's Hospital.

3. That Dr. H. B. Thomas examined the claimant, Samuel M. Smith, on May 5, 1936 in his office at Chicago, Illinois.

4. That Dr. Thomas made a report as follows:

"Henry Bascom Thomas, M. D., Chicago.
May 11, 1936.

Mr. M. K. Lingle,
Division of Highways,
Springfield, Illinois
Dear Mr. Lingle:

In regard to Mr. Samuel Smith, whom I examined 5-5-'36, three years ago while pouring curbing he was hurt by a truck. He was taken to the doctor's office and then home. He lay in bed for awhile and later was X-rayed. His back was taped. He has had no cast or brace.

He complains of pain in a spot on the lower left back over the sacro-iliac and in a region in the neighborhood of the 7th cervical vertebra. He has a scar over the right lower buttock. Straight leg raising is negative. He does not stoop well or bend sideways easily. No particular sensitiveness on pressure.

Appearance healthy.

We X-rayed sterioscopically the lower lumbar and sacro-iliac area including the pelvis and heads of both femora. There is an area of definite sclerosis of the 4th and 5th lumbar vertebrae and left sacro-ilias joint. There is an occult spina bifida. Films of the upper cervical region show no evidence of pathology.

There is no evidence now of, "Fracture of the right ischium or inferior osseous ramus or of the 5th lumbar vertebra."

I believe Mr. Smith shows results clinically and roentgenologically of severe traumatism around the lower lumbar vertebrae and left sacro-iliac joint.

I recommend that he have physiotherapy cautiously directed and a sacro-iliac belt. This treatment should be carefully administered, predicting that he will improve gradually. If he does not, then an operative fusion is recommended.

His disability at present is 35%.

This patient has a fair chance of returning to normal with proper orthopedic treatment, elimination of all focal infection and his proper attitude toward his condition.

(Signed) H. B. Thomas."

5. That the claimant does not wish to accept the treatment suggested in the doctor's report as he feels it will be of no benefit to him on advice of physicians.

It will be noted under Paragraph 4 on the preceding page that the stipulation only goes so far as to say that Dr. Thomas made a report as follows: That the claimant's disability at present is 35%, and that he has a fair chance of returning to normal, etc.

The per cent of loss that claimant suffered goes to the ultimate fact. An injured employee may testify how his in-

juries affect him and as to his ability to use injured eyes or limbs, but neither a lay witness nor an expert can testify in direct terms that the employee has lost any stated per cent of the use of any member, as such conclusion or finding must be made by the court itself. *Pocahontas Mining Co. vs. Industrial Com.*, 301 Ill. 462; *St. Louis Smelting Co. vs. Industrial Com.*, 298 Ill. 293. This is a well established rule and the stipulation does not go so far as to say that it is stipulated that the claimant is injured to the extent of 35%.

The testimony introduced pertaining to the ability of claimant to work was to the effect that he could not work as a laborer, that being his business prior to the time of the injury. On a hearing under paragraph (d) of Section 8, it is necessary to acquire proof of the actual earnings of the claimant for a substantial period before the accident and of the actual earnings of the claimant for a substantial period after his return to work after the accident, or in the event that he has not returned to work since the accident, proof of what he is able to earn in some suitable employment or business. (*Groveland Coal Co. vs. Industrial Com.*, 309 Ill. 73.) The finding of a difference in earning capacity must find support in the evidence heard or it cannot be confirmed. It is impossible to award half the difference between the average amount of earnings before the accident and the average employee is earning or is able to earn in some suitable employment or business after the accident without evidence not only of the earnings of the injured employee before the accident but also of his capacity to earn after the accident.

After consideration of all the competent evidence in this case we are unable to determine the period of temporary total disability and manifestly can make no award thereon. It is equally clear that a person who has done and can do those things the claimant testified that he has done since his injury, is not rendered wholly and permanently incapable of work. It is apparent that claimant did receive some injuries that have rendered him partially disabled but the proper foundation has not been made for this court to determine the amount which should be awarded for such disability. Award is therefore denied. On proper petition further proceedings may be had in conformity with the Workmen's Compensation Act.

(No. 2772—Claimant awarded $331.00.)

AURORA, ELGIN AND FOX RIVER ELECTRIC COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1937.

ALSCHULER, PUTNAM & JOHNSON, for claimant.

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

SERVICES RENDERED IN CONNECTION WITH SUPPLIES FURNISHED—*when award may be made for.* Where it is conceded that claimant furnished supplies to State and rendered necessary services in connection with same, and no objection is made to the charge therefor, an award may be made, for amount due, upon claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed by the Aurora, Elgin and Fox River Electric Company, a corporation, on December 16, 1935, with the clerk of this court, alleging that it is a railroad corporation within the State of Illinois, and maintains its tracks and operates its trains within Kane County, and served the Elgin State Hospital, a State institution, by maintaining tracks and operating trains to the siding of that hospital.

It is also alleged that on the 1st day of February, 1929, a contract was entered into between the then manager of the Elgin State Hospital, who was duly authorized to enter into contracts on behalf of the State, which contract was known in railroad parlance as an "Average Agreement" and is attached to the petition filed in this cause, made a part thereof and marked "Exhibit A". This agreement provided the rate for charges for demurrage of railroad cars which were to be in the future delivered to the Elgin State Hospital by the claimant; that the consideration for the signing of said "Average Agreement" by the then managing officer of the Elgin State Hospital was the adherence by the Aurora, Elgin and Fox River Electric Company, the claimant herein, to the National Car Demurrage Rules and Charges of The American Railway Association, and a copy of the applicable sections is attached to the petition filed in this cause, made a part thereof and marked "Exhibit B". It is also charged that this agreement was in force and effect throughout the

month of June, 1935, and during the said month of June, 1935, the Elgin State Hospital received large shipments of coal by way of various steam railroads, which railroads delivered their cars to the claimant for delivery to the Elgin State Hospital, and during this month of June, 80 cars of coal were delivered by the claimant to the Elgin State Hospital. (A Bill of Particulars is attached to the petition, which shows the car number, the date of delivery, the date they were returned, the total days, the free days, the debit days, credit days and excess. This Bill of Particulars shows a total debit days of 160, with 12 credit days, making a total of 148 days, at $2.00 per day, or $296.00. In excess, there were 7 debit days at $5.00 each, or the further sum of $35.00, making a total of $331.00. This is the sum computed under the plans set forth in the "Average Agreement" and the National Car Demurrage Rules and Charges of the American Railway Association.) Rule 9, Item 540, Section A of the Car Demurrage Rules and Charges provides that:

"One credit will be allowed for each car released within the first twenty-four (24) hours of free time. After the expiration of forty-eight (48) hours' (96 hours on cars subject to Rule 8, Section A, Paragraph 2, Page 45) free time, one debit per car per day or fraction of a day, will be charged for each of the first four days. In no case shall more than one credit be allowed on any one car, and in no case shall more than four credits be applied in cancellation of debits accruing on any one car. When a car has accrued four debits, a charge of $5.00 per car per day, or fraction of a day, will be made for all subsequent detention and will apply on all subsequent Sundays and legal holidays, including a Sunday or holiday immediately following the day on which the fourth debit begins to run."

It is further provided that:

"At the end of the calendar month the total number of credits will be deducted from the total number of debits and $2.00 per debit will be charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars except as otherwise provided in Section A for detention beyond the fourth debit day, and no payment will be made by this railroad on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month."

There are other provisions concerning the rules applicable hereto.

The respondent admits that such services were rendered by the claimant. An offer of compromise for the sum of $150.00 is shown to have been made but refused by the claim-

ant. The evidence shows in a statement from Charles F. Read, managing officer, submitted to Mr. A. L. Bowen, Director, under date of December 30, 1935, that the statement of days cars of screenings were on the switch track is correct, but the total charges are excessive because of bunching by the Illinois Central Railroad Company; that on June 18, 1935, 22 cars were delivered, but were shipped as follows: 5 cars, June 12th; 5 cars, June 13th; 8 cars, June 14th, and 4 cars, June 15th. This letter further states that they could not have avoided a demurrage charge, but these charges could have been considerably reduced if deliveries had been more evenly distributed. It also stated that the weather was very rainy and they were unable to keep their patients at the job of unloading as steadily as they had expected when ordering in the coal.

In another letter from Mr. Bowen to Mr. Read under date of January 3, 1936, he acknowledged receipt of the letter of December 30, 1936, and quoted that provision of Mr. Read's letter of December 30, to the effect that "total charges were excessive because of bunching by the Illinois Central Railroad. * * * While we could not have avoided a demurrage charge, same could have been considerably reduced if deliveries had been more evenly distributed". Mr. Read was then asked by Mr. Bowen: "When the Elgin State Hospital ordered this coal in anticipation of a strike was the shipping company or the railroad given any instructions concerning the number of cars which could be handled daily? In other words, were the shipping concerns responsible for sending in several cars of coal which could not be unloaded and of subsequently entering a claim for demurrage; or, did the State Hospital fail to specify the amount of coal which should be delivered at stated intervals?" In a letter dated January 10, 1936, from Mr. Read to Mr. Bowen, it is stated: That their contract for coal for this period was divided between five different mines at five different locations in Southern Illinois, and each mine was instructed to ship two cars per day. He also stated that they were able to unload ten cars per day if weather conditions were favorable. He also stated that the mines shipped as instructed, but being located at different points, there was no way for the railroads to entirely control the rate of delivery to the hospital, and he

closed his letter by this statement: "However, there was no reason why twenty-two cars should be delivered on any one day except the fault of the railroads".

We cannot see how there could be any fault of claimant in the statement of facts tendered. The shipments did not arise on the line of the claimant, and it does not appear that the railroads ever received any notice to the effect that the hospital could only handle ten cars. As a matter of fact, it appears that the railroads were not so notified. As stated in Mr. Read's letter: "The mines shipped as instructed, but being located at different points, there was no way for the railroads to entirely control the rate of delivery to us."

It appears that a strike in the coal fields was being anticipated, and for that reason, the then managing officer of the Elgin State Hospital, very properly laid in an extra supply of coal. In this, we feel that he was entirely justified under the circumstances. No doubt, many other users of coal were doing the same thing. Mr. Read was acting as a competent, careful, public officer should act under such circumstances. The railroads, including claimant, fully performed their duties. The only excuse for not unloading the coal within the time provided by the rules and agreements entered into with the claimant, was the fact that the weather was rainy and they were unable to keep their patients at the job of unloading as steadily as they expected. Of course, this would not be any reason to justify denial of the claim. The claimant rendered the service and no objection is made to the charge. The charge is made for failure to empty the cars and return them into commerce.

We have repeatedly held that where it is conceded that a claimant rendered services and furnished supplies to the State, and has not been paid therefor because of the lapse of appropriation for the purpose, and the amount is unquestioned, and no laches appearing on part of claimant, an award will be made for such services and supplies. No sufficient reason appearing why we should not adhere to that rule, an award will be made in favor of the Aurora, Elgin and Fox River Electric Company, a corporation, with offices at 46 Fox Street, Aurora, Illinois, for the full amount of the claim, to wit: the sum of $331.00.

(No. 2937—Claimant awarded $101.41.)

NICK GIBBS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1937.

BURREL BARASH, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation may be made under.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made for compensation for such injuries, in accordance with the provisions of the Act, upon claim made and application filed for same within time fixed therein.

SAME—*determination of average wage—Paragraph (e) of Section 10 of.* Where record shows that claimant, at time of injuries was being paid at rate of fifty cents per hour and had only been paid $520.80 during the preceding year, but fails to show that employment in which he was engaged at time of injury was not a continuous employment throughout year, the average wage will be determined on basis of work throughout entire year and not under provisions of Paragraph (e) of Section 10 of Workmen's Compensation Act wherein award is made on basis of two hundred working days in the year.

MR. JUSTICE YANTIS delivered the opinion of the court:

On January 20, 1936 claimant Nick Gibbs was employed by the State of Illinois in the Highway Department as a truck driver. He had been thus employed for about a month at the rate of Fifty (50) Cents per hour on an average of eight hours a day and six days per week. He had previously been employed by the Department, sometimes as a helper and at one time as a foreman, and during the latter service he received Sixty (60) Cents per hour.

On January 19, 1936 he was operating a snow plow attached to the truck then driven by him. In examining his motor he slipped and the second finger on his right hand was caught in the water pump pulley. The end of the finger was badly torn, but immediate surgical attention was given, the torn end of the finger was sewed back on, it was dressed daily and a satisfactory union resulted. The patient was under the care of the attending surgeon, Dr. Andrew R. Mailer, for about two months. His condition at the time of the hearing showed a deformed finger nail, circulatory impairment and a scar at the tip and a little atrophy of the

finger, and a limitation of flection to about fifty (50) per cent of the normal finger. From the doctor's testimony there is a partial loss of use of the finger of at least twenty-five (25) per cent. Due to the fact that the end of the finger was almost completely amputated and that the bone was cut in half, there has been surplus callous formation where the bone healed.

All medical, surgical and hospital bills incurred by reason of said injury have been paid by the State except Four ($4.00) Dollars, paid by claimant to the Gunning Clinic at Galesburg, Illinois, and claimant has been paid Ninety ($90.00) Dollars compensation.

On August 7, 1936 claimant filed his application for a further award of fifty (50) per cent loss of use of his finger, in the sum of Two Hundred Forty ($240.00) Dollars. No question is raised by the record as to the fact that claimant was duly employed by respondent, and that the injury arose out of and in the course of his employment and that same is compensable under the record. The claim recites, and the proof shows, that the State has heretofore paid total compensation of Ninety ($90.00) Dollars, which the Division of Highways reports paid claimant's compensation from January 24, 1936 to March 10, 1936, a period of seven and one-half (7½) weeks, at the rate of Twelve ($12.00) Dollars per week; compensation being based at the rate of Fifty (50) Cents per hour, the rate he was receiving at the time of his injury; the average weekly wage at that rate being Twenty-four ($24.00) Dollars.

Respondent contends that his average wage should be determined under provisions of Par. (e) of Sec. 10 of the Workmen's Compensation Act, wherein determination of award is made on a basis of 200 working days in the year, where it is the custom to operate for only a part of the working days in each year. While it is true that claimant had in fact received only Five Hundred Twenty and 80/100 ($520.80) Dollars in total wages during the preceding year, the work in which he was engaged at the time of the injury, i. e. a truck driver is, so far as the record shows, a continuous employment throughout the year. Claimant's average weekly wage is therefore determined at Twenty-four ($24.00) Dollars per week. His temporary compensation has been paid and an award is now due him for the partial

loss of his second finger, which under the proof, is found to be twenty-five (25) per cent. An award is therefore made in favor of claimant for twenty-five (25) per cent loss of the use of his second finger on the right hand due to the accident in question, in the sum of One Hundred One and 41/100 ($101.41) Dollars, and $4.00 medical expense, or $105.41 total award.

This award being subject to the provisions of an Act entitled, *"An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,"* approved July 2, 1935 (Sess. Laws 1935, p. 49) and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when, such approval is given, made *"payable from the appropriation from Road Fund in the manner provided in such Act."*

(No. 2522—Claimant awarded $125.00.)

LEHIGH PORTLAND CEMENT CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1937.

DEFREES, BUCKINGHAM, JONES & HOFFMAN, for claimant.

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

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

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that this claim is for the sum of $175.00 due claimant under a contract entered into between claimant and the Department of Purchases and Construction, Division of Purchases and Supplies of the State of Illinois, and wrongfully deducted from the payments made to claimant by the Auditor of Public Accounts for discounts contrary to the terms of the contract.

Claimant is a corporation incorporated under the laws of the State of Pennsylvania, and licensed to do business in the State of Illinois.

On December 7, 1932, the Department of Purchases and Construction requested of claimant a bid on furnishing 4,000 barrels of Portland cement to the Southern Illinois Penitentiary, and the claimant entered a sealed bid and forwarded the same to the Department, and on December 29, 1932, the claimant was notified by the Department by telegram, that it, the claimant, had been awarded a contract for 2,000 barrels of Portland cement, and said Department followed this telegram with a purchase order for that amount of cement. The purchase order is for 2,000 barrels at $1.76 per barrel, less ten cents per barrel discount for each payment made within fifteen days from the date of invoice. A Bill of Particulars was filed with the complaint. This shows the sum of $175.00 due for discounts wrongfully taken.

There was considerable correspondence with the various State officers and on October 30, 1933, the Director of Finance wrote the claimant as follows:

"We cannot say that your recent complaint concerning our deduction of cash discount in making remittance to you, is fully unjustified, as technically the discount date had passed at time of remittance. Nevertheless, we feel that we are justified in calling upon you for your cooperation at this time in accepting the remittance in the manner in which it has been made.

"Unfortunately, during the early months of this year, funds were extremely slow in coming into the State Treasury, and it became necessary to resort to extreme measures of economy to curtail expenses with a view toward placing the State in a position where it might be able in the future, to meet its obligations promptly.

"In the light of these circumstances, we ask you to give further consideration to this question of discount and we are confident that after so doing, we are assured of your cooperation in the matter at hand.

Very truly yours,

J. J. RIEL,
Director of Finance."

This the claimant refused to do.

A stipulation of facts was filed. No question arises as to the quality or quantities of the cement, and it clearly appears that the State would only be entitled to the discount of ten cents on each barrel if payment was made within fifteen days from the date of invoice. Claimant mailed its invoices to the proper officers of the State dated August 25, 1933, for five shipments of cement, and on September 25, 1933, the claimant received a warrant issued by the Auditor of Public Accounts in payment thereof, and in each instance,

a discount of ten cents per barrel had been deducted. The warrants were mailed to and received by the claimant later than fifteen days after the date of the invoices in payment of which it was issued. Paragraph 5 of the stipulation is as follows: "That the sum of the amounts so deducted as discounts, as set out in the preceding paragraph hereof, for which claim is made herein, is $125.00". The stipulation does not claim any other amount.

The Attorney General's Statement, Brief and Argument states that the claim is for $125.00 due claimant under a contract for the purchase of cement. The Attorney General also states that there was a dispute as to the discount on two of the cars, and the claimant waived the claim as to the two cars, and thus reduced the claim to $125.00, this being the amount contained in the stipulation.

The only question that we are called upon to decide is whether a party to a contract who has not complied with its terms is none the less entitled to benefits expressly conditioned upon such compliance. It is clear from the elementary principles of the law of contracts that he is not.

Corn Products Refining Co. vs. *Oriental Candy Co.*, 168 Ill. App. 585; *J. Wolkind & Co.* vs. *R. & W. Cloak & Suit Co.*, 184 New York Supplement 460.

In the latter case, the court discussing a discount provision used the following language:

"The outstanding fact, however, is that defendant, whatever the terms of the discount were, never conformed to the terms, and therefore never was entitled to them, and the mere fact that it deducted the amount in paying the bills from time to time gives it no right it did not possess before."

The letter of the Director of Finance under date of October 30, 1933, while commendatory under the circumstances, is not a legal defense to the claim, and no authority has been cited contrary to the views herein expressed.

We, therefore, allow the Lehigh Portland Cement Co., a corporation, the sum of One Hundred Twenty-five Dollars ($125.00).

(No. 3032—Claimant awarded $9.32.)

GEORGE MURPHY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SALARY—*member of Illinois National Guard—when award may be made for.* Where it clearly appears that member of Illinois National Guard is entitled to salary and that before adjustment of his account was completed, appropriation out of which same could be paid had lapsed, an award for payment of amount due will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant George Murphy, of 649 East Marquette Road, Chicago, Illinois, was supply officer of the 8th Infantry, Illinois National Guard, and resigned effective May 2nd, 1933. The usual procedure for withholding any pay due, until the property accountability is adjusted, was followed. Claimant was entitled to two days pay at the rate of $4.66 per day for the days of May 1st and 2nd, 1933. The adjustment of his account however was not completed until after the lapse of the appropriations on September 30, 1933. The record shows that there is due him the sum of $9.32 for the two days in question, and that the only reason for the non-payment thereof has been the lapsing of said appropriation. His claim was filed December 1st, 1936 for said amount, and under the showing made, an award is hereby entered in favor of claimant for said sum of $9.32.

(No. 2821—Claim denied.)

KARL A. GLOVER, RECEIVER OF THE FIRST NATIONAL BANK OF LAWRENCEVILLE, ILLINOIS, A NATIONAL BANKING CORPORATION OF LAWRENCEVILLE, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1937.
Rehearing denied May 12, 1937.

SUMNER & LEWIS, for claimant; WILLIAM MCKINLEY, of counsel.

JACOB LOGAN FOX, *Amicus Curiae.*

OTTO KERNER, Attorney General, and A. B. DENNIS, GLENN A. TREVOR and JOHN KASSERMAN, Assistant Attorneys General, for respondent.

BANKS—*State Depositary Act—does not constitute amendment to General Banking Act—unnecessary to submit to vote of people.* The State Depositary Act governing deposit of moneys of the State in banks within the State as may be authorized to receive such deposits under the terms of the Act does not change the primary obligation existing between a bank and its depositors, and does not add to or increase the powers of any bank or banking association and therefore does not constitute an amendment to the General Banking Act and it was not necessary that such Depositary Act be submitted to a vote of the people.

SAME—*Section 5 of Article 11 of Constitution of 1870—State Depositary Act not in violation of provisions of.* The State Depositary Act does not violate the provisions of Section 5 of Article 11 of the Constitution of 1870, providing that "No Act of the General Assembly authorizing or creating corporations or associations with banking powers * * * nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same," as there is nothing whatsoever in the said Act with reference to the organization of corporations or associations with banking powers, nor is there anything therein which purports to regulate banks or the banking business. The positive requirements of the Act have relation to the State Treasurer and the deposit of State monies and any reference therein to banks or the banking business is merely incidental to the other provisions of the Act, and the scope of the Act is indicated by the penal provisions thereof.

SAME—*Sovereign, right to priority in payment of funds in—exists at common law—State Depositary Act granting, not additional powers.* Although there is no constitutional or statutory provision on the subject, the State under the common law enjoys a right to priority in payment of its claims for its moneys on deposit in insolvent banks over creditors who do not have an antecedent lien against the assets of the bank and as the State had such right prior to the enactment of the State Depositary Act, any provisions thereof giving rise to such priority do not grant any additional powers.

SAME—*State Depositary Act—deposit of State funds under—deposit of assets by bank under provisions of, to secure repayment—when award for value of assets deposited and sold to protect deposit, upon insolvency of bank on grounds bank had no power to deposit will be denied.* Where State Treasurer deposited money in State bank under authority and in accordance with provisions of State Depositary Act and bank accepted same and in accordance with said provisions of said Act deposited certain assets with State Treasurer to secure repayment of deposit, and State Treasurer, upon insolvency of said bank demands payment of said deposit, which bank is unable to make, proceeds in accordance with provisions of said Act and conditions under which said deposit was made and accepted, to sell said assets and out of proceeds retains amount of deposit and remits balance to Receiver of bank, a claim for value of said assets on ground bank had no power to deposit said assets must be denied.

CONSTITUTION—*rules of construction.* The legal presumption is that a statute is valid, and if capable of two constructions, the one which favors

its validity is the interpretation to be adopted, and one who challenges the constitutionality of a statute has the burden of showing clearly wherein it is in conflict with the Constitution.

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

From the stipulation filed herein by the parties to this cause, the following facts appear:

Prior to and on November 1st, 1931 The First National Bank of Lawrenceville, a national banking association, was engaged in the banking business in the City of Lawrenceville, in the County of Lawrenceville, and State of Illinois. On the last mentioned date, Edward J. Barrett, State Treasurer of the State of Illinois, deposited in said bank $45,000.00 belonging to the State of Illinois, and in his possession as such Treasurer, and thereupon said bank issued to such Treasurer six (6) certificates of deposit in the usual form, in the total principal sum of $45,000.00; each certificate being payable to order of Edward J. Barrett, State Treasurer, or his successors in office, on the return thereof, properly endorsed, with 2 per cent interest per annum payable monthly, and bearing on the face thereof the following notation, to wit, "The right to demand five days notice of payment is reserved. Not subject to check."

At the time of making such deposit, said bank deposited with and delivered to said treasurer certain assets belonging to said bank, including certain State of Illinois 4 per cent Highway Bonds, due 1946-1959, of the total par value of $50,000.00, all of which assets were put up as collateral and pledged to secure the repayment of the aforementioned deposit. At the same time said bank and said treasurer entered into a contract which provided, among other things, that if, in the judgment of said treasurer, said collateral, or any part thereof, should become depreciated in value, said treasurer should have the right immediately to declare the entire amount of said deposit to be due and payable; and to sell all of said collateral at public or private sale, without notice to said bank, and apply the proceeds, after deducting the necessary costs and expenses, to the payment of the amount owing to such treasurer, whether due or not, and return the surplus, if any, to said bank.

On August 20th, 1932 said bank became insolvent and ceased doing business, and on August 22d, 1932 the Comptroller of the Currency of the United States appointed one J. B. Reid Receiver for said bank. Reid accepted said appointment and continued to act as such receiver until March 15th, 1934, at which time he resigned. Thereupon said Comptroller appointed the claimant, Karl A. Glover, as receiver of said bank. Glover duly qualified as such receiver, and has been since the date of his appointment and is now the duly qualified and acting receiver of said bank.

On August 23d, 1932 the aforementioned State Treasurer demanded of said bank the repayment of said deposit of $45,000.00, and advised said bank that if payment was not received, and the margin became impaired, he would sell the aforementioned collateral to protect said deposit.

On August 25th, 1932 J. B. Reid, then receiver of said bank, advised said treasurer that he was not in position to remit the amount demanded.

On September 26th, 1932 said Comptroller of the Currency authorized said receiver to consent to the sale of the aforementioned State of Illinois Highway Bonds by said State Treasurer to secure sufficient funds to liquidate said deposit, with accrued interest.

On September 29th, 1932 said receiver notified said treasurer that the Farmers State Bank of Lawrenceville, Illinois, was sending him a draft for $50,593.34 in payment of said State of Illinois Highway Bonds of the par value of $50,000.00, including interest, and directed said treasurer to retain the amount due him, and deposit the balance, to wit the sum of $5,443.34 in the First National Bank of St. Louis to the account of said receiver.

Said draft was duly received by said treasurer, the sum of $45,150.00 was retained by him in repayment of the aforementioned deposit and interest, and the balance, to wit, $5,443.34, was deposited by said treasurer in the First National Bank of St. Louis to the account of said J. B. Reid, receiver, in accordance with the instructions of said receiver.

On October 5th, 1932 the account of said treasurer with said bank was closed; the certificates issued by said bank evidencing the aforementioned deposit, were returned to said receiver for cancellation, and thereafter the remaining

securities held by said treasurer as collateral for said deposit were re-delivered by said treasurer to said receiver.

Claimant takes the position that the First National Bank of Lawrenceville had no power or authority to pledge its assets to secure deposits of State money; that said pledge was illegal and void; and that therefore the State is liable to the receiver of said bank for the difference between the amount the State Treasurer received by reason of the sale of the pledged assets, and the amount such treasurer would have received if said assets had not been pledged, and he had been required to participate in the distribution of the proceeds of such bank as a common creditor.

The respondent takes the position that said bank had full power and authority to pledge its assets to secure the deposit in question, and relies upon the amendment to Section 45 of the National Bank Act (12 U. S. C. A. sec. 90; U. S. R. S. sec. 5153) and Sections 1, 10 and 12 of an Act entitled "An Act in Relation to State Moneys," approved June 28th, 1919, in force July 1st, 1919, commonly known as the State Depositary Act, (State Bar Assn. Stat. 1935, Chap. 130, par. 20, 29 and 31) which said sections provide as follows:

National Banking Act:

"Any association, may, upon the deposit with it of any public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the laws of the State in which such association is located in the case of other banking institutions in the State."

State Depositary Act:

"Section 1. That the State Treasurer shall deposit all money received by him on account of the State within five days after receiving the same in such banks of the State as may be autthorized to receive such deposits under the terms of this Act. The money so deposited shall be placed to the account of the State Treasurer."

"Section 10. No moneys in the State Treasury shall be deposited in any bank approved as a depositary under the terms of this Act unless such bank shall have deposited securities with the State Treasurer equal in market value to the amount of moneys deposited. The State Treasurer is authorized to enter into agreement in conformity with the provisions of this Act with any such depositary bank relating to the deposit of such securities."

"Section 12. All securities deposited by approved banks under the provisions of this Act shall remain the property of the banks depositing such securities. Should the depositary fail or refuse to pay over the moneys, or any part thereof, deposited with it, when due and payable,

the State Treasurer may sell such securities in accordance with the terms of any agreement between the State Treasurer and the depositary bank. Such sale shall transfer absolute ownership of the securities so sold to the vendee thereof. The surplus, if any, over the amount due to the State and the expenses of the sale shall be paid to the depositary. Actions may be brought in the name of The People of the State of Illinois to enforce the claims of the State with respect to any securities deposited by an approved bank."

Claimant contends that that portion of the State Depositary Act which provides in substance that no money in the State Treasury shall be deposited in any bank unless such bank shall have deposited securities with the State Treasurer equal in market value to the amount of the monies deposited, constitutes an amendment to the General Banking Act of this State; that inasmuch as said Depositary Act was not submitted to a vote of the people at the general election next succeeding the passage of the same, it is unconstitutional and void, being in violation of Section 5 of Article 11 of the Constitution of 1870, which provides that:

"No Act of the General Assembly authorizing or creating corporations or associations with banking powers * * * nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same," etc;—

that inasmuch as there is no valid law of this State authorizing State Banks to pledge their assets to secure deposits of State money, national banks have no authority to pledge their assets to secure such deposits; that the pledge of its assets by the First National Bank of Lawrenceville was illegal; that the receiver therefore was entitled to the return of all of the pledged assets; and that the State Treasurer should have been considered only as a general creditor of said bank.

The respondent contends that the State Depositary Act does not constitute an amendment of the General Banking Act of this State, and that therefore the aforementioned constitutional provision has no application to such Act.

The respondent further contends that even though such enactment be held illegal, nevertheless, under the laws of this State, the claimant is not entitled to maintain its action in this behalf, and sets forth in its brief and argument numerous propositions and authorities in support of such contention.

The first question for consideration, therefore, is the question of the validity of the aforementioned Act commonly

known as the State Depositary Act. If such Act is not subject to the objections raised, the claimant has no right to recover in this proceeding. If such Act is subject to the objections raised by the claimant, it is unconstitutional and void and it will then become necessary to consider the other contentions made by the respondent.

The question now under consideration may therefore be stated briefly as follows: *Does the State Depositary Act constitute an amendment of the General Banking Act of this State?*

So far as we have been able to learn, this question has never been presented to or passed upon by the Supreme Court of this State.

The respondent claims that the State Depositary Law has been impliedly held constitutional by the Supreme Court of the United States, and by the Supreme Court of Illinois, and relies upon the case of *Marion* vs. *Sneeden*, 291 U. S. 269, and the cases of *Nelson* vs. *Colegrove & Co. State Bank*, 354 Ill. 408, and *People* vs. *Wiersema State Bank*, 361 Ill. 85, in support of its claim. The State Depositary Act was referred to, and the existence thereof as a law of this State was recognized by the court in each of such cases, but in neither case was the constitutionality of the Act drawn in question, and consequently anything said by either court with reference to such Act, cannot be considered as a determination of the constitutionality thereof.

Claimant concedes that not every law which affects banks constitutes an amendment to the Banking Act, within the constitutional prohibition, and although it contends that the Depositary Act constitutes such an amendment, it does not specify what section or sections are amended thereby.

The first General Banking Act of this State subsequent to the adoption of the Constitution of 1870 was passed in 1887. Several amendments were made thereto, and in 1919 the General Assembly adopted "An Act to Revise the Law in Relation to Banks and Banking," which expressly repealed the Act of 1877 as amended. The Act of 1919, as thereafter amended, is still in force.

The question as to whether the provisions of certain laws enacted by the Legislature constitute amendments to the

General Banking Act, has been considered by our Supreme Court in the following cases, to wit:

Reed vs. *People*, 125 Ill. 592.
Sykes vs. *People*, 132 Ill. 32.
Italia America Shipping Corporation vs. *Nelson*, 323 Ill. 427.
People vs. *Gould*, 345 Ill. 288.
McQueen vs. *Randall*, 353 Ill. 231.
People vs. *Dennhardt*, 354 Ill. 450.
People vs. *First State Bank & Trust Co.*, 364 Ill. 294.

A review of such cases will be helpful in solving the question before us.

The case of *Reed, et al* vs. *The People ex rel*, 125 Ill. 592, involved the constitutionality of an Act of the General Assembly adopted in 1887, entitled "An Act to provide for the organization of Savings societies, or institutions for savings, for their supervision, and for the administration of their affairs". It was contended that such Act authorized the creation of corporations having banking powers, and that the same was therefore an amendment of the General Banking Act. Upon consideration of the several provisions of the Act the court said:

"Under the sections of the Act we have referred to, the corporation is invested with full power to receive money on deposit, and to discount notes. These are banking powers, as has been abundantly shown."

The court therefore held the Act there in question to be an amendment to the General Banking Act, and inasmuch as the same had not been submitted to a vote of the people, it was unconstitutional and void.

The case of *Sykes* vs. *The People*, 132 Ill. 32, involved the following facts: The Merchants' Savings Loan and Trust Company was organized under the provisions of a private Act of the General Assembly approved January 28th, 1857 entitled "An Act to incorporate the Merchants' Savings Loan and Trust Company", which Act, among other things, conferred upon such corporation banking powers. Thereafter the name of the corporation was changed to "The Merchants Loan and Trust Company", in accordance with the provisions of an Act of the General Assembly entitled "An Act to provide for changing the names * * * of incorporated companies", etc., approved and in force March 26th, 1872. It was

contended that the latter Act constituted an amendment of the previous Act, and that it was null and void for the reason that it had not been submitted to a vote of the people in accordance with the foregoing constitutional provision. In that case the court said:

"The provision fixing the name of the corporation created is an essential part of the Act and is an express Legislative declaration that the corporate name shall be as there given. 'The identity of name is the principal means of effecting that perpetual succession, with members frequently changing, which is an important purpose of incorporation.' * * *

"Any act therefore, which provides that a corporation shall or may take another name, changes in an essential particular the organic law of such corporation and is therefore necessarily an amendment thereto. * * * The charter of said corporation being an Act creating a corporation with banking powers, within the meaning of the constitutional limitation above cited, was not subject to amendment except by an Act properly submitted to and adopted by the people of the State at a general election."

In the case of *Italia America Shipping Corporation* vs. *Nelson*, 323 Ill. 427, the complainants were engaged in the business of buying and selling foreign exchange and the transmission or transfer of monies to foreign countries, and filed their amended bill of complaint in the Circuit Court of Cook County praying the court to declare unconstitutional and void an Act entitled "An Act in relation to the buying and selling of foreign exchange and the transmission or transfer of money to foreign countries", approved June 28th, 1923. The defendants filed a general demurrer to the complaint. The Supreme Court ordered the demurrer sustained and the bill dismissed, and in the course of its opinion said (p. 430):

"Appellees' first contention is that the Act is an amendment to the Act relating to banks and banking, which Act is entitled, "An Act to revise the law in relation to banks and banking," approved June 23, 1919, and ratified by vote of the people on November 2, 1920, and that being such amendment and not having been submitted to a vote of the people, as required by Section 5 of Article 11 of the Constitution of the State of Illinois, it is therefore unconstitutional and void. The basis for this contention seems to be that the powers of banking corporations are increased or enlarged by reason of their exception from the provisions of the Act. While the passage of this Act may have a tendency to increase the amount of business done by banking corporations by reason of its restrictions upon other corporations, the Act does not increase or enlarge the powers of banking corporations, for the reason that, prior to the passage of the Act it was within the scope of the ordinary functions of a bank to deal in foreign exchange and money."

In the case of *The People* vs. *Gould*, 345 Ill. 288, the defendants, who were the president and cashier of the Savings Bank of Kewanee, were indicted and convicted of receiving a deposit in said bank when the same was insolvent and when said defendants knew of said insolvency, contrary to the provisions of Section 1 of an Act entitled "An Act for the protection of bank depositors", approved June 4th, 1879, as amended in 1903.

A motion to quash the indictment was made, and one of the grounds for such motion was that the Act upon which the indictment was based, was an amendment of the General Banking Act of this State, and that the same was null and void for the reason that it had not been submitted to a vote of the people, as required by the aforementioned constitutional provision.

After a very thorough consideration of the question, the court said (p. 294):

"This Act did not authorize or create any corporation or association with banking powers nor was it an amendment to any such Act. There was no such Act in existence in the State of Illinois to which the constitutional prohibition could apply except the special charters granted by the Legislature before the Constitution was adopted, and these charters were in no way affected by the Act. No right or duty, no power or privilege, no liability or obligation, of any incorporated bank or banking association was added to or increased, subtracted from or diminished or in any way affected by the law. The mutual rights of the bank and its depositors, legal or equitable, were in no respect changed by it. It acted only upon the individual "bank or broker, or person or persons doing a banking business, or any officer of a banking company or incorporated bank." The prohibition was to the *individual*. *The responsibility* was upon him and his was the punishment."

Also, on page 302:

"The subject matters of Section 5 of Article 11 of the Constitution is the organization of corporations or associations having banking powers. Whatever law may be passed on that subject must receive the approval of a vote of the people, and so must every amendment. * * * The section refers to the manner of organization of banking corporations, the privileges granted to them, the duties and obligations imposed upon them, the supervision, regulation and control of them by the Auditor, and not to the general rules of commercial law, the law of negotiable instruments, and the great mass of substantive law to which the banking Act makes no reference."

Also, on page 307:

"By no stretch of the imagination can the Act of 1879 be regarded as an amendment of the Act of 1919, under which the Savings Bank of Kewanee was incorporated."

The case of *McQueen* vs. *Randall*, 353 Ill. 231, involved the constitutionality of "An Act defining the relations between banks and their depositors with respect to the deposit and collection of checks and other instruments payable in money", approved July 8th, 1931.

McQueen was the holder of two checks which had been certified by the Maywood State Bank, which thereafter was closed by the Auditor of Public Accounts. McQueen filed a claim with the receiver of said bank, claiming a preference under the provisions of the aforementioned Act. The trial court held such Act unconstitutional, and allowed the claim as a general claim, and McQueen perfected an appeal to the Supreme Court. The case was thoroughly considered by the court and the previous cases of *Reed* vs. *People*, *Sykes* vs. *People*, and *People* vs. *Gould* were reviewed.

The court pointed out that the effect of the Act there under consideration was to change the relation between the bank and its depositors from that of debtor and creditor to that of principal and agent; and also pointed out that the effect of Section 2 of such Act was to establish a trust in favor of the holder of a certified check, and that the holder of such check thereby became a preferred creditor, whereas under the law in existence prior to the adoption of such Act, the holder of such check was only a general creditor of the bank. In that case the court said:

"The appellee argues that the Act is an amendment of the Banking Act, and not having been submitted to a vote of the people is void under the provisions of Section 5 of Article 11 of the Constitution. On the other hand, the appellant asserts that the Act does not relate to the organization or creation of banking corporations or associations, is not an amendment of any such prior Act, and that therefore the constitutional provision does not apply.

"The title of the Act confines it to the relations existing between banks and their depositors. It is expressly stated in the title that the act defines the relations between banks and their depositors, having to do with "the deposit and collection of checks and other instruments payable in money." No language is contained showing it to be an amendment of the Banking Act. Equally clear is the fact that the General Assembly was not dealing with the organization or creation of banking institutions.

"A careful survey of the Act of 1931 demonstrates that it does not make any attempt to change the primary obligation existing between a bank and its depositors under the subjects and conditions disclosed in the title of the Act. That primary obligation is, that if the bank has possession of funds of its depositors it is legally bound to pay them over when demanded.

The Act of 1931 only changes the point (in time) respecting the deposit and collection of instruments payable in money when the bank gains title to the proceeds of such instruments. Under the old law the bank gained title to the instrument upon its deposit; now it does not gain title but obtains the instrument as an agent for the purpose of collection. When the proceeds have been collected by the bank and credited to the account of the depositor, then, and then only, do the proceeds become part of the general funds of the bank. Consequently the Act of 1931, to again use what we said in the Gould case, does not add to or increase, subtract from or diminish, or in any way affect a right, duty, power or privilege of any incorporated bank or banking association. As it was not an amendment to the Banking Act, no reason existed for submitting the Act of 1931 to a vote of the people."

The case of *The People* vs. *Dennhardt*, 354 Ill. 350, involved the same statute as was under consideration in the case of *McQueen* vs. *Randall*, and the court in the Dennhardt case, without further consideration of the constitutional question, applied the law as laid down in the McQueen case.

The case of *The People* vs. *First State Bank and Trust Co.*, 364 Ill. 294, involved the following facts: One U. G. Orendorff entered into a contract with the First State Bank and Trust Company of Canton, pursuant to authority of the board of directors of such bank, whereby he purchased from such bank certain securities owned by it, on the promise of the bank to repurchase the same on demand, or in any event not later than certain dates set forth in said contract. Thereafter the bank was closed by the Auditor of Public Accounts, and a receiver appointed therefor. Orendorff demanded that said receiver carry out the contract for the repurchase of such securities. The receiver refused to do so, and justified his position by the provisions of Section 4 of "An Act for the protection of bank depositors", approved June 4th, 1879, which provides in substance that it shall not be lawful for any bank to assume the payment for, or become liable for, or to guarantee to pay the principal or interest of any bonds, notes or other evidences of indebtedness.

Orendorff contended that said Section 4 constituted an amendment of the General Banking Act and was null and void; not having been submitted to a vote of the people.

The Supreme Court had previously held in the Gould case that Section 1 of this same Act was not subject to this objection. In considering the question presented in the case

before it, and referring to said Section 4, the Supreme Court, on page 296, said:

"This section of the Act has nothing to do with the organization of corporations or associations with banking powers nor with any act of the General Assembly amending existing laws on that subject. It is not an Act creating corporations or associations with banking powers but is penal in its nature. Various sections of this Act have previously been before this court for consideration, and it has been uniformly held that they do not constitute an amendment to the Banking Act and so do not come within the constitutional provision for determination by a vote of the People."

The foregoing cases comprise all of the cases submitted to our Supreme Court since the adoption of the Constitution of 1870, in which any Act of the Legislature was claimed to be an amendment of the General Banking Act of this State.

Of the seven cases in which it was contended that the several legislative enactments involved therein constituted amendments of the General Banking Act, only two were held to constitute such amendments, and those two were the earliest decisions on the question, to wit: the decision in the Reed case, rendered in 1888, and the decision in the Sykes case, rendered in 1890. Furthermore, neither of said cases has any similarity whatsoever to the present case.

A careful study of the more recent decisions of our Supreme Court discloses the fact that such court has been gradually becoming more strict in its construction and determination of what is necessary to constitute an amendment of the General Banking Act.

Claimant's position on the question here involved is set forth on page 25 of its Brief, in the following language:

"State Depositary Law is unconstitutional because it amends the State Banking Act by granting to banks additional powers not possessed prior thereto. This no law can do without the approval of the People at a referendum."

In elaborating upon such proposition, claimant contends that the State Depositary Act attempts to change the primary obligation existing between a bank and its depositors and increases the rights, powers and privileges of banks by granting the power to pledge assets to secure deposits of State funds, which power they did not theretofore possess.

The primary obligation existing between a bank and its depositors was defined by our Supreme Court in the McQueen case, supra, as follows:

"That primary obligation is, that if the bank has possession of funds of its depositors, it is legally bound to pay them over when demanded."

For the purpose of determining whether the State Depositary Act changes this primary obligation, or grants any powers or privileges not theretofore possessed, we will consider briefly the terms and provisions of such Act and the legal effect thereof.

The title of such Act is "An Act in relation to State monies". There is nothing in the title of the Act which refers even remotely to banks or banking. The Act itself refers only incidentally to those subjects. It is complete in itself and entirely independent of any other Act. It prescribes the duties of the State Treasurer with reference to the deposit of State monies; provides for the collection of interest on such deposits; provides the manner of advertising for and receiving proposals for the deposit of public monies; the classification of depositaries; the manner of approval or rejection of such proposals; provides that all such proposals shall be filed in the office of the State Treasurer and shall be open at all reasonable hours to public inspection; and further provides that the State Treasurer shall publish in pamphlet form a list of the banks approved as State depositaries of public monies, etc., which pamphlet shall be for general distribution by the State Treasurer. Section 9 of the Act specifically provides that the approval of any proposal shall confer no right upon any bank to receive deposits of public money. Section 10 provides that no monies in the State Treasury shall be deposited in any bank approved as a depositary unless such bank shall have deposited securities with the State Treasurer equal in market value to the amount of monies deposited. Section 11 defines the class of securities which may be accepted. Section 12 provides that the securities deposited shall remain the property of the banks depositing the same, and further provides that should the depositary fail or refuse to pay over the money deposited, when due and payable, the State Treasurer may sell the securities. Section 23 provides that "any State official or other person who wilfully violates any provision of this Act, for which a penalty is not otherwise prescribed", etc., shall be subject to a fine or imprisonment in the penitentiary, or both.

From this brief summary of the Act we deduce the following conclusions:

There is nothing whatsoever in the Act with reference to the organization of corporations or associations with banking powers, nor is there anything in the Act which purports to regulate banks or the banking business. The positive requirements of the Act have relation to the State Treasurer and the deposit of State monies. Any reference in the Act to banks or the banking business is merely incidental to the other provisions of the Act. There is no requirement that any bank shall become a State depositary, and any bank which becomes such depositary does so of its own volition. Under Section 9, if any bank makes application to become such depositary and the application is accepted, such bank nevertheless does not have a right to any deposit of State monies. The relation between the bank and the depositors remains the same as theretofore, to wit, that of debtor and creditor. The scope of the Act is indicated by the penal provision thereof, which applies only to "any State official or other person" who wilfully violates the same.

It is also a part of claimant's contention that that portion of the Depositary Act which authorizes a pledge of deposits, increases the powers of banks, and thereby gives the State a preference over other creditors. As stated by claimant, the provisions of the Act must be judged by their legal effect.

An Act which has the effect of granting to certain creditors a preference which they did not enjoy prior to the adoption of such Act, does not, by reason thereof, change the primary obligation existing between a bank and its depositors, and does not constitute such an increase of power as will make it an amendment of the Banking Act. This was expressly decided in the case of *McQueen* vs. *Randall*, *supra*. In that case the court pointed out that the effect of the Act was to change the relationship existing between the bank and its depositors from that of debtor and creditor to that of principal and agent, and further pointed out that under the provisions of the Act there in question, the holder of a certified check would become a preferred creditor, whereas prior to the adoption of such Act the holder of such check would be only a general creditor of the bank. Yet, notwithstanding

such facts, the court said that the Act there in question "does not add to or increase, subtract from or diminish, or in any way effect a right, duty, power or privilege of any incorporated bank or banking association," and held that the same did not constitute an amendment of the General Banking Act. The McQueen case, on the facts and the principles involved, more closely resembles the present case than any of the other cases herein cited.

It may be contended that in the McQueen case there was no express grant of additional powers to the bank. This is correct;—but the legal effect of the provisions involved in each case is identical, that is to say, to grant a preference, and, as stated by claimant, such provisions must be judged by their legal effect.

The decision in the McQueen case was approved in the recent case of *The People* vs. *First State Bank and Trust Co., supra*, and therefore is the last authoritative expression of the Supreme Court on the questions involved. In our opinion the decision in the McQueen case is decisive of the issues in this case.

Furthermore, the General Banking Act relates to and regulates only State banks. It has no application whatsoever to National banks. Consequently, in order to constitute an amendment of the General Banking Act, of the nature suggested by claimant, the amending Act (State Depositary Act) must increase the powers of State banks. The effect of the provisions of such Act authorizing a pledge of assets to secure deposits of State money, is to give a preference to the State;—hence, if the State was entitled to a preference prior to the adoption of the State Depositary Act, the powers of State banks have not been increased by such Act, and the General Banking Act has not been amended thereby. Our Supreme Court has repeatedly held, and it must now be considered the well established law of this State, that the State has a sovereign right at common law, to a preference over general creditors in the distribution of the assets of a closed bank. *People* vs. *Farmers State Bank*, 335 Ill. 617; *People* vs. *Waukegan State Bank*, 351 Ill. 548; *People* vs. *West Englewood Bank*, 353 Ill. 457; *People* vs. *Oregon Savings Bank*, 357 Ill. 545; *People* vs. *Wiersema State Bank*, 361 Ill. 85.

In the Oregon State Bank case, supra, the court said:

"Upon the adoption of the common law the sovereign's right to priority in payment became an attribute of the People of the State. * * * It follows that although there is no constitutional or statutory provision on the subject, the State enjoys a right to priority in payment of its claims for undistributed tax moneys on deposit in insolvent State banks over creditors who do not have an antecedent lien against the assets of the bank."

In the Wiersema State Bank case, supra, the court said:

"No Legislation was necessary to establish or preserve the State's sovereign right to a preference in the distribution of the assets to the general creditors of a closed bank. That right existed at common law."

The State having a sovereign right to a preference prior to the adoption of the State Depositary Act, any provisions of such Act which give rise to such a preference, do not grant any additional powers. A somewhat similar question was presented in the Italia America Shipping Corporation case, supra, where the court held that the Act there in question did not increase or enlarge the powers of any banking corporations, for the reason that prior to the passage of such Act, banking corporations possessed the powers in question.

In determining the question here involved, we must also take into consideration certain well established rules of construction which have been approved by our Supreme Court in numerous cases.

In the case of *People* vs. *Anderson*, 353 Ill. 289, the court, on page 295, said:

"Constitutional provisions are to be liberally construed in order that the Legislative enactment may be sustained. All doubt and uncertainty arising from the Constitution itself as well as those in the statute should be resolved in favor of the validity of the statute."

In the case of *People* vs. *Gill*, 358 Ill. 301, the court, on page 264, said:

"It is only where there is a clear conflict between the terms of the Act and some provision of the Constitution that the court is justified in holding the Act unconstitutional. Doubt and uncertainty must yield to the legal presumption in favor of the validity of the Act."

In the case of *Punke* vs. *Village of Elliott*, 364 Ill. 604, the court said:

"The legal presumption is that a statute is valid, and if capable of two constructions, the one which favors its validity is the interpretation to be adopted, and one who challenges the constitutionality of a statute has the burden of showing clearly wherein it is in conflict with the Constitution."

Upon a careful consideration of the foregoing and other authorities cited by claimant and respondent, as well as the

terms and provisions of the State Depositary Act, we have come to the conclusion that such Act does not change the primary obligation existing between a bank and its depositors, and does not add to or increase the powers of any bank or banking association within the meaning of those words as used in the decisions hereinbefore referred to, and therefore does not constitute an amendment to the General Banking Act. Consequently, it was not necessary that such Depositary Act be submitted to a vote of the people.

Having arrived at this conclusion, it will not be necessary to consider the other questions raised by the Attorney General.

The motion of the Attorney General to dismiss the case must therefore be sustained.

Motion sustained. Case dismissed.

OPINION ON REHEARING.

Per Curiam:

Claimant filed a petition for rehearing herein on March 31st, 1937.

We find nothing in such petition which was not fully and carefully considered by the Court in arriving at its original decision, and the petition for rehearing will therefore be denied.

(Nos. 2987, 2988, 2989, Consolidated—Claims denied.)

WILEY JENKINS, No. 2987, MARY E. JENKINS, No. 2988 and MAURICE HELLYER, BY WAYNE HELLYER, HIS FATHER AND NEXT FRIEND, No. 2989, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1937.

CAVANAGH, LAMET & IRWIN, for claimant.

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

PERSONAL INJURY—*property damage—negligence of employee of State—doctrine of respondeat superior not applicable to State.* The State is not liable for damages to property or for personal injuries, alleged to have been sustained as the result of the negligence and carelessness of one of its employees in operating automobile, the doctrine of *respondeat superior* not being applicable to the State.

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

All of the above cases grew out of the same accident and involve the same principles of law, and inasmuch as all of the claimants are represented by the same counsel, the cases are consolidated for the purpose of this hearing.

The facts involved in said several cases, as set forth in the respective complaints on file, are as follows:

1. On August 6th, 1936 the claimant, Wiley Jenkins, was driving his Nash automobile in a westerly direction on Wabash Avenue in the City of Carthage in Hancock County, at the intersection of said Wabash Avenue with Scofield Street.

2. At that time Fred Ireland, a game warden and employee of the respondent in the Department of Conservation, was driving his automobile in a northerly direction on said Scofield Street.

3. The claimants, Mary E. Jenkins and Maurice Hellyer, were then and there riding in said Nash automobile.

4. While the claimant, Wiley Jenkins, was driving across the intersection of Wabash Avenue and Scofield Street as aforesaid, the automobile of the said Fred Ireland ran into and struck the rear end of the said Nash automobile and caused the same to turn over.

5. Each of the claimants was then and there in the exercise of all due care and caution.

6. As the result of the aforementioned collision the said Nash automobile was damaged, and the claimant, Wiley Jenkins, sustained injuries about the legs and burns about the eyes, for all of which he claims damages in the sum of $3,000.00.

7. As the result of said accident the claimant, Mary Jenkins, sustained severe and permanent injuries and cuts in and about the face and shoulders, for which she claims damages in the amount of $5,000.00.

8. As the result of said accident the claimant, Maurice Hellyer, sustained severe and permanent injuries and cuts in and about the face and body, for which he claims damages in the sum of $5,000.00.

The Attorney General has moved to dismiss each of said cases on the ground that there is no liability on the part of the respondent under the facts set forth in the several complaints.

This court has repeatedly held that the State is not liable for the negligent and wrongful acts of its servants and agents under the doctrine of *respondeat superior,* in the absence of a statute making it so liable. *Audie Crank* vs. *State,* No. 2868, decided at the January term, 1937, of this court, and cases there cited. *Goldie Ryan* vs. *State,* 8 C. C. R. 361, and cases there cited.

Such holding is in accordance with numerous decisions of our Supreme Court. *Hollenbeck* vs. *County of Winnebago,* 95 Ill. 148; *City of Chicago* vs. *Williams,* 182 Ill. 135; *Minear* vs. *State Board of Agriculture,* 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park,* 354 Ill. 234.

The liability, if any, is upon the servant and not upon the State.

Under the law as above set forth, and under the facts set forth in the several complaints, we have no authority to allow an award. The motion of the Attorney General in each case is therefore allowed, and each case is dismissed.

(No. 2729—Claim denied.)

LOWELL MAXWELL KELLY, A MINOR, BY W. F. KELLY, HIS NEXT FRIEND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1937.

HASSEL B. SMITH, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

HIGHWAYS—*construction and maintenance of, governmental function—personal injuries—negligence of employee of State—doctrine of respondeat superior not applicable to State.*

The same question involved herein was before this court in the case of *Royal* vs. *State,* No. 2597, *ante,* and what was said in that case is equally applicable and controlling herein.

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

Claimant filed his complaint herein on September 24th, 1935 and alleges therein as follows:

1. That on September 28th, 1934, about four-thirty o'clock p. m., he was riding as a passenger in a Chevrolet

roadster, in an easterly direction on S. B. I. Route No. 14, about three miles east of McLeansboro.

2. That at that time and place Ray Rogers, an employee of the respondent in the Division of Highways, had charge of a crew of men who were engaged in clearing the underbrush from the right-of-way and burning the same.

3. That in connection with the work there being done, the said Ray Rogers left a State truck standing upon a portion of the concrete roadway, opposite a point where the men were engaged in burning underbrush as aforesaid; that the left side of said truck extended out into and over that portion of said highway which was customarily traveled by vehicles proceeding in an easterly direction.

4. That the burning of such underbrush caused a screen of smoke to hang over and cover the traveled portion of such roadway, at and near the place which said truck was standing.

5. That the point or place where said motor truck was stopped as aforesaid was about two hundred (200) feet east of the crown or top of a hill sloping to the eastward.

6. That said Ray Rogers carelessly and negligently failed to post signals warning the traveling public of the fact that said motor truck was obstructing a portion of said highway.

7. That by reason of the foregoing, and while the claimant was riding as a passenger in said automobile, and while he was in the exercise of all due care and caution for his own safety, the car in which he was riding, without any fault or negligence on the part of the driver thereof, struck the left rear corner of the aforementioned State truck, whereby the claimant sustained a compound fracture of the right arm at and near the elbow, as well as other bruises and injuries.

8. That the claimant has spent large sums of money for medical attention necessitated by such injuries, and his right arm has become permanently injured. Wherefore he claims damages in the amount of $10,000.00.

The Attorney General has entered a motion to dismiss the case for the reason that the respondent is not liable for the negligence of said Ray Rogers under the facts set forth in the complaint.

This court has repeatedly held that the State in the maintenance of its hard-surfaced roads is engaged in the exercise

of a governmental function. *Lester A. Royal* vs. *State*, No. 2597, decided at the September, 1935, term, and cases there cited.

We have also repeatedly held that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *Audie Crank* vs. *State*, No. 2868, decided January, 1937, term; *George McGready* vs. *State*, No. 2604, decided September, 1936, term; *Ryan* vs. *State*, 8 C. C. R. 361, and cases there cited.

This rule is in accordance with the uniform holding of our Supreme Court in cases involving cities, counties, school districts, park districts, and other municipal corporations, while engaged in the exercise of governmental functions. *Hollenbeck* vs. *County of Winnebago*, 95 Ill. 148; *City of Chicago*, vs. *Williams*, 182 Ill. 135; *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234.

Under the facts set forth in the complaint herein, and the law as above set forth, we have no authority to allow an award.

Award must therefore be denied. Award denied. Case dismissed.

(No. 1731—Claim denied.)

ROBERT C. WILSON AND G. B. RICHARDSON, CO-PARTNERS, DOING BUSINESS UNDER THE STYLE NAME OF MIDWEST CONSTRUCTION COMPANY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 14, 1937.

BARRETT, BARRETT & WERMUTH, for claimants.

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

CONTRACTS—*claim for damages alleged to have been sustained on account of unusual ground conditions at location of bridges—provision in contract that acceptance of last payment precludes—when award denied.* Where contract for construction of bridges contains provision that acceptance of last payment for work done thereunder shall operate as and be a release from all claims or liabilities under contract for anything done or relating to work under same, or for any act or neglect of the department of the State, relating to or connected with contract, such provision is binding

and if said last payment is made and accepted, an award for damages claimed to have been sustained by reason of unusual ground conditions at site of bridges which it is alleged were not disclosed to claimants, must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein recites that in September, 1927 respondent gave notice that it would receive proposals and bids for the construction of certain sections of highway known as Section 123-B of Route No. 122 in Mason County, District No. 6, being one R. C. slab bridge and two R. C. sub-structures for a bridge to be constructed in accordance with the requirements of the standard specifications for road and bridge construction, and according to plans on file in the office of the Division of Highways, Springfield, Illinois; that claimant obtained the plans for the construction of said bridges and in reliance thereon filed their proposal and bid for the work on said three bridge jobs for a consideration of Twenty One Thousand Fifty Four and 18 100 ($21,054.18) Dollars; that such bid was accepted and claimants entered upon the construction of said work, but that due to the existence of quick sand which was not disclosed in the notice of letting and due further to a variance between the actual elevation of the bed of the stream and the elevation set out in the plans, claimants allege they were misled in submitting the proposal and bid and that they incurred an increased expense in the performance of the contract, amounting to Thirty Five thousand Six Hundred Thirty Six and 03/100 ($35,636.03) Dollars, for which they now seek an award.

Both Robert C. Wilson and G. B. Richardson, who constitute the co-partnership now seeking this award, are former employees of the State Highway Department of the State of Illinois. Mr. Wilson was an Assistant Highway Engineer for more than a period of five years prior to May 1, 1927. Mr. Richardson was employed in the Division of Highways of the State for four years, and at the time he left the employ of the State was District Engineer of Designs, and prior to that time was Division Engineer on Construction.

Plaintiffs complain that they were misled in bidding on the bridge work in question, because the State did not disclose to them in its original notice to the contractors that quicksand might be encountered in the construction work in ques-

tion, and that the Highway Department had knowledge of such condition at the time of the acceptance of proposals for such work. The record discloses that the Highway Department did possess some information in regard to the character of the soil at the proposed bridge locations, and that such information was available to anyone who desired to submit a bid for the work to be done. Claimants' Exhibit 3, being its proposal for the work in question in Section 6 on page 4 recites that, "He (the bidder) has carefully examined the location of the proposed work, the plans, specifications, etc., etc." In Section 8 of the proposal it is stated that, "The undersigned declares that he understands that the quantities are approximate only and that they are subject to increase or decrease, etc." In the standard specifications for road and bridge construction, being a part of Claimant's Exhibit 3, it is stated in Paragraph 1, page 5, "The bidder should make a careful examination of the site of the proposed work, the proposal, plans, specifications and contract form before submitting a proposal. He should fully inform himself as to the quality and quantity of materials required and the character of the work, and he should further investigate the location and make a careful examination of the source of supply for materials. The bidder will be held responsible for his failure or neglect to observe or comply with these instructions." It is further stated, in Paragraph 2, "The Department does not guarantee that the estimated quantities given shall obtain strictly. * * *." In Section 3, "The proposal will state any special provisions or requirements which vary from or which are not contained in these specifications." Under Section 38 of General Provisions of the Standard Specifications, it is stated, "The contractor shall receive and accept the compensation herein provided in full payment for furnishing all materials, labor, tools and equipment; for performing all work contemplated and embraced under the contract; for all loss or damage arising out of the nature of the work or from the action of the elements; for any unforeseen difficulties or obstructions which may arise or be encountered during the prosecution of the work * * *; for all risks of every description connected with the prosecution of the work." It is further stated in Section 41 of such General Provisions, "The acceptance by the contractor of the last payment shall operate as

and shall be a release to the Department from all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act or neglect of said Department relating to or connected with this contract."

From the testimony it appears that soon after claimants began the construction work in question they encountered quicksand. They first began the use of wood-sheeting for the construction of coffer-dams, and later were compelled to abandon same and to construct a steel-sheet piling coffer-dam. A substantial loss of time in the construction work resulted from this, but Lewis A. Lush, one of the State Engineers, testified that he had a conversation with claimant Wilson in November, 1927 at the site of the East bridge when the excavation work was first begun. He states that the contractors were then excavating with teams and that the coffer-dam material was not yet on the job; that he at that time informed Mr. Wilson they would probably encounter quicksand; that notwithstanding this knowledge, claimants attempted to use wooden coffer-dams and did not abandon their efforts to use such material until between the 16th and 23rd of February, 1928. Both the claimants, as above stated, had been employed in the Highway Department of the State for a number of years. There is no apparent reason why they could not have obtained all the information they may have desired, as to the nature and character of the work for which they proposed to bid. The proposal and specifications attached made it their duty to inform themselves as to such details, if they desired to bid on the job.

The evidence is conflicting as to the variance between the specifications and the actual construction work required, with reference to the elevation of the bed of the stream. Claimants contend that after they arrived on the job they learned that the Drainage District contemplated lowering the existing bed of the stream grades approximately four (4) feet at the points of the bridges, but that this work had not been completed; that claimants were not required to remove additional excavation from the stream bed itself; but that they were required to remove additional excavation in order to go to the required depth for the bridge abutments, (Record p. 37.)

W. L. Esmond, an Assistant Engineer for the State Highway Department, testified that he was one of the Engineers assigned to the supervision of the construction of the three bridges in question, and was in regular attendance at the location of same; that a revision was made in the plans and specifications after the Mid-West Construction Company began its work, and that by such revision, the footings for abutments on the East bridge were raised about one and one-half (1½) feet; that no material change was made on the plans for the middle bridge and that the plans were changed on the west bridge so as to raise the depth of the footings approximately two (2) feet. He further testified "that the practical effect of this change lessened the amount of excavation which the Bridge Company was required to do the approximate distance of the change in footage shown by the revised plan, and that insofar as the decrease in excavation required was concerned, such change was beneficial to the Company."

It further appears from the evidence that claimants bid for the construction of the three bridges in question, which was accepted by the State, amounting to Twenty One Thousand Fifty Four and 18/100 ($21,054.18) Dollars. Claimant Wilson testified that they had received from the State Twenty Four Thousand Five Hundred Forty Four and 30/100 ($24,544.30) Dollars, and that the additional amount was paid to them for the reason that under special provisions of their contract there was a clause which stipulated they should perform additional work; that additional work was performed which raised their figures from Twenty One Thousand Fifty Four and 18/100 ($21,054.18) Dollars to Twenty Four Thousand Five Hundred Forty Four and 30/100 ($24,544.30) Dollars, and that they had received the latter sum in full from the State. This witness further testified that they had received from the State all that their bid called for, plus additional work to the amount of approximately Three Thousand ($3,000.00) Dollars, and that their claim herein is based entirely on the extra cost of construction work made necessary by the unusual ground condition at the location of these bridges. (Record p. 40.)

Nothing appears in the record to indicate *any* acceptance under protest by claimants of the *final payment* that was made to them under this contract.

As hereinabove indicated, the standard specifications under which this work was undertaken provides,

"The acceptance by the contractor of the last payment shall operate as and shall be a release to the department from all claims or liability under this contract for anything done or furnished or relating to the work under this contract."

Art. 9.7 (p. 36) Standard Specifications.

The record fails to disclose a meritorious right in favor of claimants for an award. While they may have encountered unfortunate conditions and delays that resulted in a financial loss to them, there is no basis shown to justify the State in compensating them for their lack of information or error in judgment. They have received the amount of their bid, plus approximately Three Thousand ($3,000.00) Dollars additional for certain extras, the nature of which is not disclosed in the record, and their acceptance thereof is final so far as any rights herein are disclosed. An award is denied and the claim dismissed.

(No. 2441—Claim denied.)

LINDER, INC., AN ILLINOIS CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1937.

MONROE & ALLEN, for claimant.

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

HIGHWAYS—*maintenance of, governmental function—damages alleged to have been caused to property by reason of fire started by the State Highway employee—State not liable for.*

The facts in this case and the principles involved are similar to those in the case of *Titone* vs. *State*, No. 2473, *ante*, and what was said in that case is applicable and controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant in this case seeks to recover the sum of $344.50, and alleges that sometime on the day of February 14, 1934, a number of workmen working for the State Highway Department on State Bond Issue Route Number 2, two miles south of Decatur, Illinois, on C. W. A. Project No. 4033,

started a fire on the premises of claimant, in order to keep warm, the fire having been started behind and to the west of the boards for advertising. The fire burned the back braces on some of the signs, and the heat from the fire blistered the face panels of all of the sign boards to such extent that it was necessary to clean the boards of the paint, re-coat the panels, and in fact, re-finish the entire displays. Claimant further alleges that because of the inclement weather, the re-painting and re-conditioning of the signs was considerably delayed, so that claimant lost two months rental upon four of the boards.

Mr. Apple, district engineer of the Highway Department contends that the origin of this fire is unknown to him and that the place the fire was originally started is not known; that no employee in the Department could be found who knew anything about the origin of the fire. We are not, however, basing our opinion upon this statement of Mr. Apple's. Even were this highway work there would be no liability.

This court has repeatedly held that in the construction and maintenance of its roads the State acts in a governmental capacity and in the exercise of such governmental functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. See *Mincar* vs. *State Board of Agriculture*, 259 Ill. 549. Such also is the holding of the Supreme Court in *Symonds* vs. *Clay County*, 71 Ill. 355, wherein it was held that where a poor farm was owned by a county and the servant of the county was burning brush thereon and through his negligence a fire spread to an adjoining farm and caused damages thereto, the county was not liable.

We must, therefore, hold that in this case the State is not liable and recovery is denied.

(No. 2432—Claim denied.)

HARRY LUNN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1937.

J. V. MCCARTHY, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*property damage—doctrine of respondeat superior not applicable to state.*

The question involved herein, is the same as in the case of *Kelly vs. State*, No. 2729, *ante*, and what was said in that case is applicable and controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that on the 17th day of November, 1933, the claimant's automobile was struck by a truck owned by the State of Illinois, and driven by an employee of the State; that the automobile of claimant had stopped over near the curb in order to avoid an automobile on a slippery pavement in the City of Geneva, Kane County, Illinois; that the truck owned by the State, skidded, turned completely around and struck the automobile of the claimant. The complaint further alleges that this was negligently done, and that the driver of the claimant's automobile, and the claimant were in the exercise of due care and caution for the safety of the car. The sum of $52.00 is claimed as damages as the result of this collision.

The State has made a motion to dismiss, and this motion must be sustained for the reason that the rule is universal that the State is never liable for the negligence of its agents and employees, unless there is a statute making it so liable and in this State there is no such statute and unless a claimant can show a legal liability on the part of the State for damages sustained as the result of the negligence of its employee or agent, the court has no power to make an award.

Derby vs. *State*, 7 C. C. R. 145;
Chumbler, Admrx. vs. *State*, 6 C. C. R. 138.

In numerous other cases this court has followed the rule above announced. Cause dismissed.

(No. 2719—Claim denied.)

CHARLES E. MARQUIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 11, 1937.

HUBERT H. EDWARDS, for claimant.

OTTO KERNER, Attorney General, and JOHN KASSERMAN and MURRAY F. MILNE, Assistant Attorneys General, for respondent.

CIVIL SERVICE—*employee's claim for salary—when no services performed—during period following abolishment of position and until re-employed—position in same classification during period occupied by temporary employee—when denied.* Where position of chief clerk at State institution is abolished and employee, classified as such under Civil Service Law, is by reason thereof not in service of State and renders no services to it from December 1, 1932, the date of abolishment to February 18, 1933, during which time a temporary appointee of Civil Service Commission, is filling position in such classification in another State institution and on said latter date said temporary appointee is discharged and claimant is appointed to said position, a claim for salary during said period on grounds that no person, other than claimant was eligible under Civil Service Law to such position, must be denied.

SAME—*temporary appointment.* The statute provides that when there is no eligible list the appointing officer may, with the authority of the Civil Service Commission make temporary appointments to remain in force only until regular appointments under the provisions of the law can be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was certified under the classified civil service of Illinois to the Lincoln State School and Colony as business manager on September 13, 1918. He was thereafter transferred to the Illinois State Reformatory at Pontiac as institutional chief clerk, and was again transferred on October 30, 1930 to the Kankakee State Hospital at Kankakee as business manager. Stipulations of fact have been filed, wherein it appears that both the above offices are under the same classification. On November 17, 1932, the Department of Public Welfare of the State of Illinois, acting through A. L. Bowen, then Superintendent of Charities, abolished the position of business manager at the Kankakee State Hospital, effective November 30, 1932. Such abolishment was not due to any fault or misconduct of claimant and the latter was then and continued to be in good standing with the Civil Service Commission of the State.

The record discloses that claimant received notification from A. L. Bowen that the position he was then holding had been abolished. He communicated with Superintendent Bowen in writing and accepted the latter's request to resign (Exhibit C, attached to Supplemental Stipulation of Facts); that on November 22nd he again wrote to Superintendent Bowen and stated that he desired to reconsider his action in resigning and that he demanded to be placed in position of chief clerk in the place of someone who was holding such

position as temporary appointee in some other State institution. Claimant was out of employment from November 30, 1932, to February 18, 1933, at which latter date the Department of Public Welfare discharged a temporary appointee who had been acting as chief clerk at the Illinois State Reformatory at Pontiac, and placed the claimant in said position.

Claimant contends that during the time he was out of employment there were no other parties certified by the Civil Service Commission or placed upon the waiting or eligibility list for said positions, and that during said period he was the only person eligible to a position under the civil service classification of business manager, chief clerk and comptroller for institutions. Claimant further contends that there is due him for salary and maintenance for the period from December 1st to February 18th, 1933, the sum of One Thousand Forty-two and 84/100 ($1,042.84) Dollars, together with legal interest.

No infringement of claimant's rights appears from the record. Why no other names but claimant's were shown on December 1, 1932 for the positions that existed at the several institutions of the State, does not appear. The statute however (*Sec. 12, Chap. 126a, Ill. State Bar Edition*) provides:

> "When there is no eligible list the appointing officer may, with the authority of the commission, make temporary appointments to remain in force only until regular appointments under the provisions of this Act can be made."

As long as claimant was holding his position as managing officer at Kankakee there were no names on the eligibility list, and according to the record, positions similar to his own at all the other institutions of the State were then and there filled by temporary appointees. Notwithstanding the fact that claimant had apparently sent his written resignation to Superintendent Bowen, after receiving notice that the position he was then occupying would be shortly thereafter abolished, the Civil Service Commission and the Department of Public Welfare acceded to claimant's demands for re-employment and to a preference under his eligibility rating and within what appears to have been an entirely reasonable time, i. e. two and one-half months, discharged the temporary appointee who was holding the position of chief clerk at the State Reformatory at Pontiac and certified claimant for the

latter's position. The positions held by these several appointees i. e. institutional managers and chief clerks do not appear from the record to be of "an essentially temporary and transitory nature", which under the further provisions of said section shall be made only for a period of thirty days.

The Attorney General makes the further contention in defense against this claim that, even though claimant as a civil service employee had been illegally prevented from occupying a position to which he is entitled, that he cannot recover salary for such period of non-employment, because the record discloses that temporary appointees performed the services and received the salary incidental to such positions at all the various institutions of the State, during the time of claimant's non-employment. In support of such defense counsel cites *People* vs. *Burdette*, 283 Ill. 124, and decisions therein appearing. Claimant's demands appear to be without merit and the claim is hereby dismissed.

(No. 2971—Claim denied.)

SAMUEL BLOCK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

Claimant, pro se.

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

ILLINOIS LIQUOR CONTROL ACT—*license issued to partnership under and surrendered upon dissolution of partnership—license issued for same premises and period to one of former partners and new partner and fee voluntarily paid therefor—claim for refund of latter fee.* Award denied.

The question involved herein was before this court in the case of *Robb* vs. *State*, No. 2706, *ante*, and what was said there is equally applicable and controlling herein.

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

Prior to May 6th, 1936 Samuel Block and John M. Kesner were engaged in the retail liquor business at 169 N. Clark Street, Chicago. On said date they paid the sum of $58.33 to the Illinois Liquor Control Commission as the fee for the renewal of their retail liquor license for the period from May 1st, 1936 to July 1st, 1937. At that time they knew that said

John M. Kesner was to sell out his interest in the business on July 1st, 1936, but did not know that they might have taken out a license from May 1st, 1936 to June 30th, 1936. License was duly issued to them in accordance with the aforementioned payment. On July 1st, 1936 John M. Kesner sold out his interest in the business, and on July 9th, 1936 payment was made to the Illinois Liquor Control Commission in the amount of $50.00 by Samuel Block and Lawrence Croak for retail liquor license from July 1st, 1936 to June 30th, 1937, for the same premises mentioned in the aforementioned license.

Claimant takes the position that he has paid two license fees for the year commencing July 1st, 1936 and should be entitled to a refund in the amount of $50.00 covering one of such fees.

The Attorney General contends that claimant is not entitled to an award, for the reason that there is no statute which authorizes a refund of the license fee under the circumstances set forth in the complaint, and that in the absence of such statute, claimant is not entitled to a refund.

Section 119 of the Liquor Control Act provides that "A license shall be purely a personal privilege * * * and shall not constitute property * * * nor shall it be alienable or transferable voluntarily or involuntarily * * *", etc.

The first license was issued to Samuel Block and John M. Kesner and authorized them to sell alcoholic liquor at retail from May 1st, 1936 to June 30th, 1937.

When John M. Kesner sold out his interest in the business, the previous partnership was dissolved and a new firm was organized; such new firm acquired no right to sell alcoholic liquor under the license previously issued to Samuel Block and John M. Kesner. It therefore became necessary for such new firm to make application for a retail liquor license if they intended to continue in that business.

From the standpoint of the principle involved, the case stands upon the same basis as though both of the original partners had sold out to Lawrence Croak on July 1st, 1936.

Claimant apparently takes the position that he is entitled to a refund on account of the fact that from July 1st, 1936 to June 30th, 1937 there were outstanding two licenses for the same premises, covering the same period of time. There is nothing unusual about that situation. It will arise in any

case where the original license holder discontinues business for any reason during the term of the license and another person commences a similar business in the same place.

The question involved is the question as to the right of a licensee, upon the voluntary surrender of his license, after the commencement of the term, to recover the unearned portion of the license fee theretofore paid by him.

The Liquor Control Act of this State authorizes a refund of the unearned portion of a license fee in only three cases, to wit:

1. Where application is denied. Section 116.
2. In case of the death, insolvency or bankruptcy of the licensee, etc. Section 119.
3. Where the political subdivision, etc. in which the licensed premises are situated becomes prohibition territory during the term of the license. Section 181.

The rule of law applicable to cases of this kind in the absence of a statute on the subject is set forth in 33 Corpus Juris 572. Section 180, as follows:

"A licensee or holder of a liquor tax certificate upon the voluntary surrender of his license or certificate is not, in the absence of a statute, entitled to a rebate for the unexpired portion of his license or certificate. But in some jurisdictions provision has been made by statute for a rebate in such cases."

The same rule is set forth in 15 R. C. L. 315, Section 76, as follows:

"It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of license, become entitled to the return of the license fee, in proportion to the unexpired term in the absence of a statutory enactment to the contrary."

The question here involved was before this court in the following cases, to wit: *A. C. Robb* vs. *State*, No. 2706, decided at the January term, 1936; and *Emil Kellner & Co.* vs. *State*, No. 2546, decided at the present term of this court; in each of which cases a refund was denied.

Furthermore, both license fees were paid voluntarily, with the full knowledge of all of the facts. The courts uniformly hold, in such cases, that the licensee is not entitled to a refund. *Yates* vs. *Royal Insurance Co.*, 200 Ill. 202; *Board of Education* vs. *Toennigs*, 297 Ill. 469; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122.

Award is therefore denied and the case dismissed.

(No. 3020—Claim denied.)

S. A. BEALS, DOING BUSINESS AS WILSON HAZEL DRUG COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

ALLEN H. SCHULTZ, for claimant.

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

ILLINOIS LIQUOR CONTROL ACT—*license issued under—claim for refund of fee upon voluntary retirement from business for which issued after commencement of and before expiration of term for which issued.* Under the terms and provisions of the Illinois Liquor Control Act, provision is made for refund of license fees paid thereunder only in the event of certain contingencies specifically enumerated therein and refunds are only authorized in such contingencies. The fact that claimant voluntarily retired from business after commencement of and before expiration of period for which license was issued and paid for does not authorize award for refund as same is not one of the contingencies specifically mentioned in the Act.

SAME—*interpretation.* It is a general principle of statutory interpretation that the enumeration of certain specified things implies the exclusion of all others not therein mentioned.

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

On October 28th, 1936 claimant filed his complaint herein, in which he alleges that on May 1st, 1936 he was engaged in selling alcoholic liquors at retail in the City of Chicago; that on the morning of said date he paid the sum of $58.33 as a fee for a retailer's license for the period from May 1st, 1936 to June 30th, 1937, under the provisions of the Illinois Liquor Control Act; that at twelve o'clock noon on said 1st day of May, he sold his said business; that on May 2d, 1936 he requested the Liquor Control Commission of the City of Chicago to cancel the local retail liquor license issued to him by said city; that said local retail liquor license was officially cancelled on May 21st, 1936; that since twelve o'clock noon on said 1st day of May, 1936 he has not engaged in the sale of alcoholic liquors at retail; that since said 21st day of May, 1936 he has not been licensed by the local authorities of the City of Chicago; that the Illinois Liquor Control Commission has failed to direct the Department of Finance to issue a license to him "inasmuch as the claimant does not

hold a retailer's license" issued by the local authorities; that said Illinois Liquor Control Commission has refused to refund the amount of the license fee paid by him to it; and he therefore asks for a refund of such license fee.

Notwithstanding the allegation in the complaint to the effect that the Liquor Control Commission has failed to direct the Department of Finance to issue a license to him, it is admitted by both claimant and respondent that a formal certificate or license was duly issued to claimant by the Department of Finance on June 5th, 1936.

The Attorney General has entered a motion to dismiss the case for the reason that there is no liability on the part of the respondent to make a refund under the facts in the case.

The complaint alleges that claimant was engaged in the sale of alcoholic liquors at retail on May 1st, 1936, and that he sold his place of business at noon of that day. Consequently he was engaged in business for half a day.

The question involved in this case is the question of the right of a retail liquor dealer to a refund of the license fee paid by him, when he voluntarily retires from business, after the commencement and before the expiration of the term for which application was made. The period during which the licensee continued in business, whether one-half day, one day, one month or six months, does not affect the question of the right to such refund.

This question was fully considered by the court at the present term in the case of *Emil Kellner & Co.* vs. *State*, No. 2546, to which reference is hereby made. The facts in that case were similar to the present case and we there reached the conclusion that the claimant was not entitled to a refund of the license fee paid by him. The same conclusion was previously reached in the case of *Robb* vs. *State*, No. 2706, decided at the January term, 1936.

For the reasons set forth in the Kellner case, award must be denied.

Award denied. Case dismissed.

(Nos. 2162-2163-2164-2167-2670-2671, consolidated—Claims denied.)

MAX R. BRODERIC, No. 2162, SAMUEL J. SIMON, No. 2163, AARON H. PAYNE, No. 2164, SELLAC G. GRAHAM, No. 2167, WILLIAM H. CRUDEN, No. 2670 AND ERNEST WITHALL, No. 2671, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.
Rehearing denied June 30, 1937.

JOSEF T. SKINNER and WILLIAM M. SCANLAN, for claimants.

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

SALARY—*when claim for will be denied.* Where claimants, throughout their terms of service as employees of the State received their regular monthly salary warrants, for such services, in amounts appropriated by Legislature therefor, and accepted same, they will be deemed to have been paid in full for such services for the times for which said warrants were issued, regardless of any right which they may have had to demand or receive salary in any other amount, and an award for any additional amount of salary will be denied.

SAME—*Act in relation to State Finance—when applicable to.* The statute on State Finances providing among other things that amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher and no additional sum shall be paid to such officer or employee from any lump sum or other appropriation is a direct limitation on the right of a claimant to salary, where such claimant received and accepted regular salary warrants for such services, during term of employment, for amounts appropriated therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

In each of the above entitled claims plaintiffs seek awards as former arbitrators of the Industrial Commission of Illinois, such claims being for the difference between what claimants were paid for such services and the amount which they allege was due as compensation for such services, under statutes then in force. All of the claimants are represented by the same attorneys and the same questions of law and of fact, with two exceptions, are involved in each case. On application of claimants the cases have been consolidated and will be disposed of in one opinion, made applicable to each:

IN THE CASE OF SAMUEL J. SIMON, No. 2163, claimant was first appointed as an arbitrator by Governor Small,

under a commission issued November 21, 1927. He served thereunder until July 1, 1929, at which time the Industrial Commission designated him as an arbitrator and he thereafter continued to serve until June 30, 1932.

The amendment of the Civil Administrative Code, effective July 6, 1927, passed by the 55th General Assembly placing the eleven arbitrators of the Industrial Commission under said Code, is contended by Claimant Simon to have classified the holder of such position as an officer instead of an employee. Section 5 of that statute placing the arbitrators under the Code and Section 9 thereof, stating what salary should be paid, were both eliminated by action of the 56th General Assembly. We are of the opinion Claimant Simon should be classified as an officer and not an employee during the period of his service from November 21, 1927 to July 1, 1929.

The service of all other claimants was subsequent to such amendment of the Civil Administrative Code, and those serving as arbitrators thereafter would be classified as employees.

Claimant Simon received his salary in regular monthly installments at the rate of Five Thousand ($5,000.00) Dollars per annum from November 21, 1927 until July 1, 1929. Thereafter he received his salary in regular monthly installments at the rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars per annum, whereas he contends such payments should have been continued on the basis of Five Thousand ($5,000.00) Dollars per year; the difference being Two Thousand Two Hundred Fifty and 24/100 ($2,250.24) Dollars, for which he now makes claim.

IN THE CASE OF MAX R. BRODERIC, No. 2162, claimant assumed his duties as arbitrator under appointment from the Industrial Commission on September 16, 1929, and served until January 26, 1933. He received his salary in regular monthly installments of Three Hundred Fifty-four and 16/100 ($354.16) Dollars being at the rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars per year, and contends that he should have been paid at the rate of Five Thousand ($5,000.00) Dollars per year, and now seeks an award of Two Thousand Five Hundred Twenty-one and 51/100 ($2,521.51) Dollars.

IN THE CASE OF AARON H. PAYNE, No. 2164, claimant served as an arbitrator under appointment by the Industrial Commission from July 1, 1930 to January 26, 1933, receiving compensation from the State for such service in regular monthly installments of Three Hundred Fifty-four and 16/100 ($354.16) Dollars, being at the rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars per annum and he now seeks an award for *additional pay in* the sum of One Thousand Nine Hundred Twenty-seven and 74/100 ($1,927.74), claiming that payment for his services as such arbitrator should have been at the rate of Five Thousand ($5,000.00) Dollars per year.

IN THE CASE OF SELLAC G. GRAHAM, No. 2167, claimant served as arbitrator under appointment by the Industrial Commission from September 16, 1929 to June 30, 1932. He received his salary regularly each month during said period in the sum of Three Hundred Fifty-four and 16/100 ($354.16) Dollars, being at the rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars per year, and now seeks an award of Two Thousand Ninety-three and 95/100 ($2,093.95) Dollars, contending that he should have been paid at the rate of Five Thousand ($5,000.00) Dollars per year.

IN THE CASE OF WILLIAM H. CRUDEN, No. 2670, claimant served as an arbitrator, appointed by the Industrial Commission, from July 19, 1932 to August 31, 1933. From appointment until January 31, 1933 regular monthly salary warrants were issued to him in the sum of Three Hundred Fifty-four and 16/100 ($354.16) Dollars per month, being at the annual rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars, and from the latter date until June 30, 1933 he received monthly salary checks in the sum of Two Hundred Ninety-seven and 50/100 ($297.50) Dollars each, being at the rate of Three Thousand Five Hundred Seventy ($3,570.00) Dollars per annum, and for the months of July and August, 1933 he received Three Hundred ($300.00) Dollars each, being at the rate of Three Thousand Six Hundred ($3,600.00) Dollars per year. He contends that he should have been paid throughout said period of service at the rate of Five Thousand ($5,000.00) Dollars per year, and he now seeks an award in the sum of One Thousand Two Hundred Thirty and 26/100 ($1,230.26) Dollars.

Counsel for respondent contends that a part of the variation in claimant's pay was due to a voluntary reduction of ten (10) per cent from the salary of Three Hundred Fifty-four and 16/100 ($354.16) Dollars per month that he was receiving.

IN THE CASE OF ERNEST WITHALL, No. 2671, claimant served as an arbitrator under appointment from the Industrial Commission, from July 1, 1932 to January 31, 1933. He also received regular monthly salary payments for said period in the sum of Three Hundred Fifty-four and 16/100 ($354.16) Dollars per month being at the rate of Four Thousand Two Hundred Fifty ($4,250.00) Dollars per year. He now seeks an award of Four Hundred Thirty-seven and 50/100 ($437.50) Dollars, claiming that he should have been paid at the rate of Five Thousand ($5,000.00) Dollars per annum.

Each of these Claimants contends that the only Acts of the Legislature which fix the salaries of arbitrators is Section 14 of the Workmen's Compensation Act, effective July 1, 1927, and July 1, 1929, and July 1, 1931, whereby the annual salary to be paid such arbitrators is fixed at Five Thousand ($5,000.00) Dollars each. Claimants contend that the action of the several General Assemblies in making appropriations for such salaries in an amount less than Five Thousand ($5,000.00) Dollars per year was ineffective so far as changing the correct salary due claimants, and that the Legislature having failed to appropriate the amount necessary to pay claimants at the annual rate of Five Thousand ($5,000.00) Dollars per year, claimants are entitled to an award for the difference in the amount that he heretofore received and the amount fixed by the terms of the Workmen's Compensation Act (and in the case of Samuel J. Simon, No. 2163, in accordance with the further provisions of the Civil Administrative Code).

The Attorney General has filed his motion to dismiss said claims, and in support thereof cites the provisions of the statute known as "An Act in relation to State finance, in force July 1, 1919, as amended".

Claimants herein in each instance, throughout their terms of service received regular monthly salary warrants from the State of Illinois, and accepted same from month to

month as received. Regardless of any rights which they may have had to have demanded and received salary in any other amounts, claimants accepted said monthly warrants regularly through their term of service.

The Illinois statute on "State Finances" contains these provisions:

"Amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the payroll or other voucher and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purpose or any accumulated balances in specific appropriations, which payments would constitute, in fact, an additional payment for work already performed and for which remuneration had already been made."

Item 3, Sec. 9, Par. 9, Chap. 127b, State Finances.

"When an appropriation is made for personal service for specific positions at a fixed rate or at a rate not to exceed a certain amount the incumbents of such positions at the time the Appropriation Law goes into effect shall be paid at such rate in full and a smaller rate may be paid to persons entering upon the duties of such positions after such Appropriation Law goes into effect."

Item 5, Sec. 9, Par. 9, Chap. 127b, State Finances.

The wording of the above Act, i. e. "The amount paid * * * shall be considered as full payment for all services rendered between the dates specified in the * * * voucher" is a direct limitation upon the right of claimants to the awards now sought by them. The question of a reduction in salary, raised by claimants, is not an issue. Every voucher under which monthly payments were made to each claimant for services performed prior thereto carries the notation as to the period of time for which payment in full is thereby being made. Regardless of any prior awards made by this court as heretofore constituted, we are of the opinion that claimants are barred from the right to any further payment, and are of the opinion that we as the court have no authority to make such award, and that the Legislature would be acting contrary to the provisions of the said statute on "State Finance" if any additional appropriation was made to cover payment for such services. The motion by the Attorney General in each case for a dismissal is hereby allowed and each of said claims is accordingly hereby dismissed.

(No. 2748—Claimant awarded $10.00.)

ROBERT L. FRENCH, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SERVICES—*when award may may be made for.* Where it clearly appears that claimant rendered services to the State, and that bill therefor which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for the value of same will be made on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed November 4, 1935, for the sum of $10.00. It is alleged that the bill was for X-ray services on the left leg of Albert Finkler, 104 State Highway Police Department, who worked out of Desplaines Station at River and Rand Road, Desplaines, Illinois, on September 5, 1934.

This claim has been presented to the various State Departments and the claim contains a Bill of Particulars, and is properly sworn to. The Highway Department admits that it is a legitimate claim but was not submitted in time for the previous appropriation and will not be contested by that Department.

It has been the holding of this court that where evidence is uncontroverted that claimant rendered medical services at the request of the proper authority and the amount claimed is reasonable and undisputed, an award will be made on claim filed with statutory period on recommendation of proper authority.

Marquis vs. *State*, 7 C. C. R. 88.
St. Margaret's Hospital vs. *State*, 7 C. C. R. 222.

It appears from the statement of the Highway Department and numerous letters sent by claimant, that this claim should be paid although the appropriation has lapsed. The statute of limitations does not bar the items and as the Department admits the services were rendered, and there being no objection on the part of the Attorney General, an award will be made in the sum of $10.00.

(No. 2724—Claimant awarded $15.57.)

E. HENNING, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

MISTAKE OF FACT—*franchise tax paid under—when award for refund may be made.* Where it appears that franchise tax, in excess of amount lawfully due, was paid through mutual mistake of fact, an award for refund of such excess will be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks a refund of Fifteen and 57/100 Dollars ($15.57) for excess Franchise Tax. The complaint alleges that in making its annual report to the Secretary of State for the year ending December 31, 1933 it showed a Paid-in Surplus of Thirty One Thousand One Hundred Thirty Two Dollars ($31,132.00) and stated capital of Fifty Thousand Dollars ($50,000.00), whereas in fact it had no paid-in surplus, but did have an earned surplus of Thirty One Thousand One Hundred Thirty Two Dollars ($31,132.00). A Corporation Tax of Forty and 57/100 Dollars ($40.57) was assessed upon the report as made and claimant now seeks a refund of the portion alleged to have been paid through its mistake.

An earned surplus is not taxable but a paid-in surplus becomes a part of the capitalization and is taxable under the law and it is apparent that had plaintiff made a correct report to the Secretary of State it would have been taxed on its capital alone.

Where it clearly appears that a Franchise Tax in excess of the amount due was assessed and paid through a mutual mistake of fact an award for such excess will be made.

"Where money is paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, and the money would not have been paid if it had been known to the payer that the fact was otherwise, it may be recovered. The ground on which the rule rests is that money, paid through misapprehension of facts, in equity and good conscience belongs to the person who paid it. Municipal corporations as well as individuals are subject to this rule. An error of fact is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." (21 R. C. L. 164).

The above rule has been recognized by this court in the following cases: *Moorman Mfg. Co.* vs. *State*, 8 C. C. R. 106; *Bates Valve Bag Corp.* vs. *State*, 7 C. C. R. 64.

The claimant seems to be entitled to a refund of the difference between the amount due, i. e. Twenty Five ($25.00) Dollars and the sum actually paid, i. e. Forty and 57/100 ($40.57) Dollars and an award is therefore made in favor of claimant for the sum of Fifteen and 57/100 ($15.57) Dollars.

(No. 2546—Claim denied.)

EMIL KELLNER & COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

MILLER & THOMAS, for claimant.

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

ILLINOIS—LIQUOR CONTROL ACT—*license issued under—claim for refund of license fee, where claimant voluntarily discontinues business for which license required and issued during period of—when award denied.* The facts in this case are similar and the principles involved the same as those in the cases of *Robb* vs. *State*, No. 2706, *ante*, and *Beals* vs. *State*, No. 3020, *ante*, and the opinions therein are applicable in the present case.

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

For the period of six years prior to the filing of the complaint herein, claimant was engaged in the general confectionery and soft drink jobbing business in the City of Rockford. In 1933 claimant became an importing distributor of malt and vinous beverages, and obtained a license as such distributor under the "Malt and Vinous Beverages" Act of this State, which said license expired on April 30th, 1934. On May 4th, 1934 claimant filed its application with the Illinois Liquor Control Commission for a license as an importing distributor under the provisions of the Liquor Control Act of this State, and forwarded the necessary bond, and certified check or draft in the sum of $250.00 in payment of the required license fee.

On May 15th, 1934 said Commission issued to the claimant its receipt for the aforementioned license fee, but the formal certificate or license was not issued by the Department of Finance until August 8th, 1934. Across the face of the aforementioned receipt was written the words "Void After 30 Days 1934-1935."

On June 5th, 1934 claimant notified said Commission by registered mail that it would discontinue the business of importing distributor of alcoholic liquors on June 9th, 1934, and requested a refund of the unearned portion of the license fee theretofore paid. Claimant discontinued its said business on June 9th, 1934, but said Commission refused to make the requested refund on the ground that there was no law authorizing the same.

Claimant contends that it is entitled to a refund of the unearned portion of the license fee paid by it, on account of the fact that it quit business and made demand for such refund prior to the time the formal license was actually issued to it.

Claimant fails to distinguish between the license or right to do business as an importing distributor, and the formal certificate or evidence of such right.

Under Section 117 of the Liquor Control Act as it then existed, all licenses issued by the Department expired on April 30th following their issuance. Thousands of applications were filed with the Commission each year, and a very large percentage of them were filed shortly before or shortly after the 30th day of April. It necessarily followed that all formal certificates or licenses could not be issued within the course of a few days, and for that reason receipts were issued as soon as convenient, and the formal certificates or licenses were issued thereafter. When issued, such licenses covered the period from the 1st day of May (or, if the application was received after that date, from the date of the receipt of the application by the Commission) to the 30th day of April next following.

Claimant makes much of the fact that the receipt on the face thereof contains the following words, to wit: "Void After Thirty Days 1934-1935," and contends that such notation authorized it to operate as an importing distributor for thirty days but not afterwards. If such notation is susceptible of

the construction placed upon it by the claimant, it is absolutely null and void, as the Commission had no authority under the Liquor Control Act to authorize anyone to conduct business as an importing distributor for the period of thirty days.

The fact that claimant decided to quit business and actually did quit business and make a claim for a refund prior to the time the formal certificate or license was received by him, does not change the legal aspect of the question. The question here involved is the question as to the right of an importing distributor to a refund of the unearned portion of the license fee paid by him, when he voluntarily retires from business after the commencement and before the expiration of the term for which application for license was made.

The only provisions of the Liquor Control Act which authorize a refund of the unearned portion of a liquor license fee are the following:

1. Where application is denied. Sec. 146.
2. In case of the death, insolvency or bankruptcy of the licensee, etc. Sec. 119.
3. Where the political subdivision, etc. in which the licensed premises are situated becomes prohibition territory during the term of the license. Sec. 181.

Claimant does not come within any of the foregoing provisions, and consequently has no right to a refund by virtue of the provisions of the Liquor Control Act.

The rule governing the right of a licensee to a refund of any portion of the license fee paid by him upon the voluntary surrender of his license, in the absence of a statute authorizing such refund, is set forth in 33 Corpus Juris, 572, sec. 180, as follows:

"A licensee or holder of a liquor tax certificate, upon the voluntary surrender of his license or certificate is not, in the absence of statute, entitled to a rebate for the unexpired portion of his license or certificate. But in some jurisdictions provision has been made by statute for a rebate in such cases."

The same rule is set forth in 15 R. C. L. p. 315, as follows:

"It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of his license, become entitled to the return of the license fee, in proportion to the unexpired term, in the absence of statutory enactment to the contrary."

This identical question was before this court in the case of *Robb* vs. *State*, No. 2706, decided at the January term,

1936 of this court. In that case we held that the claimant was not entitled to a refund of the unearned portion of the license fee.

Under the law as above set forth, we have no authority to allow an award, and the claim is therefore denied.

Award denied. Case dismissed.

(No. 2346—Claimant awarded $123.50.)

JOSEPH KIEGEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937

MILLER & THOMAS, for claimant.

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

WORKMEN'S COMPENSATION ACT—*claim for compensation for increased disability under Section 19 (h)—previous award necessary.* To predicate an award in a re-hearing under Section 19 (h) of Workmen's Compensation Act there must have been a previous grant of an award for the specific loss for which an increased redress is sought.

SAME—*same—same—when award may be made.* Where a previous award has been made for permanent partial loss of use of leg and subsequent to such award there is an increase in such loss, an award may be made under Section 19 (h) of the Act, upon application for review made within time provided therein.

MR. JUSTICE YANTIS delivered the opinion of the court:

On April 10, 1935 an award was entered in the above entitled cause for One Hundred Fifty Six and 08/100 ($156.08) Dollars, as a balance due for temporary disability; also Three Hundred Seventy and 50/100 ($370.50) Dollars for a fifteen (15) percent partial permanent loss of the use of the right leg; also the further sum of One Hundred Two ($102.00) Dollars for the use of Dr. T. H. Culhane for professional services rendered to plaintiff, making a total award of Six Hundred Twenty Eight and 58/100 ($628.58) Dollars. In the original hearing plaintiff sought an additional award for partial loss of use of his left leg and due consideration was given such claim.

Application was thereafter made for a review under Section 19 (h) of the Workmen's Compensation Act, whereby claimant seeks an additional award of five (5) percent for

partial permanent loss of the use of each of his legs; said Application for Review having been filed November 13, 1935, and within eighteen months of the original award heretofore entered.

It is clear from the decisions of the Supreme Court that the previous award is conclusive as to all questions of law and fact, as to liability for compensation and as to the existence and nature and extent of disability at the time of the previous award, and the only ground for the proceedings under Section 19 (h) is that the disability has recurred, increased, diminished or ended subsequent to the time of such award.

As the question of an award to plaintiff for purported loss of use of the left leg was fully considered in the original hearing and no award was made therefor, any award made therefor at this time would be in the nature of a re-hearing, and not for an increased disability as contemplated by Section 19 (h). The court is of the opinion that to predicate an award in a re-hearing under Section 19 (h), there must have been a previous grant of an award for the specific loss for which an increased redress is sought.

In *Becker Cleaning Co.* vs. *Ind. Com.*, 322 Ill. 603, there was a settlement for temporary compensation and also twenty (20) percent loss of use of an arm. Petition for Review under Section 19 (h) was filed, claiming disability for a fractured hip from the same accident. The Commission awarded fifty (50) percent loss of use of the arm and forty (40) percent loss of use of a leg. The award as to the arm was not sustained because there had been no claim in the petition for increased disability of the arm, and the award to the leg was not sustained because it was not an injury included in the original settlement. The court said:

> "The words of the statute 'recurred, increased, diminished or ended' imply a previous injury for which the award has been made, and a petition under this section cannot be used as a means of securing a hearing on a new claim."

In the previous hearing Dr. Culhane stated that plaintiff's right leg was one-half inch shorter than the left, that there was some bowing of the leg just below the knee; that while he has free motion in the knee joints and no disability as far as walking is concerned, yet there is a slight limitation of motion in the knees when plaintiff "squats down"; further that such limitation may improve with time.

The evidence submitted at this time in support of any increased disability is very meager. Plaintiff testified that in his opinion his right leg has grown shorter than it was when the award was entered, and he limps more and becomes more tired than at that time. His work as a foreman on the WPA and as a nursery-stock salesman necessitates his being on his feet for long periods. The testimony of two medical men, Dr. Earnst E. Oehsner and Dr. Robert A. Reedy, has been submitted in the review. The examination made by these two gentlemen dates back to approximately a month after the previous award was entered, i. e. May 21, 1935. Both Doctors fix plaintiff's disability at twenty (20) percent loss of use of his right leg and five (5) percent loss of use of his left leg. Dr. Oehsner further stated that judging from the amount of deformity and atrophy of the muscles, plaintiff's injuries had reached a permanent stage. The evidence in support of an increase, being based upon the examination made so closely following the previous award, does not give much support for an increased finding. Consideration of the entire record however, apparently warrants that there is an increased permanent partial loss of use of plaintiff's right leg to the extent of five (5) percent, and an additional award is hereby entered in favor of plaintiff under the provisions of Section 19 (h), in the sum of One Hundred Twenty Three and 50/100 ($123.50) Dollars.

(No. 2782—Claim denied.)

HENRY F. MEYERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937

JULIUS E. EPSTEIN, for claimant.

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

PERSONAL INJURY—*inmate of penal institution—negligence of employees of—State not liable for.* In the conduct of penal institutions the State exercises a governmental function and is not liable to respond in damages for personal injuries alleged to have been sustained by inmate thereof as the result of the negligence of the agents or employees of such institution.

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

Claimant filed his complaint herein on December 27, 1935 and alleges therein that on March 5th, 1935 he was committed to the Cook County jail on a charge of bastardy; that while in said jail he was put to work at different kinds of work; that on June 15th, 1935 he was assigned to the bakery detail and put to work on a bread slicing machine which was operated by man power; that at a moment when the knife had ceased to operate, claimant put his right hand into the receptacle to remove the bread that had been cut and while so doing, and while in the exercise of all due care and caution for his own safety, the slicing knife was put into operation and the claimant's third finger of his right hand was severed at the first knuckle.

Claimant contends that said slicing machine was not equipped with the necessary guards or safety appliances, and that the failure to so equip the same constituted gross negligence on the part of the respondent; also that the stump of his finger was so carelessly and negligently sutured and sewn by the attending physician that as a result thereof it is bulky and cumbersome and interferes with claimant's ability to perform his duties. By reason of which he claims damages, including loss of earnings, in the total amount of $4,150.00.

The Attorney General has moved to dismiss the case for the reason that the respondent is not liable under the facts set forth in the complaint.

This court has repeatedly held that the State in the maintenance of its charitable and penal institutions is engaged in a governmental function, and that in the exercise of such functions, it is not liable for the negligence of its servants and agents in the absence of a statute making it so liable. *Schwab* vs. *State*, 4 C. C. R. 77; *Burghardt* vs. *State*, 5 C. C. R. 221; *Pelka* vs. *State*, 6 C. C. R. 390; *Sturrock* vs. *State*, 7 C. C. R. 157; *Parks* vs. *State*, 8 C. C. R. 535; *Schaefer* vs. *State*, No. 1968, decided at the September, 1935, term of this court; *White* vs. *State*, No. 2859, decided at the May, 1936, term of this court; *Edward Shilkitis* vs. *State*, No. 2355, decided at the January, 1937, term of this court.

Such decisions of this court are in harmony with repeated decisions of our Supreme Court.

Hollenbeck vs. *Winnebago County*, 95 Ill. 148.
Kinnare vs. *City of Chicago*, 171 Ill. 332.
City of Chicago vs. *Williams*, 182 Ill. 135.

Tollefsen vs. *City of Ottawa*, 228 Ill. 134.
Minear vs. *State Board of Agriculture*, 259 Ill. 549.
Gebhardt vs. *Village of LaGrange Park*, 354 Ill. 234.
See also 25 R. C. L. p. 407, sec. 43; 13 R. C. L. p. 944, sec. 8; and 8 R. C. L. Supp. p. 5580, sec. 43.

There is no statute making the State liable in cases of this kind, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2701—Claim denied.)

CECIL W. YORK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 12, 1937.

BUNGE & BUNGE, for claimant; CRESCY E. WOEHREL, of counsel.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence of State Highway employees—State not liable for—doctrine of respondeat superior not applicable to State.* In the construction and maintenance of its highways the State exercises a governmental function and is not liable for damages on account of the negligence of its employees in such construction or maintenance, the doctrine of respondeat not being applicable to it.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case sets forth that on the 7th day of June, 1935, the Highway Department of the State of Illinois, was making repairs on a State highway known as No. 18, and also known as U. S. Route No. 34, at a point just west of Madison Street, Hinsdale, Illinois; that while making the repairs, the highway was not closed to vehicular traffic.

The complaint further sets forth that on the evening of said June 7th, said Highway Department, by its agents and servants, placed several heavy wooden barricades across the highway to obstruct traffic, but did not properly put lights on the barricades in order to protect persons lawfully using the said highway, and that about 9:20 p. m. in the evening of the said 7th day of June, the claimant with several guest passengers in his car, and while in the exercise of due care and

caution for his own safety, collided with one of said unlighted barricades, greatly damaging his automobile and injuring the claimant, and damaging the clothing of the claimant.

Claimant asks damages in the sum of $212.00. A Bill of Particulars is also filed, itemizing all of the damages, there being $200.10 to the automobile, doctor's bill of $2.00 and $10.00 damage to the suit worn by the claimant.

The claim was filed on July 15, 1935. On October 11th of the same year, the Attorney General made a motion to dismiss on the grounds that claimant seeks to recover for damages resulting from a collision on account of the negligence of the agent of the Highway Department in not keeping and maintaining a light on a barrier across a highway. To this motion to strike, the claimant's attorneys moves the court to strike the motion to dismiss filed by the Attorney General from the records on the grounds that the Attorney General's motion was not filed in accordance with the rules of this court. If we should sustain the motion filed by claimant, it would not be of any advantage to him because he does not present a cause of action against the State.

The rule is universal that the State is never liable for the negligence of its agents and employees unless there is a statute making it so liable. The following are but a few of the many cases announcing the rule:

United States vs. *Kirkpatrick*, 9 Wheaton, 720; *Story on Agency*, 9 Ed. Sec. 319; *Belt* vs. *State*, 1 Ct. Cl. 266; *Johnson* vs. *State*, 2 Ct. Cl. 165; *Schroeder* vs. *State*, 3 Ct. Cl. 36; *Kinnare* vs. *City of Chicago*, 171 Ill. 332; *Derby* vs. *State*, 7 C. C. R. 145; *Chumbler* vs. *State*, 6 C. C. R. 138.

For the reason that the claimant does not present a cause of action, the court will, on its own motion, strike the complaint. Case dismissed.

(No. 2098—Claimant awarded $690.00.)

TOM L. BOOTH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

CLARENCE B. DAVIS, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for.* An award may be made to member of Illinois National Guard for personal injuries sustained by him while in the performance of his duties as such member, under authority of Section 11 of Article 16 of the Military and Naval Code.

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

On the 13th day of August, A. D. 1932 claimant was a member of Troop F, 106th Cavalry, Illinois National Guard, and was on duty at Camp Grant. On said date, while in line of duty, he was struck by the front foot of a horse and was injured in the right groin and right hip, from which injury a hernia subsequently developed. Claimant was taken to the medical officer and returned to camp where hot applications were applied to his side. He remained in camp until his regiment returned to Springfield. He was then assigned to Dr. Lockie of Springfield who made an examination and found "a hernia, or the beginning of a hernia." Dr. Lockie fitted claimant with a truss, which he wore until January 1st, 1933. On January 1st, 1933 the medical board decided there was no hernia at that time. In February, 1933 claimant was called with his troop to Taylorville on riot duty and was there examined by the same doctor who, as a member of the medical board, examined him on January 1st. Upon the last examination, the doctor found that claimant had a hernia, which became strangulated while he was there on duty. Claimant was removed to the hospital at Taylorville and was operated on by the army surgeon, Captain Bitter. Claimant remained in the hospital at Taylorville four weeks, and was then returned to Springfield, where he continued under the care of Dr. Lockie for a period of seven or eight months. The operation was successful and claimant has no permanent injury. All medical and hospital bills were paid by the respondent.

Prior to the time he went to Camp Grant, claimant was working for the Illinois State Register as collector and solicitor, and was paid $23.00 or $24.00 per week. After he returned from Camp Grant, and before going to Taylorville, he attempted to procure employment in the Pillsbury Mills, where he is now working and where he could then have obtained employment at $120.00 per month, but was rejected on account of his hernia.

Claimant contends that he was totally unable to work from the time he was fitted with a truss as aforesaid, until

August 24th, 1934. The evidence indicates, however, that in six months after his operation his condition was such that he could have performed the same kind of work he performed prior to his injury.

After his operation claimant received half pay for a period of thirty days, in accordance with military regulations. After his discharge by Dr. Lockie, claimant was employed by the A. & P. stores on Saturdays for a total of approximately twenty days. Dr. Lockie died prior to the hearing herein, and the only evidence in the record is the testimony of the claimant. His testimony with reference to the time that he was totally disabled is far from satisfactory, but we must dispose of the case on the record before us.

Section 11 of Article 16 of the Military and Naval Code of this State provides as follows:

"In every case where an officer or enlisted man of the National Guard or Naval Reserve shall be injured, wounded or killed while performing his duty as an officer or enlisted man in pursuance of orders from the Commander-in-Chief, said officer or enlisted man, or his heirs or dependents, shall have a claim against the State for financial help or assistance, and the State Court of Claims shall act on and adjust the same as the merits of each case may demand," etc.

There is no question but what claimant was injured in line of duty, and the only question for determination is the amount of financial help or assistance to which he is entitled as the result of the injuries so sustained by him, as shown by the evidence in the case.

Upon a consideration of all of the testimony in the record, we feel that an award of Six Hundred Ninety ($690.00) Dollars will be fair compensation for the injuries sustained.

Award is therefore entered in favor of the claimant, Tom L. Booth, for the sum of Six Hundred Ninety ($690.00) Dollars.

(No. 2469—Claimant awarded $860.94.)

MARLOW CASE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

Claimant, pro se.

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

PERSONAL INJURY—*member of Illinois National Guard when further award may be made.*

In this case an award was heretofore made to claimant and by order of court case was kept on docket for purpose of allowing an additional award, if same was justified for the expense, if any, as might thereafter be shown to have been necessarily expended in surgical treatment and hospitilization for purpose of effecting relief from injuries and disfigurement for which award made, and it appearing that further expenses were necessarily incurred and expended for such purpose, award therefor is made.

Per Curiam:

This cause again coming before the court upon supplemental petition by Marlow Case for the allowance of an additional award in reimbursement of monies expended for surgical care and incidental expenses in connection therewith for rehabilitation of claimant from the effects of injuries received by him while in the line of duty as a member of the Illinois National Guard;

Also for monies due Dr. Vilray P. Blair for fees for surgical services rendered the said Marlow Case;

And it appearing that certified bills for all of said expenditures and fees have been filed herein and that all of the said bills and expenses were incurred pursuant to the former order of this court entered herein and that payment of said claims is due the said Marlow Case and the said Dr. Vilray P. Blair;

It is therefore ordered that there be and is hereby allowed to the said Marlow Case in reimbursement of monies heretofore expended by him for surgical care and expenses incidental thereto in seeking rehabilitation from the effects of the injuries involved, the sum of Four Hundred Sixty Dollars and Ninety-four Cents ($460.94), said award being in payment of the several items appearing in claimant's petition.

Further, that an award in the sum of Four Hundred Dollars ($400.00) is hereby made in favor of Dr. Vilray P. Blair for additional surgical services rendered to said Marlow Case as per statement of account appearing in said petition.

(No. 2963—Claimant awarded $1144.90.)

FIRESTONE TIRE AND RUBBER COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

PFEIFER, FIXMER & GASAWAY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where it is conceded that State received supplies as ordered by it, and that bill therefor, which is unquestioned, was not presented for payment, before lapse of appropriation out of which it could be paid, an award may be made for the price thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation of facts filed in this cause it appears that claimant sold and delivered to the Division of Highways, Department of Public Works and Buildings of the State of Illinois, several orders of automobile tires and tubes; the dates thereof being, August 3rd, August 15, August 28th, October 26th and September 5th, 1934 and June 3rd, 1935, all in the total sum of One Thousand One Hundred Forty Four and 90/100 ($1,144.90) Dollars; that claimant submitted its bills for said merchandise on March 1st, 1936, except for the items delivered to respondent on September 5th, 1934, for which a bill was submitted to the Chief Clerk of the Division of Highways on April 7th, 1936; that the appropriation from which such bills were properly payable lapsed September 30th, 1935, at which time ample funds remained in said appropriation.

The Attorney General contends that the delay upon the part of claimant from June 3rd, 1935 to March 1st, 1936, in presenting its bill is an unreasonable delay and that by reason of such laches claimant has lost any right to an award in payment of its account. As a matter of fact the lapse of time appears to have been nine months between the last shipment of June 3rd, 1935 and the filing of claimant's bill on March 1st, 1936. However, counsel for respondent also calls attention to the fact that only one and one-half months elapsed between the time of the delivery of the last order and the lapse of the appropriation from which account might have

been paid. Inasmuch as claimant would thereafter have to await a new appropriation, the difference of a few months in presenting his claim should not in the opinion of the court be construed too strictly against claimant, in view of the repeated holdings by this court that, where the facts are undisputed that the State has received supplies as ordered by it, and that such supplies were legally purchased by the State, and that the only reason same have not been paid for is by reason of the lapsing of the appropriation, an award will be made, unless it clearly appears that claimant has delayed an unreasonable length of time in presenting its bill. The purpose of requiring that bills be presented within a reasonable time is to avoid vexatious annoyance to the State in determining the facts as to the merit of such claim. The facts herein appear to justify the allowance of claimant's bill and the same is hereby allowed, and an award made in favor of claimant for the amount thereof in the sum of One Thousand One Hundred Forty Four and 90 100 ($1,144.90) Dollars.

(No. 2967—Claimant awarded $572.68.)

GENERAL COURT REPORTING SERVICE, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES—*when award may be made for.* Where it clearly appears that State ordered services and that same were performed satisfactorily, and that bill therefor, amount of which is not disputed, was not presented before lapse of appropriation out of which same could be paid, an award may be made for the value thereof, upon claim filed within a reasonable time.

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

The House of Representatives of the 59th General Assembly adopted a resolution known as House Resolution No. 38, which provided, among other things, as follows:

That a committee of five members of the House of Representatives be appointed by the Speaker to investigate the production, distribution and sale of milk and other dairy products; that said Committee be authorized to subpoena witnesses and to take their testimony; that the necessary expenses of the Committee be paid from the appropriation made for Committee Expenses of the House of Representatives of the 59th General Assembly.

Such Committee was duly appointed, and Hon. Michael F. Hennebery was named Chairman thereof. At the request of such Chairman, the claimant rendered services in taking and transcribing the testimony of witnesses at the hearings held by said Committee in Chicago and Elgin, on May 20th, 24th and 31st, and June 3d, 6th, and 17th, 1935.

Claimant duly presented to the Chairman of said Commission an itemized statement for the services rendered, in the total amount of $572.68. However, said Chairman became ill and died without approving said bill, and the same was not approved and placed in line for payment before the lapse of the appropriation out of which the same should have been paid. Said appropriation lapsed on September 30th, 1935 and at that time there remained therein an unexpended balance of $9,368.36.

From the facts in the record it satisfactorily appears that the Committee was authorized to contract for the services in question; that the services were actually rendered, and that the charges made therefor are the usual, ordinary and reasonable charges for such services.

Claimant acted promptly in presenting its claim, and the only reason the same was not approved and paid in due course was the death of the Chairman of the Committee to whom the bill had been presented. Under the facts presented, there is no reason why the claim should not be allowed.

Award is therefore entered in favor of the claimant for the sum of Five Hundred Seventy-Two Dollars and Sixty-Eight Cents ($572.68.)

(No. 3054—Claimant awarded $83.09.)

THE L. FISH FURNITURE COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

D'ANCONA PFLAUM & KOHLSAAT, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case and the principles involved are the same as those in case of *Firestone Tire & Rubber Co., vs. State*, No. 2963, *ante*, and what was said in that case applies with equal force herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

A stipulation filed herein discloses that on March 4, 1935 claimant, pursuant to Purchase Order No. B-20867, delivered to respondent at the Alton State Hospital fifty-four (54) yards of cloth, of the value of Eighty Three and 09/100 ($83.09) Dollars. Claimant thereafter submitted its bill in the sum of Eighty Five and 40/100 ($85.40) which on computation was found to be erroneous to the extent of Two and 01/100 ($2.01) Dollars. There was at the time of the order a substantial unexpended balance in the appropriation for the operating expenses of said hospital, and the only reason for the non-payment of said bill has been that the error was not adjusted prior to the time such appropriation lapsed.

The bill having been presented without unreasonable delay and the merchandise having been legally purchased, there is nothing apparent in the record to justify non-payment thereof and an award is therefore made in favor of claimant for the sum of the bill as corrected, i. e. Eighty Three and 09/100 ($83.09) Dollars.

(No. 2372—Claimant awarded $1014.37.)

GILBERT H. LARGE & CO., A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

PROVINE & WILLIAMS, for claimant.

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

ILLINOIS NATIONAL GUARD—*landlord and tenant—verbal lease—implied contract as to condition of premises on surrender—when award may be made for breach of.* Where Officers of Illinois National Guard, having authority so to do, entered into a verbal lease for premises for the use and occupancy of Illinois National Guard while in the performance of its duties, a contract is implied to surrender said premises on termination of tenancy, in as good condition as when received, ordinary wear and tear, from reasonable use excepted, and if when said premises are surrendered they are not in such condition, an action will lie for breach of the implied contract and an award made for any damages properly shown to have been sustained as the result of said breach.

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

Claimant is the owner of a large three-story-and-basement building of brick and concrete construction, located at the corner of Market and Webster Streets in the City of Taylorville, Illinois. For some time prior to, and on November 10th, 1933, the first floor of said building was occupied by the claimant as an automobile sales and service room, and the second and third floors and part of the basement of said building was occupied by officers and members of the Illinois National Guard who were then on duty in Christian County in connection with disorders in the Midland coal fields.

There was no written lease between the claimant and the respondent, but the occupancy of said premises by the military authorities was pursuant to a verbal understanding or agreement between the claimant and the officers of the Illinois National Guard in charge of such troops.

The building was heated by a sectional steam boiler which was located in the northeast corner of the basement. In order that there might be uniform heat at all times of the day and night for the men who were quartered in the building, the National Guard, upon the suggestion of the officer in charge, assumed the duty of firing the furnace. The necessary fuel was furnished by the claimant. Members of the National Guard were detailed by the proper officer to take care of the firing of the furnace in 24-hour shifts. The men detailed for such work were selected from the duty roster and were not chosen with any special reference to their knowledge of that kind of work.

The man who was detailed to fire the furnace on the 9th and 10th days of November, 1933, was Private Lawrence

Widener, who was then 18 years of age, and who had no previous knowledge of, or experience in work of that kind, and whose first experience with this furnace was on November 9th. On one or more occasions prior to November 10th, 1933, the man in charge of the furnace had permitted the water in the boiler to get low, and the claimant had notified the officer in charge, of such fact, and such officer promised to see that it was taken care of immediately. On the night of November 9th, 1933 the soldiers' quarters became very cold and it seemed impossible to heat the same, notwithstanding the fact that there was a good fire in the furnace. On the morning of November 10th, Private Widener noticed that the water in the boiler was low, but apparently failed to realize that there was any connection between that fact and the failure to heat the quarters. There was a heavy bed of coals in the furnace, and portions of the boiler became red hot, but nevertheless Widener continued active firing, in an attempt to get up some heat. Two of claimant's employees went to the basement that morning, while Widener was having trouble in getting up heat. One of the men suggested that Widener throw on more coal, and the other turned a small amount of water into the boiler. Shortly thereafter there was a muffled explosion which disturbed the asbestos covering of the boiler. The fire was drawn and it was ascertained that seven sections of the boiler were broken or burned out, and were thereby rendered worthless.

Thereupon the officers of the National Guard sent trucks from Taylorville to South Bend, Indiana for new sections which were obtained and installed in said boiler as soon as possible, at a cost and expense of $1,014.37. The new sections were purchased and installed at the instance of the officers of the National Guard, but payment therefor was made by the claimant, and it now seeks to recover the amount which it was required to pay in order to replace the sections which were ruined as aforesaid.

No question is raised as to the necessity for the repairs which were thus made, or the reasonableness of the charge made therefor.

The Attorney General resists the claim on two grounds:

First: that the injury in question resulted from the negligence of the servants and agents of the claimant, and

therefore the respondent is not liable for the damage in question.

Second: That the respondent at the time in question was engaged in a governmental function and that therefore it is not liable for the carelessness and negligence of its servants and agents in the absence of a statute making it so liable.

As to the first point made by the Attorney General;—we are of the opinion, upon a careful consideration of the entire record, that this point is not supported by the evidence.

The second point raised by the Attorney General requires a consideration of the allegations of the original and of the amended complaint, and the legal effect thereof.

The original complaint was filed herein on May 4th, 1934, and alleges that there was a verbal agreement or contract between the claimant and respondent with reference to the use of that portion of the building occupied by the members of the National Guard; that it was the duty of the respondent to so use the building as not to injure or damage the same, and to surrender it back to the claimant in good condition; that notwithstanding such duty, the respondent carelessly and negligently fired said furnace, and negligently overheated and overfired the same, at a time when there was not sufficient water therein, whereby seven sections thereof were ruined and rendered worthless.

The amended complaint which was filed herein on May 1st, 1936 contains allegations similar to those in the original complaint with reference to the contract or agreement between the claimant and respondent, and also contains an allegation that as a part of such agreement, the respondent undertook and agreed to surrender said building to the claimant in good condition. The amended complaint, however, omits all allegations with reference to the carelessness and negligence of the officers and agents of respondent in the firing of the furnace. Claimant's right to recover, as set forth in the amended complaint, is based entirely upon respondent's breach of contract in failing to surrender the building back to claimant in as good condition as it was at the time of the letting.

Under the amended complaint, claimant's case is an action on contract, and not an action of tort, and is based upon the implied contract of the respondent to surrender the demised premises at the termination of the tenancy, in as-

good condition as it was at the beginning of the term, ordinary wear and tear excepted.

Section 63 of The Military and Naval Code of this State provides as follows:

"The Quartermaster's Department is charged with furnishing all means of transportation, clothing, tentage, fuel, stoves, and other means of heating; * * * and, in general, all necessary supplies and service not specified for some other staff Department."

The military authorities therefore had full power and authority to rent the quarters in question, and provide for the heating thereof.

In 16 R. C. L. p. 1085, section 603, the law governing cases of this kind is set forth as follows:

"Independent of any contract or express agreement, at common law a tenant must treat the premises in such a manner that no substantial injury shall be done them through any negligent or wilful misconduct on his part. This implied obligation is part of the contract itself, as much so as if incorporated into it by express language; and it results from the relation of landlord and tenant between the parties which the contract creates."

The principles of law here involved are similar to those involved in the case of *United States* vs. *Bostwick*, 94 U. S. 53 (24 Law Ed. 65), which case came to the United States Supreme Court on appeal from the United States Court of Claims.

That case involved, among other things, a claim for damage done to certain property of the claimant during the time said property was occupied by the soldiers of the United States Army for the purposes of a hospital and camp ground.

There was no written lease for the premises but the same were occupied pursuant to a letter or note of General Mansfield to one Lovett who was acting for the owners of the property. With reference to the effect of the agreement between the parties, the court there said:

"The contract is one by which Mr. Lovett agreed to let and United States to hire the premises described for the term of one year, with the privilege of three, at a rent of $500.00 a month, and without restriction as to the use to which the property might be put. United States agree to nothing in express terms, except to pay rent and hold for one year."

"But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not, unnecessarily to injure it, or, as it is stated by Mr. Comyn, 'to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the willful or negligent conduct of the lessee.' Com. Land & T. 188. This implied obligation is part of the contract itself, as

much so as if incorporated into it by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford* vs. *Dunnett*, 7 M. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs, as far as possible. *Horsefall* vs. *Mather*, Holt, 7; *Brown* vs. *Crump*, 1 Marsh, 569."

* * * * * * *

"The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon."

* * * * * * *

After holding that any injury done to the property during the occupation thereof by the soldiers previous to the agreement for a lease, could not be recovered for in that action, the court said:

"But damage after the lease commenced, and while the United States were actually in possession under it, occupies a different position. That comes within the contract by which the rights of the parties in this action are to be determined. As has been seen, that does not bind the United States to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use. It binds them not to commit waste, or suffer it to be committed. If they fail in this, they fail in the performance of their contract, and are answerable for that in the Court of Claims, which has jurisdiction of "all claims founded upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein." R. S. sec. 1059; (10 Stat. at L., 612, sec. 1.) If there had been in this lease an express agreement to repair, certainly it could not have been successfully claimed that the Court of Claims would not have had jurisdiction to award damages for a failure to rebuild after the fire, even though the fire was caused by the soldiers while in the hospital for treatment. But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract."

"It appears in the finding that, during the occupancy under the lease, ornamental trees were destroyed, fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action."

The action of the claimant being an action of contract and not in tort, the rule contended for by the respondent does not apply.

No question is raised as to the authority of the military officers to enter into the contract with the claimant for the occupancy of the premises owned by it. The contract being within the authority of the officers making the same, the State is bound thereby and cannot escape the obligations legally resulting therefrom.

Under the allegations of the amended complaint, the evidence in the record, and the law as above set forth, claimant is entitled to an award for the amount expended by it as hereinbefore set forth.

Award is therefore entered in favor of the claimant for the sum of One Thousand Fourteen Dollars and Thirty-seven Cents ($1,014.37.)

(No. 2225—Claimant awarded $3045.00.)

JULIUS MENESTRINA, LEO MENESTRINA AND LEONA MENESTRINA, CHILDREN OF THEODORE J. MENESTRINA, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

WHEELER, OEHMKE & DUNHAM and WILMER L. VOGT, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when veterinarian employed in making tuberculin test of cattle is not engaged in farm work as defined in Paragraph 8 of Section 3 of—when award for compensation for injuries resulting in death while making may be made.* Where veterinarian is employed by State, in making tuberculin tests of cattle, in which he necessarily used knives and other sharp-edged cutting tools, at Stock Yards, not engaged in farming or stock raising but used for receiving and disposing of live stock, and not being a farm or country place but located entirely within the limits of a city, such work is not farm work and does not come within the proviso of Paragraph 8 of Section 3 of the Act, and an award may be made for compensation for accidental injuries sustained while so employed, resulting in death, upon notice given, claim made and application filed therefor, within time prescribed in Act, to those entitled under the provisions thereof.

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

For more than five years prior to the 3d day of June, A. D. 1932, Dr. Theodore J. Menestrina was employed by the respondent in the Department of Agriculture, Division of Animal Industry, as a veterinarian, in making tuberculin tests of cattle at the St. Louis National Stock Yards, National City, Illinois. On the last mentioned date Dr. Menestrina, in the course of his duties, was attempting to make a tuberculin test of a bull at one of the pens in said stockyards, when the animal turned on him. In attempting to escape, the doctor climbed the fence on the south side of the pen. He had one leg over the cap board when the vertical board under the cap board gave way, and he fell into the adjoining pen, landing on his feet.

The next day he developed a cough which gradually became worse; thereafter he complained of a pain in his left side, and was troubled with a shortness of breath. His condition gradually became worse, although he continued to perform the duties of his employment until November 9th, 1932. Shortly thereafter he went to the Veterans' Hospital at Jefferson Barracks, Missouri, where he remained about three months. His condition continued to grow worse and he died on April 9th, 1933.

Julius Menestrina was appointed Administrator of the estate of said decedent and commenced an action in the City Court of East St. Louis against the National Stock Yards Co. The jury rendered a verdict in favor of the plaintiff for $2,000.00, on which judgment was entered. Such judgment was reversed by the Appellate Court on the ground that the evidence did not disclose any negligence on the part of the defendant.

Said Administrator filed his complaint in this court on August 8th, 1933, and subsequently filed an amendment thereto, whereby Julius Menestrina, Leo Menestrina and Leona Menestrina, children of said decedent, were substituted for said Administrator as parties plaintiff.

The Attorney General contends:

1. That Dr. Menestrina was not engaged in an employment which comes within the provisions of the Workmen's Compensation Act; that the employment in which he was engaged comes within the proviso of Paragraph 8 of Section 3 of the Workmen's Compensation Act, which provides as follows:

"*Provided*, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

2. That claim for compensation was not made within the time required by Section 24 of the Workmen's Compensation Act.

3. That the death of Dr. Menestrina did not result from, nor was it accelerated by the injury.

We will consider such contentions in the order mentioned.

I.

It has been stipulated that Dr. Menestrina in the performance of his duties as a State veterinarian "was engaged in using scalpels, trochors, knives, scissors, hypodermic needles, razors, clippers, and other sharp-edged cutting tools, implements and surgical implements commonly used by a veterinarian."

It has also been stipulated that the National Stock Yards is located entirely within the city limits of National City; that under the statutes of this State the National Stock Yards is a public stockyards and cattle received in such yards are considered in quarantine.

Under such stipulation and the other facts in the record, it therefore appears that claimant was under the Workmen's Compensation Act unless he came within the proviso of Paragraph 8 of Section 3 above quoted.

The evidence in the record shows that said Stock Yards Company is not engaged in farming or stock raising, but furnishes a place for receiving and disposing of livestock; and the work in which the decedent was engaged at the time of the accident in question, was not being done on a farm or country place. Although stock raisers may require their cattle to be tested by a veterinarian, yet the testing of cattle at a public stockyards, under the circumstances in evidence in this case, cannot be considered a part of the work of farming or stock raising.

II.

It is admitted that the respondent had notice of the accident in question within the time required by Section 24 of

the Workmen's Compensation Act; also that Dr. Menestrina was paid his full salary from the date of the accident to the date of his death, to wit, April 9th, 1933. The complaint was filed herein on August 8th, 1933, and under the decision of our Supreme Court in the case of *United Air Lines* vs. *Ind. Com.*, 364 Ill. 346 (which decision was rendered subsequent to the filing of the brief of the Attorney General herein) the contention here made by the Attorney for the respondent is without merit.

III.

The question as to whether the death of Dr. Menestrina resulted from the accident in question, presents the most serious question in the case. From the evidence in the record it appears that Dr. Menestrina returned to his headquarters immediately after the accident. His superior officer saw him about noon of the same day, and testified that Dr. Menestrina came into the office stooped over and holding the side of his chest with his right hand. That evening Mrs. Menestrina rubbed the left side of his chest with linament and such treatments were continued every other day for a long time. He developed a cough on the day after the accident, which became progressively worse, and which continued to the day of his death. He consulted Dr. R. E. Little of East St. Louis on June 22d, at which time he was coughing and complained of a pain in his left chest. The cough grew progressively worse and he complained of a shortness of breath. On October 25th, 1932 he again consulted Dr. Little who strapped the patient's chest with adhesive tape to prevent deep breathing and relieve him of the pain of which he complained on breathing or coughing.

He continued to perform his work at the stockyards until November 9th, 1932. On November 11th, 1932 he went to the Veterans Hospital at Jefferson Barracks, Missouri and remained there until February 4th, 1933. He then returned home on account of the sickness of his wife, who died shortly thereafter. He was examined by Dr. H. H. Hurd of East St. Louis on the 4th day of February, 1933. He then complained of shortness of breath and discomfort in his left chest, and remained under the care of Dr. Hurd until the time of his death on April 9th, 1933.

At the time of his first examination, Dr. Hurd found the left chest entirely filled with fluid, which indicated to him an inflammatory process of the lungs. The fluid was removed from the patient's chest on February 5th, 1933 and on three subsequent occasions between that date and the time of his death on April 9th, 1933.

Prior to the time of this accident Dr. Menestrina appeared to be active and healthy, had a dark ruddy complexion, and never remained home on account of sickness or disability during the five year period he was stationed at such stockyards.

After Dr. Menestrina's death, Dr. Hurd performed an autopsy, in the course of which he opened the abdominal cavity and examined all of the organs. He discovered a malignant growth involving the entire left lung; the chest was filled with fluid; there was a growth on the second rib in front on the left side, and one on the third rib in back on the left side; there was a metastaces covering the heart, stomach, spleen, both kidneys and the liver. In the opinion of Dr. Hurd there had been a previous fracture of two ribs which had not healed, although he could not state the date of such fracture.

Dr. Hurd injected some of the fluid which he removed from Dr. Menestrina's chest into the abdomen of a guinea pig, and the pig died in seventeen or eighteen days. The doctor opened the pig and found a malignant growth all over its abdomen.

Dr. Hurd concluded that the malignant growths which he found in the chest of Dr. Menestrina were cancer, and he testified that they could possibly have resulted from the injury, or the injury could have aggravated the growths if they were present prior to the injury.

Two experts testified on behalf of respondent. Neither of them treated Dr. Menestrina or were present at the autopsy. In answer to hypothetical questions, both doctors testified in effect that the accident in question could have had no bearing upon the death of the hypothetical person from cancer of the stomach.

From a careful consideration of all of the evidence in the record, and the inference which may reasonably be drawn therefrom, we are of the opinion that the death of Dr. Menestrina resulted from the accident in question.

It is admitted that respondent had notice of the accident within a short time thereafter, and that Dr. Menestrina was paid his full salary of $200.00 per month to March 1st, 1933, and $180.00 per month thereafter until the time of his death. The sum of $955.00 was paid to the doctor for his salary from the time he quit work on November 9th, 1932 until the time of his death on April 9th, 1933, and it has been stipulated and agreed that if an award is entered herein, said sum of $955.00 shall be deducted from the amount of such award.

Said decedent left him surviving Julius Menestrina, Leona Menestrina and Leo Menestrina, his children, who resided with him at the time of his death. It appears from the record that at the time of the injury to their father, said Julius Menestrina and Leona Menestrina were adults, and the said Leo Menestrina was a minor, aged 18 years. Consequently, Leo Menestrina was the only child whom the decedent was under legal obligation to support at the time of his injury.

From a consideration of the record before us, we therefore find as follows:

1. That Theodore J. Menestrina and the respondent, were, on June 3d, 1932, operating under the provisions of the Workmen's Compensation Act.

2. That on said date said Theodore J. Menestrina sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the 9th day of April, 1933.

3. That notice of the accident was given to respondent and claim for compensation made within the time required by the provisions of such Act.

4. That the earnings of the said Theodore J. Menestrina for the year preceding his death were Twenty-three Hundred Seventy-four Dollars ($2,374.00.)

5. That said Theodore J. Menestrina left him surviving his minor son, Leo Menestrina, whom he was under legal obligation to support, and who was then more than sixteen (16) years of age.

6. That the claimant, Leo Menestrina, is therefore entitled to have and recover from the respondent the sum of $4,000.00, less the sum of $955.00 which is to be deducted therefrom in accordance with the stipulation of the parties hereto as hereinbefore set forth.

7. That said award is payable in weekly installments of Fifteen Dollars ($15.00) per week; and that the entire amount of said award has accrued at this time.

Award is therefore entered in favor of the claimant, Leo Menestrina, for the sum of Three Thousand Forty-Five Dollars ($3,045.00.)

This award being for the death of a State employee, is subject to the provisions of an Act entitled "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 2d, 1935 (Session Laws of 1935, p. 49.)

In accordance with the provisions of such Act, this award is subject to the approval of the Governor, and upon such approval, is payable from the appropriation from the General Revenue Fund in the manner provided in such Act.

(No. 2629—Claim denied.)

JOHN A. PALUCHOWSKI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

JOSEPH S. PERRY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injury for which compensation sought must arise out of and in the course of employment—when award denied.* Where claimant was instructed to saw a piece of wood and instead of using hand saw, furnished for such purpose, wholly without any authority, took same to mill and sawed it on power saw, and while so doing sustained accidental injuries, such injuries do not arise out of or in the course of his employment, and an award will be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was employed as a laborer in the Highway Department of the State of Illinois, his duties being that of a cement finisher. On November 20, 1934 he was given a piece of lumber 2x2, 18 inches long to cut in half. The road crew had a hand saw to use for such purposes but claimant chose to go to a nearby milling company which operated a power saw, and there attempted to saw the stick. In doing so the saw struck the second finger on his left hand, and

claimant contends it completely cut off the first phalange thereof. By agreement of counsel the records herein disclose that the claimant appeared at the hearing of this cause, and his finger was measured and that the measurement showed a difference of one-half inch in the length of the injured finger and the corresponding finger on the right hand.

Claimant gave as an excuse for using the power saw that it was much quicker than if he had attempted to use the saw which was available in the road equipment. His foreman, Mr. Vogt, testified that had he used the hand saw it would in his opinion have required about one-half hour to saw the strip in question.

Plaintiff was averaging about One Hundred ($100.00) Dollars per month in wages and he received the sum of Thirty-six and 08/100 ($36.08) Dollars during the time lost by him as a result of his accident. He seeks a further award for temporary total incapacity for the time lost by him as a result of said accident and for the total loss of the first joint of said second finger. At the time of the accident he was married but had no children under the age of sixteen years. The records of the Division of Highways disclose that claimant returned to work January 19, 1935, making a period of temporary total incapacity of eight and one-half (8½) weeks.

It is apparent that claimant in taking the sticks of lumber to the mill company and there attempting to operate a power saw, without any instructions or orders from his superior authorizing him to engage in such work, instead of using the hand saw as was apparently expected of him, was acting without and not within the course of his employment. One employed to work in a certain field of endeavor who departs from that work without authority and engages in a type of work more hazardous, and is injured in such work, is not entitled to an award under the provisions of the Workmen's Compensation Act. The injury to claimant did not arise out of and in the course of claimant's employment.

Weiss Paper Mill Co. vs. *Ind. Com.*, 293 Ill. 282.
Dietzen Co. vs. *Ind. Bd.*, 279 Ill. 11.

Award is denied and claim dismissed.

(No. 2918—Claimant awarded $134.59.)

MAX SIELOFF, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

JOSEPH S. PERRY, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award under may be made.* Where employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra hazardous employment, an award may be made for compensation, upon notice given, claim made and application filed for same within time provided in Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant was employed as a laborer in the Division of Highways of the State of Illinois, and while engaged in operating a power mower on September 5, 1935 the thumb of his right hand became enmeshed in a chain on a sprocket wheel attached to said mower. The end of the bone was cut and it required two stitches to pull the finger together over the end of the bone. Measurement of the thumb discloses that the injured thumb is now approximately three-sixteenths of an inch shorter than the thumb on the left hand. Claimant testified that just a little bit of the finger nail was left. He received medical attention over a considerable period and incurred a total bill therefor in the sum of Fifty ($50.00) Dollars, payable to Dr. J. R. Tobin of Elgin. The State Highway Office reports that claimant returned to work November 21, 1935. Plaintiff by his claim seeks an award for temporary total incapacity for one month and twenty-two days, Fifty ($50.00) Dollars doctor's bill incurred, and also Three Hundred Ninety-three and 75/100 ($393.75) Dollars for the total loss of the first phalange of the thumb on his right hand. Plaintiff was unmarried at the time of the accident and his wages are determined on a basis of Four ($4.00) Dollars per day and two hundred days employment per year, making Eight Hundred ($800.00) Dollars per year or Fifteen and 38/100 ($15.38) Dollars per week.

Under the holdings of the Supreme Court and previous decisions of this court we find that claimant is not entitled to any compensation for the loss of the portion of the thumb

suffered in said accident, as the record discloses that he lost but three-sixteenths of an inch from such phalange and that no award is due for a portion of such first phalange under Section 8 (e) 6 of the Workmen's Compensation Act.

McMorran & Co. vs. *Ind. Com.*, 290 Ill. 569.
Nelson vs. *State*, 8 C. C. R. 70.

Claimant is entitled to an award for the medical expense incurred by him in the care of his thumb, in the sum of Fifty ($50.00) Dollars, and he is further entitled to compensation for temporary total incapacity for eleven (11) weeks at fifty (50) per cent of Fifteen and 38/100 ($15.38) Dollars, or Eighty-four and 59/100 ($84.59) Dollars.

An award is therefore hereby entered as follows:

To Max Sieloff for temporary total incapacity.....$84.59
Max Sieloff for use of Dr. J. R. Tobin..... 50.00.

This award being subject to the provisions of an Act entitled, "*An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof,*" approved July 2, 1935 (Sess. Laws 1935 p. 49), and being, by the terms of such Act, subject to the approval of the Governor, is hereby, if and when such approval is given, made payable from the appropriation from the Road Fund in the manner provided in such Act.

(No. 3051—Claim denied.)

PETER TIVNAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

EDWIN A. FELDOTT, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURIES—*property damage—negligence of State Highway employees—State not liable for.* The facts in this case are similar and the principles involved are the same as those in the case of *York* vs. *State*, No. 2701, *ante*, and the opinion therein is applicable here.

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

Claimant filed his complaint herein on January 21st, 1937, and alleges therein in substance that on the 22d day of

January, A. D. 1935, about seven-thirty or eight o'clock p. m., he was driving his Plymouth automobile in a northerly direction on Broadway in the Village of Melrose Park, in Cook County, and was approaching North Avenue in said village; that the roadway was covered with ice and was very slippery; that when he was in the center of the intersection of North Avenue and Broadway he noticed that said Broadway ended at North Avenue; that he tried to stop his automobile, but on account of the slippery condition of the highway was unable to do so, and said automobile skidded into a ditch on the north side of North Avenue; that at that time the respondent was in control of said North Avenue at said intersection; that the accident in question resulted from the negligence of the respondent in failing to have proper lights or barricades on said highway at said intersection for the protection of the traveling public; that the claimant was in the exercise of all due care and caution for his own safety, and that by reason of the negligence of the respondent as aforesaid, he sustained serious and permanent injuries, and his automobile was damaged; that he was required to pay $500.00 for medical, hospital and nursing bills, as well as $200.00 for repairs to his automobile; and asks an award in the amount of $25,000.00.

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

This court has repeatedly held that in the maintenance of its hard-surfaced highways the State exercises a governmental function, and that in the exercise of such function, it is not liable under the doctrine of *respondeat superior* for the negligence of its servants and agents. This has been decided so often that the citation of authorities seems useless. See *George McGready, et al* vs. *State*, No. 2604, decided at the September, 1935, term of this court, and cases there cited.

Under the facts set forth in the complaint, there is no legal liability on the part of the respondent, and the motion of the Attorney General must therefore be sustained. *Crabtree* vs. *State*, 7 C. C. R. 207.

Motion to dismiss allowed. Case dismissed.

(No. 2970—Claim denied.)

THE TRUST COMPANY OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF ELEANOR HANDZEL, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

ROBERT F. MUNSELL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURIES—*negligence of employees of State—State not liable for—doctrine of respondeat superior not applicable.* The State, as a sovereign, is not liable for damages, injuries or death resulting from the negligence of its officers or employees, the doctrine of respondeat not being applicable to the State.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein as administrator of the estate of Eleanor Handzel, deceased, seeks an award because of the death of said Eleanor Handzel alleged to have occurred as the result of injuries sustained in an automobile collision. The complaint recites that the car in which decedent was riding was struck by a passenger bus from the St. Charles School for Boys that was then and there being operated in a careless and negligent manner, and the award is sought because of the alleged negligence of the driver of said bus as the agent, servant or representative of the State of Illinois.

The Attorney General has filed a motion on behalf of respondent to dismiss the complaint for the reason that plaintiff's claim is predicated solely on the purported liability of respondent for the alleged negligence of an employee. Respondent is entitled to the allowance of said motion. The rule applicable thereto has repeatedly been set forth as follows:

"The State, as a sovereign, is not liable for damages, injuries or death resulting from the negligence of its officers or employees. The doctrine of *respondeat superior* does not apply to the State."

Crabtree vs. *State*, 7 C. C. R. 207.
Childress vs. *State*, 8 C. C. R. 223.

The motion to dismiss the complaint is allowed and cause dismissed.

(No. 2916—Claim denied.)

WESTERN DAIRY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.
Rehearing denied June 11, 1937.

EDELSON & PACLLIN, for claimant.

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

FRANCHISE TAX—*paid through negligence or inadvertence— not made under mistake of fact—is voluntary payment—cannot be recovered.* Where amount of franchise tax is computed by Secretary of State, in accordance with law, based on information furnished by claimant, and it pays such amount, such payment is voluntary and not made under mistake of fact and a claim for rebate of a part thereof alleged to be excessive, due to error in information so furnished by claimant will be denied.

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

Claimant filed its complaint herein on June 22d, 1936, and seeks to recover the sum of $194.66 which it alleges it overpaid to the Secretary of State as franchise tax for the years commencing July 1st, 1934 and July 1st, 1935.

It appears from the complaint that on February 3d, 1934 claimant filed its annual report with the Secretary of State, in which it set forth that the sum of its stated capital and paid in surplus for the year commencing July 1st, 1934 was $1,281,876.25. A similar report was made for the year commencing July 1st, 1935, and the Secretary of State thereafter assessed, and the claimant paid, a franchise tax of $640.95 in each of such years, said tax being based upon the sum of the stated capital and paid in surplus as set forth in the annual report filed by the claimant in each year, as aforesaid.

Claimant alleges that its stated capital and paid in surplus for the years commencing July 1st, 1934 and July 1st, 1935 was inadvertently set forth in its aforementioned annual reports at $1,281,876.25, and that the same should have been $1,087,210.98; that by reason of its error as above set forth, it paid the sum of $97.33 for each of such years in excess of the amount it was legally required to pay, and asks for an award for the amount of such excess payments.

On June 1st, 1936 claimant caused to be filed in the office of the Secretary of State its supplemental annual report for the year commencing July 1st, 1934, setting forth a total of stated capital and paid in surplus in the sum of $1,087,210.98.

Section 133 of The Business Corporation Act of this State provides that the annual franchise tax payable by each domestic corporation shall be computed at the rate of one-twentieth of one per cent for the twelve-month period commencing on the first day of July of the year in which the tax is payable.

Section 132 of The Business Corporation Act provides as follows:

"The basis for the annual franchise tax payable by domestic corporations shall be the amount represented in this State, determined in accordance with the provisions of this section, of the sum of its stated capital and paid in surplus, on the thirty-first day of December of the preceding calendar years, minus the amount by which the sum of the stated capital and paid in surplus may have been reduced after the thirty-first day of December of the preceding calendar year and prior to the 25th day of June of the current calendar year as disclosed by any report or document filed by it with the Secretary of State."

In its annual reports for the years 1934 and 1935, claimant set forth that the sum of its stated capital and paid in surplus on December 31st of the preceding year was $1,281,875.25, and it was assessed and paid a tax upon that amount.

The supplemental annual report for 1934, which was filed June 1st, 1936, could not be effective until after the same was filed in the office of the Secretary of State, and therefore it could have no effect on the amount of the franchise tax for the years commencing July 1st, 1934, and July 1st, 1935, which taxes had been paid long prior to the filing of such supplemental report. It was effective for the year commencing July 1st, 1936 and claimant's franchise tax for that year was reduced accordingly.

The question here involved is whether a corporation which has paid an excessive franchise tax, as the result of its own *mistake or error*, is entitled to recover the amount of the excess so paid.

The rule is well established in this State that where an illegal or excessive tax is paid voluntarily, with full knowl-

edge of all the facts, the same cannot be recovered. It is equally well established that where such tax is paid under a mistake of fact, it is not considered as having been paid voluntarily; also that where such tax is paid under a mistake of law, it may not be recovered. *Alton Light & Traction Co.* vs. *Rose*, 117 Ill. App. 83; *Yates* vs. *Royal Insurance Co.*, 200 Ill. 202; *Board of Education* vs. *Toennigs*, 287 Ill. 469; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122; *Hettler Lumber Co.* vs. *Cook County*, 336 Ill. 645; *Cooper, Kanaley & Co.* vs. *Gill*, 363 Ill. 418; *American Can Co.* vs. *Gill*, 364 Ill. 254.

The difficulty arises not with the principles of law but with the application of such principles to the particular case.

In this case the facts with reference to the amount of its stated capital and paid in surplus were peculiarly within the knowledge of the claimant; there was no mistake on the part of the Secretary of State who assessed the tax in accordance with the annual report prepared and filed by the claimant; the only error was that of the claimant. No objection was made to the assessment, and no request for a hearing thereon was made in accordance with the provisions of Section 143 of The Business Corporation Act.

There are numerous authorities to the effect that where an illegal or excessive tax is imposed by reason of the negligence or inadvertence of the taxpayer, and thereafter paid by him, such payment is not made under a mistake of fact, and cannot be recovered. *Bateson* vs. *City of Detroit*, 143 Mich. 582; *Cooley on Taxation*, 4th Edition, sec. 1295; *Shenango, etc.* vs. *Fairfield Township*, 229 Pa. 357; *Dubuque & Sioux City R. Co.* vs. *Board of Supervisors*, 30 Ia. 16; *O'Reilly* vs. *Clark*, 48 R. I. 407; 61 Corpus Juris, p. 992, sec. 1270; *National Lock Co.* vs. *State*, 8 C. C. R. 320; *Seth Sedders, Inc.* vs. *State*, 7 C. C. R. 9.

On the record before us, and under the law as above set forth, claimant is not entitled to an award.

Award is therefore denied and the case dismissed.

(No. 3073—Claim denied.)

EUPHIE WOOD, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PERSONAL INJURY—*inflicted by inmate of State Charitable Institution—State not liable for.* There is no theory of law upon which to base any legal liability on the part of the State for the acts of inmates of State institutions, in the absence of a statute making it so liable.

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

From the complaint herein it appears that prior to and on November 2d, 1936 claimant, who was then seventy years of age, resided on a farm near the railroad station known as Pisgah, in Morgan County.

While she was performing her household duties on the last mentioned date, she heard a knock at the side door. She responded thereto and found a man who was later ascertained to be Joseph Flynn, an escaped patient from the Jacksonville State Hospital, Jacksonville, Illinois. He asked for food, and while claimant was preparing the same, Flynn grabbed her about the throat and struck her. She defended herself to the best of her ability, but Flynn dragged her to the basement where she was assaulted and raped and was left unconscious. When consciousness returned Flynn had departed and claimant telephoned for help. Flynn was apprehended shortly thereafter by the sheriff who had been notified of his escape by the authorities of the Jacksonville State Hospital. Claimant was afterwards taken by ambulance to the Passavant Memorial Hospital at Jacksonville, and incurred expenses for medical and hospital care, nursing, etc., in the total amount of $102.75, and asks an award in an amount sufficient to cover such expenses, and in addition thereto the sum of $1,500.00.

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

This court has repeatedly held that the State in the conduct of its penal and charitable institutions is engaged in a

governmental function, and that in the exercise of such functions, it is not responsible for the acts of its servants and agents in the absence of a statute making it so liable. See *Jones* vs. *State*, 8 C. C. R. 77, and *Palumbo* vs. *State*, 8 C. C. R. 196, and cases there cited.

There is no theory of law upon which to base any legal liability on the part of the State for the acts of inmates of State institutions, in the absence of a statute making it so liable.

We have no authority to allow an award in any case unless there would be a legal liability on the part of the State if the State were suable. *Crabtree* vs. *State*, 7 C. C. R. 207.

There being no legal liability on the part of the State, we have no authority to allow an award, regardless of how much the case might appeal to the sympathies of the court. Award must therefore be denied. Award denied. Case dismissed.

(No. 2958—Claimant awarded $4.00.)

WORLD BOOK COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 3, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* The facts in this case and the principles involved are the same as those in *Firestone Tire & Rubber Co.* vs. *State*, No. 3054, *ante*, and what was said therein is applicable here.

MR. JUSTICE YANTIS delivered the opinion of the court:

The record discloses that on May 21, 1934 claimant delivered certain merchandise described in the claim filed herein to the St. Charles School for Boys, being one of the State institutions under the control of the Department of Public Welfare of Illinois. That said merchandise had been legally purchased by respondent, and that the charge made therefor was the fair reasonable value thereof and the price customarily charged therefor; that at the time same was ordered and delivered there was an appropriation in force from which said bill might have been paid, but that said appropria-

tion lapsed before claimant's bill was submitted, and no part of said account has been paid. The facts being undisputed that the State received the supplies ordered, that same were legally purchased, and that although the appropriation out of which said account might have been paid had lapsed, that claimant was not guilty of any unreasonable delay, an award should be made. The claim is therefore allowed and an award entered in favor of claimant in the sum of $4.00.

(No. 2500—Claim denied.)

BUTLER COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1937.

HARRY W. REIHER, for claimant.

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

FRANCHISE TAX—*paid without protest and with full knowledge of facts—is voluntary payment.* Where Secretary of State makes an erroneous assessment of amount of franchise tax based upon stated capital and paid in surplus of taxpayer, and the facts relative to same are as well known to taxpayer as they are to Secretary of State, they are both chargeable with knowledge of law relative to amount of such tax to be paid, and if such tax is paid in amount as assessed, payment is not made under mistake of fact, but is a voluntary payment and no award can be made for refund of same or any part thereof.

SAME—*amendment to articles of incorporation reducing stated capital and paid in surplus—effective on amount of, for current year, only when filed prior to June 25 of.* Where claimant seeks to have benefit of amendment to its articles of incorporation, reducing its stated capital and paid in surplus, by which amount of franchise tax would be decreased for current year, it is necessary that such amendment be filed in the office of Secretary of State prior to June 25 of such year and if not so filed, franchise tax for current year must be computed on basis of its stated capital and paid in surplus on the 31st day of December of preceding year.

SAME—*claim for refund of amount paid, claimed to be in excess of that due—remedy available to claimant—failure to avail self of—bars award.* Where statutes afford remedy to person claiming to have been assessed franchise tax in amount in excess of that rightfully due for correction of such assessment, and it fails to avail itself of such remedy, but voluntarily pays tax, without protest, no award can be made for refund.

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

Claimant filed its complaint herein on September 5th, 1934 and seeks to recover the sum of $343.45 which it claims to have paid to the Secretary of State as a franchise tax in excess of the amount which it was legally required to pay under the terms and provisions of The Business Corporation Act of this State.

It appears that claimant filed its annual report with the Secretary of State on February 23d, 1934 in which report it showed a stated capital and paid in surplus in the amount of $2,456,800.04, and showed an authorized capital stock as of the same date as follows, to wit: preferred, 27,700 shares of the par value of $100.00 per share, and 2,300 shares of common of no par value.

The Secretary of State assessed a franchise tax based upon such report, in the amount of $1,500.00, which was paid by claimant on June 26th, 1934.

On June 29th, 1934 claimant filed in the office of Secretary of State certain articles of amendment to its articles of incorporation, said amendment reducing the stated capital and paid in surplus from $3,000,000.00 to $2,313,086.40. The franchise tax on the last mentioned amount would have been $1,156.55 and the difference between such amount and the sum of $1,500.00 which claimant paid on June 26th, 1934 as aforesaid, to wit, the sum of $343.45, is the amount for which claim is filed.

Section 132 of The Business Corporation Act (Bar Association Statute of 1935, ch. 32) provides in part as follows:

"The basis for the annual franchise tax payable by domestic corporations shall be the amount represented in this State, determined in accordance with the provisions of this section, of the sum of its stated capital and paid in surplus on the thirty-first day of December of the preceding calendar year, minus the amount by which the sum of the stated capital and paid in surplus may have been reduced after the thirty-first day of December of the preceding calendar year and prior to the 25th day of June of the current calendar year as disclosed by any report or document filed by it with the Secretary of State."

For claimant to have the benefit of the amendment to its articles of incorporation reducing its stated capital and paid in surplus as above set forth, it was necessary that such articles of amendment be filed in the office of the Secretary of State prior to the 25th day of June, 1934. Such articles of amendment, however, were not filed until June 29th, 1934, and consequently claimant's annual franchise tax was re-

quired to be computed on the basis of the sum of its stated capital and paid in surplus on the 31st day of December, A. D. 1933.

The sum of claimant's stated capital and paid in surplus on December 31st, 1933, as shown by said annual report was $2,456,800.04, and therefore, in the absence of any other showing made in accordance with the statutory requirements, the capital stock tax should have been assessed in the amount of $1,228.40. Claimant therefore paid $271.60 in excess of what it should have paid.

The question for our consideration, therefore, is whether claimant is entitled to a refund of the amount of such excess, under the facts in this case.

Sections 95, 96, 115 and 116 of The Business Corporation Act require every domestic corporation and every foreign corporation authorized to do business in this State to file an annual report with the Secretary of State between the 15th day of January and the last day of February of each year.

Section 143 of said Business Corporation Act provides that:

"Between the first day of March and the fifteenth day of June of each year the Secretary of State shall assess against each corporation, domestic or foreign, required to file an annual report in such year the franchise tax payable by it for the twelve months' period commencing on the first day of July of such year in accordance with the foregoing provisions * * *."

Section 132 hereinbefore quoted, prescribes the basis upon which the franchise tax shall be assessed.

Said Section 143 also provides that the Secretary of State shall:

"mail a written notice to each corporation against which such tax is assessed, addressed to such corporation at its registered office in this State, notifying the corporation (1) of the amount of franchise tax assessed against it for the year next ensuing * * *; (2) that objections, if any, to such assessment will be heard by the officer making the assessment, on or before the twenty-fifth day of June of such year, upon receipt of a request from the corporation; and (3) that such tax * * * shall be payable to the Secretary of State on the first day of July next succeeding the date of the notice"; * * * Failure to receive such notice shall not relieve the corporation of its obligation to pay the tax * * * or invalidate the assessment thereof."

Such section also provides that the Secretary of State shall have power to hear and determine objections to any assessment of franchise tax at any time after such assess-

ment and, after hearing, to change or modify any such assessment.

It is not contended that the Secretary of State did not mail, or that the claimant did not receive the notice required to be mailed by such Secretary under Section 143. Claimant filed no objections with Secretary of State relative to the tax assessed against it, and made no request for a hearing in the matter as required by such section.

Section 2a of an Act entitled "An Act in Relation to the Payment and Disposition of Moneys Received for or on Behalf of the State" (Bar Association Statutes, 1935, ch. 127b, Par. 35,) provides as follows:

"It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency, brought within the provisions of this Act by Section 1 hereof to notify the State Treasurer as to money paid to such officer, board, commission, commissioner, department, institute, arm or agency, under protest and the Treasurer shall place such money in a special fund to be known as the protest fund. At the expiration of thirty days from the date of payment the money shall be transferred from the protest fund to the appropriate fund in which it would have been placed had there been payment without protest, unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such transfer, in which case such payment shall be held in the protest fund until the final order or decree of the court."

The statutes provided a full and complete remedy for the claimant and it should have taken advantage of the provisions of law enacted for its protection. Having failed to take advantage of the remedies provided by statute, it follows that the payment made by claimant was made voluntarily and without compulsion or duress.

Our courts have uniformly held that where an illegal or excessive tax is paid voluntarily and with a full knowledge of all the facts, it cannot be recovered. *Alton Light & Traction Co.* vs. *Rose*, 117 Ill. App. 83; *Walser* vs. *Board of Education*, 160 Ill. 272; *Yates* vs. *Royal Ins. Co.*, 200 Ill. 202; *Board of Education* vs. *Toennigs*, 287 Ill. 469; *School of Domestic Arts* vs. *Harding*, 331 Ill. 330; *Merchants Trust Co.* vs. *Harvey*, 335 Ill. 284; *Richardson Lubricating Co.* vs. *Kinney*, 337 Ill. 122; *Hettler Lumber Co.* vs. *Cook County*, 336 Ill. 645; *Cooper, Kanaley & Co.* vs. *Gill*, 363 Ill. 418; *American Can Co.* vs. *Gill*, 364 Ill. 254.

It is also uniformly held that where such tax is paid under a mistake of fact, it is not considered as having been voluntarily paid, and may therefore be recovered.

It is also uniformly held that where such tax is paid under a mistake of law, it may not be recovered. Although the foregoing principles of law are firmly established by the decisions, yet the application of such principles to the facts in the particular case is often involved in considerable difficulty.

In this case the Secretary of State made an erroneous assessment; there was no fault on the part of the claimant, but the facts relative to the amount of claimant's stated capital and paid in surplus were as well known to the claimant as they were to the Secretary of State, and both parties were chargeable with a knowledge of the law relative to the amount of the tax to be paid.

In the case of *Alton Light & Traction Co.* vs. *Rose, supra,* the plaintiff tendered to the Secretary of State for filing, two certificates of corporate consolidation, together with a fee of $1.00 for the filing of each certificate. The Secretary of State refused to file the same unless he was paid the sum of $1,045.00, which he contended was the proper filing fee. Plaintiff objected to the payment of such fee, but eventually paid the same and commenced suit to recover the amount so paid, which it claimed to be excessive, and without warranty or authority in law. The court held, however, that the fees were paid voluntarily, without legal duress or compulsion, and therefore were not recoverable.

In the case of *Yates* vs. *Royal Insurance Co., supra,* the plaintiff sued to recover certain taxes which it had paid under the provisions of a law which was thereafter held to be unconstitutional. The court there held that the payment was voluntarily made, without fraud or compulsion, and therefore was not recoverable. In that case the court quoted from Cooley on Taxation, 2d Ed. 810, as follows:

> "All payments are supposed to be voluntary until the contrary is made to appear. Nor is the mere fact that a tax is paid unwillingly or with complaint of any legal importance, but there must be in the case some degree of compulsion, to which the taxpayer submits at the time but with notification of some sort equivalent to reservation of rights."

In the case of *Walser* vs. *Board of Education, supra,* the county clerk of Cook County by mistake entered upon the tax collector's book certain real estate as lying and being in School District No. 1, whereas in fact the same was located in District No. 2. The owners of the property had no knowledge of the mistake made by the clerk, and paid the tax as

sessed against their lands, which was substantially in excess of what they should have been required to pay if their lands had been properly assessed. In that case the court, on page 275, said:

"The tax levied by District No. 1, as extended on lands belonging to District No. 2, was an illegal and void tax. That tax was paid by the owners of the property so illegally assessed, voluntarily. The books were open to inspection by the taxpayers, and the means of knowledge existed to learn and know all the facts. Money paid voluntarily by one with knowledge or means of knowledge of all the facts cannot be recovered back.

In the case of *Hettler Lumber Co.* vs. *Cook County, supra*, the plaintiffs owned two lots abutting on the river. The lots as originally laid out contained 886,880 square feet. In 1898 the City of Chicago condemned a portion of each lot for the purpose of straightening the river, and thereby reduced the area of said lots to 646,832 square feet. After such condemnation the board of assessors continued to fix the valuations of such lots upon the basis of their original areas. As the result of such action the plaintiff in the eight years following 1918, paid $21,553.07 in taxes, in excess of what it would have been required to pay if the assessors had made the proper reduction in valuation after the area of the lots had been decreased. Plaintiff sued to recover the amount of such overpayment and interest, on the ground that such payments had been made under a mutual mistake of fact. The court held, however, that the payments were made voluntarily and therefore could not be recovered.

In the case of *Cooper, Kanaley & Co.* vs. *Gill, supra*, plaintiffs' property was improved by a one-story building and the property adjoining on the east was improved by a three-story hotel. By mistake of a clerk in the assessor's office the hotel building was marked on the record card of plaintiff's property. As the result of such mistake, plaintiff's property was assessed more than it should have been, and the taxes paid by it for 1929 and 1930 were $2,001.24 in excess of what it would have been required to pay if such mistake had not been made. The court held that the payments were made voluntarily and could not be recovered, and in discussing the question, used the following language (p. 421):

"Where taxes have been voluntarily paid in full on an over-assessment, due to arriving at a value based on mistake either of fact or judgment or other error on the part of the assessor, and where fraud was not an element in the over-assessment, courts are without jurisdiction to afford relief."

In the case of *American Can Co.* vs. *Gill, supra*, certain tanks had been assessed for general taxation at $2,201.00 and $620.00 respectively. The figures were handled in the assessor's office through a comptometer, and in the operation of the machine, the decimal point was shifted two places to the right, resulting in an entry in the tax books of a valuation on said tanks of $220,100.00 and $62,000.00 respectively, upon which valuations taxes were assessed and paid. Plaintiff sought a refund under the theory of double taxation. The court held that there was no double taxation, and that the taxes had been voluntarily paid and therefore could not be recovered.

The question as to when illegal or excessive tax payments may be recovered, is the subject of an exhaustive annotation in 64 A. L. R., commencing on page 9. The general rule is set forth on page 10, as follows:

"It is a well-settled rule, in the absence of statute, that the right of a party who has paid a tax, local assessment, or license fee, to recover the same back, depends upon whether or not the payment was involuntary. If the payment was voluntary, it cannot be recovered; if it may be deemed involuntary, a recovery may be had."

Under the heading of general rules it is pointed out on page 11 that "the terms 'voluntary' and 'involuntary' when used with reference to payments of taxes, are not applied in their ordinary sense."

Under the heading "Existence and adequacy of other remedy or relief", the annotator, on page 54, says:

"There is a conflict in the authorities on the question whether the existence of another remedy or means of relief will render a payment of taxes voluntary, where the taxpayer neglects to avail himself of such remedy.

"It has frequently been held that the compulsion brought to bear upon the taxpayer must, in order to render his payment involuntary, have been of such a nature that he had no other reasonable means of immediate relief from the same, except by making the payment."

After citing a long list of cases from different jurisdictions, he proceeds (page 55):

"And according to this line of cases, representing, probably, the weight of authority, where the taxpayer has some other legal remedy or protection against the coercive acts of the collecting officer, he is bound to avail himself thereof, and, if he neglects to do so, and pays the tax, such payment is deemed voluntary."

The annotation in 64 A. L. R. 9, is supplemented by a further annotation in 84 A. L. R. 294.

As shown by this annotation, the question before us has been the subject of litigation in practically every State in the Union, and as usual, the views of the several courts are not entirely in harmony. Our own courts are inclined to construe the law strictly, in favor of the taxing body and against the taxpayer.

From the record in this case it appears that claimant made no objection to the tax assessed against it and made no request for a hearing thereon, in accordance with the statute; also that the tax in question was paid without protest, and with a full knowledge of all the facts. Under the decisions of our courts, such payment constituted a voluntary payment within the legal meaning of those words, and therefore the claimant is not entitled to have the same refunded. Award denied. Case dismissed.

(No. 3048—Claim denied.)

JAMES B. EMERICK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

LICENSE FEES—*paid through negligence or inadvertence—not made under mistake of fact—is voluntary payment—cannot be recovered.* The facts in this case are similar and the principles involved are the same as those in *Western Dairy Company* vs. *State*, No. 2916, *ante*, and what was said in that case is equally applicable here.

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

Claimant alleges in his complaint that during the years 1933, 1934 and 1935 he was the owner of a Plymouth sedan automobile; that in each of such years he filed with the Secretary of State his application for registration of such automobile, in which application he set forth that the horsepower of such automobile was 26.00; that as a matter of fact the horsepower of such automobile was 23.44; that by reason of his error as above set forth, he was required to pay $4.00 in each of such years in excess of what he should have paid, and asks for a refund of the amount of such excess, to wit, $12.00.

The Secretary of State had no knowledge of the horsepower of such automobile other than the statement contained in claimant's application. The registration fee imposed by such Secretary was based upon the application filed by the claimant, and was strictly in accordance with the statute. The only error in connection with the matter was the error of the claimant as above set forth.

In the case of *Butler Company* vs. *State,* No. 2500, decided at the present term of this court, we held that where an illegal or excessive tax is paid voluntarily and with a full knowledge of all the facts, it cannot be recovered. However, where payment of such tax is made under a mistake of fact, it may be recovered.

In the case of *Western Dairy Co.* vs. *State,* No. 2916, also decided at the present term of this court, we held that where an illegal or excessive tax is imposed by reason of the negligence or inadvertence of the taxpayer, and thereafter paid by him, such payment is not made under a mistake of fact, and therefore cannot be recovered.

The registration fee in question in this case was not paid under a mistake of fact within the legal meaning of such words, and therefore claimant is not entitled to an award.

Award denied. Case dismissed.

(No. 2657—Claimants awarded $700.00.)

JOHN FOGARTY AND ANNA FOGARTY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1937.

HOGAN & COALE, for claimants.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*property not taken for public use—caused by construction of public improvement—measure of—interference with natural drainage and access to property—proper elements of damages.* The facts in this case are similar to those in the case of *Moore et al.* vs. *State,* 8 Court of Claims Reports, Page 686, and what was said by the Court in that case applies with equal force herein.

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

Since August 1st, 1927, claimants have been and still are the owners in joint tenancy of a lot in the City of Taylorville, Illinois, having a frontage of 50 feet on Snodgrass Street and a depth of 150 feet. Snodgrass Street commences at Park Street and extends in a northerly direction. Park Street runs east and west and now constitutes a part of S. B. I. Route No. 48.

The Wabash Railway extends in a northeasterly and southwesterly direction, just east of claimants' property. Such railway previously crossed Park Street at grade, but when said Park Street was made a part of S. B. I. Route No. 48, a subway was constructed under the railroad and in the construction thereof, said Park Street was excavated for some considerable distance on each side of the railroad right-of-way.

Claimants' lot is located approximately 100 feet north of the north line of Park Street, and the natural grade of the land prior to the excavation for the subway was in a southerly or southeasterly direction towards Park Street, such grade being approximately 4%. When the subway was completed a retaining wall was constructed along the north side of Park Street, including what had previously been the entrance from Snodgrass Street to Park Street, and a considerable quantity of excavated material was placed on the premises just north of such retaining wall, and between such wall and the claimants' property, thereby raising the level of such property a considerable extent and entirely cutting off any access from Snodgrass Street to Park Street. A drain was constructed near the southeast corner of claimants' lot for the purpose of taking care of the surface water, but there was testimony tending to show that such drain was not entirely effective and that the excavated material placed on the lots adjoining claimants' premises interfered in a substantial manner with the natural drainage of said lot.

Claimants purchased their lot in 1927, and thereafter constructed thereon a frame dwelling, consisting of four rooms, bath and basement, at a total cost of over $3,800.00.

Claimants contend that their property has been damaged as the result of the construction of said subway, in the following particulars:

1. By cutting off all access to Park Street from Snodgrass Street.

2. By interference with the natural drainage from their property as it existed prior to the improvement.

It is not contended by the respondent that claimants' property has not been damaged, but the question in dispute is the amount of the damage which such property has sustained.

Claimants produced seven witnesses who testified as to the amount of damage to said property as the result of the construction of the subway and the other work in connection therewith as hereinbefore set forth. Respondent produced four witnesses who testified on the same subject. As is usual in cases of this kind, the witnesses differed widely in their estimates of the amount of damage. The highest estimate made by any witness for the claimants was $1,500.00, and the lowest estimate made by any witness for the respondent was $400.00.

Where private property is not taken, but is damaged for public use, the property owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such case is the difference between the fair cash market value of the property unaffected by the improvement, and its fair cash market value as affected by it. *Brand* vs. *Union Elevated Co.,* 258 Ill. 133; *Department of Public Works* vs. *Caldwell,* 301 Ill. 242; *Department of Public Works* vs. *McBride,* 338 Ill. 347.

Where a property owner's right of access to his property has been destroyed or interfered with, he is entitled to compensation for the damages sustained. *Rigney* vs. *City of Chicago,* 102 Ill. 64; *Barnard* vs. *City of Chicago,* 270 Ill. 27; *Lydy* vs. *City of Chicago,* 356 Ill. 230.

While the public authorities may change the grade of a street at their own pleasure, yet, when the grade is changed and sewers or drains are constructed in an imperfect manner, or where the inlets are negligently permitted to become obstructed, so that surface water cannot be carried off, and an adjoining property owner is damaged thereby, the property owner is entitled to recover for such damage. *Nerins* vs. *City of Peoria,* 41 Ill. 502; *City of Elgin* vs. *Kimball,* 90 Ill. 358; *Bouillon* vs. *City of Greenville,* 233 Ill. App. 500.

The question as to the right of a property owner to damages for property damaged but not taken as the result of a public improvement was very thoroughly considered by this

court in the consolidated cases of *Albert J. Moore, et al. vs. State*, Nos. 1957 to 1974, where the authorities were examined and the proper elements of damage considered. In that case we held that interference with the right of access and interference with natural drainage constituted proper elements of damage.

The court viewed the premises in question in this case and upon consideration of all of the evidence in the record, we feel that the fair cash market value of claimants' property has been depreciated as the result of the construction of the subway in question to the extent of $700.00.

Award is therefore entered in favor of the claimants for the sum of Seven Hundred Dollars ($700.00).

(No. 2262—Claimant awarded $606.44.)

FOREMAN-STATE SAFETY VAULT CO., A CORPORATION. (FORMERLY THE FOREMAN SAFETY VAULT CO., A CORPORATION), Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1937.

D'ANCONA, PFLAUM & KOHLSAAT, for claimant.

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

LANDLORD AND TENANT—*claim for rent—when award may be made.* Where it is shown that State occupied and used premises under written lease, and that upon expiration of same, an extension of such lease was entered into for a further period upon the same rental as provided in lease, and State pays less rent than that provided, basing such reduced payments on offer of lessor to renew lease for longer term than provided in executed extension, which offer was not accepted by State, an award for the difference between rent fixed in lease and extension thereof, and that paid by State will be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this action alleges that on the 1st day of July, 1929, a written lease was entered into by and between the Foreman-State Safety Vault Co., and the State of Illinois, for the premises described as 1309 square feet situated in the tower on the twenty-fourth floor of the building known as The Foreman National Bank Building, located at 33 North LaSalle Street, Chicago, Illinois, for a two year term, be-

ginning with the 1st day of July, 1929, for an annual rental of Five Thousand Four Hundred Nineteen and 26/100 ($5,419.26) Dollars, payable monthly at the rate of Four Hundred Fifty-One and 61/100 ($451.61) Dollars, in advance, on the first day of each and every month during the term of the lease.

The lease was signed on behalf of the State by Col. S. O. Tripp, Acting Assistant Quartermaster General of the State of Illinois.

It is alleged that at the expiration date of the above mentioned lease, it was mutually agreed in writing to extend the same from July 1, 1931 to June 30, 1933, both inclusive, with rental at the same amount. It is further alleged that this extension agreement was executed by Col. S. O. Tripp, and approved by C. E. Black, Adjutant General of the State of Illinois. It is also alleged that the premises were duly occupied by the State of Illinois, for and during the months of March, April, May and June of the year 1933, in accordance with the terms, covenants and conditions contained in the foresaid lease and the renewal thereof, but notwithstanding the terms of the lease, the State paid a rental of Three Hundred Dollars ($300.00) per month for said months of March, April, May and June of the year 1933, thereby becoming indebted to the claimant for the sum of One Hundred Fifty-One and 61/100 ($151.61) Dollars for each of said months, and the claimant alleges that the sum of Six Hundred Six and 44/100 ($606.44) is the balance due.

The leases were offered in evidence.

Evidence was taken by stipulation and it appears that on March 6, 1933, the claimant wrote General Black confirming a conversation that claimant had with General Black concerning the lease and a renewal thereof for 1200 square feet, being 109 square feet less than covered by the original lease. In this letter they offered to renew the lease for a two year extension at the rate of $3600.00 per annum, which was a reduction of 33½% from the then rate, and they further agreed that in consideration of this extended period, they would modify the lease then in existence so that the rate to be paid for balance of the term commencing March 1, 1933, would be at the same rate as that for the extended period, and asked for a reply within a reasonable time. The record

does not disclose any reply. The Adjutant General states that he has conferred with all lessors regarding a reduction of rent for the last four months of the biennium ending June 30, 1933, and one of the lessors was the plaintiff in this case, and the Adjutant General refers to a conference he had with claiments concerning a reduction of rent for the balance of the biennium to the annual rate of $3600.00, and he states: "This was agreed to in consideration of an extended period at the same rate for 2 years from July 1, 1933." He further states "The credits were accordingly taken on this basis." The General states that afterwards they agreed to extend the lease from July 1, 1933 to April 30, 1934, at the same rate, and in view of this agreement the lease was extended accordingly at the rate of $338.70 per month for this shorter period.

The original letter written to the Adjutant General and upon which they asked a reply, offered a two year extension at the rate of $3600.00 per annum, and agreed to a $300.00 monthly rental for the four months above mentioned.

No action was taken on the letter of March 6, 1933 but later the lease was extended from July 1, 1933 to April 30, 1934, on the basis of $4,064.40 per annum, payable monthly at the rate of $338.70.

It is apparent, therefore, that as a part of the consideration for such extension they would modify the then pending lease so the rental for the last four months thereof would be $300.00 monthly instead of $451.61. This offer not having been accepted by the State and a renewal having been made at a different rental than for a ten month period, the State was not entitled to a reduction in the rent for the last four months of the lease then pending.

We, therefore, hold that because the terms of the offer in the letter of March 6, 1933 which placed obligations on the respondent were not accepted by the respondent, the claimant is entitled to an additional $151.61 for each of said months, or a total of $606.44.

We, therefore, enter an award in favor of the Foreman-State Safety Vault Co., a corporation, in the sum of Six Hundred Six Dollars and Forty-Four Cents ($606.44.)

(No. 2990—Claim denied.)

THE STOTLAR-HERRIN LUMBER COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1937.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid through negligence or inadvertence—with full knowledge of facts or opportunity to obtain same—is voluntary payment—not made under mistake of fact—failure to avail self of remedy—bars award.*

The facts in this case are similar to those in the case of *Western Dairy Company* vs. *State*, No. 2916, *ante* and *Butler Company* vs. *State*, No. 2500, *ante*, and what was said in those cases applies with equal force herein.

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

In accordance with the requirements of The Business Corporation Act of this State, claimant filed in the office of the Secretary of State its annual report for the years 1934, 1935 and 1936. Each of such annual reports set forth that the corporation had a stated capital of $100,000.00. Each of such reports also set forth the paid-in surplus of the corporation which was stated to be as follows, to wit: for the years 1934 and 1935, $165,982.67; and for the year 1936, $156,308.33. In each of such years the Secretary of State assessed a franchise tax in accordance with the statute, based upon stated capital and paid-in surplus as set forth in the aforementioned annual reports, and the tax as so assessed was duly paid by the claimant.

Claimant now contends that it "placed an incorrect interpretation on the meaning of the words "paid in surplus;" that a matter of fact, said corporation had no paid-in surplus during any of such years; that the amount set forth in the several reports as paid-in surplus, was in fact earned surplus and not paid-in surplus as therein stated; that by reason of its error, claimant was required to pay the total sum of $244.14 in excess of what it should have paid for the years mentioned, and it therefore asks for a refund of the amount of the excess so paid.

The facts with reference to the amount of claimant's paid-in surplus were peculiarly within the knowledge of the claimant. Claimant made no objection to the assessment and made no request for a hearing thereon, as it had the privilege of doing, under the terms and provisions of Section 143 of The Business Corporation Act.

The question here involved was fully considered by this court at the present term in the cases of *Butler Company* vs. *State*, No. 2500, and *Western Dairy Co.* vs. *State*, No. 2916. In those cases we held in substance as follows:

1. Where an excessive tax is paid voluntarily and with a full knowledge of the facts, it cannot be recovered;

2. When the statute provides a remedy for the taxpayer and he fails to take advantage thereof, he cannot claim that the tax was involuntarily paid; and in the latter case, as follows:—

3. Where an excessive tax is assessed by reason of the negligence or inadvertence of the taxpayer and thereafter paid by him, such payment is not made under a mistake of facts, and cannot be recovered.

Under the rule laid down in the cases referred to, the claimant is not entitled to an award.

Award is therefore denied and the case dismissed.

(No. 2917—Claimant awarded $125.46.)

CITY OF SHELBYVILLE, ILLINOIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1937.

R. I. DOVE, for claimant.

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

SERVICES—*when award may be made for.* **Where it is conceded that claimant rendered services to State, and bill therefor, which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award for payment will be made, upon claim filed within a reasonable time.**

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The original complaint in this cause was filed June 22, 1936, for the sum of $143.91, and thereafter, on July 11, 1936,

an amended complaint was filed herein, and the damage claimed was $125.46.

The amended complaint alleges that the claimant is a municipal corporation, and that on or about the 15th day of December, 1930, the claimant, by its Street Commissioner, one O. W. Harris, entered into a verbal agreement with the Department of Public Works and Buildings, Division of Highways, through its representative, one C. H. Apple, the District Engineer, to the effect that the claimant was to take care of the street cleaning necessary on State Bond Issue Route No. 16, through the business district of Shelbyville, Illinois, and pursuant to that agreement, claimant was to render a statement quarterly to the Department. According to that agreement, the Clerk of the City of Shelbyville mailed a statement of services for the period from April 1, 1932 to June 30, 1933, in the amount of $125.46. The amended complaint further alleges that after the Department had received the statement, the Clerk was notified by C. H. Appel, District Engineer, that it was impossible for that Department to pay bills incurred prior to July 1, 1933 because the appropriation for the biennium prior to July 1, 1933 elapsed on September 30, 1933. This letter from the Department is attached to the amended complaint and is known as Exhibit C, and is dated February 1, 1935. The letter further stated that they were willing to schedule the invoices for cleaning from July 1, 1933 to December 31, 1934, and asked for three more copies each of the invoices covering that period.

In a letter from R. T. Cash, District Engineer, under date of July 3, 1936, it was stated that the following sums had been agreed upon but were not paid: The period from April 1 to June 30, 1932, in the sum of $29.52; July 1 to September 30, 1932, in the sum of $29.52; October 1 to December 31, 1932, in the sum of $18.45; January 1 to March 31, 1933, in the sum of $18.45, and April 1 to June 30, 1933, in the sum of $29.52, or a total sum of $125.46.

The Attorney General makes no objection to the allowance of this sum.

We have repeatedly held that where it is conceded that claimant rendered services and furnished supplies to the State, and has not been paid therefor because of the lapse of appropriation out of which payment could have been made,

and the amount is unquestioned, an award will be made for such services and supplies.

Journal Printing Co. vs. State, 8 C. C. R. 673.
Schreiber Lumber Co. vs. State, 8 C. C. R. 381.
Rock Island Sand & Gravel Co. vs. State, 8 C. C. R. 165.

An award, therefore, in the sum of $125.46, payable to the City of Shelbyville, Illinois, is hereby made.

(No. 2092—Claimant awarded $6,611.13.)

COUNTY OF ST. CLAIR, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1937.

LOUIS P. ZERWECK, for claimant.

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

CONTRACTS—*construction of State Highway—construed in entirety—when award for reimbursement made by county in connection with construction of highway may be made.* Where county expended moneys in connection with costs of constructing State Highway, under tri-party contract, providing that State would reimburse it for same, an award may be made for such moneys expended, including charge for engineering, where contract, when construed in its entirety, can be fairly said, to obligate State for such charge.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed by St. Clair County, through its States Attorney, to collect the sum of $7,011.24, which claimant declares the State of Illinois owed it under and by virtue of a certain contract entered into on the 6th day of September, 1929, between the County of St. Clair, party of the first part, The Pennsylvania Railroad Company, lessee of and operating the railroad of the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company, party of the second part, and the State of Illinois, acting by and through its Department of Public Works and Buildings, hereinafter called the State and intervenor.

The county was constructing a county highway known as State Aid Route No. 51, extending from the Village of Caseyville, St. Clair County, Illinois, in a northeasterly direc-

tion to the north line of St. Clair County, Illinois, where it made connection with the City of Collinsville in Madison County, Illinois. The County had petitioned the Illinois Commerce Commission for authority to re-locate the crossing of the Pennsylvania Railroad, and had requested that the new crossing be improved by separating the grades of the railroad and the highway by means of an overhead crossing or viaduct. The Railroad was named defendant, the case being No. 18447, before the Commerce Commission.

The State of Illinois through its Department of Public Works and Buildings intervened. The reason for the intervention by the State was that under the Act of the Legislature, providing for the issuance of a Hundred Million Dollars worth of bonds for the construction of a State wide system of hard roads, S. B. I. Rt. 157, was located and described as follows:

"Beginning at Cahokis and extending in a northerly direction to a point on Route No. 4, known as Sunset Hill; affording Cahokis Church, Edgemont, French Village, Caseyville, Peter's Station, Sunset Hill and the intervening communities reasonable connections with each other."

It was the contention of the Department of Public Works and Buildings that this re-located crossing and grade separation should serve as a portion of said State Bond Issue Route 157 when it was located and constructed, accordingly on to wit: October 25, 1929, Tri party agreement was signed and delivered by the respective parties, the State acting by and through its Department of Public Works and Buildings by H. H. Cleveland, Director and Frank T. Sheets, Superintendent of Highways. A copy of the agreement is set forth in the complaint.

In accordance with the agreement and the subsequent order entered by the Commission in case No. 18447, the County of St. Clair, advertised for and awarded contracts for the construction of this grade separation. The contracts were known officially as Section 59C-15d and Section 59D-15d.

The agreement provided that when the State should construct State Bond Issue Route 157 and incorporate the aforesaid grade separation as a part of its Route 157, the State would reimburse the County of St. Clair, to the extent of one-half of the cost of the grade separation, provided, the Pennsylvania Railroad Company would pay the remaining half of the cost. The costs of the work ordered by the Com-

mission in the case before them, being the case mentioned herein, and agreed to by the parties in supplementary claims as forming the basis of division of costs between the railroad company, and the county and State are as follows:

Payment on contracts and costs of materials of construction, paid by the county, exclusive of engineering and overhead	$140,224.57
10% of the above item as provided for in the agreement as engineering and overhead costs to the county	14,022.47
Cost of work performed by the P. C. C. & St. L. including percentage for overhead and engineering costs as provided for in the agreement	2,944.56
Total costs, used as basis for division of costs	$157,191.70
Payments made to the county by P. C. C. & St. L. and credit for work done by P. C. C. & St. L.	78,595.84
Balance due county from State of Illinois, as provided for in agreement	78,595.86
Credit allowed by Department of Public Works and Buildings, State of Illinois to the County of St. Clair, on account of work performed under the agreement	71,584.62
Balance due county from State of Illinois, account of work performed under terms of agreement	7,011.24

This is shown by an itemized account of the costs marked Exhibit "B" and attached to the complaint.

The railroad company paid its one-half of the cost but the Department of Public Works and Buildings refused to pay a portion of the costs referred to under Section 3 of said tri-party agreement. That part of the contract objected to by the State, is as follows:

Section 3. The work chargeable to grade separation, the cost of which is to be borne fifty (50) per cent by the county and fifty (50) per cent by the railroad as hereinafter provided, shall comprise the following: * * *

(c) * * * An additional charge of ten (10) per cent shall be added to the actual cost of all work performed to cover cost of engineering, supervision and accounting.

Section 6 of the agreement provides:

"When the State constructed State Bond Issue Route 157 and incorporated that aforesaid grade separation as a part of its Route 157 which the State hereby agrees to do, the State will reimburse the county for an amount the county has expended on the grade separation, not to exceed half (½) of the cost of separation of grades, *provided, further*, that the railroad has paid the remaining half (½)".

It appears that the State itself incorporated this grade separation in the State Bond Issue 157, and the railroad com-

pany paid its one-half, including the ten per cent of the costs for engineering. The Department of Public Works and Buildings has made a partial refund for its share of the cost, but refuses to include in the item of cost, the ten per cent charge for engineering, it being claimed by the Department of Public Works and Buildings that the Hundred Million Dollar Road Bond Issue Act does not allow such a refund, and under these circumstances, an award is asked in the sum of $7,011.24.

It appears to the court that the contract entered into by the State, through its proper Department, is one to be construed in its entirety, and a contract which the Department had a legal right to make and that the State is bound thereby. Costs of engineering was a necessary part of the whole contract and certainly necessary for the intelligent completion of the job, and expressly provided for in the contract. The railroad company recognized this and paid their portion, and that is the only contingency upon which the State could refuse to pay, because it is specifically provided in the contract that the State would reimburse the county for an amount the county has expended on the grade separation, not to exceed half of the cost of separation of grades, provided, further that the railroad has paid the remaining one-half.

Upon a rechecking of the figures, it appears that the amount actually owed by the State is $6,611.13 and not $7,011.24, and this is admitted and agreed to by the State's Attorney of St. Clair County.

For the reasons aforesaid, an award in the sum of $6,611.13 in favor of the County of St. Clair is recommended.

(Nos. 2749-2750 consolidated—Claimants awarded $899.64.)

HALDANE CLEMINSON, No. 2749 AND SOUTHTOWN HOSPITAL CORPORATION, A CORPORATION, No. 2750, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1937.

ALTHEIMER, MAYER, WOODS & SMITH, *for claimants.*

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

SERVICES—*when award may be made for.* Where it clearly appears that medical services and hospital treatment were furnished State employee, for which State would be liable under provisions of Workmen's Compensation Act, charge for which is reasonable and customary, and bill for same was not presented before lapse of appropriation out of which it could be paid, an award for amount will be made, upon claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The above cases were consolidated, as they grow out of the same statement of facts. The claim of Dr. Haldane Cleminson is for the sum of $511.00, and the number of that suit is 2749 and the claim of Southtown Hospital Corporation is for the sum of $388.64, said claim being numbered 2750. Each claim is duly itemized, and said claims are for services rendered to Joseph Reilly, an employee of the State.

In No. 2749 it is alleged that the claimant, being a practicing physician, on November 3, 1934, attended Joseph Reilly, an employee of the respondent in the Department of Highways. It appears that about 6:50 p. m., Reilly was engaged in repairing certain street lights and street barricades at 5200 West Fifty-fifth Street, Chicago, Illinois, in the discharge of his duties, and that while so employed, a certain automobile driven by one Frank Ackerman, a resident of Milwaukee, Wisconsin, collided with him and caused serious injuries so that it was necessary to procure immediate surgical, medical and hospital treatment for Reilly. He was taken to the Southtown Hospital Corporation, 5701 South Wood Street, Chicago, Illinois, and was given emergency and first aid treatment.

Upon an examination of Reilly it was found that he had sustained the following injuries: a multiple compound comminuated spiral fracture of the tibia of the lower left leg, a multiple compound comminuated fracture of the fibula, a laceration of the scalp, and divers other contusions and abrasions about the head, neck and body.

It appears that Dr. Cleminson attended Reilly from November 3, 1934, to and including August 18, 1935, both while he was confined to the Southtown Hospital and after his discharge therefrom, during which time the several fractures sustained by the said Reilly were reduced and a recovery effected under the care and treatment of claimant. A complete statement of the services rendered is included in

the Bill of Particulars attached to the complaint, amounting to $511.00, and this is a reasonable charge for similar services made by physicians and surgeons in Chicago at that time.

On or about October 15, 1935, the claim was presented to the head of the Maintenance Department of the Division of Highways, District No. 10, Department of Public Works and Buildings, and claimant was advised that the claim could not be paid in the due course of administration by the Department for the reason that most of it had been incurred prior to June 30, 1935, which was the close of the biennium of said Department; that thereafter, on October 16, 1935, claimant forwarded to the Division of Highways, his itemized bill, as set forth in the Bill of Particulars, and on October 21, 1935, claimant was advised by C. W. Ross, Engineer of Maintenance, Division of Highways, Department of Public Works and Buildings, that the claim could not be paid in the due course of administration by the Department for the reason above mentioned, and he was advised to file his claim in this court.

It is set forth in the claim that Reilly had received compensation from the respondent in accordance with the provisions of the Workmen's Compensation Act and that the payments were made without any contest.

The claim for hospital services sets up the same statement of facts, and avers that Reilly was taken to the Southtown Hospital Corporation and there received said emergency treatment and other treatment and that Reilly remained a patient of the hospital from November 3, 1934 to and including December 31, 1934, during which time his injuries were treated and he was ministered to, and certain medicines, dressings, splints and other medical accessories were furnished to him by the claimant, being the hospital, and that upon his discharge, there was due and owing to the hospital for services so rendered, the sum of $388.64. This claim was duly itemized.

All of the facts are conceded, and it appears that both parties were duly diligent in the presentation of their claims.

The Compensation Act provides that an employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter limited, however, to that which is reasonably required to cure or relieve from the effects of the injury.

It appears from the file that the man responsible for the injury, Frank Ackerman of Milwaukee, Wisconsin, was then a representative of the Dealers Transport Company, 7001 South Chicago Avenue, Chicago, Illinois. His employer was insured with the Employee's Liability Insurance Corporation at 175 West Jackson Boulevard, Chicago, Illinois. It appears that on December 31, 1935, Mr. Kendrick Harger, then a district engineer, attempted to collect the amounts due both claimants from the Employee's Liability Insurance Company, and they refused to pay, claiming that under the provisions of Section 29 of the Workmen's Compensation Act, it was the duty of the State of Illinois to pay the compensation as is presented in these claims, it then being encumbent upon the State to make recovery from the insurance company of the amounts paid by the State to the claimants. While this position is undoubtedly arbitrary, we see no other remedy, and would suggest that an appropriate proceeding be commenced against Ackerman's employer. We feel, however, that before doing this, these claims should be paid. There is no dispute as to the facts, or that the amounts claimed are unreasonable.

In view of the Bill of Particulars filed, we hold that the amounts claimed are reasonable, and, we, therefore, recommend an award to Dr. Cleminson in the sum of $511.00, and to the Southtown Hospital Corporation, an award in the sum of $388.64.

(No. 3098—Claimant awarded $44.20.)

INDIAN MOTOR CYCLE COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 11, 1937.

HERMAN H. COHN, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SUPPLIES—*when award may be made for.* Where it is conceded that the State received merchandise, as ordered by it, and that bill therefor, which is unquestioned, was not presented for payment before lapse of appropriation out of which it could be paid, an award will be made for price thereof, on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on May 10, 1937 with the clerk of this court, and on the 17th day of May, 1937, a stipulation was entered into between the claimant and the Attorney General of the State of Illinois, wherein it is stipulated and agreed by the parties that the claimant, pursuant to an order and request on the part of the respondent, sold and delivered on June 12, 1935, to the Illinois Division of Highways Garage, Springfield, Illinois, for the use of respondent, certain motorcycle parts as itemized in the account attached to the complaint, of the reasonable value of $44.20; that at the time these articles were ordered, there was in the appropriation from which they were payable, sufficient funds to pay for the same, and that when the appropriation lapsed on September 30, 1935, there still remained an unexpended balance sufficient to pay for these articles.

It is further stipulated that claimant presented its bill for said articles to the respondent prior to the lapse of said appropriation, but due to the delay in the vouchering of the same for payment, the appropriation lapsed before a warrant therefor was issued. Consequently, the claimant has not been paid.

We have repeatedly held that:

"Where claimant has rendered services or furnished supplies to the State on the order or request of an official authorized to contract for the same, and submits a bill therefor within a reasonable time, and due to no neglect or fault on the part of claimant, same is not approved and vouchered for payment before the appropriation from which it is payable lapses, an award for the reasonable and customary value of the services or supplies will be made where at the time the expenditure was contracted there were sufficient funds remaining in the appropriation to pay for same."

Rock Island Sand & Gravel Co. vs. *State*, 8 C. C. R. 165.

Individual Towel & Cabinet Service Co. vs. *State*, 6 C. C. R. 407.

Grant Tire Co. vs. *State*, 7 C. C. R. 183.

The Attorney General admits that this claim falls within the rule and should be paid.

An award, therefore, in the sum of $44.20 in favor of Indian Motor Cycle Company, a corporation, is hereby approved.

(No. 2881—Claimant awarded $96.00.)

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

Opinion filed June 11, 1937.

FORD L. RENDLEMAN, for claimant.

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

FEES—*coroner—inquests, deaths of inmates of State Charitable Institution—when award may be made for.* The facts in this case are almost identical with those in the case of *Taylor* vs. *State*, 8 Court of Claims Reports, Page 46 and the opinion of the court in that case is applicable herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint was filed herein on April 9, 1936, claiming that $150.00 was due the claimant who is the coroner of Union County, Illinois, and alleging that on February 11, 1936, and prior thereto, there was located in said county, the Anna State Hospital for the Insane, to which is committed insane people of Southern Illinois.

The complaint sets forth Section 27 of Chapter 85 of the Revised Statutes of the State of Illinois, which in substance provides that in the event of a sudden or mysterious death of any inmate of any public or private hospital or asylum for the insane, a coroner's inquest should be held, as provided by law in other cases, and that in cases where the deceased patient was an inmate of any State charitable or penal institution, and the fees for holding such inquest cannot be collected out of the estate of such deceased inmate, such fees shall be paid by the Department of Public Welfare out of the State treasury.

A motion to amend the complaint was filed on July 21, 1936, claiming that $96.00 was due the claimant, and said motion set forth that the following named persons or inmates of the Anna State Hospital suddenly and mysteriously died and inquests were held:

Date 1935	Name	County	Inquest	Amount
Mar. 20	Phillip Nagel	Marion	Inquest	$16.00
Mar. 27	Walter Cothern	Perry	Inquest	16.00
Mar. 30	Olive Toler	Marion	Inquest	16.00
May 29	Adam Johnson	Wabash	Inquest	16.00
June 8	Wm. Crawford	Union	Inquest	16.00
June 15	Frank Merski	Franklin	Inquest	16.00
				$96.00

A copy of the complaint was forwarded to the Department of Public Welfare and by the Department to Dr. R. A. Goodner, managing officer at the Anna State Hospital, for investigation. Dr. Goodner submitted that the above and foregoing was a true list of inquests held by the claimant for which he had not been paid, and to which his claim should apply. Dr. Goodner did not return the complaint to the Department of Public Welfare, but sent the copy directly to the clerk of this court, with a list of inquests, with the following certificate:

"When checked with the records of the Anna State Hospital, Anna, Illinois, this invoice is found to be correct.

(Signed) R. A. GOODNER, Managing Officer."

The original complaint was amended in compliance with the report of Dr. Goodner. Nothing appears concerning the financial status of the estates of the various deceased inmates, except the statement of Dr. Goodner, the managing officer, to the effect that the invoices were correct.

The managing officer of each charitable or penal institution of this State has rather extensive executive and administrative powers and duties, and he undoubtedly had knowledge of the financial status of the inmates of his institution.

One question, however, arises as to one item of $16.00, which is for an inquest on an inmate committed from Union County. This is the county wherein the institution is located. The law prior to 1931 required the fees of the coroner for inquests held on persons whose estates were insolvent to be paid out of the county treasury. An amendment of 1931 provided that where the deceased was a patient or inmate of a State institution, the fees should be paid by the State. We hold that this is a special statute on the subject and hold that it was not intended to make a distinction as to the fees of the coroner for holding an inquest on an inmate of a State institution committed from the county in which the institution was located. No defense to this claim has suggested itself to the court.

We, therefore, recommend an award in the sum of $96.00 in favor of the claimant, Dr. H. O. Taylor.

(No. 2762—Claimant awarded $2,225.00.)

PAUL H. BOYERS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

CLARENCE B. DAVIS, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

PERSONAL INJURY—*member of Illinois National Guard—when award may be made for.* An award may be made to member of Illinois National Guard, for personal injuries sustained by him while in the performance of his duties as such, under authority of Section 11 of Article 16 of Military and Naval Code.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant Paul H. Boyers, on the 18th day of August, 1934 was a member of Company "M", 129th Infantry, Illinois National Guard, and on that day was quartered at Camp Grant by order of his company commander. The record discloses that while he was sleeping in a shelter tent, placed pursuant to the orders of his commanding officer, an electrical storm occurred and lightning struck the tent in which claimant was sleeping. One man was killed outright and claimant was unconscious for several hours. He was unable to see anything out of the left eye for several weeks after the accident. Dr. William Wright of Sterling, Illinois, testified that he examined plaintiff on August 20, 1934: that the left eye showed a hemorrhage in the cornea, the pupil was slightly enlarged; there was a sagging of the left side of the face showing a paralysis; also an impairment in the use of the left arm and leg. The heart was enlarged. The doctor testified to his condition at the time of the hearing on July 31, 1936 and stated that there was an absence of reflex in the entire left arm and leg and a lack of strength in both; that he has approximately total loss of the use of the left eye, and that his general physical ability is about fifty (50) per cent of normal. Immediately after the accident claimant was taken to the camp hospital and three days later was taken to Chicago with the medical corps, was treated there and was then returned to his home in Sterling. A medical board convened at Fort Sheridan, February 12, 1935, and after careful consideration of all the evidence, diagnosed the

condition of Private Boyer as "Paralysis, partial, left arm and leg, involving flexor muscle group, incurred in line of duty."

According to the record claimant has been retained in the employ of his previous employer in limited work, and is able to earn approximately fifty (50) per cent of his previous earnings. At the time of the injury he was married, and his wife and one child now eleven years of age constitute his family. His previous earnings were between Thirty ($30.00) Dollars and Thirty-four ($34.00) Dollars per week. In the absence of any definite rate of compensation for one injured while in line of duty in the military service of the State, and under the facts appearing in this record we believe that an award made in line with the provisions of the Workmen's Compensation Act is equitable and just. Total disability under such rule would be compensated for at the rate of Four Thousand Four Hundred Fifty ($4,450.00) Dollars. An award is therefore made in favor of claimant herein on the basis of fifty (50) per cent disability, in the sum of Two Thousand Two Hundred Twenty-five ($2,225.00) Dollars. It is further ordered that this cause should be retained on the docket for such further orders as may be in accordance with law.

(No. 2244—Claim denied.)

FRIED & BELL PAPER CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

MORRIS A. HAFT, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid through negligence or inadvertence—with full knowledge of facts—is voluntary payment—cannot be recovered—failure to avail self of remedies—bars award.* The facts in this case are somewhat similar to those in the case of *Western Dairy Company* vs. *State*, No. 2916, *ante*, and the principles involved are substantially the same as those in such case and the case of *Butler Company* vs. *State*, No. 2500, *ante*, and the opinions in such cases apply with equal force herein.

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

From the stipulation of facts herein it appears that the claimant corporation was organized under the laws of this State on October 3d, 1925; that its authorized capital stock consisted of 750 shares of common stock of the par value of $100.00 per share; that the issued stock of the company at no time exceeded $55,900.00; that the articles of incorporation set forth that the amount of capital stock actually paid in was $60,000.00; that all of claimant's business has been located in the State of Illinois; that during the month of February in each of the years 1929, 1930 and 1931, claimant filed with the Secretary of State its annual report as required by law, in which it failed to set forth in the space provided therefor, or elsewhere therein, the amount of its issued capital stock; that on February 22, 1932, claimant filed with the Secretary of State its annual report in which it set forth the total amount of its issued capital stock at the sum of $55,900.00 and further stated in such report that it elected to pay its franchise tax on the basis of its entire issued capital stock; that in each of the years from 1929 to 1932, inclusive, the claimant was assessed and paid a franchise tax in the amount of $37.50, based upon its total authorized capital stock of $75,000.00; and that none of such payments was made under protest.

Claimant contends that in each of such years its franchise tax should have been based upon the total amount of its issued capital stock, to wit, $55,900.00, and that the amount of the franchise tax which should have been assessed against it in each of such years was $27.95, and asks for a refund of the amount so overpaid by it as aforesaid.

The Attorney General contends that claimant is not entitled to an award for any over-payments made by it, for the reason that payment of the tax assessed against it in each year was made voluntarily and with a full knowledge of the facts, and therefore cannot be recovered. Several other contentions are made by the Attorney General, but in the view we take of the case, it will not be necessary to consider them.

This claim having arisen prior to the adoption of The Business Corporation Act, claimant's rights must be determined by the terms and provisions of The General Corpora-

tion Act of this State, approved June 12th, 1919, in force July 1st, 1919, as amended.

Section 112 of such Act provides that between the 1st day of February, and the 15th day of June of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the tax assessed against it, and that objections, if any, to such assessment will be heard by the officer making such assessment, upon request by the corporation on a date not later than the 25th day of June, etc.

Section 111 of the same Act provides that the Secretary of State shall have power to hear and determine objections within the time specified in the Act, and after hearing, to change or modify any assessment.

Substantially the same provisions are incorporated in the present Business Corporation Act.

There is nothing in the record to indicate that the claimant made any objection to the tax assessed against it, or that it requested a hearing thereon.

In the case of *Butler Co.* vs. *State,* No. 2500, decided at the present term of this court, after a comprehensive review of the authorities, we held in effect, as follows:

1. Where an illegal or excessive tax is paid voluntarily and with the full knowledge of all the facts, it cannot be recovered.

2. Where such tax is paid under a mistake of fact, it is considered as having been involuntarily paid, and may be recovered.

3. Where such tax is paid under a mistake of law, it may not be recovered.

4. Where a franchise tax is erroneously assessed and no objection is made thereto, and no request is made for a hearing thereon in accordance with the statute, and the tax is paid, such payment constituted a voluntary payment within the legal meaning of those words.

In that case the court, in conclusion, said:

"From the record in this case it appears that claimant made no objection to the tax assessed against it and made no request for a hearing thereon, in accordance with the statute; also that the tax in question was paid without protest, and with a full knowledge of all the facts. Under the decisions

of our courts, such payment constituted a voluntary payment within the legal meaning of those words, and therefore the claimant is not entitled to have the same refunded."

What we said in the Butler Company case applies with special force to the facts in this case.

Furthermore, in the case of *Western Dairy Co.* vs. *State*, No. 2916, also decided at the present term of this court, we held that where an illegal or excessive tax is imposed by reason of the negligence or inadvertence of the taxpayer, and thereafter paid by him, such payment is not made under a mistake of fact and cannot be recovered.

The rule laid down in the Butler Company case and the Western Dairy Co. case was thereafter approved in the case of *Stollar-Herrin Lumber Co.* vs. *State*, No. 2990, and is decisive of this case.

Award denied. Case dismissed.

(No. 2687—Claimant awarded $16.00.)

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

Opinion filed June 30, 1937.

Claimant, pro se.

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

FEES—*coroner—inquest, death of inmate of State Penal Institution—when award may be made for.* Where coroner of proper county conducted inquest as provided by law on body of deceased inmate of State Penal Institution, who left no estate out of which fees therefor could be collected, and bill for such fees was not presented for payment before lapse of appropriation out of which same could be paid, an award may be made for same on claim filed within a reasonable time.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed pro se June 18, 1935, and is for the sum of $16.00. It is charged that during the month of August, 1932, claimant was coroner of Randolph County; that he was summoned to the Southern Illinois Penitentiary at Menard for the purpose of holding an inquest on August 14, 1932, on the body of John Parks, an inmate of said institution, who had been murdered.

The claim was not filed in time for the appropriation then made for the then biennium, and when the claim was presented, the appropriation had lapsed.

The file contains a letter under date of June 29, 1935, from A. L. Bowen, Director of the Department of Public Welfare, wherein he states:

"Mr. Jackson, who was coroner of Randolph County in August, 1932, has set up the correct statement of the facts.

"Mr. Jackson's claim for $16.00 is his fee in the inquest over the body of John Parks, a prisoner at the Menard Branch of the Illinois State Penitentiary, and is a valid claim."

We take it that the last clause of Mr. Bowen's letter to the effect that this claim "is a valid claim" is the result of a proper investigation made by Mr. Bowen, and that the deceased, John Parks left no estate out of which the coroner's fee could be paid.

Section 26 of Chapter 53 of our statute provides that such fee shall be certified by the court and when the same cannot be collected out of the estate of the deceased * * *, in the case of inmates of any State charitable or penal institution, by the Department of Public Welfare, out of the State treasury.

We have repeatedly held that where it appears that claimant performed services required by law but before application for payment was made the appropriation lapsed, and it is conceded by the proper Department that the State is indebted to claimant in the amount claimed, an award for same will be made.

Ruediger vs. *State*, 7 C. C. R. 11.
Miller vs. *State*, 7 C. C. R. 251.

An award is therefore made in the sum of $16.00.

(No. 2571—claim denied.)

LAKE ZURICH MILK CO., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

MICHAEL B. RODERICK, for claimant.

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

CONTRACTS—*party to cannot impose condition not provided in limitation of liability under in event of contingencies must be provided for in.* Where claimant entered into contract with State to furnish milk to it at certain prices, agreed therein, and shortly after execution of same, an order was issued by Secretary of Agriculture of United States, purporting to fix re-sale price of milk, compliance with which order by claimant obliged it to pay higher price for milk than at time of execution of contract, no claim will lie against State for difference in price of milk supplied under said contract, resulting from compliance with said order by claimant, as it cannot impose a condition not provided in the contract. If party to a contract desires to limit his liability thereunder in the event of contingencies he must make provision therefor in said contract.

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

Claimant filed its complaint herein on January 8th, 1935, and alleges therein substantially as follows:

That on or about June 20th, 1933 claimant entered into a written contract with Chicago State Hospital at Dunning, in which it agreed to supply said hospital with milk and cream during the months of July, August and September, 1933, at the following prices, to wit: 12½c per gallon for milk, and 10½c per pint for cream.

That on July 28th, 1933 an order was issued by the Secretary of Agriculture of the United States establishing a so-called Milk Code in the Chicago area, effective August 1st, 1933, which code purported to fix the re-sale price of milk in that area at 30c per gallon.

That prior to the establishment of such milk code, claimant paid the farmer $1.45 per cwt. for Class I milk, and 84c for surplus milk, and delivered to the respondent nothing but surplus milk; that after the code became effective, claimant was required to pay the farmer $1.75 for Class I milk, and was also required to deliver Class I milk to the hospital; that by reason thereof, it lost 91c per cwt. on all milk delivered to the hospital during the months of August and September, 1933, to wit, 307,275 pounds.

That claimant delivered 18,000 gallons of milk to the respondent during the month of August, and 17,550 gallons during the month of September, and on account of the requirements of such milk code, sustained a loss of 12½c per gallon on the amount so delivered.

The Attorney General has entered a motion to dismiss the case for the reason that there is nothing in the complaint

to indicate that the milk which was delivered by the claimant to the respondent was not paid for at the contract price; that having paid the contract price therefor, respondent is discharged from any further liability to the claimant; in short, that claimant is not entitled to recover anything whatsoever over and above the contract price.

Section 41 of The Uniform Sales Act of this State, Bar Association Revised Statutes, 1935, Chap. 121a, Par. 44, provides as follows:

"It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale."

In this case the seller delivered the goods and the buyer paid for the same in accordance with the contract of sale. The complaint does not aver, nor does the proof show any provisions of such contract which purport to cover a contingency such as arose in this case. If it was intended to provide against any such contingencies, adequate provision therefor should have been made in the contract.

The case of *Thomson* vs. *Thomson,* 315 Ill. 521, involved contracts made on May 23d and June 12th, 1917, for July delivery of 20,000 bushels of corn. On account of the exigencies of war demands, it would have been extremely difficult if not impossible for the seller to deliver the corn at the time specified in the contracts. In that case, however, the purchases were made in accordance with and subject to the rules, regulations and customs of the Board of Trade of the City of Chicago. On July 5th, 1917 the Board of Trade adopted a resolution fixing a price which should be the basis of settlement for all contracts made prior to that date; and the Supreme Court held that under the provisions of the purchase agreement, settlement was required to be made on the basis of the price fixed by resolution of the Board of Trade. In considering the question as to the effect of a contract for purchase or sale containing no such provisions, the Supreme Court, on page 526, said:

"One who contracts cannot be relieved from the obligation of his contract which binds him to perform his agreement, and he cannot be deprived of the benefit of his lawful contract, and the rights which it confers upon him, without his consent, and in every case the question is what the contract was and what obligation it created. A party to a contract has no right to impose a condition not provided for in the contract itself. (*Illinois Con-*

ference Female College vs. *Cooper*, 25 Ill. 148.) Neither would it be any defense in such case that by reason of the declaration of war against Germany on April 6, 1917, and the unusual conditions resulting, and sure to result in the future, in abnormally high prices, which would have enabled purchasers to compel sellers to settle their contracts at extortionate prices, the Board of Trade, by resolution of the board of directors, provided that after July 5, 1917, settlement of the contract in question should be made in the manner in which they were made. Neither would it be any defense to a suit for damages resulting from a breach of such contract that a compliance with such contract would entail great hardship upon defendants, or that by reason of the exigencies of the World War the fulfillment of the contract would be rendered extremely difficult, or even impossible, where defendant has failed to limit in the contract his liability in respect to such contingencies. *Illinois Central Railroad* vs. *McClellan*, 54 Ill. 58; *Illinois Central Railroad Co.* vs. *Cobb, Christy & Co.*, 64 id. 128; *Toledo, Wabash and Western Railway Co.* vs. *Lockhart*, 71 id. 627; *Phelps* vs. *Illinois Central Railroad Co.*, 94 id. 548."

The case of *Thomson* vs. *Thomson* was cited with approval in the case of *Green* vs. *Ashland State Bank*, 346 Ill. 174-184, and is decisive of the question here involved.

Under the law as above set forth, plaintiff has no right to recover under the facts set forth in the complaint, and the motion of the Attorney General to dismiss the case must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2226—Claim denied.)

MONARCH FIRE INSURANCE CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

HARLINGTON WOOD, for claimant.

OTTO KERNER, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*when payment of deemed voluntary—not under mistake of fact—when award for refund denied.* Where amount of franchise tax is computed by Secretary of State, in accordance with law, based on information submitted by taxpayer, and such amount is paid by it, with full knowledge of facts, or opportunity to obtain same, such payment is a voluntary payment, and if in excess of amount rightfully due, is not made under mistake of fact and no award for refund of such excess can be made.

MR. JUSTICE YANTIS delivered the opinion of the court:

Under a stipulation of facts filed herein, it appears that on the 15th day of June, 1933 the Superintendent of Insurance

of Illinois assessed the claimant under "An Act in Relation to the Taxation of Non-Resident Corporations, Etc. For the Privilege of doing an Insurance Business in this State," approved June 28, 1919, the amount of $5,965.13, being two and one-half (2½) per cent tax on $238,605.16 gross premiums received in Illinois during the year ending December 31, 1932, less local tax paid in 1932 amounting to $694.64 and less Fire Department taxes paid in 1932 of $2,874.55, making a total deduction of $3,569.19, or a net balance of $2,395.94 paid on June 13, 1933. Claimant seeks a refund on account of personal property taxes paid by its agents in Chicago in 1932, amounting to $799.10 and $104.74, or a total of $903.84, vouchers for such payments not having been submitted for credit against the Privilege Tax assessed.

Plaintiff has a similar claim pending in the case of *Monarch Fire Insurance Company* vs. *State,* C. of C. No. 2227, for a refund of $610.58 for over-payments alleged to have been made on the 14th day of May, 1932, and plaintiff has confused the latter claim somewhat in its Statement, Brief and Argument in the instant case, but regardless of the confusion as to amounts, the claim in each case is based upon a payment made under a purported mistake of facts; claimant alleges that by oversight it neglected as a matter of fact to procure a proper credit to apply upon the Privilege Tax which it might have done under the law; that such mistake of fact was caused by the forgetfulness or oversight of claimant; that such omission amounted to a mistake of fact and that claimant therefore is entitled to an award. Respondent contends that the mistake was not in the payment of the Franchise Tax which was legally due, and that if any mistake was made it was entirely that of the tax-payer itself, and was one that arose entirely by virtue of error and omission in its own office, for which no refund can be legally claimed.

In support of its claim plaintiff cites *Moorman Manufacturing Co.* vs. *State,* 8 C. C. R. 106, in which the following statement is quoted:

"As a general rule a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back * * * Where one by mistake of fact pays more than is due upon a debt or obligation, he may recover the over-payment * * * where money is paid to another under influence of a mistake of fact, that is on the mistaken supposition of the existence of a specific fact which would entitle the other

to the money, and the money would not have been paid if it had been known to the payor that the fact was otherwise, it may be recovered."

In the instant case there was a legal obligation by statute requiring claimant to pay a Franchise Tax. It was further its duty to submit a proper statement to the Secretary of State's Office, upon which to base such payment. The details of its accounts and the credits to which it was entitled by law were known to the payor. The fact that some clerical employee failed to make up a proper report to send to the Secretary of State is not such a mistake of fact as to bring the claim within the exception to the rule of the well settled law of this State "That a tax which is paid voluntarily and not under duress or compulsion cannot be recovered back." (*Oppenheimer & Co.* vs. *State*, 6 C. C. R. 465.)

"The payment of a tax will be deemed voluntary where it is paid with full knowledge of the facts and in the belief that such payment is legal. Taxes so paid cannot be recovered even though they are illegal, in the absence of a statute authorizing such recovery."

Richardson Lubricating Co. vs. *Kinney*, 337 Ill. 122.

The cases of *Anderson* vs. *State*, 8 C. C. R. 157 and *Fowler* vs. *State*, 8 C. C. R. 160, cited by claimant, are not considered as supporting its claim, as in both those cases the mistake of fact was mutual and was the fault of respondent.

Notwithstanding the views expressed in the case of *Firemen's Insurance Company, etc.* vs. *State*, 2 C. C. R. 220, the court believes that the correct expression as to the responsibility of the State and the right of claimant herein are correctly expressed in *Seiders, etc.* vs. *State*, 7 C. C. R. 9, i. e., where it appears that the Secretary of State has computed a Franchise Tax on information furnished by payor and has followed the directions of the Legislature in computing and collecting such tax, and a claimant thereafter, because of an error in the records of his own office and in the information furnished to the Secretary of State, claims a payment has been made in excess of the amount otherwise legally due, and such excess payment is in no way shown to be the fault of the Secretary of State or the State of Illinois, the court is of the opinion that no refund is due. As a matter of public policy, the various State officers and taxing bodies should be able to rely upon the information furnished by those applying for Franchise licenses, and where a tax or license fee is

legally due and the applicant submits erroneous information and thereafter voluntarily pays the license fee or tax that has been correctly computed from such information, no sufficient authority of law exists in the opinion of the court to justify a refund on any portion thereof. An award is denied and claim dismissed.

(No. 2227—Claim denied.)

MONARCH FIRE INSURANCE CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

HARLINGTON WOOD, for claimant.

OTTO KERNER, Attorney General, GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*when payment of deemed voluntary—not under mistake of fact—when award for refund denied.* The facts in this case and the principles involved are similar to those in the case of *Monarch Fire Insurance Co.* vs. *State*, No. 2226, *ante*, and the opinion in that case is applicable herein.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Six Hundred Ten and 58/100 ($610.58) Dollars for local taxes paid by it during 1931, and for which it failed to take credit in its franchise tax payment to the State of Illinois, on the 14th day of May, 1932. A similar situation as to facts and law exist herein as evidenced in the case of *Monarch Fire Insurance Company* vs. *State*, Court of Claims No. 2226, decided at the present term. For the reasons therein stated, an award herein is denied and claim dismissed.

(No. 2633—Claimant awarded $4,086.90.)

WILLIAM WHALEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 30, 1937.

JAMES M. BARNES AND FRANK H. SULLIVAN, for claimant.

OTTO KERNER, Attorney General, GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may be made.* Where employee sustains accidental injuries, arising out of and

in the course of his employment, while engaged in extra hazardous employment, an award for compensation may be made in accordance with the provisions of the Workmen's Compensation Act, upon proper notice being given, claim made and application filed for same within time provided in Act.

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

From June 15th, 1933 to April 19th, 1934 the claimant was in the employ of respondent at the Illinois School for the Deaf at Jacksonville, Illinois, and was assigned to the care and maintenance of the grounds and buildings;—his duties including the making of minor repairs on the exterior of the buildings.

The Illinois School for the Deaf consists of thirty-two buildings, including dormitories, school buildings, dairy buildings, horse barns, boiler house, power plant, bake shop, laundry, paint shop, machine shop, shoe shop, and a shop in which woodwork is done. There are machines in the shoe shop which are operated by the pupils, and saws and various types of machinery for woodwork in the workshop. The administration building is a four-story building about three hundred feet long, and is equipped with fire escapes.

While claimant was in the performance of his duties on April 19th, 1934, and while lifting an iron window grate, such grate slipped and scratched his left leg and dropped on the large toe of his left foot, causing the same to bleed. The injury caused claimant some pain, but he did not quit work. The next day he went to the doctor. On the second day after the injury his left leg and foot were swollen and he was removed to the hospital where he remained under the care of Dr. F. A. Norris until July 8th, 1934. At the time he was removed to the hospital, infection had set in and spread rapidly to the entire leg. Shortly thereafter he became delirious and was in that condition most of the time while he was in the hospital. Multiple incisions were made on the left leg, practically all the way down the leg. He continued under the care of Dr. Norris until December 5th, 1935.

Claimant was sixty-seven years of age at the time of the accident, was married, and had no children under the age of sixteen years.

The medical testimony consisted of the evidence of Dr. F. A. Norris, who treated the claimant from the time he en-

tered the hospital on April 21st, 1934, until December 5th, 1935; and Drs. George L. Drennan and William A. Thomas who examined the claimant on behalf of respondent. There is no dispute as to the nature and extent of the claimant's disability. Dr. Norris stated that claimant's illness was the result of the injuries he received, and all of the doctors agreed that claimant is totally and permanently disabled for occupation as a laborer.

Dr. George L. Drennan and Dr. William A. Thomas, who examined the claimant on October 6th, 1936, at the request of Mr. D. T. Cloud, managing officer of the Illinois School for the Deaf, made an exhaustive report of their findings, and in conclusion say: "After reviewing the history and physical findings we would consider Mr. William Whalen totally and permanently disabled from any gainful occupation."

Upon consideration of the record, the court finds:

1. That on April 19th, 1934, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State.

2. That on said date claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given to said respondent and claim for compensation was made within the time required by the provisions of such Act.

4. That claimant was in the employ of the respondent for less than one year prior to the date of the accident; that the annual earnings of persons of the same class in the same employment and same location during the year preceding the injury were $828.00, and the average weekly wage was $15.92.

5. That claimant at the time of the injury was sixty-seven years of age, was married, and had no children under the age of sixteen years.

6. That no medical, surgical or hospital services were provided by respondent, but all necessary first aid, medical, surgical and hospital services were procured by the claimant at his own expense, and that the amount due therefor is as follows:

Our Saviour's Hospital, Jacksonville, Illinois, hospital services	$397.40
Mrs. Mary Magner, nursing services	295.00
Dr. Frank A. Norris and Dr. Reginald M. Norris, medical and surgical services	127.50

7. That as the result of such accident claimant has sustained a complete disability which renders him wholly and permanently incapable of work; that under the provisions of Section 8a of the Workmen's Compensation Act, the claimant is entitled to the sum of $819.90 for first aid, medical and surgical, hospital and nursing services as aforesaid; that under the provisions of Section 8f of such Act, the claimant is entitled to the further sum of $3,312.00 for complete and permanent disability, payable in weekly installments for the period of 416 weeks commencing on April 20th, 1934; and thereafter a pension during life annually in the amount of $264.96, payable monthly.

8. That the sum of $45.00 has been paid to apply on such award.

9. That 166 weeks compensation has accrued to June 25th, 1937, which amounts, to wit, $1,321.36, less the sum of $45.00 heretofore paid to claimant as aforesaid, is payable at this time, and the balance of said compensation, to wit, $1,990.64, is payable in 249 weekly installments of $7.96 per week commencing July 2d, 1937, and one final installment of $8.60. After such final installment is paid, claimant is entitled to an anual pension of $264.96 payable in monthly installments of $22.08 during the term of his natural life.

Award is therefore entered in favor of the claimant for the sum of Four Thousand Eighty-six Dollars and Ninety Cents ($4,086.90), and a pension for life, all payable as follows:

1. To the claimant William Whalen, forthwith, for the compensation which has accrued from April 20th, 1934 to June 25th, 1937, less the sum of $45.00 heretofore paid to him as aforesaid, the sum of $1,276.36
2. To the claimant William Whalen, forthwith, for the use of Our Saviour's Hospital, Jacksonville, Illinois, for hospital services, the sum of. 397.40
3. To the claimant William Whalen, forthwith, for the use of Mrs. Mary Magner, for nursing services, the sum of 295.00
4. To the claimant William Whalen, forthwith, for the use of Dr. F. A. Norris and Dr. Reginald M. Norris, for medical and surgical services, the sum of 127.50

5. To the claimant, William Whalen, the sum of.. 1,990.64
payable in 249 weekly installments of $7.96 per week, commencing on July 2d, 1937, and one final installment of $8.60.

After the last installment of such compensation has been paid as aforesaid, the claimant William Whalen, shall be paid an annual pension for and during his natural life in the sum of $264.96, payable in monthly installments of $22.08, commencing one week after the payment of the aforementioned final installment of $8.60.

This award being for personal injuries of a State employee is subject to the provisions of an Act entitled, "An Act making an appropriation to pay compensation claims of State employees and providing for the method of payment thereof," approved July 2, 1935 (Session Laws of 1935, p. 49).

In accordance with the provisions of such Act, this award is subject to the approval of the Governor and upon such approval, is payable from the appropriation from the general fund in the manner provided by such Act.

Jurisdiction of this cause is retained for the purpose of making such other or further order or orders herein as may be in accordance with the terms and provisions of the Workmen's Compensation Act of this State.

ADVISORY OPINIONS FURNISHED BY COURT OF CLAIMS UPON REQUEST OF ILLINOIS EMERGENCY RELIEF COMMISSION.

The Illinois Emergency Relief Commission having requested the Court of Claims for advice concerning certain claims made against it by employees for compensation for accidental injuries, the court in compliance with said request furnished the following advisory opinions, based upon the facts submitted and set forth in each of the matters hereinafter set forth.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 1.

Payment of $33.00 Advised.

SAM MORRISON, Claimant *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 8, 1936.

STATEMENT OF FACTS.

Sam Morrison, Sr., 3513 Marion Avenue, Belleville, Illinois, claims to have sustained an injury on January 7, 1935, to the fourth finger on his left hand while working as a laborer on Project No. 281-B15-25. The project consisted of cleaning sewers, grading and filling flying fields, repairing fences, roads and drainage ditches. Work was to begin on July 15, 1934, and be completed by December 1, 1935. The project completed cost $32,876; of this sum, $25,748.03 was furnished by the Illinois Emergency Relief Commission, the remaining sum was supplied by the United States Army. The project was approved by A. R. Lord, State's Administrator of Work Relief, who represented the Illinois Emergency Relief Commission, and Lieutenant Colonel Frank M. Kennedy, who was commanding officer at Scott Field.

Sam Morrison, Sr., informed Mr. L. Woombacher, superintendent at Scott Field, on January 8, 1935, that he had sustained an injury to his fourth finger on the left hand while he was using his axe to clear away some of the under-growth and shrubbery which had grown along the fence. His axe became tangled in the branches of a small tree and as a re-

sult he was pitched forward and struck his left hand on a fence post.

Mr. Herman Schmidt, 12 East C Street, Belleville, Illinois, a co-worker, witnessed the accident; in fact, Mr. Schmidt suggested that Mr. Morrison, Sr. go to the infirmary for first aid. A statement of what Mr. Schmidt witnessed is attached to this file. (See Exhibit No. 1.)

Examination of the medical records at Scott Field was made. The record shows that on January 7, 1935, the claimant was given first aid treatment for his injury by Captain Gayle; further, that an X-ray picture was taken of the left hand on the day aforesaid. The X-ray picture failed to show any injury to the bones of said hand, although the X-ray picture did show that the claimant was suffering from an arthritis condition. This condition had been present for sometime prior to the accident. After the first aid treatment was administered, the claimant returned to work and continued to work until his work relief assignment was completed. (See Exhibit No. 2.)

Dr. Zipin, Belleville, Illinois, was interviewed because he had rendered what medical care was deemed necessary in the case after first aid treatment had been rendered. Dr. Zipin stated that the treatment consisted of infra red ray lamp treatments; further, that at this time he felt that the claimant had a permanent disability of about 15 per cent. (See Exhibit No. 3.)

The claimant was taken to Dr. A. B. McQuillan's office at the First National Bank, East St. Louis, Illinois. At this time an examination was made of the fourth finger of the left hand. A copy of the medical examination is attached. Dr. McQuillan also found a 15 per cent total disability of the little finger of the left hand. (See Exhibit No. 4.)

The claimant was also taken to Dr. Wendall Stewart, Murphy Building, East St. Louis, Illinois. X-ray pictures were taken of the left hand. A copy of Dr. Stewart's report is attached. (See Exhibit No. 5.)

The St. Clair County Emergency Relief Committee's records were examined. The records show that for the month of January, 1935, Mr. Morrison, Sr., was assigned to work six hours per day for four days at sixty cents per hour. This particular assignment which the claimant was working on

when injuried was completed on January 8 so the claimant lost no time as the result of his injury. (See Exhibit No. 6.)

The accident which has heretofore been described was in the course of and arose out of Mr. Morrison's employment.

Section 8, Sub-section 5, Workmen's Compensation Act of the State of Illinois: "For the loss of the fourth finger, commonly called the little finger, or the permanent and complete loss of its use, fifty per centum of the average wage during twenty weeks."

The medical examination and doctor's reports show that Sam Morrison, Sr. has a 15 per cent permanent and complete loss of the fourth finger; further, at the time of the accident, Sam Morrison, Sr. had one child under sixteen years of age.

ADVISORY OPINION.

Per Curiam:

Based upon the foregoing statement of facts, and pursuant to the provisions of the Workmen's Compensation Act of this State, we are of the opinion that the claimant is entitled to receive the sum of Thirty Three Dollars ($33.00) from any funds held by the Illinois Emergency Relief Commission for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 2.

Settlement of claim for $1,000.00 and cost of necessary medical services rendered employee, amounting to $75.00, advised.

PAUL T. O'DANIEL, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed November 24, 1936.

STATEMENT OF FACTS.

Paul T. O'Daniel, 1623 Cedar Street, Quincy, Illinois, claims to have sustained an injury on the 18th day of June, 1934, to the left patella while working as a carpenter's helper on Project No. S201-B4-33. Said project consisted of repairing and painting Turner Hall, 926 Hampshire Street, Quincy, Illinois, as offices of the Adams County Emergency Relief Committee. Work on the project started on the 1st day of

June, 1934. All labor, materials and moneys were furnished by the Illinois Emergency Relief Commission. The total cost of the project was $3,390.00. Said project was requested by the Adams County Relief Committee. Said relief committee was represented by Chairman W. F. Gerdes. This project was approved by A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

Mr. O'Daniel was assigned to work on the 18th day of June, 1934, as a carpenter's helper. On the morning aforesaid, he reported to the head carpenter, Mr. Thomas Elick, at the relief office.

Mr. Elick among other things asked Mr. O'Daniel to ascend a fourteen foot ladder which had been placed against the east wall of the building and to nail a two by four board about three feet long to a partition. In the course of Mr. O'Daniel's work, sharp-edged cutting tools were used, such as chisels and saws. Mr. O'Daniel was about ten feet above the floor proceeding with his work when the ladder slipped and he fell to the floor. See exhibit (1). As a result of said fall, claimant sustained a comminuted fracture of the left patella and general bruises. After the accident, at the direction of Fred S. Williams, superintendent of the Adams County Emergency Relief Committee, claimant was taken immediately to St. Mary's Hospital, Quincy, Illinois, where his leg was placed in a plaster cast and remained in same until the 8th day of August, 1934. See Exhibit (2). Claimant was under the care of Dr. F. T. Brenner, Illinois State Bank Building, Quincy, Illinois.

Dr. Brenner was interviewed on or about the 6th day of June, 1935. At this time he claimed that Mr. O'Daniel was permanently disabled for hard manual labor and it would be necessary to operate on the knee to cure the claimant. See Exhibit (2).

Mr. O'Daniel was brought to Chicago on the 7th day of July, 1936, to be examined by Dr. Emil D. W. Hauser, who is an outstanding orthopedic surgeon. At this time Dr. Hauser found the claimant had an 80 per cent disability. Dr. Hauser is also of the opinion that an operation should be performed on the knee to perfect a cure. See Exhibit (3).

The records of the Adams County emergency relief office showed that Mr. O'Daniel had been assigned to work twenty-

four hours on this particular assignment. This assignment was for the month of June and he was to receive $26.00 for his work. This sum was the amount of his budget for said month. The work periods were broken up into four sections. This would mean that the claimant would receive $4.50 per week.

Claimant's medical bills and hospital bills had been paid by the Adams County Emergency Relief Committee.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Adams County Emergency Relief Committee had notice of the accident and demand for compensation was made on his employer within six months after his injury.

Section 8, subsection (e) of the Workmen's Compensation Act of the State of Illinois provides as follows: "For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Section 8, subsection 15, of the Workmen's Compensation Act of the State of Illinois provides as follows: "For the loss of a leg, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during one hundred and ninety weeks."

Medical examination and doctor's report show that Paul T. O'Daniel has an 80 per cent permanent and complete loss of the left leg.

At the time of the accident, the claimant had three children under sixteen years of age, they being Lucina May, aged six; Dolores June, aged four; and Paul Frederick, aged two.

Claimant filed a petition in the Court of Claims which is known as *Paul T. O'Daniel* vs. *State of Illinois* No. 2637. A release has been filed in the Court of Claims asking that the above case be dismissed as claimant and his attorney have agreed to accept one thousand dollars ($1,000.00) in full settlement for his injuries.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion, based upon the attached statement of facts submitted by you in the matter of the claim of Paul T. O'Daniel, we beg to submit our conclusions herewith.

Based upon the foregoing statement of facts submitted by you, we are of the opinion that the claimant is entitled to receive compensation under the terms and provisions of the Workmen's Compensation Act for the injuries sustained by him as shown by said statement; and that the amount of compensation to which he is entitled for his present disability under the facts set forth in such statement is in excess of the amount which the claimant has agreed to accept in full settlement, to wit, One Thousand Dollars ($1,000).

If the claimant is represented by competent legal counsel, and has been fully advised as to his rights in the matter, and is willing to enter into a settlement contract providing for a lump sum settlement of One Thousand Dollars ($1,000.00), we are of the opinion that it is to your advantage to accept his proposition, and enter into a proper settlement contract with him regarding the matter.

We are further of the opinion that any settlement made by you in the matter should be subject to the following conditions, to wit:

1. The settlement contract should include a waiver of the right to review the same by the Industrial Commission or by this court upon the petition of either party thereto as provided by Paragraph H, Section 19 of the Workmen's Compensation Act.

2. The case of said Paul T. O'Daniel against the State of Illinois, No. 2637, now pending in this court, be dismissed.

3. That payment of the agreed amount be made by the Illinois Emergency Relief Commission out of any funds held by it for the payment of such claims.

SUPPLEMENTARY STATEMENT OF FACTS.

An award of One Thousand Dollars ($1,000.00) was sanctioned by the Court of Claims in the above entitled cause on the 8th day of December, 1936, but it has since come to the

attention of the Illinois Emergency Relief Commission that one of the claimant's doctors was not paid by the Adams County Emergency Relief Committee for his services, and the Illinois Emergency Relief Commission is now asking that the court sanction payment of this bill.

Dr. F. T. Brenner, Illinois State Bank Building, Quincy, Illinois, claims that the Adams County Emergency Relief Committee asked him to attend Paul T. O'Daniel after he sustained his injuries while working for the Adams County Emergency Relief Committee. Claimant was treated for six months after his accident. A bill for Seventy-five Dollars ($75.00) has been rendered to the Illinois Emergency Relief Commission by Dr. F. T. Brenner for his services. Said bill has been examined and found to be reasonable for the services rendered. (See Exhibit IV.)

SUPPLEMENTAL ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion in the matter of the claim of Dr. F. T. Brenner against the Illinois Emergency Relief Commission, we beg to submit the following opinion:

On December 8th, 1936, we rendered an advisory opinion in the matter of the claim of Paul T. O'Daniel against the Illinois Emergency Relief Commission. The claim of Dr. F. T. Brenner is for medical and surgical services rendered to said Paul T. O'Daniel in connection with the injuries involved in his aforementioned claim. In our opinion of December 8th, 1936, we concluded that a settlement of the claim of Mr. O'Daniel would be justified under certain conditions set forth in such opinion.

We take it for granted that such conditions have been complied with.

Based upon that assumption, and the statement of facts submitted by you in connection with the O'Daniel claim, as well as the statement of facts submitted by you in the present claim, we are of the opinion that the Illinois Emergency Relief Commission is liable for the amount of Dr. Brenner's claim, and that payment thereof should be made by the Illinois Emergency Relief Commission out of any funds held by it for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 3.
Payment of $109.00 advised.

M. PAULENE ORR, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed January 13, 1937.

STATEMENT OF FACTS.

M. Paulene Orr, 704 South Main Street, Pontiac, Illinois, claims that on the 17th day of August, 1934, she sustained an injury to her jaw and the loss of *four front teeth* as the result of an accident which occurred at the junction of Route No. 116 and Route No. 47.

M. Paulene Orr was employed as a case work aid by the Livingston County Emergency Relief Committee. The duties of a case work aid are to contact families and investigate their needs as to health, employment, and the use of Work Relief money, and also to investigate the receipts and expenditures of drought relief loans, finding pastures for government cattle, delivering clothing and surplus commodities. That on the day heretofore mentioned, the claimant was directed by Mr. Niquette, administrator of the Livingston County Emergency Relief Committee, to check drought relief loan receipts in a certain section of the county. Claimant did not own or operate an automobile so she asked her mother, Mrs. Nina King, to drive her into the county to make the visits. Claimant and her mother left Pontiac on Route No. 116 and arriving at the junction of Route No. 116 and Route No. 47 slowed up the car to make a left turn on Route No. 47; as the car was turning to the left, the right front door opened and, as a result, the claimant fell to the pavement injuring herself as described above. Immediately after the accident, the claimant was taken home by her mother and Dr. Ward called. He immediately ordered the claimant to be taken to St. James' hospital for X-rays.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely * * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Records of the Illinois Emergency Relief Commission shows that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the Criminal Courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty, 43 of said number were dismissed and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

Section 8, subsection (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services and all necessary medical, surgical and hospital services thereafter, limited, however, to that which it reasonably required to cure or relieve from the effects of the injury * * *"

As a result of the accident, the claimant was obliged to pay the following amounts:

Medical service (This amount included tetanus serum)	$15.00
X-rays	8.00
Surgery and dental work	86.00
Total	$109.00

Notice of the claimant's accident was received by Mr. Niquette the same day it happened. Demand for compensation was made by filing a claim in the Court of Claims within six months after the accident. Accident arose out of, and was in the course of, claimant's employment. Said claim is known as *M. Paulene Orr* vs. *State of Illinois*, No. 2585.

Claimant and her attorneys, Hoopes and Pefferle, have agreed to dismiss the claim now pending before the Court of Claims upon the payment of the medical bills. They are not asking for any temporary total disability or permanent total disability. Medical, dental and X-ray charges have been investigated and found to be reasonable for the services rendered.

Claimant has filed a petition in the Court of Claims asking that the case of *M. Paulene Orr* vs. *State of Illinois,* No. 2585, be dismissed.

AMENDMENT TO STATEMENT OF FACTS.

Illinois Legislators on or about the 6th day of February, 1932 created the Illinois Emergency Relief Commission. Chapter 23, Section 464 of the Illinois Revised Statutes, 1935 edition sets out the duties of said Commission which are as follows:

"It shall be the duty of the commission until (March 1, 1937), to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation, through which relief is administered, such as Maintenance Departments, Furniture Shops, Mattress Factories, Canneries and Work Relief Divisions, and other Divisions or Departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentering, plumbing, janitor service, engineering and fireman work. Said furniture shop manufactures furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Divi-

sions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All the above enterprises use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electrical motors, elevators and boilers which are governed by municipal ordinances.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion, based upon the foregoing statement of facts and the amendment thereto, submitted by you in the matter of the claim of M. Paulene Orr against the Illinois Emergency Relief Commission, we beg to submit the following opinion, based upon the aforementioned statement and amended statement, to wit:—

At the time of the accident in question both employer and employee were operating under and bound by the provisions of the Workmen's Compensation Act; that the accident in question arose out of and in the course of such employment; that under the provisions of Section 8A of the Workmen's Compensation Act, the Illinois Emergency Relief Commission is liable for the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury;—and that claimant is therefore entitled to be reimbursed the amount paid by her for medical, surgical and hospital services as aforesaid, to wit, the sum of One Hundred Nine Dollars ($109.00).

We are further of the opinion that payment of such claim should be subject to the following conditions, to wit:

1. That the case of M. Paulene Orr against the State of Illinois, being No. 2585, now pending in this court, be dismissed.

2. That payment of said claim be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 4.

Payment of $153.00 advised.

JOSEPH MELFI, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed January 13, 1937.

STATEMENT OF FACTS.

Joseph Melfi, 2545 North Austin Avenue, Chicago, Illinois, claims to have sustained a right-sided inguinal hernia on the 11th day of April, 1936, while working in the files at the Humboldt District Office of the Illinois Emergency Relief Commission, 2826 West North Avenue, Chicago, Illinois.

Mr. Melfi was employed at the above office as a file clerk. The duties of a file clerk are numerous. He has to file and withdraw case records when requested by the caseworkers, change positions of file drawers and cabinets, do odd jobs around the office, and is sometimes required to fire the boiler and act as general maintenance man throughout the office. On the day heretofore mentioned, it was necessary to move all files and file cabinets to another section of the office, the moving necessitating the carrying of file drawers which were loaded with case records, each one weighing approximately eighty pounds. Claimant carried about five hundred of these drawers in the course of the moving. While Mr. Melfi was lifting one of these drawers out of the file cabinet, the drawer caught on the cabinet, and at this time he noticed a severe pain in his right side, although the pain was not intense. Mr. Melfi completed the work that day but about one week after the accident, Mr. Melfi informed Mr. Donald S. MacDonald, office manager of said office, of what had happened on the day heretofore mentioned. Mr. MacDonald instructed the claimant to consult his family physician. A statement was secured from Mr. MacDonald which indicates what transpired between said parties (see Exhibit 1). Miss Florence Perlman, who was in charge of the files when the accident occurred, notified Mr. David E. Hickey of the injury Mr. Melfi had sustained while in the course of his employment. A statement was secured from Miss Perlman (see Exhibit 2).

Mr. David E. Hickey, supervisor of the Humboldt District Office, received notice of Mr. Melfi's accident from both Mr. MacDonald and Miss Perlman. A statement was secured

from Mr. Hickey (see Exhibit 3). Dr. James V. Mennella, who was claimant's physician, made an examination on May 1st. A copy of examination is attached (see Exhibit 4). Dr. Mennella recommended that Mr. Melfi have the hernia operated on immediately.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all of their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: *Provided*, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

The hospital and medical bills are as follows:

Dr. James V. Mennella.....$100.00
Said sum includes operation and treatment, said treatment to continue until patient is able to resume his usual occupation.
St. Anne's Hospital..... $53.00
Said sum includes use of operating room, anaesthetic and dressings.

The sum of $153.00 has been expended as a result of said injury. Hospital and doctor's bills have been examined and found to be reasonable and fair for the services rendered.

Said accident arose out of, and was in the course of, claimant's employment.

Claimant does not ask for temporary total or permanent total disability.

AMENDMENT TO STATEMENT OF FACTS.

Illinois Legislators on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464 of the Illinois Revised Statutes, 1935 edition sets out the duties of said commission which are as follows:

"It shall be the duty of the commission until (March 1, 1937), to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation, through which relief is administered, such as maintenance departments, furniture shops, mattress factories, canneries and work relief divisions, and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentering, plumbing, janitor service, engineering and fireman work. Said furniture shop manufactures furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway department, counties, townships, cities and parks for general maintenance work. All the above enterprises use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electrical motors, elevators and boilers which are governed by municipal ordinances.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion, based upon the foregoing statement of facts and the amendment thereto, submitted by you in the matter of the claim of Joseph Melfi against the Illinois Emergency Relief Commission, we

beg to submit the following opinion, based upon the aforementioned statement and amended statement, to wit:

At the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Workmen's Compensation Act; that the accident in question arose out of and in the course of such employment; that under the provisions of Section 8A of the Workmen's Compensation Act, the Illinois Emergency Relief Commission is liable for the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury;—and that claimant is therefore entitled to be reimbursed the amount paid by him for medical, surgical and hospital services as aforesaid, to wit, the sum of One Hundred Fifty-three Dollars ($153.00).

We are further of the opinion that payment of said claim should be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 5.

Payment of $130.76 advised.

FAYE WILLERTON BROCKSON, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed January 13, 1937.

STATEMENT OF FACTS.

Faye Willerton Brockson, 306 South Washington Street, Farmer City, Illinois, formerly of Champaign, Illinois, claims that on the 23rd day of October, 1934, she sustained an injury to her left ankle while investigating the needs of a relief recipient for the Champaign County Emergency Relief Committee. Said relief committee was under the jurisdiction and control of the Illinois Emergency Relief Commission.

Mrs. Brockson was employed by the Champaign County Emergency Relief Committee as a caseworker. The duties of a caseworker are to contact families and investigate their needs as to health, employment, and the use of work relief

money, and also to investigate the receipts and expenditures of drought relief loans, finding pastures for government cattle, delivering clothing and surplus commodities. Claimant, on the day heretofore mentioned, was directed by Frances Gugenheim, her superior, who was also employed by the Champaign County Emergency Relief Committee, to go to the residence of one William H. Reinhold, at 902 East Illinois Street, Urbana, Illinois, for the purpose of rendering assistance to the said William H. Reinhold and his family, information having been received by the relief office that the said William H. Reinhold and his family were being evicted from the dwelling house they then occupied. At the direction of said Frances Gugenheim, the claimant, at about 10:30 o'clock in the forenoon, went to the residence of the said William H. Reinhold, and at the time of her arrival, one R. M. Neely, a constable of Champaign County, Illinois, was attempting to evict the said William H. Reinhold and his family from said dwelling house. Claimant was on the back porch of the dwelling house and was conversing with the said William H. Reinhold, who was then inside the dwelling house and was facing the claimant through the door opening, only the screen door being closed. Said William H. Reinhold then held a butcher knife in his hand and made threatening motions toward the claimant. Said R. M. Neely, constable, during such conversation or attempted conversation, grappled with the said William H. Reinhold from behind. Both the said Mr. Neely and the said Mr. Reinhold fell through the screen door and were wrestling upon the porch. The said Mr. Neely called to the claimant to jump or get off the porch. Claimant being unable to get to the entrance of the porch because of being blocked by the heretofore mentioned men jumped or vaulted over the railing around the porch and upon striking the ground injured her left ankle.

Claimant's injury became exceedingly painful so she was taken to Dr. Opal E. Coffey in Champaign, Illinois, for examination and treatment. Statement from Dr. Coffey has been secured (see Exhibit 1). Claimant was taken to the Burnham Hospital, Champaign, Illinois, for X-rays and later treated by the following doctors: Dr. H. M. Sheaff, Oak Park, Illinois; Dr. H. E. Swantz, Oak Park, Illinois; and Dr. R. L. French, Chicago, Illinois. Claimant also received care at the

Carle Hospital Clinic, Champaign, Illinois, and the West Suburban Hospital, Oak Park, Illinois.

Constable Robert Neely, 402 South Johnson Street, Urbana, Illinois, was interviewed. He stated that he was merely carrying out the duties that were assigned to him in evicting the said William H. Reinhold (see Exhibit 2).

Mr. Ralph Nesmith, 310 North Carson Street, Champaign, Illinois, formerly employed by the Champaign County Emergency Relief Committee, stated that he was present when the altercation took place between Constable Neely and Mr. Reinhold and further witnessed the accident which claimant sustained (see Exhibit 3).

William H. Reinhold, formerly of 105 Cottage Grove, Urbana, Illinois stated that on the 23rd day of October, 1934, he was being evicted by the said Constable Robert Neely when claimant and Mr. Ralph Nesmith appeared at the rear door of his house (see Exhibit 4).

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous, namely * * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the criminal courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and

35 of said number were found not guilty; 43 of said number were dismissed and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals and one individual was committed directly to a psychopathic hospital.

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

As a result of the accident, the claimant was obliged to pay the following amounts:

10/23/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	$2.00
10/25/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing —home	2.50
10/29/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/1/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/5/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/8/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/13/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/17/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
11/28/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
12/1/34—Dr. Opal E. Coffey, Champaign—Treatment and dressing	2.00
—Drayage on crutches	.50
1/3/35—Burnham Hospital, Champaign—X-rays	3.50
1/9/35—Dr. H. M. Sheaff, Oak Park—House call	6.00
1/16/35—Dr. R. L. French, Chicago—X-rays	5.00
1/17/35—Dr. H. M. Sheaff, Oak Park—Office call	5.00
1/24/35—Dr. H. M. Sheaff, Oak Park—Office Call	3.00
1/27/35—Dr. H. M. Sheaff, Oak Park—Office call	3.00
1/29/35—Dr. H. M. Sheaff, Oak Park—Office call	3.00
2/2/35—Carle Hospital Clinic, Champaign—General examination and X-rays	35.00
2/5/35—Carle Hospital Clinic, Champaign—Crutches and cane	5.50
2/8/35—Sholem Shoe Store—2 pairs shoes	10.20
2/27/35—Carle Hospital Clinic, Champaign—Office call	2.00
2/29/35—Carle Hospital Clinic, Champaign—Office call	2.00
3/2/35—Carle Hospital Clinic, Champaign—Office call	2.00
4/10/35—Carle Hospital Clinic, Champaign—Office call	2.00
4/30/35—Carle Hospital Clinic, Champaign—Physiotherapy	2.00
7/1/35—West Suburban Hospital, Oak Park—X-rays	7.50
7/1/35—Dr. H. E. Swantz, Oak Park—Office call	3.00
7/8/35—Carle Hospital Clinic, Champaign—Office call	2.00
7/8/35—Carle Hospital Clinic, Champaign—Office call	2.00
Total	$130.70

Notice of claimant's accident was received by Frances Guggenheim the same day it happened. Demand for compensation was made by filing a claim in the Court of Claims within six months after the accident. Accident arose out of, and was in the course of, claimant's employment. Said claim is known as *Faye Willerton Brockson* vs. *State of Illinois*, No. 2586.

Claimant has agreed to dismiss the claim now pending before the Court of Claims upon the payment of medical bills. There is no demand for temporary total or permanent total disability. Hospital, medical and doctors' bills have been examined and found to be reasonable for the services rendered.

Claimant has filed a petition in the Court of Claims asking that the case of *Faye Willerton Brockson* vs. *State of Illinois*, No. 2586, be dismissed.

AMENDMENT TO STATEMENT OF FACTS.

Illinois Legislators on or about the 6th day of February, 1932 created the Illinois Emergency Relief Commission. Chapter 23, Section 464 of the Illinois Revised Statutes, 1935 edition sets out the duties of said Commission which are as follows:

"It shall be the duty of the commission until (March 1, 1937), to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation, through which relief is administered, such as Maintenance Departments, furniture shops, mattress factories, canneries and work relief divisions, and other Divisions or Departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentering, plumbing, janitor service, engineering and fireman work. Said furniture shop manufactures furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipi-

ents and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All the above enterprises use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electrical motors, elevators and boilers which are governed by municipal ordinances.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion, based upon the foregoing statement of facts and the amendment thereto, submitted by you in the matter of the claim of Faye Willerton Brockson against the Illinois Emergency Relief Commission, we beg to submit the following opinion, based upon the aforementioned statement and amended statement to wit:

At the time of the accident in question both employer and employee were operating under and bound by the provisions of the Workmen's Compensation Act; that the accident in question arose out of and in the course of such employment; that under the provisions of Section 8A of the Workmen's Compensation Act, the Illinois Emergency Relief Commission is liable for the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury; and that claimant is therefore entitled to be reimbursed the amount paid by her for medical, surgical and hospital services as aforesaid, to wit, the sum of One Hundred Thirty Dollars and Seventy Cents ($130.70).

We are further of the opinion that payment of such claim should be subject to the following conditions, to wit:

1. That the case of said Faye Willerton Brockson against the State of Illinois, being No. 2586, now pending in this court, be dismissed.

2. That payment of said claim be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 6.

Settlement of claim for $534.00 and balance due for hospital services rendered employee, amounting to $54.00, advised

WILLIAM DOUGLAS, Claimant, vs. ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

William Douglas, 1426 Newberry Avenue, Chicago, Illinois, claims to have sustained an injury on the 14th day of March, 1935, to the first and second lumbar vertebrae while working as a maintenance man on Project No. S1-B20-820. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Homes in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 16th day of October, 1934, and was completed on or about the second day of April, 1935. The total cost of said project was $83,908.50. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois

Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and Duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Mr. Douglas was assigned to work on said project about the 17th day of October, 1934. Claimant had been assigned to other projects similar to this one previous to the date heretofore mentioned. In fact, claimant had been associated with the maintenance department since 1932. Claimant worked approximately 192 hours per month and for his services received $35.00 per month and maintenance. The Illinois Emergency Relief Commission estimates that the cost of maintenance at a shelter is $9.00 per month, so this would

mean that the claimant received $44.00 per month for his services.

Mr. Douglas was directed by F. Urso, foreman at 1426 Newberry Avenue, which is a shelter supported by the Illinois Emergency Relief Commission, to solder certain parts of a refrigerator located in said building. Said refrigerator was used by the shelter for the storage of all perishable foods. It was approximately 12 feet high, 8 feet long, and 6 feet wide. Mr. Douglas had placed a stepladder in front of the refrigerator and was on the top rung inspecting the refrigerator when the ladder slipped out from under him. He attempted to grab a conduit pipe near the ceiling but could not hold on and as a result, he fell to the floor, falling on top of the ladder and injuring his back. As a result of said fall, claimant sustained a compression fracture of the first and second lumbar vertebrae. Claimant was immediately taken to Cook County Hospital, Chicago, Illinois, by F. Urso, and placed in a body cast. Patient was released from said hospital on or about the first day of April, 1935. Claimant was under the care of Dr. Charles Scuderi and Dr. John T. Reynold, both of Cook County Hospital (See Exhibit 1).

In the course of Mr. Douglas' work, sharp-edged cutting tools were used, such as chisels, saws, blow torches. There were also three Kewanee boilers, three engines, and four electrical motors in said building. Said building was occupied by about 1,400 men as temporary living quarters.

Claimant's accident was witnessed by H. W. Williams and Mark Ryder, both occupants of said shelter. It was impossible to secure statements from either of the heretofore mentioned parties because by the time the Illinois Emergency Relief Commission was informed that said accident had occurred, these transients had moved to places unknown, and to the knowledge of the Illinois Emergency Relief Commission, said witnesses have not returned to the shelter.

Dr. Carlos Scuderi was interviewed on or about the 12th day of June, 1935. At this time he stated that Mr. Douglas was permanently disabled for hard manual labor and that at this time he had a permanent total disability of 40 per cent. Further, that it was impossible to tell at this date whether the claimant's condition would improve with physiotherapy treatments.

Mr. Douglas was asked to submit to a medical examination on the 21st day of February, 1936. Said examination was made by Dr. W. C. Hammond (See Exhibit II).

Mr. Douglas was asked to submit to another medical examination which was made by Dr. L. W. Riba, an outstanding genito-urinary physician, because it was suspected at this time that the claimant was suffering from syphilis and that because of his physical condition, it was impossible for the claimant to recover completely from said injury. Said examination was made the 5th day of May, 1936 (See Exhibit III).

Payment of medical bills and hospital bills had been made by the Illinois Emergency Relief Commission with the exception of $54.00 which is due the Cook County Hospital for hospitalization (See Exhibit IV).

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, Subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, Subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Mr. Douglas claims that for thirteen years he was a journeyman's plumber and that the union scale when he was

so employed was $13.00 a day, although immediately preceding said accident, claimant was employed as a waiter and earned approximately $15.00 a week.

Section 8, Subsection (d), of the Workmen's Compensation Act of the State of Illinois provides:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in paragraphs (b) and (h) of this section, equal to fifty percentum of the difference between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

Medical examinations and doctors' reports show that William Douglas has a 15 per cent permanent and complete loss of the use of his back. At the time of the accident, claimant had no dependents.

Claimant filed a petition in the Court of Claims which is known as *William Douglas* vs. *State of Illinois*, No. 2716. Said case is now pending before the court.

A release and release and waiver have been filed in the Court of Claims providing that the above case be dismissed. Claimant and his attorney have agreed to accept $534.00 in full settlement for his injuries.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion in the matter of the claim of William Douglas against the Illinois Emergency Relief Commission, we beg to submit the following as our conclusions and opinion in the matter, to wit:

Based upon the foregoing statement of facts submitted by you, and the exhibits attached thereto, we are of the opinion that the claimant is entitled to have and receive compensation under the terms and provisions of the Workmen's Compensation Act for the injuries sustained by him, and the disability resulting therefrom, as shown by said statement; and that the amount of compensation to which he is entitled for such injuries and disability is in excess of the amount which the claimant has agreed to accept in full settlement of his claim, to wit, Five Hundred Thirty-four Dollars ($534.00).

If the claimant is represented by competent legal counsel, and has been fully advised as to his rights in the matter, and is willing to enter into a settlement contract providing for a lump sum settlement of $534.00 in full settlement, satisfaction and discharge of all liability on account of the accident and injury in question, we are of the opinion that it is to your advantage to accept his proposition.

Payment of the medical and hospital bills which you have already paid was authorized by Section 8-A of the Workmen's Compensation Act, and payment to the Cook County Hospital of the balance due it, to wit, $54.00, is also authorized by the same provisions of such Act.

We are further of the opinion that any settlement made by you in the matter should be subject to the following conditions, to wit:

1. The settlement contract should include a waiver of the right to review the same by the Industrial Commission or by this court upon the petition of either party thereto, under the provisions of Paragraph II, Section 19 of the Workmen's Compensation Act.

2. The case of said William Douglas against the State of Illinois, now pending in this court, as shown by the aforementioned statement, should be dismissed.

3. Payment of the amount agreed upon should be made by the Illinois Emergency Relief Commission out of any funds held by it for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 7.

Payment of $210.80 found to be authorized.

RICHARD DAVIS, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Richard Davis, 3753 Wilton Avenue, Chicago, Illinois, claims to have sustained a right internal inguinal hernia on March 19, 1935, while working as a carpenter maintenance man for the Illinois Emergency Relief Commission at Chase Park Carpenter Shop, 4410 Ravenswood Avenue, Chicago,

Illinois, on Project No. S1-B20-820. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said Department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Homes in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 16th day of October, 1934, and was completed on or about the 2nd day of November, 1935. The total cost of said project was $83,908.50. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo. M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through

which relief is administered; such as: Maintenance Department, Furniture Shops, Mattress Factories, Canneries, Work Relief Divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Mr. Davis was assigned to work on said project on or about the 1st day of November, 1934. Claimant had been assigned on other projects previous to the date of this accident; in fact, claimant received his first assignment in the Maintenance Department of the Illinois Emergency Relief Commission in April, 1932. Claimant worked approximately 200 hours per month and received $95.00 for his services. Said sum was the amount of claimant's budget. Said budget was set by the Illinois Emergency Relief Commission as the amount needed per month for a family the size of Mr. Davis'.

Mr. Davis was given a complete physical examination on or about September 6, 1934 by the Illinois Emergency Relief Commission for work relief assignment. At that time he was given a class "A" rating. Said classification is the highest rating given in these examinations.

Mr. Davis had been instructed by August Mianulli, foreman at the Chase Park Carpenter Shop to fill a certain lumber order. Mr. Davis was lifting a 2x4 board from the bottom of a disarranged lumber pile which contained between six thousand (6,000) and seven thousand (7,000) feet of lumber. In the process of removing said 2x4, Mr. Davis' foot slipped, and at this time he felt a sharp pain in his right groin. The

pain became so intense that it was necessary for him to rest approximately thirty (30) minutes before he could resume his duties. Mr. Davis reported the accident to foreman August Mianulli and upon hearing the facts of the accident, he immediately referred Mr. Davis to Mr. W. H. Harvey, who was in charge of the maintenance work for the Illinois Emergency Relief Commission (See Exhibit I.) Mr. Harvey referred Mr. Davis to Dr. Phil A. Daley. Dr. Daley's findings were that claimant was suffering from a right inguinal hernia of recent origin and advised that an operation be performed to relieve the condition or that patient purchase a truss.

Mr. Frank Skinner, employee at the Chase Park Carpenter Shop, was also notified at the time of the accident (See Exhibit II).

Mr. Davis was referred to Dr. Theodore L. Lescher, 1551 North Crawford Avenue, Chicago, Illinois, for medical examination (See Exhibit III.) Mr. Davis also consulted Dr. William Sweeney, 3956 West North Avenue, Chicago, Illinois (See Exhibit IV).

Dr. Samuel Matthews, who was claimant's physician, made an examination. Dr. Matthews stated that claimant was suffering from a right inguinal hernia of recent origin and that in order to relieve same it would be necessary to perform an operation. Mr. Davis was operated on by Dr. Samuel Matthews on the 12th day of June, 1936, at Ravenswood Hospital, Chicago, Illinois.

Hospital and medical bills were as follows:

Dr. Samuel Matthews	$100.00
This sum includes operation and treatment, said treatment to continue until patient is able to resume his usual occupation.	
Ravenswood Hospital	62.80
This sum includes use of operating room, anaesthetic and dressings.	
Mr. Davis was paid $48.00 for temporary partial disability on or about the 15th day of June, 1936 (See Exhibit V).	
Total	$210.80

The sum of $210.80 has been expended as a result of said injury. Hospital and doctor's bills have been examined and found to be reasonable and fair for the services rendered. Said hospital, doctor's bills and compensation to said claimant have been paid by the Illinois Emergency Relief Commission.

Said accident arose out of, and was in the course of, claimant's employment. Claimant did not have a hernia before the present injury.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: *Provided*, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Claimant does not ask for temporary total or permanent total disability.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion in the above entitled cause, based upon the foregoing statement of facts and the exhibits attached to and made a part of such statement, all of which have been submitted by you in the matter of the claim of Richard Davis against the Illinois Emergency Relief Commission, we beg to submit the following conclusions and opinion based upon such statement and exhibits, to wit:

On March 19th, 1935 the claimant and the respondent were operating under and bound by the provisions of the

Workmen's Compensation Act. On said date the claimant sustained accidental injuries which arose out of and in the course of his said employment. Under the provisions of Section 8-A of the Workmen's Compensation Act, the respondent is required to provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury.

Medical, surgical and hospital services were furnished and paid for by the Illinois Emergency Relief Commission as follows:

Dr. Samuel Matthews, medical and surgical services $100.00

Ravenswood Hospital, hospital services..... 62.80

Claimant was also paid the sum of $48.00 as compensation at the rate of $16.00 per week for the period of three weeks immediately following the date of his operation.

Claimant makes no claim for compensation for any other or further disability, either temporary or permanent, sustained by him.

You desire our opinion as to whether the payments heretofore made by you as above set forth were justified.

In our opinion, the aforementioned payments made by you for medical, surgical and hospital services, and for compensation, in the total amount of Two Hundred Ten Dollars and Eighty Cents ($210.80) were authorized under the terms and provisions of the Workmen's Compensation Act of this State.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 8.

Payment of $166.25 found to be authorized.

MARK BEAUBIEN, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Mark Beaubien, 1731 North Whipple Street, Chicago, Illinois, claims to have sustained an incomplete inguinal hernia on the left side on or about the 10th day of October,

1935, while employed as a laborer for the Illinois Emergency Relief Commission on Project No. S1-B20-820. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said Department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Homes in Cook County; mattress and comforters factory; tool department in Cook County; warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 16th day of October, 1934, and was completed on or about the 2nd day of November, 1935. The total cost of said project was $83,908.50. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The General Assembly of the State of Illinois on the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through

which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Mr. Beaubien was assigned to work on said project on or about the 16th day of November, 1934. Claimant worked approximately 190 hours per month and for his services received $95.00 per month. Mr. Beaubien had been directed by Mr. W. R. Harvey, who was in charge of all maintenance work for the Illinois Emergency Relief Commission, to go to 188 West Randolph Street, Chicago, Illinois, and assist other men in moving certain fixtures from said office. Part of Mr. Beaubien's duties at the time heretofore mentioned were to assist in loading a hand truck with material which was to be moved and then push same into the street, where it was to be loaded on to motor trucks. Said trucks when filled weighed approximately one thousand (1,000) pounds. On this one occasion, Mr. Beaubien was pushing said hand truck up a small incline when his foot slipped and as a result, the truck slid back towards him. Mr. Beaubien tried to keep the truck from going down the incline and as a result of his pressure against the truck, he felt a pain in his left side. When Mr. Beaubien returned to the floor with the other employees he had been assigned to work with, he told Mr. Frank Losas, Mr. Marino Modivi, and Mr. William Hartley what had happened (See Exhibits I, II, and III).

Mr. Beaubien was referred to Dr. Michael C. Goy, 1574 Milwaukee Avenue, Chicago, Illinois, for examination. Said examination was made on or about February 12, 1936 (See Exhibit IV).

Dr. Theodore L. Lescher, 1551 North Crawford Avenue, Chicago, Illinois, examined Mr. Beaubien and stated that Mr. Beaubien was suffering from a left inguinal hernia of recent origin. Dr. Lescher recommended that the hernia be operated on immediately (See Exhibit V).

Hospital and medical bills were as follows:

Dr. Theodore L. Lescher.....	$100.00
Said sum includes operation and treatment, said treatment to continue until patient is able to resume his usual occupation. (See Exhibit VI).	
Dr. Theodore L. Lescher.....	5.00
Medical examination. (See Exhibit VII).	
St. Anne's Hospital	61.25
Said sum includes use of operating room, anaesthetic and dressings.	

The sum of $166.25 has been expended as a result of said injury. Hospital and medical bills have been examined and found to be reasonable. Said bills have been paid by the Illinois Emergency Relief Commission.

Said accident arose out of, and in the course of, claimant's employment. Claimant did not have a hernia before the present injury.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who

rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Section 8, Subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Claimant does not ask for temporary total or permanent total disability.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion in the above entitled cause, based upon the foregoing statement of facts and the exhibits attached to and made a part of such statement, all of which have been submitted by you in the matter of the claim of Mark Beaubien against the Illinois Emergency Relief Commission, we beg to submit the following conclusions and opinion based upon such statement and exhibits, to wit:

On the 10th day of October, A. D. 1935, the claimant and the respondent were operating under and bound by the provisions of the Workmen's Compensation Act; that on said date the claimant sustained accidental injuries which arose out of and in the course of his said employment; that under the provisions of Section 8-A of the Workmen's Compensation Act, the respondent is required to provide the necessary first aid, medical, and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury.

Medical, surgical and hospital services were furnished and paid for by the Illinois Emergency Relief Commission, as follows, to wit:

Dr. Theodore L. Lescher, medical and surgical services	$105.00
St. Anne's Hospital, hospital services	61.25
Total	$166.25

Claimant makes no claim for compensation for any disability either temporary or permanent, sustained by him.

You desire our opinion as to whether the payments heretofore made by you as above set forth were justified.

In our opinion, the aforementioned payments made by you for medical, surgical and hospital services, in the total amount of One Hundred Sixty-six Dollars and Twenty-five Cents ($166.25) were authorized under the terms and provisions of the Workmen's Compensation Act of this State.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 9.

Payment of $330.50 advised.

SARAH E. SHIVELY, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Sarah E. Shively, 1246 West 97th Street, Chicago, Illinois, claims to have sustained an injury to her back on the 25th day of January, 1936, while working as a caseworker for the Illinois Emergency Relief Commission. Miss Shively was employed as a casework aide by the Illinois Emergency Relief Commission and was assigned to work at the Woodlawn District Office, 253 East 63rd Street, Chicago, Illinois. The duties of a caseworker are to contact families and investigate their needs as to health, employment, use of work relief money; also to deliver clothing and surplus commodities. On the day heretofore mentioned the claimant was directed by Miss Margaret Potts, who was Miss Shively's superior, to call on a family who were recipients of relief living in Hegewisch, Illinois. As claimant alighted from her car, she walked toward the front and as she was about to pass in front of her own car, her feet slipped out from under her and she fell to the icy pavement. As a result of said fall, claimant strained the sacro-iliac muscles of her back. The pain became so intense that it was necessary for claimant to go directly to her home and administer first aid. Miss Shively called Miss Potts, her superior, and informed her of the accident.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered, such as: Caseworking Department, Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Caseworking Department investigates the needs of recipients who have applied for and are receiving relief and directs the disbursing of funds to said individuals; said Maintenance Department *has charge of maintenance work in all buildings* operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Dr. R. L. Van Dellen, 7110 South Halsted Street, Chicago, Illinois, was called on the 27th day of January, 1936. At this time, said doctor found that Miss Shively had

strained the sacro-iliac muscles of her back and that it was necessary to tape her back. Dr. Van Dellen further instructed patient to remain in bed.

Miss Shively was later referred to Dr. Emil Hauser, 8 South Michigan Avenue, an outstanding orthopedic surgeon. Dr. Hauser immediately ordered a body cast, so claimant was taken to the Passavant Memorial Hospital where she was placed in a body cast (See Exhibit I).

As a result of said injury, the sum of $330.50 has been incurred. Hospital and doctors' bills have been examined and found to be reasonable and fair for the services rendered (See Exhibit II).

Said accident arose out of, and was in the course of, claimant's employment.

Records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the criminal courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty; 43 of said number were dismissed and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and

safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous: Provided, nothing contained herein shall be construed to apply to any work, employment or operations done, had or conducted by farmers and others engaged in farming, tillage of the soil, or stock raising, or to those who rent, demise or lease land for any such purposes, or to any one in their employ or to any work done on a farm or country place, no matter what kind of work or service is being done or rendered."

Section 8, Subsection (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Claimant does not ask for temporary total or permanent total disability.

ADVISORY OPINION.

Per Curiam:

Pursuant to your request for an advisory opinion in the above entitled cause, based upon the foregoing statement of facts, and the exhibits attached to and made a part of such statement, all of which have been submitted by you, in the matter of the claim of Sarah E. Shively against the Illinois Emergency Relief Commission, we beg to submit the following conclusions and opinion, based upon such statement and exhibits, to wit:

On the 25th day of January, A. D. 1936, the claimant and the respondent were operating under and bound by the provisions of the Workmen's Compensation Act. On said date the claimant sustained accidental injuries which arose out of and in the course of her said employment. Under the provisions of Section 8-A of the Workmen's Compensation Act, the respondent is required to provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. The respondent failed and neglected to provide any medical, surgical or hospital services whatsoever. The claimant therefore secured the necessary medical, surgical and hospital services and paid therefor as follows:

To Passavant Hospital, hospital services...	$ 52.50
To Dr. Emil Hauser, medical services.....	200.00
To Elizabeth Jansen, physiotherapy treatments	30.00
To Dr. J. S. Galloway, medical services...	5.00
To Dr. R. L. Van Dellen, medical services..	43.00
Total	$330.50

No claim is made by the claimant for temporary disability or for partial or total permanent disability.

We are therefore of the opinion that claimant is entitled to receive from the Illinois Emergency Relief Commission the amount paid and advanced by her for medical, surgical and hospital services as aforesaid, to wit, the sum of Three Hundred Thirty Dollars and Fifty Cents ($330.50).

We are further of the opinion that payment of such claim should be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 10.

Payment of $78.00 advised.

ELMER GROVES, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Elmer Groves, 3056 Addison Street, Chicago, Illinois, claims to have sustained an injury on the 27th day of February, 1935, to his left hand while working as a maintenance man on Project No. S1-B4-398. Said project was maintenance and construction work which provided for personnel for maintenance and construction department at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago Illinois, and at the Chase Park Relief office, 4410 Ravenswood Avenue, Chicago, Illinois. Said Department took care of alteration and repair work for the following relief agencies: Main office at 1319 South Michigan Avenue, Chicago, Illinois; Personnel office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook

County; Shelters in Cook County; Transient Homes in Cook County; Mattress and Comforters Factory; Tool Department in Cook County; Warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 16th day of October, 1934, and was completed on or about the 30th day of June, 1936. The total cost of said project was $674,721.51. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department; Furniture Shops; Mattress Factories, Canneries, Work Relief Divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated and occupied by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency

Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on or about the 17th day of October, 1934. Claimant had been assigned to other projects similar to the one heretofore mentioned since October, 1932. Claimant worked approximately 30 hours per week, five days each week for a full month, and for his services received $66.00 per month.

On February 27, 1935, claimant was working at the Chase Park Carpenter Shop, 4410 Ravenswood Avenue, Chicago, Illinois, on one of the carpenter benches when he struck his left hand against a piece of wood, which had been nailed against the wall. As a result of his striking his hand against the piece of wood, he fractured the fifth finger of his left hand. Claimant did not complain about his injury at this time because he thought it was merely a bruise. In fact, claimant continued to work until the fifth day of March, 1935, before he reported his accident to Donald R. Yates, timekeeper on said project. As soon as said accident was reported, claimant was taken to St. Elizabeth's Hospital, Chicago, Illinois, where an X-ray picture of his hand was made. At this time, it was discovered that the fifth finger of his left hand was fractured. His hand was immediately placed in a cast and claimant left the hospital on the same day (See Exhibit I).

There were no witnesses to claimant's accident. The only knowledge the Illinois Emergency Relief Commission has is a report made by timekeeper Donald R. Yates on the fifth day of March, 1935 (See Exhibit II).

In the course of claimant's work, sharp-edged cutting tools were used, such as chisels and saws and other tools which are used by carpenters. There were also elevators, boilers and electric engines operated in said building.

Dr. W. C. Hammond examined claimant on the 24th day of February, 1936 (See Exhibit III).

Claimant's medical bills and hospital bills have been paid by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupation, enterprises or businesses are hereby declared to be extra hazardous * * *."

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of Paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

Claimant claims that for seven years previous to the date of his injury, he has been a carpenter, also an independent contractor, and that during this period he has earned approximately $45.00 per week.

At the time of the accident, claimant had three children under sixteen years of age, namely, Loren, Bernart, and Eileen.

Section 8, subsection (d), of the Workmen's Compensation Act of the State of Illinois provides:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in Paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in Paragraphs (b) and (h) of this section, equal to fifty per centum of the difference

between the average amount which he earned before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

Medical examinations and doctor's report show that claimant had no permanent total disability.

Claimant has filed a petition in the Court of Claims which is known as *Elmer Groves* vs. *State of Illinois*, No. 2698. Said case is now pending before the court.

A release and waiver has been filed in the Court of Claims and also a stipulation to dismiss the above entitled cause.

Claimant and his attorney have agreed to accept $78.00 as full settlement for his injuries.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an advisory opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Elmer Groves* vs. *Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the *Illinois Workmen's Compensation Act;* that said accident arose out of and in the course of such employment; that by virtue of the provisions of *Sections 8 (b) and 8 (j)* of said Act said Commission is liable for the payment of compensation for temporary total disability for sixty-five (65) per cent of his average weekly wage; said wages appearing to have been at the rate of Sixty Six ($66.00) Dollars per month and claimant being the father of three children under sixteen years of age at the time of said accident. All medical bills appear to have been paid. Claimant is therefore entitled, upon said attached statement, to receive payment of compensation at the rate of Thirteen ($13.00) Dollars per week for six weeks, or Seventy Eight ($78.00) Dollars.

We are further of the opinion that payment of such claim should be subject:

First, to a dismissal of the claim of said *Elmer Groves* vs. *Court of Claims*, No. 2698, now pending in this court, and second, that payment of said claim be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION. No. 11.

Payment of $888.75 advised.

RAYMOND RUBY, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Raymond Ruby, 842 West Adams Street, Chicago, Illinois, claims that on the 23rd day of October, 1935, he sustained an injury to his right leg while working as a feeder on Project S1-D4-1089 at the cannery at Wheaton Farm, Wheaton, Illinois. Said farm was operated by the Illinois Emergency Relief Commission. Said project consisted of the following: Soil preparations, seeding, cultivating, harvesting, distribution and conservation of vegetable crops on Wheaton Farm, North Avenue and Main Street, Wheaton, Illinois, for the benefit of shelter divisions of the Illinois Emergency Relief Commission in Cook County and for raising hogs on waste products from the farm and the shelters. Said project was instituted on or about the 2nd day of April, 1935, and continued until the 5th day of November, 1935. The cost of this project was $38,696.44. Said sum included labor and materials, seeds and all machinery necessary for the operation of a cannery. All monies for said project were furnished by the Illinois Emergency Relief Commission. Said project was requested by the Illinois Emergency Relief Commission for the operation of Wheaton Farm and was approved by Leo M. Lyons, Administrator for the Illinois Emergency Relief Commission, and A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work and Rehabilitation.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the pur-

pose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated and occupied by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said Work Relief Division furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on said project on or about the 9th day of September, 1935. Claimant worked approximately 192 hours a month and for his services received $22.50 per month and maintenance. The Illinois Emergency Relief Commission estimates that the cost of maintenance is $9.00 per month, so this would mean the claimant received $31.50 per month for his services.

On October 23, 1935, claimant was directed by O. N. Benedict, maintenance man and superintendent at Wheaton Farm, to assist in operating the cabbage cutting machine. Said cabbage cutting machine had been borrowed from the St. Charles Home for Boys, St. Charles, Illinois, on October 22, 1935. Said machine was installed by the Maintenance Department of the Illinois Emergency Relief Commission on the day heretofore mentioned. Claimant was feeding the cabbage cutting machine, which had only been operating a short time, when the knife, which is part of the internal machinery

and cuts the cabbage, flew apart. As a result of the breaking of this knife, the outside steel casing gave way and struck the claimant in the leg, breaking the right femur and also knocking him unconscious. Claimant was immediately taken to Elmhurst Hospital, where he remained for two days, and afterward was removed to Cook County Hospital in the City of Chicago, where he remained until approximately the 17th day of February, 1936. During that time, claimant received medical care for the compound fracture of his right femur and was under the care of Doctors Franklin, Gaynor and Zeiss (See Exhibit I).

In the course of claimant's work, sharp-edged cutting tools were used, such as chisels and saws. There were also electrically driven motors and engines in use in said cannery.

Claimant's accident was witnessed by Stanley Zamogski, who also sustained injuries as a result of said accident (See Exhibit II).

Dr. Emil Hauser, 8 South Michigan Avenue, Chicago, Illinois, an outstanding orthopedic surgeon, examined claimant on the 7th day of January, 1937. At that time, Dr. Hauser stated that claimant had a permanent total disability of from forty (40) to fifty (50) per cent (See Exhibit III).

Payment of medical bills and hospital bills has been made by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, Subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, Subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of Paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

Section 8, Subsection (d), of the Workmen's Compensation Act of the State of Illinois provides:

"If, after the injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in the cases covered by the specific schedule set forth in Paragraph (e) of this section, receive compensation, subject to the limitations as to time and maximum amounts fixed in Paragraphs (b) and (h) of this section, equal to fifty per centum of the difference between the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

Medical examinations and doctor's reports show that Raymond Ruby has between a forty (40) and fifty (50) per cent permanent total loss of the use of his right leg. Further, there was temporary total disability for thirty-three weeks.

At the time of the accident, claimant had no dependents.

Claimant has filed a petition in the Court of Claims which is known as *Raymond Ruby* vs. *State of Illinois*, No. 2862. Said case is now pending before the court.

A release and waiver has been filed in the Court of Claims and also a stipulation to dismiss the cause which is now pending before the Court of Claims.

Claimant and his attorney have agreed to accept $888.75 in full settlement for his injuries.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Raymond Ruby* vs. *The Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the *Illinois Workmen's Compensation Act;* that said accident arose out of and in the course of such employment; that under the provisions of *Section 8 (b)* of said Act said Commission is liable to claimant for temporary total incapacity for a period of 33 weeks on a minimum basis of Seven and 50/100 ($7.50) Dollars per week, and under *Section 8 (e), Subsections 15* and *17* for a further allowance of Seven and 50/100 ($7.50) Dollars per week for 85½ weeks for a forty-five (45) per cent permanent and partial loss of use of his right leg, making a total allowance of Eight Hundred Eighty-eight and 75/100 ($888.75) Dollars.

We are further of the opinion that such claim should be subject to the following conditions, to-wit:

1. That the case of *Raymond Ruby* vs. *State*, No. 2862, now pending in this court be dismissed.

2. That payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 12.

Payment of $125.00 advised.

DOMINICK FICARROTTA, Claimant. *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Dominick Ficarrotta, 2126 West LeMoyne Avenue, Chicago, Illinois, claims to have sustained an injury to his face and nose on the 24th day of February, 1936, while working as a laborer on Project S51-B4-1090. Said project was maintenance and construction work which provided for personnel for maintenance and construction departments at headquarters of the Illinois Emergency Relief Commission, 1319 South Michigan Avenue, Chicago, Illinois, and at the Chase Park Relief Office, 4410 Ravenswood Avenue, Chicago, Illinois. Said department took care of alteration and repair work for the following relief agencies: Main office at 1319 South

Michigan Avenue, Chicago, Illinois; Personnel Office at 1222 South Michigan Avenue, Chicago, Illinois; Unemployment Relief Service in Cook County; Cook County Bureau of Public Welfare in Cook County; Shelters in Cook County; Transient Homes in Cook County; mattress and comforters factory; tool department in Cook County; warehouses in Cook County; furniture in all relief offices in the State; also the building of furniture for nursery schools. Said project was instituted on or about the 15th day of March, 1935, and was completed on or about the 30th day of June, 1936. The total cost of said project was $53,272.50. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for maintenance and construction work and was approved by Leo M. Lyons, Administrator of Cook County, and W. E. Hipsley, Work Relief Superintendent.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said

mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work for the Maintenance Department on or about the 10th day of April, 1932. Claimant has continued to work on different projects up to and including present date. Claimant was assigned to work on the above mentioned project on or about the 23rd day of November, 1935. Claimant worked approximately forty (40) hours a week and for his services, he received the sum of $22.50.

On the 24th day of February, 1936, claimant was directed by Vincent Margiotta, foreman at the Chase Park Carpenter Shop at 4410 Ravenswood Avenue, Chicago, Illinois, to go to the roof of said building and assist in repairing a water tank. Claimant was aided by Mr. Margiotta and Harry Blake. As said men were in the process of making repairs, a block of wood about 1x3x2 feet was placed between the upper and lower sections of said water tank. This block became loose and fell, striking the claimant on the face, and as a result, claimant received lacerations on his nose and face. As a result of said injury, claimant has a deep, irregular scar on his nose extending from the middle to the right side of his nose.

Claimant was immediately taken to Dr. William J. Michael, 3959 Lincoln Avenue, Chicago, Illinois, after the accident and six stitches were taken in his nose. Claimant was given medical care after the accident for a period of three weeks (See Exhibit I).

Claimant's accident was witnessed by Vincent Margiotta, formerly of 835 Bishop Street, Chicago, Illinois, and Harry Blake, formerly of 2148 North Halsted Street, Chicago, Illinois. It was impossible to secure statements from either one of the parties heretofore mentioned because by the time a

departmental report of said accident was filed, these persons had moved without leaving forwarding addresses, although departmental records show that said parties made oral statements at the time of the accident (See Exhibit II).

Claimant was taken before Abritrator Harry Kagan of the Industrial Commission, 205 Wacker Drive, Chicago, Illinois, on the 26th day of February, 1937. At that time, Arbitrator Kagan stated that he was of the opinion that claimant had a permanent scar on his nose and face and that under the rules and regulations of the Industrial Commission, a person in the claimant's walk of life would be entitled to $125.00 as a result of said scar.

At the time of the accident, claimant had three children under sixteen years of age, they being Angelina, Peter, and Vincent.

Payment of medical bills has been made by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the date of the accident.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises, or businesses are hereby declared to be extra hazardous * * *"

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of Paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject

to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

A release and waiver has been executed by claimant and he has agreed to accept $125.00 in full settlement for his injuries.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Dominick Ficarrotta* vs. *Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement.

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the *Illinois Workmen's Compensation Act;* that said accident arose out of and in the course of such employment; that under the provisions of *Section 8 (c)* of said Act, said commission is liable for serious and permanent disfigurement suffered by claimant on the 24th day of February, 1936 consisting of a permanent scar extending across the bridge of claimant's nose and to the left side thereof which, under the usual rules applied by the Industrial Commission in such matters, as appears from the record, would warrant an award of One Hundred Twenty Five ($125.00) Dollars; to which sum claimant is therefore entitled; the payment of such sum to be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 13.

Payment of $1000.00 advised.

NIELS NIELSEN, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed April 13, 1937.

STATEMENT OF FACTS.

Niels Nielsen, 3932 Osceola Avenue, Chicago, Illinois, claims that on the 25th day of January, 1935, he was shot in

the right leg by a relief client while employed at the Lincoln Park Relief Station. Said relief station was under the jurisdiction and control of the Illinois Emergency Relief Commission.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, Work Relief Divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief clients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief clients on Illinois Emergency Relief Commission soil. Said Work Relief Divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks, and axes. Said buildings operate electric motors, elevators, and boilers, all of which are governed by municipal ordinances.

Claimant was employed at the Lincoln Park Relief Station as vocational advisor. His duties were to interview and

investigate relief clients assigned to work relief; also to interview and investigate all clients who applied for Civilian Conservation Corps assignments; also contact employers and examine industrial payrolls. On the day heretofore mentioned, claimant was working on the second floor of the relief station when Henry Arden and his mother, Mrs. Ruth Watson Arden, both relief clients of said station, appeared on that floor and demanded to see the supervisor. After a short talk with the supervisor, both Henry Arden and Mrs. Ruth Watson Arden were ordered to return to the first floor where relief clients were interviewed. Following this order, Henry Arden took a revolver from his pocket and shot the supervisor through the abdomen. At the same time, Mrs. Ruth Watson Arden took a revolver from her purse and shot at random. Claimant, who was at this time about four or five feet from Henry Arden, made a gesture and Henry Arden shot claimant through the right thigh. Henry Arden then shot and killed his mother, Mrs. Ruth Watson Arden, and committed suicide.

Claimant was immediately taken to St. Luke's Hospital, where he remained until January 9, 1936. While in the hospital, he was under the care of Dr. William Hazlett, 122 South Michigan Avenue, Chicago, Illinois. All medical and hospital bills were paid by the Illinois Emergency Relief Commission (See Exhibit I).

There was a Kewanee boiler and electric motors operated by the Illinois Emergency Relief Commission at the Lincoln Park Relief Station on the date heretofore mentioned.

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers and investigators in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief clients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the Criminal Courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty; 43 of said number were discharged and 31 of said number were dismissed for want of prosecution; 3 of said number were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Mr. R. M. Hilliard, an employee of the Illinois Emergency Relief Commission, made an investigation of said shooting shortly after it occurred and a departmental report was made of his findings (See Exhibit II).

Notice of claimant's accident was received by the Illinois Emergency Relief Commission the same day it happened. Demand for compensation was made by the claimant within six months after the accident.

Claimant's accident arose out of, and was in the course of, his employment.

Claimant is not entitled to temporary total disability as the Illinois Emergency Relief Commission paid him his full salary in the sum of $100.00 per month during the time of his disability and after he had recovered sufficiently from his injury, he was immediately placed back at work.

Claimant was examined by Dr. Nathan Adams on February 22, 1936. At that time, Dr. Adams stated that there was only ten to fifteen degrees motion in the right thigh and that claimant had lost the industrial use of his right leg (See Exhibit III).

Claimant was requested by the Illinois Emergency Relief Commission to submit himself to an examination by Dr. William Hazlett. Said examination was made on the 28th day of April, 1936. At this time, Dr. Hazlett found a permanent disability of the right knee joint due to loss of from seventy-five to eighty per cent of its range of flexion and that it was reasonable to expect that after a few months there would no longer be any swelling of the tissues of the leg (See Exhibit IV.)

Claimant has filed a petition in the Court of Claims which is known as *Niels Nielsen* vs. *State of Illinois*, No. 2791. Said case is now pending before the court.

A release and waiver has been secured and a stipulation *to dismiss the above entitled cause has been filed in the Court* of Claims.

Claimant and his attorney have agreed to accept One Thousand Dollars ($1,000.00) in full settlement for his injuries.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Niels Nielsen* vs. *Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the *Illinois Workmen's Compensation Act*; that by virtue of the provisions of *Section 8 (e), Subsections 15* and *17* of said Act said Commission is liable for the payment of compensation for permanent partial loss of the use of claimant's right leg; that said percentage of disability is not less than forty-six (46) per cent, and that payment of One Thousand ($1,000) Dollars in full adjustment with claimant for his injuries under a stipulated agreement by claimant and his attorney with said Commission, is fully justified by the record. It further appears that all hospital and medical bills have been paid, the former in the sum of Four Thousand Six Hundred Ninety-one and 55/100 ($4,691.55) Dollars and the latter in the sum of Nine Hundred Fifty ($950.00) Dollars. We, therefore, find that claimant is entitled, upon

said attached statement of fact, to receive payment of compensation in a lump sum of One Thousand ($1,000.00) Dollars.

We are further of the opinion that payment of such claim should be subject:

First, to a dismissal of the claim of said *Niels Nielsen* vs. *State*, C. of C. No. 2791, now pending in this court, and second, that payment of said sum shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 14.

Payment of $1,800.00 advised.

H. MAE IRWIN, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed May 11, 1937.

STATEMENT OF FACTS.

H. Mae Irwin, 6060 Stony Island Avenue, Chicago, Illinois, mother of Alice Mae Irwin, deceased, claims that on the 25th day of January, 1935, Alice Mae Irwin was employed as a caseworker by the Illinois Emergency Relief Commission at the Lincoln Park Relief Office, 54 West Chicago Avenue, Chicago, Illinois. In the course of her employment, Alice Mae Irwin was shot and killed by Henry (Hal) Arden, a relief recipient, while visiting him in his home at 1718 Sedgwick Street, Chicago, Illinois. H. Mae Irwin further claims that Alice Mae Irwin was employed as a caseworker at the heretofore mentioned office and that the duties of a caseworker are to contact families and investigate their needs as to health, employment and the use of work relief money; also to investigate receipts and expenditures of work relief money.

Alice Mae Irwin, on the day heretofore mentioned, was directed by Miss Mary Thompson, assistant supervisor of said relief office, to make a home visit on the Arden family because on January 24, 1935, Mrs. Ruth Watson Arden, mother of Henry (Hal) Arden, had telephoned the relief office stating that her work relief earnings were not adequate

and that she wished to discuss this matter with her caseworker. Records show that Miss Irwin made several visits on different relief recipients in her district on January 25, 1935, and one of these visits was to the home of Henry (Hal) Arden. Later that same day, she was found dead of bullet wounds in the Arden home. That same day, Mrs. Ruth Watson Arden and her son, Henry (Hal) Arden, came to the relief office and while there shot Miss Caroline Wallace, supervisor, Mr. Niels Nielsen, vocational adviser, and Miss Hazel Dugan, stenographer. Henry Arden then shot his mother and committed suicide (See Exhibit I).

Captain William L. Stapleton of the Chicago Police Department was one of the first persons to discover the body of Alice Mae Irwin (See Exhibit II).

Section 3 of the Workmen's Compensation Act of the State of Illinois provides:

"The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous * * *"

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

The records of the Illinois Emergency Relief Commission show that from September, 1933, to and inclusive of September, 1936, there have been 344 disorderly conduct and assault and battery cases involving caseworkers in the employment of the Illinois Emergency Relief Commission. Said assaults were perpetrated by relief recipients while investigators were trying to investigate whether or not these individuals were eligible for relief. Of the above number, 328 were prosecuted in the criminal courts throughout the State. Of said number, 215 were found guilty of the charges heretofore alleged and 35 of said number were found not guilty; 43 of said number were discharged and 31 of said number were dismissed for want of prosecution; 3 of said number

were discharged and then sent to psychopathic hospitals, and one individual was committed directly to a psychopathic hospital.

The coroner's inquest which was held on January 26, 1935, at the Cook County Morgue, Chicago, Illinois, shows that Alice Mae Irwin died as a result of multiple bullet wounds of the head, chest and abdomen (See Exhibit III).

Alice Mae Irwin's death was in the course of, and arose out of, her employment. At the time of her death, her salary was $100.00 per month. Notice of her death was received the same day it happened and demand for compensation was made by her mother, H. Mae Irwin, within six months after her death. A claim was filed in the Court of Claims on the 17th day of December, 1935, which is known as *H. Mae Irwin* vs. *State of Illinois*, No. 2773.

Alice Mae Irwin's funeral bill in the sum of $338.25 was paid by the Illinois Emergency Relief Commission (See Exhibit IV).

H. Mae Irwin further claims that Alice Mae Irwin contributed to her support in that Alice Mae Irwin paid her rent, paid for part of her board and had at different times purchased clothing for her. At the time of Miss Irwin's death H. Mae Irwin was living with her son and Alice Mae Irwin was living separate and apart from her mother. H. Mae Irwin did not know the exact amount that her son, Felix Irwin, received for her keep as these transactions were made separate and apart from her.

Section 7, Subsection (c) of the Workmen's Compensation Act of the State of Illinois provides:

"If no amount is payable under paragraph (a) or (b) of this section and the employee leaves any parent or parents, child or children, who at the time of injury were partially dependent upon the earnings of the employee, then such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less in any event than one thousand dollars and not more in any event than three thousand seven hundred fifty dollars. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amounts payable on death."

Claimant has agreed to dismiss the claim which is known as *H. Mae Irwin* vs. *State of Illinois*, No. 2773, which is now pending before the Court of Claims, and has signed a release and waiver for the Illinois Emergency Relief Commission

and has agreed to accept One Thousand Eight Hundred Dollars ($1,800.00) in full settlement of her claim.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *H. Mae Irwin* vs. *Illinois Emergency Relief Commission*, the following opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment.

The statement further discloses that this claim rests upon the same statement of facts as did the claim of Niels Nielsen, I. E. R. C. No. 13, in which an opinion was rendered at your request by this court on April 13, 1937, both claims arising out of the murderous assault committed by Henry Arden and his mother, on the 25th day of January, 1935. It appears that Alice Mae Irwin, who was killed while in the performance of her duties as a case worker for your Commission, is survived by her mother, the claimant herein, and that the latter was partially dependent upon the said employee. It further appears that the mother has agreed to accept One Thousand Eight Hundred ($1,800.00) Dollars in full settlement of her claim. A statement of facts herein supports an award to the extent of partial dependency in favor of the mother, of forty-five (45) per cent, which sum would be in excess of a settlement of One Thousand Eight Hundred ($1,800.00) Dollars, and the amount of the funeral bill, of Three Hundred Thirty-eight and 25/100 ($338.25) Dollars heretofore paid by the I. E. R. C. for the burial of Alice Mae Irwin. We therefore find that a settlement of One Thousand Eight Hundred ($1,800.00) Dollars, in addition to the said sum of Three Hundred Thirty-eight and 25/100 ($338.25) Dollars, payable to the claimant under a stipulated agreement between her and her counsel and the Commission is fully justified by the record.

We are further of the opinion that payment of such claim should be subject:

First: to a dismissal of the claim of *H. Mae Irwin* vs. *State of Illinois*, C. of C. No. 2773, now pending in this court, and

Second: that payment of such sum shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 15.

Payment of $104.00 found to be authorized.

HAROLD C. BOUGH, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed May 11, 1937.

STATEMENT OF FACTS.

Harold C. Bough, 3037 Franklin Boulevard, Chicago, Illinois, claims to have sustained a right direct inguinal hernia on or about the 13th day of February, 1935, while working in the stores department of the Illinois Emergency Relief Commission at 1319 South Michigan Avenue, Chicago, Illinois. Said department was custodian of all goods, wares and merchandise which were shipped to the Illinois Emergency Relief Commission. After the materials were received in said department, it was then the duty of said department to furnish materials and supplies to whatever department requested them. Said department was considered one of the warehouses for the Illinois Emergency Relief Commission.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and cooperate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Mr. Bough was assigned to work in the stores department on or about the 16th day of December, 1934. He worked approximately 170 hours per month and for his services received $85.00 a month.

Mr. Bough was directed by W. J. Riley, foreman of the stores department at 1319 South Michigan Avenue, to pile certain bales of clothing and boxes of stationery in one section of the basement. The bales of clothing weighed approximately 300 pounds and the stationery, 100 to 125 pounds each. It was necessary to move each one of these bales as stickers were placed on them addressing them to certain shelters and relief offices throughout the State, and it was Mr. Bough's duty to address all of these bales. While moving same, he felt a sharp pain in his right side. The pain became so intense that it was necessary for him to rest for a short time, although after resting he continued with his work throughout the day. He informed Mr. Riley of his accident the following day. (See Exhibit I.)

Mr. Riley reported the accident to Mr. R. J. Chesbro, Director of the Procurement Department and head of the

Stores Department for the Illinois Relief Commission, who was his superior. (See Exhibit II.)

Mr. Beaver Barrett and Mr. Herbert Treskow, who were also employed in the Stores Department of the Illinois Emergency Relief Commission at 1319 South Michigan Avenue, Chicago, Illinois, stated that on the 13th day of February, 1935, they were informed by Mr. Bough that he had sustained an injury while moving certain bales of clothing. (See Exhibits III and IV.)

In the course of Mr. Bough's work, sharp-edged cutting tools were used such as chisels, saws, and knives. There were also two Kewanee boilers, three engines, and four elevators in said building. This building was occupied by the administrative offices of the Illinois Emergency Relief Commission and the Works Progress Administration.

The sum of $104.00 has been expended by the Illinois Emergency Relief Commission as a result of said injury. Medical and doctor's bills have been examined and found to be just and reasonable for the services rendered. (See Exhibit V.)

The hernia which was sustained by the claimant was treated by Dr. W. M. McMillan, 222 South Michigan Avenue, Chicago, Illinois, by an injection process. This method of treatment allows the injured to continue with his work and also eliminates an operation and thus, hospital expenditures. The only inconvenience that the patient is subjected to during the process of treatment is that it is necessary for him to wear a truss. Dr. McMillan also provides in his contract that if this injection method fails to perfect a cure, he will perform a surgical operation with no additional cost to the individual. Claimant in this particular case submitted himself for examination by another doctor after he had been pronounced cured by Dr. McMillan to see whether or not the injections had proved successful, and the doctor who made this last examination informed the claimant that he had completely recovered from his hernia. (See Exhibit VI.)

Claimant's accident was in the course of, and arose out of, his employment. The Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 4, of the Workmen's Compensation Act of the State of Illinois provides:

"The operation of any warehouse or general or terminal storehouses."

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, Subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Mr. Bough was employed by the World's Fair Greyhound Lines during the period of the World's Fair in Chicago, Illinois (1933 and 1934). At that time, he averaged $25.00 a week. A medical examination was given him by Dr. Swift on the 15th day of May, 1934. At that time, he was given a Class "A" rating and there was no showing of a hernia.

Claimant does not ask for temporary total or permanent total disability. Further, there is no claim pending against the State of Illinois or the Illinois Emergency Relief Commission.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Harold C. Bough* vs. *Illinois Emergency Relief Commission*, the following opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment; that the essential elements for an award in the case of an injury resulting in hernia are shown by the statement of facts to have existed; that by virtue of the provisions

of Section 8 (a) of said Act, the Commission was liable for the payment of compensation for temporary total disability and for medical and doctor bills incurred in relieving said employee from the effects and results of said injury. From the statement made, the payment of such medical and doctor bills and the expenditure of the sum of One Hundred Four ($104.00) Dollars by the Illinois Emergency Relief Commission as a result of said injury was and is justified under the terms of the Workmen's Compensation Act.

As it appears from the statement that full adjustment has been made with the injured employee, a final release should be obtained.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 16.

Payment of $100.00 advised.

ARTHUR KRAUSE, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed May 11, 1937.

STATEMENT OF FACTS.

Arthur Krause, 1105 West Washington Boulevard, Chicago, Illinois, claims to have sustained an injury to his right foot while working in a shelter of the Illinois Emergency Relief Commission at 116 South Green Street, Chicago, Illinois, on the 31st day of January, 1934.

The General Assembly of the State of Illinois on or about the 6th day of February, 1932, created the Illinois Emergency Relief Commission. Chapter 23, Section 464, of the Illinois Revised Statutes, 1935 Edition, sets out the duties of said Commission, which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through

which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions, shelters and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes carpentry, plumbing, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. Said shelters are operated by said commission for the benefit of transient men. These men are furnished two meals a day and shelter and some have opportunity to work around the building doing odd jobs. All of the above enterprises or projects use sharp-edged cutting tools, such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was working in the kitchen of the shelter at 116 South Green Street, Chicago, Illinois, on the day heretofore mentioned when one of the helpers in the shelter who was delivering goods throughout the shelter pushed his hand truck (a truck about two feet wide, four feet long, with a flat platform on top about two feet from the ground) against claimant's right foot. At the time of the accident, there was severe pain but the accident was not reported to Mr. James Kelley, foreman of the shelter, until the following day because claimant did not consider his injury serious. The following day claimant's ankle became swollen so he consulted Dr. Joseph, who was one of the attending physicians in the shelter. At this time claimant was instructed to apply hot applications to the injured foot and to rest. The injury did not respond to this treatment so on or about the 13th day of March, 1934, claimant was taken to the Cook County Hospital, Chicago, Illinois, for an X ray picture.

Claimant had been employed at the shelter as a butcher since the 15th day of January, 1934. His salary for his services was Three Dollars ($3.00) per week and maintenance. Maintenance consisted of two meals per day and lodging. The Illinois Emergency Relief Commission figures that the cost of maintenance for an individual in a shelter is Nine Dollars ($9.00) per month, so claimant's earnings at the time of the accident were Twenty-one Dollars ($21.00) per month.

Mr. James Kelley, foreman at the relief shelter, died shortly after the accident occurred so there was no opportunity to secure a statement from him as to the cause of the accident. Other employees who were present at the time of the accident have since left the shelter and their whereabouts are unknown.

Dr. Louis D. Joseph, formerly employed by the Illinois Emergency Relief Commission to examine and attend shelter relief recipients, informed the Illinois Emergency Relief Commission that records show that claimant came to his office on or about the 3rd day of March, 1934, complaining of an injured ankle. Records further show that claimant stated that the injury was sustained while he was preparing a meal in the kitchen and that he had been struck by a hand truck which was operated by another employee in the shelter.

The records of the Cook County Hospital, Chicago, Illinois, were examined. They show that Arthur Krause came to the hospital on the 13th day of March, 1934, for an X-ray of his right ankle. The X-ray films showed no fracture. (See Exhibit I.)

In the course of claimant's work, sharp-edged cutting tools were used, such as knives, cleavers, also electrically driven motors which operate meat slicing machines and grinders. There were also two steam boilers in the building. Said building was used as a shelter by the Illinois Emergency Relief Commission and was occupied by approximately fourteen hundred (1,400) men.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraph (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Claimant claims that he has been employed as a butcher for the past ten years and that his earnings over the past five years have averaged Thirty Dollars ($30.00) per week.

As a result of the accident, claimant was not able to work for approximately six months.

At the time of the accident, claimant had no children under sixteen years of age.

Claimant has filed a petition in the Court of Claims which is known as *Arthur Krause* vs. *State of Illinois* No. 2389. Said case is now pending before the court although claimant has at this date filed a stipulation to dismiss the above entitled cause.

A release and waiver has been secured from claimant by the Illinois Emergency Relief Commission in which claimant agrees to dismiss the case now pending in the Court of Claims upon the payment of One Hundred Dollars ($100.00.) Said agreement has been sanctioned by claimant's attorney.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Arthur Krause* vs. *The Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the *Illinois Workmen's Compensation Act;* that said accident arose out of and in the course of such employment; that under the provisions of Section 8 (b) of said Act said Commission is liable to claimant for temporary total incapacity for the period of such incapacity, i. e. twenty-six (26) weeks; that a settlement by agreement of the amount of such liability in the sum of One Hundred ($100.00) Dollars, is within the limit of liability fixed by the terms of the *Workmen's Compensation Act;* that claimant appears to have been advised by counsel and has been furnished by respondent such medical care as was required under the terms of said statute.

We are therefore of the opinion that claimant should receive settlement on said claim from the I. E. R. C. in the sum of One Hundred ($100.00) Dollars, and that such settlement should be subject to the following conditions, to wit:

1. That the case of *Arthur Krause* vs. *State of Illinois*, Court of Claims No. 2389, now pending in this court should be dismissed.

2. That payment of the above compensation shall be made by the I. E. R. C. out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 17.

Payment made of $46.00 found to be authorized and payment of $100.00 in settlement advised.

GEORGE REESE, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 3, 1937.

STATEMENT OF FACTS.

George Reese, Route No. 1, Mundelein, Illinois, claims to have sustained an injury to his right eye on the 25th day of

September, 1934, while working on Project S248-D4-32. Said project was for preparation of a convalescent women's camp at Doddridge Farm, which is located three miles north of Libertyville, Illinois. The work of said project consisted of cultivating several acres for gardens, taking out dead trees, weeds and bad bushes; trimming and grading all roads and painting buildings, steps and porches. Said project was instituted on the 31st day of May, 1934, and work was completed on or about March 30, 1935. The total cost of said project was $2,590.06. Said amount included labor and materials. All monies for said project were furnished by the Illinois Emergency Relief Commission. This project was requested by the Illinois Emergency Relief Commission for a camp for convalescent women who were recipients of relief in the Chicago area. Said project was approved by Mary G. Moon, Director of Women's Activities for the Illinois Emergency Relief Commission and by A. R. Lord, State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said commission which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many Departments within itself since its creation through which relief is administered; such as Maintenance Department, furniture shops, mattress factories, canneries, Work Relief Divisions and other Divisions or Departments too numerous to mention. Said Maintenance Department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture

which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

The Illinois Emergency Relief Commission and the trustees of the Doddridge Farm, Libertyville, Illinois, entered into an agreement on or about the 1st day of June, 1934, which provided that the Illinois Emergency Relief Commission occupy said farm, also buildings and appurtenances thereto and further provided that all labor and materials necessary to keep the premises in a good state of repair were to be furnished by the Illinois Emergency Relief Commission. Doddridge Farm was a camp which was operated by trustees of the Catherine Budd Foundation. Said camp has for many years been used by the charities in Chicago for a vacation place for children whose families were on relief. All expenses in the operation of this camp were covered by the trustees. Said farm was donated to the Illinois Emergency Relief Commission for the period of this project by the trustees free of charge.

Claimant was assigned to work on said project on or about the 30th day of June, 1934, and continued to work on same until the day of the accident. Claimant had been assigned on other work relief projects previous to the date heretofore mentioned. Claimant worked approximately 35 hours per week at fifty cents per hour and worked every other week during the month, so his total earnings were Thirty-Five Dollars ($35.00) per month.

On the day of the accident, Wilmer A. McLean, superintendent of Doddridge Farm, instructed claimant to caulk a Tabasco boiler which had become out of repair. Mr. Jess Scott was also instructed to assist in the repair work. Claimant claims that as the repairs were being made one of the

rivets on the boiler chipped off and struck him in his right eye. Claimant continued to work throughout the day so that he could complete his work relief assignment for that period. His eye became progressively worse, so it was necessary to consult Dr. Charles N. Stephens, Libertyville, Illinois, on October 2, 1934. Dr. Stephens treated claimant from October 2, 1934, to November 24, 1934 (See Exhibit I).

Mr. Wilmer A. McLean stated that shortly after the accident occurred, he examined claimant's eye and saw that there was inflammation but was under the impression at that time that it was only dirt. Claimant was not taken to a doctor at this time (See Exhibit II).

Mr. Jess Scott, who was working with claimant at the time of the accident, stated that a piece of steel flew in claimant's eye as repairs were being made on the boiler (See Exhibit III).

Claimant was asked to submit to an examination on February 24, 1936. On that date, he was examined by Dr. W. C. Hammond, who reported to the Illinois Emergency Relief Commission that at this time there was no connection between claimant's present inability to see with the accident he claimed to have sustained while working for the Illinois Emergency Relief Commission (See Exhibit IV).

Dr. Charles N. Stephens rendered a bill for his services in the sum of Forty-Six Dollars ($46.00), which has been paid by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, sharp-edged cutting tools were used in the course of his work such as chisels and saws. The Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made within six months after the accident.

At the time of the accident, claimant had two children under sixteen years of age, Earl George and Ernest, ages 10 and 8 respectively.

Section 3, subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *"

Section 8, subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

As a result of the accident, claimant was not able to work for approximately four and a half months.

Claimant has filed a petition in the Court of Claims which is known as *George Reese* vs. *State of Illinois,* No. 2581. Said case is now pending in the Court of Claims although claimant has filed a stipulation to dismiss the above entitled cause.

A release and waiver have been secured from the claimant by the Illinois Emergency Relief Commission in which claimant has agreed to dismiss the case now pending in the Court of Claims upon the payment of One Hundred Dollars ($100.00). Said agreement has been sanctioned by claimant's attorney.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *George Reese* vs. *Illinois Emergency Relief Commission,* the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that the injury to claimant's right eye arose out of and in the course of his employment and that under the provisions of Section 8 (a) of the Workmen's Compensation Act the Illinois Emergency Relief Commission is liable for the neces-

sary first-aid medical and surgical services, and for such necessary medical, surgical and hospital services thereafter as may be reasonably required to cure or relieve the employee from the effects of said injury; that the payment therefore, of the bill of Dr. Charles N. Stephens for services rendered claimant, as shown by the record, in the sum of Forty Six ($46.00) Dollars was justified and legally proper.

It further appears that as a result of the accident, claimant was unable to work for approximately four and one-half months; that claimant is entitled to compensation for temporary total incapacity for such period; that a settlement has been agreed upon between claimant and said Commission in full settlement of his rights to compensation for said accidental injury in the sum of One Hundred ($100.00) Dollars; that such agreement has been sanctioned by claimant's attorney and that said sum is within the amount fixed under the terms of the Workmen's Compensation Act. We are therefore of the opinion that such settlement is properly made by said Commission, and that the following conditions should be observed in connection therewith.

First: That the claim of *George Reese* vs. *State of Illinois*, Court of Claims No. 2581, now pending, should be dismissed.

Second: That payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 18

Payment of $313.50 advised.

TOBEY ELLIS, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 3, 1937.

STATEMENT OF FACTS.

Tobey Ellis, 920 Sedgwick Street, Chicago, Illinois, claims to have sustained an injury on the 15th day of February, 1935, to his left foot while working as a laborer for the Illinois Emergency Relief Commission on Project No. 1-B3-2.

Said project was requested for general repairs and alterations at the Naval Armory of the State of Illinois at the Lake Front and Randolph Street in Chicago, Illinois, by Edward A. Evers, Captain, Illinois Naval Militia, and was approved by A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief. Said project provided for work as follows:

"Cut off piling above waterline around the Naval Armory, approximately 1,300 linear feet. Install 12 x 12 timbers on top of cut piling. Install precast concrete cribbing to form wall. Dig trench to enable work to be done. Back fill trench. Build concrete forms and construct ballards. Grade approximately 12,000 square yards of surface ground with cinder fill. Lay granite paving blocks in Armory yards. Preparation for and planting of shrubs in beds, aggregating about 2,400 square feet; rebuild tile partition of boat storage room, approximately 800 square feet; renovating, cleaning, refinishing, polishing floor, wall and ceiling surfaces where worn."

All labor and materials and monies were furnished by the Illinois Emergency Relief Commission. The total cost of said project was $159,916.73. This project was approved March 28, 1934, and completed on June 21, 1935.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said Commission which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture fur-

niture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on or about the 17th day of April, 1934, and continued to work on said project until the day he sustained his injury.

On February 15, 1935, claimant was directed by Robert Gruwell, foreman of the above mentioned project, to assist certain men in removing worn out electric light bulbs from the ceiling of the handball court. As claimant was in the performance of his duty, the ladder which was placed against the side of the wall shifted, and as a result, claimant fell to the floor, a distance of about eighteen (18) feet, striking on his feet and back. Claimant's left leg began to swell and John Kopshever was directed by Mr. Gruwell to take claimant to St. Luke's Hospital, Chicago, Illinois, for emergency care. (See Exhibit I.)

At the time of the accident, sharp-edged cutting tools were used such as saws, chisels and mattocks. There were also two steam boilers and electrically driven motors operating in the building when claimant sustained his injury.

The records of St. Luke's Hospital show that claimant sustained a fracture of "left tibia and os. calcis" while working for the Illinois Emergency Relief Commission. Said fracture was placed in a cast and the patient was discharged from the hospital on the 16th day of February, 1935. (See Exhibit II.)

Mr. Sam Jackson Dey stated that on the 15th day of February, 1935, he was assisting claimant in his work on the handball court at the Naval Armory when claimant fell from a ladder upon which he was working. As a result of this fall, he sustained an injured foot. (See Exhibit III.)

Dr. Nathaniel H. Adams, Chicago, Illinois, examined claimant on the 21st day of March, 1935. At that time, Dr. Adams stated that it was too early to estimate the specific loss of use. (See Exhibit IV.)

Claimant was again examined by Dr. Adams on the 12th day of July, 1935. At that time, Dr. Adams stated that claimant had a specific loss of use of twenty-five (25) per cent of the leg. (See Exhibit V.)

Dr. Emil Hauser, 8 South Michigan Avenue, Chicago, Illinois, an outstanding orthopedic surgeon, examined claimant on the 13th day of January, 1937. At this time, Dr. Hauser found there was a probable disability of less than ten (10) per cent. Further, that this disability may clear up with proper treatment. (See Exhibit VI.)

Claimant's medical bills and hospital bills have been paid by the Illinois Emergency Relief Commission.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, Subsection (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury. * * *"

Section 8, Subsection (e) of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss

herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provision of this Act."

Section 8, Subsection (e), paragraph 14, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a foot or the permanent and complete loss of its use, fifty percentum of the average weekly wage during one hundred and thirty-five weeks."

Claimant's wages at the time of the accident were Nine Dollars ($9.00) per week. His work assignments were for eighteen (18) hours per week at Fifty Cents ($.50) per hour.

Medical examinations and doctors' reports show that Tobey Ellis has a ten (10) per cent permanent and complete loss of the use of his left foot.

At the time of the accident, claimant had one child under sixteen years of age—Raymond Ellis, eight years old.

Claimant has filed a petition in the Court of Claims which is known as *Tobey Ellis* vs. *State of Illinois*, No. 2662. Stipulation to dismiss the cause has been filed in the Court of Claims.

A release and waiver has been secured by the Illinois Emergency Relief Commission and claimant and his attorney have agreed to accept Three Hundred Thirteen Dollars and Fifty Cents ($313.50) in full settlement for his injuries.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Tobey Ellis* vs. *Illinois Emergency Relief Commission*, the following opinion is submitted, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Workmen's Compensation Act; that claimant's accident was in the course of and arose out of his employment, and that the Commission had notice of the accident and that demand of compensation was made by employee within the requirements of the said Act. The record further discloses that the injury suffered by claimant to his left foot in the fall sustained by him on February 15, 1935, caused such a fracture of the left tibia and os. calcis that claimant was temporarily and totally disabled for a period

of at least six months and suffered a permanent partial loss of the use of the left leg of approximately ten (10) per cent. We further find that by virtue of the foregoing a settlement of hospital and medical bills by your said Commission is legal under the provisions of said Workmen's Compensation Act, and that a settlement with claimant in full for claims growing out of said accidental injury, by and with approval of his attorney, in the sum of Three Hundred Thirteen and 50/100 ($313.50) Dollars, is within the amount which claimant would be entitled to under the provisions of said Workmen's Compensation Act. We are therefore of the opinion that such settlement is proper and that in making same the following conditions should be observed:

First: That the claim of *Tobey Ellis* vs. *State of Illinois*, Court of Claims No. 2662, now pending in the Court of Claims should be dismissed, and

Second: That payment of the above compensation shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for the payment of such claims.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 19.

Payment of $2,000.00 advised.

CHARLES HANKUS, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 30, 1937.

STATEMENT OF FACTS.

Charles Hankus, 1239 North Wood Street, Chicago, Illinois, claims to have sustained an injury on the 8th day of October, 1934, to both of his legs while working as a laborer for the Illinois Emergency Relief Commission on Project S1-B2-1, Schedule No. 34905, Division 8, Division of Highways.

Said project was requested by the State Highway Department, 35 East Wacker Drive, Chicago, Illinois, for work as follows:

"Work to be embraced in this project shall include widening and construction at shoulders, reconstructing ditches, flattening slopes, daylighting intersections and curves, quarrying flagstone, constructing stone gutters,

stone retaining walls and head walls, rip-rapping steep slopes, preparing grounds for planting, planting and caring for trees and shrubs, trimming trees, removing stumps, laying sod, sowing grass seed, constructing stone and cinder sidewalks, constructing fences, constructing and painting guard fences, patching and maintaining pavement, laying tile, constructing and repairing catch basins and culverts, painting bridges, maintaining roadway signs, moving roadsides, unloading and handling materials to be used on various State roads in Cook County, dressing and maintaining tools to be used for work as listed, and keeping accurate costs, records and distribution of all work."

The above mentioned project was requested by the State of Illinois, Division of Highways, by Kendrick Harger, district engineer, and the provisions were that the Illinois Emergency Relief Commission was to furnish $196,040.00 for labor, and the Division of Highways was to supply $67,498.05 for materials and supplies. The total cost of said project was $263,538.05. Said project was sanctioned by A. R. Lord, Illinois Emergency Relief Commission State Administrator of Work Relief. Said project was approved the 1st day of August, 1934, and was to be completed by the 23rd day of March, 1935.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said Commission which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair

work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Claimant was assigned to work on the above project on the 26th day of September, 1934, and was to report to work to Andrew Ludwig, 111th and Western Avenues, Chicago, Illinois, on October 1, 1934, and work the days of October 1, 2, 3, 8, 9, and 10. His rate of pay was Fifty Cents ($.50) per hour and he was to work a total of forty-two (42) hours during this period.

Claimant was directed by Andrew Ludwig, on October 8, 1934, to go to the warehouse at 1731 North Elston Avenue, Chicago, Illinois, and assist other employees in loading a truck with cement. As claimant was in the process of working around the warehouse, a pile of cement bags collapsed and fell on his legs. As a result of this accident, claimant sustained a fracture of both legs.

E. F. Dickson, employee of the State of Illinois, Division of Highways, stated that he was in charge of the warehouse at 1731 Elston Avenue on the 8th day of October, 1934, when Charles Hankus sustained his injuries while working in and around the warehouse; that shortly after the accident occurred, he was notified by other employees in the warehouse as to how Charles Hankus was injured and that he was taken directly to Dr. H. W. Mullins' office for first aid treatment. (See Exhibit I.)

Adam Glass, 11653 Yale Avenue, Chicago, Illinois, stated that on the 8th day of October, 1934, he was directed by Andrew Ludwig, foreman on the project at 111th and Western Avenues to go with Charles Hankus and other employees to the warehouse at 1731 Elston Avenue and assist in loading

a truck with cement. As the men were in the process of loading the truck, one of the piles of cement collapsed and as a result, claimant broke both of his legs. E. F. Dickson, who was in charge of the warehouse, was notified of the accident. (See Exhibit II.)

At the time of the accident, sharp-edged cutting tools were used, such as saws, chisels, pneumatic hammers and gasoline driven cement mixers.

The records of Alexian Brothers Hospital, Chicago, Illinois, show that claimant was brought to the hospital on the 8th day of October, 1934, and released the 16th day of February, 1935. During this period, claimant was under the care of Dr. H. W. Mullins.

Dr. H. W. Mullins, 1859 Elston Avenue, Chicago, Illinois, stated that claimant sustained a complete transerve fracture, middle third, right tibia with forward displacement and overriding proximal phalanx; comminuted fracture, middle third, right fibula; linear fracture incomplete upper end of tibia. Left fracture upper third running through to joint with fracture of spine of tibia; comminuted fracture upper third of fibula. (See Exhibit III.)

Dr. Mullins treated claimant from the 8th day of October, 1934, to the 16th day of September, 1935. Dr. Mullins stated on the 27th day of February, 1936, that he was of the opinion that claimant could never do any kind of laboring work again as a result of the injuries he sustained on October 8, 1934, because the muscles, nerves and tendons were injured and there was some restriction of action in the muscles of the legs and knees. Dr. Mullins claims that there was temporary total disability for a period of 64 weeks and 75 per cent permanent total disability of both legs.

Dr. William Hazlett, 122 South Michigan Avenue, Chicago, Illinois, testified on behalf of the respondent as to the disability of Charles Hankus. An examination was made by Dr. Hazlett on the 23rd day of April, 1936. At this time Dr. Hazlett found that there was a disability in both legs and the disability was so great that it would impair his physical condition sufficiently so that he could not do heavy manual work. (See Exhibit IV.)

Claimant's hospital bill has been paid by the Illinois Emergency Relief Commission. Claimant's bill from Dr. H.

W. Mullins in the sum of $226.00 has not been paid. The Illinois Emergency Relief Commission has agreed to pay the above amount. Said amount has been found to be reasonable for the services rendered.

Claimant's accident was in the course of, and arose out of, his employment. Further, the Illinois Emergency Relief Commission had notice of the accident and demand for compensation was made on his employer within six months after the accident.

Section 3, Subsection 8, of the Workmen's Compensation Act of the State of Illinois provides:

"In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra hazardous * * *"

Section 8, Subsection (a), of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury."

Section 8, Subsection (e), of the Workmen's Compensation Act of the State of Illinois provides:

"For injuries in the following schedule, the employee shall receive compensation for the period of temporary total incapacity for work resulting from such injury, in accordance with the provisions of paragraphs (a) and (b) of this section, for a period not to exceed sixty-four weeks, and shall receive in addition thereto compensation for a further period subject to limitations as to amounts as in this section provided, for the specific loss herein mentioned, as follows, but shall not receive any compensation for such injuries under any other provisions of this Act."

Section 8, Subsection (e), paragraph 15, of the Workmen's Compensation Act of the State of Illinois provides:

"For the loss of a leg, or the permanent and complete loss of its use, fifty percentum of the average weekly wage during one hundred and ninety weeks."

Section 8, Subsection (e), paragraph 18, of the Workmen's Compensation Act of the State of Illinois provides:

"The specific case of loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, suffered in one accident, or the permanent and complete loss of use thereof, suffered in one accident, shall constitute total and permanent disability, to be compensated according to the compensation fixed by paragraph (f) of this section * * *"

At the time of the accident, claimant had three children under sixteen years of age; Stanley, born in 1922; Thaddeus, born in 1923; and Mitchell, born in 1926.

Claimant has filed a petition in the Court of Claims which is known as *Charles Hankus* vs. *State of Illinois*, No. 2732. Stipulation to dismiss the cause has been filed in the Court of Claims.

A release and waiver has been secured by the Illinois Emergency Relief Commission and claimant and his attorney have agreed to accept Two Thousand Dollars ($2,000.00) in full settlement for his injuries. The Illinois Emergency Relief Commission has agreed to pay Dr. H. W. Mullins Two Hundred Twenty-Six Dollars ($226.00) for professional services rendered Charles Hankus.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Charles Hankus* vs. *Illinois Emergency Relief Commission*, the following opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment.

Claimant herein appears to have sustained an injury on the 8th day of October, 1934 while employed as a laborer by the Illinois Emergency Relief Commission. At the time of said accident he was working in a warehouse when a pile of cement bags fell on him, resulting in a fracture of both legs. The record discloses substantial hospital treatment, the bill for which has been paid by the Relief Commission, and medical services rendered by Dr. H. W. Mullins for which the Commission states it is ready to pay, in the sum of Two Hundred Twenty-six ($226.00) Dollars. At the time of the accident claimant had three children under sixteen years of age: Stanley, born in 1922; Thaddeus, born in 1923 and Mitchell, born in 1926.

Claimant is shown to have been in the hospital from October 8, 1934 to the 16th day of February, 1935. It appears that his wages were Fifty Cents (50c) per hour for forty-

two (42) hours per week. The record discloses that claimant has suffered a permanent disability and that he would be entitled to an award for temporary total disability while in said hospital, and a permanent partial disability for the condition resulting from the injuries to his two legs. We further find that a settlement of Two Thousand ($2,000.00) Dollars, in addition to the hospital and medical bills paid or assumed by the Commission, payable to claimant under a stipulated agreement between him and his counsel and the Commission, is fully justified by the record. We are further of the opinion that payment of such claim should be subject:

First, to a dismissal of the claims of *Charles Hankus* vs. *State of Illinois*, Court of Claims Nos. 2732 and 2736 now pending in this court.

Second, the payment of such sum shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for such purpose.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 20.

Payment of $2,000.00 advised.

STELLA McGEE, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed June 30, 1937.

STATEMENT OF FACTS.

Stella McGee, Breese, Illinois, wife of Joseph J. McGee, deceased, claims that on the 8th day of August, 1934, Joseph J. McGee was employed as a laborer by the Illinois Emergency Relief Commission on Project S-214-B16-8 in Clinton County, at Carlyle, Illinois. Said project was requested by the State of Illinois, Department of Conservation, by C. F. Thompson, Acting Director, for landscaping and reconditioning of the building at the fish hatchery at Carlyle, Illinois. Work consisted of:

"Dig out pond, build levee, rip-rap embankments, install pumping equipment for water supply and shelter for same, set up holding tanks, install bug lights, paint buildings, build tables and benches on Fish Hatchery ground east of Carlyle."

The Illinois Emergency Relief Commission was to furnish $11,727.00 for labor and the State of Illinois was to

furnish $3,068.75 for materials and equipment. The total cost of said project was $14,795.75. This project was approved June 27, 1934, and completed about October 20, 1934. Said project was approved by A. R. Lord, State Administrator of Work Relief.

The Illinois Emergency Relief Commission was created by an Act of the General Assembly of the State of Illinois effective February 6, 1932. Chapter 23, Section 464, of the Illinois State Bar Statutes, 1935, sets out the duties of said Commission which are as follows:

"*Powers and duties.* It shall be the duty of the commission until March 1, 1937, to provide relief to residents of the State of Illinois, who, by reason of unemployment or otherwise, are destitute and in necessitous circumstances. Such relief shall be provided by distributing funds or supplies and by any other means deemed desirable by the commission. For the purpose of carrying out the provisions of this Act, the commission may make use of and co-operate with counties, townships, and any other municipal corporations charged by law with the duty of poor relief and with other local relief agencies."

The Illinois Emergency Relief Commission has created many departments within itself since its creation through which relief is administered; such as maintenance department, furniture shops, mattress factories, canneries, work relief divisions and other divisions or departments too numerous to mention. Said maintenance department has charge of maintenance work in all buildings operated by the Illinois Emergency Relief Commission. Said work includes plumbing, carpentry, janitor work, engineering, and general repair work. Said furniture shops manufacture furniture which is used in relief offices throughout the State. Said mattress factories manufacture mattresses for relief recipients and for shelters operated by the Illinois Emergency Relief Commission. Said canneries preserve vegetables and fruits which have been grown by relief recipients on Illinois Emergency Relief Commission soil. Said work relief divisions furnish men to the State Highway Department, counties, townships, cities and parks for general maintenance work. All of the above enterprises or projects use sharp-edged cutting tools such as saws, chisels, mattocks and axes. Said buildings operate electric motors, elevators and boilers, all of which are governed by municipal ordinances.

Joseph J. McGee, deceased, was directed by the Clinton County Emergency Relief Commission, which is a division of

the Illinois Emergency Relief Commission, to report to C. R. Miller, foreman and superintendent at the fish hatchery, Carlyle, Illinois, on or about the first day of August, 1934, and to work August 8th and 9th for six hours each day and was to receive Fifty Cents ($.50) an hour for his services.

Joseph J. McGee was taken by a truck which was operated by the State of Illinois with a group of other men on the day heretofore mentioned to the State Fish Hatchery at Carlyle, Illinois, to work as a laborer at maintenance and construction work at the fish hatchery. The work consisted of excavating in order to lay a certain drain pipe which was to supply the State Fish Hatchery with water from the City of Carlyle water works. On the day heretofore mentioned, the temperature on or about 1:00 p. m. was 100 degrees, and C. R. Miller, foreman and superintendent, directed that all men working in the ditch were to work for ten-minute periods so that none of them would suffer sunstroke or heat prostration. While Joseph J. McGee was working in and around the ditch, he was overcome by the sun and was removed from the ditch to the shade. He was told to remain there the rest of the day but he failed to comply with the command of the foreman, and after a short time returned to his work and continued to work until 5:00 o'clock in the afternoon of said day. After Joseph J. McGee resumed work and from that time on until about 9:30 p. m. on the day heretofore mentioned, he became progressively worse and Dr. J. B. Warren of Breese, Illinois, was called in to attend him. Mr. McGee became worse and on the following day Dr. Warren ordered that he be removed to St. Joseph's Hospital, Breese, Illinois. His condition became steadily worse and he died on the 20th day of August, 1934.

C. R. Miller, superintendent and foreman, employee of the State of Illinois, Department of Conservation, stated that Joseph J. McGee had been assigned to him through the Clinton County Emergency Relief Commission as a laborer for the days of August 8th and 9th for six hours each day. That during the day of August 8th, the temperature was about 105 degrees in the shade. (See Exhibit I.)

Mr. S. H. Brink, Centralia, Illinois, stated that on August 8, 1934, he was employed by the State Department of Conservation at Carlyle, Illinois, at the fish hatchery as foreman. That on said date, Joseph McGee had been assigned

to work on Project S-214-B16-8 as a laborer. That during the course of the day, Mr. McGee was stricken with a sunstroke. (See Exhibit II.)

John Ayres, Beckmeyer, Illinois, stated that on the 8th day of August, 1934, there were about 75 men working in and around the fish hatchery at Carlyle, Illinois. That Joseph J. McGee was assigned to work in the ditch (four feet deep and one and one-half feet wide) in the preparation of laying a drain pipe from one pond to the other. The ground on which these men were working was very soft so that shovels were all that were needed to remove the dirt. That because of the excessive heat on this day, the men were working in ten-minute shifts. That about one o'clock Joseph McGee complained of the excessive heat and was told to rest in the shade. (See Exhibit III.)

Dr. H. B. Warren was called to Joseph McGee's home on August 8, 1934, at about 9:30 p. m. At this time, Dr. Warren found that Joseph McGee had suffered from sunstroke during the day. The following morning Dr. Warren returned to the home and at this time found that Mr. McGee needed hospital care, so he ordered him to be taken to St. Joseph's Hospital, where he remained until his death. (See Exhibit IV.)

The records of St. Joseph's Hospital were examined and they show that Joseph McGee's condition was caused by working in the hot sun and excessive heat and that death was caused by sunstroke which had been suffered by the deceased on August 8, 1934. (See Exhibit V.)

All medical and hospital bills have been paid by the Illinois Emergency Relief Commission.

Joseph McGee's death was in the course of, and arose out of, his employment. The Illinois Emergency Relief Commission had notice of his death and demand for compensation was made by claimant on his employer within six months after the death.

Sharp-edged cutting tools such as saws, chisels, picks and mattocks were used in the course of Joseph McGee's work.

Section 8, Subsection (a) of the Workmen's Compensation Act of the State of Illinois provides:

"The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury."

Section 7, Subsection (c) of the Workmen's Compensation Act of the State of Illinois provides:

"If no amount is payable under paragraphs (a), (b) or (c) of this section and the employee leaves any grandparent, grandchild or grandchildren or collateral heirs dependent at the time of the injury to the employee upon his earnings to the extent of fifty percentum or more of total dependency, then such proportion of a sum equal to four times the average annual earnings of the employees as such dependency bears to total dependency, but not less in any event then one thousand dollars and not more in any event than three thousand seven hundred fifty dollars. Any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amounts payable on death."

Stella McGee claims that Joseph J. McGee, deceased, was her sole support and also was the sole support of Ennis McGee, a grandchild.

Claimant has filed a petition in the Court of Claims which is known as *Stella McGee* vs. *State of Illinois*, No. 2559. Stipulation to dismiss the above cause has been filed in the Court of Claims.

A release and waiver has been secured by the Illinois Emergency Relief Commission and claimant and her attorney have agreed to accept Two Thousand Dollars ($2,000.00) in full settlement of her claim.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

Pursuant to your request for an Advisory Opinion, based upon the foregoing statement of facts submitted by you in the matter of the claim of *Stella McGee* vs. *Illinois Emergency Relief Commission*, the following opinion is rendered, based upon the aforementioned statement:

We find that at the time of the accident in question, both employer and employee were operating under and bound by the provisions of the Illinois Workmen's Compensation Act; that said accident arose out of and in the course of such employment.

The facts submitted in such statement show that Joseph J. McGee was employed with a crew of men on the 8th day of August, 1934 in laying a drain pipe at the fish hatchery at Carlyle, Illinois; that the temperature was from 104 degrees to 105 degrees, and that because of the excessive heat, the men were working in ten-minute shifts; that Joseph J. McGee was working in a ditch four feet deep and one and one-half feet wide, removing loose dirt with a shovel; that he suffered a

sunstroke on the afternoon of that date; he was taken to a hospital the next morning and there remained until his death on August 20, 1934; that his wages were on the basis of a six-hour day, 50c per hour, under irregular employment; that he left surviving, his wife, claimant, Stella McGee and a grandchild, Ennis McGee, who was dependent upon him for such grandchild's sole support; that claimant, by and with the advice of counsel, has agreed to accept Two Thousand ($2,000.00) Dollars in full settlement of her claim.

An applicant in a heat prostration case must as in all other cases, prove by competent and sufficient evidence that the accident arose out of and in the course of the employment. The mere fact that the sunstroke occurred while employee was in the discharge of his regular duties is insufficient unless it also appears that such prostration arose out of the employment. Such accident cannot be said to arise out of the employment unless there is competent proof that the employee was subjected to an unusual and special hazard from the heat greater than that to which the public generally, and other workmen in the same vicinity, were subjected. The statement of facts submitted in this claim shows that Joseph J. McGee and those working with him down in the ditch were in fact subjected to a special degree of exposure to the sun's rays and extreme and unusual heat, and a lack of air enjoyed by others not engaged in such work. It therefore appears from the said statement of facts that an award is properly allowable under the provisions of the Workmen's Compensation Act, and that the payments heretofore made by the Commission for medical and hospital charges were properly paid, and that a settlement with claimant, as the widow of Joseph J. McGee, in full for the death of the latter, in the sum of Two Thousand ($2,000.00) Dollars, is within the limits of liability under Section 7 (a) of the Workmen's Compensation Act and is a proper settlement with claimant, it appearing that she is duly advised by counsel. (*Brown* vs. *State*, 8 C. C. R. 442.)

Payment of such claim should be subject, first, to a dismissal of the claim of *Stella McGee* vs. *State of Illinois*, Court of Claims No. 2559, now pending; and second, the payment of such sum shall be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for such purpose.

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Under the objection interposed by respondent, the motion to dismiss is hereby allowed and claim dismissed.

(No. 3057—Claim denied.)

PERCY MONAHAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 19, 1937.

LEOPOLD SALTIEL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State Penal Institution—State not liable where inmate injured as result of.* The State is not liable to respond in damages for personal injuries sustained by inmate of penal institution as the result of the negligence of employees of such institution, as in the conduct of its penal institutions it exercises a governmental function and is not liable for the negligence of its servants or agents, the doctrine of respondent superior not being applicable to the State in the exercise of its governmental functions.

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

Claimant filed his complaint herein on February 18th, 1937, and alleges therein in substance that on March 23d, 1936 he was an inmate of the Illinois State Penitentiary at Joliet; that he was a member of the prison band, and on the last mentioned date was assembled with said band in the dining room of the penitentiary; that he was then and there in the exercise of all due care and caution for his own safety; that one of the guards stationed in said dining room carelessly, negligently and improperly handled a certain gun, whereby the same was discharged and the bullet therefrom struck the claimant in the leg, and as the result thereof he sustained serious and permanent injuries, for which he asks compensation.

The Attorney General has filed a motion to dismiss the claim on the ground that the doctrine of respondeat superior does not apply to the State in the operation of its penal institutions, and that therefore there is no liability on the part of the State for the injuries sustained by the claimant.

This court has repeatedly held that in the management and operation of its charitable and penal institutions, the

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