REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 11

Containing cases in which opinions were filed and orders of dismissal entered, without opinion, between July I, 1939 and June 30, 1941, and advisory Opinions furnished Illinois Emergency Relief Commission

---

SPRINGFIELD, ILLINOIS
1941

[Printed by authority of the State of Illinois.]

7

(10757)

o

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.

JUSTICES OF THE COURT OF CLAIMS

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

OTTO KERNER, *Attorney General,*
January 9, 1933–November 23, 1938;
JOHN E. CASSIDY, *Attorney General,*
November 24, 1938–January 12, 1941;
GEORGE F. BARRETT, *Attorney General.*

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

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

TERMS OF COURT

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

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

COMPLAINT

RULE 2. (a) Causes shall be commenced by a verified complaint which, together with four copies thereof, shall be filed with the Clerk of the Court. A party filing a claim shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The original complaint and all copies thereof shall be provided with a suitable cover or back having pcinted 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 mutally 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 elaimant 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 orig-

inal 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.

The above and foregoing rules were adopted as the rules of the Court of Claims of the State of Illinois on the 22nd day of November, **A.** D. 1933, to be in full force and effect from and after the first day of January, **A.** D. **1934,** in lieu of all rules theretofore in force.

COURT OF CLAIMS LAW

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

SECTION **1.** *Be it enacted by the People of the Xtate 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 materia1 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.

TABLE OF CASES REPORTED IN THIS VOLUME

A

PAGE

Adair. Roy K., Receiver. etc., v. State 649
Adair. Roy K., Receiver. etc., v. State 650
Adair. Roy K., Receiver. etc., v. State 650
Advisory Opinions. Illinois Emergency Relief Commission 651
Allison. Maude. v. State 420
Alton Railroad Company. The. v. State 201
Amick. Ernest R., v. State 625
Andrushat. Martin. et al., v. State 542
Anker. George Herbert. v. State 32
Apex Motor Fuel Company. v. State 36
Arcole Construction Company. v. State 423
Argento. Joseph. v. State 498
Arnold. Lee. v. State 344
Arnston, Andrew. v. State 650
Automatic Home Telephone Co., v. State 92

B

Balding. Ned A., v. State 128
Bartlett. Frederick H., etc., et al., v. State 135
Baum Packing Company. v. State 610
Bellentini. Rudolph. v. State 45
Benoit. Arthur. v. State 580
Berg. F. J. & Company. v. State 649
Bergen. Michael W., v. State 487
Bettinardi. John. v. State 38
Bickers. L. V., v. State 649
Billek. August. v. State 335
Bishop. Bessie Evelyn. v. State 319
Bishop. Robert. v. State 438
Blaha. Otto J., v. State 612
Blazwich. Catherine. v. State 291
Boismenue. Velma. v. State 650
Boley. A. J., v. State 649
Bolt. Henry. et al., v. State 650
Bolt. Henry. et al., v. State 650
Boorde. E. J., et al., v. State 649
Bourland. Elizabeth S., v. State 202
Boyers. Paul H., v. State 650
Boyke. Paul, v. State 441
Braddy. Tillman, etc., v. State 516
Brandle. George. v. State 649
Bray. Leo. v. State 42
Broha. Michael. et al., v. State 650

PAGE
Broker. Everett K., v. State 277
Brokmyer. Amy. v. State 265
Brouse. Ivan E., M. D., v. State 230
Brown. Ed., v. State 649
Bryant. James. v. State 650
Buchness. Edward M., v. State 443
Bulli. Blanche. v. State 45
Bunting. Sim E., v. State 181
Bureau of Water of the City of Chicago. v. State 614
Burns. Frank. v. State 48
Burroughs. Winifred. et al., v. State 231
Burzych. Catherine. v. State 512

C

Caesar. Alvin G., et al., v. State 517
Caldwell. David E., v. State 183
Caldwell. James. v. State 1
Callahan. Harry D., v. State 205
Callahan. Marcella M., v. State 629
Castelli. Fred. v. State 45
Central States Distributors. Inc., et al., v. State 417
Chetlain. Lucy C. F., v. State 444
Chicago Park District. etc., v. State 499
Chicago Title & Trust Company. v. State 205
Chicago Title & Trust Company. v. State 205
Chicago Title & Trust Company. v. State 205
Chicago Title & Trust Company. v. State 205
Choate. Delia. v. State 350
Choate. Wilson F., Executor. etc., v. State 278
Clarke. Foster R., v. State 100
Cobb. Guy L., v. State 185
Collins. Bertha. v. State 574
Collins; Melvin. etc., v. State 445
Continental Oil Company. v. State 235
Cook. the County of. v. State 503
Cook. Melvin. v. State 484
Cordes. Bernice. v. State 8
Coultas. Chester E., Admr., etc., v. State 447
Cox. Roy DeVincent, v. State 186
Cram. Leonia J., v. State 282
Cratty. John James. v. State 172
Crews. Edith. et al., v. State 236
Critchlow. Walter. v. State., ... 125
Crum. Margaret. v. State 321
Culhane. A. B., Receiver. etc., v. State 649
Culhane. A. B., Receiver. etc., v. State 649
Culhane. A. B., Receiver. etc., v. State 649
Cure. Frances. v. State 387

D

Dannenbarger. E. B., v. State 197
Davenport. J. Burrell, v. State 176
Davis. Adelia. v. State 52
Davis. Joseph H., v. State 650
Delaney. Walter L., v. State 649
Diel. Alphonsus L., v. State 159
Dinwiddie. Frank. v. State 649
Ducey. Glenn. v. State 337
Dugger. Neva J., v. State 389
Duncan. Florence Carnahan. v. State 392

E

PAGE

Effinger. Joseph C., et al., v. State 542
Eickolz. Victor; et al., v. State 242
Erickson. Melvin B., Receiver. etc., v. State 649
Erickson. Melvin B., Receiver. etc., v. State 649
Evans. Alfred W., Admr., etc., v. State 449

F

Finkler. Nellie. Admx., etc., v. State 55
Fivash, Jesse G., v. State 143
Freeman. John. v. State 11

G

Gagel, Teresa. v. State 340
Galli. Albert. v. State 45
Galli. Anna. v. State 45
Gardener. Milton. v. State 359
Gayan. Rudolph. v. State 615
Gemelli. Marie. v. State 101
Gerdes. Carl K., v. State 243
Giroux. Alfred. et al., v. State 580
Goelitz. H. G., Company. v. State 649
Goelitz. H. G., Company. v. State 649
Goldberg. Louis. v. State 542
Goldstein. Joe. v. State 575
Graf. Mollie. v. State 84
Grapes. John W., v. State 251
Gross. Julius J., v. State 310
Gruber. Harry. v. State 630

H

Halloran. Rose. v. State 542
Hamilton. Charles. v. State 245
Hardware Mutual Casualty Company. etc., v. State 300
Harrison. Carter H., Jr., Receiver. etc., v. State 649
Harrison Engineering and Construction Corporation, v. State 61
Hayes Transfer & Storage Company. v. State 188
Heine. Elmira, Admx., etc., v. State 376
Heitman. William. et al., v. State 649
Henry. Minnie. v. State 191
Herman. A. R., v. State 108
Hertel. Susan Marie. v. State 86
Higgins. James. v. State 649
Hileman. H. D., v. State 451
Hogue. Robert. v. State 249
Horton, A. R., v. State 453
Howard. Sam. Trustee. etc., v. State 649
Howard. William J., Inc., v. State 522
Hyland Electrical Supply Company. v. State 649

I

Illinois Central Telephone' Company. v. State 90
Illinois Lumber Company. Inc., v. State 467
Illinois Telephone Company. v. State 92
Illinois Valley Telephone Co., v. State 92
Insurance Exchange Building Corporation. v. State 526

J

PAGE

Jacobs. Albert. et al., v. State 580
Jacobs. J. L., v. State 650
Jaeger. Oswald. Baking Company. v. State 119
Jaicks. Stanley. et al., v. State 649
Janner, George, v. State 542
Johnson. R. W., Receiver. etc., v. State 650
Johnson. R. W., Receiver. etc., v. State 650
Jones. Harry E., v. State 537
Joseph. Harry. Receiver, etc., v. State 649

K

Kaffer. William H., Receiver. etc., v. State 650
Kansas Flour Mills Corporation. The. v. State 361
Kehoe. Jane. v. State 164
Kiehn. Mary. v. State 650
King. George W., v. State 15
King. Omer C., v. State 577
Klimczak. Leo. et al., v. State 110
Knowlton. M. D., Co., v. State 617
Knutson. William M., Receiver. etc., v. State 649
Kolar. Edward F., v. State 205
Kopp. Harry J., v. State 454
Koppert. Roman. v. State 115
Korando. Thomas. v. State 193

L

Lamore, Oscar. et al., v. State 580
L. Balkin Builder. Inc., v. State 407
Langvin. Mary. v. State 542
Laughlin, Harry J., v. State 506
Lawrence. Louise C., et al., v. State 542
Leavitt. Mary. v. State 342
Lefler. Raymond C., v. State 620
Leming. Marjorie. v. State 328
Lesch. Harold. etc., et al., v. State 394
Lieurance. Lowell. v. State 363
Liss, Joseph. v. State 469
Lissak. Karl. v. State 364
Litchfield and Madison Railway Compan v. State 455
Lloyd. E., etc., v. State 456
Logan. Bert. et al., v. State 650
Lohn. Gertrude. v. State 458

M

Maddox. Flora E., v. State 303
Madera Wineries & Distilleries. K. Arakelian. Inc., v. State 632
Madison Construction Company. v. State 64
Martin. E. T., Receiver. etc., v. State 649
Matheson. Mona. v. State 470
Mathieu. Evelyn. Admx., etc., v. State 397
Mathis. E. W., et al., v. State 542
Merchants Fire Insurance Company. v. State 471
Merwin. Edgar G., et al., v. State 459
Messenger. Helen R., v. State 276
Meyer. Jennie. et al., v. State 650
Miller. Jesse. v. State 490

PAGE

Miller. L. B., v. State 649
Moore. George C., v. State 491
Morgan. Laura. v. State 492
Mowery. Roy O., v. State 18
Munn, Harry Z., et al., v. State 205
Muntz & Lea Company. etc., v. State 285
Murray. Leona. v. State 650

Mc

McComb. Joe. et al., v. State 580
McCord, Hugo. v. State 461
McGuire. Mary. v. State 21
McKinney. Roy A., Receiver. etc., v. State 650
McNeely, John. v. State 5

N

Nauykos. Aggie. v. State 542
Neltnor. Louis. v. State 472
Nesbitt. Nellie M., Exec., etc., v. State 649
Nevin. James R., v. State 117
Norman. Edward A., et al., Executors. etc., v. State 650

O

Oak Park Hospital. Inc., v. State 219
Oetting. Alfred H., v. State 527
Orchard Theatre Corporation. v. State 271
Owens. Lloyd. v. State 399
Ozier. Claude H., et al., v. State 542

Parish. Zelma Ruby. v. State 307
Parker. Mrs. Sophia. et al., v. State 649
Pearsall. B. S., Butter Co. v. State 178
Penwell. Elva Jennings. v. State 365
Perona. Joe. v. State 296
Petri. Martin. v. State 256
Phillips. Myrtle. v. State 286
Pianfetti. Dominic. v. State 289
Pienta. Stanley. v. State 30
Polley. N. W. et al., v. State 650
Pollock. Earl. et al., v. State 542
Porter. Joe G., v. State 649
Postage Meter Company. v. State 650
Pozzi. Eliza, etc., v. State 45
Progressive Printing & Calendar Co., Inc., v. State 622
Prothero & Willis. v. State 402

R

Radcliffe. Barney S., v. State 205
Ransom. J. I., Inc., v. State 649
Reaugh. Ernest O., etc., v. State 649
Reed. James. v. State 24
Reichman. Maurice. v. State 272
Reuter. Theodore H., v. State 462
Rider. Joseph. v. State 495
Riefler. Harold J., etc., v. State 381

PAGE

Rite Price Gasoline Co., v. State 542
Roberts, Edith, v. State 268
Rodgers, Nellie, v. State 542
Rosman Uehling Kinzer Company, v. State 650
Rule, Jesse L., et al., v. State 531
Ryan, Katherine, v. State 650

S

Sachs, S. C., Inc., v. State 649
Sadowski, Valerie, v. State 475
St. Louis Fire and Marine Insurance Company, etc., v. State 195
Salmon, Herman, Jr, Receiver, etc., v. State 650
Saunders, H. L., v. State 121
Schermer, Manie, v. State 650
Schlup, Nettie, Admx., etc., v. State 355
Schoenig, John, v. State 634
Schwartz, M. K., et al., v. State 650
Scourtis, Spiros, v. State 650
Shannahan, Jennie, et al., v. State 649
Shibovitch, Leon, v. State 331
Shonkwiler, H. N., v. State 602
Smith, Aquilla T., v. State 374
Smith, Cornelius, et al., v. State 650
Smith, Cornelius, et al., v. State 650
Smith, Ed. P., v. State 580
Smith, Marie, v. State 384
Smith, William L., v. State 220
Snyder, W. E., v. State 508
Socony-Vacuum Oil Company, Inc., v. State 149
Sokolowski, Rose, v. State 542
Spur Distributing Co., v. State 542
Steininger, H. Claude, v. State 316
Stone, Julius, etc., v. State 477
Strelitz, J. Malcolm, et al., v. State 78
Strong, James, etc., v. State 603

T

Taylor, Frank J., v. State 649
Taylor, Harriet S., v. State 463
Taylorville Record Publishing Co., v. State 650
l'heiss Bros. Feed Company, v. State 542
Thiedor, Stella A., v. State 152
Tiernan, Frank J., v. State 479
Tom Collins Corporation, The, v. State 649
Tull, Anna, v. State 650
Tutewiler, Jacob H., v. State 649

U

United Oil Corporation, v. State 174

V

Valentine, Ellsworth H., v. State 465
Viking Automatic Sprinkler Company, v. State 466
Von Hatten, Josephine, v. State 403

W

PAGE

Wabash Telephone Company. v: State **92**
Watkins. Nina Bratton. et al., v. State 542
Wedel. Mark. et al., v. State 542
Weiss. Frank. et al., v. State 605
Weller. Anna L., v. State **258**
Werckman. Rose. v. State **131**
Western Union Telegraph Company. v. State 649
Wetherby. Judson P., v. State **81**
White Paving Company. v. State 649
White Paving Company. v. State 649
White. Ross. et al., v. State 405
Willyard. Lawrence, v. State 644
Wilson. L. A., and Company. v. State 649
Wilson. Minnie. v. State 480
Wolfe. Herbert. v. State 650
Wolfe. J. Binnie. Admr., etc., v. State 650
Wolff. Percy. v. State 122
Wolford. G. A.. v. State 99
Wright. Henry P., et al., v. State 580
Wright. Thomas C., Receiver. etc., v. State 649

Y

Youngman. Nina. Admx., etc. v. State **228**

Z

Zelvis. Anna. v. State **542**

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

(No. 3301—Claimant awarded $325.37.)

JAMES CALDWELL, Clainiant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 16, 1939.

R. C. HARMON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General and SVEINBJORN JOHNSON, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for partial loss of use of finger.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in partial loss of use of finger, an award for compensation may be had therefor in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

As originally filed, claimant in this case sought an award of Three Hundred Sixty ($360.00) Dollars for the partial loss of use of the first phalange of the first finger on his right hand, while in the course of his employment as a laborer at the Physical Plant at the University of Illinois. Under an amended complaint filed October 5, 1938, claimant increased the amount of his demand to Seven Hundred Twenty ($720.00) Dollars and alleged that he had lost the permanent and complete use of the first finger of his right hand, or "at least 25 per cent" loss of use of the entire right hand. The amended complaint was filed after the taking of evidence in the cause and was apparently the result of the testimony of Dr. Christie who testified he had examined claimant, and that he had almost a total loss of use of the finger in attempting many occupations. The record in this case consists of the original and amended complaints; the report of the University Committee on accident compensation for employees; reports of Doctors J. Howard Beard and John B. Christie as

part of said University Committee's report; a transcript of testimony taken at the University of Illinois; and the respective Statements, Briefs and Arguments of claimant and respondent. The record shows that claimant had been employed as a certified laborer at the Physical Plant of the University since May 27, 1936; that on January 11, 1938 about 3.30 P. M. he was doing some miscellaneous work in connection with the steam distribution system of the University of Illinois in the Materials-testing Laboratory. While closing the door of a freight elevator he caught the first finger of his right hand between the doors, severely mashing the first phalange of the finger. He gave immediate notice to his employer and was given medical and hospital service, the expense of which has been paid by respondent.

Claimant resumed work on January 24, 1938 and mas paid the sum of Forty-eight ($48.00) Dollars for the time he was disabled. At the time of the injury and for more than one year prior, his earnings had been Sixty (60c) Cents per hour for eight hours' work per day, six days per week. At the time of the accident and now claimant has three children under the age of sixteen years, all residing with claimant, their ages being respectively seven (7), nine (9), and fourteen (14) years. His annual wage figures One Thousand Four Hundred Forty ($1,440.00) Dollars on the basis of $4.80 per day for three hundred (300) days and the average weekly wage figures $27.70.

Claimant having been injured on January 11th and having resumed work on January 24th, his temporary total disability extended through the 12th to the 23rd inclusive, or a matter of twelve days. As the temporary total disability did not extend for a period of thirty days, he was only entitled to compensation for temporary total disability for the time beginning on the 8th day of such temporary total incapacity. There should therefore be deducted from any amount found to be due him for specific loss, the sum of Thirty-four and 63/100 ($34.63) Dollars heretofore overpaid him for nonproductive time on the temporary total disability compensation. Claimant was entitled to a maximum of Eighteen ($18.00) Dollars per week compensation since he had three children under the. age of sixteen years at the time of the injury, which entitled him to compensation at the rate of sixty-five (65) per cent of his average weekly wage instead

of fifty (50) per cent. We have repeatedly held that the amount of overpayment for temporary total disability is allowable as a credit to the employer when called upon to pay specific loss or partial or total permanent disability, and such rule would apply in the present case. As above suggested, it was alleged in the orginal complaint herein filed that claimant had "severely mashed the end of the first joint of said finger and suffered the complete loss of the first phalange thereof." Such was his own conclusion as to his injury at the time he filed his complaint. After hearing Doctors Beard and Christie express their opinion as to the percentage of disability which he had suffered, he concluded that he should amend his complaint and ask for partial loss of use of the entire finger. Dr. Beard and Dr. Christie each testified to a percentage of loss, the former stating that in hid opinion such loss amounted to sixty-five (65) or seventy (70) per cent of functioning of the finger. Dr. Christie testified that the finger is atrophied and that there is no use of the distal joint and that the finger is approximately fifty (50) per cent weak in the middle interphalange joint as far as functioning is concerned. Dr. Christie stated his final conclusion to be that claimant probably has only ten (10)' per cent use of the index finger. The claimant himself testified (P.4 of the Transcript) that he was doing the same kind of work which he did before this accident, and that the finger doesn't seem to interfere with the kind of work he is doing at all, and that it doesn't handicap him in any way. He was asked if he was able to make any use of this finger in connection with his work, and he stated "It doesn't seem to bother me much; it doesn't handicap me in any way." He was also asked, "Do you use that finger?" and he replied, "To a certain extent. I can hold a pencil or pick up things or hold a pencil and write with it." In answer to the question, "Is there any more use in that finger than if you had no finger there at all?", he replied, "I believe there is. I would rather have it like it is than no finger at all." Claimant also stated that if the work in which he was engaged required that the finger be in a flexible condition so it could be flexed at will, it would be a handicap as he cannot close the finger all the way down to the hand.

The Courts have held that an injured employee may testify how his injury affects 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 must be made by the Industrial Commission—or the Court—from the legitimate evidence in the record. *(Pocahontas Mining Cornpamy* vs. *Ifidustrial Comm.,* 301 Ill. **462.)**

It has also been held that the loss of all four fingers where there is no loss or impairment of the hand itself, does not constitute the loss of a hand, and the award is limited to that for the fingers themselves. (*Sykes* vs. *Industrial Cornrn.,* **314** Ill. **326.)**

Dr. Beard testified as to the injury to the finger that the latter was severely mashed and cut down to the first joint; that the distal half of the finger was mashed back as far as the second joint; that the joint between the middle and distal phalanx is practically functionless, and that the joint between the middle and proximal phalanx is about fifty (50) per cent impaired.

Under Section 8 (e-2) of the Workmen's Compensation Act, if claimant had suffered the entire loss of the first finger he would be entitled to Eighteen ($18.00) Dollars per week for a period of forty (40) weeks. Under Section 8 (e-17) he is entitled to such proportion of forty (40) weeks as the proportion of loss of use of his index finger bears to total loss. Under Section 8 (e-6) the loss of the first phalange is considered the loss of one-half of the finger.

The claimant has not lost the first phalange of his finger. When the doctors looked at the finger and told him they would take it off, claimant insisted that they dress the finger and leave it on, and his testimony shows that he now uses the distal end of the finger to advantage in writing and picking up articles. We find from the record that the claimant has not lost the complete use of the first phalange of his index finger; that on the other hand there appears to be a partial loss of use of said finger from the second or middle joint to the distal end. The bone of the finger was not severed but the tendons were severed and were sewed back together. The injury, according to Dr. Christie, had taken place right in the distal inter-phalange joint, but because of the laceration and the injured tendon, there is some effect upon the entire distal half of the finger. The conclusion of the Court, from an examination of the record, is that an award of fifty (50) per

cent loss of use of the finger should be made to claimant; that is, 'an award of Eighteen ($18.00) Dollars per week for twenty (20) weeks, or Three Hundred Sixty ($360.00) Dollars. From this amount should be deducted the over-payment that has heretofore been made to him for non-productive time, in the sum of Thirty-four and 63/100 ($34.63) Dollars, making a net award of Three Hundred Twenty-five and 37/100 ($325.37) Dollars. The full amount of such award has accrued and is payable at the present time.

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 3, 1937 (Session Laws 1937 Page 83), and being subject further to the terms of an Act entitled "An Act making appropriations to the Auditor of Public Accounts for the disbursement of certain moneys until the expiration of the first fiscal quarter after the adjournment of the next regular session of the General Assembly'' (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 3371—Claimant awarded $606.15.)

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

Opinion filed August 16, 1939.

C. Ross REYNOLDS, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for temporary total disability and loss of use of finger.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and loss of use of finger, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

Prior to and on May 9th, 1938 the claimant was employed by the Division of Highways, Department of Public Works and Buildings of the respondent, as a laborer with Day Labor Unit B, which Unit was then laying concrete on S. B. I. Route No. 1 near Vienna, Illinois.

On the last mentioned date, while working as a puddler, and in the performance of his duties, the third finger of his right hand was accidentally cut by the sharp edge of a shovel blade in the hands of a fellow employee, causing a deep laceration. Claimant mas given first-aid treatment by a division foreman, and went home for the remainder of the day. He returned to work the two following days, and at the end of the second day his services with the Division were terminated.

On May 25, 1938, at the instance of the Division, he was sent to Dr. J. W. Blanchard of Harrisburg for treatment. On June 3d the finger was operated and it was found that the extensor tendon had been severed and could not be sutured. Claimant continued to receive treatments from Dr. Blanchard until and including July 21, 1938. On August 5, 1938 claimant was sent by the Division to Dr. N. B. Thomas, orthopedic surgeon of Chicago, for examination and treatment, which treatment was continued to August 15th, when he was sent home. Claimant returned to Dr. Thomas for further treatment on October 4th, and on the following day the finger was amputated at the mid proximal phalanx. Claimant remained under the treatment of Dr. Thomas until October 13th when he again returned to his home. On November 15th he was again examined by Dr. Blanchard of Harrisburg and mas pronounced able to report to work.

Respondent furnished all necessary medical, surgical and hospital services, the bills therefor aggregating $284.84, and also paid claimant compensation in the total amount of $117.85.

Upon a consideration of the facts before the court, and a persona1 inspection of the claimant who appeared in open court for the purpose, the court finds as follows:

1. That on May 9, 1938 claimant and respondent were operating under and bound by the provisions of the Workmen's Compensation Act of this State.

2. That on said date the claimant sustained accidental injuries which arose out of and in the course of his employment.

3. That notice of the accident was given and claim for compensation on account thereof was made within the time required by the compensation Act.

4. That the claimant was in the employ of the respondent for less than one year prior to the date of the injury; that his annual earnings computed in accordance with the provisions of the Workmen's Compensation Act, were $800.00; and his average weekly wage was $15.38.

5. That claimant at the time of the injury was thirty-seven years of age, and had four children under the age of sixteen years.

6. That all necessary first aid, as well as all medical, surgical and hospital services were furnished by the respondent.

7. That claimant was temporarily totally disabled from May 12, 1938 to November 15, 1938, and also sustained the loss, or the permanent and complete loss of the use, of the third finger of his right hand.

8. That claimant has been paid the sum of $117.85 to apply on the compensation due him.

9. That claimant is therefore entitled to have and receive from the respondent for temporary total disability as aforesaid, the sum of $14.00 per week for 26 5/7 weeks commencing May 12, 1938, to-wit, the sum of $374.00, in accordance with the provisions of Paragraphs (b) and (j) of Section 8 of the Workmen's Compensation Act, as amended; and is also entitled to have and receive from the respondent the further sum of $14.00 per week for twenty-five weeks for the loss, or the permanent and complete loss of the 'use of the third finger of his right hand, to-wit, the sum of $350.00, in accordance with the provisions of Paragraph (d) of Section 8 of the Workmen's Compensation Act;—in all, the sum of $724.00; that respondent is entitled to a credit of $117.85 for compensation paid to the claimant as hereinbefore set forth; that the net amount of compensation due claimant as aforesaid is $606.15;; that all of such compensation has accrued prior to this date.

Award is therefore entered in favor of the claimant for the sum of Six Hundred Six Dollars and Fifteen Cents ($606.15.)

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled ''an Act making appropriations to the Auditor of Public Accounts for the disbursement of certain moneys until the expiration of the first fiscal quarter after the adjournment of the next regular session of the General Assembly" (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 2835—Claimant awarded $628.36.)

BERNICE CORDES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 18, 1939.

FRANK R. EAGLETON AND WILLIAM H. A. RUST, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for temporary total disability and for permanent partial loss of use of leg.* Where employee of Chicago State Hospital suffers accidental injuries, by being kicked in leg by patient of such institution, while in the performance of her duties, resulting in temporary total disability and permanent partial loss of use of her leg, an award for compensation and medical expenses incurred in the treatment of such injuries may be made in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

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

For more than one year prior to March 24, 1935, claimant was in the employ of the respondent as an attendant at Chicago State Hospital, Chicago, Illinois, a State charitable institution. On the last mentioned date, while in the performance of her duties at the institution, she was attacked by a mental patient and was severely kicked in and about the right leg. As the result of such injuries, claimant was hospitalized at the institution from April 24th to May 15, 1935, and from May 27th to June 11, 1935. Subsequent to June 11, 1935 claimant was treated by her own physician, Dr. J. B.

Musselwhite, who continued to treat her from June 16th to December 7,1935.

After December 7, 1935 claimant received no treatments until 1938. Dr. Musselwhite gave her two treatments the early part of 1938, and on or about May 5, 1938, at the request of Dr. Dombrowski, Managing Officer of the Chicago State Hospital, claimant was examined by Dr. Goldstein of the Chicago State Hospital, Dr. Conley of the Cook County Hospital, and Dr. Miller of the Orthopedic Clinic of the Cook County Hospital. In the opinion of Dr. Goldstein, claimant has sustained the permanent loss of 20 per cent of the use of the right leg. The conclusions of the other examining physicians do not appear in the record.

Claimant contends that she is entitled to compensation for 64 weeks temporary total disability; 109 weeks total permanent disability; such amount as the court deems proper for partial permanent disability; and $128.00 for medical attention.

Compensation for temporary total disability is awarded for the time which is usually known as the healing period, that is to say, "The period during which medical treatment is given to cure and relieve the injured employee from the effects of the injury. It is usually considered to terminate at the time the attending physician discharges the employee as cured, or as having recovered, as far as possible, from the effects of the injury"—*Angerstein* 1930 Ed. P. 486, Sec. 264. In this case the claimant was under the care of a physician practically all of the time from April 22d to December 7, 1935; subsequent to that time she received no medical treatment until 1938. It would seem, therefore, that her condition on December 7, 1935 was such that no further improvement was anticipated, and we may take that date as the end of the period of temporary total disability.

The only permanent disability sustained by the claimant resulted from the injury to her right leg. The complete loss of the use of a leg, or any partial loss of the use thereof, is known as a specific loss, and any disability resulting from the injury to claimant's right leg must be considered as a specific loss and compensated in accordance with tha provisions of Paragraph (e) of Section 8 of the Compensation Act. The injury to the claimant being confined to her right leg, she is not entitled to compensation for any permanent disability other than the disability to her right leg.

The respondent objects to payment for the services of Dr. Musselwhite in the amount of $128.00. Inasmuch as respondent mas not in position to furnish to the claimant at the institution, such treatments as were required, and did not offer to furnish them elsewhere, she is entitled to be compensated for the reasonable expense she was put to for such treatments. The bill of Dr. Musselwhite, however, covers items aggregating $30.00 which were incurred between July 18th and October 1st, 1938, long after the condition of the patient became permanent, and such items are not a proper charge against the respondent.

From a consideration of all of the evidence in the record the court finds as follows:

1. That on March 24, 1935, claimant and respondent were operating under and bound by the provisions of the Workmen's Compensation Act of this State.

2. That on said date the claimant sustained accidental injuries which arose out of and in the course of her employment.

3. That notice of the accident was given and claim for compensation on account thereof was made within the time required by the Compensation Act.

4. That the claimant's annual earnings were $583.20, and her average weekly wage was $11.21.

5. That claimant at the time of the injury was 42 years of age, and had no children under the age of 16 years.

6. That the necessary first aid, as well as all medical, surgical and hospital services to June 11,1935, were furnished by the respondent; that all necessary medical services since June 11, 1935 were furnished by the claimant; that said services were fairly and reasonably worth $98.00.

7. That claimant was temporarily totally disabled from April 22, 1935 to December 7, 1935, and has also sustained the permanent loss of 20 per cent of the use of her right leg.

8. That claimant is therefore entitled to have and receive from the respondent for temporary total disability as aforesaid the sum of $7.50 per week for 32 5/7 weeks commencing April 29, 1935, to-wit, the sum of $245.36, in accordance with the provisions of Paragraph (b) of Section 8 of the Workmen's Compensation Act, as amended; and is also entitled to have and receive from the respondent the further sum of $7.50 per week for 38 weeks for the permanent loss

of 20 per cent of the use of the right leg, to-wit, $285.00, in accordance with the provisions of Paragraph (e) of Section 8 of the Workmen's Compensation Act; and is also entitled to have and receive from the respondent for the use of Dr. J. B. Musselwhite, the sum of $98.00 for medical services rendered by him as aforesaid; that all of such compensation has accrued prior to this date.

Award is therefore entered herein as follows:

To Bernice Cordes, compensation as aforesaid.	$530.36
To Bernice Cordes, for the use of Dr. J. B. Musselwhite	98.00
Total	$628.36

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 3, 1937 (Session Laws 1937 page 83), and being subject further to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter after the Adjournment of the Next Regular Session of the General Assembly" (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 3116—Claimant awarded $647.17.)

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

Opinaon filed August 18, 1939.

SEYMOUR SCHEFFRES, *for claimant.*

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for compensation to employee within provisions of.* When employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation for such injuries may be made, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

SAME—*no provasion in for conapensation for partaal loss of hearing—no award can be made for.* No provision appears to have been made in the Act

for compensation for the partial loss of hearing and no award can be made therefor.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

John Freeman, the claimant, while in the employ of the Division of Highways of the State of Illinois, on the 25th day of May, 1937, was sweeping the gutter on 87th Street near Princeton Avenue, in the City of Chicago, Illinois, when he was struck by what is commonly called a "hit and run," automobile driver. He sustained a severe injury, including a concussion of the brain, a fracture of the right fibula, a laceration' of the frontal region and abrasion about the right ear and shock, and numerous contusions and abrasions about his chest, body and limbs. He was taken to the Auburn Park Hospital.

Claim was duly filed and the proper notice given.

It appears that claimant was a married man at least sixty-eight years of age. On examination he said that he did not know just how old he was but thought he was sixty-eight. He had no child or children under sixteen years of age.

Claimant's employment was seasonal and it is admitted that his annual earnings for compensation purposes amounted to $800.00 per year based on 200 days work, eight hours per day at 50c per hour, and it is conceded by both parties that he was struck by a Ford truck driven by Mr. William Dorman, 8139 Vincennes Avenue, Chicago, Illinois.

It is also admitted that the accidental injury sustained by the claimant arose out of and during the course of his employment, and that with respect to claimant's employment, both the claimant and respondent were operating under the Illinois Workmen's Compensation Act.

The respondent has paid the Auburn Park Hospital $148.00 for hospitalization necessitated by claimant's injuries and has paid Dr. C. K. Barnes $68.00 €or medical services. The claimant mas paid compensation in the sum of $138.00.

Claimant seeks an award for permanent total disability with a pension for life, or an award for forty per cent loss of use of his right leg, seventy-five per cent loss of hearing in the right ear, sixty-four weeks of temporary total incapacity and **$274.00** for medical expenses.

The respondent produced Dr. Thomas as a witness. He is a very able man and testified that the claimant was able to return to work about four months after the accident. Dr.

Thomas had examined the claimant sometime before the hearing, but no physician was present on behalf of the claimant, and objection was made because claimant was not furnished with a copy of his findings, and this objection must be sustained.

Claimant testified that he worked six weeks during the summer of 1938 at a swimming pool taking care of lockers, showers and mopping floors, but there is no evidence as to what his earnings were at this work. We are, therefore, unable to make a finding of permanent partial disability. He has received the sum of $138.00 from the State. It is stipulated that his annual earnings for compensation purposes were $800.00, or an average weekly wage of $15.38. Therefore, the compensation rate applicable would be $7.69 per week. Because we are unable to consider Dr. Thomas' testimony, we must rely upon the testimony of Dr. Tito. According to the last named Doctor, the condition of claimant's right leg reached a permanent stage six months from the time of the injury. The injury occurred on May 25, 1937, and this would bring it down to November 25, 1937. He was paid down to September 28, 1937. He is, therefore, entitled to 8 2/7 weeks at $7.69 per week or $63.72.

From the testimony in the record, we are of the opinion that the claimant has sustained a forty per cent limitation of flexion in the right knee. This does not necessarily mean that he only has a sixty per cent use of his right leg. Manifestly, it is not necessary to be able to flex a knee 100% to perform the average laborer's job, because his ability to double up his leg in one motion, only 60% of normal, does not mean that the leg has been 40% disabled. It appears that the condition he has found in the knee is permanent. His own testimony is that he has worked since the accident. He testified that he worked for six weeks during the summer of 1938 taking care of lockers, showers and mopping floors. He has done no work since then and what he received for that work does not appear in the record. He has trouble getting his foot down when he is going down steps or getting off the street car. He was not using a cane when he testified. His leg tires easily and he has pain when he stands on his leg a little while.

All the testimony considered, we are of the opinion that claimant has lost not to exceed 40% of the use of his right

leg. There is no evidence in the record that would justify a permanent partial disability otherwise.

Giving the respondent credit for the amount that has 'been paid and from the testimony of Dr. Tito, we conclude that claimant has 8 2/7 weeks coming to him or the sum of $62.73 for temporary total disability.

Under Section 8 (e) subsection 15 of the Compensation Act it is provided that 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. His average weekly wage is $7.69. If we are correct in finding that he has a forty per cent loss of the permanent use of his leg, that would entitle him to 40% of $7.69 x 190 weeks, or $584.44.

It is also contended that the claimant lost 75% of the use of one ear. Subsection 16½ of Section 8 (e) provides as follows: "For the total and permanent loss of the hearing of one ear, fifty percentum of the average weekly wage during fifty weeks, and for the total and permanent loss of hearing of both ears, fifty percentum of the average weekly wage during one hundred twenty-five weeks.'' Subsection 17 of the same Section provides : "For the'permanent partial loss of use of a member or sight of an eye, but not including the hearing of an ear * * *.'' It would seem that the partial loss of hearing is especially excluded from the Act, and no award can be made therefor.

Another question for this court to consider is whether Dr. Tito is entitled to a fee for medical services. It seems that Dr. Tito was an interne in the hospital when claimant was taken there. The State paid the hospital physician for taking care of the claimant, and paid the hospital bill. It does not appear that the claimant employed either doctor and it does not appear that the respondent employed either doctor. The respondent did recognize the claim of the hospital physician. In October following the accident, the State advised Dr. Tito that it would not recognize his employment and that he must look to claimant for his pay. From all of the facts in the record it would apear that Dr. Tito was an agent of the hospital doctor and that his principal has been paid. We cannot, therefore, allow any further fees for medical care. Under the Act, Dr. Tito must look to claimant for his remuneration.

We, therefore, make an award to claimant, John Freeman, in the sum of $62.73 for 8 2/7 weeks that elapsed during the healing period that he has not been paid for, and the further sum of **$584.44** for permanent disability of the right leg, or a total of $647.17.

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 3, 1937 (Sess. Laws 1937 p. 83) 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 for in such Act.

(No. 3122—Claimant awarded $408.71.)

GEORGE W. KING, Clainiant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion **filed** *August* ***18, 1939.***

BENJ. F. CASSIDAY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where employee of State sustains accidental injuries, arising out **of** and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation therefor may be made in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

ME. JUSTICE LINSCOTT delivered the opinion of the court:

This claim comes before the Court on claimant's amended complaint, a stipulation covering certain of the facts involved, the testimony of the claimant and the testimony of Dr. **J. J.** Donovan, and two questions are presented.

1. From the nature of claimant's emplayment, are both parties under the Compensation Act?

2. If the claimant is under the Act, what compensation should; be paid to him?

The evidence shows that on the 22nd day of April, **1937,** claimant was washing windows in the southwest corner of the State Capitol Building on the first floor; that he attempted to raise a window, and for this purpose he got on a radiator;

that there was a metal piece on top of the radiator and the radiator and metal piece became unbalanced and threw him to the floor. Claimant's superior officer was immediately notified and he was taken in an ambulance to St. John's Hospital, Springfield, Illinois. The evidence further shows that in his performance of his duties as janitor, he used the elevators in going up and down; that he used acids and compounds in the wafer for washing windows; he was also required to use ladders. The evidence further shows that the windows on the first floor of the State House are 12 to 15 feet high. The evidence further shows that claimant's duties also included moving heavy objects, moving furniture, emptying waste paper, polishing furniture, cleaning cuspidors, mopping on his hands and knees, and generally whatever he was told to do along that line.

The evidence further shows that when claimant fell he received a Y fracture of the left tibia into the knee joint—a comminuted fracture; that he suffered great pain; that X-rays were taken at the hospital; that the fracture extended into the knee joint; that he received treatment at the hospital which included extension and immobilization of the left leg and knee for eight weeks at St. John's Hospital; that the leg was in a cast, and that during the healing period it was stretched in order that the left leg would not become shorter; that said treatment continued for eight weeks, and then the passive motion was begun; that the claimant was at the hospital from April 22,1937 to June 30,1937, a period of 69 days, being in bed, in a wheel chair and on crutches during this time; that due to weakness of the knee and pain in the knee, claimant was unable to participate in any gainful occupation; that he received medical treatment for about thirty days after he left the hospital.

At the time the testimony was taken which was on the 17th day of January, 1938, Dr. Donovan said that although there was no limitation of motion, there was some stiffness, and some pain, but not enough to prevent the patient from returning to work and continuing his usual occupation; that a traumatic condition prevailed; that this condition is known as traumatic arthritis. Dr. Donovan testified at the time that the arthritis was still present but that it would gradually wear away; that the fracture itself had cleanly and thoroughly healed, without a limitation of motion, and that claimant had all of the original necessary flexing motion in his left knee.

It was the opinion of the doctor that there was some partial disability which may be permanent, but the permanency would not exceed over 15%. In other words, it was the opinion of the doctor that he had received a possible 15% impairment of the use of his knee which may or may not continue depending upon the claimant's ability to recover at his age. Dr. Donovan expected the claimant to have a complete recovery, and to get more and more use of the left knee exclusive of any progressive rather than any regressive traumatic arthritis that might set up.

We are inclined to the view that the claimant, in the performance of his duties, was under the Compensation Act, and that under Section 8 (a) of the Compensation Act, he is entitled to an award in the sum of $379.18, which represents unpaid hospital and medical bills incurred by the claimant as the result of the injury.

The testimony of the Doctor is not very satisfactory as to the permanency of the injury. The total temporary incapacity was of five month's duration, but giving the doctor's testimony the most favorable consideration, this claimant has suffered a permanent loss of 15% of the use of his left leg.

Claimant's monthly wage at the time of the injury was $112.50, an annual earning of $1,350.00, or an average meekly wage of $25.96. He was injured April 22, 1937. The most claimant would be entitled to would be compensation for five months total incapacity based upon a 15% loss of the use of his left leg. Five months thereafter would end September 22, 1937, a period of twenty-two weeks. Compensation for temporary total incapacity for the twenty-two weeks' period of inability to work equals $285.56 (22 weeks time 50% of $25.96). Section 8 (b) Workmen's compensation Act. Compensation for fifteen per cent loss of use of the left leg, under Section 8 (e-15) Workmen's Compensation Act, equals fifteen per cent of 190 weeks times fifty per cent of $25.96 or $369.93. Aside from the doctor and hospital bills the total compensation for temporary total incapacity and specific loss of fifteen per'cent of the use ,of the left leg to which elaimant would have been entitled amounts to $369.93, plus $285.56, or $655.49.

The record discloses that following his injury, claimant was paid his regular salary of $112.50 per month until July 1, 1937 and then $125.00 per month until October 1, 1937. All of his salary having been paid for unproductive time follow-

ing the injury it must be treated as a payment of compensation to the claimant. *United Air Lines* vs. *Industrial Commission,* 364 Ill. 346. These salary payments total $625.96 and deducting this amount from the compensation as above computed would leave a balance of $29.53 compensation due and unpaid.

We, therefore, make an award to George W. King in the sum of $29.53, and an award to George W. King for the use of St. John's Hospital, for hospital services and attention in the sum of $251.18, for the use of Kirlin & Egan, for ambulance service in the sum of $3.00 and for the use of Dr. John J. Donovan, for professional and medical services and treatment in the sum of $125.00.

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 3, 1937 (Session Laws **1937** page 83), and being subject further to the terms of an Act entitled "An Act making appropriations to the Auditor of Public Accounts for the disbursement of certain moneys until the expiration of the first fiscal quarter after the adjournment of the next regular session of the General Assembly" (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 3096—Claimant awarded *$5.00.)*

ROY O. MOWERY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed October 12, **1937.***
Supplemental opinion filed August 18, 1939.

Claimant, pro se.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* ACT—*when award may be made for expense of medical services.* Where it is stipulated that employee sustained accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, necessitating medical treatment, which was procured by employee, amount of which was reasonable, award may be made for payment thereof.

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

Prior to and on April 23, 1937, claimant was employed as a watchman for respondent in the Centennial Building at Springfield. On the last mentioned date, while in the course of his employment, and while remonstrating with some young folks who were creating a disturbance in the building, he was struck in the face, his glasses were broken, and his face was cut and bruised. He expended $5.00 for medical services and $26.50 to replace his broken glasses, and asks for an award for the amount thus expended.

The Attorney General has entered a motion to strike that portion of the complaint in which the claimant seeks to recover $26.50 for the glasses which were broken, and has also entered a motion to dismiss the case on the ground that the complaint does not contain any facts which entitled the claimant to recover under the provisions of the Workmen's Compensation Act.

We have repeatedly held that the jurisdiction of this court is limited to claims in respect to which the claimant would be entitled to redress against the State, either at law or in equity, if the State were suable. *Crabtree* vs. *State,* 7 C. C. R. 207; *Kromer* vs. *State,* 8 C. C. R. 31; *Shumway* vs. *State,* 8 C. C. R. 43; *Titone* vs. *State,* No. 2473, decided at the January Term, 1937.

There is no law of this State making respondent liable for damage to the personal property of an employee, where such damage is caused by the wrongful act of a third person, and consequently the motion of the Attorney General to strike must be sustained.

The motion to dismiss on the ground that the complaint does not set forth facts sufficient to show that the State is liable under the Workmen's Compensation Act presents a different question.

A complaint under the Workmen's Compensation Act is not to be construed with the same strictness as a declaration in a suit at law. The Compensation Act is remedial in its nature, and should be given a liberal construction in order to carry out the provisions of the Act. In considering the requirements of an application for adjustment of claim in a proceeding before the Industrial Commission, our Supreme

Court, in the case of *Valier Coal* Co. vs. *Industrial Commission,* 329 Ill. 139-147, said:

"The Workmen's Compensation Act does not prescribe in specific terms any particular form of application for adjustment of claim. Section 16 states that the procedure before the commission shall be simple and informal. It is only essential to *a* proper statement of claim for compensation for the applicant to state formally the time, place, manner and character of the accident, so that the employer will be advised of the nature of the claim and can properly prepare his defense."

The rule as laid down in the Valier case was followed in the case of *Merritt* vs. *Industrial Commission,* 322 Ill. 160.

The complai-nt in this case comes within the requirements of the rule laid down by the Supreme Court.

If the claimant can establish by proper evidence that at the time of the injury in question, both he and the respondent were operating under the provisions of the Workmen's Compensation Act, and that he sustained accidental injuries which arose' out of and in the course of his employment, he will be entitled to compensation in accordance with the provisions of the Act;—and we feel that be is entitled to an opportunity to present such evidence.

The motion of the Attorney General to dismiss is therefore overruled.

SUPPLEMENTAL OPINION.

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

Subsequent to the filing of the opinion in this case on October 12, 1937, the parties hereto filed herein a stipulation of facts from which it appears that on April 23, 1937, claimant and respondent were operating under and bound by the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that as the result thereof claimant did not sustain any disability, either temporary or permanent, and did not sustain any specific loss, but did require first aid and medical services; that such services were not provided by the respondent but were provided by the claimant, who was required to and did expend therefor the sum of $5.00; that notice of the accident was given to the respondent, and claim for compensation on account thereof was made within the time required by Section 24 of the Compensation **Act.**

Under the provisions of Paragraph (a) of Section 8 of such Act, claimant is entitled to be reimbursed the amount so paid by him, and an award is therefore entered in favor of the claimant for the sum of $5.00.

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 Thereon," approved July 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided. for by the foregoing Acts.

(No. 3377—Claimant awarded $5,500.00.)

MARY McGUIRE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed August 18, 1939.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* ACT—*when award may be made for death* of *employee under.* Where employee of State 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 may be made for compensation therefor to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Charles McGuire, Jr., for more than a year prior to April 22, 1939, had been in the employ of the State of Illinois as a maintenance patrolman in the Division of Highways, Department of Public Works and Buildings. One of the duties incident to his employment was the care of a State-owned truck which was assigned to him for use in his work. By arrangement with the Department the truck was kept at

the employee's home, and on the date in question he was there greasing it. He had raised' the body to a "dump position" by the hydraulic lift and was leaning over the side of the truck frame in order to grease certain parts of the mechanism behind the cab. In some manner the lever which operated the hydraulic lift was moved and the box descended on him, crushing his body and resulting in his immediate death.

Claimant, Mary McGuire, is the widow of said employee and in addition he left surviving four children, Charles John, Eugene Edward, Mary Frances, and Kathleen, of the respective ages of Seven (7), Five (5), Four (4), and Two (2) years. A medical bill for first-aid by Dr. Thomas F. Forest of Woodstock, Illinois, in the sum of Five ($5.00) Dollars has been paid by respondent.

The widow, Mary McGuire, filed her claim herein Pro Se on the 17th day of May, 1939, for an award under the provisions of Sections 7 (a) and 7 (h)3 of the Workmen's Compensation Act, resulting in the payment of Five Thousand Five Hundred ($5,500.00) Dollars by reason of the death of said employee. By stipulation between claimant and the Attorney General's office it is agreed that the foregoing are the facts, and that the decedent's annual earnings for the year immediately prior to April 22, 1939, in his employment as such maintenance patrolman amounted to One Thousand Six Hundred Twenty ($1,620.00) Dollars; further, that respondent had immediate notice of the accident; that claimant made demand for compensation within six months thereafter, and that the claim for compensation was filed within one year from the date of such accident.

From the record it appears that the claimant suffered accidental injury and death, and that same arose out of and in the course of his employment; that said employee and respondent were within the terms of the Illinois Workmen's Compensation Act; that the payment provided for by Section 7 (a) of the Act for four times the average annual earnings of the employee is increased by virtue of the fact that claimant left surviving four children mho were under the age of sixteen years at the time of the accident. Under Section 7 (h) 3 the maximum of Four Thousand ($4,000.00) Dollars is increased to Five Thousand Five Hundred ($5,500.00) Dollars in case of three or more children under the age of sixteen years at the time of the death of the employee.

The Court therefore finds that under the provisions of the Act claimant Mary McGuire is entitled to receive from respondent the sum of Four Thousand ($4,000.00) Dollars. This amount is increased to Five Thousand Five Hundred ($5,500.00) Dollars by virtue of said employee being survived by four children under the age of sixteen years at the time of their father's death. His salary being One Thousand Six Hundred Twenty ($1,620.00) Dollars for the year preceding his death, his average weekly wage would therefore be Thirty-one and 15/100 ($31.15) Dollars.

The maximum payment of fifty (50) per cent of said meekly wage is increased to sixty-five (65) per cent because of the existence of said four children, and payments on any award herein are computable at the rate of Nineteen and 60/100 ($19.60) Dollars per week.

We further find that said claimant, Mary McGuire, and each of said children were wholly dependent on the earnings of deceased at the time of the latter's injury and death. Under authority of the statute whereby the Court is granted the discretion to award payment of the children's share to the parent for such children's support, we find that an order for payment in such manner should be herein made.

An award is hereby made to claimant in th'e sum of Five Thousand Five Hundred ($5,500.00) Dollars, Four Thousand ($4,000.00) Dollars of which is awarded to claimant in her own right and One Thousand Five Hundred ($1,500.00) Dollars thereof awarded to her as next friend for the use of Charles John McGuire, Eugene Edward McGuire, Mary Frances McGuire and Kathleen McGuire; said award being payable as hereinafter provided.

The time that will have elapsed from the date of said accident until September 16, 1939, will be twenty-one (21) weeks. Claimant will therefore be entitled to receive on September 16,1939, on the basis of Nineteen and 60/100 ($19.60) Dollars per week, the sum of Four Hundred Eleven and 60/100 ($411.60) Dollars for compensation accrued to that time, leaving a balance of Five Thousand Eighty-eight and 40/100 ($5,088.40) Dollars to be thereafter paid at the rate of Nineteen and 60/100 ($19.60) 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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill **123,** as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 3312—Claimant awarded $1,780.87.)

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

Opinion filed August 18, 1939.

JOSEF T. SKINNER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT — when *award may be made under for partial loss of use of leg.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in partial loss of use of leg, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein had been continuously employed by respondent in its Division of Highways for more than a year prior to May 26, 1937, and had been paid during such time at the rate of One Hundred Twenty-five ($125.00) Dollars per month as an engineering assistant. On the latter date he was engaged in his duties as a cement inspector at the cement plant at the Marquette Cement Manufacturing Company, Oglesby, Illinois. At about 2:00 p. m. he entered an empty railroad box car which was standing on a spur track at the cement plant, for the purpose of tacking a cement inspection report card on the wall of the car. The car was moved toward

the cement loading chute and was suddenly coupled against a loaded car standing there. This sudden stopping of the car caused claimant to lose his footing and to fall on the floor of the car on his right hip. Being apparently injured he was removed to the office of the loading foreman and thence to his home, where he was placed under the care of Dr. Edmund J. Burke of LaSalle, who transferred him to St. Mary's Hospital in that city. Dr. Burke reported the nature of the injury as a fracture of the neck of the right femur and stated the age of claimant to be seventy (70) years. On June 14, 1937, F. L. Sperry, Assistant Engineer of the State of Illinois, visited the claimant in the hospital and at the instruction of Mr. W. L. Glover, Engineer of Materials, endeavored to persuade claimant to go to Chicago at the expense of the Highway Division, to obtain the services of an orthopedic surgeon. The claimant refused these services. On July 20, 1937, M. K. Lingle, Engineer of Claims in the Highway Department, visited the claimant at the hospital and again requested claimant to accept these services, which were again declined. On September 4, 3937, claimant left the hospital at the instruction of Dr. Burke and went home. On December 7, 1937, Dr. Burke reported to Mr. Lingle as follows:

"As compared with the previous X-ray, taken about three months before, there is no evidence of any increase in new bone formation. It must be admitted that this is not distinctly encouraging, although it is by no means surprising with this type of fracture. As the situation now stands, it appears improbable that firm bone union will occur. Fibrous union is possible, provided absorption of the neck of the femur (always a possibility) does not take place. A further discussion of the entire problem with a representative of your office might be helpful, should one be traveling this way in the near future."

On December 20, 1937, A. L. Sand of the Highway Department visited Dr. Burke and the claimant and received from the former the following report, signed by Dr. T. L. Rypina of the X-ray department of St. Mary's Hospital:

"Progress film of the right hip as compared with July 29, 1937, shows beginning of absorption of the neck of the right femur. There continues to be an upward displacement of the major fragment. There is no evidence of union."

At the request of Mr. Sand, claimant on January 5, 1938, reported to Dr. Thomas in Chicago and was examined by the latter. Dr. Thomas' report of such examination shows:

"Fracture of neck of right femur with some upward displacement. The patient walks on crutches, touches leg to floor. No pain. Hip can be flexed

to 60°, abducted to 20°, without causing pain; 1⅛ inch shortening of leg. Patient not desirous of having any surgical intervention, which is quite reasonable for his age. The operative risk is great, and he has many hard vessels. * * *"

Dr. Thomas expressed the conclusion that—

"The patient could do his work as an inspector very well, getting along first on a crutch, later on a cane and probably later without any support, provided he gets fibrous union, or with no union if the fragments adjust themselves to a new position. I think he is going to have a fibrous union. The neck of the femur is all absorbed. He has a great deal of focal infection in his mouth and his arteries are extremely brittle. * * *"

On January 26, 1938, Dr. Burke supplied plaintiff at the cost of the State with an ambulatory splint, and on February 20th claimant began the use of two canes instead of crutches. He was paid his full salary at the rate of One Hundred Twenty-five ($125.00) Dollars per month for the last five days of May, 1937, and for the period from June 1, 1937, to August 17, 1938, he was paid compensation for temporary disability. The total period for which compensation was paid amounted to sixty-four (64) weeks and the total sum so paid was Nine Hundred Nineteen and 43/100 ($919.43) Dollars. Claimant had no children under sixteen years of age dependent upon him for support at the time of the accident. Treatment bills were paid for him by the Division of Highways up to September 7, 1938, in the sum of Six Hundred Ten ($610.00) Dollars. According to his annual earnings his average weekly wage was Twenty-eight and 84/100 ($28.84) Dollars, and his compensation rate $14.42 per week.

The claim herein was filed August 25, 1938. The Court finds from the record that claimant and respondent were on the 26th day of May, 1937, operating under the provisions of the Workmen's Compensation Act of Illinois; that on the date last stated claimant sustained accidental injuries arising out of and in the course of his employment, and that notice of the accident was given to respondent and claim for compensation on account thereof was made on respondent within the time required under the provisions of said Act.

That necessary first-aid, medical, surgical and hospital services have been furnished by respondent.

That the earnings of claimant during the year next preceding the injury were One Thousand Five Hundred ($1,500.00) Dollars, and that the average weekly wage was Twenty-eight and 84/100 ($28.84) Dollars.

That claimant has been compensated for all temporary disability to which he is entitled.

There is some difficulty in determining to what permanent partial disability or specific disability claimant is entitled.

Dr. Edmund J. Burke testified that—

The last X-ray was made of claimant's right leg on December 4, 1937; that at that time there was no bony union, and that the inference drawn from the X-ray was that there was a fibrous union with absorption of the neck of the femur. There was no disability of the claimant's foot itself and no impairment of motion in his ankle as a result of this injury; that while the knee never works properly in the case of permanent impairment at the hip, the motion of the knee is good and claimant has full extension of the knee itself; that the flexion in the knee of the injured right leg compares favorably with the flexion in the left knee, though not as agile and with a smaller range of motion.

Dr. Burke further testified that—

In the hip joint there is motion in four directions, extension, flexion, adduction, and abduction. That in claimant's case the flexion of the right hip joint is about 30° active motion, and that in the ordinary case normal flexion would be 90"; that passive motion would be slightly more than the 30° indicated. In abduction, i.e., movement in the hip joint outward from the hip line, claimant has sufficient motion to cross his right leg over the left; further, that claimant can extend his right leg backward about 10° to 15° and there is no partial ankylosis in any of the joints of claimant's right leg.

The doctor further testified that—

If the claimant were to stand on either leg without the use of a cane he could not move the other leg; that the shortening of the right limb of 1¼ inch to 1½ inch is caused by the absorption of the neck of the femur, and that the weight bearing line in which the fibrous union was formed is not correct, and that the alignment is not correct because of such shortening of the limb.

Dr. Burke further testified:

The range of motion of the muscles is better than sometimes results in similar cases, but there is no framework with which the muscular power can adequately be used, and that in his opinion claimant could not do work requiring physical exertion, and that claimant's condition will not improve and that he will not be able to do any work that requires agility.

Claimant testified that he has not been able to perform any work since the date of his accident. That at the time of the hearing he was still using the brace which had been furnished him, and that he gets around fairly well with a cane, walks about a block at a time, and was not hurt anywhere except in the hip joint.

Claimant contends that he has suffered an 80 per cent loss of use of his right leg and seeks an award of Two Thou-

sand One Hundred Ninety-one and 84/100 ($2,191.84) Dollars on the basis thereof.

The record does not disclose what, if any, increase may have resulted in claimant's permanent or specific disability by reason of his refusal or negligence to submit himself to the attention of Dr. Thomas, orthopedic specialist, in Chicago. These requests to him were made on June 14, 1937, and again July 20, 1937. Counsel for claimant contends that the latter was then confined in the hospital at LaSalle and was not discharged therefrom until September 4,1937, and that on January 5, 1938, when the request was again renewed he took advantage of the offer, and that as the findings of Dr. Burke, under whose care he was at LaSalle, were not at variance with those of Dr. Thomas, no exception should be taken to his earlier refusal of the proffered services of the orthopedic specialist.

Paragraph (d) of Section 19 of the Workmen's Compensation. Act provides :

"If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the commission may, in its discretion, reduce or suspend the compensation of any such injured employee."

These provisions are just to both the employer and the employee. In many cases, such as fractures or infections, if proper treatment is received in apt time there is a minimum period of total temporary disability and probable decrease in the permanent disability. The statute contemplates that while the employer is liable for compensation, regardless of the negligence of the employee that may have caused the injury, such employee should cooperate in accepting proper medical and hospital treatment.

While no question is raised as to Dr. Burke's ability or care of claimant, Dr. Thomas is recognized as an orthopedic surgeon of note, and early care at his hands may have resulted in a lessened disability to claimant.

The record does not disclose, however, that such would necessarily have been the case here. Neither does the record disclose that it would have been impossible or dangerous to claimant for him to have been removed to Chicago and placed under the care of Dr. Thomas when first requested six months prior to the time when he finally consented to go. From these facts and the evidence appearing in the record that

claimant is able to use his injured leg, to possess substantial flexion thereof, to have no substantial injury in the knee or ankle, and to be able to walk on the injured leg with the use of a cane, and to stand on the leg, leads to the conclusion that he still possesses substantial use thereof.

The court finds from the evidence that plaintiff has suffered sixty-five (65) per cent loss of use of the right leg as a result of said accident, and under authority of the provisions of the Workmen's Compensation Act of Illinois is entitled to an award for sixty-five (65) per cent specific loss of use of such leg in the sum of One Thousand Seven Hundred Eighty and 87/100 ($1,780.87) Dollars.

An award is hereby made in favor of claimant, James Reed, in the sum of One Thousand Seven Hundred Eighty and 87/100 ($1,780.87) Dollars, such award being payable on the basis of Fourteen and 42/100 ($14.42) Dollars per week. Temporary total disability has heretofore been paid of Fourteen and 42/100 **($14.42)** Dollars per week, commencing on the 1st day of June, A. D. 1937, and continuing to August 17, A. D. 1938, the latter being the date to which claimant has heretofore been paid temporary total disability. Payments have heretofore accrued over a period of fifty-two (52) weeks to August 17, 1939, for which compensation is now payable in the sum of Seven Hundred Forty-nine and 84/100 ($749.84) Dollars. The balance of One Thousand Thirty-one and 03/100 ($1,031.03) Dollars is payable at the rate of Fourteen and 42/100 ($14.42) Dollars per week, commencing on the 18th day of August, A. D. 1939, and continuing until the total of such balance has been paid, under the terms of the Workmen's Compensation Act of Illinois.

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations **to** the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if

and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 3329—Claimant awarded $67.50.)

STANLEY PIENTA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion. filed August 19, 1939.

JAMES EUGENE MALONE, JR., for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for temporary total disability and partial loss of use of finger.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and partial loss of use of finger, an award for compensation may be made therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, together with several others, was employed on April 7,1938, as a temporary or extra laborer for the purpose of chipping ice from the electrical connection on a certain steel bridge spanning the Illinois River at the City of LaSalle, Illinois, commonly known as the "Shippingsport Bridge" over the waterway. This work became necessary because of a terrific blizzard that began April 5, 1938. On the second day of his employment, April 8, 1938, claimant was assisting in adjusting the counterweight lifting blocks from the bridge to the roadway, and as the block was raised it swung around catching the second finger on the right hand of Mr. Pienta between the concrete block and a steel girder on the bridge. Mr. Pienta showed his finger to his foreman and he was referred to an attending physician, Dr. E. F. Cox of LaSalle, Illinois. The latter testified:

The extensor tendons had been torn from their attachment at the base of the distal phalanx of the third or middle finger of the right hand. He placed an aluminum splint over the finger so as to aid in obtaining a fibrous attachment of the injured tendon, but did not have much success: that the degree of flexion resulting from a failure of the extensor tendons to perform their function is limited to the joint itself: that usually one did not get more than 90° of flexion, and that Mr. Pianta probably has 25 per cent flexion.

Dr. Cox further testified that—

> In his opinion the injury to the distal-phalanx of claimant's finger does not produce any disability in the remainder of the fingers; that while there is a certain amount of clumsiness in plaintiff's picking up things with this finger, a claim of 50 per cent disability of the distal phalanx would be fully ample.

Claimant was employed immediately prior to the accident by the Illinois Power and Light Company at the rate of Seven ($7.00) Dollars per day, but was not working for them on April 7th and 8th because of bad weather. He testified that he was totally unable to use the injured finger for three weeks; that he can now move the first joint of the finger laterally, but that it remains in a bent condition, is larger than it was prior to the accident, and that he is unable to grip as well with that finger as he could before. He testified that he can now only bend the end joint of the injured finger about half as far as he can the corresponding joint on his other hand. After three weeks' disability claimant returned to his prior employment with the Illinois Power and Light Company, and has been working for them since that time in similar work to that which he previously performed. A Department Report from the Division of Waterways shows that claimant was paid for eleven (11) hours of labor at Forty (40c) Cents per hour, being seven (7) hours on April 7, 1938, and four (4) hours on April 8, 1938. Mr. Pienta, through his attorney, filed a claim with the Waterway Division June 29, 1938, and sent a copy of such claim to the Governor's Office. The doctor's bill in favor of Dr. Cox in the amount of Ten and 50/100 ($10.50) Dollars was paid by respondent.

Claim was filed in the Court of Claims on October 25, 1938.

As claimant was only a temporary employee, the proper method of computing his average weekly wage is on the basis of Forty (40c) Cents per hour, eight (8) hours per day, multiplied by the minimum number of days, i.e., two hundred (200), as provided for by *Section 10* (e) of the Workmen's Compensation Act of Illinois, making a total of Six Hundred Forty ($640.00) Dollars, which results in an average weekly wage of Twelve and 30/100 ($12.30) Dollars. Fifty (50) per cent thereof being less than the minimum of Seven and 50/100 ($7.50) Dollars weekly compensation provided for by *Section 8 (b)* of the Act, compensation is allowed at the latter figure.

The Court finds that claimant at the time of his injury was such an employee of the State of Illinois as was entitled to the benefits of the Workmen's Compensation Act; that he suffered an accidental injury which arose out of and in the course of his employment; that he suffered temporary total disability of three weeks; that no compensation is due for the first eight days, and that there is due him for such ternporary total disability, the sum of Fifteen ($15.00) Dollars; that he has suffered forty (40) per cent loss of use of the first phalange of the second finger of his right hand, for which specific injury he is entitled to compensation in the sum of Fifty-two and 50/100 ($52.50) Dollars.

An award is therefore made in favor of claimant for the sum of Sixty-seven and 50/100 ($67.50) Dollars, and as the full amount has accrued, payment therefor is to be made instanter.

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 3, 1937 (Sess. Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (S. B. 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. **2216—Claim** denied.)

GEORGE HERBERT ANKER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinzon **filed** February 13, 1935.*

Rehearing denied September 13, 1939.

Doyle, Sampson & Griffin, for claimant.

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

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application therefor within time fixed by Section 24 of Act is a condition precedent to jurisdiction of Court.* Where the record discloses that no claim or demand for compensation was made by employee within six months after date of accident, nor any application made therefor within one year after date of injury or after date of last payment of compensation, the Court is without jurisdiction to proceed with hearing on claim filed thereafter.

SAME—*furnishing medical services not payment of compensation.* The furnishing of medical services by employer is not payment of compensation within meaning of Workmen's Compensation Act!

SAME—LIMITATIONS—*Section 10 of Court of Claims Act inapplicable in claims under—Section 24 of Workmen's Compensation Act controlling.* In claims by State employees for compensation for accidental injuries arising out of and in the course of their employment, Section 24 of the Act is controlling as to time within which same must be filed and Section 10 of the Court of Claims Act, allowing claims against State to be filed within five years after accrual is inapplicable.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case comes to the court on a stipulation of facts.

The declaration was filed on July 14, 1933, and avers that George Herbert Anker, on and prior to the 29th day of May, 1931, was employed as a Junior Engineer in the Division of Highways of the Department of Public Works and Buildings of the State of Illinois; that on that date he was performing his usual and customary duties as such Junior Engineer in and about the construction of a hard road designated as Route No. 48 at a place between Welden and Farmer City in the State of Illinois, and while so engaged he stepped upon a finishing machine and received an accidental injury by the breaking of a bone in the arch of his right foot; that the State had notice of the injury and provided certain medical and hospital services and paid therefor the sum of One Hundred Three and 50/100ths Dollars ($103.50); that the treatment furnished did not effect a permanent cure, and that the claimant has since that time continuously suffered therefrom; that the bones of his foot slip out of place whenever pressure is placed on the foot and that he has been compelled to undergo continuous treatment for the injury since being discharged by the physician furnished and provided by the State; that he is still undergoing such treatment; that as the result of this injury he became liable for a doctor bill in excess of the sum of Two Hundred Fourteen and no/100ths Dollars ($214.00), and that claimant has suffered a fifteen (15%) per cent permanent loss of the use of the right foot; that for the year

immediately preceding the injury his average monthly salary was the sum of One Hundred Fifty and no/100ths ($150.00) Dollars per month, and that for the fifteen (15) per cent permanent loss of the use of said foot, he is entitled to the further sum of Four Hundred Twenty-seven 'and 50/100ths ($427.50) Dollars.

The Attorney General has made a motion to dismiss, for two reasons: First, that it appears that no claim or demand was made upon the respondent within six months after the date of the accident, and second, for the reason that an application for compensation or complaint herein was not filed within one year after the date of injury or within one year after the date of the last payment made by the respondent to the claimant of any temporary total compensation payable under the Act.

It is conceded that the injury arose out of and during the course of the employment of the claimant.

It appears from the stipulation that the attending physician furnished and provided by the State of Illinois pronounced the claimant permanently cured. It is further stipulated that on September 3, 1931, at the request of agents for the State of Illinois, the claimant executed a release under the mistaken belief that he was permanently cured. It is further stipulated that claimant has taken osteopathic treatments at least once each week from August 1, 1931, at a cost of Two Dollars ($2.00) each, and in support of his contention he attached an affidavit of C. A. Wendel. It further appears in the stipulation that claimant received One Hundred Fifty and no/100ths Dollars ($150.00) per month continuously up to February 1, 1933, when he discontiiiued his employment with the State of Illinois.

From this stipulation we assume that the claimant was paid his usual and customary salary from the time of his injury on the 29th day of May, 1931, up to February 1, 1933.

The statute 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 an 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 claimant contends that the five-year statute provided in the Court of Claims Act governs this case. The Attorney

General contends that Section 24 of 'the Workmen's Compensation Act governs, and this Court has held that the special provision of the Compensation Act, which is Section 24 thereof, and which provides that a claim or demand must be made within six months after the date of the accident, and application for compensation must be made within one year after the date of injury or one year after the date of last payment made by respondent for the claim of any total temporary disability under the Act.

We have repeatedly held that this Court has no greater jurisdiction in compensation cases where State employees are injured than the Iiidustrial Commission of the State of Illinois has in cases before it.

> Statutes of limitation relate to the remedy and not the right. They are statutes of repose, designed to accelerate the settlement of controversies, and are, therefore, favored.
>
> *Chicago Board of Underwriters* vs. *Ind. Com.* 332 Ill. 611.

In controversies before this Court between an employee and the State every reason exists to facilitate and expedite the settlement of a claim by imposing limitations that are present in a suit before the Industrial Commission between individuals. No good reason appears why the statute of limitations under the Compensation Act should not be enforced against an employee of this State just simply because he is an employee of this State.

Section 24 of the Compensation Act, as subsequently amended, provides that when no proceeding for compensation has been made within six months after the accident, and when no 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 such application shall be barred.

In the case of the *City* of *Rochelle* vs. *Ind.* Corn., 332 Ill. 386, the Court held that unless such claim has been made within the time fixed by the statute, the Industrial Commission would have no jurisdiction in the case.

It is claimed that the State paid for medical services as of September 10, 1932, and, therefore, paid compensation within one year from the time the claim was made, and each warrant was stamped on the face over the printed word "Appropriation" the following words: "Compensation for Injured Employees.''

These warrants used for payments in such matters are in printed forms and cannot be used to deny the truth.

Prior to 1925, the furnishing of medical and hospital services was held to be a payment of compensation in the same manner and with the same effects as the payment of weekly or other compensation under Section 8. That presented a very unsatisfactory and unfair situation. The prompt furnishing of proper medical and hospital services was of great immediate importance both to the employee and to the employer, and yet the employer was placed in the position that if he provided such service and then it developed that there was no compensation liability, as for example that the condition was not due to accidental injury arising out of and in the course of employment, yet the furnishing of such service was a payment of compensation, and an admission of liability, it affected the matter of limitations as to making claim under Section 24, and was subject to review under Section 19 (h) as being conclusive of any and all questions of liability and left open for consideration only the question whether there had been a recurrence or increase of disability since the time of the payment for such services.

The statute now provides that the payment for medical and hospital services is not an admission of liability to pay compensation and not a payment for compensation.

We, therefore, hold that there has been no payment of compensation within the meaning of the statute in this case, and proper application was not filed within the time fixed by the statute, and this view is supported by *Chicago Board of Underwriters* vs. *Industrial Commission,* 329 Ill. 543, and *Arnold & Murdock Co.* vs. *Industrial Commission,* 312 Ill. 251, and other decisions.

We, therefore, sustain the Attorney General's motion to dismiss for want of jurisdiction and the claim is accordingly dismissed.

(No. 3287—Claim denied.)

APEX MOTOR FUEL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respoadent.

Opinion filed September 13, 1939.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

TAX—*oil inspection fees—paid under mistake of law—cannot be recovered.* Taxes or fees paid under a mistake of law cannot be recovered and the Court of Claims is without authority to make award for any refund thereof.

SAME—*same voluntarily paid cannot be recovered.* Where a tax or fee is paid voluntarily, with a full knowledge of the facts, or the opportunity to ascertain same, no recovery can be had thereof.

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

The complaint herein alleges in substance that during the period beginning January 1, 1935, and ending July 31, 1937, it paid to the respondent, oil inspection fees of three cents (3c) per One Hundred (100) gallons on 2,322,650 gallons of range oil, to wit, the sum of $696.80; that all of said oil was purchased and sold by claimant as range fuel oil for heating purposes, and was not subject to inspection by the respondent; that the operating department of the claimant mistakenly reported the arrival of the range oil cars to the Division of Oil Inspection of the respondent; that the respondent charged, and the claimant paid, the inspection fees thereon as above set forth; that such inspection fees were not being paid by any other firm in the industry; and claimant therefore asks for a refund of the fees so paid by it as aforesaid.

The Attorney General has entered a motion to dismiss the case on the grounds that the fees in question were paid voluntarily and under a mistake of law and therefore are not recoverable.

The Oil Inspection Act (Cahill's Ill. Revised Statutes, 1935, Chap. 104) requires an inspection and the payment of an inspection fee on "petroleum products." Section 1 of such Act provides that "petroleum products" as used in such Act "means gasoline and kerosene."

Section 5 of such Act requires the consignee of petroleum products to notify the Department of Trade and Commerce within twelve (12) hours after the receipt thereof. Section 13 fixes the inspection fee at three cents (3c) for each 100 gallons, and Section 14 provides for the payment or collection thereof.

It appears from the allegations in the complaint that the tax was paid voluntarily, and we have repeatedly held that where a tax is paid voluntarily, and with a full knowledge of the facts, it cannot be recovered. See *Western Dairy* Co.

vs. *State,* 9 *C. C.* R., 499; *Butler Paper* Co. vs. *State,* 9 C. C. R., 503, and cases there cited.

Assuming, but not deciding, that the statute did not require an inspection of range fuel oil, yet the act of the claimant in reporting the arrival of such range fuel oil, the inspection thereof, and the payment of the inspection fees by the claimant, were all made under a mistake **of** law.

It is a well established rule of law that a tax or fee paid under a mistake of law cannot be recovered. *Walzer* vs. *Board of Education,* 160 Ill. 272; *Yates* vs. *Royal Ins. Co.,* 200 Ill. 202; *School of Domestic Arts* vs. *Harding,* 331 Ill. 330; *Richardson Lubricating* Co. vs. *Kinney,* 337 Ill. 122.

Under the law as above set forth, we have no authority to allow an award, and therefore the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3281—Claimant awarded $633.74.)

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

Opinion filed September 18, 1939.

MAX J. BECKER, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when awurd justified under.* Where employee of the State 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 therefor, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

SAME—*temporary total incapacity—compensation for justified even though not immediately following injury.* An award for compensation for temporary total incapacity is justified even though such incapacity does not immediately follow an accidental injury, when it is clearly shown that it is directly traceable to and the result of such injury.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that on the 13th day of March, 1937, John Bettinardi, the claimant, was injured by reason of an accident arising out of and in the course of claimant's employment by the State of Illinois.

The record discloses that claimant is an unmarried man with no child under sixteen years of age, and that claimant was in the employ of the respondent in the capacity **of** orderly

at the Illinois Research and Educational Hospital, a charitable institution maintained and operated by the State of Illinois at 1819 Polk Street, Chicago, Illinois; that he was receiving a salary of $85.00 per month, plus maintenance valued at $18.00 per month; that he had not been in such employment for one year previous to March 13, 1937, but it was stipulated that claimant's annual earnings for the purpose of computing compensation should be considered at $1,236.00. Claimant's duties consisted of emptying the patient's vessels, handling bottles containing medicine, waiting on the patients, moving beds and tables, assisting in the service of meals, collecting laundry, taking patients to the dispensary and handling oxygen and gas tanks. He also operated the elevators when the occasion required. The Research and Educational Hospital is a five-story brick building accommodating about three hundred patients and employing about seventy-five people. It is equipped with four electrically operated elevators, and the kitchen where the meals for patients and employees are prepared is equipped with knives, gas stoves, a refrigerator and electrically operated meat grinders and bread slicers. The laundry at the institution is equipped with electric washing machines, mangles and driers.

On March 13, 1937, while claimant was handling a urinal, a piece of enamel pierced the middle finger of his right hand, causing it to bleed. He immediately reported the incident to his superior, and Dr. Reynolds, a physician at the institution, examined the finger. In January, 1938, the finger bothered him and on January 4, 1938, Dr. Roberg, a physician at the institution, opened the finger and removed a small particle of enamel therefrom. The condition of the finger grew worse and on January 17, 1938, claimant was hospitalized at the institution and remained in the hospital for nine weeks.

Claimant had worked from March 13,1937, until January 17, 1938, at his regular employment and received his regular salary. After his discharge from the hospital he received intermittent treatment at the dispensary and on May 13, 1938, was again hospitalized at the institution and a sequestrum of bone was removed from the distal phalanx of the finger. The claimant was again discharged from the hospital on May 16, 1938, and thereafter received intermittent treatment and observation at the dispensary while the wound was still draining. Subsequent to June 27, 1938, a skin graft was done on

the claimant's finger and the claimant was able to return to his regular duties November 21, 1938. The claimant did not work from January 17 to November 21, 1938, but was paid one month's salary of $85.00 in February, 1938.

All the hospitalization and medical services have been furnished by the respondent.

Dr. Arthur H. Schoenwetter was called on behalf of the claimant and testified that claimant's right middle finger was one-half inch shorter than the corresponding finger of the left hand; that claimant has lost about one-half of the distal phalanx of the finger; that the finger is flexed at a 45 degree angle and that the distal phalanx cannot be extended completely; that the finger closes only to one-half inch of the palm.

Under the Compensation Act the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of this amount; and the loss of one-half of the distal phalange of the finger constitutes the loss of the phalange. Generally speaking, compensation for temporary total incapacity is payable only for that period immediately following the accident during which the employee is totally incapacitated from work by reason of the illness attending the injury—the period of the healing process.

The record shows that the respondent had immediate notice of the accidental injury sustained by the claimant on March 13, 1937, and that claimant was paid his regular salary for non-productive time from January 17 to February 17, 1938, which constituted the payment of compensation under the case of *United Air Line* vs. *Industrial Commission,* 364 Ill. 346. No demand for compensation was therefore necessary. The claim was filed within one year from the payment of this compensation, and all the jurisdictional requirements have been complied with.

It has been stipulated that claimant's annual earnings for compensation purposes is the sum of $1,236.00, or an average weekly wage of $23.76, one-half of which equals $11.88. It appears that the claimant is entitled to the benefits of the Workmen's Compensation Act and under that Act is entitled to compensation in the sum of $207.90 (which is 50 per cent

of 35 weeks times $11.88) for the specific loss of 50 per cent of the middle finger of the right hand.

We are also of the opinion that claimant is entitled to total temporary incapacity for that period following the accident during which he was unable to work because of the effects of the injury, even though the injury did not manifest itself immediately after the accident. It is admitted that the injury was caused by the piece of enamel embedding itself in the finger. We are of the opinion that under Section 8 (b) of the Workmen's Compensation Act the Legislature did intend to provide compensation for total temporary incapacity, even though it did not follow the injury for several months. Claimant was injured on March 13, 1937, and he lost no time from his employment on account of the injury until January 17, 1938, ten months after the accident. We believe that it would be a narrow construction of the Act to say that the temporary total incapacity must immediately follow the injury, and we hold that the claimant is entitled to compensation equal to fifty per cent of his average weekly wage for the period from January 17 to November 21, 1938. The record shows that the claimant was either in the hospital or undergoing treatment with his finger still draining or submitting to a skin grafting process during this period, and that his finger was not completely healed, and consequently he did not return to work until November 21, 1938, or a period of forty-three weeks. Compensation for this period at the rate of $11.88 would amount to $510.84. He did, however, receive $85.00 for non-productive time and this should be deducted from the above amount.

Holding as we do, that claimant is under the Workmen's Compensation Act, he is entitled to $207.90 for the specific loss of the first phalange of the second finger, plus 43 weeks' temporary total incapacity at the rate of $11.88 per week or $510.84, less the one month's salary paid to claimant in the sum of $85.00, or the total sum of $633.74.

Claimant was injured on March 13, 1937. He lost no time from his employment on account of the injury until January 17, 1938, a little more than ten months after the accident. From the time he went to the hospital until he returned to work, **43** weeks had elapsed. He is entitled to receive the compensation for the specific loss of the first

phalange of the second finger and for temporary total incapacity in a lump sum for the reason that more than that amount has accumulated at $11.88 per week up to September 12, 1939, the date of this award.

An award is therefore made in favor of John Bettinardi, the claimant, in the sum of $633.74.

This award being subject to the provisions of an Act entitled "An Act making an Appropriation to Pay Compensatian Claims of State Employees and providing for the Method of' Payment Thereof," approved July 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 2504—Claimant awarded $130.50.)

LEO BRAY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 18, 1939.

WILLIAM M. SCANLAN, for claimant.

JOHN E. CASSIDY, 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 may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint was filed on September 17, 1934, claiming the sum of $1,077.50 for compensation alleged to be due under the Workmen's Compensation Act for an injury suffered by the claimant in an accident which occurred on September 29, 1933, while the claimant was in the employ of the State of Illinois, in its Division of Highways, Department of Public

Works and Buildings. The respondent was at the time of claimant's injury engaged in maintaining a concrete paved highway. The claimant sustained an accidental injury while cleaning up a mud jack, which was used for raising low places in the pavement.

At the time of the injury claimant was 41 years of age and had the following children under sixteen years of age at that time:

Josephine Bray, age 13;
Leo Robert Bray, age 10;
Edward Bray, age 8;
William Bray, age 6;
James Bray, age 2.

No compensation was paid to the claimant on account of the injury and no hospital or doctor bills were paid.

The State had due notice of the injury and according to Dr. Edgcomb, his attending physician, the claimant received a cut eight inches long on the posterior surface of the right forearm. The cut went through the skin, the subcutaneous tissues and into the tendon and extensor longus pollices. It did not completely cut the tendon but cut into it. Dr. Edgcomb took care of him and testified that there was no complete disability. He was under the doctor's care approximately six weeks. There was a scar five inches long at the site of the wound that is healthy; it is not attached to the fascia. The sensitiveness is gone, the scar is not tender now, and there is full extension and flexion, but there is loss of pronation. The doctor estimated that he would have been able to return to work about two weeks after the six-week period that he treated him.

This accident occurred on September 29, 1933; the claim was not filed until September 17, 1934, and the Statement, Brief and Argument on behalf of respondent was not filed until June 27, 1939. The State had due notice of the accident and demand was made for compensation by the claimant within six months after the date of the accident.

The Court finds that the petitioner was under the Compensation Act and received an additional injury arising out of and in the course of the employment; that he had been, prior to the accident, a railroad engineer, and when work opened up he went back to his employment and received more for his employment than he was receiving operating the mud

jack. At the end of the day it was the custom to clean the mud jack. The accident occurred about 4:45 p. m. Claimant was paid at the rate of 35 cents per hour for an eight-hour day, and during the ten calendar weeks that he had been employed by the Division of Highways he had worked 291 hours at 35 cents per hour, making a total of $101.85, and two hours at 50 cents per hour, or $1.00.

As stated above, claimant had five children under sixteen years of age who were living with him and dependent upon him.

The Court finds that the bill for medical services was $13.00 and that this was a fair and reasonable charge. The Court also finds that the hospital bill amounted to $5.50 for the use of the operating table, and that this was a fair and reasonable charge. As to the specific loss, the claimant testified that he was doing the same general type of work, for the same company, with the exception of such changes as had been made in the equipment by that company, that he had been doing before he secured employment with the State Highway Department.

Dr. Edgcomb testified that claimant should have been able to return to his regular employment in about two months after the accident. His regular employer was the American Silica Sand Works.

Under Section 8 of the Illinois Workmen's Compensation Act, an employee having four or more children under the age of sixteen years at the time of the injury is entitled to $14.00 per week.

It is admitted that this accident arose out of and in the course of the employment, and that all parties are under the Compensation Act, and that nothing has been paid by the State, either by way of compensation, hospital or medical bills.

We, therefore, make an award in favor of the claimant, Leo Bray, for eight weeks at $14.00 per week, or the sum of $112.00; and an award to the claimant, Leo Bray, for the use of Ryburn King Memorial Hospital in the sum of $5.50, and an award to the claimant, Leo Bray, for the use of Dr. J. H. Edgcomb in the sum of $13.00.

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 3, 1937 (Sess. Laws 1937, p. 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(Nos. 2267, 2268, 2269, 2270, 2271, 2272, Consolidated—Claims denied.)

BLANCHE BULLI, No. 2267, ELIZA POZZI, A MINOR BY ANNA GALLI, HER MOTHER AND NEXT FRIEND, No. 2268, RTJDOLPH BELLETINI, No. 2269, ANNA GALLI, No. 2270, FRED CASTELLI, No. 2271, ALBERT GALLI, No. 2272, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1939.

WOLFBERG & KROLL, for claimants.

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

NEGLIGENCE—*respondeat superior—doctrine* of not applicable *to State in* the exercise of governmental functions. In the exercise of governmental functions, the State is not liable for the negligence of its officers, agents or employees, in the absence of a statute making it liable therefor, and in the State of Illinois 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 a defect in construction or failure to maintain same in a safe condition for travel, or the negligence or wrongful conduct of its officers, agents or employees in connection therewith.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

All of these cases arose out of the same accident, and on motion of the Attorney General they were consolidated.

The basis for the claim is an accident which occurred on the 13th day of August, A. D. 1933.

The claimant, Blanche Bulli, in claim number 2267, alleges that at the time of the injury the respondent was a commonwealth and was in possession and control of a certain

public highway known as Illinois Route No. 5, at or near the city of Mendota, Illinois, and that it was the duty of the respondent to exercise ordinary care to keep the said public highway in a reasonably safe condition for the purpose of public travel thereon; that at the time of the injury and for a long time prior thereto the respondent had carelessly and negligently failed and neglected to exercise ordinary care to keep said public highway at the place aforesaid in a reasonably safe condition; but on the contrary thereof, on the day of the injury and for a long time prior thereto carelessly and negligently permitted and allowed said Illinois Route No. 5, especially at a certain point, to-wit: near the farm of Stanley M. Wujek, on the said Illinois Route No. 5, to be and remain in a dangerous and unsafe condition, and carelessly and negligently permitted and allowed divers holes, depressions and uneven places to be and remain in said public highway at the place aforesaid. Claimant further alleges that the respondent had notice of the dangerous and unsafe condition of the public highway at the place aforesaid, or by the exercise of ordinary care should have had notice; that at the time of the injury claimant was riding as a passenger in a certain automobile which was then and there being driven along and upon said Illinois Route No. 5, at the place aforesaid, in a northerly direction, and that while the claimant was then and there in the exercise of ordinary care for her own safety, by reason of the carelessness and negligence of the respondent, as aforesaid, the said automobile ran and was precipitated into one or several of the holes in the pavement, and the said automobile was thrown from the road into the ditch by the side of the road and overturned, by means of which the claimant received certain injuries, and she claims damages in the sum of $1,500.00.

Elisa Pozzi, a minor, by Anna Galli, her mother and next friend, makes substantially the same allegations in her complaint and also claims damages in the sum of $1,500.00.

To the same effect is the complaint of Rudolph Belletini, and the same amount of damages is alleged, except he avers he was driving the automobile.

Anna Galli avers that she was a passenger in the car and the other facts hereinbefore related are also averred, and she also claims damages in the sum of $1,500.00.

Fred Castelli also avers that he was a passenger in the said car, and makes like charges, and also claims damages in the sum of $1,500.00.

Albert Galli makes similar charges, and also avers that Anna Galli was the mother of Anita Marie Galli, a minor aged four and 'one-half months, who was killed in said accident. Albert Galli charges that he is entitled to the earnings of the minor child until said minor reaches the age of majority; and that he expended large sums of money for funeral expenses for the said Anita Marie Galli, and claimant asks damages in the sum of $2,500.00.

The complaints allege that this accident occurred on Route No. 5 near the City of Mendota, Illinois. Route No. 5 at the time of the accident is what is known as U. S. No. 20 now and does not run near Mendota, Illinois, nor in LaSalle County, in which Mendota is located, but extends westerly from the City of Chicago, Illinois, through the City of Rockford, Illinois, to Dubuque, Iowa, and on west. It is not averred in said complaints that the said highway is a State Bond Issue highway under the supervision and control of the respondent, but if there was a cause of action in this case at all, proper amendments could have been made.

The Attorney General has made a motion to dismiss each of the complaints on four different grounds :

"1. That each of said declarations filed herein are substantially insufficient in law and fail to. state a proper legal cause of action against the respondent.

2. That the doctrine of respondeat superior has no application to the respondent herein, for the reason a sovereign state in the exercise of a governmental function cannot be held liable for the misfeasance, malfeasance or nonfesance of its officers, agents or employees.

3. That while it is alleged in said complaints the accident occurred upon a public highway designated as 'Illinois Route No. 5' located 'at or near the City of Mendota, Illinois,' it does not affirmatively appear from the allegations in the complaints that said paved highway is a State Bond Issue Route under the control and supervision of the respondent so as to give this Court jurisdiction of the alleged claim.

4. That this Court should take judicial notice of the fact that the paved highway officially known and designated as

State Bond Issue Route No. 5 is not located at or near the City of Mendota, Illinois."

This motion must be sustained, and any one of these grounds is sufficient. We further base our decision on the second reason; that is, that the doctrine of respondeat superior has no application to the respondent herein, for the reason a sovereign state in the exercise of a governmental function cannot be held liable for the misfeasance, malfeasance or nonfeasance of its officers, agents or employees.

In the building and maintenance of a system of improved and hard-surfaced highways the State acts in its sovereign capacity in carrying out one of its governmental functions and cannot be held liable for the misfeasance, malfeasance or nonfeasance of its officers or agents. This Court has so held in many cases. See Story on Agency, 9th Ed., Sec. 319, p. 390.

For the reasons above mentioned the motion of the Attorney General to dismiss these complaints will be sustained. Each cause is, therefore, dismissed.

(No. 3313—Claimant awarded $2,725.96.)

FRANK BURNS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September *13*, 1939.

KNOBLOCK & SLOAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may* be *made* under *for loss* of *leg.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in loss of leg, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The facts in this case have all been stipulated. The claimant, Frank Burns, was employed by the respondent in the Division of Highways as a crane operator, and had been so employed since October 20, 1931. On November 24, 1937, the date of the accident, the claimant was operating a gasoline motor-driven Austin Badger shovel owned by the Division of Highways and was loading gravel from a gravel pit into trucks. About 3:30 in the afternoon a part of the gravel

bank gave way, and part of the bank crushed the left leg of the claimant against the shovel boom.

Claimant was taken to the office of Dr. John T. France in Findlay, Illinois, and from there to St. Mary's Hospital in Decatur, Illinois, where he was placed under the care of Dr. Ciney Rich. Dr. Rich reported that the tibia and fibula of claimant's left leg were fractured at the middle third and lower third, and that the tibia was fractured longitudinally through the middle fragment, and that the skin, muscle, nerves and blood vessels were badly crushed in the middle area of the lower leg.

On December 10, 1937, the claimant was taken on a stretcher to St. Luke's Hospital, Chicago, Illinois, and placed under the care of Dr. H. B. Thomas. On December 27, 1937, Dr. Thomas amputated the claimant's left leg above the knee, and on January 7, 1938, claimant returned to St. Mary's Hospital in Decatur and was again placed under the care of Dr. Rich. On February 21, 1938, claimant returned to his home in Edelstein, Illinois, and on March 17, 1938, returned to Chicago for examination by Dr. Thomas. Claimant was in Chicago from March 21 to March 26 under the care of Dr. Thomas and received his board and room at the Y. M. C. A. Hotel in Chicago at the expense of the respondent. On May 2, 1938, claimant went to Chicago and was fitted for an artificial limb by the Merrick-Hopkins Company and returned to Chicago on May 20 for such artificial limb. On June 3, 1938, the claimant went to Dr. H. B. Thomas in Chicago for a final examination, and as a result of such examination Dr. Thomas reported that the artificial limb furnished to the claimant by the respondent was satisfactory and functioning properly.

Claimant's total temporary disability ceased on June 8, 1938, and during that period of claimant's temporary total disability the respondent paid him the total sum of $544.04.

Claimant was unmarried and had no child under sixteen years of age.

The State of Illinois has furnished transportation, through the Division of Highways, or reimbursed the claimant for the expense of all his trips to the City of Chicago, and has paid all the doctor, hospital and medical bills and nurses' bills and has furnished the claimant with an artificial limb. The respondent has paid, through the Division of Highways, for such services the sum of $2,811.04.

The Court finds that it has jurisdiction of the person and of the subject matter. Due notice was properly given. Construction, excavating or electrical work, except as is provided in Paragraph 8, is declared to be extra-hazardous and is automatically under the Workmen's Compensation Act. He was actually employed by the respondent at the time of the injury and the injury arose out of and in the course of his employment.

Compensation should be computed on the basis of the annual earnings which the injured person received as salary, wages or earning!, if in the employment of the same employer continuously during the year next preceding the date of the injury.

This Court has repeatedly held that the construction and maintenance of a hard-surfaced public highway is the maintenance and coiistruction of a structure under the Workmen's Compensation Act.

Manhart vs. *State, 8 C. C. R. 356;*
City of Rock Island vs. *Industrial Commission,* 287 Ill. 76;
Bond vs. *State, 7* C. C. R. 197;
Pennington vs. *State, 7* C. C. R. 253.

The amount of compensation which shall be paid to the employee for an injury iiot resulting in death shall be:

(a) 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.

(b) If the period of temporary total incapacity for work lasts more than six working days, compensation equal to fifty per centum of the earnings but not less than $7.50 nor more than $15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit under paragraph (a), section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in said paragraph (a), section 7; *Provided,* that in the case where the temporary total incapacity, for'work continues for a period of more than thirty days from the day of the injury, then compensation shall commence on the day after the injury.

(e) 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.

15. For the loss of a leg, or the permanent and complete loss of its use, Mty percentum of the average weekly wage during one hundred and ninety weeks.

Section 8, Workmen's Compensation Act.

In *Payne* vs. *Industrial Commission,* 296 Ill. 223, the Court held that under the Workmen's Compensation Act, amputation of the leg ten inches above the ankle constitutes loss of the leg.

Compensation for temporary total disability was paid by the respondent to the claimant from the date of the accident through June 7,1938, and no further claim is now made. Both the State and the claimant are clearly under the terms and conditions of the Compensation Act.

It was stipulated that the average annual earnings of the claimant were $1,753.50. This does not take into consideration over-time. On these earnings his average weekly wage would be $33.73, but under the Act he is only entitled to $15.00 per week compensation. During the twenty-eight weeks from November 24, 1937, to June 8, 1938, which the report of the Division of Highways shows to have been the period during which the claimant was temporarily totally disabled, the claimant should have been paid compensation in the amount of $420.00 at the rate of $15.00 per week. However, he was paid for that period on the basis of $19.43 per week, or a total of $544.04, which makes an over payment of $124.04, and this should be deducted from any specific loss award hereinafter made.

We are of the opinion that claimant has suffered a complete loss of the leg and under Section 8 (e) 15, the compensation payable for the loss of a leg is one hundred ninety weeks at the compensation rate, which in this case is $15.00 per week, or the sum of $2,850.00, less the over payment of the temporary total disability of $124.04, leaving a net award of $2,725.96.

We, therefore, make an award to claimant, Frank Burns, in the sum of $2,725.96.

One year, three months and four-sevenths weeks had elapsed since the date that claimant's temporary total disability ceased, which was June 8, 1938, up to September 12, 1939, and compensation figured at the rate of $15.00 per week

for this period of time amounts to $983.58, and we hold that claimant, Frank Burns, is entitled to said sum of $983.58 to be paid to him in cash. We further hold that the balance of said award or the sum of $1,742.38 shall be paid to claimant, Frank Burns, at the rate of $15.00 per week, commencing as soon after. September 12, 1939, as it shall be convenient for the Department to so do.

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (Senate Bill 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 3315—Claimant awarded $3,959.68.)

drove in the latter's car from Tamms to Horse Shoe Lake State Game Preserve in Alexander County. There they removed a State-owned boat from the lake so that it might dry out and be repainted. They then drove to the City of Cairo for a conference with their immediate superior, Inspector Robert Halliday. They then drove out into the country district to investigate any illegal hunting of game that might be in progress. When they reached a point near Sandusky their automobile accidentally and for some unknown reason left the gravel road, got out of control of the driver, DeWitt, and ran into a ditch. The car was badly damaged and Lee B. Davis was violently thrown and received a fracture of his skull and other injuries, as the direct result of which he died at St. Mary's Infirmary in Cairo, Illinois, the next day, May 22, 1935, leaving the claimant herein, Adelia Davis, his widow, as his only dependent, there being no children under the age of sixteen (16) years surviving him.

A report from the Department of Conservation, appearing in the record shows that his earnings were One Hundred Twenty-five ($125.00) Dollars per month and his average annual earnings for the year immediately preceding the accident were One Thousand Four Hundred Fifty-five ($1,455.00) Dollars; in addition to which the State furnished said employee with an automobile for his use in the performance of his work and paid the necessary upkeep and expense of operation thereof.

It further appears from said report that as an Investigator of said Department most of his work was performed in Alexander County, where the State maintains what is known as the Horse Shoe Lake Game Preserve of approximately 2,500 acres of land and water; that in the operation of Horse Shoe Lake the State maintains a large concrete dam about thirty-nine **(39)** feet in length, with an eastward wing of about two hundred forty **(240)** feet in length and a westward wing of about one hundred ten (110) feet in length. Two iron gates in the main part of the dam are closed and open from time to time in controlling the lake level. Such opening and closing is controlled through two iron devices on top of the dam, which can only be operated after certain locks attached thereto are opened with keys provided for that purpose, one set of which were in the custody of said Lee B. Davis as Investigator.

The Departmental Report further confirms the following statement of Lee B. Davis' duties:

(a) To patrol the County of Alexander for the purpose of enforcing the game and fish laws of the State, and to make arrests and prosecute violators of the law.

(b) To carry and distribute in an automobile operated by him and furnished him by the State for that purpose, fish taken and removed by him from one body of water to other bodies of water within the State, and to carry in said automobile fishing seines or nets, outboard motors and other equipment for boats operated by the State upon said Horse Shoe Lake, and to carry in said automobile other commodities belonging to the State. .

(c) To operate upon said Horse Shoe Lake motor boats belonging to the State for the carriage of employees and officials of the State in connection with the discharge of their duties as such, and for the carriage of visitors to said Horse Shoe Lake Preserve, the water in the lake ordinarily and on the average being from 8 to 10 feet in depth.

(d) To operate upon said Horse Shoe Lake a barge belonging to the State, propelled or towed by one of said motor boats operated by him, the said Lee B. Davis, for the carriage of automobiles used by employees and officials of the State in connection with the discharge of their duties as such, and for the carriage of visitors and their automobiles from one part of the Preserve to other parts thereof upon the waters of the lake.

(e) To maintain the concrete dam at the southerly end of said Horse Shoe Lake, to operate the gates in the dam for the purpose of controlling the level of the water in the lake, and to inspect and examine the dam with its equipment and appliances for the purpose of maintaining the same in good repair and condition, and in connection with all of which it was necessary for him, the said Lee B. Davis, to walk or go upon the top of the central or main portion of the dam, about 22 inches in width, and of the wings of the dam, about 14 inches in width, above the water of the lake, which were ordinarily at that point 7 or 8 feet in depth.

The Court finds that Lea B. Davis was, on the 21st day of May, 1938, an employee of the State of Illinois in the Department of Conservation.

That on said date he suffered an accident which resulted in his death, and that the injury which caused his death arose out of and in the course of his employment. That he was married and left surviving him, Adelia Davis, his wife, claimant herein, and no children under the age of sixteen years. That due notice of the accident and notice of demand for compensation, and the filing of claim herein have all been within the statutory limitations. That Lee B. Davis' annual wage from respondent for the year preceding his death was One Thousand Four Hundred Fifty-five ($1,455.00) Dollars, or an average weekly wage of Twenty-seven and 98/100 ($27.98) Dollars per week. That all hospital and surgical bills incidental to said accident have been paid by respondent,

in the sum of Two Hundred Eighty ($280.00) Dollars. That under the provisions of Section 7 of the Workmen's Compensation Act, claimant herein is entitled to an award in a sum equal to four times the average annual earnings of said employee, but not more in any event than Four Thousand ($4,000.00) Dollars; that such award is subject to a credit of 10/31sts of One Hundred Twenty-five ($125.00) Dollars because of over payment to claimant of salary for the month of May, 1938.

An award is therefore hereby made in favor of claimant Adelia Davis in the sum of Three Thousand Nine Hundred Fifty-nine and 68/100 ($3,959.68) Dollars, payable at the rate of Fourteen ($14.00) Dollars per week. Of said award, the amount of Nine Hundred Fifty-two ($952.00) Dollars has heretofore accrued to September 10, 1939, and is payable instanter. The balance of Three Thousand Seven and 68/100 ($3,007.68) Dollars is payable in monthly warrants at the rate of Fourteen ($14.00) Dollars per week, commencing on the 18th day of September, A. D. 1939.

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 3, 1937 (Sess. Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly" (S. B. 123, as amended), approved July 8, 1939; and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. **2734—Claimant** awarded $1,383.82.)

NELLIE FINKLER, ADMINISTRATRIX OF THE ESTATE OF ALEXANDER C. FINKLER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion ***filed September 13, 1939.***

M. D. MORAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employees in State Hospitals for Insane entitled to benefits of—when award may be made for injury to.* Where attendant at Manteno State Hospital suffers accidental injury, arising out of and in the course of his employment, in assisting to subdue patient, an award may be made for compensation.

SAME—*injury followed by death of employee with pre-existing disease—when death deemed result of injury.* Where Stat; employee sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, and at the time and prior thereto, was suffering from a disease, and death results, such death results from injury by accident, if such disease is aggravated or accelerated by such injury and death is hastened or accelerated by reason thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Nellie Finkler, is the widow of Alexander C. Finkler and has filed a claim with this Court for an award under the Workmen's Compensation Act. The claim was filed on October 2,1935, and the claimant filed briefs on September 22, 1938. The State filed its brief on March 17, 1939.

The record shows that the deceased was an attendant at the Manteno State Hospital, and on December 29, 1934, about 11:00 a. m. a patient was received at the hospital and while the attendant, Lyle Bauer, was taking care of him the patient broke loose and ran down the stairs. The attendant grabbed him around the waist and the deceased, Alexander C. Finkler, went to the bottom of the stairs to help subdue the patient. Finkler was knocked down on the floor on his back and the patient and the attendant Bauer fell on top of him. Finkler had been assigned to the ward as an attendant. The institution at Manteno, Illinois, has a power house in which there is electrical machinery, and they also have lathes and saws and other kinds of machinery.

Dr. Arthur H. Gollmar was regularly employed at this institution and was on the staff of the Manteno State Hospital. He is a graduate of Rush Medical College and was licensed in the State of Illinois in 1900, and devotes all of his time to this institution. At the time his testimony was taken he was devoting all of his time to psychiatry, and had been on the staff of the hospital seven years and two months. He had first seen the deceased when he was required to examine, him, an examination being made of all new employees. He found the deceased to be under-developed and undernourished and a rather frail man, who had a hernia and mitral murmur and some rales in the chest. He had what the doctor called

an emphysematous condition of the chest. He looked rather pale and was classified as "poor." He made out an injury report which was dated December 29, 1934. They were not prepared at the Manteno State Hospital at that time to take care of injury cases. They had one ward on the male side and one ward on the female side. On the day of the injury Dr. Gollmar saw the deceased and spoke to him, and then the doctor went up to the infirmary department. He then learned that the claimant's intestate had been injured; that is, knocked over, and the doctor went down and inquired about his condition. The deceased said he was all right and that he did not get hurt, and further said: "I can take it; it's nothing." The doctor suggested that he look him over and the deceased said, "There's no need." The doctor made no further examination at the time because the deceased did not report disability and kept on working. About a week after that the doctor was called up to Brandon Hall, a dormitory there, and found the deceased in bed. He wasn't feeling well and reported off duty. The deceased had a temperature of about a degree and some rales in the chest. He did not seem to be in any great pain, but mentioned that his back hurt him, and the doctor rolled him over in bed. He examined the spine by pressure and feeling with his hands and palpated him. He found no fracture. Treatment was given for his acute indisposition and the patient was confined to his bed. No opiates were given. It was customary to send patients to Kankakee State Hospital, and this doctor discussed that with the deceased, but! the deceased did not feel that he was sick enough or injured sufficiently to go to Kankakee State Hospital.

There were no X-ray facilities at the hospital. The Manteno State Hospital was more or less in a state of organization in 1934 and 1935. At that time the hospital had eight two-story cottages and twelve or thirteen hundred patients, and not more than three doctors.

No objective symptoms of pain were found, but the patient had subjective symptoms of pain. Nothing was said about the pain in his back until about a week after the injury. Heat treatments were given which seemed to help at first. At the time of the injury Finkler did not report any disability. He had previously had lumbago.

At the time of his death Finkler was married, but had no children under sixteen years of age.

The deceased. started to work in this department on November 14, 1934, and continued to perform his regular duties until January 4, 1935. He was paid $45.00 per month and each six months they received a $2.00 a month raise until they got $60.00 per month. His salary had been raised to $52.00 per month. His wife, Nellie Finkler, was similarly employed. The chief nurse at the institution had been notified that the deceased was unable to work, but she knew about it at the time. Prior to Mr. Finkler's employment at the institution he had been a cigar salesman. Finkler was about 70 years of age. He had enjoyed good health prior to the injury and his wife testified that he had no illness for a year prior to the injury, and she could not recall of Mr. Finkler having been in bed on account of illness for perhaps thirty years, and then for tonsilitis.

Mr. Finkler was taken away from the institution on January 30, 1935, to his home in LaSalle, Illinois, where he remained until his death. He stayed in bed and was unable to sit up. He couldn't sit on a chair. Dr. Haskins of LaSalle took care of him. Dr. Haskins was asked the following question:

"Q. Did you form any opinion from the statements he made to you as to how he was injured--or did you form any opinion as to whether or not his injury caused any aggravation of the condition he had in his back—did you form an opinion? Answer, yes or no.

A. Yes.

Q. What is that opinion?

A. I think that the injury hastened the man's death. He was a man along in years, between 65 and 70, and I would say definitely that his alleged injury aggravated that condition. A man approximately 73 years of age who receives a fall or who was knocked down to the floor, having a tubercular spine or condition he may have had to the spine prior to this injury would, in my opinion, cause an increase or accelerate the tubercular condition of the spine."

Dr. Haskins was of the opinion that the cause of deceased's death was due to tuberculosis, which was evidently present in his chest and back, and to pernicious anemia, combined with his age and the condition of a person's heart at

this age, but he was of the opinion that the injury aggravated all of these things, and that the deceased mighb have gone on indefinitely if the injury had not arisen.

The evidence showed that the deceased had been knocked to the floor and that an attendant and a patient had fallen upon him as he lay on his back.

"Claimant's Exhibit 2" is an X-ray film taken of the deceased under the direction of Dr. Haskins, and this plate had either been mislaid or lost in Dr. Haskins' office or in St. Mary's Hospital in LaSalle, Illinois. The doctor had examined this plate, and he testified that if the deceased had received a trauma to the back, in his opinion, that would have contributed to the condition found in the X-ray plate. This doctor also testified that he believed that the injury that the deceased received to the first and second processes resulted in the deceased's death. The doctor said: "I think it was the main factor in the death of the deceased."

It has been held on numerous occasions that when a person has a pre-existing disease, and that disease is aggravated or accelerated in the course of employment by accidental means, and death results therefrom, that death results from the injuries caused by the accident.

In the case of *Cameron, Joyce &* Co. vs. *Industrial Commission,* **324** Illinois, 497, it was held that where an employee of a road construction company dies of valvular heart trouble within five months after his left arm and foot had been crushed under the wheels of a heavy road grader, a finding that the injury contributed to the employee's death is warranted where the evidence shows that although the employee had chronic heart trouble he had always been able to work up to the time of his injury, and that although he made satisfactory recovery from the local injuries to his arm and foot he continued to suffer pains in his chest, back and side, which constantly increased in severity.

In the case of *Valier Coal* Co. vs. *Industrial Commission,* 339 Illinois, 458, it mas held that an award of compensation for the death of an employee a little more than a year after he was severely injured by the falling of coal upon him while in the course of his employment will be sustained where the weight of the testimony is to the effect that while death was due to myocarditis, which may have resulted from a syphilitic condition which existed prior to the injury, the injury accel-

erated and aggravated the heart condition, some experts testifying that the myocarditis was caused by an infection of the lung, resulting from the injury.

Many other authorities may be cited sustaining this proposition of law.

The deceased suffered the accident December 29, 1934, continued to work until January 04,1935, remained at Manteno State Hospital until January 30th, when he was taken to his home at LaSalle, where he died April 16, 1935.

Attendants at State institutions receive $45.00 per month for the first six months and $46.80 per month for the second six months, and in addition maintenance valued at $24.00 per month, or a total of $838.80 per year.

The Court finds that the deceased received an injury arising out of and in the course of his employment; that: the respondent received due notice of this injury.

We have heretofore held that employees in State hospitals for the insane are entitled to the benefits of the Workmen's Compensation Act.

Crawford vs. *State*, 8 *C. C.* R. 639;
Whalen vs. *State*, 9 *C. C.* R. 541;
And numerous other cases.

Deceased left a widow, but no children under sixteen years of age that he was under legal obligation to support. Under Section 7 of the Workmen's Compensation Act, his widow is entitled to recover a sum equal to four times his average annual earnings, but not less in any event than two thousand five hundred dollars and not more in any event than four thousand dollars, and any compensation payments other than necessary medical, surgical or hospital fees or services shall be deducted in ascertaining the amount payable on death.

Deceased's total salary, including maintenance, amounted to $838.80 per year, or $16.13 per week, and the compensation is, therefore, payable at the rate of $8.07 per week. He had been paid for thirty days' non-productive time or the sum of $45.00. He was idle 15 2/7 weeks from December 29, to April 16th, when death ensued. The total compensation will be four times the yearly rate of $838.80, less the sum of $123.35 which had accrued up to the time of death, or the sum of $3,231.85. This is to be paid to the widow in weekly installments of $8.07. There is as of this date September 12,

1939 accrued the claimant 229 weeks at $8.07 per week, or the sum of $1,848.03, leaving a balance of $1,383.82, which shall be paid to the claimant at the rate of $8.07 per week, commencing September 19, 1939.

It appears that the hospital bill at LaSalle has been paid. It also appears that Dr. Haskins was a physician of their own choice, and that the deceased was receiving medical care at Manteno State Hospital by Dr. Gollmar, a physician employed by the State. Therefore, nothing can be allowed for the physician for the reason that the deceased was under the care of Dr. Gollmar at Manteno State Hospital and was removed to LaSalle, Illinois, so as to be near his own physician.

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 3, 1937 (Session Laws 1937 page 83), and being subject further to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly" (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 1823—Claim denied.)

HARRISON ENGINEERING AND CONSTRUCTION CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1939.

GILLESPIE, BURKE & GILLESPIE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

CONTRACTS—*when claim for loss alleged to have been sustained an performance of must be denied.* A claim for the recovery of moneys alleged to have been lost by claimant in the performance of a contract with the State must be denied when there is no allegation that the State violated the terms thereof nor any proof of any such violation.

PLEADING—*allegations of must be sufficient to justify award.* Where a claim does not contain sufficient allegations to warrant a finding for claimant no award can be made thereunder.

EVIDENCE—*claimant must prove case by preponderance of—no award can be made unless so proven.* Claimant must prove his claim by a preponderance or greater weight of the evidence and no award can be made in the absence of such proof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, Harrison Engineering and Construction Corporation filed its claim setting forth that it was a corporation duly organized and existing under the lams of the State of Delaware and authorized to do business in the State of Illinois, and that the Harrison Engineering and Construction Corporation of New York was also authorized to do business in the State of Illinois; that prior to the 6th day of June, 1927 and from thence hitherto the Harrison Engineering and Construction Company of New York had been engaged in the construction of hard surfaced roads and highways, bridges and public improvements in general and prior thereto had entered into a certain contract with the State of Illinois acting by and through the Division of Highways of the Department of Public Works and Buildings for the construction of Sections 7 and 8 State Bond Issue Route 30 in Peoria County, Illinois.

The complaint further alleges that the New York Corporation had full equipment necessary for the execution of the contract, which included particular batch boxes used by it prior thereto for six bag batches which had been purchased by it in 1923 for the construction of a certain State Bond Issue highway on Route 25 in Champaign County, Illinois.

The complaint further avers that on the 15th day of May, 1927, the Division of Highways of the Department of Public Works and Buildings acting through its duly authorized agents ordered said New York Corporation to immediately increase the size of its batch by increasing the amount of sand and gravel being used by it in the construction of this particular highway. The complaint further avers ··although upon its urgent request it was permitted to finish said Section 7 with its batch boxes then and there being used by it which undea the mixture theretofore used were of sufficient size to enable it to use a six bag batch.''

The complaint further avers that the claimant complied with the order and did thereafter use a five bag batch and by reason thereof it was from thence to the completion of the contract greatly limited in its daily work, that is to say, it used a five bag batch instead of a six bag batch, and that by reason of the order it was required to consume twenty-one days in the construction of 18,500 feet, which with its six bag batch it could have completed in 13½ days; that this increased the cost of construction to the extent of $4,620.00, and the work required 7½ more days to complete than it should have, and consequently the claimant suffered a loss of $4,620.00 in the performance of its contract.

The complaint further alleges that the claimant, subsequently to the dates above mentioned, was organized under the laws of the State of Delaware to take over all of the business of the Harrison Engineering and Construction Corporation of New York then and prior thereto transacted or existing in the State of Illinois, and that the New York Corporation assigned all of its rights to the Delaware Corporation.

The complaint does not set forth a copy of the contract.

It is not contended that the State of Illinois wrongfully brought about the change in the size of the batch.

It was stipulated by the Attorney General and Counsel for the claimant that the case should be submitted to the court upon the complaint, the general traverse or denial considered as filed under Rule 15 of the Court of Claims, and without evidence other than the report of C. M. Hathaway, Engineer of Construction of the Division of Highways, which was offered as evidence. Certain exhibits identified by Mr. Hathaway were placed in the record. They consisted of a general report from the District Engineer; general layout of work under the contract; the report and graph showing daily average of cement used for 100 feet of pavement; yield tests taken by the resident engineer on May 19, 1927 and June 23, 1927; graph showing relation of size of batches to capacity of batch boxes on industrial railway, and an analysis which was made of different proportions for different size of batches. All of these exhibits were known as Exhibits "A", "B", "C", "D", "E", "F", and "G".

We have carefully gone over this technical data in the file, and we find that there was a loss of nine hours on account

of the change which was made in the size of the batch. It appears from this data that the capacity of the batch box for a six bag batch was too small. The figure shows the six bag batch under the new proportions. It shows that the aggregates for a six bag batch would have a total loose volume of 36.06 cubic feet, and the capacity of the boxes was 32.99 cubic feet. The boxes were, therefore, too small.

It is not contended that the State did not have a right to insist upon these changes. There are many facts and figures, graphs and blue prints in the file, but it is left for the court to determine the amount of damages, if any, that the plaintiff is entitled to.

We have given this case much careful thought. We find that the claimant did not file a statement,, brief and argument. It is always encumbcnt upon the claimant, in civil proceedings, to prove its case by a greater weight or preponderance of the evidence, and no award will be entered against the State unless a claim has been clearly proven and it is shown that some legal or equitable right has been denied the claimant. The burden of proof is always'upon the plaintiff. We do not find sufficient allegations to warrant a finding for the claimant, and there is a total lack of any proof to show where the State has done a legal wrong or deprived the plantiff of its rights. There undoubtedly was a written contract but this does not appear from the record; and it does not show how the State violated this contract.

. We, therefore, deny any award and direct that the complaint be dismissed.

(No. 2385—Claim denied.)

MADISON CONSTRUCTION COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 25, 1938.
Rehearing granted May 11, 1938.
Opinion on rehearing filed September 13, 1939.

TERRY, GUELTIG & POWELL, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE and GLENN A. TREVOR, Assistant Attorneys General, for respondent.

CONTRACTS—*performance delayed due to failure of State in furnishing cement therefor—award for damages resulting therefrom not justified where*

failure due to exorbitant prices being fixed by manufacturers — State within sovereign rights — public policy. Where State in a contract for the improvement of a public highway by a private party, undertook to furnish the cement therefor, and in the interest of the general public delayed doing so, for the reason that cement contractors were demanding excessive prices for same, it was justified on the grounds of public policy and acted within its sovereign rights and will not be held liable for any damages resulting from such delay, as the rights of the general public must prevail over any rights of an individual. *O'Keefe*, vs. *State, 10* Court of Claims Reports, 480, followed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that the State of Illinois, acting through its Department of Public Works and Buildings, duly gave notice to contractors and to this claimant that sealed proposals for the improvement of a State highway, known as State Bond Issue Route 150, Federal Aid Project Number **194,** Section **1922,** in Jackson-Randolph County, near Rockwood, Illinois, by constructing a paved roadway eighteen **(18)** feet wide with eleven **(11)** feet of earth shoulders, would be received by the Department on September 7,1932, and as part of said notice to contractors stated that cement for said work would be furnished by the Department.

The claimant made a proposal which was accepted and the contract was awarded to the claimant, and the State and the claimant entered into a contract which was dated October **17, 1932.** Under this contract the State was to furnish the cement necessary for the improvement and claimant was to furnish the labor and other materials.

Paragraph **3** of the claim is as follows:

"The claimant, thereupon and pursuant thereto made a proposal to the said Department for the construction of said road improvement, and the said proposal was, by the said Department, accepted and the work and contract awarded to the claimant, and thereafter the State of Illinois entered into the contract with the claimant which is in words and figures as follows:

CONTRACT.

"1. **THIS AGREEMENT**, made and concluded his 17th day of October, **1932,** between the State of Illinois, acting by and through the Department of Public Works and Buildings, known as the party of the first part, and Madison Construction Company, his/their executors, administrators, successors or assigns, known as the party of the second part.

"2. **WITNESSETH:** That for and in consideration of the payments and agreements mentioned in the Proposal hereto attached, to be made and performed by the party of the first part, and according to the terms expressed in the Bond referring to these presents, the party of the second part agrees with said party **of** the first part at his/their own proper cost and expense

to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all of the terms of this agreement and the requirements of the Engineer under it.

"3. And it is also understood and agreed that the Notice to Contractors, Special Provisions, Proposal, and Contract Bond, hereto attached, and the Plans for State Bond Issue Route No. 150 Federal Aid Project No. 194, Section 122, in Jackson-Randolph County, dated August 17th, 1934, and the "Standard Specifications for Road and Bridge Construction," adopted by said Department January 2, '1932, are all essential documents of this contract and are a part hereof.

"4. IN WITNESS WHEREOF, The said parties have executed these presents on the date above mentioned.

THE STATE OF ILLINOIS,
By the Department of Public Works and Buildings
By H. H. CLEAVELAND, *Director.*

ATTEST:
FRANK T. SHEETS,
Acting Superintendent of Highways.

Party of the First Part
(*If a* corporation)
Corporate
Name MADISON CONSTRUCTION *Co.*
By ORLIE T. DUNLAP, *President.*

ATTEST:
M. D. POWELL, *Secretary.*
(Corporate Seal Attached)."

Party of the Second Part.

The complaint sets forth several provisions from the Standard Specifications for Road and Bridge Construction adopted by the Department on January 2, 1932.

It is averred that after entering into the contract, complainant immediately entered upon and commenced doing the work according to the contract and employed various persons as managers, superintendents, foremen, machine operators, watchmen, timekeepers and others in perfecting an organization to do the work efficiently and promptly, and placed its machinery and equipment necessary in service at the location of said work, and mas prepared to promptly complete the work according to the contract without delay. Under the terms of the contract the work was to be completed July 1, 1933.

It is further averred that upon completion of all the preliminary work necessary to commence laying concrete, the claimant requested the Department to furnish the cement therefor in accordance with the contract, and on January 3, 1933, the Department authorized the claimant to obtain the

cement therefor from the Marquette Cement Manufacturing Company of Chicago, Illinois, and afterward on April 5, 1933, the Department authorized the claimant to obtain the cement from the Alpha Portland Cement Company, and the claimant being ready for the use of the cement, instructed the Alpha Portland Cement Company to ship six cars of cement on April 25, 1933, and thereafter, five hundred barrels of cement per day until further notice, said cement to be used upon this improvement.

It is further alleged that notwithstanding the authorization to obtain cement, that on or about April 25, 1933, the State withdrew its consent for the shipment of the cement and instructed the cement company to make no shipments until further notice, and by reason of the refusal of the Department to comply with its contract and furnish the cement as required, the claimant was compelled to suspend operations indefinitely and wait for cement, and the work was suspended from April 27, 1933, to June 27, 1933, at which time the Department furnished the cement and the work was continued until completed.

It is also charged that during the time the work was suspended, which was two months, the claimant paid its manager, its superintendent and other employees, and its machinery and equipment was held ready for use on the job and could have been used in said work on nearly every day during the period of time it was waiting for cement, and it had other contract jobs in which it could have used its machinery and equipment, and because of the failure of the State to furnish cement, the claimant avers that it is entitled to the sum of Twenty-one Thousand Two Hundred Twenty-one Dollars and Sixty-six Cents ($21,221.66).

From the evidence it appears that claimant did everything he could reasonably do to obtain cement.

It is a well known fact that during this time the cement dealers had greatly increased the cost of cement without any apparent reason. On April 27, 1933, claimant wrote the Highway Department to the effect that it had been put to huge expenses on account of unavoidable conditions, and for it to assume additional heavy expenses to cooperate on a bad situation, which could be avoided, it could not fully agree to do, unless the Department agreed to reimburse it for all of

its losses. The claimant stated in this letter that it had carefully studied all of the correspondence relative to the matter, and found only a "request" not to order cement had been made, and it positively stated that it had construed that to mean a "request" instead of positive instructions was given to avoid any liability, and claimant informed the State that if the State would assume the financial liability and expenses it would be glad to cooperate with the "request" and Governor Horner, but otherwise claimant was not willing to assume the expense of stopping the work and laying up the equipment. Claimant further called the State's attention to the fact that there were no provisions in the contract which permitted the State to cancel the contract or suspend the work at its option whenever the arrangements for securing cement by the State were not as satisfactory as the State had expected, and stated in its letter that the condition confronted was not brought about by the failure of the State to secure the cement, but simply, as claimant understood it, the State desired more favorable price or terms, and claimant stated that it was not responsible for this, and emphasized the fact that the State should be responsible for the loss and not the contractor. This is the substance of Claimant's Exhibit 10.

Claimant's Exhibit 13 is a letter from the Governor to the claimant. In this he acknowledged receipt of a telegram and stated while he was in sympathy with the claimant's situation, "you surely do not expect your State to submit to the efforts of a combination of cement manufacturers to impose an arbitrary and excessive price upon the State. Personally, I expect every good citizen to stand behind my efforts to prevent the State being mulcted."

From the above we see the attitude of both claimant and the State. It is very apparent that the claimant was delayed from April 27th to June 27, 1933. The contract provided for the **work** to be completed by July 1, 1933. Claimant finished paving on Section No. 122 on July 29,1933, and clean up **work** and shouldering were completed October **14,** 1933. It is not claimed that there was any increased cost in shouldering or cleaning caused by rise of price of labor or materials, or that claimant's paving equipment was held on the job for this work!

The Attorney General argues that there were nineteen days on which weather conditions would have prevented oper-

ation, even if the cement was available, and there does not seem to be anything in the record to controvert this.

The State offered testimony that claimant's method of arriving at its loss incurred by reason of idle equipment during the two months period included items which were not applicable to idle equipment for which claimant made charge. Claimant's testimony with reference to its expense for the equipment during the two months period was based upon the average cost of ownership as compiled by the Associated General Contractors of America, Inc., rather than upon claimant's actual experience in regard to the particular items of equipment involved.

The report of the Division of Highways disclosed that on January 20, 1934, the final estimate had been prepared by the engineer, and the claimant was paid the sum of $9,669.98, which was the last payment for this job; that the claimant accepted the warrant issued for this amount and cashed the same.

Several questions have been raised upon the record both by claimant and the State.

The State argues that under no circumstances would the claimant be entitled to compensation for the delay referred to for the period of time from July 1, 1933, to July 29, 1933, for the reason that claimant was to finish the job on July 1, 1933, and it eventually finished the paving job on July 29, 1933, and that nineteen days during the period in which the cement was not furnished were unsuitable for operation on account of weather conditions, and the State cites authorities to that effect.

The claimant argues that under its system of figuring damages, it was entitled to compensation, but under our view of the case it will not be necessary to decide which system was proper.

It is averred in claimant's complaint, Paragraph 3, Section 3 thereof, that Standard Specifications for Road and Bridge Construction, adopted by the Department on January 2, 1932, is an essential part of the contract, and made a part thereof. The Standard Specifications provide that 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 the contract for anything done or furnished or relating to the work under the contract, or for any act or

neglect of the Department relating to or connected with the contract. Claimant does not dispute this, but says that at no time was this question raised until it was raised in the brief filed by the Attorney General, and that it was greatly surprised and, therefore, this Court should not consider it. That payment was finally made is not denied. This provision of the contract is set forth in the complaint,. Just how they were taken by surprise does not appear. It was a part of the contract and certainly known to the claimant at the time the contract was entered into.

In the case of *Urech* vs. *State of Illinois,* 8 C. C. R., page 212, this Court held that "where party is paid amount provided in contract, and it is provided therein that acceptance of payment shall release State from any and all claims and liabilities thereunder, an allowance for an additional amount claimed as damages mould constitute extra compensation and is prohibited by the Constitution of the State of Illinois."

The claimant cannot now be heard to say that it did not know that such a provision was in the contract. This was a contract that was voluntarily and fairly entered into by both parties.

At the time the claimant received the final payment, it must be held to have been familiar with this provision of the contract, and the constitutional provisions herein referred to, and for these reasons we hold that the claimant, if entitled to an award, has waived that right. An award, therefore, will be denied.

OPINION ON REHEARING.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This cause now comes before the Court on an order allowing Petition for Rehearing.

It was charged in the Petition for Rehearing that the decision of the Court is against the claimant on the sole ground that the contract provides that acceptance by the contractor of the last payment shall operate as and for a release to the Department of Highways for all claims in connection with the work. The release was not pleaded and was not an issue at the trial.

After the Petition for Rehearing was granted, proof was introduced by O. T. Dunlap, president and manager of the

claimant, and many exhibits were offered in evidence. Several other witnesses testified, being C. M. Hathaway, Charles York and Clarence A. Hamlin, all tending to show that the provisions of the original contract concerning final payment had been waived on behalf of the highway officials of Illinois.

The original complaint alleges that the State of Illinois, acting through its Department of Public Works and Buildings, duly gave notice to contractors and to this claimant that sealed proposals for the improvement of a State Highway, known as State Bond Issue Route 150, Federal Aid Project Number 194, Section 1922, in Jackson-Randolph County, near Rockwood, Illinois, by constructing a paved roadway eighteen (18) feet wide with eleven (11) feet of earth shoulders, would be received by the Department on September 7, 1932, and as part of said notice to contractors stated that cement for said work would' be furnished by the Department.

The claimant made a proposal which was accepted and the contract was awarded to the claimant, and the State and the claimant entered into a contract which was dated October 17, 1932. Under this contract the State was to furnish the cement necessary for the improvement and claimant was to furnish the labor and other materials.

Paragraph 3 of the claim is as follows:

"*The* claimant, thereupon and pursuant thereto made a proposal to the said Department for the construction of said road improvement, and the said proposal was, by the said Department, accepted and the work and contract awarded to the claimant, and thereafter the State of Illinois entered into the contract with the claimant which is in words and figures as follows:

CONTRACT.

"1. THIS AGREEMENT, made and concluded this 17th day of October, 1932 between the State of Illinois, acting by and through the Department of Public Works and Buildings, known as the party of the first part, and Madison Construction Company, his/their executors, administrators, successors or assigns, known as the party of the second part.

"2. WITNESSETH: That for and in consideration of the payments and agreements mentioned in the Proposal hereto attached, to be made and performed by the party of the first part, and according to the terms expressed in the Bond referring to these presents, the party of the second part agrees with said party of the first part at his/their own proper cost and expense to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all of the terms of this agreement and the requirements of the Engineer under it.

"3. And it is also understood and agreed that the Notice to Contractors, Special Provisions, Proposal, and Contract Bond, hereto attached, and the Plans for State Bond Issue Route No. 150 Federal Aid Project No. 194, Section 122, in Jackson-Randolph County, dated August 17th, 1934, and the "Standard Specifications for Road and Bridge Construction," adopted by said Department January 2, 1932, are all essential documents of this contract and are a part hereof.

"4. IN WITNESS WHEREOF, The said parties have executed these presents on the date above mentioned.

THE STATE OF ILLINOIS
By the Department of Public Works and Buildings
By H. H. CLEAVELAND, *Director.*

ATTEST:
FRANK T. SHEETS,
Acting Superintendent of Highways.

Party of the First Part
(If a corporation)
Corporate
Name MADISON CONSTRUCTION CO.

ATTEST:
M. D. POWELL, *Secretary.*
(Corporate Seal Attached)."

By ORLIE T. DUNLAP, *President.*
Party of the Second Part.

The complaint sets forth several provisions from the Standard Specifications for Road and Bridge Construction adopted by the Department on January 2, 1932.

It is averred that after entering into the contract, complainant immediately entered upon and commenced doing the work according to the contract and employed various persons as managers, superintendents, foremen, machine operators, watchmen, timekeepers and others in perfecting an organization to do the work efficiently and promptly, and placed its machinery and equipment necessary in service at the location of said work, and was prepared to promptly complete the work according to the contract without delay. Under the terms of the contract the work was to be completed July 1, 1933.

It is further averred that upon completion of all the preliminary work necessary to commence laying concrete the claimant requested the Department to furnish the cement therefor in accordance with the contract, and on January 3, 1933, the Department authorized the claimant to obtain the cement therefor from the Marquette Cement Manufacturing Company of Chicago, Illinois, and afterward on April 5, 1933, the Department authorized the claimant to obtain the cement from the Alpha Portland Cement Company, and the claimant being ready for the use of the cement, instructed the Alpha

Portland Cement Company to ship six cars of cement on April 25, 1933, and thereafter, five hundred barrels of cement per day until further notice, said cement to be used upon this improvement.

It is further alleged that notwithstanding the authorization to obtain cement, that on or about April 25, 1933, the State withdrew its consent for the shipment of the cement and instructed the cement company to make no shipments until further notice, and by reason of the refusal of the Department to comply with its contract and furnish the cement as required, the claimant was compelled to suspend operations indefinitely and wait for cement, and the work was suspended from April 27, 1933, to June 27, 1933, at which time the Department furnished the cement and the work was continued until completed.

It is also charged that during the time the work was suspended, which was two months, the claimant paid its manager, its superintendent and other employees, and its machinery and equipment was held ready for use on the job and could have been used in said work on nearly every day during the period of time it was waiting for cement, and it had other contract jobs in which it could have used its machinery and equipment, and because of the failure of the State to furnish cement, the claimant avers that it is entitled to the sum of Twenty-one Thousand Two Hundred Twenty-one Dollars and Sixty-six Cents ($21,221.66).

From the evidence it appears that claimant did everything he could reasonably do to obtain cement.

It is a well known fact that during this time the cement dealers had greatly increased the cost of cement without any apparent reason. On April 27, 1933, claimant wrote the Highway Department to the effect, that it had been put to huge expenses on account of unavoidable conditions, and for it to assume additional heavy expenses to cooperate on a bad situation, which could be avoided, it could not fully agree to do, unless the Department agreed to reimburse it for all of its losses. The claimant stated in this letter that it had carefully studied all of the correspondence relative to the matter, and found only a "request" not to order cement had been made, and it positively stated that it construed that to mean a "request" instead of positive instructions was given to avoid any liability, and claimant informed the State that if

the State would assume the financial liability and expenses, it would be glad to cooperate with the "request" and Governor Horner, but otherwise claimant was not willing to assume the expense of stopping the work and laying up the equipment. Claimant further called the State's attention to the fact that there mere no provisions in the contract which permitted the State to cancel the contract or suspend the work at its option whenever the arrangements for securing cement by the State were not as satisfactory as the State had expected, and stated in its letter that the condition confronted was not brought about by the failure of the State to secure the cement, but simply, as claimant understood it, the State desired more favorable price or terms, and claimant stated that it was not responsible for this, and emphasized the fact that the State should be responsible for the loss and not the contractor. This is the substance of Claimant's Exhibit 10.

Claimant's Exhibit 13 is a letter from the Governor to the claimant. In this he acknowledgecl receipt of a telegram and stated that while he was in sympathy with the claimant's situation, "you surely do not expect your State to submit to the efforts of a combination of cement manufacturers to impose an arbitrary and excessive price upon the State. Personally, I expect every good citizen to stand behind my efforts to prevent the State being mulcted."

From the above we see the attitude of both claimant and the State. It is very apparent that the claimant was delayed from April 27th to June 27, 1933. The contract provided for the work to be completed by July 1, 1933. Claimant finished paving on Section No. 122 on July 29, 1933, and clean-up work and shouldering were completed October 14, 1933. It is not claimed that there was any increased cost in shouldering or cleaning up caused by rise of price of labor or materials of that claimant's paving equipment was held on the job for this work.

Since the original opinion was rendered in this cause this court, in passing upon similar facts in the case of *James P. O'Keefe Company, a Corporation,* vs. *State* of *Illinois,* No. 2438, said: "It also might well be assumed that the public officials of the State of Illinois, through its Chief Executive, the Governor of the State of Illinois, rightfully felt that the action of the cement manufacturers or dealers was such as to make those public improvements so costly as to be prohib-

itive and against public policy." In that same opinion we also quoted *Pope Mfg.* Co. vs. *Gormully,* 144 U. *S.* **224,** 36 L. ed. **414,** wherein it was held that courts have not exactly defined the term "public policy" because it is impossible to define with accuracy what is meant by that phrase, for an interference and violation of which a contract may be declared invalid. There the court said: "It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban."

It appears from the record in this case that the State had entered into a contract with the claimant at a time when the price of cement was satisfactory to all concerned, and as we understand it, it is common practice to let contracts of this character at various seasons of the year, and at times when the contract is not to be performed for several months. The questions here presented are of much importance for those reasons. The exorbitant prices demanded by cement manufacturers affected the whole State of Illinois. This claim for damages arising from the fact that the State could not furnish cement, could, therefore, be denied on the grounds of public policy.

In the *O'Keefe* case, *supra,* we said: "It may be contended that in repudiating any liability on behalf of the State for its failure to furnish cement under the circumstances in this case is an unconscionable act. The answer to this is that in a situation of this kind the interest of the public, rather than the equitable standing of individual .parties, is of determining importance ; and we base our opinion upon principles of public policy and to conserve the public welfare."

It is admitted by claimant that there were times, owing to weather conditions, when the work could not have proceeded and no paving could have been laid, even if the State had furnished cement.

A much bigger and broader question, however, is presented than arises or could possibly arise under that provision of the contract wherein it is claimed that claimant has waived its right to further compensation, and that question is: Should the State be held to the same rules as any private party entering into a contract of this kind? That question has been determined by the Supreme Court of the United States and other Federal Courts.

In the case of *United States* vs. *Warran Transportation Company,* 7 Fed. (2d) 161, in discussing a similar feature, the Court said: "When the United States is a party litigant it assumes one of two characters; it may appear in the character of a sovereign or in the character of contractor. ,, Continuing, the court held: "It follows, therefore, that when the United States appears as a contractor, it cannot be held liable for an obstruction to the performance of its contract resulting from its public and general acts as sovereign, whether legislative or executive.'' The court cited numerous authorities.

The Supreme Court of the United States in the case of *Horowitx* vs. *United States,* 267 U. *S.* 458, 69 L. Ed. 736, dismissed the petition, on demurrer, for failure to state a cause of action. On December 20, 1919, the claimant submitted a bid for certain silk, and at that time an agreement was made that the claimant would be given an opportunity to resell the silk before completing the payment of the purchase price, and that the "departments of the government having jurisdiction in matters of this kind" would ship the silk, which was then in Washington, within a day or two after shipping instructions were given. On December 22 claimant was notified by the board that the sale of the silk to him had been "approved," and claimant thereupon paid part of the purchase price, and on January 30, 1920, he sold the silk to a silk company in New York. On February 16 he paid the balance of the purchase price and wrote the board to ship the silk at once, by freight, to the silk company. Two days later claimant was notified by the board that it had received the shipping instructions and had ordered the silk to be shipped. Thereafter the price of silk declined greatly in New York market until March **4.** On that date the claimant learned that the silk was still in Washington and had not been shipped because the government, through one of its agencies, the United States Railroad Administration, had, prior to March **1,** 1920, placed an embargo on shipments of silk by freight, and that the shipment of silk for claimant had been held up.. Afterwards the government shipped the silk to the consignee by express. It arrived in New York on or about March **12.** The consignee then refused to accept delivery on account of the fall in the prices. And "by reason of the government's breach of the contract and agreement in placing an embargo, and failing

to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for $10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time.'' The petition alleges that the claimant is entitled to recover from the United States the said sum of $10,811.84 "for and on account of the violation of the said agreement" and prayed judgment. The court affirmed the Court of Claims and held that the United States, when sued as a contractor, cannot be held liable for an obstruction to the performance of a particular contract, resulting from its public and general acts as a sovereign. *Deming* vs. *United States,* 1 Ct. Claims, 190, 191; *Jones* vs. *United States,* 1 Ct. Claims, **383;** *Wilson* vs. *United States,* 11 Ct. Claims, 513.

In the *Jones* case, 1 Ct. Claims, **383,** the Court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.''

By a parity of reasoning the same rules would apply to the State of Illinois acting in its sovereign capacity.

Basing our conclusions on the language of the Supreme Court of the United States in the *Horowitx* case, *supra,* we must hold that when the State of Illinois is sued as a contractor on a contract entered into by the Highway Department, it cannot be held liable for an obstruction to the performance of a particular contract, resulting from its public and general acts as a sovereign. The Governor of the State of Illinois was acting on behalf of the People of Illinois. No other person could have performed those acts. The Governor himself well stated his reasons in Claimant's Exhibit **13,** which was a letter from the Governor to the claimant. In this

the Governor acknowledged receipt of a telegram and stated that while he was in sympathy with the claimant's situation, "you surely do not expect your State to submit to the efforts of a combination of cement manufacturers to impose an arbitrary and excessive price upon the State. Personally, I expect every good citizen to stand behind my efforts to prevent the State being mulcted."

The facts justified the acts of the Governor. It is unfortunate that this claimant lost money, but as said above, "in a situation of this kind the interest of the public, rather than the equitable standing of individual parties, is of determining importance."

Irrespective of whether the release relied upon by the Attorney General was or was not pleaded, under the conclusions above stated, we find that on the grounds of public policy, and under the holdings of the Supreme Court of the United States in the case of *Horowitz* vs. *United States*, **267** U. *S*. 458, 69 L. Ed. 736, the claim made by claimant cannot be allowed, and same is therefore denied and cause dismissed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

An opinion was heretofore rendered in this cause allowing the claimants $192.86, and thereafter a petition for rehearing was filed by the Attorney General and said petition was granted on January 12, 1938.

A stipulation of facts was filed herein on March 14, 1936.

The Court finds that in granting an award for the claimants it did miscontrue the facts. The claimants charged that on January 30, 1930, and on February 13, 1930, the Electric Shovel Coal Corporation filed in the office of the Secretary of the State of Illinois annual reports for the year 1929, for the purpose of paying franchise taxes and initial fee taxes, showing that the Electric Shovel Coal Corporation's capital stock, represented by business transacted and property located in the State of Illinois was 34.45 per cent of the total issued capital stock; that the total issued capital stock was given in said reports as $3,900,500.00, making the proportion taxable in Illinois $1,343,722.00, which at five cents per $100.00 made the annual franchise tax $671.86, and that an initial fee having previously been paid on $1,025,379.00 under the aforesaid reports, there was therefore due an additional initial fee on $318,343.00, or the sum of $109.07. The Electric Shovel Coal Corporation paid by its draft dated June 28, 1930, to the State of Illinois the aforesaid sums of $671.86 and $109.07. Claimants then charged that the above figures thus submitted by them to the Secretary of State were erroneous, and that in fact and in truth the proportion of said Electric Shovel Corporation's corporate capital stock represented by business transacted and property located in the State of Illinois mas 34.45 per cent on $3,195,240.00, or $1,000,760.18, and that therefore the annual franchise tax due was five cents per $100.00 on $1,000,760.18, or the sum of $500.38, making an over payment of $171.48, and that an over payment was therefore made on the initial fee amounting to $109.07, or a total of $280.55.

Under the stipulation of facts filed a further correction is made upon the computations involved, and it is agreed that the total correct amount of tax due at the time in question was $588.07; that the tax actually paid was $780.93 and that the over payment made by claimant was $192.86.

It appears from the file that these taxes were voluntarily paid under a mistake of law and cannot be recovered.

The Arundel Corp. vs. *State,* 8 C. C. R. 506;
Mohawk Carpet, Mills vs. *State,* 8 C. C. R. 37;
Chicago Foundation Co. vs. *State,* 8 C. C. R. 22.

In the case of *Handy Button Machine* Co. vs. *State,* No. 2786, which opinion was filed in this Court under date of February 10, 1937, we held that where the claimant had an adequate remedy at law and failed to take advantage thereof and paid the tax with full knowledge of all the facts, payment must be considered as having been voluntarily made and claimant is not entitled to a refund.

This court has further held that when the statute provides a limitation for the taxpayer and he fails to take advantage thereof he cannot claim that the tax was involuntarily paid.

Butler Co. vs. *State,* 9 C. C. R. 503;
Western Dairy Co. vs. *State,* 9 C. C. R. 498;
Stotlar-Herrin Lumber Co. vs. *State,* 9 C. C. R. 517.

There does not appear to have been any fault or negligence on behalf of the Secretary of State, and we cannot see that there was any mistake of fact. The claim herein was computed and collected by the Secretary of State in accordance with law, based on information submitted by claimant, and a claim for rebate of a part thereof alleged to have been excessive on account of error in information furnished by claimant will be denied.

Seth-Seiders, Inc., vs. *State,* 7 C. C. R. 9;
Emerick vs. *State,* 9 C. C. R. 510.

The report of the Secretary of State shows that the original tax assessment for the year 1930 was made upon the report furnished by the Electric Shovel Coal Corporation, and further shows that the assessment was correctly made upon the amount shown in such report. From the facts presented to the Secretary of State the tax was correctly assessed and the amount was paid voluntarily. The true facts were known only to the claimant, and any mistake therefore was not a mutual mistake of fact, but was a mistake known only by the officers of the corporation of which claimant was the receiver.

An award, therefore, will be denied.

(No. 1480—Claim denied.)

JUDSON P. WETHERBY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 13, 1939.

M. D. MORAHN, for claimant.

JOHN E., CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION *ACT—when claim for additional compensation under must be denied.* Where it clearly appears that an employee of the State has already been paid compensation, in an amount in excess of that provided by the Act no further award can be made.

SAME—*claimant and Court both bound by provisions of—seriousness of injury no basis for additional compensation under where full compensation is paid under provasaons of.* There is no basis upon which the Court of Claims can legally justify an award for additional compensation to an employee, however grievously injured, when the record clearly discloses that such employee has already been paid full compensation in accordance with the provisions of the Act, as both Claimant and the Court must be governed thereby.

MR. JUSTICE YANTIS delivered the opinion of the court:

This cause now comes before the Court upon Supplemental Briefs and Arguments filed by claimant and respondent, respectively, on August 14, 1939, and August 4, 1939.

The claim was originally filed April 12, 1929, asking for an award for injuries suffered by claimant on September 20, 1928, while engaged in his duties as a Highway Engineer, Department of Public Works and Buildings of the State of Illinois. In an opinion filed May 19, 1929, appearing in Volume 6, Court of Claims Reports, page 290, an award of Four Thousand ($4,000.00) Dollars was granted to claimant. The Court there found that claimant up to that time had incurred medical, hospital and ambulance expense to the extent of Three Thousand Seven Hundred Ninety-four ($3,794.00) Dollars as a result of his injuries.

The accident occurred while claimant with others was supervising the blowing out of trees and stumps on a proposed right-of-way. A large piece of wood struck petitioner, knocking him down and breaking his right leg in ten places between the knee and the ankle and also breaking the ankle. Both large and small bones of the leg were broken and petitioner suffered a long series of operation and treatment in various hospitals. On April 10, 1931, claimant filed his further

petition in which he represented that he had received a permanent injury to his leg, and that since the payment of the award of Four Thousand ($4,000.00) Dollars he had necessarily incurred expenses in an effort to relieve and cure himself of the effects of his injury, in sums aggregating Three Thousand Six Hundred Thirty-four and 25/100 ($3,634.25) Dollars, for which he then sought a further award, together with such compensation for the period during which he had been unable to work as the court might see fit to grant. He further represented that the injured leg had not healed at that time and was still draining, and that such condition might continue for two years. On May 14, 1931, the court disallowed any additional claim, and in its Opinion stated as follows:

"This Court is of the opinion that some definite sum should be claimed and determined to cover the damages sustained by the Claimant. It would not seem fair that the State of Illinois as tax-payer should wait in suspense as to possible liability, and this Court is of the opinion that no recommendation should be made until the full and permanent liability of the State is established."

Thereafter, on January 11, 1933, a rehearing was granted. Claimant thereafter filed his amended statement on November 16, 1933, wherein it appears that of the amount of Three Thousand Six Hundred Thirty-four and 25/100 ($3,634.25) Dollars sought to be recovered by the amended petition of May 14, 1931, the State Highway Department had subsequently paid Two Thousand Four Hundred Twenty and 70/100 ($2,420.70) Dollars; that there remained due for money expended for hospitalization and medical care the sum of One Thousand Three Hundred Ninety-eight and 55/100 ($1,398.55) Dollars, plus other additional moneys which claimant has subsequently expended. Claimant contends that he has suffered a fifty (50) per cent loss of use of the right leg as a permanent disability and now seeks an award for such fifty (50) per cent total loss of use of the right leg and for the sum of One Thousand Three Hundred Ninety-eight and 55/100 ($1,398.55) Dollars for additional medical, surgical and hospital care paid out by him in seeking recovery.

It further appears from a Highway Departmental Report filed herein on September 17, 1938, that claimant was injured on September 20, 1928; that he returned to work on June 9, 1930; that during this entire period of disability of 20-19/30ths months he was paid his full salary in the amount

of Four Thousand Three Hundred Thirty-three ($4,333.00) Dollars. He had no children under the age of sixteen years at the time of the accident, and under the terms of the Workmen's Compensation Act then in effect was entitled to receive compensation at the rate of Fourteen '($14.00) Dollars per week for 89-3/7ths weeks of temporary disability, amounting to One Thousand Two Hundred Forty-six ($1,246.00) Dollars. Claimant therefore received an over payment of temporary disability compensation in the amount of Three Thousand Eighty-seven ($3,087.00) Dollars.

The compensable sum for the loss of use of a leg is fifty (50) per cent of the average meekly wage for a period of 190 weeks. Under claimant's contention and the evidence in support thereof, for a fifty (50) per cent loss of use of such right leg, claimant would be entitled to the sum of One Thousand Three Hundred Thirty ($1,330.00) Dollars. A tabulation of the sums which claimant has received and to which he might have been entitled is as follows:

Surgical and hospital expense prior to May 8, 1929	$3,794.00
Paid by Respondent under award	4,000.00
Subsequent bills incurred for medical care	3,634.25
Paid to Claimant by Highway Department for medical expense	2,711.30
Balance of medical and hospital expense for which Claimant has not been directly repaid	716.95

According to the Departmental Report, he was further entitled to 89-3/7ths weeks temporary total disability at Fourteen ($14.00) Dollars per week, or One Thousand Two Hundred Forty-six ($1,246.00) Dollars. He has heretofore been paid wages in full for non-productive time for 20-19/30ths months, or Four Thousand Three Hundred Thirty-three ($4,333.00) Dollars, or an over payment of Three Thousand Eighty-seven ($3,087.00) Dollars. If an award were granted to him for a fifty (50) per cent loss of use of his right leg in the sum of One Thousand Three Hundred Thirty ($1,330.00) Dollars, and for the further sum of Seven Hundred Sixteen and 95/100 ($716.95) Dollars, balance of medical care for which he has not previously been directly reimbursed, said two items would amount to Two Thousand Forty-six and 95/100 ($2,046.95) Dollars, which sum subtracted from the over payment heretofore made to him of wages chargeable as compensation still leaves an over payment to him of One Thousand Forty and 05/100 ($1,040.05) Dollars.

This court is charged with the duty of administering the provisions of the Workmen's Compensation Act in matters pertaining to State employees. We are charged with determining the rights of claimants under the limitations of that Act. There is no basis upon which we can legally justify making an award for additional payment of funds to an employee, however grievously injured, when the record discloses that such employee has already received from the State an amount in excess of what his rights would entitle him to under the provisions of the Workmen's Compensation Act. He seeks his award by virtue of that Act, and he, and the court must be governed by its provisions. Any' further award is hereby denied and the claim dismissed.

(No. 3135—Claimant awarded $205.45)

MOLLIE GRAF, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion ***filed September 14, 1939.***

HARRY C. DANIELS, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION ACT— When award made under.* 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 for compensation therefor may **be** made in accordance with the provisions of the Act, upon compliance **by** employee with the requirement thereof.

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

From the stipulation of facts herein it appears that the claimant, Mollie Graf, on September 12, 1936, and for some time prior thereto, was employed by the respondent as a cook at the Elgin State Hospital, Elgin, Illinois; that on the last mentioned date, while at such institution and in the performance of her duties, she slipped and fell, fracturing her right wrist; that she was immediately taken to the institution hospital, the fracture was reduced and a cast applied; that subsequent X-rays revealed the necessity for a further reduction of the fracture, and claimant was sent to the Illinois Research and Educational Hospital at Chicago, where she was operated

and received treatments which eventually resulted in her recovery with no loss of function of the injured wrist or hand, and she returned to her work on February 1,1937.

Upon a consideration of all of the facts in the record, the Court finds:

1. That on the 12th day of September, 1936, claimant and respondent were operating under and bound by the provisions of the Workmen's Compensation Act of this State.

2. That on said date the claimant sustained accidental injuries which arose out of and in the course of her employment.

3. That notice of the accident was given and claim for compensation on account thereof was made within the time required by the Compensation Act.

4. That the annual earnings of the claimant for the period of one year prior to the injury in question were $1,188.00 and the average weekly wage was $22.84.

5. That claimant at the time of the injury had no children under the age of sixteen (16) years.

6. That necessary first aid, as well as all medical, surgical and hospital services were furnished by the respondent, but the claimant was required to and did expend the sum of $32.05 in connection with her treatment at the Illinois Research Hospital.

7. That claimant was temporarily totally disabled from the date of her injury as aforesaid, to wit, September 12, 1936, to February 1, 1937, and has been paid the sum of $55.00 to apply on the compensation due her.

8. That claimant is therefore entitled to have and receive from the respondent, for temporary total disability as aforesaid, the sum of Eleven Dollars and Forty-two Cents ($11.42) per week for twenty (20) weeks, to wit, the sum of Two Hundred Twenty-eight Dollars and Forty Cents ($228.40), in accordance with the provisions of Paragraph (b) of Section Eight (8) of the Workmen's Compensation Act of this State, as amended, and is also entitled to have and receive from the respondent the sum of Thirty-two Dollars and Five Cents ($32.05) for money advanced by her for expenses as hereinbefore set forth, making a total of Two Hundred Sixty Dollars and Forty-five Cents ($260.45); that respondent is entitled to a credit of Fifty-five Dollars ($55.00) for compensation heretofore paid to claimant, as hereinbefore

set forth; that the net amount due claimant as aforesaid is Two Hundred Five Dollars and Forty-five Cents ($205.45).

9. That all of such compensation has accrued prior to this date.

Award is therefore entered in favor of the claimant for the sum of Two Hundred Five Dollars and Forty-five Cents ($205.45).

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly" (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given made payable from the appropriation from the General Revenue Fund in the manner provided for by the foregoing Acts.

(No. 3348—Claimant awarded $5,000.00.)

SUSAN MARIE HERTEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1939.

GERALD C. SNYDER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries resulting in death of employee within provisions of—when award may be made for.* Where employee of State 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 may be made for compensation therefor to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

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

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

. For more than one year prior to October 17th, 1938, Leo Nicholas Hertel, deceased husband of the claimant herein, was employed as a day laborer in the Division of Highways of the Department of Public Works and Buildings of the respondent. On the last mentioned date, while in the performance of his duties, he sustained accidental injuries which resulted in his death on the next succeeding day.

Just prior to the time of the accident which resulted in his death, said Leo Nicholas Hertel was working with several other employees on U. S. Route No. **41,** about one mile north of the Village of Gurnee, in Lake County. Route No. **41** is essentially a north and south route, but at the point of the accident is more nearly east and west. The roadway at that point consists of two pavements, each thirty feet in width, with a boulevard between them, and each pavement is divided into three traffic lanes.

Hertel was engaged in pouring tar into pavement cracks and expansion joints in the concrete roadway. On account of the fact that the workmen were continually moving along the highway, no "Men Working" signs were placed on the highway, but the workmen mere protected by a flagman. The maintenance patrolman had instructed the flagman to take the Division service truck and get a supply of fresh drinking water, and at the same time instructed Hertel to stop pouring operations until the flagman returned.

Hertel started to move off the pavement, but stopped io pour tar into a longitudinal joint between the outside and middle trafficlane, At that time an automobile was approaching from the west, in the outside traffic lane. The driver "tapped" the horn when he was approximately fifty feet from Hertel, and slackened the speed of his car. Apparently Hcrtel did not hear or see the approaching car, as he kept on moving, and walked into the left front side of the car and was struck by the left front fender.

The maintenance patrolman was facing in the opposite direction and did not see the accident, and the only eye witnesses were the driver and the passengers in the car.

The only question involved in the case is whether claimant is barred from maintaining a proceeding under the Workmen's Compensation Act by reason of the fact that at the

time of the accident her husband was violating the instructions of his superior officer in failing to cease pouring operations until the return of the flagman.

A similar question was considered by our Supreme Court in the case of *Republic Iron* Co. vs. *Ind. Com., 302* Ill. 401, and the rule was there laid down as follows: (page 406)

"The rule is, that where the violation of a rule or order of the employer takes the employee entirely out of the sphere of his employment and he is injured while violating such rule or order it cannot be then said that the accident arose out of the employment, and in such a case no compensation can be recovered. If, however, in violating such a rule or order the employee does not put himself out of the sphere of his employment, so that it may be said he is not acting in the course of it, he is only guilty of negligence in violating such rule or order and recovery is not thereby barred. (*Union Collier Co.* vs. *Industrial Corn.*, 298 Ill.' 561.) As was said in the case just cited in quoting from the case of *Jackson* vs. *Denton Colliery* Co., W. C. & Ins. Rep. 91, (7 B. W. C. C. 92), it does not matter in the slightest degree how many orders the employee disobeys or how bad his conduct may have been if he was still acting in the sphere of his employment and in the course of it the accident arose out of it."

The rule there announced is in accordance with the previous decisions of the court. *Chicago Ry.* Co. vs. *Ind. Board,* 276 Ill. 112; *Union Colliery Co.* vs. *Ind. Corn.,* 298 Ill. 561.

In the case of *Imperial Brass* Co. vs. *Ind. Corn.,* 306 Ill. 11, the court quoted from the decision in the Republic Iron Co. case, and after a consideration of the previous authorities on the subject, adhered to the rule above set forth.

At the time of the accident in question, Hertel was acting within the sphere of his employment and in the course of it, and consequently his failure to obey the orders of his superior does not constitute a bar to this action.

Upon a consideration of all of the evidence in the record, we find as follows:

1. That on October 17th, 1938 claimant's intestate, Leo Nicholas Hertel, and the respondent were operating under the provisions of the Workmen's Compensation Act of this State.

2. That on said day said Leo Nicholas Hertel 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.

3. That notice of the accident was given to the respondent, and claim for compensation on account thereof was made

within the time required by the provisions of the Workmen's Compensation Act.

4. That the necessary first aid, medical, surgical and hospital services were provided by the respondent.

5. That said Leo Nicholas Hertel left him surviving the claimant, Susan Marie Hertel, his widow, and Donald Hertel, Howard Hertel, and Earl Hertel, his children, all of whom were totally dependent upon the earnings of said Leo Nicholas Hertel for their support; that all of said children were under the age of sixteen years at the time of the accident.

6. That the earnings of said Leo Nicholas Hertel during the year next preceding the injury were Twelve Hundred Forty-eight Dollars ($1,248.00), and his average weekly wage mas Twenty-four Dollars ($24.00).

7. That under the provisions of Sections 7-a and 7-h-4, the amount of compensation to be paid to the dependents of said Leo Nicholas Hertel, is Five Thousand Dollars ($5,000.00); that such compensation is payable in weekly installments of Fifteen Dollars ($15.00) per week, commencing October 19th, 1938.

8. That the share of such compensation which otherwise would be payable to said Donald Hcrtel, Howard Hertel and Earl Hertel, should be paid to their mother, Susan Marie, Hertel, for the support and maintenance of such children.

9. That said Susan Marie Hertel is now entitled to have and receive from the respondent the sum of Seven Hundred Five Dollars ($705.00), being the amount of compensation which has accrued from October 19th, 1938 to September 13th, 1939, to-wit, forty-seven (47) weeks, at Fifteen Dollars ($15.00) per week.

It Is Therefore Ordered that the share of such compensation which otherwise would be payable to the said Donald Hertel, Howard Hertel and Earl Hertel, shall be payable to their mother, Susan Marie Hertel, for the support and maintenance of such children.

It Is Further Ordered that an award be entered herein in favor of the claimant, Susan Marie Hertel, for the sum of Five Thousand Dollars ($5,000.00), payable as follows, to-wit :

The sum of Seven Hundred Five Dollars ($705.00), being the amount of compensation which has accrued from October 19th, 1938 to September 13th, 1939, shall be paid forthwith.

The balance of such compensation, to-wit, the sum of Forty-two Hundred Ninety-five Dollars ($4,295.00), shall be paid in Two Hundred Eighty-six (286) weekly installments of Fifteen Dollars ($15.00) each, commencing September 20th, 1939, and one final installment of Five Dollars ($5.00).

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 3, 1937 (Session Laws 1937, page 83), and being subject further *to* the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1st, 1939 (Session Laws 1939, page 117);—and being by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3150—Claim denied.)

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

Opinion filed September 14, 1939.

HOPKINS, SUTTER, HALLS & DEWOLFE, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PUBLIC UTILITY TAX—*paid under protest—claim for refund on Statute under whtch collected being declared unconstitutional—when award for dented.* The precise question presented here was before the court in *City* of *Oglesby* vs. *State,* 10 Court of Claims Reports, 694 and *Wabash Telephone Company et al.* vs. *State,* post, this volume, and the decisions in those cases govern here.

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

The claimant, Illinois Central Telephone Company, a Corporation, seeks an award in the amount of $13,287.42, being the amount paid by it to the respondent during the

period from August 14th, 1935 to January 12th, 1937 inclusive, as a tax on its gross receipts from the transmission of telephone messages pursuant to the provisions of an Act entitled "An Act in Relation to a Tax Upon Persons Engaged in the Business of Transmitting Telegraph or Telephone Messages, or of Distributing, Supplying, Furnishing or Selling Water, Gas or Electricity," approved June 27th, 1935, commonly known as The Public Utility Tax Act (Smith-Hurd Ill. Rev. Stat. 1935, Chap. 120, Sec. 440 et seq.), which Act was declared unconstitutional by the Supreme Court of this State in the case of *City of Chicago* vs. *Ames,* 365 Ill. 529.

Claimant contends that the payments made by it as aforesaid were made under a mistake of law, and that it is entitled to have the same refunded pursuant to the provisions of Section Six (6) of the aforementioned Public Utility Tax Act, which said Section provides as follows:

> "Sec. 6. If it shall appear that an amount of tax, penalty or interest has been paid *which* was *not due under the provisions of this Act,* whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."

The Attorney General has moved to dismiss the claim, and the case nom comes before the court on such motion.

In the case of *City* of *Oglesby* vs. *State,* No. 3097, decided at the November, 1938, term of this court, the facts were similar to the facts in this case, and the same legal questions were involved.

After a full consideration of the record, and the questions raised thereon, we held that the tax in question was paid voluntarily and with a full knowledge of the facts, and that therefore the claimant was not entitled to have the same refunded, and further, that the provisions of the aforementioned Section 6, relative to a refund of taxes paid, by the express terms thereof applied only to cases in which the taxes paid were not due under the provisions of the Public Utility Tax Act. In that case, as in the present case, the taxes paid by the claimant were due under the provisions of the Public Utility Tax Act, and therefore the provisions of said Section 6 could have no application thereto, even if the validity of the law had been upheld by the Supreme Court.

The decision in the City of Oglesby case was followed by this court in the case of *Village* of *Deerfield* vs. *State,* No. 3223, decided at the May Term, 1939, and in the consolidated cases of *Wabash Telephone Co. et al.* vs. *State,* Nos. 3146, 3147, 3148, 3149, and 3150, decided at the present term of this court.

For the reasons set forth in the aforementioned cases, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(Nos. 3146, 3147, 3148, 3149, consolidated—Claims denied.)

WABASH TELEPHONE COMPANY, No. 3146, ILLINOIS VALLEY TELEPHONE COMPANY, No. 3147, ILLINOIS TELEPHONE COMPANY, No. 3148, AUTOMATIC HOME TELEPHONE COMPANY, No. 3149, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinaon filed September 14, ***1939.***

HOPKINS, SUTTER, HALLS & DEWOLFE, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PUBLIC UTILITY TAX—*when payment of deemed voluntary— despite protest accompanying— when not deemed paid under compulsion or duress—when payment of not deemed involuntary— payment of under law subsequently declared unconstitutional—does not alone warrant refund—protest—recovery of moneys paid under—must show notice of at tame of payment— take action to enjoin payment until validity of law determined—remedy in court of general jurisdiction—failure to pursue bars recovery—Statute—declared unconstitutional—proviso—therein* for *refund* of *tax collected under fails.* The precise question presented herein was before this Court in *Czty* of *Oglesby* vs. *State,* 10 Court of Claims Reports, 694, and the decision in that case is controlling herein.

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

Each and all of the above entitled cases are based upon similar states of fact, and involve the same principles of law, and upon motion of the respective claimants, have been consolidated for the purposes of this hearing.

The claimants seek to recover the respective amounts paid by them between July 1st, 1935 and January 14th, 1937, as taxes on their gross receipts from the transmission of telephone messages, pursuant to the provisions of The Public Utility Tax Act of 1935. (Smith-Hurd Illinois Revised Statutes, 1935, Chap. 120, Sec. **440** et seq.)

Such Act imposed a tax upon each public utility at the rate of three per cent (3%) of the gross receipts of such utility from the conduct of the business of transmitting telephone messages, and of distributing, supplying, furnishing or selling water, gas or electricity to persons for domestic or commercial consumption, and not for resale.

Section One (1) of the Act defined "gross receipts" as "the consideration received for the transmission of telegraph or telephone messages, or for water, gas or electricity supplied or furnished to persons for domestic or commercial consumption and not for resale," and defined a "public utility" as "a person engaged in the business of transmitting telegraph or telephone messages, or of distributing, supplying, furnishing or selling water, gas or electricity for domestic or commercial consumption and not for resale."

Section Six (6) of the Act provided as follows:

"If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the public utility which made the erroneous payment, or such amount shall be refunded to such public utility by the department."

The Department of Finance of the respondent ruled that persons furnishing water, gas or electricity should be taxed only upon receipts derived from domestic or commercial consumers, but that persons engaged in the business of transmitting telegraph or telephone messages should be taxed upon receipts from other than domestic or commercial users.

In making payment of the tax, the several claimants, stated that the payments were made under protest, but they failed to avail themselves of the remedy by injunction provided by an Act entitled "An Act in Relation to the Payment and Disposition of Moneys Received For or on Behalf of the State," approved June 9, 1911, as amended. Illinois Revised Statutes, 1937, Bar Assn. Edition, Chap. 127, Par. 170 et seq.

The Wabash Telephone Company paid the total sum of $20,034.41, of which $1,779.05 was the tax on receipts from other than domestic or commercial purposes.

The Illinois Valley Telephone Company paid the total sum of $8,778.01, of which $729.69 was the tax on receipts from other than domestic or commercial purposes.

The Illinois Telephone Company paid the total sum of $10,227.96, of which $243.43 was the tax on receipts from other than domestic or commercial purposes.

The Automatic Home Telephone Company paid the total sum of $2,480.84, of which $302.34 mas the tax on receipts from other than domestic or commercial purposes.

On October 27th, 1936 the Supreme Court of this State decided in the case of *Illinois Bell Telephone* Co. vs. *Ames,* 364 Ill. 362, that a company engaged in the business of transmitting telegraph and telephone messages in the State of Illinois should be taxed only upon receipts derived from domestic and commercial services or uses.

Thereafter the Department of Finance of the respondent, pursuant to such decision of the Supreme Court, issued to each of the claimants herein, a "notice of credit," stating that the account of such claimant had been credited in the amount set forth in such notice, and that said credit was due to the decision of the Illinois Supreme Court in the Illinois Bell Telephone Company case. The several amounts due the respective claimants in accordance with the aforementioned notices of credit, were as follows, to-wit:

Wabash Telephone Company.	$1,779.05
Illinois Valley Telephone Company.	729.69
Illinois Telephone Company..	243.43
Automatic Home Telephone Company..	302.34

On February 12th, 1937 the Supreme Court of this State, in the case of *City* of *Chicago* vs. *Anzes,* 365 Ill. 529, held that the Public Utility Tax Act of 1935 was illegal and unconstitutional, in that it set up a classification for which there was no reasonable basis.

Thereafter the claimants filed their several complaints herein for the recovery of the total tax paid by them as hereinbefore set forth.

The complaint in each case is substantially the same, and consists of two counts.

The first count seeks the recovery of the total amount of the tax paid, and is based upon the following grounds, to-wit:

a) That the several payments were not voluntarily made, but were made under duress, and claimant is therefore entitled to the return thereof.

b) That the respondent is the recipient of monies to which it is not entitled in equity and good conscience, and the same should therefore be refunded.

c) That each of the payments were made as the result of a mistake of fact and an error of law, and that under the

provisions of the aforementioned Section Six (6) of the Public Utility Tax Act, the same should be refunded.

The second couht seeks the recovery of the several amounts which were paid as a tax upon gross receipts from the sale of services for uses other than domestic or commercial consumption, that is to say, the several amounts for which a notice of credit was issued by the Department of Finance as hereinbefore set forth.

Subsequent to the filing of the complaint herein, the Department of Finance of the respondent refunded to the several claimants the respective amounts due them in accordance with the aforementioned notices of credit, and on August 15th, 1939, on motion of the several claimants, Count II of their several complaints was dismissed without prejudice to the rights of such claimants under Count I of their respective complaints.

The several cases now come before the court 'upon the allegations of Count I of the respective complaints, and the motion of the Attorney General to dismiss;—the statements of fact, as set forth in the complaint, being taken as true for the purposes of such motion.

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

I.

That the several payments were not voluntarily made, but were made under duress.

The question as to when assessments or taxes are considered to have been voluntarily paid has come before this court in numerous cases. In the case of *Butler* Co. vs. *State,* 9 C. C. R. 503, the question was exhaustively considered, and the authorities thereon were reviewed by the court. In that case we held, in substance, that:

a) The terms "voluntary" and "involuntary," when used with reference to the payment of taxes, are not applied in their ordinary sense.

b) If a tax is paid voluntarily and with a knowledge of the facts, it cannot be recovered.

c) If the taxpayer has an adequate remedy in the courts of general jurisdiction, and fails to take advantage thereof, he cannot be permitted to say that the tax was paid involuntarily or under duress.

The decision in the Butler case has been followed by this court in numerous cases since decided.

In the present case the claimants had an adequate remedy under the provisions of an Act entitled "An Act in Relation to the Payment and Disposition of Moneys Received For or on Behalf of the State" (Ill. Rev. Stat. 1937, Chap. 127, Sec. 170 et seq.), paragraph 2-A of which provides as follows:

"It shall be the duty of every officer, * * * to notify the State Treasurer as to money paid to such officer, 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 have filed a complaint in chancery and secured within such thirty days a temporary injunction restraining the making of such transfer, in which case such payment and such other payments as the court may direct subsequently made under protest by the same person, the transfer of which is restrained by such temporary injunction, shall be held in the protest fund until the final order or decree of the court."

In the case of *Ward & Co.* vs. *Stratton,* 342 Ill. 472, the plaintiff filed a bill in chancery against the Secretary of State to require him to hold $19,971.50 alleged to have been illegally exacted from said plaintiff as an additional fee under the General Corporation Act, until the court could determine whether said sum was due the State. A demurrer was sustained to the bill and the case was dismissed for want of equity. In affirming the decision of the Circuit Court, our Supreme Court (page 476) said:

"In determining whether the demurrer was properly sustained to this bill it will not be necessary to determine whether the fee of $55,701 was or was not legally assessed. Section 35 of Chapter 327b (Cahill's Stat., 1929, p. 2469), in substance provides that all officers of the State shall hold for thirty days all money received for or on behalf of the State under protest, and on the expiration of such period deposit the same with the State Treasurer, unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the court. This statute provides a method by which money paid under protest to a State official may be recovered. It affords a complete and adequate remedy in a court of equity where all questions can be fully and speedily determined. It is the only statute on this subject to which our attention has been called. Appellant did not see fit to take advantage of the provisions of this statute and no reason or excuse is alleged in the bill for such failure."

Although claimants in the present case allege that the payments in question were made under protest, they do not allege any facts showing that such payments were made under legal compulsion or duress, or were made as the result of any fraud or deceit.

Furthermore, claimants failed to take advantage of the remedy provided by the last mentioned Act of the General Assembly, and under the repeated decisions of this court we must hold that the tax so paid by the claimants was paid voluntarily.

II.

It is next contended by the claimants that the respondent is the recipient of monies to which it is not entitled in equity and good conscience, and that the same should therefore be refunded.

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

The question as to the proper construction of the foregoing paragraph was considered by this court in the case of *Crubtree* vs. *State*, 7 C. C. R. 207, in which case, after a careful consideration of the authorities on the question, we held that the foregoing paragraph 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; 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.

The decision in the Crabtree case has been followed in numerous subsequent decisions of this court. *Pelli* vs. *State*, 8 C. C. R. 324; *Ryan* vs. *State*, 8 C. C. R. 361; *Rehman* vs. *State*, 8 C. C. R. 556; *Simpson* vs. *State*, 9 C. C. R. 321; *Finney* vs. *State*, 9 C. C. R. 327; *Titone* vs. *State*, 9 C. C. R. 389; *Crank* vs. *State*, 9 C. C. R. 379.

Under the facts set forth in the complaint, and the law as set forth under claimants' first contention, the claimants would not be in position to maintain an action at law or in equity against the State if the State were suable, and consequently they have no right to an award in this case.

III.

It is next contended by the claimants that the payments in question were made as the result of a mistake of fact and an error of law, and that under the provisions of the aforementioned Section 6 of the Public Utility Tax Act, such payments should be refunded.

The Attorney General contends that inasmuch as the Public Utility Tax Act has been declared unconstitutional, Section 6 of such Act can have no force or effect, and consequently claimants have no right to recover thereunder.

The claimants contend that the Public Utility Tax Act is severable; that the objections urged to the constitutionality of the Act do not apply to said Section 6, and that they are therefore entitled to the benefit of the provisions of said section.

In the view we take of the case, it is not necessary to consider the contention thus raised. Assuming for the purposes of this motion only, and not deciding, that in a proper case, the taxpayer might have the benefit of the provisions of such Section 6, yet under the facts in the present case, such Section can have no application.

It will be noted that the provisions of Section 6, by the express terms thereof, apply only to cases in which the taxes paid, *were not due* under the provisions of the Public Utility Tax Act. In each of the instant cases, the taxes paid were *due* under the provisions of the Public Utility Tax Act, and therefore the provisions of the said Section 6 could have no application to such payments, even if the constitutionality of the Act had been upheld.

Furthermore, the question involved in the present cases was squarely before this court in the case of City of *Oglesby* vs. *State*, No. 3097, decided at the November, 1938, term of this court. The facts in that case were substantially the same as in the present case, and the same questions of law were involved. The case was carefully considered by the court, and we there held that the payments in question were volun-

tarily made; and that the provisions of Section 6 of the Public Utility Tax Act had no application to the payments made by the claimant, and we therefore denied an award.

What we said in that case applies with equal force to the contentions made in the present case.

The decision of this court in the City of 'Oglesby case was followed in the case of *Village* of *Deerfield* vs. *Xtate,* No. 3223, decided at the May, 1939, term of this court.

For the reasons set forth in the City of Oglesby case, as well as the reasons herein set forth, the motion of the Attorney General to dismiss must be allowed.

Motion to dismiss allowed. Case dismissed.

(No. 3341—Claim denied.)

G. A. WOLFORD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1939.

ROSCOE C. BONJEAN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*officers, agents and employees of State — State not liable for. Property damage-mules owned and nsed by claimant in performance of work for State—possibility of loss or damage to, risk incident to employment—no award can be made for loss or damage to.* The facts in this case are similar to those in *Baie* vs. *State,* 9 Court of Claims Reports, 103; *Caslyn* vs. *State,* 9 Court of Claims Reports, 107 and *Hupp* vs. *State, 10* Court of Claims Reports, 360, in which awards were denied and what was said by the Court therein applies with equal force in the present case.

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

It appears from the record in this case that on or about August 1st, 1938, one J. L. Todd, Superintendent of Maintenance of the Division of Highways of the Department of Public Works and Buildings of the respondent, entered into an agreement with the claimant whereby the latter agreed to furnish a team of mules, a driver, and a mower, and cut the weeds along the right-of-way of S. B. I. Route No. 10, near the city limits of Springfield, in Sangamon County; that on August 18th, 1938, while a certain! servant and agent of the claimant was cutting weeds on a steep bank on said right-of-way, pursuant to the aforementioned agreement, the mower

ran into and struck the lower part of the right leg of one of the mules, whereby such mule was seriously and permanently injured, and claimant asks damages in the amount of $125.00 on account thereof.

The claimant has waived his right to file a Brief and Argument, and it is impossible for the court to determine upon what grounds he relies for recovery. The mules-were being driven by a servant and agent of the claimant, and there is nothing in the record to indicate that the injury sustained by the mule in question was the result of any negligence on the part of any servant or agent of the respondent. Furthermore, this court has repeatedly held that there is no liability on the part of the State on the grounds of respondeat superior.

A similar state of facts was presented in each of the following cases, and in each case an award was denied, to-wit: *Baie* vs. *State*, 9 C. C. R. 103; *Caslyn* vs. *State*, 9 C. C. R. 107; *Hupp* vs. *State*, No. 3227, decided September 14th, 1938.

Under the facts in this case, there would be no liability on the part of the State if the State mere suable, and therefore we have no authority to allow an award. *Crabtree* vs. *State*, 7 C. C. R. 207; *Titone* vs. *State*, 9 C. C. R. 389.

Award denied. Case dismissed.

(No. 3376—Claim denied.)

FOSTER R. CLARKE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1939.

BURKE & SCHENH, for claimant.

JOHN E. CASSIDP, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State Highway Department—State not liable for-award cannot be made for damages resulting from on grounds of equity and good conscience.* In the construction and maintenance of its public highways the State exercises a governmental function, and is not liable for damages caused by either a defect in the construction, or failure to maintain same in a safe condition, or the malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith, and no award can be made therefor under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of One Thousand Five Hundred ($1,500.00) Dollars for damages to his automobile and for personal injuries alleged to have been caused by the negligent and wrongful acts of a State Highway employee while operating a snow plow. Claimant alleges that at 12:30 A. M., February 1,1938, he was driving his car in a northerly direction on Route No. 66 in Grundy County, Illinois, and that although he was in the exercise of due care and caution, the Highway Department employees, C. J. Barnes and John Green, negligently and carelessly ran against his car with the snow plow which they were then operating.

The Attorney General has filed a Motion to Dismiss the Complaint on the ground that same does not set forth a claim for which there is any basis for a legal award.

We have been forced to repeatedly hold that the State is not liable for the nonfeasance, misfeasance or malfeasance of its officers, servants, agents or employees in the discharge of their duties; that the doctrine of respondeat superior does not apply to the State, and that the State in the absence of a statute so providing, is not liable in damages for injuries resulting from the negligent or wrongful conduct of its employees.

We have also held in the construction and maintenance of its highway system the State is engaged in a governmental function, and in the absence of a statute expressly so providing, it is not liable for personal injuries or damages to property occasioned by the negligent or wrongful conduct of its employees. (See *Schultz* vs. *State*, 9 C. C. R. 96; *Bass* vs. *State*, 9 C. C. R. 120; and *Kelly* vs. *State*, 9 C. C. R. **339.)**

No good purpose could be served by encouraging claimant to submit its evidence, when the claim, upon its face, would not support an award.

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

(No. 3232—Claim denied.)

MARIE GEMELLI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 16, 1939.

Rehearing denied October 10, 1939.

IRVING M. GREENFIELD, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*burden of proof on claimant to show accident and injury resulting therefrom — when claimant pails to sustain claim.* In claims under. the Workmen's Compensation Act, the burden of proof is upon claimant to show that an accident occurred and that as a result thereof, she sustained personal injuries, and when the only evidence as to the accident and injury is the testimony of claimant, without any showing of past or present objective conditions, she has failed to sustain such burden and no award for compensation can be made.

SAME — evidence of injury—when insufficient. Where the only evidence of an accident and injury resulting therefrom is the testimony of claimant, and it clearly appears from other creditable evidence that the symptoms and reactions alleged to have resulted from such accident and injury are substantially the same, as complained of by her long before such alleged accident, the evidence is insufficient to sustain a claim for compensation.

MR. JUSTICE YANTIS delivered the opinion of the court:

Mrs. Marie Gemelli filed her complaint herein on March 23, 1938 and thereby seeks an award under the provisions of the Illinois Workmen's Compensation Act for disability alleged to have resulted from alleged injuries sustained during the course of her employment at the Illinois Research and Educational Hospital, Chicago, Illinois. In claimant's statement, brief and argument she contends, for an award for permanent total disability. The record discloses that on the 27th day of October, 1937 claimant was in the employ of respondent as a housekeeper's helper at the Research and Educational Hospital. a charitable institution maintained and operated by respondent at 1819 Polk Street, Chicago. Claimant entered such employment on September 23, 1937 and on October 27, 1937 was receiving a salary of $64.50, being $52.50 plus $12.00 cash allowance in lieu of maintenance. Other employees in the same capacity received the same salary for the first six months of employment and an increase of $2.50 per month for the second six months of their employment. Her duties consisted of scrubbing, mopping floors and general cleaning. On the afternoon of October 27, 1937 while attempting to remove a steel scrubbing tank full of water from the elevator, one of the wheels of the tank passed over her right foot and she let go of the elevator door and the latter struck her on the left side somewhat below the breast. No one else was present and the only information of what happened is claimant's statement. She reported the accident to her immediate superior and later in the afternoon complained to the housekeeper that she had a "funny pain" over

her left breast. Claimant continued to complain of her discomfort and was permitted to perform lighter work until November 1, 1937 when she was hospitalized at the institution. On November 23rd the patient returned to her home. She worked thirty-one days in December and twenty-nine days in January. On January 29, 1938 about 2:30 P. M. she complained to the assistant superintendent nurse, Miss Radek, that "her strained heart" was again troubling her. At that time she was staggering and gasping for air and complaining of sharp pain in the cardiac region. She was again admitted to the hospital that day for treatment with a diagnosis of psychoneurosis. She was considerably agitated mentally, but sat upright in bed, and except for shallow respirations, was apparently not in great distress. She complained of feeling chilly, but there was no rise of temperature at the time. A spot over the fourth rib when pressed seemed to elicitate sharp pain which radiated up the sternum and, as the patient claimed, choked her. According to the medical examination the pain seemed superficial, not deep and no definite pathology was apparent. A Departmental Report, filed April 19,1938, from the Department of Public Welfare, and appearing in the record, shows that on January 31st claimant's son-in-law informed the attending nurse that the patient had had pains of this character before her admission to the hospital.

On February 5, 1938, claimant again had a spell in which she asked for a chair, gasped for breath and complained of pain, but rapidly recovered. X-rays were taken on February 4th and February 15th and an examination showed no pathology. Claimant gave her age at the time of the accident as forty-two (42) years. She did not work any for respondent during February, 1938, and in her complaint, filed March 23, 1938, stated that she was still disabled at that time from pursuing any manual labor. She received full pay for the thirty-one days in February, 1938. The medical attention and hospital service received by her up to February 26, 1938, was furnished by the State of Illinois.

Claimant contends, and her counsel argues, that prior to the alleged accident on October 27, 1937, she had always been in good health (p. 1, Respondent's Statement); that prior thereto she had never experienced any sensation of ill-being in connection with performing her work; had never had any trouble with her work, and was never sick or tired. That with-

in an hour or two after the alleged accident on October 27, 1937, she had a funny pain under her left breast which she had never had before; "that it is just like a pressure and the pain catches her; that a certain way she would move it would cut off her breath." Claimant testified at the first hearing on June 8, 1938, that: "If I sit up I get purple and cold, my left arm gets cold and my mouth and nose get icy, my hand turns cold and I get out of breath. I never had a feeling like that before October 27th * * * My nose, under the eyes and about the lips and chin gets awful cold and purple when that pain gets awful bad * * *. I never had a heart attack prior to the time I worked at the hospital." These statements are refuted by later evidence, to which reference will hereafter be made.

Claimant was examined by various medical men, whose testimony appears in the record. This included Dr. Nathaniel H. Adams, a witness for claimant, who examined her on July 6, 1938, and Dr. Paul L. Schroeder, a witness for respondent, who examined her on July 8, 1938, and Dr. Abraham A. Low, called by respondent, who examined her on July 12th and 13th, 1938; also Dr. Ford K. Hick, for respondent, mho examined her on October 20, 1938. The testimony of these gentlemen was that they found she had a tendency to become fatigued, had somewhat low blood pressue, and that a point in the neighborhood of the left fifth rib was apparently sensitive to pressure, with a condition of cardiac neurosis with the following symptoms: Weakness and great fatigue, shortness of breath on exertion with a tendency to palpitation or rapid heart action after exertion, pain about the heart, and a tender point somewhere in the left chest.

Following the testimony of the above witnesses, a further hearing was held on April 25, 1939, in open court, Justices C. N. Hollerich and Aubrey L. Yantis presiding, at which time photostatic copies of records of the Cook County Hospital, Chicago, Illinois, concerning the claimant, Marie Gemelli, were admitted in evidence and the following witnesses were examined, i.e.: Dr. Frederick Tice, Dr. Maurice Adelman and Dr. Samuel G. Taylor, all called by respondent, and Dr. Frederick C. Test and Marie Gemelli, witnesses called by claimant.

The testimony of these medical men and the records of the Cook County Hospital, dated August 29, 1932, January 9, 1933, and January 30, 1933, being Respondent's Exhibits

A, B, and C, disclose the following: That Marie Gemelli, claimant herein, was admitted to the Cook County Hospital on August 27, 1932; that at that time she had a tumor in her neck. She then complained of weakness and had lost forty-eight (48) pounds in five weeks about a year prior to said date, when she had blood poisoning from running a rusty nail in her foot. She had gained back this weight in the succeeding six months, but had been feeling weak thereafter. She had lost twenty-four **(24)** pounds since June, 1932, and had had frequent attacks of nausea. She complained of pain in the epigastrium the following evening. She further stated at that time that she had had headaches associated with nausea all her life. She had frequent cold flashes. She had a smothering feeling in the chest associated with a fluttering of the heart; also a slight pitting of legs and became black and blue easily.

The hospital record further disclosed: That she had had an appendectomy seventeen years previously and an operation on the female organs in 1926; also that she had had typhoid fever when she was sixteen years of age. She was seen by Dr. Samuel G. Taylor of the hospital staff and remained in the hospital for two days and was again readmitted on January 4, 1933.

The record discloses further that from a history given' by her at that time she suffered pain which was knifelike at times with pressure along the sternum which had been of one year duration; that she had a tired feeling and was sleepy all the time and was subject to fainting spells; that during these spells she could hear well, but could not respond; further, that for about a year she had had a tingling in the arms, legs and neck; that at times she had attacks when she mas unable to walk and that these had occurred about tmelve times during the preceding year.

The record further discloses (Respondent's Exhibit B) that the patient at that time stated she was well until about 1931, when she ran a nail in her foot; that this was followed by blood poisoning and lockjaw, and that she has not been well since; that when the fainting spells would attack her she would have *to* be supported or she would fall; that her legs, arms and neck stiffen and she could not open her eyes until consciousness is restored by use of ammonia and massage. The record discloses further that the pain complained of in

her chest at that time traveled up and down the sternum from the fourth rib to her navel. She was subject to headaches and drowsiness.

It also appears from claimant's history, as given to the hospital authorities at that time that: In 1915 claimant swallowed a bone, was rushed to a hospital and, according to her statement, "the bone was pushed down, and since then she has been having discomfort ranging from an empty feeling to a feeling of fullness with accompanying pain in varying degrees." When she was eight years of age she had a hemiplegia and a facial paralysis. At the time of the 1932-33 hospitalization she had a semi-hard tumor about the size of a plum over the lower portion of the larynx. The diagnosis showed a slight grade mitral heart leak. The patient's mental reaction at that time showed typical signs of psychoneurosis. She remained in the hospital for five days, during which time she seemed to rest well and she was discharged on January 9, 1933.

She was again readmitted to the hospital on January 13, 1933. The record at that time discloses that she had left the hospital against the doctor's advice on the occasion of her hospitalization in August, 1932. She was diagnosed this time as having a cyst in her neck and also as being a psychoneurotic. The operation for the removal of the tumor was performed and the record showed that on January 30, 1933, the stitches were removed and healing was proceeding properly, and the patient was discharged.

Mrs. Gemelli testified that in 1935 she was confined to the Swedish Covenant Hospital because of blood poisoning in her foot, and that prior to the alleged injury of October 27, 1937, she was "dizzy lots of times," and although denying the verity of certain statements appearing in the Cook County Hospital Reports above referred to, she ,admitted having given a history of her case to the doctors, and verified many of the statements appearing in those records. Both Dr. Nathaniel H. Adams and Dr. Frederick C. Test, called as witnesses for claimant, testified that they had made examinations of claimant prior to testifying, and in answer to hypothetical questions stated that in their opinion the accident alleged to have been sustained by claimant on October 27, 1937, had a direct causal effect on her subsequent state of ill-being, and that the objective findings made by them in the course of their

examination were sufficient to account for the sensations of ill-being experienced by claimant. This conclusion is not agreed to by the medical testimony produced by respondent. Dr. Paul L. Schroeder examined claimant on July 8,1938, and testified that he found her to be a well nourished, obese, well developed person who was not very well physically, but that the stress or difficulty under which he found she was laboring was not related to the symptoms and signs found in his examination; that she was ill and not able to work at the time of his examination, but that such inability to work was not related to the conditions which the alleged accident was purported to have caused; that her condition was one of fatigue and being "rundown," and generally troubled about the problems of her family.

Dr. A. A. Low, a witness for respondent, examined claimant on July 12 and 13, 1938, and testified that she showed a condition of ill-being with a point in the chest sensitive to pressure which in his opinion was the result of an accidental injury.

Dr. Ford K. Hick, called by respondent, testified that he examined claimant on August 15, 1938, and found her to become easily fatigued, to have somewhat low blood pressure, a point over the left fifth rib sensitive to pressure, swelling of the legs with evidence of a hypothyroidism and evidence of what has been called a cardiac neurosis. That the latter phrase is a vague term presenting the following symptoms: Weakness and great fatigue, shortness of breath on exertion, tendency to find palpitation with rapid heart action; pain about the heart and many times a tender point somewhere in the left chest. Dr. Hick had been treating the claimant, prescribing rest and the administration of thyroidectin. In answer to a question as to what is the usual cause of hyperthyroidism, the doctor stated, "previous surgery on the thyroid gland, goitre and unknown causes, but that it was not likely to arise from trauma, except from an injury direct to the thyroid gland in the neck."

Doctors Frederick C. Test and Samuel G. Taylor differed in their conclusions in the reading of an X-ray picture of Mrs. Gemelli's chest and as to whether same disclosed any sign of a fracture.

From a consideration of the entire record herein, the court is convinced that the attempt by Mrs. Gemelli to obtain

an award from the State for an alleged injury on October 27, 1937, is unwarranted and without merit. The symptoms of ill-being testified to by her, as resulting from the alleged accident of October 27, 1937, follow in a remarkably close manner the symptoms and physical reactions displayed by her in the Cook County Hospital in 1932 and 1933, as they appear in her case history, as disclosed by the records of that institution. The cold hands, the tendency to readily become blue in color about the mouth, the fainting and nausea, the weakness and loss of weight to which she became subject after the occasion of October 27, 1937, and all of which she ascribes to the alleged accident of that date, were all a substantial repetition of her symptoms and reactions disclosed by her case history, as given by her six years before the alleged accident of October 27, 1937. In her examination she was asked (p. 23), "Was any of this condition that you have just described ever present before the occurrence of October 27th?" To which she replied: "No, sir; I never had a feeling like that before in my life, ever." We do not desire to comment further about the evidence, but we believe that the record would well justify an investigation concerning the testimony given by Mrs. Gemelli in an effort to obtain an award herein. Under the state of the evidence the court definitely finds that no award should be made. The claim is denied and the case dismissed.

(No. 3399—Claim denied.)

A. R. HERMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1939.

JOS. B. SCHLARMAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees* of *State Highway Department—State not liable for—award cannot be made for damages resulting on grounds of equity and good conscience.* In the construction and maintenance of its public highways the State exercises a governmental function and it is not liable for damages *to* persons or property occasioned by the negligent and wrongful operation of motor vehicles by employees of the Division of Highways, the rule of respondeat superior not being applicable to it, and no award can be made for such damages on any **theory of law** or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant alleges that on the 30th day of March, A. D. 1939 he was driving his Chevrolet Truck on S. B. I. Route No. 12 near French Village, in St. Clair County, Illinois; that unnamed employees of the State of Illinois who were then and there in the possession and control of a certain motor truck numbered T 1606, operated by the Department of Public Works and Buildings, Division of Highways of the State, negligently and carelessly backed the same into claimant's automobile, and that as a direct and proximate result claimant's car was damaged in the sum of Three Hundred ($300.00) Dollars.

The Attorney General has filed a motion to dismiss the claim for the reason that no award could legally be warranted upon the facts therein stated.

Traffic upon the highways involves such hazards, that every right should be preserved for those who are injured through the negligence of others and without contributory negligence upon their own part while traveling upon the highways. The State however cannot guarantee the safety of the traveling public, nor under existing statute can the Court of Claims legally support an award against the State, where the damages are the result of the negligence of the State employee who at the time is engaged in the performance of his duties. The rule of *Respondeat Superior* does not apply to the State. The latter in the construction and maintenance of its highway system is engaged in a governmental function, and in the absence of a statute expressly so providing it is not liable for damages to property occasioned by the negligent and wrongful operation of motor vehicles in the hands of employees of the Division of Highways. (*Boner, etc.* vs. *State*, 9 C. C. R. 55. *Morgan* vs. *State*, 9 C. C. R. 109.)

The court is reluctant to dismiss a claim of this character on motion but it would be of no benefit to claimant in view of the basis of the claim, to take the desired evidence. It is possible that the driver of the State truck should be held responsible but such redress is a matter for the claimant to seek through other courts or through the Department wherein such employee is employed. The motion is allowed and the claim dismissed.

(No. 3072—Claims denied.)

LEO KLIMCZAK, STANLEY LEVANDOWSKI, WALTER PILASKI, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1939.

ECHT & COLE, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SALARY—*claim for by one not shown to have been lawfully appointed or employed-no award can be made for.* Where claim is for salary for services rendered by one in a position to which he was not lawfully appointed or employed, there is no legal basis for an award for same and claim therefor must be denied.

PRINCIPAL AND AGENT—*authority of purported agent of State—one rendering services at request of—bound to ascertain extent of authority.* One rendering services to or for a Department of the State, at the request of one purporting to be an agent of the State, for which he expects compensation, is bound to ascertain the extent of the authority of said purported agent to employ him, and if he has no authority so to do, he cannot bind the State to pay for such services.

ESTOPPEL—*claim for salary for services rendered—when 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 by one and accepted by it, where there is no showing that person was ever lawfully appointed or employed to render same.

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

Claimants filed their complaint herein on March 25th, 1937, and alleged therein that on or about March 11th, 1936 they were employed as investigators by the Department of Public Welfare of the respondent, to make a survey of relief conditions in Cook County, at a salary of $125.00 per month; that they worked as such investigators from March 11th, 1936 to April 11th, 1936; that they have never been paid for their services, although they have made numerous requests therefor.

The Attorney General contends:

1. That the claimants were not employed by any representative of the State having authority to employ them.

2. That no appropriation had theretofore been made for the payment of investigators in the Department of Public Welfare.

3. That therefore the respondent is not liable to claimants for any services which they may have rendered.

The case has been submitted to the court upon the testimony of the claimants and the report of A. L. Bowen, Director of the Department of Public Welfare. The testimony of the claimants is to the effect that on March 8th or 9th, 1936, the claimant, Leo Klimczak, was Democratic Precint Captain of the 51st Precinct, 33d Ward, Chicago; that on said date he and the other claimants were in the Democratic Headquarters for said precinct and met Chester Kantowski, then a candidate for ward committeeman of said ward; that said Kantowski told them he had some work for them as welfare investigators at $125.00 per month, and gave each of the claimants a written assignment for work, and directed them to report at the Hotel LaSalle; that the next day they reported at said hotel where their assignments for work were taken up and identification cards were issued to them, with instructions to go to the Public Welfare Department located on the 18th floor of the Transportation Building; that each of said identification cards contained the name of the party to whom it was issued, as well as a statement to the effect that he was an investigator for the Department of Public Welfare at $125.00 per month; that they went to a room on the 18th floor of the Transportation Building, having on the door thereof the following sign, to-wit: "Department of Public Welfare, State of Illinois;" that a Mr. Levinson was at a desk in the rear of the office; that there were then present in such office a number of other persons who had similar identification cards; that Mr. Levinson took the cards, looked at them and said, "Well, boys, I will put you to work. You are going to be relief investigators and you will work from this office. You will report twice a week and your pay will come from the Department of Public Welfare of the State of Illinois."

Claimants further stated that each of such investigators was given a sheet purporting to be instructions to investigators, which was signed by Mr. Levinson in their presence; that they were handed a block of report cards and were instructed as to the manner in which the report cards were to be filled out, and were told to report to that office twice a week; that Levinson advised them that they would receive their checks every two weeks; that they need not worry about their money as the State of Illinois would pay them.

Claimants testified that they performed the work required of them, in accordance with the instructions given, and

that they worked from March 11th until April 11th; that they turned in their reports as requested; that the first reports were presented to Mr. Levinson; that he sent claimants to a young woman in the office to whom the reports were delivered; that all subsequent reports were also delivered to her; that claimants saw Mr. Levinson several times at the office, but did not speak to him at any time again; that they called at the office on numerous occasions for their pay checks, but the woman to whom they gave the reports said the checks had not yet arrived and would probably come in later; that thereafter they called for their checks on numerous occasions, but the same woman told them the checks were not in, but that she would notify them when they came.

Claimants also testified that there were others doing work similar to the work which they did, who had received their checks from such woman.

The report of the Director of the Department of Public Welfare is as follows:

"I am returning the enclosed declaration in the case of *Stanley Levandowski, et al.*, vs. *The State of Illinois*, Court of Claims No. 3072. I regret that I am unable to give you any information. Appointments of these three men were never requested of me, and I have never signed any appointment notices. Their names have never appeared on any payroll that has gone through the Department of Public Welfare."

Section three (3) of the State Civil Service Act (Illinois Revised Statutes, 1937, Chap. 24%) provides for the classification of all offices and places of employment in the State service except those expressly exempted in Section 11 of such Act. The office or employment of investigator for the Department of Public Welfare is not mentioned or included in said Section 11, and should therefore be included in the offices and places of employment classified under the Civil Service Act of this State.

Under the provisions of such Act, appointments to positions thereunder are required to be made from the register of eligibles for such position, which register is established by an examination by the Civil Service Commission. Section 10 of such Act provides that whenever a position classified under the Act is to be filled, the appointing officer shall make requisition upon said Commission, and the Commission shall certify to him the name and address of the candidate standing highest upon the register of eligibles for such position; also, that when there is no eligible list, the appointing officer may,

with the authority of the Commission, make temporary appointments to remain in force only until regular appointments under the provisions of the Act can be made.

The Civil Service Act also provides that in employments of an essentially temporary nature the appointing officer may, with the authority of the Cornmission, make temporary appointments to fill a vacancy; that immediate notice in writing shall be given by the appointing power to the Commission, of all appointments, permanent and temporary, in the classified Civil Service; and that the Commission shall certify to the State Auditor all appointments in the classified Civil Service.

There is nothing in the evidence to show that the claimants were selected from any eligible list pursuant to the requirements of the Civil Service Law, nor is there anything to show that they received a temporary appointment with the authority of the Commission. If the claimants held their offices or appointments under the Civil Service Act, they have failed to produce any evidence whatsoever to show such fact.

However, they do not specifically claim to be Civil Service appointees, and apparently base their right of recovery solely upon the appointment which they claim was made by Mr. Levinson. The record does not show what position, if any, Mr. Levinson held with the Department of Public Welfare, nor is there anything in the record to show his powers or duties, nor does the record show anything whatsoever with reference to the authority of Mr. Levinson to make any appointments in the Department of Public Welfare.

It is an elementary principle of law that parties dealing with an assumed agent are bound, at their peril, to ascertain not only the fact of the agency, but the extent of the agent's authority and power, and it is their duty to determine whether an act by him is within his power and is such as to bind his principal; also, that a person dealing with a special agent is bound, at his peril, to ascertain the extent of the agent's authority. *Ellis* vs. *Saline County Coal* Co., 199 Ill. App. 219; *Merchants National Bank of Peoria* vs. *Nichols & Shepard* Co., *223* Ill. **41;** *Kuecks* vs. *New Home Sewing Machine Co.*, 123 Ill. App. 660; *Blackmer* vs. *Summit Coal etc.* Co., 187 Ill. **32;** *Murray* vs. *Standard Pecan* Co., 309 Ill. 226.

In this connection it must also be noted that a distinction is recognized between the acts of an agent representing a pri-

vate individual or corporation and the acta of an agent representing a public corporation. This distinction is pointed out in the case of *Bouton et al.* vs. *McDonough County,* 84 Ill. *384,* where the court, on page 395, said:

"Different rules prevail in respect to the acts and declarations of public agents, from those which ordinarily govern in the case of mere private agents. As to the latter, the principals are, in many cases, bound, where they have not authorized the declarations and representations to be made. But, in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation for the government. * * *

"Where the officers or agents of a public corporation have no powers with respect to a given matter, we regard the rule to be, that neither their acts nor their individual knowledge in respect to the matter can, in any way, bind or affect such corporation."

The law, as announced in the *Bouton* case, has been cited with approval in many subsequent cases.

Nor does the fact that the claimants rendered *the services* for which they seek compensation, and the respondent received the benefit thereof, make the State liable on the ground of estoppel.

In applying the rule of estoppel, a distinction is also recognized between cases involving private individuals and cases involving the State. This distinction is clearly set forth in the case of *People* vs. *Brown,* 67 Ill. 435, where the court, on page 438, said:

"As between individuals, it is no doubt true, if one, by words or conduct, wilfully causes another to believe the existence of it certain state of things, and induces him to act upon it so as to change his previous condition, he will be estopped to deny the truth of the representation. As between the government and an individual, we have found no case holding the former would be estopped by any statement of its officials from recovering its own.

"It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

The "doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials."

The rule as set forth in the *Brown* case has been recognized and applied in many cases since that time. *The People* vs. *Gary*, 196 Ill. 310; *The People* vs. *Union El. R. R. Co.*, 269 Ill. 212; *People ex; rel. Smith* vs. *Woods*, 354 Ill. 224.

The burden of establishing the authority of Mr. Levinson was upon the claimants. *Kuhn* vs. *Pulaski County, etc. Co.*, 188 Ill. App. 279; *Fred Miller Brewing* Co. vs. *Jones*, 190 Ill. App. 169.

In the absence of any showing as to the position held by Mr. Levinson, the extent of his authority, and his right to appoint the claimants, we have no authority to allow an award.

It therefore becomes unnecessary to consider the other point raised by the Attorney General.

Award denied. Case dismissed.

(No. 3375—Claim denied.)

ROMAN KOPPERT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1939.

GARIEPY & GARIEPY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State Highway Department—State not liable for—award cannot be made for damages resulting from on grounds of equity and good consczence.* In the construction and maintenance of its public highways the State exercises a governmental function and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition, and no award can be made therefor on any theory of law or equity.

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

Claimant filed his complaint herein on May 6, 1939, and alleges therein in substance that on June 1, 1937, the respondent was possessed of and had control of a certain street or highway in the City of Chicago known as East 95th Street; that it was the duty of said respondent to keep said highway in good repair and safe condition for travel; that notwithstanding its duty in that behalf, the respondent wrongfully and negligently suffered and permitted said highway to be

and remain in a bad state of repair, and unsafe for traffic for a long time prior to said 1st day of June; that as the result thereof the claimant, while in the exercise of all due care and caution for his own safety, was caused to lose control of the motor vehicle which he was then and there driving, whereby the same ran into one of the pillars of a viaduct extending across said street; that as the result thereof the claimant received severe bodily injuries and was permanently disabled, and his automobile was damaged and destroyed; wherefore he claims damages in the sum of $10,000.00.

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

This Court has repeatedly held that in the maintenance of its durable, hard-surfaced highways, the State is engaged in a governmental function; also that the doctrine of respondeat superior does not apply to the State, and that it is not liable for the carelessness or negligence of its servants or agents in the absence of a statute making it so liable. *Wilson* vs. *State*, 8 C. C. R. 72; *Baumgart* vs. *State*, 8 C. C. R. 220; *Royal* vs. *State*, 9 C. C. R. 67; *Crank* vs. *State*, 9 C. C. R. 379; *Wolfe* vs. *State*, No. 3215, decided May term, 1938.

This is in accordance with the 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.

This Court has also repeatedly held that we have no authority to allow an award in any case where there would be no legal liability on the part of the State if the, State were suable. *Crabtree* vs. *State*, 7 C. C. R. 205; *Titone* vs. *State*, 9 C. C. R. 389; *Atchison* vs. *State*, 9 C. C. R. 114.

Under the facts set forth in the complaint, we have no authority to allow an award. The motion of the Attorney General will therefore be sustained and the case dismissed.

(No. 3317—Claimant awarded $602.14.)

JAMES R. NEVIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 10, 1959.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under for loss of one finger and permanent partial loss of use of another finger. Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in loss of one finger and permanent loss of part of use of another finger, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

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

For a number of years prior to Friday, March 18, 1938, the claimant was in the employ of the Division of Highways, Department of Public Works and Buildings of the respondent as an assistant highway engineer. He worked out of the Elgin office and resided at Woodstock, Illinois. On the last mentioned date, while in the performance of his duties, about eight miles east of Lockport, and while engaged in securing soil samples by means of a gasoline operated sampling machine, a hammer weighing 150 pounds, used for the purpose of driving test pipes, dropped a distance of twenty inches on to claimant's left hand, crushing the first and second fingers thereof.

From the evidence in the record it appears that claimant received immediate medical and hospital attention at St. Joseph's Hospital in Joliet; that he remained in the hospital about an hour and then returned home, against the wishes of the treating physician; that he went to work the next morning (Saturday); that upon his return to his home in Woodstock on Saturday his hand was so painful that he went to the local hospital, where he remained under the treatment of Dr. Henry W. Sandeen for four days; that he then returned to his home, but remained under the care of Dr. Sandeen until April 4, 1938, on which date he returned to his regular work; that the period of temporary total disability was fifteen days; that claimant received his regular salary during the time he

was so disabled, to wit, the sum of $105.00; that he desires to have the period of his temporary disability considered as a sick leave, pursuant to the policy of the Elgin office of the Highway Department to allow each employee of such office (in case of sickness) two weeks' sick leave per year with pay.

Under the provisions of Paragraph 6 of Section 6 of the Court of Claims Act, our determination of claims of employees of the State for compensation for accidental injuries suffered in the course of employment is required to be made in accordance with the provisions of the Workmen's Compensation Act. The Compensation Act makes no provision for sick leave, and consequently any rights accruing to the claimant by virtue of any regulations adopted by the Elgin office of the Highway Department with reference to sick leave must be adjusted between the claimant and the Department, and cannot be determined in this proceeding.

From a consideration of the evidence in the record, we find that on said March 18, 1938, claimant and respondent were operating under the provisions of tbe Workmen's Compensation Act of this State; that on said date the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to the respondent, and claim for compensation on account thereof was duly made in accordance with the provisions of the Compensation Act; that the annual earnings of said James R. Nevin for the year preceding the injury were $2,520.00, and his average weekly wage was $52.50; that at the time of the injury in question he was forty-five years of age and had one child under the age of sixteen years; that as the result of the accident in question claimant was temporarily totally disabled for the period of two and one-seventh weeks, and suffered the loss of the first finger of his left hand and the permanent and complete loss of twenty per cent (20%) of the use of the second finger of his left hand; that all medical, surgical and hospital bills have been paid by the respondent; that under the provisions of Section 8, paragraphs (b) and (e) of the Workmen's Compensation Act, claimant is entitled to have and receive from the respondent compensation at the rate of Fifteen Dollars ($15.00) per week for one and one-seventh (1-1/7) weeks, for temporary total disability, and in addition thereto for forty-seven **(47)** weeks for specific loss, as hereinbefore set forth, to wit, the total sum of Seven Hun-

dred Seven Dollars and Fourteen Cents ($707.14), less the sum of One Hundred Five Dollars ($105.00) heretofore paid to him as above set forth; such compensation to be paid in weekly installments of Fifteen Dollars ($15.00) commencing on March 19, 1938.

All of such compensation has accrued at this date, and an award is therefore entered in favor of the claimant for the sum of Six Hundred Two Dollars and Fourteen Cents ($602.14).

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws, 1939, p. 117); and being by the terms of the first mentioned Act subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3394—Claim denied.)

OSWALD JAEGER BAKING COMPANY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opanaon filed October 10, 1939.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE *LICENSE* FEE—*voluntarily paid—under mistake of law—cannot be recovered.* Where one pays a-license fee, without any compulsion or duress, which the law would not compel him to pay, such payment is voluntary and made under a mistake of law and cannot be recovered.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is a foreign corporation, having its principal office in Milwaukee, Wisconsin. According to its claim, it is

engaged in operating its bakery trucks in inter-state commerce between the State of Wisconsin and the State of Illinois; that on the 9th day of January, A. D. 1939, it paid to the State of Illinois, through the office of the Secretary of State, the sum of One Hundred Eight ($108.00) Dollars for license fees for nine automobile trucks operated by it in Wisconsin and in Illinois, and received therefor nine Illinois license plates to be affixed to its said trucks.

Claimant recites that it was in error in applying for such Illinois licenses for the reason that under the reciprocal agreement existing between Illinois and Wisconsin, the former does not require that the Wisconsin trucks carry an Illinois license while engaged in inter-state operation if hauling their own merchandise and if the gross weight of such truck is under eight thousand (8,000) pounds; that the gross weight of each of the trucks in question was less than eight thousand (8,000) pounds and that such trucks were in fact engaged in hauling its own commodities in inter-state operation.

The Attorney General has filed a motion to dismiss the complaint for the reason that the claim on its face seeks a refund of a motor vehicle registration fee which has been paid voluntarily and without protest, and that such payment was made under a mistake of law.

We have repeatedly held that the State of Illinois in establishing its Court of Claims merely provided a forum in which claims against the State might be heard, and that the court cannot properly recommend an award unless there exists some legal basis upon which the State if it were suable in a court of law, might be held liable.

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 Eommon 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."

The facts as to the weights of the trucks and the interstate nature of their traffic were matters within the particular knowledge of claimant. Under the facts recited in the corn-

plaint no award could be properly allowed by the court, and the motion of the Attorney General is therefore allowed and the claim dismissed.

(No. 3393—Claim denied.)

H. L. SAUNDERS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opznion filed October 10, 1939.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*claim for refund where use of vehicle for which issued discontinued during period for whzch zssued—no provision in law authorizing—cannot be made on grounds of equity and good conscience—award for refund must Be denied.* The identical question presented here was before this Court and decided in *Phillips* vs. *Xtate,* 10 Court of Claims Reports, 53 and the ruling therein is decisive in the present case.

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

Claimant filed his complaint herein on June 29, 1939, and seeks to recover the sum of Eleven Dollars ($11.00) which he paid to the Secretary of State for a 1939 automobile license, and Fifty Cents (50c) which he paid to the same officer for driver's license. The complaint alleges that claimant was unable to secure a driver's license, and consequently was forced to, and did dispose of his automobile on April 30,1939, and thercfore asks for a refund of the unpaid portion of the fees so paid by him as aforesaid.

The Attorney General has entered a motion to dismiss the case on the ground that the claimant is not entitled to an award under the facts set forth in the complaint.

The question here presented mas before this court in the case of *Phillips* vs. *State,* No. 3091, decided at the September term, 1937. In that case the claimant sold his car, and did not opcratc it at any time after the receipt of the license plates. In considering his right to a return of the unearned portion of the license fee paid by him, we said:

"There is no provision of the Motor Vehicle Act, or any other act, which authorizes a return of a license fee under the facts set forth in the complaint. Had the Legislature intended that licensees should be entitled to a return of the license fees paid by them, in the event of a sale of the licensed car, they would undoubtedly have made provision to that effect."

Also :

"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. *Crabtree* vs. *State*, 7 C. C. R. 207; *Kramer* vs. *State*, 8 C. C. R. 31; *Shumway* vs. *State*, 8 C. C. R. 43; *Titone* vs. *State*, No. 2475, decided at the January Term, 1937 of this court.

"Under the facts set forth in the complaint, claimant could not maintain an action against the State if it were suable, and therefore we have no authority to allow an award."

The same rule was applied by this court in the following cases, to wit: *Dealers Transport* Co. vs. *State*, 8 C. C. R. 510; *Freeport Floral Co.* vs. *State*, 9 C. C. R. 149; *Eaid* vs. *State*, No. 3157, decided January term, 1938; *Great Northern Chair* Co. vs. *State*, No. 3234, decided May term, 1938.

What has been said with reference to the vehicle license fee applies with equal force to the driver's license fee.

For the reasons set forth in the cases cited, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2181—Claim denied.)

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

Opznion filed September ***1.9, 19.99.***

Rehearing denied October ***10, 19.99.***

THOMAS A. MURPHY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*court without jurisdiction to entertain claim for compensation under unless made within time fixed in Section 24 thereof.* Section 24 of the Workmen's Compensation Act provides that no proceedings for compensation under the Act shall be maintained 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, and when application is not so made the Court is without jurisdiction to entertain any claim for compensation.

MR. JUSTICE LINSCOTT delivered the opinion of the court :

This claim was filed on May 25, 1933, and avers that the claimant was a State police officer and employed by the Division of Highways of the Department of Public Works and Buildings; that on December 1, 1928, while in the performance of his duties, and while pursuing a coupe bearing no

State license, and proceeding in an easterly direction on the south side of the road, he was struck by a Buick which ran headon into the claimant, and he received the following injuries: Broken skull; a contusion of the brain? broken left hand in or near the wrist; broken left leg between the thigh and the knee and also between the knee and the ankle, and several broken bones in the left leg; the bone between the knee and ankle of the right leg was split, the socket of the knee joint being torn out and several bones in the right foot were badly bruised, some of which were subsequently removed; and the dislocation of the right joint or socket of the jaw bone; injuries to the right eye and ear and various external and internal bruises and injuries.

Following this injury, on May 14, 1931, this court made an award to this claimant, and found that while in the performance of his duties he was struck by an automobile, and as a result of the collision he suffered certain injuries mentioned in the opinion, and found that the injuries necessitated his being kept in a hospital for 166 days, where he received the services of nurses and physicians. The court further found that 14 X-rays of his injuries were taken and that he was furnished with a walking appliance before leaving the hospital, and that his medical, nurse and hospital bills aggregated the sum of $4,024.79, of which the State has paid $1,472.85, leaving a balance of $2,551.94, for which he was asking an award. The court found that one of the medical bills was $135.00 more than it should be, and deducted this amount from the amount claimed and made an award in the sum of $2,416.94. This was Claim No. 1717, and is reported in 6 C. C. R. 566.

This court held on a motion to reinstate the claim that the rule of res adjudicata would apply and said: "This is not a harsh rule, particularly in this case, because it appears from the records of the Division of Highways, Department of Public Works and Buildings, that the claimant actually received $175.00 per month from December 1, 1928, the date of his injuries to February 13, 1933, and then continued on the State payroll at a salary of $100.00 per month from then until April 17, 1933." The motion to reinstate was denied. Bee 8 C. C. R. 8.

The opinion which was filed on May 14, 1931, found that the claimant had been in the hospital for 166 days. It will

thus be seen that he was released from the hospital on or about May 15, 1929. The complaint in this case charges that he was incapacitated from pursuing his regular employment as such police officer until October 1, 1931, on which date he returned to duty. This court, in its opinion in Volume 8 C. C. R. 8, found that he had been regularly paid $175.00 per month from December 1, 1928, to February 13, 1933, and from February 13, 1933, to April 17, 1933, he received $100.00 per month, or approximately the sum of $9,000.00.

The petition filed, on which the award of May 14, 1931, for the payment of hospital bills, doctor bills and nurses' bills was based, contained the following paragraph:

"That as a result of his injuries your claimant has been unable to pursue his duties or to do any work alone since the date of the accident and is not now able to perform any work, but he does not at this time desire to make claim for any temporary total disability, or partial permanent disability, or permanent disability, or for specific loss, and will not do so unless his recovery is not as complete as it now appears to be."

This petition was addressed to the January session, 1930, of this court and was not filed for more than a year after petitioner received his injury.

Claimant in this cause avers that he returned to his work on October 1, 1931, and was employed until he was laid off in the month of January, 1933. Claimant did not file this claim until May 25, 1933, almost five years after the accident.

Claimant received, as this court found, compensation at $175.00 per month from December 1, 1928, to February 13, 1933, and then continued at $100.00 per month until April 17, 1933. This is much more than provided for by statute. He returned to his employment on October 1, 1931; and a period of one year, seven months and twenty-five days elapsed from the time he filed his claim and the time he again commenced work. Section 24 of the Workmen's Compensation Act provides that no proceedings for compensation under the Act shall be maintained 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, and that thereafter the right to make application for compensation is barred. Construing the last payment of compensation as having been made on September 30, 1931, this applica-

tion was not made for one year, seven months and twenty-five days thereafter.

We must, therefore, hold that this court has no jurisdiction to enter the petition or to grant an award. The cause is, therefore, dismissed for want of jurisdiction.

(No. 3206—Claimant awarded $648.94.)

WALTER CRITCHLOW, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 11, 1939

JOSEPH H. GOLDENHERSH, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for permanent partial loss of use of arm may be made under—based on average wage determined on 200 working days 'in year.* Where it appears that employee of State, engaged in work not operating more than two hundred working days a year, sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in permanent partial loss of use of arm, an award for compensation for same, may be made, based on his average wages for two hundred working days, in accordance with the terms of the Act, upon compliance by employee with the terms thereof.

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

For about sixty (60) days prior to May 14, 1937, claimant was employed as a laborer by the Division of Highways of the Department of Public Works and Buildings of the respondent. On the last mentioned date claimant, with other employees of the respondent, was engaged in watering recently-laid sod, and was working near the junction of U. S. Routes 40 and 67, between the cities of Collinsville and East St. Louis.

While in the performance of his duties, he tripped over a three-inch hose which was being used in the watering process and fell heavily against a steel plate guard rail. He was immediately taken to the office of Dr. R. H. Graves in Collinsville, where first aid treatment was administered, and was then taken to St. Mary's Hospital in East St. Louis. X-ray pictures were taken and it was ascertained that claimant had sustained a spiral fracture of the upper third of the shaft of

the left humerus and an avulsion fracture of the greater tuberosity of the left humerus.

Claimant remained in such hospital until June 11, 1937, when he was returned' to his home. He remained under the care of Dr. Graves until September 29, 1937, when he was sent to Chicago for examination by Dr. Thomas. Two days later he returned to his home and remained there until October 6, 1937, on which date he again went to work for the respondent and continued in such work until December 20, 1937. On the last mentioned date he was sent to Dr. Thomas for further treatment. He continued under the treatment of Dr. Thomas until January 14,1938, on which date he returned to his home, and on January 17, 1938, his services with the Department were terminated.

There is no question but what at the time of the accident the claimant and respondent were operating under the provisions of the Workmen's Compensation Act; that the injuries sustained by the claimant arose out of and in the course of his employment; that the respondent had notice of the accident; and that claim for compensation on account thereof was made within the time required by tbe provisions of the Act. Claimant at the time of the accident was fifty-two (52) years of age, was married, and had no children under the age of sixteen (16) years.

All necessary first aid, medical, surgical and hospital services were furnished by the respondent, and claimant was paid compensation for temporary total disability at the rate of Nine Dollars and Forty-four Cents ($9.44) per week for the following periods, to wit: For the period from May 15 to October 5, 1937, $194.11; for the period Erom December 20, 1937, to January 17,1938, $39.10; making a total of $233.21.

No claim is made for any further temporary disability, but claimant seeks an award for the specific loss of the use of his left arm.

The question of the extent of such loss and the rate and amount of compensation to be paid therefor, are the only questions in dispute herein.

From the stipulation of the parties hereto, it appears that during the time claimant was in the employ of the respondent, he worked on two Federal projects, the first of which was commenced on March 22,1937 and which closed on September 7th, 1937, and the other of which was authorized on August

16th, 1937 and closed on March 7th, 1938; that none of the men who were members of the gang on which claimant was working, worked in excess of Two Hundred (200) days during the year preceding the date of claimant's injury. From such stipulation and other facts in the record, we conclude that claimant's annual earnings must be computed on the basis of 200 times his daily wage of Four Dollars ($4.00), making his annual earnings Eight Hundred Dollars ($800.00), and his average weekly wage Fifteen Dollars and Thirty-eight Cents ($15.38). His compensation for temporary total disability therefore should have been at the rate of Seven Dollars and Sixty-nine Cents ($7.69) per week, instead of Nine Dollars and Forty-four Cents ($9.44) as hereinbefore set forth. As the result of such error in computation, claimant has been overpaid the sum of Forty-three Dollars and Sixteen Cents ($43.16) on account of temporary total disability.

The medical witnesses differed widely in their conclusions as to the extent of the loss of the use of claimant's left arm, and his resulting disability. He appeared personally in court for inspection and examination. From such inspection and examination, and from a consideration of all of the evidence in the record, we find that as the result of the accident in question, claimant has suffered a loss of motion in the fingers of his left hand, the forearm and elbow of his left arm, and in his left shoulder, and that he has thereby sustained the permanent loss of forty (40) per cent of the use of his left arm; and that under the provisions of Paragraph (e) of Section 8 of the Workmen's Compensation Act, he is entitled to to have and receive from the respondent compensation for the period of Ninety (90) weeks, at the rate of $7.69 per week, commencing May 15th, 1937, less the sum of $43.16, overpaid to him for temporary total disability as above set forth.

All of such compensation has accrued at this time, and an award is therefore entered in favor of the claimant for the sum of Six Hundred Forty Eight and 94/100 ($648.94) 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", (Illinois Revised Statutes 1939, Bar Assn. Edition, Chap. 127, Pars. 180-181) and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disburse-

ment of, Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the Next Regular Session of the General Assembly", approved July 1st, 1939 (Sessions Laws 1939, page 117);—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3309—Claim denied.)

NED A. BALDING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinaon filed November 1, 1939.

TRAPP & TRAPP, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney .General, for respondent.

CHARITABLE INSTITUTIONS—*conduct* of, *governmental function.* In the conduct of its Charitable institutions, the State exercises a governmental function.

SAME—*negligence of inmates of—acts of inmates of—State not laable for.* The State in the exercise of its governmental functions is not liable for the negligence of, or the acts of inmates of its Charitable institutions, and a claim based on such negligence or such acts is without legal foundation and must be denied.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks payment of One Hundred Forty-Seven ($147.00) Dollars damages alleged to have been suffered because of negligence and carelessness of inmates at the Lincoln State School and Colony.

The claimant alleges that in the 24th day of June, 1938 certain of the inmates of said institution were allowed by the managers thereof to be at large to perform farm labor for the institution; that in order to reach the farm land owned by the institution where they were to perform such labor, the inmates passed from the Home premises to such other land through the premises of the claimant; that in going through such lands, the inmates and patients carelessly, negligently, wilfully, and wantonly cut the wires of the division fence at or near the northeast corner of claimant's premises, leaving a gap of about six feet in width through which about thirty-five head of cattle owned by the Institution entered claimant's land; that they went across the first field and then through

an open gate into a second field where claimant had hybrid corn, that the cattle ate, trampled and otherwise destroyed three and one-half (3½) acres of such corn of the alleged value of One Hundred Forty-seven ($147.00) Dollars.

The Attorney General has moved to dismiss the complaint for the reason that the claim for damages is predicated upon alleged liability of respondent for the careless, negligent, wilful, and wanton conduct on the part of inmates of a charitable institution maintained by the State, for which the State cannot be held legally liable.

The motion has been argaed'orallyand Counsel for claimant has ably presented his theory and argument to distinguish this case from the prevailing rule that—

"The State in the conduct of its penal and charitable institutions is engaged in a governmental function, and in the exercise thereof is not responsible for the negligent acts of its servants, agents, or inmates, in the absence of a statute making it so liable."

Counsel for claimant contends that there is a distinction between the functions of a State or its administrative agencies which are governmental in their character, and those which are proprietary, and that the activity of the State may be in part governmental and in part proprietary; further, that the farm land which was located some distance away from the institution buildings, was owned by the State in its proprietary character; that in farming said land and in using the labor of its institution inmates therefor, the State was acting in a proprietary and not a governmental character; that the State should therefore be liable for any damages that may have resulted from the negligent acts of its employees, or in this case the institutional inmates, who were being sent out to perform such farming operations. Counsel cites the case of *Dr. Johns Hopkins* vs. *Clemson Agricultural College of South Carolina,* 221 U. S. 636. The College was a State Agricultural Institution, the fee being in the State but the corporation, as equitable owner, being in possession. The College constructed a dyke to protect its land, and in so doing damaged the adjoining property. The College was held responsible, and in connection with said citation, counsel further cites cases at page **243** in Volume 35 L. R. A. (N. S.) where the rule is given, that—

"Where State institutions of the character here considered are not regarded strictly as agents of the government performing a governmental function, they are generally held not to be immune from suit."

We have not heretofore nor can we now apply such distinction to the State Penal and Charitable Institutions of the State of Illinois. The care and treatment of such inmates is definitely performed as a governmental function, and while the management of such institutions may see fit to have such inmates engage in various occupations, such activity is recognized as being for the primary purpose of occupying the time of such inmates.

The gravamen of the charge here is not that the State mas or was not engaged, in **a** proprietary sense, in the operation of farming activities, but that inmates of one of its Charitable Institutions have committed a tort. The fact that they were housed on one part of the institutional premises, and were going to another is not material, nor is it material to what work they might be assigned while there. The record does not disclose that such inmates had any right to go on or across claimant's land. Their acts in cutting his fence in order to more freely cross his premises was a tort upon their part for which no redress against the State has ever been provided by our Legislature.

We are therefore confronted with the application of the previously stated rule of law that in the absence of a statute making the State liable, there is no legal liability on the part of the State for the acts of inmates of its State Institutions. There being no legal liability, the Court of Claims mould not have authority to allow an award. In creating the Court of Claims the Legislature of Illinois did not create a cause of action nor a right of action in any given case, but merely provided a forum wherein claimants against the State might submit their grievance, and where, if a legal basis for redress was shown to exist, an award might be obtained.

The fact that the Legislature has seen fit to provide such a forum where those who may have a valid claim against the State growing out of contractual and other relations may sue, does not lay the State open to awards being made against it in such Court for the negligent and tortuous acts of its agents, servants or institutional inmates. As stated in the case of *Minear* vs. *State Board of Agriculture*, 259 Ill. at P. 559—

"Even if such authority (the power to be sued in certain cases) **was** given, it would cover only actions ordinarily incidental in its operation and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to debts and other liabilities for which the State's prison is now liable and extending liability for causes **not** heretofore recognized."

We are unable to distinguish the case at bar from the above and from the case of *Wood* vs. *State*, 9 C. C. R. 501, in which an inmate of the State Hospital at Jacksonville, Illinois, escaped and injured a woman on an adjoining farm. An award was therein denied for the reasons herein stated.

In the absence of a specific law providing for liability by the State, no liability would accrue under the facts stated in the pending complaint. The motion of the Attorney General is therefore allowed and the complaint dismissed.

(No. 2435—Claim denied.)

ROSE WERCKMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinzon filed December 8, 1936.

Rehearing denied November 1, 1939.

E'. K. LEMON, for claimant.

ARTHUR H. SHAY, for intervening petitioner.

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

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

SAME—*Department of Finance not engaged in extra-hazapdous enterprise under—employee of not wathzn provasaons of.* One employed by the State as a Field Auditor and to perform other duties in the Occupational Tax Division of the Department of Finance does not come within the provisions of the Workmen's Compensation Act, as such department is not engaged in an extra-hazardous enterprise.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Rose Werckman, the administratrix of the estate of John C. Werckman, deceased, filed her Application for Adjustment of Compensation in this court on July 17, **1934,** alleging that the deceased, John C. Werckman was employed by the State of Illinois as Field Auditor, and at other duties in the Retailers' and Occupational Tax Division of the Department **of** Finance, and had been so employed since the last week in August in the year **1933;** that the officesof the Retailers' and Occupational Tax Division were located in what is known as the Public Service Building in the city of Springfield, Illinois,

and the deceased made his headquarters there while employed by the State; that on the 22d day of February, 1934, upon the direction of his immediate superior, the deceased went to Wheaton, County of DuPage, on matters concerning his employment and conducted an investigation as to whether or not certain persons should pay a retailer's or occupational tax, as provided by the statute of the State of Illinois; that he conducted a hearing, and it then became his duty to return to Springfield to the place of his employment and report his acts and doings and the result of his investigation.

The application sets forth that the deceased was on his way to Springfield and had arrived in the city of Springfield, and was on a street known as Fifth Street, driving an automobile, when the automobile in which the deceased was riding, collided with another automobile and the deceased was seriously injured. This accident occurred on the 23rd day of February, 1934. The deceased died the next day at a hospital in the city of Springfield. His hospital bill was $22.50 and his physician's bill was $15.00.

At the time of his death, John C. Werckman, left him surviving the claimant as his widow, who was wholly dependent upon him and one child named Lura Jean Werckman, aged thirteen years, and it is alleged that she is partially dependent upon the deceased. At the time of Werckman's death, he was receiving Two Hundred Dollars ($200.00) per month.

An intervening petition was filed on behalf of the minor child of the deceased, by a former marriage, but the facts as above set forth constitute the grounds upon which this decision must rest.

The first question to be determined is whether or not the duties of the deceased brought him under the Compensation Act of this State, it being admitted that the deceased met his death in the manner herein set forth.

Under the Court of Claims Act, the Court of Claims must administer the Workmen's Compensation Act in the manner provided in the Workmen's Compensation Act. Section 3 thereof provides that the provisions of the Act shall apply automatically and without election to the State * * * 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. Then follows ten subparagraphs. From that part of said Section 3 above referred to, it is apparent that the Act only applies automatically to an employee engaged in any one of the departments or enterprises or businesses which are declared to be extra hazardous.

The Attorney General contends that the principal business of the State is the exercise of a governmental function, and that such function in administering the Retailers' Occupational Tax is not extra hazardous. Claimant contends that because the Department of Finance which regulates the collection of the Retailers' Occupational Tax happens to be located in a rented building, which is subject to statutory or municipal regulations on account of fire escapes, boilers, elevators, etc., such employment is extra hazardous.

Claimant further contends that at the time the deceased met his death, he was on actual duty, and it was a part of his business to drive around over the State and make proper reports and investigations, and further contends that if the deceased traveled by automobile, he was under the Compensation Act, whether struck by another automobile or a train, and cites several cases to that effect.

No question arises upon this record as to whether or not the deceased was in the performance of his duty but there must be something else in addition to the performance of his duty *to* bring the deceased under the Workmen's Compensation Act. He must have been employed in some employment which the Statute declares to be extra hazardous and mentioned in said Section **3.** It is admitted by claimant that an employer may be engaged in both a hazardous and a non-hazardous occupation, and urges that in this instance, the employer, the same being the State of Illinois, was and is engaged in both hazardous and non-hazardous employment or businesses. The business which consists of necessarily housing people in buildings that are regulated by law and ordinances for the protection of persons housed in the building and those employed in it is regulated by statute, because the persons are necessarily situated there in constant danger. Claimant further urges that laws are made to regulate the being and driving of automobiles and other vehicles on city streets and hard roads and travel by railroads because persons engaged in that line of endeavor are in constant danger, and concludes that this makes persons so engaged come

within the classification of extra hazardous occupations, and as such compensable through the provisions of the Workmen's Compensation Act.

The statute provides as follows: "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 and come under the Compensation Act."

Claimant's petition for compensation does not set up sufficientgrounds, but inasmuch as both sides argued this contention, me will pass upon it.

It will be noted that the statute uses the word "enterprise." Now, in this instance, the State is nothing more or less than a tenant, in a building several stories high, subject to municipal and statutory regulations. The State does not own it, but merely occiipies a part thereof. It is difficult to see how this could be an "enterprise" or come within the definition of the term "business" as set forth in claimant's brief. Claimant quotes from the case of *Walsh* vs. *Industrial Commission,* **345** Illinois, 356, wherein the term "business" is held to mean an employment which occupies a substantial portion of the time and attention of the one engaged in it. It cannot be said that the State comes within this definition of the term "business."

Whether or not a person is within the provisipns of the Compensation Act must be determined by the business itself. A familiar illustration is set forthh in Angerstein's treatise on Workmen's Compensation. The author of that work says that an employer might own a factory containing power-driven machinery, etc., which automatically would bring it under the act. All the employees of such factory would be under the act regardless of what their duties were, just so long as they were engaged in any department of the business, and this would include stenographers, salesmen, clerical help, etc. Tht same employer might own and operate a clothing store entirely separate and apart from the factory, in which store there were no appliances or machinery of any description. This clothing store, therefore, would not come under the act automatically, and the employees, therefore, would not

be under the act unless and until the employer had filed his written acceptance of the act with the Industrial Commission. If an employee of any department of the factory were injured, he would have no remedy except the measure of compensation provided by the act. An employee of the clothing store, would have no rights whatever under the Compensation Act unless the employer had affirmatively filed his written acceptance of the act, and the employee's only possible remedy would be an action at common law, in which in order to recover damages he would have to establish that the injury was due to the employer's negligence and that he, the employee, had not been negligent.

The State of Illinois, with its multiplicity of departments, must be considered, insofar as the Workmen's Compensation Act is concerned, the same as an employer engaged in separate and distinct lines, some of which are under the Compensation Act, as an illustration, the Highway Department, and some of which are not under the Act. Nothing appears in this case which would lead us to the conclusion that the department in which the deceased was employed, was extra hazardous within the meaning of the Compensation Act. The State was not maintaining a building or structure for profit, or otherwise. Neither could it be successfully contended, that even though it could be said that the State was maintaining a structure, that such maintenance required a substantial portion of the State's time and attention.

We, therefore, conclude that the motion of the Attorney General must be sustained, and this cause dismissed.

(No. 3107—Claim denied.)

FREDERICK H. BARTLETT, AS TRUSTEE UNDER THE PROVISIONS OF A TRUST AGREEMENT, DATED JANUARY 2, 1923 AND KNOWN AS THE FRED'K H. BARTLETT REALTY CO., TRUST, CHICAGO TITLE AND TRUST COMPANY, A CORPORATION, AS TRUSTEE, UNDER THE PROVISIONS OF A TRUST AGREEMENT DATED OCTOBER 29, 1928 AND KNOWN AS TRUST No. 21768, AND FRED'K H. BARTLETT COMPANY, A COMMON LAW TRUST, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 15, 1939.

Rehearing denied November 14, 1939.

MARK W. BEMIS and HADLEY & LEREN, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY—*unimproved real estate—not taken for public use—alleged to have been caused by construction of public improvement—when evidence insufficient to sustain claim for—when award for denied.* Where claimants as owners of unimproved real estate in an area where there are no settlers, claim damage to same, as the result of the construction of a public improvement they must show by a preponderance of the evidence, that as the result of such construction the fair, cash market value of same was less just after completion thereof than *just* prior to the time of making, and failing to do so, no damage is proven and an award will be denied.

JUSTICE C. H. LINSCOTT delivered the opinion of the court:

The complaint in this case charges that Frederick H. Bartlett as Trustee under the provisions of a trust agreement dated January 2, 1923, and known as the Fred'k H. Bartlett Realty Company Trust, and the Chicago Title and Trust Company a corporation as trustee under the provisions of **a** trust agreement dated October 29, 1928 and known as trust No. 21768 and Frederick H. Bartlett Company a common law trust under the provisions of respective trust agreements, are nominal claimants and the actual claimant herein is Frederick H. Bartlett Company. The Bartlett Company was engaged in Real Estate business primarily as a sub-divider and developed many subdivisions in the counties of Cook, DuPage and Lake in the State of Illinois and other subdivisions in Wisconsin, Indiana and Michigan. .

The complaint charges that on October 29, 1928 the Chicago Title and Trust Company a corporation as trustee, mas the legal owner and was lawfully possessed of certain land containing 69 acres more or less and described as follows:

The North East Quarter of the North East Quarter and that part of the North East Quarter of the North West Quarter, lying East of Joliet Road in Section Twenty-three (23), Township Thirty-nine **(39)** North, Range Ten (10) East of the Third Principal Meridian, DuPage County, Illinois.

The trustee held the legal title to this property for the use and benefit of Frederick H. Bartlett Company, one of the claimants. It is further charged that in the year of 1928 the Frederick H. Bartlett Company subdivided the tract of land above described into a subdivision known as Roosevelt Hills Addition comprising **13** blocks containing 290 lots of various sizes. which subdivision is located entirely within the corporate limits of the village of Glen Ellyn, DuPage County, Illi-

nois and the proof shows is approximately 22% miles west of the city of Chicago. The north boundary of this subdivision is the Illinois State Bond Issue Route No. 330 also known as Roosevelt Road and is directly connected with Lincoln Highway on United States Route No. 30 at a point west of Geneva, Illinois.

The East boundary of this subdivision is known as Illinois Route No. 53 which crosses the Roosevelt Road, and the West boundary of this addition is the Joliet Road, a north and south Public Highway with a macadam surface maintained by the town of Milton, DuPage County, Illinois and the south boundary of the Roosevelt Hills addition is the South corporate limits of the Village of Glen Ellyn.

It is charged that this tract of land was ideally situated for the development of a first class subdivision containing some lots platted for business, located along Route 53 and 330 and also for residental purposes. That after the subdivision of the above described premises, the claimant Frederick H. Bartlett Company spent considerable money in advertising these lots for sale and the employment of a sales force. They did some grading and improving streets and made other expenditures that would increase a demand for these lots. A considerable number of the lots were sold on real estate contracts until the improvements made upon Route 53 and hereinafter referred to.

That on and subsequent to November 2, 1933, the Chicago Title and Trust Company, a corporation, as trustee under the provisions of a trust agreement dated October 29, 1928 and known as trust No. 21768, was the legal owner and lawfully possessed certain premises described in the complaint. It is charged in the complaint that the legal title of said premises was vested in Frederick H. Bartlett, as trustee and the Chicago Title and Trust Company as trustee and that they held title to respective lots for the use and benefit of said Frederick H. Bartlett Company. The object and purpose of the trust agreement does not appear in the pleading but sufficient evidence appears to show that part of the premises are held in trust.

It is charged that about the first of November, 1932 pursuant to an Act of the General Assembly of Illinois, the State Highway Department built a by-pass under the Roosevelt Road on what is known as State Highway No. 53 in front of

some of these premises and along the eastern boundary thereof beginning at a point approximately 500 feet south of the North East corner of the subdivision which point was at the intersection of routes 53 and 330, so that the said Route 53 was depressed and lowered on a certain grade below the level of certain of the lots to a depth of approximately 22 feet at the extreme North lot and the Highway Department also did erect an iron railing on top of and along the retaining wall adjoining said Highway and directly in front of a part of the premises hereinbefore referred to.

It is charged that because of this construetion the value of the entire subdivision known as Roosevelt Hills Addition was greatly damaged and destroyed and the value of the lots facing route 53 and platted for business purposes was entirely destroyed so that said lots had no value whatsoever for business or residential purposes and there is no means of ingress or egress to and from said lots facing said route 53 from the intersection of the said route 53 with said route 330, south to a point where the said route 53 reaches the normal grade level; that the value of said lots facing Route 330 has been destroyed for business purposes and are not suitable for residential purposes due to their location upon a four lane arterial highway and due to the depressing of Route 53 as aforesaid and that the value of the lots located south of the said Route 330 and west of said Route 53 so platted for residential purposes, was nearly destroyed due to the destruction and loss of value of the business lots adjoining and facing said Routes Nos. 53 and 330.

That since the construction of Route 53, many of the persons purchasing the lots in Roosevelt Hills Addition have failed to make the payments as therein specified and have allowed their rights io become delinquent and forfeited due entirely to the loss in valuation of the said. premises by virtue of the construction and depression of said Route 53.

That since the construction of this under-pass, it is charged that the Frederick H. Bartlett Company has been unable to sell any of the lots remaining unsold prior to the construction 'of Route 53 and has been unable to sell arty of these lots sold by contract previous to construction of Route 53.

The complaint charges damages to the extent of $50,000. Considerable evidence was taken and the court viewed these premises personally. No buildings of any kind have been put

upon either of the lots described, and although the subdivision was made several years ago, no business property has been erected. It is a matter of common knowledge that the Country has gone through a great business depression and these premises as well as all other premises have suffered accordingly. There is much area in DuPage County that has been platted and many of these lots so platted have not been sold and this is true in areas that have joining underground Highway passes and areas that do not join underground Highway passes. As said above the object and purpose of the Trust Agreement does not appear but from the information averred in the complaint the Trust Agreement apparently was executed prior to the time of the construction of Route 53 and the question of whether or not the Trust Agreements referred to were made for the purpose of securing the payment of debts or obligations out of the sale of these lots, is one of conjecture.

The testimony shows that these premises are about a mile and a half from Glen Ellyn. Glen Ellyn is a strictly residential village and from 85 to 90% of its working population commute to the city of Chicago and are executives or semi-executives in Chicago Business Institutions. Glen Ellyn is approximately 22½ miles from Chicago. The rail facilities between Glen Ellyn and Chicago are the Aurora and Elgin and the Chicago and North Western with 165 trains a day. Roosevelt Road, St. Charles Road and North Avenue are main highways between Chicago and Glen Ellyn. When the testimony was taken it was stipulated that claimant's claim should be limited to the following described property:

Lots 31-32-33-35-36-38-39-40-41-42-43-44-45-46 in Block 1.
Lots 1-2-6-7 and 9 in block 5.

Roosevelt Hills subdivision of the North East Quarter of the North East Quarter and part of the North West Quarter of the North East Quarter of Section 23, township 39 North range 10 east of the 3rd principal meridian, DuPage County, Illinois. It was also stipulated that such title to said lots 31, 32, 33, 35, 36, 38, 40, and 44 in Block 1 and lots 6 and 7 in block 5 is vested in the claimant, Frederick H. Bartlett, trustee, and Title of said lots 39, 41, 42, 43, 45 and 46 in Block 1 and lots 1, 2 and 9 in block 5 Roosevelt Hills Addition is vested in the claimant Chicago Title and Trust Company as trustee and that the beneficial interest in said amounts is held

and retained by claimant Frederick H. Bartlett Company, a common law trust. The improvement on Route 53 as it passed under Route 6 or Route 330 at the South line of Roosevelt Road was 18 feet and it gradually came to a grade at a distance of 440 feet South of the South line of Roosevelt Road and there is a similar construction on the North side of Roosevelt Road. On either side of Route 53, concrete walls from 12 to 14 inches thick at the top, 42 feet apart between the curb and 44 feet between the two walls, were constructed; and a bridge on Roosevelt Road across Route 53 of reinforced construction with four lanes of concrete 40 feet wide was also constructed; and on either side of the travelled portion of the Highway, a sidewalk and a hand rail were built.

Bryant Avenue is Route No. 53. At a point approximately 800 feet West of Route 53 on what is known in this subdivision as Nicoli Way, a concrete road was built South from the main Highway on Roosevelt Road, across Taft Avenue and East on Pershing Street to Bryant Highway. Lots 31, 32, 33, 35, 36, 38 and 40 in Block 1 are on the South Half of Block 1 and front on Taft Avenue and each are 50 feet wide and approximately 129 feet in depth. They extend from a public alley way southerly to Taft Avenue.

Lot 44 in Block 1 fronts on Bryant Avenue and is 25 feet in width and 110 feet in depth between the wall on the West side of Bryant Avenue and at the East front of this lot there is a strip some 20 or 25 feet in width. The title of the last named lot is vested in Frederick H. Bartlett, trustee and title to lots 39, 41, 42, 43, 45 and 46 in Block 1 and lots 1, 2 and 9 in block 5 in this said addition is vested in the Chicago Title arid Trust Company. Block 5 lies immediately south of block 1 and fronts on said Taft Avenue. Taft avenue is 66 feet wide and the north portion of Block 5 is approximately 160 feet from the South side of the Roosevelt Road Highway. Lots 1 and 2 in block 5 are approximately 66 feet wide and 116 feet in depth and front in an easterly direction. Lot 9 is approximately 56 feet in width, 134.9 feet in depth and faces a northerly direction. Neither the lots fronting on Bryant Avenue or Route 53 nor other lots in this Addition have been improved. Nicoli Way was improved by concrete Highway at the cost of the people of the State of Illinois and it must be admitted that the value of the lots along the western end of Blocks, 1 and 2 have suffered little if any in damages by construction of the underground pass hereinbefore referred to.

Charles W. Boardman was called as a witness on behalf of the State. He testified he resided at 731 Highland Avenue, Glen Ellyn, Illinois; that he had lived in Glen Ellyn since 1924 and immediately prior thereto he had lived in Chicago. He had a license as Real Estate Broker and had been in the Real Estate business in Glen Ellyn for 12 years and had handled over 100 properties. He testified the highest and best use of these properties was for subdivision purposes. He was familiar with the work done by the State on Route 53. He knew of no sales in this particular vicinity since or before January 3, 1932 except what had been sold by the LaSalle Realty Company. He testified that the fair market value of all of these lots is $5.00 a front foot. He also testified that lots north of the subdivision known as the Roosevelt Garden Home Site had been offered at figures from $200.00 a lot upwards for 50 feet lots where there were no improvements and that lots immediately north were listed for sale in his office during 1928 and 1929 at prices of $200.00 and upward. That he did not take the trouble to list them for the reason that there was no demand for lots in that vicinity. While in some instances this witness' testimony was perhaps not technically correct, considering his experience in the sale of lots in this vicinity and his knowledge of values, we would not be justified in ignoring his testimony. This witness also had an opinion as to those lots bordering on Nicoli Avenue and that these lots had been increased somswhat in value because Nicholi Avenue which is paved with concrete, brought them closer to the main travelled Highway on a road that had been paved. Evidence was introduced by the claimant and Hugo W. Celander who had been in the employ of the Frederick H. Bartlett Company for 21 years selling these subdivision properties. He testified that he was familiar with the several lots above referred to and his attention was directed to the particular lots in question. He testified that lots 41, 42 and 43 in Block 1 were sold on January 12, 1930 for the sum of $6,775.00 and Lot 44 in Block 1 was sold on April 18, 1931 for $4,000.00 and Lots 45 and 46 in that same block were sold on October 1,1930 for $7,000.00. They were sold on contracts but the contracts were not carried out and were evidently cancelled after the year of 1932. Other sales for groups of lots were made for the sum of $40,000.00.

Roy Spaulding also testified. He lived at Glen Ellyn and had been in the Real Estate business for 33 years in Glen

Ellyn. He had built 198 houses in Glen Ellyn, bought the vacant property and had opened up about six subdivisions in that vicinity. These subdivision contained from 10 up to 250 lots, and was mostly since 1918. Generally speaking this witness was of the opinion that these lots on Bryant Avenue were worth $30.00 per front foot cash in 1932. This was the value before the construction improvement and that after the construction improvement, these lots for business purposes were valueless. It was his opinion that there had been a depreciation of the value of Lots 1 and 2 in Block 5 of 25% to 50%. Lot 2 in Block 5 would be a 50% loss on a basis of $30.00 per front foot and lots 31, 32, 33, 35, 36, 38, 39 and 40 prior to the separation of Grade would have sold for at least $10.00 per front foot and that after the separation of the Grade these properties were depreciated 25% that is from $10.00 a front foot to $7.50 per front foot.

Joseph Wagoner also testified for the claimant. He was a Real Estate Broker who lived at Glen Ellyn and had been in the Real Estate business since 1915 selling residential and subdivision property. He said that these properties under discussion were approximately a mile and a half from the business section of Glen Ellyn; that he had examined this property for the purpose of testifying and was familar with all the circumstances. He was of the opinion that the lots along Bryant Avenue prior to the construction of the improvement were worth $35.00 a front foot because these had been sold for business purposes and that after the construction of the improvement, they were ruined as far as business property was concerned.

We have gone into the evidence sufficiently to show the general trend of the proof now before the court and from an examination of these premises and the surrounding premises including premises located near Chicago and also premises near to Glen Ellyn, and we are strongly impressed with the fact that these lots and lots in this vicinity back in 1928 and 1929 were sold at high and speculative values and it is difficult for us to see how lots 6, 7 and 9 in Block 5 have been affected by this improvement and it is also difficult for us to see in what degree if any, lots 31, 32, 33, 35, 36, 38, 39 and 40 have been greatly affected. The more reasonable view, it seems, would be that these lots are just a part of a large area that has been subdivided, are unimproved and are on the same

basis as much other similar property in that locality now; there being no residents for quite an area close to lots **41, 42, 43, 44, 45** and **46** upon which no improvements were ever made, these having been zoned for business purposes, these lots never had any value for business purposes except perhaps a speculative value. Zoning country property for business in unimproved localities and on ordinary farm land that does not contain population, does not of itself create values which a court can recognize. If there had been improvements upon this property or if settlements had been made in these vicinities where there would be a use for grocery stores, meat markets, garages and the like, this court would look at this problem in a different way and what has been said of the other lots also applied to Lots **1** and **2** in Block **5.**

We are of the opinion that the testimony introduced by the State is fair and reasonable and this testimony is also considered in the light of a personal inspection of these premises.

An amard, therefore, on the grounds hereinbefore specified, is denied.

(No. 3199—Claimant awarded $2,507.94.)

JESSE G. FIVASH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1939.

WHEATLEY & COMBE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN **A. TREVOR,** Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for temporary total disability may be made under.* Where it appears that employee of the State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

SAME—*failure or refusal of employee to submit to medical treatment offered by employer—does not forfeit right to compensation—reduction or suspension of—when within discretion of Court.* Failure of employee to leave his home **City,** where he was as far as is shown, being given adequate medical treatment for his injuries, and journey to distant City, for such treatment, does not of itself forfeit his right to compensation, but if such failure or refusal tends to either imperil or retard his recovery, it is within the discretion of the Court to reduce or suspend compensation.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein was employed by the Division of Highways, Department of Public Works and Buildings, State of Illinois. On December 8, 1936 while engaged as a rodman in a party of engineers) on State Aid Route No. 20 in Williamson County, Illinois, he slipped on some icy ground and fell on his right hip causing an intertrochanteric fracture of the right femur. There mas some delay in procuring an ambulance but as soon as possible he was taken to the Herrin Hospital where first-aid, medical and surgical attention was furnished to him by the State and he was there placed under the care of Dr. W. R. Gardiner of Herrin, Illinois, at the request of the Highway Department. Dr. Gardiner took an X-ray picture of the injured pelvis which disclosed the fracture, with some displacement of the ends of the femur. The fractures were reduced and weights attached to the limb, and after about two weeks a cast was applied to the limb, but this had to be removed because the claimant developed pneumonia. The patient remained in the hospital until February, 1937, and was then removed to his home at Marion, Illinois, where he continued under the treatment of Dr. Alonzo N. Baker, of that city. His condition became worse and on February 18, 1937 the State Highway Department caused him to be removed to St. Andrems Hospital at Murphysboro where he was placed under the care of Dr. R. S. Sabine who discovered that the patient's right foot was beginning to drop and to pull inward. On March 2, 1937 he was returned to 'his home at Marion under the care of Dr. Baker. During all of this period he had continued to run temperature and could not move except by the use of two crutches. On May 1, 1937, under instructions from the State Highway Department at Carbondale, claimant returned to work and a "make-shift job" was provided for him. He was supposed to draw gasoline and make out tickets at the Carbondale Highway Office, but, was unable to do any substantial work because it was necessary for him to use his crutches at all times and apparently the only work he did during that month was a few clerical duties. On May 29, 1937 Dr. Bake; found that gangrene had developed on the right foot. The latter was red and discolored. The patient was taken to St. Luke's Hospital in Chicago on orders from Mr. Lingle of the Highway Office, and was there placed under the care of Dr. Thomas.

Applications were given and the foot treated to reduce the swelling, and according to Mr. Fivash's testimony the development of the gangrenous condition was stopped. On June 9, 1937 he mas sent to the Y. M. C. A. Hotel in Chicago by the State, but was unable to carry out the medical instructions because of lack of facilities and being unable to wait on himself. Mr. Pelzman from the Research Laboratory called on him each day and treated him with light rays and massage, and patient called at the Research Hospital twice to see Dr. Thomas. Claimant returned to his home July 23, 1937 under the care of Dr. Baker who also prescribed massage of the injured limb. On August 11, 1937 claimant was again taken to Chicago by the Highway Department, where he stayed in the Y. M. C. A. Hotel under the care of Mr. Pelzmaii who resumed his former treatments under the direction of Dr. Thomas. The latter ordered a brace applied to the lower part of the injured limb in an effort to prevent the foot-drop. Patient again returned home August 31, 1937; went back to Chicago in September to St. Luke's Hospital under the care of Dr. Thomas where he received physiotherapy treatment. He returned home November 1, 1937 and was sent back to the Y. M. C. A. in Chicago from December 8th to December 21st, 1937, and received treatments similar to those previously given.

At the hearing claimant testified that there mas no improvement in his leg during his Chicago treatments; that he still had to use crutches; that his left arm was gradually becoming lame; and that his lungs were troubling him during all of this time. That when he complained of his lungs in Chicago he was told that he was being treated there for the injured leg and if he needed treatment for other conditions he would have to go elsewhere for same.

The record shows that on December 29, 1937 claimant was notified by M. K. Lingle that Dr. Thomas wanted him to return to complete the treatments for his leg, and that transportation and board and lodging at the Y. M. C. A. in Chicago had been arranged for. On January 3, 1938 Mr. Fivash notified Mr. Lingle as follows:

"It will be impossible for me to return to Chicago today for further treatment, as per your request, due to the fact that to date I have failed to see any material improvement in my foot and leg, and I am badly in need of other medical attention which has been denied me in Chicago, as Dr. Thomas has told me that all he was getting paid for was to treat my foot;

therefore, it will be necessary for me to remain at home to obtain this attention. Also due to the fact that my compensation has been cut down to such a small amount, it is impossible for me to stay in Chicago and provide anything for my family at home. Thanking you for all past favors, I am, Yours very Resp."

On January 7, 1938 Mr. Lingle notified Mr. Fivash that if he failed to avail himself of the further treatment offered by Dr. Thomas, such action would serve as a definite refusal of treatment and that the State might avail itself of the provisions of the Compensation Law of Illinois to suspend compensation when an employee refuses to submit to such medical, surgical or hospital treatment as offered by the employer.

Mr. Fivash made no reply and did not return to Chicago for any further care.

All expenses for ambulance service, medical, surgical, x-ray, railroad, street car, bus, hotels, nursing, and appliances from the date of the injury December 8, 1936 through December 31, 1939, so far as is known to the Highway Department have been paid by the State in a total amount of $1,501.63.

Since he discontinued the treatments in Chicago his limb has continued to have a drop-foot condition, and at a physical examination in open court before the members thereof in April, 1939, the right foot was found to be in a diseased, swollen, inflamed state, and drainage in the bottom of the foot that indicated a continuing gangrenous condition. There was some movement from the hip but in a highly reduced measure. Claimant could not use the foot but of necessity walked with a crutch, and he still wore a brace extending from below the knee and fastened underneath the ball of the foot for the purpose apparently of aiding in the correction of the drop-foot condition. The continued wearing of this brace with any binding effect therefrom doubtless tends to restrict circulation in the foot.

Extensive evidence appears in the record from the testimony of the various doctors and others regarding the injury suffered by Mr. Fivash and the later lameness of his left arm, and the resultant effects from the pneumonia which he had in the early period of his hospital treatment. Counsel for claimant contend that the combination of these conditions has resulted in his becoming permanently and totally disabled, and that he is entitled to compensation on such basis in

the sum of $4,450.00, less compensation paid, with an annual pension thereafter during his lifetime equal to eight (8) per cent of said sum of $4,450.00.

Respondent contends that claimant, having failed to return to Chicago in January, 1938 when requested so to do by the Highway Department, forfeited his right to an award, under the theory that his original fracture which resulted from the accident in question was fully healed, and that his present condition is entirely the result of his negligence and failure to continue with the treatments offered him at the hands of Dr. Thomas in Chicago.

Section 19(d) of the Workmen's Compensation Act provides as follows:

"If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the commission may, in its discretion, reduce or suspend the compensation of any such injured employee."

Under the foregoing it is for the Industrial Commission, or in this instance the Court of Claims, in its discretion to reduce or suspend the compensation of any injured employee when it is brought to the attention of the court that such employee is persisting in injurious practice. In the present instance no application was ever made to the court in regard to claimant's failure to return to Chicago, and the record does not establish that his failure to return has imperiled his recovery, or that he did not receive adequate care after declining to return to Chicago.

We do not desire to attempt to recapitulate all the evidence of the various witnesses, but the court has carefully studied the testimony of all such witnesses and has had the benefit of personally viewing claimant's condition.

Our conclusion is:

That claimant is entitled to an award under the Workmen's Compensation Act for temporary total disability for a period of sixty-four (64) weeks, and for specific loss of use of the right leg. Dr. J. B. Moore, of Benton, Illinois, a witness called by claimant, was unable to explain the apparent involvement of the left arm.

Dr. E. H. Deppe, of St. Louis, Missouri, called by claimant, testified that the latter had an almost complete paralysis of the right foot and toes.

Dr. Zach Hudson, of Marion, Illinois, claimant's family physician, testified that he thought the complaint in the left arm was due to crutch pressure; that he made a test for tuberculosis and found no tuberculi germs.

Dr. R. N. Baker testified to a complete paralysis of claimant's right leg from the knee down but found nothing seriously wrong with his left arm.

Dr. Charles W. Miller, of St. Louis, examined claimant on May 21, 1938 and testified that he found no evidence of any pulmonary trouble, and that a complete physical examination and x-ray of the chest disclosed the latter to be normal.

As above indicated, we find that the evidence does not support an award for permanent total disability.

Claimant's annual earnings were $1,200.00 per year and his average weekly wage was $23.08. He had one child under sixteen (16) years of age at the time of the accident, and his compensation, based on-fifty-five (55) per cent of his average weekly wage, should be computed at $12.69 per week. Claimant was paid compensation until January 22, 1938 and his temporary total incapacity should extend to the maximum period of sixty-four (64) weeks. We therefore find that claimant is entitled to an award as follows:

For temporary total disability at $12.69 per week for 64 weeks.	$ 812.16
Specific loss of use of the right leg, 190 weeks at $12.69 per week.	2,411.10
	$3,223.26
Less compensation paid from Dec. 9, 1936 to Jan. 22, 1938.	715.32
Balance due for award	$2,507.94

Compensation has accrued from the date of the injury to November 3, 1939—147 weeks at $12.69 per week, or $1,865.43. Claimant has been paid the sum of $715.32 to apply on his compensation, leaving a balance of accrued compensation to November 3, 1939 of $1,150.11. Claimant is entitled to an award in the amount of $2,507.94 payable as follows, to-wit:

$1,150.11 forthwith and the balance in weekly installments of $12.69 per week. The first installment being due and payable on November 10, 1939. An award is hereby made in favor of Jesse G. Fivash in accordance with the foregoing, in the sum of $2,507.94 payable as hereinabove stated.

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of'the General Assembly'' (S. B. 123 as amended), approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 3141—Claim denied.)

SOCONY-VACUUM OIL COMPANY, INCORPORATED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1939.

WILSON & MCILVAINE, for claimant.

JOHN E. CASSIDY, Attorney ,General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR *VEHICLE LICENSE* FEES—*amount* of *fixed* **from** *information submitted by payer—claim for refund where overpayment made—under* **no** *compulsion or duress—award for denied.* Where the amounts of motor vehicle license fees are correctly computed in accordance with law, based on information submitted by payer, and payment of same made without any compulsion or duress, such payment is voluntary, and if amount is in excess **of that** rightfully due, no award can be made for refund of *such* excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant in this suit alleges that it paid license fees to the State of Illinois in an amount in excess of the amount required to be paid under the terms and provisions of the statute. These fees were paid to the Secretary of State's office, the automobile department, at 120 South Ashland Avenue, Chicago, Illinois, which was the agency authorized to receive such license fees.

Claimant further alleged that it owned and operated in Illinois, two 4-wheel trucks which come under the classification of second division vehicles under Section 2, Chapter 95½, 1937 Illinois Revised Statutes; that: one of said trucks

weighs 23,810 pounds when fully loaded and the other weighs 23,360 pounds when fully loaded; that claimant erroneously believed that the trucks each weighed over 24,000 pounds when fully loaded, and paid to the State of Illinois, $250.00 each for truck license plates for these two vehicles, that being the sum required by law for 4-wheel vehicles weighing more than 24,000 pounds when fully loaded.

Claimant further alleged that sometime after these payments were made, it discovered that each of the trucks weighed less than 24,0001 pounds when fully loaded; that it paid $500.00 for the license plates for both vehicles; that under Section 9, Chapter 95½ Illinois Revised Statutes, 1937, it should have paid $150.00 each, or a total of $300.00 for license plates for both trucks, because each weighed over 20,000 pounds when fully loaded but less than 24,000 pounds.

Claimant asks for an award against the State for $200.00, being the amount of the overpayment.

The Attorney General has made a motion to dismiss on the grounds that the claimant does not set forth a claim which the State of Illinois as a sovereign commonwealth should discharge and pay in that therein claimant seeks an award representing a refund of a portion of an automobile registration fee paid in 1937 without, protest and correctly assessed on the basis of an application filed by claimant.

The facts averred in the complaint are taken as true and it appears that the claimant itself furnished all the facts to the Secretary of State upon which the license plates for these two vehicles were issued. The payments were not made under protest and the Secretary of State relied absolutely upon the information furnished by claimant.

In the Attorney General's brief, reliance is placed upon several cases heretofore decided by this court where it is 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 claimant contends that the present case is not of the same nature as the cases relied upon by the Attorney General, but that the present case is based upon an entirely different principle, and that there is nothing in this case that would justify the assumption of the Attorney General that

the tax was paid with full knowledge of all the facts or that it was paid as a result of any negligence or inadvertence of the taxpayer.

In the case of *American Can Co.* vs. *Gill, County Collector,* 364 Ill. 254, the Supreme Court of this State in its opinion filed October **14,** 1936 held that taxes voluntarily paid cannot be recovered or refunded unless the statute expressly authorizes such recovery or refunding. The Supreme Court also held in that case that even though it is admitted that a misplaced decimal point in the assessment books resulted in multiplication of the valuation by 100, the taxes resulting from such erroneous increase in valuation do not constitute double taxation within the meaning of Section 268 of the Revenue Act, and such excess taxes, voluntarily paid for three successive years before the error is discovered, cannot be recovered under said section.

It is conceded by the Attorney General that the amount paid by claimant for the license plates of the two vehicles in question, was in excess of the amount which claimant was required to pay under the law.

In *LeFevre* vs. *County* of *Lee,* 353 Ill. 30, the Supreme Court of this State again held that taxes paid voluntarily and not under duress cannot be recovered by the tax-payer even though the tax be illegal.

We have examined many authorities of this State, and this principle of law has always been applied, so far as we have been able to ascertain, by the Supreme Court, and we cannot, in a suit by a tax-payer seeking to recover funds wrongfully paid to an officer of the State, where he is acting within the scope of his authority, waive the rules of law established by the Supreme Court of this State. These payments were not made under duress and only upon the information furnished by the claimant.

In the case of *Standard Oil Co.* vs. *Bollinger, Director of Finance, et* al., 348 Ill. 82, it was held that the mere filing, at times of payment, of protests against the legality of a tax is of no avail in an action to recover the tax paid where evidence of other conduct of the party so paying indicates a willingness to comply with the act imposing the tax and shows that the payment of the tax is voluntary, and the fact that the complainant believed that the penalties provided by the statute

in question, would be operative against it if the tax were not paid is not sufficient to show involuntary payment.

It is apparent that in this instance the claimant did that which it believed the law required of it, but this does not change the situation.

In the case of *Richardson Lubricating* Co. vs. *Kinney*, 337 Ill. 122, the rule is laid down that one who makes payment of a legal demand cannot be said to have made such payment involuntarily merely because he does so in the fear and belief that unless such payment is made he will be subjected to the penalties of a valid act, as the law presumes that every citizen freely and voluntarily discharges every duty which he believes it imposes upon him, and no person will be heard to say that he was coerced to do that which he believed the law required of him.

In the case before us there is not the slightest suggestion of coercion or duress.

In the case last cited it was held that in the absence of fraud, taxes voluntarily paid cannot be recovered even though they are illegal because laid under an invalid law, where there is no statute authorizing such recovery.

Claimant does not, point out any statute authorizing a recovery and we are of the opinion that this case comes on principle within the decisions of the, Supreme Court of Illinois herein referred to.

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

(No. 2685—Claimant awarded $1,553.47.)

STELLA **A.** THIEDOR, EXECUTRIX, ESTATE OF EMILY HILLIER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1939.

ARTHUR H. SHAY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN **A.** TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* **ACT**—***State in operation of Elgin State Hospital engaged in enterprise within meaning*** of. The State in the operation **of** the Elgin State Hospital is engaged in an enterprise or business within the meaning **of** those words as used in the Workmen's Compensation Act.

SAME—attendant at within provisions of—when injury sustained by deemed accidental and arising out of and in the course of employment.

Where a person, employed as an attendant at the Elgin State Hospital is and has been for sometime past fully able to perform duties for which employed, and while attending patient, on order of her superior to and from dental office is stamped on and kicked by patient and at completion of return of patient collapses and becomes unconscious and thereafter unable to work, there is *a* justifiable conclusion that such person sustained an accidental injury and that same arose out of and in the course of her employment.

SAME—*injury* aggravating pre-existing disease—death of *employee*—employer liable *for* conzpensation. Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in extra-hazardous employment, and at the time and prior thereto, was suffering from a disease, which is aggravated or accelerated by such injury, resulting in total disability and subsequent death, compensation may **be** had for such injury.

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

On March 1st, 1934 Emily Hillier entered the service of the respondent as an attendant at the Elgin State Hospital, Elgin, Illinois, and continued to perform the duties of an attendant at that institution until October 26th, 1934. On the last mentioned date, she was instructed by the nurse in charge of Burr Cottage to take one Ruth Alpert, an inmate of the institution, to the dental office which was about three blocks away. Said Ruth Alpert had been an inmate of the institution for some time, was then about thirty-three years of age, and mas about five feet, nine or ten inches tall. She was strong and vigorous and very stubborn and resistive; was difficult to handle, and mas known as a runaway patient. Ordinarily, resistive and runaway patients were sent to the dental officeby bus, but on the day in question, no bus was provided, and Emily Hillier walked to such office with the patient. On the way back to the cottage the patient was very resistive. She stamped on the attendant's feet, kicked her in the legs, attempted to get away, and resisted strenuously all the way from the dentist's office back to the cottage. The nearer she got to the cottage, the worse she behaved, and the attendant had to hold her arms and push and drag her back to the cottage. As she approached the cottage, Mrs. Hillier felt herself getting weak, and she collapsed and became unconscious just after she got inside the doorway.

She was immediately placed in an ambulance and taken to the General Hospital on the institution grounds, where she remained until December 4th, 1934. After she left the hospital she stayed with her son in Elgin for about a week, and

then returned to her daughter's home in Streator, where she continued to live up to the time of the hearing herein.

She claimed that she was totally and permanently disabled as the result of injuries sustained on October 26th, 1934 as aforesaid, and on June 17th, 1935 she filed her complaint in this court. On June 19th, 1938, while her claim was still pending in this court, she died. On October 13th, 1938 her death was suggested of record, and pursuant to leave of court, Stella A. Thiedor, as Executrix of the Last Will and Testament of Emily Hillier, deceased, was substituted for the decedent as plaintiff in this cause.

The Attorney General raises the following questions, to-wit:

1. Were the employer and the employee operating under the provisions of the Workmen's Compensation Act at the time of the occurrence on October 26th, 1934?

2. Did Mrs. Hillier sustain an accidental injury?

3. If so, did the same arise out of and in the course of her employment?

I.

Were the Employer and the Employee Operating Under the Provisions of the Workmen's Compensation Act?

It appears from the evidence in the record that the grounds of the Elgin State Hospital, including the Farm Colony, comprise about 900 acres; the exact number of buildings thereon is not disclosed by the evidence, but reference is made therein to the Main Building which has four stories, basement and attic; also an electric lighting plant; a general hospital; a machine shop; and a number of cottages, including Burr Cottage, Salster Cottage, Hogan Cottage, and Holden Cottage. The electric light plant is of the size ordinarily used in cities of 10,000 to 15,000 population. There is an electrically operated laundry; a machine shop with a lathe and mill, which machine shop contains sharp-edged cutting tools and instruments.

From the foregoing statement, there can be no question but what the respondent, in the operation of the Elgin State Hospital, is engaged in an enterprise or business, within the meaning of those words as used in the Compensation Act, and as defined by our Supreme Court. *Uphoff* vs. *Industrial Board*, 271 Ill. 312; *Hahnemann Hospital* vs. *Ind. Com.*, 282 Ill. 316; *Board of Education* vs. *Ind. Com.*, 301 Ill. 611.

The claimant contends that the enterprise in which the respondent was engaged, is an enterprise in which statutory or municipal ordinance regulations were then 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; also that such enterprise is an enterprise in which sharp-edged cutting tools or implements are used;—and that by virtue of Section Three (3) of the Workmen's Compensation Act, the provisions of such Act apply automatically 'to the employer and the employee therein.

The Attorney General contends that municipal ordinance regulations have no application to State institutions and buildings, and that statutory regulations have no application to the State unless they are specifically made to apply to it.

The facts in the record, however, disclose that the machine shop on the hospital grounds contains sharp-edged cutting tools, and consequently the enterprise in question is directly within the provisions of Paragraph 7½ of Section Three (3) of the Compensation Act, and therefore the claimant's intestate and the respondent were automatically bound by the provisions of the Compensation Act. It therefore becomes unnecessary to consider the question raised by the Attorney General as to the application of the provisions of Paragraph Eight (8) of Section Three (3) of the Compensation Act relative to statutory or municipal ordinance regulations.

II and 111.

Did the Claimant's Intestate Sustain an Accidental Injury; and If So, Did the Same Arise Out of and in the Course of Her Employment?

The record shows that Mrs. Hillier was sixty (60) years of age at the time she entered the employment of the respondent; that she worked continuously from the time she entered such employment on March lst, 1934 until October 26th, 1934, except for three days when she was in the hospital on account of a cold, and two or three days when she was laid up on account of vaccination, and that the time she so lost was afterwards made up by her.

Dr. George L. Wilson, mho was 'the family physician of the claimant's intestate, testified that he examined her in the fall of 1933; that she then had diabetes millitis, a' light case;

that she had an increased blood pressure, sometimes 185, sometimes 200; that there was nothing in her blood pressure that would interfere with the performance of ordinary labor; that she had a slight heart murmur; that the heart muscle was well compensated, and that there was noehing in any of such conditions which would interfere with the performance of ordinary labor on her part; that he also examined her on the last of January, **1934,** and her condition was about the same as at the time of the previous examination.

Claimant, was also examined at the institution when she reported for work on March 1st, **1934.** Her examination at that time showed a heart lesion, high blood pressure, and some diabetes. Notwithstanding that fact, she was accepted for work and continued to perform her duties regularly and satisfactorily until October 26th, **1934** except for the few days that she was in the hospital as hereinbefore set forth.

After her release from the hospital subsequent to the occurrence of October 26th, **1934,** claimant's diabetes was worse and she began taking insulin, which she had not taken prior to that time;—she also complained very much of anginal pains.

Dr. Wilson also testified that Mrs. Hillier's condition at the time of the hearing was such that she could not perform ordinary labor, and that she would never be able to do such work; that in his opinion her then condition could result from her struggle with the patient; that such struggle mould have a tendency to increase the diabetic condition and increase and aggravate the heart condition; also that there was nothing in Mrs. Hillier's history or physical condition to explain her condition at the time of the hearing except the occurrence of October 26th, **1934.**

Dr. Wiltrakis, Senior Physician of the institution, who was in charge of the acute medical and surgical service, testified that he had charge of claimant during the time she was in the hospital from October 26th, to December **4, 1934;** that in consultation with Dr. Gabby of Elgin, a diagnosis of coronary thrombosis was established; that in his opinion a violent struggle by a person in whom pre-disposing causes then existed, would aggravate and bring on coronary thrombosis.

It appears from the medical testimony that thrombosis may result from an injury, or it may result from disease.

However, if it is due to a trauma, it is of swift onset, whereas if it is due to disease, it is of slow onset.

It is well settled in this State that where there is a pre-existing disease or condition, if such disease or condition is aggravated or accelerated under circumstances which can be said to be accidental, and disability results, such disability is the result of an accidental injury. C. & A. R. R. Co. vs. *Ind. Com.*, 310 Ill. 502; *Hahn* vs. *Ind. Com.*, 337 Ill. 59; *Cameron Joyce &* Co. vs. *Ind. Com.*, 324 Ill. 497; *Simpson* Co. vs. *Ind. com.*, 337 Ill. 454.

Considering the physical condition of Mrs. Hillier prior to the occurrence of October 26th, 1934, and her condition subsequent to that time, in connection with the medical testimony in the case, there can be no question but what the occurrence of October 26th aggravated the diabetic and coronary conditions which had previously existed, and produced the condition which existed at the time of the hearing; also that her condition at the time of the hearing was such that she could not perform ordinary labor, and would never ihereafter be able to do so. We conclude, therefore, that claimant's intestate sustained an accidental injury within the meaning of those words as used in the Compensation Act.

The question as to the construction of the words "arising out of and in the course of the employment," has been before our Supreme Court in numerous cases, and the meaning of such words has been quite definitely determined.

The rule as to when an accidental injury may be said to arise "out of" the employment is stated in the case of *Mueller Construction* Co. vs. *Ind. Board,* 283 111. 148, as follows:

"An injury may be said to arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after

the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

The rule there announced has been consistently followed by the Supreme Court. *Vincennes Bridge Co.* vs. *Industrial Cornrnissiolz,* 351 Ill. 444; *Mazursky* vs. *Ind. Corn.,* 364 Ill. 445; *Scholl* vs. *Ind. Corn.,* 366 Ill. 588.

The rule as to when an accidental injury may be said to arise "in the course" of the employment is stated by our Supreme Court in the case of *Atlantic & Pacific Tea Co.* vs. *Ind. Corn.,* 347 Ill. 596, as follows:

"An injury occurs in the course of the employment, within the meaning of the Workmen's Compensation Act, when it takes place within the period of the employment, at a place where the employee has the right to be, and while he is engaged in performing the duties of the employment or something incidental to it."

Such rule has been followed in numerous cases since decided. *Landon* vs. *Ind. Corn.,* 341 Ill. 51; *Mt. Olive* Coal Co. vs. *Ind. Cow.,* 355 Ill. 222; *Wabash Ry. Co.* vs. *Ind. Cow.,* 360 Ill. 92.

Mrs. Hillier's injuries were sustained by her while she was in the performance of her ordinary duties, and by applying the rules above set forth, we reach the conclusion that Mrs. Hillier's disability arose out of and in the course of her employment, within the meaning of those words as used in the Compensation Act, and that she was completely disabled from the time of such injury on October 26th, 1934 until the date of her death on June 19th, 1938.

The record does not disclose whether her death resulted from the injuries she sustained on October 26th, 1934 or from other causes.

Notice of the accident was given to the respondent, and claim for compensation on account thereof was duly made within the time required by the Compensation Act.

Mrs. Hillier's annual earnings, computed in accordance with the provisions of Section 10 of the Compensation Act, were Eight Hundred Forty-nine Dollars and Sixty Cents ($849.60), and her average weekly wage was Sixteen Dollars and Thirty-four Cents ($16.34).

Claimant's intestate was totally disabled from the time of her injury on October 26th, 1934 until the date of her death on June 19th, 1938, and the claimant is therefore entitled to an award for One Hundred Ninety and one-seventh (190-1/7)

weeks' compensation at Eight Dollars and Seventeen Cents ($8.17) per week, to wit, Fifteen Hundred Fifty-three Dollars and Forty-seven Cents ($1,553.47), payable in accordance with the provisions of the Workmen's Compensation Act.

The total amount of such compensation has accrued at this date, and award is therefore entered in favor of the claimant for Fifteen Hundrtd Fifty-three Dollars and Forty-seven Cents ($1,553.47).

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," (Illinois Revised Statutes 1939, State Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursements of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1st 1939 (Session Lams 1939, page 117); — and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3271—Claimant awarded $3,207.79.)

ALPHONSUS L. DIEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 15, 1939.

WILBER H. HICKMAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*guard at State penal institution entitled to benefits of—when award may be made under.* Where guard at Illinois Penitentiary sustains accidental injuries, arising out of and in the course of his employment, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by such injured person with the requirements thereof.

SAME—*loss of leg—what constitutes.* The loss of any substantial portion of the leg constitutes the loss of the leg within the meaning of the Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed on June 8, 1938, asking damages in the sum of $10,000.00 because of injuries incurred by claimant while a guard at the Illinois Penitentiary, Joliet branch, on or about November 10, 1937.

It appears from the record that claimant had been employed in the same capacity in which he was working at the time of the accident since May, 1934. During the forenoon, and to the best of claimant's recollection, on November 10, 1937, the claimant was guarding some prisoners on the honor farm and they were hauling in posts and using a hay-rack. Claimant mas standing on this rack which was about three and one-half feet from the ground. When the horses started, claimant lost his balance and in an attempt to protect himself, jumped to the ground, injuring his right foot. He continued in the employment, although there were days that he was unable to work, until February 8, 1938, when he went to the hospital at the institution. It appears from the record that on the suggestion of the Warden, Mr. Ragen, because the institution hospital was not properly equipped to take care of the claimant, the claimant, who was a veteran of the World War, went to Hines Veterans Hospital on February 10, 1938, and remained there until May 28, 1938. His right leg was amputated on March 4, 1938 above the knee. The claimant returned to work at Joliet Penitentiary on August 12, 1938 at the same rate of pay that he received prior to the accident.

It appears from the record that claimant drew his full pay up to March 1, 1938, although he had been at the Hines Hospital since February 10th of that year.

The complaint in this case was filed on June 8, 1938, and proper notice was given by the claimant within thirty days after the accident.

During the year immediately prior to the date of the injury, he had received $112.75 per month, and in addition thereto he had received board and room, laundry, barber work, cleaning and pressing and a garage for his automobile, and he is willing to compute those services at the rate of $24.00 per month. On July 1, 1937, his pay was raised to $118.75 per month. It appears that at that time his wife came to live at Joliet from their home in Paris, Illinois; that she came sometime during the month of July, 1937, and thereafter the claimant continued to receive the benefits previously received, except that he no longer occupied a room at the penitentiary. Although married, he has no children.

The State did not pay any of his bills at the Hines Hospital; that because of the fact that he was a former soldier, the Federal Government paid these bills and furnished him with an artificial leg.

Claimant's right leg was amputated half way between the knee and the hip. Prior to the date of the injury he had never had any trouble with his right foot, and had no other injury after the accident before his foot and leg became infected. The foot was at first sore and slightly discolored on the bottom. The skin then broke open and infection set in on the ball of the foot between the second and third toes just at the toe.

The court finds that it has jurisdiction of this case under the Workmen's Compensation Act and that due notice was properly given and the complaint filed within one year.

The Compensation Act provides that:

"If the period of temporary total incapacity for work lasts more than six working days, compensation equal to fifty per centum of the earnings but not less than $7.50 nor more than $15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit under paragraph (a), Section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in said paragraph (a), Section 7: *Provided,* that in the case where the temporary total incapacity for work continues for a period of more than thirty days from the day of the injury, then compensation shall commence on the day after the injury."

Other provisions of the Compensation Aot provide that:

"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."

In the case of *Payne* vs. *Industrial Commission,* 296 Ill. 223, at 229 it was held that no distinction is made under the Act between the loss of the whole leg and the loss of a part of the leg. The loss of any substantial portion of the leg constitutes the loss of the leg within the meaning of the Act, and the court held that the amputation of the leg ten inches above the ankle joint entitled claimant to compensation for the loss of the leg.

The entire period of temporary total disability need not follow immediately after the injury but is concluded when the injury has reached a permanent stage.

Peabody Coal Co. vs. *Industrial Commission,* 308 Ill. 133.

Under Sections 7 and 8 of the Compensation Act it is necessary to refer to Section 10 of the same Act for the basis for computing the compensation:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury.

(i) To determine the amount of compensation for each installment period, the amount per annum shall be ascertained pursuant hereto, and such amount divided by the number of installment periods per annum.

This court has held in the cases of Clarence E. Vaugh, which was decided by this court on February 8, 1938 and William E. Bauer, which was decided by this court on May 11, 1938, numbers 2840 and 2934 respectively, as follows, that:

"A guard or attendant at a State penal or charitable institution is entitled to the benefits of the Workmen's Compensation Act of Illinois even though his duties may-pertain to inmates who work on farm land constituting a part of such institution."

From the facts in this case, we find that the claimant's injuries arose out of and in the course of his employment.

It appears from the facts in this case that claimant was paid for non-productive time and that he made a demand for compensation six months from the date of the injury is not denied but admitted by the State. It also appears that he made a demand upon Warden Ragen on February 10, 1938, before he went to Hines Hospital.

Claimant had received an increase in salary on July 1, 1937, from $112.75 to $118.75. His wife went to live with him at Joliet on or about July 1,1937, and from then on he did not occupy his room at the institution. Using the customary basis of $24.00 per month for maintenance and which the claimant admits against his own interest though stating that the maintenance was worth more than that, but that he is willing to accept for the purposes of this claim and using the further customary basis of $6.00 per month for room, it appears that the maintenance which the claimant did not avail himself of to the extent of $6.00 per month from July 1, 1937, was offset by the increase in pay which he received beginning July 1, 1937.

From the facts in evidence, it appears that from November 10, 1936 to July 1, 1937, a period of 7 2/3 months, the claimant was paid at the rate of $112.75 and in addition received maintenance valued at $24.00 per month, or a total of

$136.75 per month, which for the period of 7 2J3 months would amount to a total wage payment of $1,048.42. It further appears that for the period from July 1, 1937 to November 10, 1937, the claimant was paid on a basis of $118.75 plus maintenance which he received in kind, of a value of $18.00 because he did not occupy the room which would have been furnished him by the institution had he desired, making a total wage payment of $136.75 per month for a period of 4 1/3 months or a total wage payment during that period of time immediately preceding his accident of $592.58. The total wages received by claimant while employed by respondent in the same capacity totals $1,641.00, per year, or the sum of $31.55, as the average weekly wage. One half of $31.55 amounts to $15.77, which is more than the maximum provided by the Compensation Act. Claimant did not have any children under sixteen years of age. He is, therefore, only entitled to the sum of $15.00 per week compensation. His temporary total disability did not commence until February 8, 1938 when he went to the hospital at the institution and continued until August 12, 1938 when he returned to his work at the Stateville Penitentiary, or a period of 185 days, or 26 3J7 weeks. On the basis of $15.00 per week for the period of 26 3/7 weeks, claimant would be entitled to the sum of $396.43 temporary total disability compensation. However, the claimant was paid his full salary during the month of February, 1938, although he only worked seven days, which mas one-fourth of that month of twenty-eight days, and he received one-fourth of his maintenance of $18.00 or $4.50, or a total of $123.25, while he should have received one-fourth of $136.75, the total of his cash wages and his maintenance, or $34.19, which is the amount which, the claimant actually earned during the month of February, 1938 as against the amount which he actually received of $123.75. The claimant was, therefore, over-paid the sum of $89.06 for that amount. This should be deducted from the sum of $396.43, which leaves a balance of $307.37, being the amount of temporary total disability to which the claimant is entitled.

Having lost his right leg about midway between the knee and the hip; he is also entitled to 190 weeks at the rate of $15.00 per week, or the further sum of $2,850.00 for the specific loss of the leg.

Claimant also claims that there is due him the further sum of $79.50 for other and additional hospital and medical

services. Under Exhibits 3, 6, 7, 8 and 9 of his own testimony, he is only entitled to $50.42, the difference of $29.08 not being shown either in any Exhibit or in his own testimony, and we can only allow the sum of $50.42.

We, therefore, hold that claimant is entitled to the sum of $307.37, being the amount of temporary total disability, the sum of $2,850.00, being for the specific loss of the right leg, and the sum of $50.42 for other and additional hospital and medical services, or the total sum of $3,207.79; and that claimant is now entitled to have and receive from the respondent the sum of $307.37, being the amount of temporary total disability, the sum of $50.42 for other and additional hospital and medical services, and the sum of $981.43 being the amount of compensation that has accrued from August 12, 1938 to November 13, 1939, (being 65 3J7 weeks at $15.00 per week), in all, the sum of $1,339.22; and the remainder of said award to-wit the sum of $1,868.57 to be paid to him at the rate of $15.00 per meek, said sums to be paid on the dates when claimant usually received his salary checks.

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 3, 1937 (Session Laws 1937 page 83), and being subject further to the terms of an Act entitled "An Act making appropriations to the Auditor of Public Accounts for the disbursement of certain moneys until the expiration of the first fiscal quarter after the adjournment of the next regular session of the General Assembly'' (Senate Bill 123 as amended) approved July 8, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided for by the foregoing Acts.

(No. 3203—Claimant awarded $1,600.00.)

JANE KEHOE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 16, 1939.

A. J. CLARITY and FRANK R. EAGLETCIN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries resulting in death of employee within provisions of—when award may be made for.* Where employee of State 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 therefor may be made, to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

SAME—*employee on hourly basis—not employed continuously for one year preceding injury—when annual earnings determined on basis of 200 working days in year.* Where it appears that claimant, who was paid on hourly basis had not been in employ of State for one whole year, preceding injury, was employed in a department of the State, the work of some divisions of which continued throughout the year, but that the work that claimant was engaged in at the time of such injury was operated for less than two hundred working days in each year, his annual earnings will be computed upon the basis of two hundred times his average daily earnings for the purpose of determining compensation.

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

For some time prior to, and on the 18th day of August, A. D. 1937, claimant's son, Donald Kehoe, was employed as a laborer in the maintenance department of the Division of Highways, Department of Public Works and Buildings of the State of Illinois, and on the last mentioned date was engaged in painting Turtle Creek Bridge, located on S. B. I. Route No. 2 just north of the Village of South Beloit, Illinois. While engaged in the work of his employment, the ladder upon which he was working was struck by an automobile driven by one Herbert Johnson, as the result of which said Donald Kehoe was thrown against one of the beams of said bridge and sustained a fracture of the skull, as well as other injuries, from which he died within the course of a few minutes.

From the evidence in the record it satisfactorily appears that on the 18th day of August, A. D. 1937, the said Donald Kehoe and the respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date the said Donald Kehoe sustained accidental injuries which arose out of and in the course of his employment, and which resulted in his death on the same day; that notice of the accident was given to the respondent, and claim for compensation on account thereof was made within the time required by the provisions of the Compensation Act; that said Donald Kehoe was not in the employ of the respondent for the full year immediately preceding the accident; that his

daily wage was Fifty Cents (50c) per hour, and he worked eight (8) hours per day; that at the time of the accident in question he was twenty-five (25) years of age, and unmarried; that he left him surviving the claimant Jane Kehoe, his mother, with whom he resided at the time of his death, as well as eight (8) brothers and sisters; that Donald Kehoe's father left the family about twenty-two **(22)** years prior to the accident in question, and has not since been heard from; that said Donald Kehoe was the only one of claimant's children who contributed anything towards her support within the period of several years prior to the death of said Donald Kehoe.

The eridence satisfactorily shows that Herbert Johnson, who mas the driver of the automobile which struck the ladder on which claimant's intestate was working, died as the result of the accident in question; that he owned no money or property out of which a judgment could be satisfied either in whole or in part.

The only questions in dispute are:

1. The basis upon which the compensation is to be computed.

2. The extent of the dependency of "the claimant Jane Kelioe.

3. The amount of the compensation to which she is entitled under the provisions of the Workmen's Compensation Act.

The basis for computing the compensation to be paid under the provisions of the Workmen's Compensation Act in cases of this kind is fixed by Section 10, Paragraphs (a), (b), (c), (d), and *(e)* which read as follows:

"(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) If the injured person has not been engaged in the employment of the same employer for the full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same employment and same location, (or if that be impracticable, of neighboring employrnents of the same kind) have earned during such period

(d) As to employees in employments 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 300 times the average daily earnings in such computation.

(e) As to employees in employments 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 300 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 200."

Claimant contends that Kehoe was engaged in the work of maintaining highways; that such work is an employment in which it is the custom to operate throughout the working days of the year; that Kehoe's annual earnings should be determined in accordance with the provisions of the aforementioned paragraph (d); that under the provisions of such paragraph, his annual earnings should be determined by multiplying the amount of his daily wage, to wit, Four Dollars ($4.00), by three hundred (300).

The respondent contends that Kehoe was working as a painter; that painting is an employment in which it is the custom to operate for a part of the whole number of working days in each year; that Kehoe's annual earnings should be determined in accordance with the provisions of the aforementioned paragraph (e); that under the provisions of such paragraph, his annual earnings should be determined by multiplying the amount of his daily wage by 200.

The basis upon which the compensation is to be computed, therefore, depends upon the proper construction of the several paragraphs of said Section 10 of the Compensation Act.

The matter of such construction was before our Supreme Court in the case of *Ruda* vs. *Industrial Board, 283* Ill. *550,* where the court, on page 543, said:

"It is a cardinal rule in construing statutes that they are to be construed so as to give effect to each word, clause and sentence, so that no word, clause or sentence shall be considered superfluous or void, (*Crozer* vs. *People.* 206 Ill. 464; *People* vs. *Flynn,* 265 id. 414; 36 Cyc. 1128); and a statute should be so construed, if possible, as to give to each word and sentence its ordinary and accepted meaning. (*Crozer* vs. *People, supra.)* The word 'minimum' is defined as 'the least possible quantity, amount or degree that can be assigned in a given case or under fixed conditions.' (New Standard Dict.; 27 Cyc. 793.) In reaching the proper construction to be placed upon any provision of a statute the whole should be construed together in order to get the intention of the legislature, as one part may furnish an explanation

of another. (*Maiss* vs. *Metropolitan Amusement Ass'n.*, 241 Ill. 177.) Reading all of said section together we think it is quite manifest that the legislature intended, if the employment operated all the working days of the year and an injured employee's wages were not determinable otherwise, that three hundred should be taken as a basis from which to calculate his compensation; that if the employment operated only a part of the working days, such number, if the injured employee's annual earnings were not otherwise determinable, should be taken as a basis, but that in any event no less than two hundred days should be used in such computation. Paragraph (c) has reference, obviously, to a situation where the employee has not worked for the same employer a full year prior to the accident, whether persons in that employment customarily worked all of the working days in the year or not. Paragraph (d) has reference solely to a situation where the employment operated all of such working days and provides the method of computing compensation if not otherwise determinable, while paragraph (c) is intended to cover a different situation — that is, ascertaining a basis where the working days are intermittent — and where in this proviso an express limitation is added, viz., that no less than two hundred days shall be taken as the minimum. (Harper on Workmen's Compensation, sec. 172.) Paragraph (c) does not provide, as do some of the other paragraphs, that if the annual earnings are not otherwise determinable two hundred days shall be used as a basis but does clearly state that in any event the minimum shall not be less than two hundred days, and this was the construction put upon this statute by the Industrial Board in this proceeding and it has been so construed by the board in other cases."

The only other authorities cited by counsel for either side, bearing upon this question, are the following: *Stellwagen* vs. *Ind. Corn.*, 359 Ill. 557; *Truax-Traer Coal Co.* vs. *Ind.* Co., 362 Ill. 75; and *Puttkamer* vs. *Ind. Corn.*, 371 Ill. 498; 21 N. E. 2d, 575.

There is nothing in any of such cases which conflicts in any way with the views expressed in the *Ruda* case, *supra*.

In the *Stellwagen* case, the employer was engaged in the real estate business, and although his business apparently operated all of the working days of the year, yet the work of the employee was part time work. In that case the court said:

"The employment of defendant in error was such that it would customarily engage him only a part of the whole number of working days, depending upon the weather and circumstances. In such case Section 10e applies, and the award was properly based on a daily wage of $8.00 multiplied by the two hundred day minimum to determine the average annual earnings."

As we view the matter, the several provisions of Section 10 must be considered together in order to obtain the true intent and meaning of the section.

Although the work of some of the divisions of the Highway Department continues throughout the working days of the year, yet the work in which claimant's intestate was engaged at the time of his death operated less than 200 working days during the year.

Claimant's intestate was not engaged in the employment of the State for the full year immediately preceding the accident, and the annual earnings during such period, of persons of the same class, in the same employment and same location, does not appear from the record.

Considering said Section 10 as a whole, and considering also the aforementioned decisions of our Supreme Court construing the meaning of such section, and considering the facts in the record, we conclude that the annual earnings of the claimant's intestate must be ascertained by multiplying his daily wage, to wit, Four Dollars ($4.00), by the two hundred (200) day minimum.

The extent of the dependency of the claimant, Jane Kehoe, is a question of fact, and the amount of compensation to which she is entitled must be determined in accordance with the provisions of Section Seven (7) of the Workmen's Compensation Act.

Counsel for claimant contends that she was totally dependent upon the earnings of her son for her support, and that the amount of compensation to which she is entitled must be computed in accordance with the provisions of paragraph (b) of said Section Seven (7) which provides, in effect, that where an employee does not leave a widow, child or children whom he was under obligation to support, but leaves a parent, husband, child or children who at the time of the injury were totally dependent upon the earnings of the employee, then the compensation shall be "a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars and not more in any event than four thousand dollars."

The respondent contends that the dependency of the claimant upon the earnings of her son was but partial, and that the amount of compensation to which claimant is entitled must be computed in accordance with the provisions of Section (c) of said Section Seven (7), which provides, in effect, that if the employee leaves no widow, child or children whom he was under legal obligation to support, but leaves any

parent or parents, child or children, who at the time of the injury were partially dependent upon the earnings of the employee, then the compensation shall be "such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to the total dependency, but not less in any event than one tliousand dollars and not more in any event than three.thousand seven hundred fifty dollars."

It is clear from the facts in the record that the claimant was not totally dependent upon the earnings of her son for her support. For several years prior to the death of her' son, claimant maintained a rooming house in which she kept one or two regular boarders, and also served meals to such boarders and others. Her earnings were not large, but they. constituted a substantial portion of the cost of her maintenance, and consequently the amount of compensation to which she is entitled must be considered on the basis of partial dependency rather than total dependency.

The facts in the record show that Donald Kehoe was an exceptionally fine young man; that he was extremely devoted to his mother; that he was the only one of her children who provided for her support, all of her other children being married and having families of their own; that during the school year he attended school at Dubuque and worked before and after school hours and on holidays at any work he might be able to get, and thereby provided for his own support, maintenance and education; that during the summer months he was extremely active and managed to keep employed the greater part of the time at some kind of work; that during the year preceding his death his earnings in the summer months from his employment by the State of Illinois aggregated $223.70, all of which mas turned over to his mother; that in addition to such sum he earned small amounts from other employers during the summer and thereby provided for his own wearing apparel and miscellaneous items of living expenses and made small contributions to his mother.

No amount of money that this court could award the claimant would compensate her for the loss she has sustained by reason of the death of her son. However, in allowing awards in compensation cases, we must be governed solely by the provisions of the Workmen's Compensation Act, and

our award can be determined only in accordance with the provisions of such Act.

After carefully considering all of the evidence in the case, including the earnings of the claimant from her rooming house and from serving meals, as well as the earnings and coiitributions of her son, we have concluded that the dependency of the claimant upon the earnings of her son was fifty per cent (50%) of the total dependency.

Four times the average annual earnings of Donald Kehoe, as hereinbefore set forth, aggregates Thirty-two Hundred Dollars ($3,200.00), and therefore the amount of compensation to which claimant is entitled in accordance with the provisions of the Workmen's Compensation Act, is Sixteen Hundred Dollars ($1,600.00), payable in weekly installments of Seven Dollars and Sixty-nine Cents ($7.69), commencing August 19, 1937.

Compensation has accrued from August 19, 1937, to November 15, 1939, to wit, for One Hundred Seventeen (117) weeks; that is to say, the sum of Eight Hundred Ninety-nine Dollars and Seventy-three Cents ($899.73).

Award is therefore entered in favor of the claimant for the sum of Sixteen Hundred Dollars ($1,600.00), payable as follows, to wit: The sum of Eight Hundred Ninety-nine Dollars and Seventy-three Cents ($899.73) shall be paid forthwith; and the balance of said award, to wit, the sum of Seven Hundred Dollars and Twenty-seven Cents ($700.27), shall be paid in weekly installments of Seven Dollars and Sixty-nine Cents ($7.69), commencing November 22, 1939.

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" (Illinois Revised Statutes 1939, State Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3406—Claim denied.)

JOHN JAMES CRATTY, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed December 12, 1939.

MARY DOUBET CASSELL, CLARENCE W. HEYL and RICHARD J. KAVANAGH, for claimant.

JOHN E. CASSIDY, Attorney General;; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of Division of Highways—State not liable for—rule of respondeat superior not applicable to State—award cannot be made for damages resulting from, on grounds of equity and good conscience.* In the construction and maintenance of its public highways, the State exercises a governmental function and is not liable. for damages to persons or property, caused by either a defect in the construction or failure to maintain same in a safe condition, or for the malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith and no award can be made therefor under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

On September 25,1937 plaintiff mas employed as an automobile salesman by one Joe Fisher. His complaint recites that on that date while engaged in the performance of his duties, he called upon a prospective customer at a building located on what is commonly designated as "Plank Road" in Peoria County, lying below and parallel with State Route No. 116 at a point where a certain bridge built by the State of Illinois connects with said Route; that Route No. 116 is about thirty-five or forty feet above "Plank Road," and that there is a flight of steps leading down to the road from said Route. The stairway was erected by the State of Illinois to provide a connection from the road to the Route. It is constructed of cement and an iron railing is placed along the edge of the stairway to be used as a support for persons traveling such stairs.

The complaint further alleges that the State by its agents and servants in so constructing and maintaining the stairs, carelessly, negligently and recklessly failed to securely fasten the iron railing, and permitted same to remain in a dangerous and unsafe condition, and that plaintiff being unaware thereof, while ascending the steps on the day stated took hold of the railing which gave way, causing him to lose his balance and to fall a distance of thirty feet from said steps to the "Plank Road." Claimant suffered serious injuries as a result of the fall which confined him to the hospital for almost eleven

months, and incurred hospital and medical bills aggregating Three Thousand Nine Hundred Ninety-nine ($3,999.00) Dollars.

At the time plaintiff was injured he and his employer were operating under the Workmen's Compensation Act of Illinois, insurance thereunder being carried with the Travelers Insurance Company of Hartford, Connecticut. Payment of compensation was contested before the Industrial Commission but eventually a settlement was made whereby the Insurance Company paid claimant Four Thousand Three Hundred Forty **($4,340.00)** Dollars. The hospital and medical bills were settled for One Thousand Nine Hundred Fifty-seven ($1,957.00) Dollars. The claim recites that in case of any award hereunder, said Insurance Company would be entitled to subrogation in the above sum of Four Thousand Three Hundred Forty **($4,340.00)** Dollars, and claimant herein seeks an award of Twenty-five Thousand ($25,000.00) Dollars to cover medical and hospital bills past and future, and loss of earning ability, permanent disability, pain, and suffering.

The Attorney General has filed a motion to dismiss the complaint for the reason that-same does not set forth a compensable claim, in that it is predicated upon alleged liability of the State to respond in damages for personal injuries alleged to have been caused by the negligence of the agents and servants of the State in the construction of said stairway and rail; that the rule of "Respondeat Superior" not applying to the State, no legal liability rests upon the State for the negligence of its agents, and that even if the condition as alleged be true no right to an award would accrue.

We have held in numerous cases that in the maintenance and construction of its hard surfaced roads the State is engaged in a governmental function, and that in such construction and maintenance the State is not liable for damages caused by defects in construction or negligence upon the part of its employees or agents. (*Harmon* vs. *State,* 9 C. C. R. **26;** *Cavatio* vs. *State,* **9** C. C. R. 245.)

As there is no statute in Illinois by which the State is made liable for the negligence of its employees, this court is without authority to enter an award against the State for the unfortunate injuries suffered by claimant. The motion of the Attorney General is allowed and the claim dismissed.

(No. 3361—Claim denied.)

UNITED OIL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 12, 1939.

KENWORTHY, SHALLBERG & HARPER, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILSE, Assistant Attoriiey General, for respondent.

TAX—oil inspection fees—provision in Statute for *refund of—failure to comply with bars awurd.* Where Statute contains a provision whereby oil inspection fees, paid on oil shipped out of State, may be refunded, payer must comply therewith and if it fails to do so the Court is without authority to make an award for any refund.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim was filed February 17, 1939, seeking an award of One Hundred Forty-six and 26/100 ($146.26) Dollars as a refund of inspection fees on petroleum products shipped outside of the State of Illinois during the years 1934-35-36-37. During that period claimant was engaged in the distribution of such products in the City of Rock Island, Illinois, and paid to the Department of Finance inspection fees on gasoline received by it. Certain portions'of such products were shipped outside of the State after inspection.

Section 13 of the Oil Inspection Act ('Par. 13, Ch. 104, Ill. Revised Statutes—1935) as it read during the period covered by this claim, provided as follows:

"The fee for inspecting petroleum products shall be at the rate of 3 cents for each 100 gallons contained in the total quantity represented by the samples.

"However, when petroleum products shall be shipped outside of the State after inspection, the person so making such shipment shall be given credit by the department for such fees, if notice of such shipment out of the State, properly acknowledged and sworn to before a Notary Public is given the department, together with such other and further information relating to such shipment as the department may require, not later than the 15th day of the following month.''

In its claim claimant recites—

"Notice of such shipments out of the State, properly acknowledged and sworn to by P. L. Welch, as President, before a Notary Public, was given the Department of Finance of the State of Illinois in accordance with said statute";

further,

"That on receipt of said notices claimant was immediately billed by the Department of Finance of the State of Illinois for inspection without

allowance of any credit to claimant for the gasoline gallonage shipped outside of the State of Illinois."

The Attorney General filed a motion to dismiss the claim on the ground that it was insufficient upon its face. This contention was overruled and the motion to dismiss was denied. The claim is now submitted upon a stipulation whereby the claim is to be considered upon the complaint and a report filed herein by the Supervisor of Motor Fuel Tax and Oil Inspection Divisions.

The report in question gives an itemized list of the dates on which the reports to the Motor Fuel Tax Division of the Department of Finance were filed by claimant for the respective months; also the month which such report represented and the dates of the respective monthly reports upon which same were acknowledged, as shown by the Notary's Affidavit.

The report discloses that the earliest date at which any of the reports were filed was the 18th day of the following month for which such report was made, and others varied from that date up to the 23rd of the month following that for which a report was then being made.

The Notary Public's acknowledgment dates on the respective reports vary from the 16th to the 19th of the respective subsequent months.

It is apparent that compliance with the requirements of the statute above cited, was not made whereby a refund might be obtained if the required report was made "not later than the 15th day of the following month."

This court has been repeatedly called upon to hold that the only basis upon which moneys paid into the State for a legitimate tax can be refunded, is where such payment is made under a mistake of fact, or where the statute under which the payment is required, contains some proviso directly authorizing a refund under stated conditions.

Where such proviso for a refund is contained in the statute, and the taxpayer shows compliance with such conditions, a payment can be made. Where a failure to so comply is shown, this court has taken the position and does now believe that it is without authority to authorize an award to the claimant for such refund. (*National Lock Co.* vs. *State*, 8 *C. C.* R. 320.)

The claim is hereby denied and the cause dismissed.

(No. 3113—Claim denied.)

J. BURRELL DAVENPORT, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion *filed* January *9, 1940.*

FRANK M. RAMEY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

Workmen's compensation act—making claim for *compensation* and filing application therefor within *time* fixed by Section 24 of Act—condition precedent to jurisdiction of Court—Section *10* of *Court of* Claims Act inapplicable in claims under Act—furnishing medical services is not payment of compensation under. The question presented here has been before this court on numerous occasions and was fully discussed and decided in Crabtree vs. State, 7 Court of Claims Reports, 207 and in Anker vs. State, ante, this volume and the opinions in those cases are decisive herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On August 14, 1937, claimant filed his complaint in this court alleging that on March 26, 1933, the claimant was in the employ of the State of Illinois as a State Highway Patrolman or as a Highway Maintenance Policeman of the Division of Highways, Department of Public Works and Buildings of the State; that on said date, while in the course of his employment in the City of Hillsboro, on Route 16, and while taking an injured person to a hospital at Hillsboro, and driving through the traffic, both bones in his right leg were broken in an accident, and claimant was thereby hindered and prevented from attending to and transacting his duties; that his leg never fully recovered; that he nom suffers a permanent injury to this leg, and that he is in great pain and suffering.

That at the time of the accident, claimant was receiving One Hundred Fifty Dollars ($150.00) per month for services as such Highway Patrolman; that he was paid a salary up to and including June 15,1933; that the respondent has paid the sum of One Hundred Fifteen Dollars and Twenty-five Cents ($115.25) to the Hillsboro Hospital on account of services rendered to the claimant, and the respondent has also paid the sum of One Hundred Fifty Dollars ($150.00) an account of doctor and medical bills rendered on account of said injury. Claimant alleges that there is now due from the respondent to claimant the sum of Fifteen Dollars ($15.00) per week from June 15, 1933 to December 22, 1933, being twenty-seven weeks, amounting to the sum of Four Hundred and Five Dol-

lars **($405.00)** as computed according to the provisions of the Workman's Compensation Act of the State of Illinois and according to Section 6 of the Court of Claims Act of the State of Illinois; that there is also due from respondent to claimant, compensation for permanent disability on account of the injury to his right leg; that no claim has been presented to any State Department of the State of Illinois, or to any State Officer of the State of Illinois. A Bill of Particulars was attached to the complaint, making the same claim.

The Attorney General filed a motion to dismiss and as one of the grounds stated that the 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, as provided by Section **24** of the Illinois Workmen's Compensation Act and Section 6, subsection 6 of the Court of Claims Act.

Counsel for claimant argues that he is not limited to one year in which to file this claim, but that the statute of limitations in this kind of a case is five years. Among other things, counsel argues that Section **10** of the Court of Claims Act provides for a limitation of five years and that this is controlling.

If the claimant in this case has any claim at all, it is under the Workmen's Compensation Act.

Section 6 of the Court of Claims Act gives the court the power to hear and determine the liability of the State for accidental injuries or death suffered by any employee of the State, etc., in accordance with the rules of the Workmen's Compensation Act. Here is a statutory direction to determine this case in accordance with the rules of the Workmen's Compensation Act.

Section **24** of the Workmen's Compensation Act provides that an employee has only one year to file a claim after the receipt of the last payment of compensation. This is jurisdictional. See *Crabtree* vs. *State of Illinois,* 7 C. C. R. 207; *DuQuoin School District* vs. *Ind. Com.,* **329** Ill. **543;** *Chicago Board of Underwriters* vs. *Ind. Com.,* **332** Ill. **611.**

This claim was not filed for more than four years after the accident. It is averred that he was paid, apparently for unproductive labor, up to June 15, **1933.** Holding this to be a payment under the Compensation Act, much more than a year elapsed between then and the date of filing this claim, which was August **14,1937.**

The motion of the Attorney General must be sustained and the claim dismissed.

(No. 3047—Claimant awarded $2,623.02.)

B. S. PEARSALL BUTTER CO., a CORPORATION, (Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1940.

SCHNELL & EAKIN, for claimant.

JOHN E. CASSIDY, Attorney General:, MURRAY F. MILNE, Assistant Attorney General, for respondent.

CONTRACT—*cancellation of-when breach* of. When one of two contracting parties has partially performed and is ready, able and willing and offers to fully perform all of the obligations undertaken by him in a contract, and the other party without any legal justification or excuse refuses to accept such performance and cancels the contract, he is guilty of a breach of the contract and an action will lie for damages for such breach.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of Two Thousand Six Hundred Twenty-three and 06/100 ($2,623.06) Dollars for damages alleged to have been occasioned by a breach of contract.

The record discloses that claimant, a corporation organized under the laws of Illinois, in response to notice to prospective bidders, submitted on June 20, 1935, a bid for the sale and delivery of 55,200 gallons of milk at the rate of 600 gallons per day to the Chicago State Hospital at Dunning, Illinois, during the period between July 1 and September 30, 1935, at a price of $.2345 per gallon. 011 June 21, 1935, the respondent accepted the offer and the Division of Purchases and Supplies issued claimant a purchase order therefor.

At the time claimant was awarded the contract it held Permit No. 274 issued by the Board of Health of the City of Chicago on July 1, 1934, and expiring June 30, 1935, by which claimant was permitted to deliver milk pasteurized by it at its plant at Elgin, Illinois, into the City of Chicago. .

The specifications attached to the contract in question provided that—

"The Milk Ordinance, passed by the City Council (of Chicago) January 4, 1935 and the rules and regulations of the Chicago Board of Health, adopted January 8, 1935, will govern for the standards and requirements for milk

and milk products delivered to State institutions in the Chicago area, and bidders must be governed accordingly."

Claimant began delivery of milk under the contract to the Chicago State Hospital at Dunning, Illinois, on July 1, 1935, and delivered 600 gallons daily until August 16, 1935. Commencing on that date respondent refused to accept deliveries or to pay therefor, and informed the claimant that the latter's contract had been canceled for non-compliance with the provisions of the Chicago Milk Ordinance in that its Permit No. 274 had expired June 30, 1935, and no subsequent permit had been issued by the City of Chicago to the claimant. No further milk was accepted and a new contract was made by the State with the Bowman Dairy Company at an increased price, the latter company being the next lowest bidder at the time the contract was awarded to claimant herein.

The claimant company had made the necessary arrangements whereby it might be able to carry out the terms of its contract, and the cancellation of such contract resulted in losses and additional expense to the claimant.

The Attorney General submits that if an award is found to be due the claimant for breach of contract, the measure of damages would be the difference between the contract price for the remaining quantity of milk that was to have been delivered and the price for which claimant mas able to dispose of same when he was prevented from delivering same to the respondent.

Counsel for respondent concedes that if the respondent wrongfully cancelled the contract, claimant would be entitled to an award in the sum of Two Thousand Six Hundred Twenty-three and 02/100 ($2,623.02) Dollars, which represents the difference between the contract price of the milk remaining undelivered (27,600 gallons at $.2345 per gallon), Six Thousand Four Hundred - Seventy-two and 20/100 ($6,472.20) Dollars and Three Thousand Eight Hundred Forty-nine and 18/100 ($3,849.18) Dollars, the price at which claimant disposed of the remaining 27,600 gallons. The record discloses that in disposing of the balance of milk due on the contract the total amount received was Two Thousand Six Hundred Twenty-three and 02/100 ($2,623.02) Dollars less than the price called for under the contract.

That which gave rise to the cancellation was the fact that prior to July 1, 1935, the inspectors for the Chicago Board of Health inspected pasteurization plants outside of the City of Chicago, and issued permits for the delivery of pasteurized milk into the city. On July 9, 1935, the Chicago Board of Health adopted a resolution restricting inspections to Cook County, and ruling that no milk or milk products should thereafter be sold or offered for sale as pasteurized milk or milk products in the City of Chicago unless the same shall have been pasteurized in a pasteurization plant which is located within the boundaries of Cook County, Illinois. The questions which presented themselves in determining whether respondent was warranted in terminating the contract are:

1. Is the Chicago State Hospital at Dunning, Illinois, a State institution *in the Chicago area?*

2. Has the proviso,, contained in the specifications, that the rules and regulations of the Chicago Board of Health adopted January 8, 1935, will govern for the *standards and requirements for milk,* been violated?

There is nothing in the record to show what State institutions are included in the "Chicago area" within the meaning of the two latter words. It is apparent, however, that the claimant was complying at all times with the rules and regulations of the Chicago Board of Health as adopted January 8,1935, and it was those regulations which were to govern the *standards and requirements* for the milk that was to be delivered under this contract.

Witness Paul F. Krueger, the Chief Sanitary Officer for the Chicago Board of Health, who testified at the request of the board in answer to a subpoena, stated that he was connected with the Chicago Board of Health prior to July 1, 1935, and continued to so be at the time of the taking of the evidence in this case. The witness knew the Pearsall Butter Company and its plant at Elgin. He was asked:

Q. "Has the Pearsall Butter Company of Elgin, Illinois, complied with the rules and regulations of the Chicago Board of Health since July 1, 1935, up to the present time? (June 9, 1939.)

A. "To the best of my knowledge they have; yes, sir."

This witness also stated that the Pearsall Butter Company had subsequent to July 1, 1935, received authority from

the Chicago Board of Health to handle raw milk only in Chicago, and to pasteurize milk for the Chicago Hospital at Dunning until its contract was fulfilled.

It is apparent from the record that claimant was ready, able and willing to continue to perform the balance of its contract with the State Hospital at Dunning on August 16, 1935, and that the respondent breached its contract without legal justification. The milk then being furnished by the claimant conformed with the standards and requirements for pasteurized milk as laid down by the rules and regulations of the Chicago Board of Health. The fact that such milk could not be delivered in the City of Chicago because of a rule made subsequent to January 8, 1935, did not affect the standard of the product, nor would the health of those to whom it was furnished have been jeopardized in any way. The claimant was in possession of a Certificate of Approval issued by the Department of Public Health of the State of Illinois, showing that its pasteurization plant located at Elgin, Illinois, was complying in all respects with the rules of the Department of Public Health of the State of Illinois, such permit certifying that "the construction and equipment of its pasteurization plant was such that with proper maintenance and operation the pasteurized milk will be safe for human consumption."

From a consideration of the entire record the court is of the opinion that claimant is entitled to an award for the sum of $2,623.02, and an award is therefore accordingly made in favor of the B. S. Pearsall Butter Company for the said sum of $2,623.02.

(No. 2332—Claim denied.)

SIM E. BUNTING, Clairmant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1938.

Petition for rehearing filed May 10, 1938.

Original opinion affirmed February 13, 1940.

FRANCIS T. CARSON, for claimant.

OTTO EERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*farm work excepted from the 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 in its nature is a part of

farming, or any work done on a farm or country place, no matter what kind of work or service is being done or rendered, is excepted from the provisions of the Workmen's Compensation Act.

SAME—SAME—*employee* of *Animal Husbandry Department of Agricultural Expertmental Station* of *State is engaged an farm work.* An employee of the Animal Husbandry Department of Agricultural Experimental Station of State is engaged in farm work, and no award for compensation can be made for accidental injuries sustained by him while so employed, regardless of the kind of work he was engaged in at time of injury.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claim mas filed herein under the Compensation Act for temporary total incapacity, medical bills, specific loss of a thumb and partial loss of use of an index finger, and an award is sought in the sum of Two Thousand Six Dollars and Forty-five Cents ($2,006.45).

The facts are undisputed; proper notice was given and the claim was filed within a year.

It is alleged that claimant was an employee of the Animal Husbandry Department, and received an injury to his hand in the silo cutter while in the course of his regular employment. The injury consisted of the loss of the thumb on his right hand, the loss of function of his right index finger of about fifty per cent, medical bills, etc. Nothing appears in this record showing that the University is under the Compensation Act.

In an informal opinion given at the request of Hon. Sveinbjorn Johnson, under date of March 14, **1934,** concerning this very case, this court, after fully reviewing the facts under the law, held that a decision authorizing an award could not be justified on this claim. (See C. C. R., Volume 8, page 774.)

Nothing appears in the case nom before us which would justify a modification of the opinion given then; that opinion is based upon the fact that claims of this kind are not within the provisions of the Workmen's Compensation Act because of a part of Division 8 of Section 3 of the 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 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."

We are of the opinion that our former opinion should not be modified or changed, and in addition to the authorities therein cited, we cite the case of *Hill* vs. *Industrial Commission,* 346 Ill. 392, wherein it was held that an employee is not within the Act when engaged in general farming operations or doing any farm work on a farm or country place; the case of *Noverio* vs. *Industrial Commission,* 348 Ill. 137, wherein it was held that where an employer was engaged in laying tile for farm drainage, the Act did not apply to an injury received to an employee while at employer's house, not on the farm, making a screen for a tile outlet; and the case of *Uphoff* vs. *Industrial Board of Illinois,* 271 Ill. 312, wherein it was held that where a carpenter was employed by a farmer to assist in building a broom-corn shed on the farm, an injury due to a piece of steel flying from a hammer he was using and destroying sight of one eye was not within the Workmen's Compensation Act.

Our former opinion in this case will be adhered to and an award denied.

(No. 3335—Claimant awarded **$1,588.74.)**

DAVID E. CALDWELL, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion filed February 14, 1940.

W. S. KAY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* ACT—*when award may be made for temporary total disability and loss of* eye. Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and loss of eye, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case comes to this court on the petition of claimant and stipulation of facts by the Attorney General. The stipulation disclosed that on July 12, 1938, David E. Caldwell, forty-five years old, was in the employ of the State in the capacity of Maintenance Patrolman for the Division of Highmaps, Department of Public Works and Buildings, and that

his annual earnings for one year prior to the time of the injury amounted to $1,475.81. About 4:00 in the afternoon of the date mentioned, claimant was engaged with others in the removal of a part of the concrete highway that had been displaced by heat expansion, and was using a twelve pound sledge to break it up. Immediately following a heavy blow that he had made in the concrete a chip of concrete flew and struck him in the right eye and became imbedded therein, and as the result of that injury, it became necessary to remove his right eye. As the result of the injury, lie lost seven weeks work.

The respondent had immediate notice of the injury and the claim was filed in apt time.

The respondent furnished claimant an artificial eye, glasses, and the necessary hospitalization and medical treatment, at a total cost of $469.30, and the claimant was paid his full salary of Two Hundred Thirteen Dollars and Thirty-nine Cents **($213.39)** during the time he mas unable to work because of the injury.

Claimant had no children under sixteen years of age at the time of the injury and was forty-five years, of age at that time.

From the facts contained in the record, it appears that both claimant and the respondent were operating under the provisions of the Illinois Workmen's Compensation Act. Claimant was paid a salary during the unproductive time following the injury and that constituted a payment of compensation. *Field & Compmy* vs. *Ind. Corn.*, and *United Air Limes* vs. *Ind. Corn.*, 364 Ill. 346, and this obviated the necessity of making a demand.

From the admitted facts in this case, we find that the accidental injury arose out of and in the course of the employment. Claimant's annual earnings were $1,475.81 or $28.38 per week, and 'therefore the compensatioii rate applicable is **$14.19** per week.

Claimant's compensation is to be computed as follows:

Temporary total incapacity, July 12 to August 31, 1938—7 weeks at $14.19 per week (Sec. 8 (b) Ill. Workmen's Compensation Act). ...	$ 99.33
Loss of right eye, 120 weeks at $14.19 per week (Sub. sec. 16, Sec. 8 (e) Illinois Workmen's Compensation Act)	$1,702.80
Total compensation	$1,802.13

From the total amount of compensation of $1,802.13, must be deducted the compensation heretofore paid of $213.39, which leaves a balance of $1,588.74 remaining due to claimant. Compensation has accrued to February 14, 1940 in the amount of $1,177.77. Award is therefore entered for the sum of $1,588.74, payable as follows: Balance of accrued compensation, payable forthwith $964.38; balance of award i.e., $624.36 is payable in weekly installments of $14.19 until paid.

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 3, 1937 (Sess. Laws 1937 p. 83) 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 for in such Act.

(No. 2614—Claim denied.)

GUY L. COBB, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1940.

BARBER & BARBER, for claimant.

JOHN E. CASSIDY, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employee of State—State not liable for.* The State is not liable for damages for personal injuries or damage to property, resulting from the negligence of one of its employees, while operating one of its trucks, the doctrine of respondeat superior not being applicable to the State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The petition for an award in this case alleges that on or about the 7th day of September, 1934, at about 7:40 o'clock A. M., the State Highway Department was possessed of a certain motor truck, and by its duly authorized agent and servant was operating said motor truck along and upon a certain public street in the City of Springfield, Illinois, to-wit: North Second Street, at or near the intersection of said street with North Grand Avenue, and was proceeding in a northerly direction on the East side of said Second Street; that at said time and place, the claimant was driving and operating his motor vehicle upon said North Grand Avenue, proceeding in

a westerly direction and approaching the intersection of North Second Street and North Grand Avenue from the East; that the claimant was driving his said motor vehicle and approaching said intersection with due care and caution for his own safety and. that of his motor vehicle; that the driver of the State-owned motor vehicle was traveling at a high and unlawful rate of speed, to-wit: forty miles per hour, and entered upon said intersection on the left-hand side and in front of claimant's motor vehicle, wholly regardless of the right of may of the claimant and disregard of the provisions of the statutes of the State of Illinois, thus causing the claimant's motor vehicle to collide with the right side of the respondent's truck; that by reason of the collision, claimant's motor vehicle was broken and damaged, and the claimant was obliged to pay and expend the sum of $57.25 in order to make the necessary repairs to his automobile. An itemized statement of the account is attached to the petition.

The Attorney General made a motion to dismiss this claim and as grounds for the motion says that it is sought to recover for damages to the automobile of claimant occasioned by a collision thereof with a truck of the respondent, it being alleged the collision resulted froin the negligence, carelessness and recklessness of the driver of the truck, who was an employee of the respondent and that the respondent is not liable for such damage so caused.

This court has held many times that a State is never liable for the negligence of its agents and employees, unless there is a statute making it so liable. In this State there is no such statute, and we must hold that this court has *no* jurisdiction to make an award. *Derby* vs. *State*, 7 C. C. R. 145; *Churnbler, Admrx.* vs. *State*, 6 C. C. R. 138.

The motion of the Attorney General will, therefore, be sustained and an award denied.

(No. **3419—Claim** denied.)

ROY DE VINCENT COX, Claimant, *vs.* STATE OF ILLINOIS. Respondent.

Opinion filed February 14, 1940.

JOSEPH SAM PERRY, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

COURT REPORTER—*term of once — death of judge appointing terminates— salary earned after death of judge appointing — no award can be made for.* This claim was before the Court in 10 Court of Claims Reports, **381** and fully and finally adjudicated therein.

RES ADJUDICATA—*increasing amount of claim already adjudicated — will not defeat plea of.* Where a claim involving the identical cause of action between two parties for the recovery of moneys by one from the other for services, has been fully and finally adjudicated, a further claim by said party against the other for a greater amount for the same services will not defeat a plea of res adjudicata and same will be sustained.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars for services rendered by him and alleged to be due him as Official Court Reporter of the Circuit Court of DuPage County, from the first day of September, 1936 to the first day of October, 1938. The complaint further recites that claimant was appointed as Official Court Reporter by the Hon. Mas F. Allaben, Circuit Judge; that the latter died August 10, 1936; that following his death and until November 1, 1939 when this complaint was filed, tlie judicial work of that Judicial Circuit was carried on by the two remaining Judges of such Circuit.

Further, that claimant received all the salary that was due him up to and including the month of August, 1936; that claimant was requested by the two remaining Judges to continue rendering service, and that he was advised by them that they believed his appointment continued and that the State should and would pay for such service. Further, that after learning this court had allowed a similar claim to one Fred J. Shell in Case No. 2366, C. of C., he continued to act as a Court Reporter until tlie first day of October, 1938 when he lie learned that this Court had handed down a decision upon a claim previously filed by this claimant for the services in question, wherein the conrt held that he was not entitled to salary after the date of Judge Allaben's death. The claim further recites that his service terminated October 1, 1938, and after tlie election of a new Circuit Judge a new Official Reporter was appointed.

The Attorney General has filed a motion to dismiss the claim and contends:

First, That claimant's demand is barred by the prior judgment of this court in the case of Roy *de Vincent Cox* vs. *State* of *Illinois,* C. of C. No. 3092, in which an opinion was filed October 13, 1938 denying said claim.

Second, That the claimant does not set forth a demand which the State of Illinois, as a sovereign commonwealth, should discharge and pay for the reason that such complaint shows upon its face that claimant's position as Court Reporter terminated with the death of the Judge who appointed him.

Third, That claimant had an adequate remedy by mandamus to enforce his alleged rights, if any.

As recited in the complaint, claimant herein did, in fact, attempt in a previous claim to obtain payment for these same services. That claim was filed April 29, 1937, and requested an award for services to April 1, 1937, in the sum of One Thousand Eight Hundred Ninety ($1,890.00) Dollars. In the opinion filed October 13, 1938, this court felt impelled, because of the then recent decision by the Supreme Court in the case of *People* vs. *Barrett*, 365 Ill. 73, to reverse its previous attitude in regard to the rights of a claimant under the facts stated. In the case of *Shell* vs. *State*, 8 C. C. R. 235, decided November 13, 1934, we held that under the authority of the *People ex rel., etc.*, vs. *Kelley*, 134 Ill. App. 642, a Court Reporter's term of office did not necessarily expire upon the death of the appointing judge, and that such reporter continued in office until the time of the appointment of another Court Reporter by the successor to the deceased judge. We further held that inasmuch as the Supreme Court had laid down a different construction in the case of *People* vs. *Barrett, supra*, a further award under the facts stated would be denied.

The rule of Res Adjudicata applies to the complaint now pending before the court, and while the amount for which claimant contends has been increased above the sum originally requested by him, the claim is in all respects the same as that which was considered under Court of Claims No. 3092. The motion of the Attorney General is hereby allowed and the claim dismissed.

(No. 2700—Claim denied.)

HAYES TRANSFER & STORAGE COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

***Opinion filed** February 14, 1940*

KIGER & DILSAVER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

HIGHWAYS—*construction and maintenance of, governmental functaon—negligence of employees of State in—State* **not** *liable for—damage* **to** *property sustained as tha result of—award for on grounds* of *equity and goad* **con**-*science cannot be made.* The facts in this case and the issues involved are almost identical with those in *Allison* **vs.** *State*, No. 2696, ante, this volume, and the decision of the Court therein is applicable here.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, an Illinois Corporation, charges that on the 25th day of July, 1934, and at all times since that time it has been engaged in the transportation of goods by automobile truck for hire; that on July 25,1934, the respondent, the State of Illinois, owned and was maintaining by and through its agent, servants and employees, a certain public highway lying within the State of Illinois, known as U. S. Route No. 66, at and near Lexington, Illinois; that at said time and place the respondent through its agent, servants and employees was repairing the paved portion of said highway and as part of said repair work had removed a large section of the paved portion of said highway and a portion of the foundation thereof, creating a deep unpaved section across the main travelled portion of said highway, rendering that part of the highway extremely dangerous and unsafe to one rightfully using the highway; that the State, through its agents, servants and employees had wholly failed and neglected to erect at or near the approach to said section of the highway so under repair, any warning signals, signs, barricades or other devices or keep a watchman there to warn persons of the danger; that on the said date, between the hours of eight and eight-thirty P. M. while the truck of the claimant was rightfully upon the highway travelling in a southerly direction from Joliet, Illinois, to Springfield, Illinois, and while the driver of the truck was in the exercise of due care and caution for the safety of the truck, he drove from the paved portion of the highway onto the part where the pavement had been removed, and the truck was damaged thereby.

A Bill of Particulars was filed, itemizing damages in the sum of $257.30.

The Attorney General made a motion to strike on the grounds that the damages were occasioned by the negligence

and carelessness of the agents, servants and employees of respondent in the repair and maintenance of the said State highway; that the State was engaged in the construction and maintenance of its roads, and was thereby acting in a governmental capacity, and because of that the State does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence of a statute creating such liability. The Attorney General argues that such has been the settled decision of this court for many years, and cited *Morrissey* vs. *State, 2 C. C.* R. **454;** *Minear* vs. *State Board of Agriculture,* **259** Ill. **549.**

The claimant contends that it is the duty of this court 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, and cities several decisions of this court, but does not cite any statutes.

At least two times in the past several years, an effort has been made to pass a statute which covers cases of this kind, but in each instance, such a statute failed to become the law.

Claimant argues that this court has jurisdiction to pass upon the merits of this case under Paragraph Four of the statute defining the powers of this court.

In the case of *Crabtree* vs. *State of Illinois, 7* C. C. R., page 207, similar contentions were made. We therein held that an award will not be made on the grounds of equity and good conscience, and held that 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 in equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

The motion of the Attorney General, therefore, must be sustained and the cause dismissed.

(No. 3392—Claimant awarded $4,000.00.)

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

Opinion filed February 14, 1940.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—When *award may be made for death of employee under.* Where it appears from stipulation of facts that employee of State sustained accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in his death, that State had immediate notice of accident causing injuries, that demand for compensation was made and claim filed therefor within time fixed in Act, an award for compensation may be made to those legally entitled in accordance with the provisions thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case comes to this court on a stipulation of facts. Minnie Henry, widow of Abel Henry, filed her petition with the Clerk of this Court on June 27, 1939. It is agreed that on May 25, 1939, and for more than one year prior thereto, Abel Henry was in the employ of the respondent in the capacity of first helper to Richard Enoch, maintenance patrolman in the Division of Highways, Department of Public Works and Buildings; that said Division of Highways was on May 25, 1939, engaged in the construction, maintenance and repair of hard-surfaced roads; that they had no children under the age of sixteen years.

It also appears from the stipulation that on the date last mentioned both Richard Enoch and Abel Henry were engaged in the repair of a portion of the pavement on S. B. I. Route 128, about one and one-half miles north of Shelbyville, Illinois, where a blowup had occurred by reason of excessive expansion of the concrete due to high temperature; that said Richard Enoch and Abel Henry had removed and excavated a portion of the pavement approximately four feet by six feet and six inches deep; that Enoch then drove to Shelbyville to obtain a sledge hammer and instructed his assistant, Abel Henry, to remain at the side of the hole in the pavement and warn traffic, but did not give him a red flag; that about 1:45 Abel Henry saw an automobile driven by L. H. Baker of Decatur, Illinois, approach the hole, and Abel Henry ran across the pavement and motioned the driver to pass around

the east side of the hole; that the car was driven to the west side of the pavement and struck Henry.

It also appears from the stipulation that an ambulance was summoned and said Henry was taken to the Shelbyville Memorial Hospital, where he was pronounced dead.

It also appears that the State of Illinois paid the sum of $7.50 for medical and ambulance services.

It also appears that the decedent's annual earnings for one year prior to May 25, **1939,** was the sum of $1,255.60.

It appears that the respondent had immediate notice of the injuries and death; that a demand was made for compensation within six months after May 25, 1939, and claim for compensation was filed shortly thereafter:

It also appears from the stipulation that it was agreed that this claim be submitted to the court on the claimant's complaint, the report of the Division of Highways attached to the stipulation, and the stipulation, and that the claimant and respondent waived the filing of statements, briefs and arguments and requested that this claim be assigned to the court for its determination on the facts.

It was further stipulated and agreed that the deceased left him surviving the claimant, Minnie Henry, his widow, whom he was under legal obligation to snpport.

It is further agreed that if an award should be made it should be in the sum of $4,000.00, payable in installments and in conformity with the provisions of the Workmen's Compensation Act.

Section 7 of the Workmen's Compensation Act provides that the amount of compensation which shall be paid for an injury to the employee resulting in death shall be, if the employee leaves any widow, child or children whom he was under legal obligation to support at the time of his injury, a sum equal to four times the average annual earnings of the employee, but not less in any event than two thousand five hundred dollars and not more in any event than four thousand dollars.

In this case the employee had earned $1,255.60 for the year prior to the time he was killed. His compensation, therefore, was $24.14 per week.

This section also provides that any right to receive compensation hereunder shall be extinguished by the remarriage of a widow, if the deceased did not leave him surviving any

child or children whom he was under legal obligations to support at the time of said injury. Section 7 further provides 'that all compensation, except for burial expenses provided in the Act in case an injury results in death, shall be paid as provided for in Section 8, at the same intervals at which the services or earnings of the employee were paid.

From the stipulation of facts in this case the court finds that Abel Henry died as the result of an injury which arose out of and in the course of his employment; that he left a widow, Minnie Henry, and that he was under a legal obligation to support her; that he left no children under sixteen years of age.

The court, therefore, makes an award payable to Minnie Henry in the sum of $4,000.00, payable at the rate of Twelve Dollars and Seven Cents ($12.07) per week from the time of her husband's death.

Accrued compensation is as follows: From May 25, 1939, up to February 16, 1940, being 38 weeks, the sum of, Four Hundred Fifty-eight Dollars and Fifty-six Cents ($458.56) now payable; the balance, i.e. : $3,541.34 to be paid at the rate of Twelve Dollars and Seven Cents ($12.07) per week.

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 3, 1937 (Sess. Laws 1937, p. 83), 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 for in such Act.

(No. 2544—Claim denied.)

THOMAS KORANDO, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1940.

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

JOHN E. CASSIDY, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*limitations in claims under—making claim for compensation and filing application therefor within time fixed by Section 24 of Act, condition precedent to jurisdiction of Court.* Where the record discloses that no claim or demand for compensation was made by employee, within six months after date of accident, nor any application made

therefor within one year after date of injury, no compensation having been paid by employer, the Court is without jurisdiction to proceed with hearing on claim Aled thereafter and same must be dismissed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Thomas Korando filed his complaint on November 26, 1934, alleging that on the 30th day of June, 1933, he was employed by the State of Illinois as a guard of rank two at the Southern Illinois Penitentiary at Menard, Illinois; that his employment required him to work on the farm of the said penitentiary and to assist with the slaughtering and butchering of cattle and hogs; that on the 30th day of June, 1933, while engaged in the line of his employment, which required him to butcher a beef, and while preparing to stick the beef, the animal threw its head to one side and the knife went into claimant's left arm about four inches above the wrist joint on the inside of the arm where it severed the main artery cutting off the main blood supply to the arm and hand and where it cut off and severed the muscle in the arm; that because of the injury his hand and arm are numb and he has very little feeling in either his hand or arm; that he is unable to do any hard work or heavy lifting with his arm, and is unable to perform his daily duties around the farm that he was able to perform prior to said injury; that he has permanently lost the partial use of his hand and arm by reason of the injury.

Claimant further alleged that prior to the time of the injury he was earning $25.96 per week, and he claims $3,504.60 damages, which is for the permanent partial disability under which he was placed by reason of the injury.

The Attorney General made a motion to strike the claim for the reason that no claim for compensation was made within six months after the accident, and that by reason of the limitations contained in Section 24 of the Workmen's Compensation Act, this claim is barred.

If this court has any jurisdiction, it is under the Compensation Act. Approximately one year and five months elapsed from the time of the injury until the claim was filed. Section 24 of the Workmen's Compensation Act provides that no proceedings for compensation under said Act shall be maintained unless claim for compensation has been made within six months after the accident, and 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. No compensation was ever paid to claimant.

It has been repeatedly held by this court and the Supreme Court of Illinois that the filing of the claim within the year as above set forth is jurisdictional. More than a year 'having elapsed, this court has no jurisdiction to entertain the claim.

The motion of the Attorney General mill, therefore, be sustained and the cause dismissed.

(No. 3413—Claim denied.)

THE ST. LOUIS FIRE AND MARINE INSURANCE COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 14, 1940.

ARTHUR F. GRUENWALD, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FRANCHISE TAX—*privilege tax—amount of based on information supplied by payer—when payment of deemed voluntary—not under mistake of fact—when award for refund of amount alleged to be in excess of that rightfully due must be denied.* Where amount of privilege or franchise tax is correctly computed by State Department, in accordance with law, based on information submitted by payer and payment thereof made, without any compulsion or duress, with full knowledge of facts or opportunity to obtain same, such payment is voluntary, 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:

The St. Louis Fire and Marine Insurance Company, a Corporation of St. Louis, Missouri, seeks a refund for alleged errors made by it in the payment of Privilege Tax to the Insurance Department of Illinois for the years **1935-36-37-38.** Claimant states that during each of those years it inadvertently failed to take its proper deductions from its tax payments as provided in Section 409 of the Illinois Insurance Code. The total alleged to have been paid to city fire departments, for which it should have taken credit in making its payment to the State, amounted to $1,052.97 for the **four** years in question.

The Attorney General has filed a motion to dismiss the claim. The tax in question for the years 1935 and 1936 were

evidently assessed and paid under the provisions of Paragraphs 79-87, Ch. 73, Ill. Rev. Statutes of 1935; and the payments made for the years 1937 and 1938 were evidently made under Sections 409-412 of the Illinois Insurance Code of 1937, Ch. 73, Illinois Rev. Statutes, 1937. Both statutes required the payment of an annual Privilege Tax, assessed on the basis of the figures submitted by the respective companies in a report to be filed by the latter with the Director of Insurance not later than March of each year. A computation is made by the Director upon the figures appearing in said report and he then notifies the company of the amount, and that objections, if any, to such assessment will be heard by him or his deputy not later than the 25th day of June following, upon receipt of a request within fifteen days from the company. The Director was by statute given power to hear and determine objections to any assessment and thereupon to change or modify the same. During the four years in question claimant apparently paid the State of Illinois a total tax of $4,110.04, based upon the reports which it had filed, and of that amount it now seeks a refund of the sum of $1,052.97.

A stipulation has been filed by the parties showing photostatic copies of the notice given to claimant in each instance, stating the amount of Privilege Tax due for the current year; said notice containing specific instructions that objections, if any, to such assessment would be heard within the time stated therein. It is apparent from the allegations of the complaint and the record that no part of the taxes in question were paid under protest, and that the total thereof was paid from time to time voluntarily and were based entirely upon figures submitted by claimant *to* the Insurance Department. Claimant states in its complaint that "it inadvertently failed to take its proper deductions." There is no allegation or suggestion that the taxes were not correctly computed and assessed on the basis of the information which claimant supplied in its reports. After having submitted those reports and after the Insurance Department had made the required computation thereon, claimant had a still further opportunity of correcting its error, for the notice which it received of the amount due as computed by the Insurance Department specifically notified claimant that any objections it might have to the assessment could be heard within the time limit specified by the statute.

As suggested in Respondent's Statement, Brief and Argument, a similar situation was considered by this court in the case of *Monarch Fire Insurance Company,* 9 C. C. R. 538. As therein stated, "When it appears that a State Department has computed a tax on information furnished by the payer 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 by it to the State Department, thereafter claims a payment has been made in excess of the amount due, and such excess payment is in no way shown to be the fault of the State Department, the court is of the opinion that no refund is due. As a matter of public policy the various State officials and taxing bodies should be able to rely upon the information furnished by those applying for Franchise and Privilege Licenses, and where a tax or a fee is legally due and the applicant submits erroneous information, and thereafter voluntarily pays the fee or tax which has been correctly computed upon the information given, no sufficient authority of law exists, in the opinion of the court, to justify a refund of any part thereof."

The motion to dismiss is allowed and the claim denied.

(No. 1871—Claim denied.)

E. B. DANNENBARGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1940.

E. D. GEORGE and LEIGH M. KAGY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

STATE EMPLOYEE—*use of own automobile in performance of duties—cost of operating expenses and repairs thereon paid by State—when no award for mileage can be made.* Where it appears that claimant entered the employ of the State on October 1, 1929, as an investigator for the Department of Conservation and continued therein until June 1, 1931 during which time he used his own automobile, the costs of operating and repairs thereon being paid for by the State, he cannot have an award for the mileage of said automobile during such time, in the absence of any proof that there was any agreement or undertaking on the part of the State to pay same.

SAME—*same—same—when award for mileage on grounds of equity and good conscience must be denied.* An award for mileage of an automobile owned by a State employee and used by him in the performance of his duties,

the costs of operating and repairs thereon being paid for by the State cannot be made on the grounds of equity and good conscience under the rulings of this Court in *Crabtree* vs. *State*, 7 Court of Claims Reports, 207; *Titone* vs. *State*, 9 Court of Claims Reports, 389 and *Garbutt* vs. *State*, 10 Court of Claims Reports, 37.

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

Claimant was appointed Investigator for the Department of Conservation of the respondent (game warden) on October 1, 1929, by Ralph F. Bradford, Director of such Department, and continued in such employment until June 1, 1931. He used his own automobile in the performance of his duties, and in addition to his regular salary of $125.00 per month was paid for his meals, as well as for the operating expenses of his car and the repairs thereon.

In his complaint herein he alleges that in addition to the foregoing, he is entitled to mileage at the rate of seven cents per mile for 22,000 miles covered by him during the period of his employment as aforesaid, and asks for an award in the amount of $1,540.00 therefor.

The record in the case consists of the evidence of claimant, together with the departmental report of Ralph F. Bradford, Director, under date of January 27, 1932, and the further report of Thomas J. Lynch, Acting Director, under date of November 22, 1937, which reports, under Rule 21 of this Court, are *prima facie* evidence of the facts set forth therein.

The only question involved in the case is the question as to whether, under the terms of his employment, claimant was entitled to mileage on his car.

Claimant states that at the time of his appointment he asked if he would have a State car, but was informed by the Director that the State did not have a car at that time; that he should use his own car and the State would take care of all expenses on it and allow him for his car.

The documentary evidence material to the question here involved consists of the following:

1. A pamphlet entitled "Guide for Inspectors and Investigators, State of Illinois, Departmenti of Conservation."

2. A pamphlet entitled "Revised Instructions to Travelers of State of Illinois."

3. A letter dated October 1, 1929, addressed to all inspectors and investigators, signed by Ralph F. Bradford, Director, Department of Conservation.

Claimant states that he received all of the above documents at the time of his appointment, and therefore they must be construed together in order to arrive at the correct meaning and intent thereof.

The aforementioned guide for inspectors makes provision, under the heading of "Expense Accounts," for gasoline, oil, repairs, etc., but there is nothing therein which could lead claimant to believe that he was to receive an allowance for mileage on his car.

The aforementioned "Revised Instructions to Travelers of State of Illinois" apparently applies to State appointees generally, and not merely to those in the Department of Conservation, and contains the following provision relative to special conveyance, to-wit:

"Travelers are expected to use railroad, interurban, or bus service whenever practicable, and shortest direct route. Whenever other means of transportation are used a satisfactory written explanation must accompany the expense account. Whoever unnecessarily uses other means of travel will be allowed only the regular railroad fare."

"An employee traveling in a private automobile to a place which can be conveniently reached by railroad, interurban, or bus service, will be allowed not in excess of the regular railroad, interurban, or bus rate, for the use of such automobile. When a place cannot be thus conveniently reached, a charge not exceeding 7 cents per mile will be allowed for use of such automobile."

The foregoing paragraph is the provision upon which claimant bases his case.

The aforementioned letter from the Director, dated October 1,1929, contains the following provision, to-wit:

"The Department bears the actual expense of operating cars used in carrying on your work. Statements for gas and oil and storage must be shown on one set of yellow expense blanks; lodging, meals, railroad fare, etc., must be rendered on another set; and those for minor repairs which you have paid, must be shown on a separate set of like blanks. A receipt must be obtained for any item of $1.00 or over, and attached to your statements. In showing gas and oil purchases, the mileage should also be indicated. These accounts must be rendered for the calendar month and not for longer or shorter periods of time."

The departmental report of Ralph F. Bradford, Director of the Department of Conservation, directly contradicts claimant's statement to the effect that he was to be paid for the use of the car in addition to the operation expenses thereof. The Director in such report further states:

"In addition, I would advise you that never at any time did I enter into any agreement with Dannenberger to approve bills for the use of his automobile for any amount or for any purpose, except as stated in a letter of

instructions addressed to all inspectors and investigators, on the subject of "expense accounts" a copy of which I am sending to you."

The departmental report of Acting Director Thomas J. Lynch contains the following:

"At the time of Mr. Dannenberger's employment, investigators operating their own personal cars did so at the expense of this Department. They were reimbursed for the actual expense incurred in operating their cars, and not upon a mileage basis. The payment of a mileage rate has never been the practice of this Department, and is not now, all personally-owned cars being operated upon an actual expense basis. It will be readily seen that in supplying parts, tires, batteries, etc., the owner of the car would derive certain benefits therefrom which would serve to offset any overhead by reason of the operation of his car in State service. This is true in a more limited manner of gasoline, oil and other operating expenses."

Claimant made monthly reports to the Department during the entire period of his employment, which reports showed the amount of his expenses for meals, gas and oil, repairs, etc., as well as his mileage. Ne admits that he received payment for all operating expenses, and admits that he made no claim for mileage at any time within a year from the date of his employment. He states that he made a verbal claim therefor several times during the year 1930, but admits that he made no written demand for such mileage until after the time he ceased to be in the employ of respondent.

Claimant's car was a Dodge sedan purchased in August, 1929, for $500.00 cash and a trade-in allowance of $150.00 on an old car. He states that when he left the employ of respondent in 1931, the car was worn out, although it appears from the evidence that the sum of $162.36 was paid to him for repairs thereon by respondent during the period he mas in such employ, and that such repairs included two tires and tubes in February, 1930, as well as two tires and tubes and a battery in May, 1931, just before he left the service of the State.

If the claimant mas to be paid mileage at seven cents per mile, such mileage included all expenses for gas, oil, repairs, etc. The fact that during the entire period of his employment he was paid monthly for all operating expenses and repairs on his car indicates very strongly that it was not intended by the Department, and was not expected by the claimant, that he was to receive anything for the use of his car other than the operating expenses thereof and the repairs thereon.

Considering all of the evidence in the record, together with the inferences which may reasonably be drawn there-

from, we conclude that the claimant has failed to prove that there was any agreement or undertaking on the part of respondent to pay mileage on his car, in addition to the operating expenses and repairs thereof.

Counsel for claimant suggests that he is entitled to an award on the grounds of equity and good conscience. This court has repeatedly held that we have no authority to allow an award solely on the grounds of equity and good conscience; that our authority in that behalf is limited to claims in respect of which the claimant mould 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. *Crabtree* vs. *State, 7* C. C. R. 207; *Titone* vs. *State,* 9 C. C. R. 389; *Garbutt* vs. *'State,* No. **2246,** decided September Term, 1937.

For the reasons above stated, award must be denied.

Award denied. Case dismissed.

(No. 3068—Claim denied.)

THE ALTON RAILROAD COMPANY, Claimant, *vs.* STATE OF ILLINOIS. Respondent.

Opinion filed March 13, 1940.

SILAS H. STRAWN and WILLIAM L. PATTON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PROPERTY DAMAGE—*negligence* **of** *employee of State causing—while engaged in performane of duties—State not liable for—remedy of injured party against employee in courts of general jurisdiction.* The same question presented here has been before this Court many times, e. **g.,** *Johnson* vs. *State, 8* Court **of** Claims Reports, 67 and what was said in that and the other cases in the reports **of** this Court is applicable here.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein seeks an award under averments that on the morning of October 5, **1936** one Carroll Dick a truck driver in the employ of the Department of Public Works and Buildings, Division of Highways, while driving a dump truck engaged in hauling stone from the railroad car of the claimant at Broadwell in Logan County, Illinois, negligently drove

the truck over and upon a certain signal battery box of claimant located near the highway crossing over the Alton Railroad Company tracks, and thereby broke the battery box and apparatus contained therein, causing damage in the sum of $67.62.

The Attorney General has filed a motion to dismiss the claim, for the reason that same is predicated upon the negligent acts of an employee of respondent, for which no legal liability exists as against the State of Illinois.

This court has found it necessary to hold many times that the doctrine of *respondeat superior* does not apply to the State, and that the latter as a sovereign is not liable for damage to property caused by the negligence of its officers, agents or employees. (See *Johnson* vs. *State, 8 C. C.* R. 67 and *Trompeter* vs. *State, 8 C. C.* R. 141.)

It is unfortunate that claimants, in this type of case are left to seek their redress against the individual committing the tort, but the Court of Claims cannot consistently rule otherwise, and the motion to dismiss the claim is hereby allowed. Claim dismissed.

(No. 2933—Claimant awarded $225.00.)

ELIZABETH S. BOURLAND, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March *13, 1940.*

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SALARY—*when* award *may be made for.* Where it clearly appears that claimant was lawfully employed by State at a stipulated salary and rendered services, in a satisfactory manner, an award for such salary, for the period of such employment may be made.

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

In her amended Complaint, claimant alleges in substance that on October 30th, 1934, she was appointed Home Visitor in the Department of Public Welfare, at a salary of $135.00 per month; that she performed all of the duties of her employment until August 29th, 1935, when she was discharged ; that she was paid for her services the sum of $112.50 per month

from November 20th, 1934 to and including June 30th, 1935; that there is now due and owing to her for her salary as aforesaid, the sum of $22.50 per month from October 30th, 1934 to and including June 30th, 1935; also $150.00 per month from June 30th, 1935 to August 30th, 1935; also the sum of $16.44 for expenses incurred while in such employ.

It appears from the evidence that claimant was appointed Home Visitor, Division of Visitation of Children, by Mr. A. L. Bowen, Director of the Department of Public Welfare, on November 20th, 1934; that such appointment was on a temporary permit, subject to the next Civil Service Examination; that she was asked to report for duty at once to Edna Zimmerman, Superintendent, and to notify the Director at once if she was unable to accept the position; that on November 22nd claimant wired Edna Zimmerman that she would arrive Friday morning for instruction; that on November 26th claimant was advised by Miss Zimmerman that the salary available to her office was $112.50 per month.

In a letter from Miss Zimmerman to claimant, dated December 15th, 1934, it was stated,

> "It is understood that you are to receive $112.50 per mo.";

and in another letter from Miss Zimmerman to claimant, dated January 5th, 1935, claimant was notified that a payroll voucher in her favor had been approved at $112.50 beginning November 20th.

Shortly after her appointment, claimant filed her application for Civil Service Examination, and on February 7th, 1935 was advised that her application had been rejected on account of lack of college education or its equivalent. The Civil Service examination was approved May 21st, 1935, and when it came to the attention of the aforementioned Director that claimant had not taken such examination, to-wit, on or about the 18th day of June, 1935, he notified the Secretary of the Civil Service Commission that he was arranging to classify claimant as a maternity hospital inspector in the Division of Child Welfare, effective July 1st, and asked that her title be changed accordingly.

There are in evidence photostatic copies of payroll vouchers issued to claimant as follows: $153.75 covering salary and wages for the period from November 20th to December 30th, 1934; also six vouchers in the sum of $112.50 each,

covering salary and wages for the months of January to June, 1935, both inclusive.

On May 30th, 1935 Miss Zimmerman wrote bo claimant as follows:

"The Civil Service Commission has advised that you did not take the examination for Home Visitor which was held March 14th, and, in future, it will not be possible to approve salary for you under that classification.

"This matter will be taken up with Mr. Bowen, Director, to learn what may be worked out."

Claimant states that she never received such letter, and her testimony to that effect is not impeached in any way.

Respondent takes the position that the aforementioned letter of May 30th constituted a discharge or release of the claimant, and that she is not entitled to be compensated for the services rendered by her after that date, although it is not denied that the claimant rendered services to August 29th as claimed, and it is admitted by the Director of the Department that there was no dissatisfaction with her services, but that, on the contrary, they were quite satisfactory.

We are not convinced that the aforementioned letter of May 30th constituted a discharge or release of claimant, and respondent's contention in that behalf is not consistent with the aforementioned letter from the Director of the Department to the Secretary of the Civil Service Commission dated June 18th, 1935, in which he stated that he was arranging to classify claimant *as* a maternity hospital inspector, and requested that her title be changed to cover such classification. As we view the matter, claimant's classification was changed, but she remained in the employ of the respondent until subsequently discharged on August 29th, 1935.

There is no testimony in the record to substantiate claimant's claim for expenses paid.

From certain conversations preliminary to her appointment, claimant apparently mas under the impression that she was to receive a salary of $135.00 per month. However, no statement to that effect was made to her by the Director of the Department or anyone having authority to act for him in the matter, and the evidence clearly shows that within a meek after her appointment, claimant was advised by her superior officer that the salary available to her office was $112.50 per month; also that she accepted and cashed monthly payroll vouchers computed on the basis of $112.50 per month, covering her salary from the date of her appointment to July lst,

1935. We conclude, therefore, that as to such period she has been paid the full salary to which she is entitled.

As to the services rendered by claimant from July 1st, 1935 to August 29th, 1935, inclusive, there is no question but what the services were rendered as claimed, and that claimant has not been paid therefor. There was no dissatisfaction with her services and claimant had no knowledge that she was released from the service of the respondent until the 29th day of August, 1935.

As to such services, we conclude that she is entitled to be compensated therefor at the rate of $112.50 per month, and award is therefore entered in favor of the claimant for the sum of Two Hundred Twenty-five Dollars ($225.00).

Mr. Justice Linscott took no part in the consideration of this case.

(Nos. 2824 to 2831,—Inclusive, consolidated; No. 2824—Claimant awarded $1,250.00; No. 2825—Claimant awarded $1,915.50; No. 2826—Claimant awarded $1,568.25; No. 2827—Claimant awarded $2,000.00; No. 2828,—Claimant awarded $250.00; No. 2829—Claimant awarded $250.00; No. 2830—Claimant awarded $750.00 and No. 2831—Claimant awarded $500.00.)

CHICAGO TITLE & TRUST COMPANY, Nos. 2824, 2825, 2827, 2831, BARNEY S. RADCLIFFE, No. 2826, HARRY D. CALLAHAN, No. 2828, HARRY Z. MUNN AND ANNA MUNN, No. 2829 AND EDWARD F. KOLAR AND JOSEPHINE KOLAR, No. 2830, Claimants, *vs.* STATE OF ILLINOIS. Respondent.

Opinion filed March 13, 1940.

MARKMAN, DONOVAN & SULLIVAN and FRANK S. RIGHEIMER, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY NOT TAKEN FOR PUBLIC USE—*caused by construction of public improvement—award may be made for—measure of damages.* Where private property is not taken for public use, but is damaged by being depreciated in value, by reason of the construction of a public improvement, compensation may be had for such damage, and the proper measure of the damage 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.

MR. JUSTICE YANTIS delivered the opinion of the court:

The eight above entitled claims were filed prior to the passage of Senate Bill 526 in 1939, amending the Court of

Claims Act relative to claims for damage to real estate. After the passage of said Act amended claims were filed so as to bring the determination of said claims within the provisions of said Act. The Chicago Title & Trust Company as Trustee is claimant in four cases, and separate individuals are claimants in the other four. As the same cause of purported damage is involved in each case and the same Counsel represent all claimants, the cases have been consolidated by agreement of the parties.

Each of the claims is for damages alleged to have resulted to lots belonging to the several claimants from construction of a grade separation by the State of Illinois, of highways adjacent to said properties.

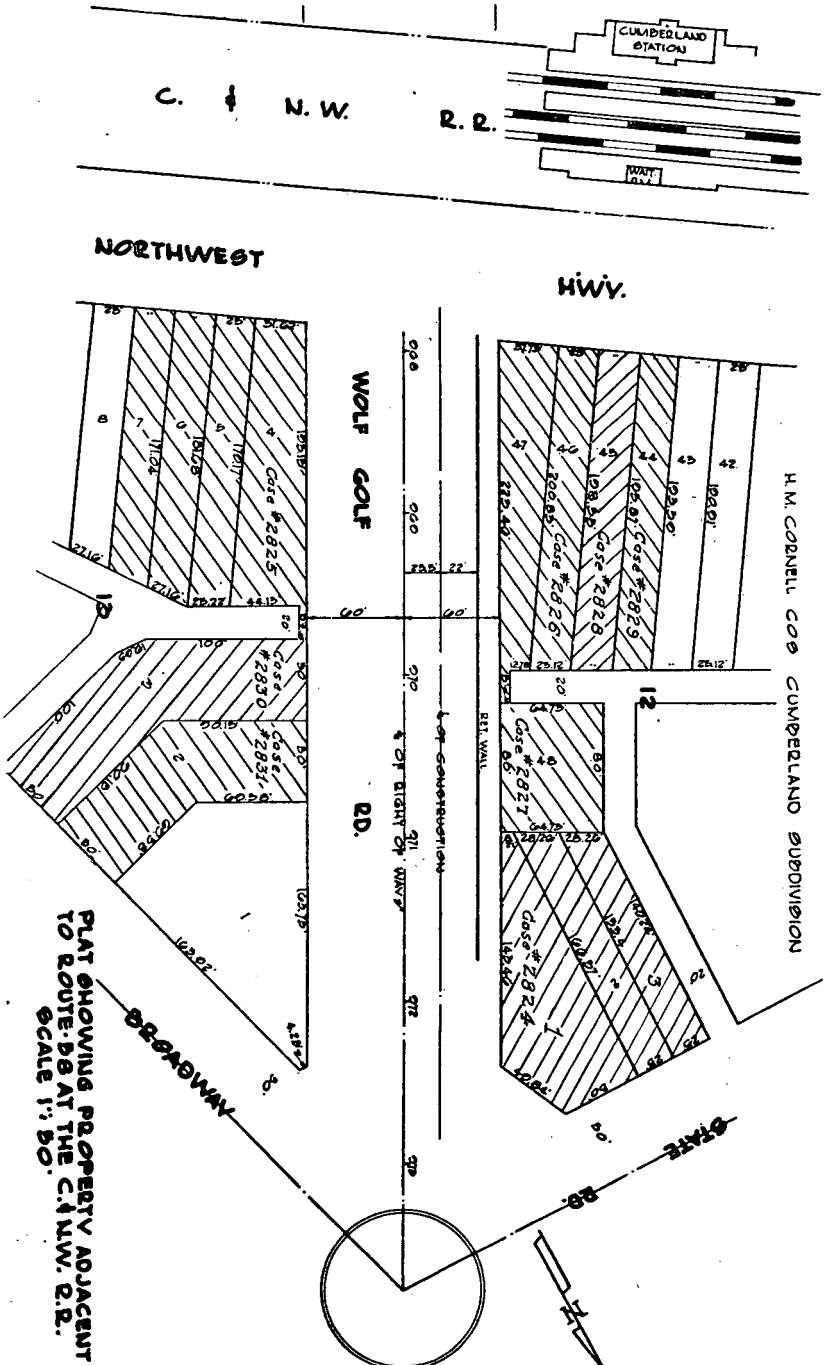
The lots involved are Nos. 1, 2, 3, 44, 45, 46, 47 and 48 in Block 12, and Lots 2, 3, 4, 5, 6 and 7 in Block 13, all in H. M. Connell Company Cumberland Subdivision in the City of Des-Plaines in Cook County, Illinois.

There are no buildings in either of the two blocks. There are three twenty-foot pavements separating various lots which give the appearance of street frontage, but which were platted as alleys. The closest business community is about a mile from the property. There is a filling station within sight, southeast of these lots at the corner of Broadway and Northwest Highway, and the Benjamin Electric Company is located about two blocks east of the oil station.

The Northwest Highway runs northwest and southeast along said property on the south. South of such highway is the right-of-way of the Chicago & Northwestern Railway. An abandoned and closed railroad station previously known as the Cumberland Station lies directly south of the lots in Block 12. This station was boarded up in March, 1937. Certain trains still stop for passengers and a bus line runs along the Northwest Highway. Two highways, i. e. Wolf Road and Golf Road, also known as State Route No. 58 join at the railroad and continue in a northeasterly direction between Blocks 12 and 13 of said Addition, and is now designated in that Block as Wolf-Golf Road. State Road adjoins Block 12 on the north and Broadway adjoins Block 13 on the east.

Prior to the construction of the grade separation, Lots 1, 47 and 48 in Block 12 and Lots 1, 2, 3 and 4 in Block 13 all had a frontage on what was then Wolf Road. It appears from the testimony of William Wallace, State Engineer, that

A plat of the several properties is herewith shown:



Wolf Road had never been developed or improved as a street from the intersection of State Road and Broadway to the railroad right-of-way, prior to the construction of the grade separation. The testimony shows there was quite a hill commencing at a point thirty feet southeast of the Northwest right-of-way line, and that there was a slope from Lot 47 in Block 12 toward Lot 4 in Block 13. This hill sloped to the northeast so that at Station 972 of the Engineer's Plat at the extreme north end of all these properties, the old grade line was fairly level.

The testimony of the Engineer, Mr. Wallace, shows that prior to the building of the viaduct neither Wolf Road, Golf Road nor the combined Wolf-Golf Road was ever paved northward across the Northwestern Railroad along the street between Blocks 12 and 13. Neither was the street open in a southwesterly direction across the Northwestern Railroad on a grade with the railroad. Mr. Wallace was employed in securing the right-of-way for Wolf-Golf Road as now constituted south of the Northwestern Railroad. Such right-of-way was never used for a grade crossing, but was secured so as to connect Route 58 and Wolf Road from a point south of the railroad with Route 58 and Wolf Road north of the railroad by a subway to be constructed underneath the railroad and underneath the Northwest Highway.

Prior to the construction of this subway travel across the railroad was at a point approximately one thousand feet southeast of where the subway was later built, at a grade crossing on Seegers Road. The latter road connected with Golf Road and Wolf Road several hundred feet west of the railroad and connected with Broadway east of the railroad. A person who desired to drive from any of the lots for which damages are sought to a point across and beyond the Northwestern tracks, prior to the construction of this subway, must have proceeded northeasterly from the lots to Broadway, thence southeasterly on Broadway and on Seegers Road across the Northwestern Railroad, and thence to Route 58. Since the construction of the subway Seegers Road has been closed at the railroad riglit-of-may and traffic now uses the subway in question. There was some excavation work done along the Wolf-Golf Road in 1928-1929 prior to securing the right-of-way south of the Northwestern Railroad. The pavement which now extends along Wolf-Golf Road between

Blocks 12 and 13 of the Cornell Subdivision is a forty-foot pavement, one side of which lies close to the retaining wall that was erected along the frontage of Lots 47, 48 and 1 in Block 12. The right-of-way at that point is one hundred twenty (120) feet.

The right-of-way of Northwest Highway which runs along the southerly side of Lots 4, 5, 6 and 7 in Block 13 and of Lots 44, 45, 46 and 47 of Block 12 is also a forty-foot pavement, the right-of-way being eighty-three (83) feet. There is a sidewalk on the northern side of Northwest Highway adjacent to the lots abutting thereon, and there is a sidewalk on the northwest side of Wolf-Golf Road between the top of the retaining wall and Lots 47, 48 and 1 in Block 12. The top of the retaining wall follows approximately the ground line or elevation of those lots. There is also a sidewalk on the southerly side of State Road adjacent to Lots 1, 2 and 3 in Block 12. There is a concrete handrail about three feet high on top of the retaining wall and a stairway for pedestrians on the north side of Northwest Highway near the corner of Lot 47, which goes from the lot level down to a sidewalk on the lower level of the subway, thence under the Northwest Highway and the tracks.

At the time of the construction of the subway the only part of the paving of the Northwest Highway which was torn out, was that which was involved in the grade separation and which was replaced across Route 58. The change in elevation of the Northwest Highway, if any, was less than one foot, the change there being a widening job of such Northwest Highway. Pedestrians now going from any of the lots in question would have access from their properties along the sidewalk and the stairmay in question to the stairway, and thence across to any desired point beyond the Chicago & Northwestern Railroad.

Claimants predicate their claim to damages on averment of the legal principle, that, "Any Change in the Grade of a Street or Highway by Which Egress or Ingress to Private Property is Obstructed Amounts to Damages to Private Property Within the Meaning of Section 13 of Article 2 of the Constitution of 1870," and that "The Measure of such Damages to Abutting Property Caused by a Change in the Grade of a Highway is the Difference Between the Fair Cash Market Value of the Property Prior to the Construction of the Im-

provement and Unaffected by it, and ita Fair Cash Market Value After the Construction of the Improvement as Affected by it."

Respondent takes no issue with the two foregoing provisions of law, but contends that the damage which is recoverable by an owner of private property resulting from the construction of a public improvement, must not be such as is fanciful, speculative, imaginative or conjectural.

The testimony of claimants' witnesses as to the amount of damage incurred is also attacked by respondent, the latter contending that opinions as to damages must be based on lawful elements of damages, and that testimony as to the amount of damages, where the witnesses are shown to have taken into account improper elements in forming their opinions, should be disregarded.

The two principal witnesses called by claimants were G. W. Kunstman and Grover C. Elmore, both of Chicago. Mr. Kunstman has been a real estate appraiser for thirty-six years for municipalities, corporations, banks and individuals, and has been a witness in a number of grade separation cases in and about Chicago. While he testified to a detailed knowledge of the commercial and residential use to which the several lots were best adopted, his testimony disclosed some confusion of mind as to the conditions of the street upon which the lots fronted as such conditions existed prior to the construction of the viaduct. In his testimony he stated that Wolf Road which lies between Blocks 12 and 13 was being used by vehicle traffic prior to the building of the viaduct. That Wolf Road was opened across the railroad with a grade road and extended south of this property all the way to the southern limits of Cook County; that it crossed the Chicago & Northwestern Railroad with a grade crossing and had an old asphalt pavement. These elements were taken into account by him in fixing his valuation of the property prior to the construction of the improvement. Later in his testimony he recalled that Wolf Road was not open across the railroad tracks prior to the building of the viaduct in 1933, and the witness could not then recall for sure whether old Wolf Road was paved between Blocks 12 and 13, as .previously stated by him. He was however certain that prior to the improvement the street was all connected up with the Northwest Highway. At another point in his testimony Mr. Kunstman states that

in fixing his valuation of the property as it existed prior to the construction work he based his conclusions on the consideration that Wolf Road would be extended as a grade crossing; that if the plans called for a grade separation, his valuation of Lots 1, 2 and 3 in Block 12 before the improvement would have been $8,000.00, instead of $11,500.00. It becomes apparent that Mr. Kunstman's valuation of the lots before the improvement was premised not entirely on the conditions as they then existed but upon a surmise as to what might in the future take place in the surrounding community. Mr. Kunstman also testified that the best use for Lots 4, 5, 6 and 7 in Block 13 was commercial before the improvement and was still commercial after the improvement, but that such commercial use was limited and restricted by the construction of the viaduct because the Northwest Highway grade had been raised three and one-half (3½) feet. From his testimony it appears that the witness drew many of his assumptions as to the Highway plans from a 1933 highway map showing proposed road construction. The three to four foot change in grade of the Northwest Highway, he stated, decreased the commercial value of Lots 4, 5, 6 and 7 in Block 13 and Lots 45, 46 and 47 in Block 12. In determining his prior valuation for Lot 48 in Block 12, Mr. Kunstman testified (Tr. p. 84), "The important thing I took into consideration in arriving at a valuation of this property was that this Wolf Road was direct access to the Northwestern Railroad; not only vehicles, but pedestrians on their way to the Station would have to pass this property." The value of the several lots have been reduced, according to his testimony, by changing the properties from commercial to residential, due to various factors as testified to by him.

Mr. Grover C. Elmore of Chicago also testified for plaintiffs and stated he had been a real estate broker for twenty-nine years. In 1916 he sold a three hundred (300) acre subdivision west of DesPlaines, and in 1932 or 1933 at the request of the owners, he looked over the properties involved herein with a view to testifying as to their values. There is some confusion apparent in his testimony as to the time at which he determined his opinion of value of the properties before the construction of the improvement and after the construction of the improvement. He also testified that there was a dirt road grade crossing of Wolf Road across the

Chicago & Northwestern tracks in 1933, and that he based his opinion of pre-construction valuation of these properties upon that fact; that he also took into account as one of the elements of decreased valuation of the several properties a change of three to three and one-half feet in the elevation of the Northwest Highway; that such change in grade would influence the values twenty-five (25) per cent. Mr. Elmore also stated he formed his conclusion of pre-construction and after-construction values all in 1933 after the work began. He was asked (Tr. p. 149)—(Q) "Now then the lower figure (after-construction value) when did you form your opinion as to what that would be worth after the work was completed?'' He replied, **(A)** "Well, that was, I took into consideration at the time I made my appraisal, the difference of what the grade separation made between your two pieces of property, and it is very easy to do it all at one time." On the same page appears the previous answer of the witness that his opinion as to pre-construction-value was formed in 1933 shortly ***after*** the construction work had started.

We again emphasize at this point that the rule as to measure of damages, is the difference in the fair cash market value of the property prior to the construction of the improvement aiid unaffected by it, and its fair cash market value after the construction of the improvement and as affected by it.

Mr. Elmore further testified that in 1933 he and those with whom he conferred in regard to valuations did not have in mind an immediate demand for the use of these lots, but took into consideration the potential value, and the general trend of building; further, that there was no immediate prospect of any demand for building in 1933.

Mr. H. M. Cornell testified to having laid out the subdivision of the lots in question. Mr. Cornell is a real estate dealer residing in Park Ridge, Illinois with twenty-five years' experience in the business. The lots in question that have been sold since the subdivision, were sold in 1928 shortly after the subdivision of the property. To use his words (Tr. 113), "It was a sort of a stock proposition—a group of people organized a syndicate on a unit basis, and after they subdivided the property they sold a part of the lots and some of the lots are still owned by the syndicate." Mr. Cornell testified that there was no paved road along what is now

designated as Wolf-Golf Road prior to the construction of the subway under the Northwest Highway and the Northwestern Railroad tracks. The paving of the subway was completed in 1936. Mr. Cornel1 further testified that prior to the time they laid out the Cumberland Subdivision it was possible to cross the Northwestern tracks onto Wolf Road, but that in 1930 the State made an excavation in the territory known as Wolf-Golf Road to use for film in fixing fifty feet of Golf Road east of the circle, i. e. east of these properties, which made it impossible to use Golf Road *if it was usable before;* that since 1930 Wolf-Golf Road was not used until after the subway construction.

Mr. B. F. Eidamiller of DesPlaines, a real estate dealer for fifteen years in that vicinity, was called as a witness by respondent. His testimony shows an intimate knowledge of local conditions and of the physical surroundings of these properties.

Mr. Donald T. Morrison of Chicago, testified to being a member of various real estate boards and engaged in the real estate business for twenty years, during which time he has made subdivisions of various tracts in and near DesPlaines. His evidence! discloses a detailed study of conditions and of the facts pertaining to the properties in question. In his testimony we find that Wolf-Golf Road, prior to the construction of the subway was a dedicated street lying between Blocks **12** and **13,** but was not used by traffic; that it was grown up in weeds and that as it approached the Northwest Highway at the south end of these properties, the street sloped up to the highway some five or six feet, so that no matter what had happened to Wolf Road they either had to grade it up or grade it down in order to cross the Northwest Highway and the Chicago and Northwestern Railway.

There is much evidence in the record by the various witnesses as to the best use to which these various lots were adapted prior to and after the improvement of Wolf-Golf Road; also as to the grouping of various lots together for sale purposes and their accessibility in such case from other streets. The following chart shows the amount claimed as damages in the several cases, and the opinion of the several witnesses as to value and damage of the respective lots in question:

DAMAGES CLAIMED.

Name	Lot	Block	Original Complaint	Amended Complaint
Chicago Title & Trust Co.. etc. (2824)	1 2 3	12	$3,500.00	$3,500.00
Chicago Title & Trust Co., ctc. (2825)	4 5 6 7	13	8,500.00	7,500.00
Barney S. Radcliffe (2826)	47 46	12	7,000.00	8,000.00
Chicago Title & Trust Co. (2827)	48	12	3,500.00	4,000.00
Harry D. Callahan (2828)	45	12	1,500.00	1,500.00
Harry Z. Munn & Anna Munn, wife (2829)	44	1%	1,000.00	1,000.00
Edward F. Kolar & Josephine Kolar (2830)	3	13	3,000.00	2,500.00
Chicago Title & Trust Co. (2831)	2	13	3,000.00	2,500.00

CLAIMANTS' EVIDENCE.

Name	Lot	Block	(Kunstman)			(Elmore)		
			Before	After	Damage	Before	After	Damage
Chicago Title & Trust Co. etc. (2824)	1 2 3	12	$11,500	$8,000	$3,500	$11,850	$8,000	$3,850
Chicago Title & Trust Co. etc. (2825)	4 5 6 7	13	15,000	7,500	7,500	14,750	7,250	7,500
Barney S. Radcliffe (2826)	47 46	12	14,000	6,000	8,000	12,000	6,000	6,000
Chicago Title & Trust Co. etc. (2827)	48	12	6,000	2,000	4,000	6,000	2,000	4,000
Harry D. Callahan (2828)	45	12	3,000	1,500	1,500	3,000	1,500	1,500
Harry Z. Munn & Anna Munn. wife (2829)	44	12	2,500	1,500	1,000	2,500	1,500	1,000
Edward F. Kolar & Josephine Kolar (2830)	3	13	5,000	2,500	2,500	5,250	3,000	2,250
Chicago Title & Trust Co. (2831)	2	13	5,000	2,500	2,500	5,000	2,900	2,100

RESPONDENT'S EVIDENCE.

Name	Lot	Block	(Eidamiller)			(Morrison)		
			Before	After	Damage	Before	After	/Damage
Chicago Title & Trust Co. etc. (2824)	1 2 3	12	$2,000.00 1,000.00 1,000.00	$1,250.00 750.00 750.00	$ 750.01 250.01 250.01	$2,500.00 1,300.00 1,300.00	$2,000.00 1,170.00 1,170.00	$500.00 130.00 130.00
Chicago Title & Trust Co. etc. (2825)	4 5 6 7	13	1,264.80 1,000.00 1,000.00 1,000.00	474.30 375.00 750.00 750.00	790.51 625.0(250.01 250.01	2,520.00 2,520.00 1,450.00 1,400.00	1,890.00 1,890.00 1,305.00 1,260.00	630.00 630.00 145.00 140.00
Barney S. Radcliffe (2826)	46 47	12	1,000.00 1,509.20	375.00 565.95	625.0(943.2:	1,800.00 1,800.00	1,350.00 1,350.00	450.00 450.00
Chicago Title & Trust Co. etc. (2827)	48	12	2,400.00	400.00	2,000.0(	2,560.00	1,920.00	640.00
Harry D. Callahan (2828)	45	12	1,000.00	750.00	250.0(	1,500.00	1,350.00	150.00
Harry Z. Munn & Anna Munn, wife (2829)	44	12	1,000.00	750.00	250.0(	1,500.00	1,350.00	150.00
Edward F. Kolar & Josephine Kolar (2830)	3	13	2,000.00	1,250.00	750.0(	2,200.00	1,650.00	550.00
Chicago Title & Trust Co. (2831)	2	13	2,000.00	1,500.00	500.0(	2,200.00	1,760.00	440.00

An inspection of the attached plat discloses that Lots 2 and 3 and 44, 45 and 46 in Block 12, and Lots 5, 6 and 7 in Block 13 never had any frontage on Wolf Road or Golf Road, and have not lost any direct ingress or egress rights by reason of the construction of the subway. The damage to those lots is only indirect by virtue of their use with other property.

The members of the Court of Claims have on two occasions inspected the properties and surroundings involved herein, in order to better understand the evidence of the wit-

nesses as it appears in the record, and to gain at first hand a view of the premises in question.

The construction by the State of Illinois of this forty-foot pavement and subway has changed what was previously a dead-end street, untraveled and grown up in weeds, to a modern arterial highway. The loss of ingress and egress to the lots in question appears negligible, except to Lot 48 in Block 12 which has no direct street outlet. However, it, like several others, has access to paved roadways within the subdivision, and from there can now travel over the new pavement of Wolf-Golf Road to all points south.

Witnesses for claimants were apparently mistaken in believing that the grade of Northwest Highway was raised three or four feet in the course of this improvement as the evidence shows there was a change of less than. one foot in such grade. In-so-far as this element affected the witnesses' judgment, same is disregarded.

From all the evidence and the conclusions reached from our inspection we must conclude that certain elements were taken into account by the witnesses Kunstman and Elmore in arriring at their opinions of damages which are not supported by the evidence.

The law in this case is plain. In the case of *C. & E. I. Ry. Co.* vs. *Loeb,* 118 111. *203,* the court said:

> "Before adoption of the Constitution of 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 apparent 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."

The question as to the right of a property-owner for damages to property damaged but not taken as the result of a public improvement, was thoroughly considered by this court in the consolidated cases of *Albert J. Moore, et al.*, vs. *State, 8* C. C. R. 686, and the proper elements of damages were there considered,

The law is well settled as to the damages recoverable in cases where private property is damaged but not taken. In the case of *Department* of *Public Works* vs. *Caldwell,* 301 Ill. 42 and in the case of *Department* of *Public Works* vs. *McBridge,* 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 Stern, et al.* vs. *State of Illinois, 8* C. C. R. 251-265.

Opinions as to damages must be based on lawful elements of damage. *Super Power* vs. *Sommers,* 352 Ill. 610 (618).

The damage which is recoverable by an owner of property resulting from the construction of a public improvement must not be such as is fanciful, speculative, imaginative or conjectural.

Upon consideration of all the evidence in the record the court finds: That the fair cash market value of claimant's property has been depreciated as the result of the construction of the subway in question in the following amounts:

Claimant	No. of Case	Amount
Chicago Title & Trust Co., etc. (Lots 1, 2, 3 in Block 12)	2824	$1,250.00
Chicago Title & Trust Co., etc. (Lots 4, 5, 6, 7, Block 13)	2825	1,915.50
Barney S. Radcliffe (Lots 46 & 47, Block 12)	2826	1,568.25
Chicago Title & Trust Co., etc. (Lot 48, Block 12)	2827	2,000.00
Harry D. Callahan (Lot 45, Block 12)	2828	250.00
Harry Z. Munn & Anna Munn, wife (Lot 44, Block 12)	2829	250.00
Edward F. Kolar & Josephine Kolar (Lot 3, Block 13)	2830	750.00
Chicago Title & Trust Co., etc. (Lot 2, Block 13)	2831	500.00

An award is therefore hereby entered in favor of the respective claimants in the several consolidated cases as follows:

Claimant	No. of Case	Amount
Chicago Title & Trust Co., etc. (Lots 1, 2, 3 in Block 12)	2824	$1,250.00
Chicago Title & Trust Co.. etc. (Lots 4, 5, 6, 7, Block 13)	2825	1,915.50
Barney S. Radcliffe (Lots 47 & 46, Block 12)	2826	1,568.25
Chicago Title & Trust Co., etc. (Lot 48, Block 12)	2827	2,000.00
Harry D. Callahan (Lot 45. Block 12)	2828	250.00
Harry Z. Munn & Anna Munn, wife (Lot 44, Block 12)	2829	250.00
Edward F. Kolar & Josephine Kolar (Lot 3, Block 13)	2830	750.00
Chicago Title & Trust Co.. etc. (Lot 2, Block 13)	2831	500.00

It is further ordered that if a sufficient amount of money is available from funds heretofore appropriated by the Legislature for the payment of such awards and the costs of these proceedings, over and above any and all amounts heretofore ordered paid therefrom, the Director of Public Works and Buildings is in such case directed to issue vouchers in payment of the respective awards hereinabove made and costs as taxed and certified by the Clerk herein, and shall deliver the same to the Director of Finance, and the latter is hereby in such case directed to approve such vouchers and to certify the same to the Auditor of Public Accounts of the State of Illinois, and the latter in such case is directed to issue a warrant or warrants in accordance with such vouchers against the appropriation made for that purpose, and said Auditor shall thereupon deliver said warrants to the Treasurer of the State of Illinois, who is in such case directed to counter-sign and pay such warrant or warrants, all as provided by Section 7 of "An Act in Relation to Compensation For Private Property Damaged For Public Use By the Department of Public Works and Buildings in the Construction or Improvement of Public Highways, approved July 11, 1939." (Ill. Rev. Statutes, 1939, Ch. 47, Par. 24.)

Unless a petition for rehearing is filed within 30 days from this 13th day of March, A. D. 1940, this order shall be and become final upon the expiration of the said period of 30 days.

(No. 3410—Claimant awarded $10.00.)

OAK PARK HOSPITAL, INC., A CORPORATION, Claimant. *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1940.

MORTON C. ELDEN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SERVICES—*lapse of appropriation out of which could be paid—before payment—when award may be made for.* Where claimant has rendered services to the State on the order of one authorized to contract for it, and submits a bill therefor within a reasonable time, and due to no fault or negligence on the part of claimant, same is not approved and vouchered for payment, before the lapse of the appropriation from which it is payable, an award for the

reasonable value **of** same may be made, where at tlie time the services were rendered there were sufficient funds remaining therein to pay same.

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

Claimant seeks an award in the amount of Ten Dollars ($10.00) for X-ray services furnished to an injured employee of the respondent on May 23d, 1937. The services in question were necessary and were furnished at the request of the attending physician who was acting pursuant to proper authorization by the respondent. The bill for such services was presented to respondent on September 20th, 1937, but same was not vouchered for payment for the reason that although there mere ample funds in the appropriation at the time the services were rendered, such appropriation had lapsed at the time the statement was presented. The reasonableness of the claim is not questioned.

This court has repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered €or payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such materials or supplies will be made, where, at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel* Co. vs. *State, 8 C. C.* R. 165; *Indian Motorcycle* Co. vs. *State,* 9 C. *C.* R. *526; Metropolitan Electrical Supply* Co. vs. *State,* No. 3270, decided at the September Term, 1938, of this court.

This case comes within the rule above set forth, and award is therefore entered in favor of the claimant for tlie sum of Ten Dollars ($10.00).

(No. 2853—Claimant awarded $495.00.)

WILLIAM L. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1940.

CHARLES E. LEE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when* award *for* temporary total disability *may* be *made* under. Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation may be made therefor in accordance with the provisions of the Act, upon compliance with the terms thereof by said employee.

SAME—*evidence* in claims tinder—not limited *to* disability alleged in *complaint*. Claimant for compensation under the Workmen's Compensation Act is not limited to the disability alleged in his complaint, but is entitled to show every disability whch he has sustained as the result of the accident.

SAME—claim *for* total *permanent* disability—evidence *insufficient* to *sup*port. Where claimant fails to prove by a preponderance or greater weight **of** the evidence, that total permanent disability for which award for compensation is sought was the result of the accidental injuries sustained, no award for same can be made.

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

Claimant was injured August 12th, 1935, while in the employ of respondent as a laborer at the Griffin Gravel Pit in Moultrie County. He was immediately removed from the scene of the accident to the office of Dr. Stephen Ambrose in Lovington, and from there to St. Mary's Hospital in Decatur where he was X-rayed, and where he remained for treatment until August 18th when he was returned to his home and remained in bed until September 9th.

The X-rays showed no fracture of the skull, no fracture of the ribs, and no evidence of fracture to the bony part of the chest, but revealed an old arthritic condition in the knee joint, and a floating cartilage that apparently had lodged in the tendon above the knee cap.

At the time Dr. Ambrose first examined claimant, he complained of pain in his head, chest and knee. Apparently the head and chest gave him no further trouble at that time, but he continued to suffer considerable pain from the knee injury. At the suggestion of Dr. Ambrose, claimant was given a treatment by Dr. Stewart Wood, an orthopedic surgeon of Decatur, and also was given diathermy treatments by Dr. Scaggs of Lovington for about eight weeks.

The knee continued to bother claimant, and at the suggestion of the Department of Highways, claimant was taken to 'Chicago and placed under the care of Dr. Henry B. Thomas, an orthopedic surgeon, who removed the floating cartilage on May 23d, 1936. Thereafter claimant was given physiotherapy treatments under the direction of Dr. Thomas,

and later returned to his home. The date of such return does not appear in the evidence, but apparently at that time claimant was able to do some light work. His condition improved, and from the evidence in the record it appears that so far as the injury to his knee is concerned, claimant had fully recovered from the effects of the injury, and was able to resume his former work on September 1st, 1936.

The record discloses that claimant had suffered a previous injury to his knee, and had the floating cartilage since 1928, but apparently it did not interfere with the performance of any of his duties. Inasmuch as there was no previous disability, and inasmuch as the accident of August 12th, 1935 aggravated the pre-existing condition, and thereby produced the disability in question, claimant is entitled to recover therefor under the provisions of the Compensation Act. *Rockford City Traction Co.* vs. *Ind. Corn.*, 295 Ill. 358; *Ohlson* vs. *Ind. Corn.*, 357 Ill. 335.

Claimant had been working for respondent for about a week prior to the injury, and his wages were fifty cents (50c) per hour. At the time of the accident he was forty-seven **(47)** years of age, was married, and had one child under the age of sixteen years. Compensation payments therefore must be computed on the basis of Eleven Dollars ($11.00) per week, in accordance with the provisions of the Compensation Act.

From all of the evidence in the recoi-d, there is no question but what the claimant, as the result of the injury to his knee, was temporarily totally disabled from the date of the accident, to-wit, August 12th, 1935, to September 1st, 1936. The respondent paid all medical and hospital bills and also paid claimant the compensation due him to October 19th, 1935. There remains due to claimant for temporary total disability as aforesaid, compensation at the rate of $11.00 per week from October 19th, 1935 to September 1st, 1936, to-wit, Four Hundred Ninety-five Dollars ($495.00).

The complaint which was filed on F'ebruary 29th, 1936, mas apparently based upon the injury to claimant's knee and leg, and no mention is made of a disability resulting from claimant's coronary condition. At the hearing, and in counsel's Brief and Argument, the claim is made that in addition to the disability resulting from the injury to his knee, claimant is completely and permanently disabled by reason of a

coronary disease resulting from the accident of August 12th, 1935.

In the case of *Madison Coal* Co. vs. *Ind. Corn.*, 320 Ill. 65, the employee in his application made claim for temporary total disability as well as for partial disability, but made no claim for total permanent disability. Upon the hearing before the Industrial Commission, award was made for total permanent disability, and on review it was contended that the application was not sufficient to sustain the award. In that case the Supreme Court said:

"We do not regard it essential to a proper statement of claim for compensation for the applicant to state specifically the amount of compensation claimed. It is essential that he state informally the time, place, manner and character of the accident so that the employer will be advised of the nature of the claim and can properly prepare his defense. * * *

Under section 12 of the Act the employee is required to submit himself for medical or surgical examination when requested by the employer. The question for the Commission to determine was the amount of compensation due under the provisions of the Act, and no useful purpose could be served by requiring the employee to determine that question in advance and to state his conclusion in the application for adjustment of claim."

Claimant therefore is not limited to the disability alleged in his complaint, but is entitled to show any and every disability which he has sustained as the result of the accident in question.

It therefore becomes necessary to determine from the evidence in the record whether the claimant is completely and permanently disabled, as contended by him, and if so, whether such disability is the result of the accident of August 12th, 1935.

When the claimant was first examined by Dr. Ambrose on the day of the accident, he complained of pain in his head, chest and knee. From that time until after he returned to work about September 1st, 1936, very little appears in the record as to any complaint relative to claimant's heart condition.

In the fall of 1936 claimant took up work of different kinds, cutting broom corn, working in soy beans, driving a truck, and engaged in trapping, but the time he commenced or completed any of said work, or the time he was engaged therein, does not appear in the record. During the trapping season in the fall of 1936 claimant went to Dr. Ambrose's office, complaining of pain in his chest and arm, and stated that when he walked too long or too fast against a strong

wind, he would have to sit down and rest. This was the first time the pain in his chest was severe enough to cause him to seek the services of a physician, and he had never previously said anything to Dr. Ambrose to cause the Doctor to believe that he had any coronary condition.

Dr. Ambrose at that time made a diagnosis of coronary thrombosis and stated that it was his impression that the condition came on spontaneously. He also stated that in his opinion claimant was permanently disabled at that time (October 14th, 1937), and that as a general thing, that type of heart condition does not improve.

Dr. Ambrose was again called as a witness on July 19th, 1938 and testified that he had been attending claimant professionally since testifying in 1937; that the treatments consisted mainly of rest and tablets supposed to ward off angina attacks, of which the patient was complaining; that he also treated claimant for spitting up of blood; that in his opinion the accident of August 12th had nothing to do with claimant's present heart and lung condition; that in his opinion claimant was not wilfully misrepresenting or malingering but was suffering from what he termed a traumatic neurosis, in which he could no6 keep himself from feeling ill; and further gave it as his opinion that when a settlement was made, claimant would show considerable improvement in his condition. The Doctor further stated that from any examination he was able to make, he was unable to find anything wrong with claimant's heart; that there were no objective symptoms, but that claimant described beautifully the subjective symptoms of coronary trouble.

Dr. Scaggs testified that he first discovered a heart condition called angina pectoris in the fall of 1936; that in giving a history of the case, claimant said that as soon as he started husking corn he got a pain in his heart and had to quit; that every time he took any exercise he would have this pain. Dr. Scaggs stated that in his opinion the claimant's heart condition is a result of his accident of August 12th, 1935; and that it is doubtful if claimant will ever be able to do manual labor.

Dr. Stanley, a heart specialist, stated that he made an examination of claimant January 5th, 1937, and took his history, examined his heart by the usual methods of physical examination, and took an electro-cardiograph; that findings were essentially negative throughout; that he could come to

no conclusion from his examination, but from claimant's history, he was convinced that claimant had angina pectoris, but the electro-cardiograph did not show any such condition; that taking the history into consideration, it was his opinion that claimant's heart condition could have been a result of the injury of August 12th, 1935; that claimant is totally disabled from doing any type of manual labor; that angina pectoris is much more prevalent in persons having mental worry and great responsibility than in the laboring class; that it is a disease more among business and professional men than laboring men; that hardening of the arteries usually manifests itself in the fifth and sixth decades of life.

Dr. E. S. Moore, for fifteen years Superintendent of Illinois Research Hospital, Emeritus Associate Professor of Medicine, University of Illinois, and heart specialist for thirty-five years, examined claimant at the request of Dr. Thomas to see if claimant had a normal heart or was suffering from angina pectoris. Dr. Moore obtained a personal history, made a physical examination of claimant's chest and abdomen, and took electro-cardiographs and X-rays. As the result of such examination, Dr. Moore stated that he found claimant's heart was of normal size, the rate was regular, tones clear, no adventitious sounds, i. e. no sounds other than normal; that claimant had a tender point on the left side at the nipple line; that this tender point is rarely seen in organic heart disease but is frequently present in nervous neurotic persons without heart disease; that there was no evidence of coronary sclerosis; that patient's condition was significant; that he was emotionally disturbed, cried freely, hands trembled; that he broke out in perspiration and the water ran down his sides; that he showed great anxiety and expressed fear that his attacks would return; that his heart beat was regular; that there were no objective symptoms of any coronary disease which would account for the pain described by claimant; that the frequency, the type of radiation, the unusually constant long periods, of discomfort as stated by claimant; are not the customary characteristic picture of angina of organic origin; that in his opinion claimant did not have angina pectoris, based on any organic lesion; that in a man who was emotionally unstable generally, to be told that he had angina pectoris would make a profound impression

and might account for the condition in which claimant was at the time of his examination.

The evidence in the record satisfactorily shows that at the time of the last taking of testimony, to-wit, July 19th, 1938, the claimant was wholly incapable of performing any manual labor. That, however, is not sufficient to entitle him to an award. He must also show that his condition is the result of the accident of August 12th, 1935. As said in the case of *Rittler* vs. *Ind. Corn.*, 351 Ill. 338-353:

"The claimant has the burden of proving not only that an accident happened but also that the accident was the proximate cause of the injury suffered or the condition of incapacity for which compensation is sought—that is, he must Prove the causal connection between the accident and the condition of the incapacity which constitutes his claim for compensation."

In considering a somewhat similar case, our Supreme Court in the case of *American Smelting* Co. vs. *Ind. Corn.*, 353 Ill. 324, said:

"The Workmen's Compensation Act was enacted for a beneficient purpose by requiring the employer to bear a part of the burden sustained from occupational disease6 contracted or injuries sustained by the employee while in the service of the employer and while in the discharge of his duties as such employee. However, before an employee is entitled to recover an award under the provisions of this Act he must bring himself within the provisions of the statute."

Also, on page 328:

"The liability cannot rest upon imagination, speculation or conjecture but must be based on facts established by a preponderance of the evidence, neither can it rest upon a choice between two views equally compatible with the evidence."

This statement of the law was previously announced in numerous cases. *Illinois Bell Telephone* Co. vs. *Ind. Corn.*, 325 Ill. 102; *Byram* vs. *Ind. Corn.*, 333 Ill. 152; *Rittler* vs. *Ind. Corn.*, 351 Ill. 338.

In determining the question here involved, consideration must be given to the following:

1. Claimant had no trouble in his chest of sufficient importance to cause him to seek the services of a physician, for more than a year after his accident.

2. The first. doctor that examined the claimant on account of his heart condition (Dr. Ambrose) diagnosed his condition as "coronary thrombosis", and was of the opinion that the accident of August 12th, 1935 had nothing to do with such heart condition.

3. The next doctor that examined the claimant on account of heart condition (Dr. Scaggs) diagnosed his condition as "angina pectoris", and was of the opinion that such condition was the result of the accident in question.

4. The next doctor that examined the claimant on account of his heart condition (Dr. Stanley) stated that he could come to no conclusion from his examination, but from claimant's history he concluded that claimant had angina pectoris, and gave it as his opinion that such condition *could* have been the result of the accident.

5. The next doctor that examined the claimant on account of his heart condition (Dr. Moore) found no objective symptoms of any coronary disease which would account for the pain described by elaimant, and also stated that "in a man who was emotionally unstable generally, to be told that he had angina pectoris would make a profound impression and might account for the condition in which claimant was at the time of his examination".

6. None of the medical men who examined claimant found any objective symptoms of any coronary disease, and the electro-cardiograph indicated nothing abnormal.

7. The testimony of Edward Kirby who was a patient at St. Luke's Hospital when claimant was there, and who was staying at the Y. M. C. A. Hotel in Chicago at the same time claimant was there. He stated that claimant on one occasion said he got hurt in a gravel pit and if there was any chance at all he felt like he wanted something out of it. Kirby also stated that claimant "had a crutch and a cane when he was sent to the Y. M. C. A. Hotel from the hospital, but he discarded the crutch, shoved it under his bed in his room"; also that on one occasion between June 14th and June 20th, 1936 they walked from the Y. M. C. A. Hotel to the new Outer Drive Bridge, then to 30 North Michigan Avenue, and from there back to the Hotel, then, after dinner, walked from the Hotel to the Illinois Research Hospital and back, a total of ten or eleven miles, at which time claimant requested Kirby not to let the nurses or Dr. Thomas "know but what he used his cane all the time, as he thought that it would hurt him in getting anything out of his claim, and he said he could walk fairly well without it".

We conclude from a consideration of all of the evidence in the record that the claimant has failed to establish by the

greater weight of the evidence that the coronary condition of which he now complains is the result of the accident of August 12th, 1935, and award for any disability on account of such condition is denied.

Claimant is entitled to an award for temporary total disability resulting from injury to his knee as hereinbefore set forth.

An award is hereby made in favor of claimant, William L. Smith, for temporary total disability to his right knee as hereinbefore set forth, in the sum of Four Hundred Ninety-five Dollars ($495.00).

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", (Illinois Revised Statutes, 1939, Bar Assn. Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly", approved July 1st, 1939 (Session Laws 1939, page 117); and being, by ths terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3262—Claim denied.)

NINA YOUNGMAN, ADMINISTRATRIX OF THE ESTATES OF JOHN YOUNGMAN, DECEASED AND ROBERT YOUNGMAN, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December *12, 1939.*

Rehearing *denied* March *14, 1940.*

HAROLD J. DALTON, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

GOVERNMENTAL FUNCTION—*public* park. The establishment and maintenance *of* a public park by the State is a governmental function.

RESPONDEAT SUPERIOR—*not* applicable *to* State. The doctrine of respondeat superior is not applicable to the State in the exercise *of* its governmental functions.

NEGLIGENCE—*employees of State—State not liable for.* The State is never liable for the, malfeasance, misfeasance or negligence of its officers, agents or employees in the exercise of its governmental functions.

MR. JUSTICE YANTIS delivered the opinion of the court:

On June 18, 1936 Robert Youngman, aged ten years, and John Youngman, aged twelve years, were drowned in Pine Creek at White Pines State Park, Oregon, Illinois; the latter being a park established and operated by the State of Illinois. The complaint filed by Nina Youngman, as Administratrix of the children's estates, alleges that there was a concrete slab across Pine Creek which was formerly used by cars, but was no longer so used; that the waters of the creek passed over it in a shallow manner, and that the surface of the slab had become overgrown with moss; that it was attractive to children of tender years who were in the habit of wading upon the slab; that the waters of the Creek on each side of the slab were approximately fifteen feet deep, making it a dangerous place for children to play.

The complaint further alleges that it was the duty of respondent to exercise such care in the control and management of the slab that children of tender years who were attracted thereby would not be injured or killed; that the respondent negligently and carelessly failed to remove the slab or to provide a fence or protection for same, and permitted children to play thereby and thereon, and that as a result of such negligence the two children while wading on the slab slipped off the slab and were drowned.

The Attorney General has filed a motion to dismiss the complaint for the reason that the right to damages claimed therein is predicated upon the alleged negligence of the respondent through its agents and servants.

The Doctrine of Respondeat Superior does not apply to the State, and in the absence of a statute so providing, the State is not liable for death or injuries resulting from the negligence of its agents, officers or employees. (*Trombello* vs. *State*, *8* C. C. R. 56; *Cavatio* vs. *State*, 9 C. C. R. 245; *Wilson* vs. *State*, 8 C. *C*. R. 72.)

The establishment and maintenance of a park is a governmental function. (*Trornbello* vs. *State*, supra.)

It further appears that the two children above named were drowned June 18, 1936. The complaint mas filed herein on May 19, 1938, being considerably more than one pear after

the children's death. The Attorney General contends that Paragraph 2, Chapter 70, Ill. Rev. Statutes, 1937, provides that every action for recovery of pecuniary damages resulting from death shall be brought within one year after the death of such person, and that therefore the claim in question would be barred under the statute.

Claimant contends that inasmuch as the Court of Claims Act provides that every claim filed herein shall be barred unless filed within five years after the claim first accrues, that the one year limitation under the Injuries Act does not apply. To this, we cannot concur. It does not follow, that since no claims can be filed in the Court of Claims after five years from the time the right of action accrued that all other limitations of statute are nullified so far as the filing or hearing of claims in the Court of Claims are concerned.

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

(No. 3459—Claimant awarded **$20.00.)**

IVAN E. BROUSE, M. D., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion ***filed*** *April 11, 1940.*

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

MEDICAL SERVICES—*rendered to employee of State under Workmen's Compensation Act—lapse of appropriation* ***at*** *of which could be paid—before presentment of bill—when award may be macle* for. Where medical services were rendered to employee of State for accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, at the request of State, and bill for reasonable value of same was not presented before lapse of appropriation out of which it could be paid, due to no negligence of claimant, an award may be made for amount due, on claim **Aled** within a reasonable time.

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

On February 17th, 1939 one Franklin Story, an employee of the Division of Highways of the respondent, sustained an accidental injury which arose out of and in the course of his employment, and was treated therefor by Dr. F. A. Norris.

On March 27th, 1939, with the approval **of** the Division

of Highways, said Franklin Story was referred by Dr. Norris to the claimant herein for X-ray pictures of his dorsal and cervical spine, and for an interpretation of such pictures. Claimant made the pictures as requested, and gave his interpretation thereof, and on December 4th, 1939 rendered a bill therefor to the respondent in the amount of $20.00. Payment was refused on the ground that the appropriation from which same was properly payable had lapsed, and claimant was advised that he would have to seek payment through the Court of Claims.

No question is raised as to the value of the services rendered, nor is it claimed that there were not sufficient unexpended funds in the proper appropriation at the time of the rendition of such services. Under similar circumstances we have repeatedly held that the claimant is entitled to an award. *Rock Island Sand and Gravel* Co. vs. *State*, 8 C. C. R. 165; *Indian Motorcycle* Co. vs. *State*, 9 C. C. R. 526; *Metropolitan Electrical Supply* Co. vs. *State*, No. 3270, decided at the September Term, 1938, of this court.

Award is therefore entered in favor of the claimant for the sum of Twenty Dollars ($20.00).

(No. 3422—Claim denied.)

WINIFRED BURROUGHS AND CHARLOTTE N. BURROUGHS, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opnion pled April 11, 1940.

WARNOCK, WILLIAMSON & BURROUGHS and BROWN, HAY & STEPHENS, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State—State not liable for—doctrine of respondeat superior not applicable to State.* In the exercise of its governmental functions, the State is not liable for damages occasioned by the negligence of its officers, agents or employees.

SAME—*same—personal injury sustained as result of—award for damages on grounds of equity and good conscience cannot be made.* Regardless of the merits of a claim for damages, for personal injuries or damages to property, sustained as the result of the negligence of an officer, agent or employee of the State, or the extent of such damages or seriousness of such injuries, or the degree of such negligence, or the absence of contributory negligence, no award can be made for such damages, on the grounds of equity and good conscience.

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

The complaint herein alleges in substance that on November 6th, 1937, the claimant, Winifred Burroughs, was driving an automobile in a northerly direction on S. B. I. Route No. 4 (U. S. Route No. 66), at a point about three miles north of the Village of Hamel, in Madison County; that the claimant, Charlotte N. Burroughs,' was riding as a guest in said automobile; that at the same time one John D. Owens, Assistant Engineer of the respondent, in the course of his employment was driving an automobile in a southerly direction upon said S. B. I. Route No. 4 and was approaching the Burroughs car; that a heavy fog prevailed and the visibility was poor; that the pavement was damp and wet; that said. Owens was driving his automobile at a high and dangerous rate of speed, and while passing another vehicle proceeding in the same direction, and while the foggy condition of the atmosphere was so dense that it was impossible to see more than fifty (50) feet, drove his automobile over the center line of said highway, directly in the path of the Burroughs car, whereby the two automobiles collided head on; that as a result thereof the Burroughs automobile mas demolished and claimants sustained serious and permanent injuries, for which the claimant, Winifred Burroughs, asks an award in the amount of $6,800.00, and the claimant, Charlotte N. Burroughs, asks an award in the amount of $6,000.00.

The complaint further alleges that the claimants were in the exercise of all due care and caution prior to and at the time of the accident, and that said John D. Owens was guilty of wilful and wanton misconduct in the operation of his automobile, and that therefore the respondent is liable for the injuries and damages sustained by them.

The Attorney General has filed a motion to dismiss on the grounds that the State is not liable for the carelessness and negligence, or for the wilful and wanton misconduct of its employees.

The claimants contend that under the provisions of Section 6 of the Court of Claims law, the court has jurisdiction to hear and determine all claims and demands, legal and equitable, which the State, as a sovereign commonwealth, in equity and good conscience should discharge and pay; and

that in this case the State in equity and good conscience should pay the claimants the damages sustained by them.

The question raised in this case has been before this court in numerous cases, and was carefully considered in the case of *Crubtree* vs. *State*, 7 C. C. R. 207. In that case, after an exhaustive review of the previous decisions of this court, we said:

"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 contracto 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 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."

In the case of *Garbutt* vs. *State*, No. 2246, an opinion denying an award was filed at the January Term, 1935. That case involved the question of the liability of the respondent for the negligence of the maintenance patrolman on S. B. I: Route 172, and we there held, following the case of *Crubtree* vs. *State*, *ante*, that there was no liability.

Thereafter a rehearing was allowed on the petition of the claimant, and upon such rehearing the claimant contended that the servants and agents of the respondent were guilty of gross and wanton negligence, and that under such circumstances an exception exists to the general rule that the State is not liable for the acts of its servants and agents under the doctrine of respondeat superior. In that case we held:

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants or agents in the absence of a statute making it so liable. The purported exception has no basis in law, and is no longer recognized by this Court."

The question as to the liability of the State on the grounds of equity and good conscience was again fully con-

sidered by the court in the case of *Titone* vs. *State*, 9 C. C. R. 389, in which the authorities in this and other States were again considered and reviewed, and the decision in the *Crabtree* case was adhered to.

The rule as laid down in the *Crabtree*, *Garbutt* and *Titone* cases has been recognized and applied in New **Pork,** Massachusetts, and numerous other States. In the case of *Smith* vs. *State*, *227* N. *Y*. 405, the New Pork Court of Appeals 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."

The case of *Burroughs* vs. *Commonwealth*, **224** Mass. *28*, involved **a** statute which gave the Superior Court "jurisdiction of all claims against the Commonwealth whether at law or in equity," and in that case the court, on page **39,** said:

"It has been held that while the terms of the statute now embodied 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.** ***Corn.,*** **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."

Under the law as above set forth we have no authority to allow an award, and the motion of the Attorney General must be sustained. Motion to dismiss allowed. Case dismissed.

(No. 3447—Claimant awarded $3.46.)

CONTINENTAL OIL COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1940.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid—when award may be made for.* Where it appears that State received merchandise, as ordered by it, and that bill therefor in agreed amount for same, was not presented before lapse of appropriation out of which it could be paid, due to no negligence on part of claimant, an award may be made for amount due therefor, on claim filed within a reasonable time.

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

On February 21, 1939 the claimant furnished to the respondent for its Bureau of Maintenance, Roadside Planting and Landscaping, District No. 4, certain merchandise of the value of $1.73, and on March 4, 1939 furnished similar merchandise in the same amount.

Claim therefor was properly presented for payment in April, 1939, but apparently the same was mislaid. Another claim was filed on November 17, 1939, but payment was refused for the reason that the appropriation out of which the same was properly payable had lapsed.

No question is raised as to the receipt of the merchandise, or the value thereof, nor is it contended that there were not sufficient unexpended funds in the proper appropriation at the time the merchandise in question was purchased.

We have held in numerous cases that under such circumstances claimant is entitled to an award. *Rock Island Sand and Gravel Co.* vs. *State,* 8 C. C. R. 165; *Indian Motorcycle* Co. vs. *State,* 9 C. C. R. 526; *Metropolitam Electrical Supply Co.* vs. *State,* No. 3270, decided at the September Term, 1938, of this court.

Award is therefore entered in favor of the claimant for the sum of Three Dollars and Forty-six Cents ($3.46).

(No. 3099—Claim denied.)

EDITH CREWS, HOWARD CREWS AND WAYNE CREWS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***April 11,*** *1940.*

PARKER, BAUER & PARKER, for claimants.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries resulting in death—sustained before commenczng work—not on premises where employed—not accident arising out of and in course of employment.* As a general rule, employer is not liable under the Workmen's Compensation Act for compensation for accidental injuries sustained by an employee while on the way to or from his employment, especially when he is not on premises where employed, such injuries not being deemed as arising out of and in the course of employment.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The petitioners are the wife and heirs at law of the decedent.

The complaint consists of two counts. The first count alleges that the deceased was driving his automobile in a southerly direction on Schyler Avenue in the City of Kankakee, Illinois, at the rate of ten miles per hour; that he was an employee of the State, being an attendant at the State Institution for the Insane at Kankakee; that he desired to turn west at the intersection of Schyler Avenue and River Street; that there is located there a strip of land, immediately south of River Street, belonging to the park district of the City of Kankakee, which strip of ground borders on the North side of the Kankakee River; that he was in the exercise of due care and caution for his own safety and the safety of his automobile; that while in the exercise of due care and caution for himself and property at about 5:30 in the morning of January 8, 1937, the weather being misty, foggy and the visibility very bad, and he being an experienced driver, for the lack of proper guards and barricades, he drove off the highway for some seventy or seventy-five feet into the river and was drowned. This count charges that it was then and there the duty of the State to erect sufficient barricades to prevent one from driving into the river. It might be said that this count attempts to charge negligence under the common law.

The decedent's work had to do with milking at the Kankakee State Hospital, and he supervised others doing that kind of work. He had been working there since **1934,** and it appears that on the morning in question, he had taken a grandchild and daughter-in-law to catch an early conveyance. These relatives had been visiting the decedent's family at Kankakee and mere about to return home, and they had stopped for an early morning breakfast. The evidence shows that he was on a regular, approved, customary route from the restaurant to the State Institution or the place where he was employed, and it is contended that he had a right to go around about way if he so desired "as long as he was on his way to work." The evidence does not disclose that this particular part of the road over which decedent rode was under a state of repairs, or mas in any way other or different than it had been for sometime, and was not in a good state of repair.

It appears from the record that on the morning in question a very dense fog prevailed along this particular highway which was probably due to its close proximity to the river. One witness, a driver of a delivery truck, had met the deceased at the restaurant and discussed with deceased the matter of the heavy fog and this driver of a delivery truck stated that it was almost impossible to see; that in a short distance he had been required to stop several times so that he might ascertain if his vehicle was on the street, and that he had been unable to drive it at a greater speed than five miles per hour.

There were no eye witnesses and consequently no evidence as to the rate of speed, but as we regard this question, the rate of speed is not a controlling factor.

It has been thorough established that the doctrine of respondeat superior does not apply to this State and the State is not liable for injuries to the person or damages to property caused by the negligence or wrongful acts of its officers, agents or employees.

In the case of *Minear* vs. *State Board of Agriculture,* 259 Illinois, **549,** our Supreme Court held that the State Board of Agriculture is not liable in an, action for damages for an injury received by the collapsing of the elevated seats or bleachers provided for spectators of the races at the State Fair, even though the board may have been guilty of negligence in not discovering the defective condition of said seats

or bleachers. In this case the negligent act charged is the failure of the State to erect suitable barricades to prevent one from driving into the river from Schyler Avenue. We know of no statute requiring any officer of the State to erect such barricades, and, of course, there is nothing under the common law creating a duty on behalf of the sovereign power to erect barricades, and the deceased never had the right, under the common law, to sue the State. In the *Minear* case above referred to, our Supreme Court, discussed a similar question, quite thoroughly, and much of the reasoning applied in that case, would apply with equal force to the case at bar.

In a much more recent case, that of *Gebhardt* vs. *Village of LaGrange Park*, **354** Ill. 235, decided in **1933,** our Supreme Court held that the principle upon which freedom from liability for damages occasioned by servants of a municipality in performing governmental functions is based rests on the fact that the duty of the municipality is owed to the public, and though the neglect causing the injury may prove of damage to the individual affected, the benefits of the discharge of the duty to the public generally is deemed an outweighing consideration and so justifies immunity to the municipality. In this same case the court said that in determining the application of the rule of respondeat superior, the question whether a municipality, at the time in question, was performing a governmental function or was engaged in a proprietary enterprise is to be determined not only by the question whether or not the function was voluntarily assumed but also from the 'nature and effect of the duty diecharged or the act done, and if the duty involves a general public benefit as distinguished from the interest of the municipality in a corporate or business undertaking, the function is governmental whether the duty is directly imposed or voluntarily assumed.

In view of these authorities and others and the many decisions of this court, we must hold that the doctrine of respondeat superior does not apply and there is no liability insofar as Count **1** is concerned.

Count **2** is based upon the same state of facts, but no where therein does it directly charge that the deceased was drowned or killed as the result of the accident, but that fact may be reasonably inferred from the other allegations contained in the Count. The deceased was employed by the State on State property. He supervised the milking of cows and

probably did other work pertaining thereto. He had driven his own car in aiding relatives to return to their homes. It appears that the conveyance that they boarded was on the opposite side of the river to both the decedent's home and the State Institution. It is charged that the said "James Cash Crews, at the time of the accident aforesaid, was on his way to the State institution located at Kankakee, Illinois; that he was driving said automobile with due care and caution; that he was then and there taking the usual customary and regular route in going to the said State institution." This count was apparently attached for the purpose of bringing the deceased within the terms and provisions of the Workmen's Compensation Act. It does not charge that the decedent was on his way from his home on the usual, customary and regular route, to the institution: it does not aver that the decedent had any business on behalf of his employer upon the street in question or in that vicinity, at that time or any other time, and it does not aver that he was in the performance of his duties.

The question for us to determine is: Did the deceased receive an injury that arose out of and in the course of his employment and was he under the Compensation Act at the time of his death? It appears from the record that his car had run from the street into the river and that he was drowned, and it further appears that he had some few bruises in addition to the drowning. It is generally conceded that every employment under the State is not under the Compensation Act.

In *Landon* vs. *Ifidustrial Covn.,* **341** Ill. 51, the employee, Cleary, and three other truck drivers were returning to Chicago and the rear truck which Cleary was driving, went into a ditch. In a telephone conversation, the employer instructed them to leave the truck and also instructed the other drivers to return their trucks to the garage and for Cleary to return home. Cleary had the option of riding to Chicago in one of the other trucks but he rode part way in an automobile and was then overtaken by the truck and without the knowledge of the driver, climbed into the rear end and then endeavored to climb around the side of the truck-to the cab and fell and was injured. The court held that Cleary was in the course of his employment but that the accident did not arise out of the employment because he incurred *a* hazard or danger not in-

cident to the employment. The language of the court in the Landon case throws much light upon the instant case. Therein the court said:

"Whether an employee, when injured in going to or from his work, is in line of his employment depends upon the facts and circumstances of the particular case, but as a general rule a man's employment does not begin until he reaches the place where he is to work and does not continue after he has left the place where he works. (*Dambold* vs. *Industrial Com.*, 323 Ill. 377.)

The cases which hold that an employee injured while going to or coming from his work is within the course of his employment have been cases decided upon the ground that the employment required the particular route to be traveled or the route followed was the only one open to the employee. Where the employee is left to his own choice as to the method of reaching his place of employment or in going home and selects a dangerous route when he could have selected a safe one, his act in so doing is not incident to the employment. (*Lumaghi Coal* Co. vs. *Industrial Corn.*, 318 Ill. 51; *Dambold* vs. *Industrial* Corn., 323 Ill. 377.)

An employee must not unnecessarily increase the risk of injury to himself beyond that contemplated in his contract of service or choose an unnecessarily dangerous place for the doing of the *act* which is claimed to be incident to the employment. (*Weiss Paper Mill* Co. vs. *Industrial Corn.*, 293 Ill. 284.)

Where an employee chooses to go to a dangerous place where his employment does not necessarily carry him, and thus increases a danger of his own choosing altogether outside of any reasonable requirement of his work, such risk is not incident to the employment. (*St. Louis and O'Fallon Coal* Co. vs. *Industrial Com.*, 325 Ill. 574; *Terminal Railroad Ass'n* vs. *Industrial Com.*, 309 id. 203; *Nelson Construction Co.* vs. *Industrial Corn.*, 296 id. 632; *Lumaghi Coal* Co. vs. *Industrial Com.*, supra.)

In *United Disposal* Co. vs. *Industrial* Corn., 291 Ill. 480, the employee was killed while going to his employment. He chose a route not provided by his employer but one which better suited his convenience. It was held that in so doing he voluntarily accepted unnecessary risk and that the injury which he received did not arise out of his employment."

All employees of the State of Illinois are not under the Compensation Act.

Mr. Walter Cleveland Peters, Chief Clerk of the Kankakee State Hospital testified that the deceased at the time of his death earned "$83.00 plus $6.00 per month commutation." It may be argued that the deceased mas receiving compensation for traveling to and from his work. It does not appear in this case that the deceased had any duties to perform away from the Kankakee Institution, and even if $6.00 per month was allowed for transportation purposes, we fail to see how that can change the situation. That was not payment for corn-

pensation; at the most, it was merely an allowance for his expense in getting to and from his home.

His employment in this instance had not as yet commenced. From the evidence it appears that he was not on the regular route from his home to the institution, and that he had no duties to perform on Schyler Avenue whatsoever.

In the case of *Public Service Company* of *Northern Illinois* vs. *Industrial Corn., 370* Ill. **334,** the arbitrator and the Industrial Commission awarded compensation to the widow of the deceased employee and the superior court of Cook County confirmed the Commissioner's award. The award was based upon a finding that death was due to accidental injury arising out of and in the course of the employment. .The Supreme Court reversed the judgment of the superior court and the award of the Industrial Commission. The facts, as stated by the court in its opinion, were:

"Beckman was employed by the plaintiff in error about twenty-five years. At the time he died he was a foreman in its gas-generating and pumping department. He worked in Blue Island where he lived, until he was transferred to the company's new plant at Niles Center. He continued to live in Blue Island, but was allowed sixty-seven cents per day to cover the cost of his transportation. The same arrangement was made with another employee, Habenicht, who took turns with Beckman in furnishing an automobile to drive to work. Habenicht was driving and the two were on their way home from work when Beckman was killed in an automobile collision. Beckman had no duties, except those he performed at the plant in Niles Center."

The Court then stated:

"Plaintiff in error contends that Beckman was through work and that his death did not occur in or arise out of his employment. In *Fairbank Co.* vs. *Industrial Com.*, 285 Ill. **11,13,** we said: 'when work for the day has ended and the employee has left the premises of his employer to go to his home the liability of the employer ceases, unless after leaving the plant of the employer the employee is incidentally performing some act for the employer under his contract of employment.'

"The defendant in error relies on our holding in *Irwin-Neisler* & Co. vs. *Industrial Com.*, 346 Ill. 89, and cases therein cited. The facts of that case bring it within the latter part of the rule quoted from the Fairbank Co. case. The employee, there, had been directed to make a business call in LaFayette, Indiana, while he was returning from a vacation, and was hurt when his automobile overturned. We held that although an employee may regularly be employed only at the plant or place of business, yet he will still be in the course of his employment, if he is directed to perform other or even unusual duties elsewhere. In the case before us, Beckman is not shown to have had any duties to perform away from the plant. Whether the sixty-seven cents was wages or expense money is immaterial. His death did not arise out of or in the course of his employment, and his employer, is, therefor, not liable."

And so it is in this case. Whether the $6.00 per month was wages or expense money is immaterial.

The Attorney General had made a motion to dismiss this case. Much evidence was introduced. The claimants have been ably represented but we must hold that the deceased's death did not arise out of and in the course of his employment, and the motion of the Attorney General, therefore, must be sustained.

The petition for compensation will, therefore, be dismissed.

(No. 3443—Claim denied.)

VICTOR EICKOLZ, CLETIS YATES, DOROTHY YATES, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***April 11, 1940.***

ROBERT H. CHASE, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employee* of ***Division*** *of Highways — State not liable for — rule* ***of*** *respondeat superior not applicable to State—award cannot* ***be*** *made for damages resulting from under any theory of law or equity.* The State is not liable for damages to property caused by the negligent operation **of** one **of** its trucks by an employee **of** the Division **of** Highways, the doctrine ***of*** respondeat superior not being applicable to the State, and no award can,be made therefor under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimants herein allege that on October 12, 1939 Victor Eickolz was the owner of a certain Ford truck which was then and there being driven on an Illinois public highway described as U. S. Highway No. **45.** That the owner's employee Cletis Yates mas driving the car and was accompanied by his wife Dorothy Yates.

That an employee of the Illinois Division of Highways, named Ralph Snyder, was driving a State Highway truck and was engaged in attempting to pull another truck onto the highway; that in disregard of his duties Ralph Snyder negligently drove the State trucks onto the highway in such a manner as to obstruct both lanes of travel without warning to other trucks and cars, and that as a result, Cletis Yates while in the exercise of due care drove the Eickolx truck over

the brow of a hill and struck the State trucks, resulting in damage to the Eickolz truck in the purported sum of $435.00 and personal injuries and damages to Cletis Yates in the sum of $200.00, and personal injuries and damages to Dorothy Yates in the sum of $200.00 plus an additional claim of $52.00 for medical expense.

The Attorney General has filed a motion to dismiss the demand of each of said claimants, for the reason that it is predicated upon an alleged liability of respondent for the negligent action of an employee of the State.

Respondent's contention is correct. The doctrine of respondeat superior does not apply to the State, and in the absence of a statutory provision the State is not liable for the negligence or misconduct of its officers, agents or employees. *Schultz* vs. *State,* **9** C. C. R. 96; *Kelly* vs. *State,* **9** C. C. R. **339;** *Crank* vs. *State,* **9** C. C. R. **379.**

In the exercise of its governmental functions, the State is not liable for the negligence of its servants or agents in the absence of a statute making it thus liable. *Baumgart* vs. *State,* *8* C. C. R. **220.**

This court has had occasion to hold many times that the State in the construction and maintenance of its hard-surfaced highways is engaged in a governmental function. The employee in question is alleged to have been operating one of the State highway trucks at the time of the injury complained of. No award can properly be entered against the State for his alleged negligence. This does not relieve him from any tort liability for which he individually might be liable. The motion of the Attorney General is allowed and the claim as to each of said claimants is dismissed.

(No. 3400—Claim denied.)

CARL K. GERDES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion pled April 11, 1940.

EARL B. WILLIAMSON and ROSCOE FREDERICK, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of Division of Highways—State not liable for—award cannot be made for damages resulting from, on grounds of equity and good conscience.* **In the construction and maintenance of its public highways**

the State exercises a governmental function and is not liable for damages to persons or property caused by either a defect in the construction, or failure to maintain same in a safe condition, or the malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith, and no award can be made therefor under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, Carl K. Gerdes, seeks an award of Seventeen Thousand ($17,000.00) Dollars under a complaint which alleges that on July 28, 1937 the State of Illinois had constructed a State highway known as Route 29 which was then under the supervision and control of the Department of Public Works and Buildings, and in so doing: had built a culvert including an abutment on each side of the hard road eighteen inches in height. That these abutments 'were concealed by a growth of weeds some three feet in height; that about one hundred feet south of the abutment there was a large amount of dirt, sand and gravel which had been packed upon and across the highway by trucks hauling, dirt, sand and gravel under respondent's supervision in the course of constructing a fill for a new hard road connection that was being built at that point; that the sand, dirt and gravel had been spilled by the trucks and had become packed into two ridges, one-half foot wide and eight or nine inches high; that on said date claimant was traveling in a northeasterly direction upon said Route 29, that his car struck the ridges of dirt causing the car to leave the cement slab; that there was considerable traffic and he was compelled to drive his car upon the right-hand earth shoulder for a considerable distance, and while so driving he ran into the eighteen-inch abutment. above mentioned. That as a result of the accident he suffered serious injuries and expended large sums for hospital bills and medical care.

The Attorney General has filed a motion to dismiss the claim for the reason that same is predicated upon alleged liability of respondent for injuries alleged to have been caused by the failure of respondent to properly maintain in a reasonably safe condition for public use, a highway under respondent's control and jurisdiction.

Reluctant though the court may be to deny Plaintiff a recovery we have no choice but to allow the motion. We have been repeatedly called upon to recognize the rule that the doctrine of Respondeat Superior does not apply to the State, and

that the State in the absence of a statute so providing is not liable for injuries resulting from the negligence or failure of its employee to properly maintain its highways.

The State, in the construction and maintenance of its highway system, is engaged in a governmental function, and in the absence of a statute expressly so providing, is not liable for personal injuries or damages to property that may be occasioned by its failure or negligence to maintain its highway in a safe condition. (*Harman et al.* vs. *State*, 9 *C.* C. R. 29; *Wentworth* vs. *State*, 9 *C. C.* R. 240.)

The Court of Claims will make awards only in cases where the State would be liable in law or equity if it could be sued in a court of general jurisdiction. (*Crabtree* vs. *State*, 7 C. *C.* R. 207.)

Motion is allowed and claim dismissed.

(No. 2777—Claimant awarded $172.39.)

CHARLES HAMILTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1940.

JOSEPH W. KOUCKY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* ACT—*employee suffering prior loss* of *hand at time and place other than accident—award for partial loss of use* of *remaining part of arm—amount that would be payable as compensation for loss of hand must be deducted.* Where employee suffered prior loss of hand and thereafter sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in partial loss of use of remaining part of arm, then t4e amount that would have been paid for loss of hand must be deducted from any award for such partial loss of use of remaining part of arm.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Charles Hamilton has made a claim against the State of Illinois' for compensation to be awarded him pursuant to the Workmen's Compensation Act, on account of an injury which he received. Claimant states that he resides at the Chicago State Hospital, 6400 Irving Park Boulevard, Chicago, Illinois; that on the 2nd day of February, 1935, and for several years prior to that date, he was employed by the State of Illinois as an employee of the Chicago State Hospital, as a

landscape gardener; that his duties, among other things, were to look after the lawn, shrubs, etc., and in other ways assist in the maintenance of the grounds of the Chicago State Hospital.

Claimant further charges that while he was working for the Chicago State Hospital, in the City of Chicago, on the date last mentioned, and while in the discharge of his duties, he slipped and fell on the ice, and as the result of the fall he sustained injuries to his left shoulder and arm. (The proof and subsequent amendments to the complaint show this to be the right shoulder.)

Claimant also alleges that notice was given of the accident on or about the same day, and that medical and surgical services were furnished and paid for by the State of IIllinois. Claimant's compensation was alleged to be $58.00 per month, exclusive of board, room and laundry service, and that his average annual earnings for the year preceding the injury, including board, room rind laundry, were $1,200.00. He also alleges that he has not received any compensation on account of said injury, except his regular monthly salary and maintenance for eight weeks, that being the period of temporary disability, and he asks for an award under Section 7 of the Illinois Workmen's Compensation Act.

The proof shows that in 1912 the claimant suffered the amputation of his right hand at about the wrist on account of a shot-gun wound and blood poisoning.

As we construe the proof in the record, he suffered as the result of the injury complained of, fifty per cent loss of the use of bis right arm independent of the amputation; that after the amputation and before his injury, he did have considerable use of this arm. He could carry many things by holding them tight to his body and by the use of a hook upon the wrist, he was able to do a number of things. The evidence further discloses that the present condition of his arm is permanent.

At the time of the injury, claimant was working with eight or nine men, presumably inmates of the hospital, and two of them got into trouble. Claimant tried to separate them and in so doing, his right shoulder 'was broken. Some of these patients are mentally deranged and it was a part of the claimant's duty to maintain order. Claimant was treated at the hospital at the expense of the State. He testified that

he was treated for six or seven weeks, but the more convincing evidence is that he was back to work in thirty-two days.

Claimant was injured on February 2, 1935. During the year preceding the accident, for two months he received $50.40, for six months $48.60 and for four months $46.80. At the time of the accident his salary was $50.40. It was stipulated that the annual salary for the year next prior to the injury amounted to $795.60 and that the average weekly wage for that period was $15.30 per week.

Claimant lost thirty-two days work on account of the injury. He was in the hospital twenty-six days and it was six days more before he returned to work. Apparently it was a bad fracture and when it healed the arm and shoulder were somewhat stiffened and there was a loss of limitation of 45 to 50%.

The claimant stated that he had received $18.00 per month maintenance and upon that statement, together with the departmental report, it was stipulated between the parties that his salary or wages for the year immediately preceding liis injury amounted to $795.60, or an average weekly wage of $15.30. During the thirty-two days that claimant was totally temporarily disabled, he received his full ,salary on the basis of $50.40 wages and $18.00 commutation, or a total of $68.40 per month, or a total of $72.96 for thirty-two days. Based on the rate of pay for the year immediately prior to the injury, the claimant was entitled to a compensation rate of $7.65 per week for a period of four weeks and four days. This would amount to $34.97. The claimant was therefore, overpaid the sum of $37.99, and this amount should be deducted.

Plaintiff had, prior to this injury, lost the use of his right arm by amputation at the wrist. Both Dr. Adams and Dr. Bell testified, and the prior loss of the hand is admitted.

Section 17½ of the Compensation Act provides as follows:

"In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot, or any toes, such loss or partial loss of any such member shall be ded'ucted from any award made for the subsequent injury, and for the permanent total loss of use or the permanent partial loss of any such member or the sight of an eye shall be deducted from any award made for the subsequent injury, and for the permanent total loss of use or the permanent partial loss of use of any such member for which compensation has been paid, then such

loss shall be taken into consideration and deducted from any award for the subsequent injury."

The record discloses that the claimant did not receive any compensation for the loss of the hand, and he now contends that for that reason an award should be fixed at the same amount as it would have been had the hand been lost as the result of the accident in question.

Prior to the amendment of the Act by the addition of Section 17½ that was the interpretation of the law by the Supreme Court, but we regard the law as now amended as having been amended to prevent a recovery of more than a one hundred per cent loss of an arm, hand, leg, etc., in cases of this kind. As we construe Section 17½, it means that we must take into consideration the permanent partial loss of use of any such member or the permanent total loss of use, and deduct that amount from any reward: for the subsequent injury. The question does not depend upon whether or not compensation has been paid, but depends upon whether or not there has been a loss or partial loss; by amputation of any member, including arm, hand, thumb, etc., and if such a loss has taken place then the amount which was paid or should have been paid under the Compensation Act must be deducted.

If claimant had suffered the complete loss of his arm, he would have been entitled to 50% of his average weekly wages during 225 weeks, but we cannot allow anything for the loss of the hand because that occurred at another time and at another place, and for the loss of a hand, the statute fixes the amount at one-half of the average weekly wage for 170 weeks. Deducting this 170 weeks from the 225 weeks, we have 55 weeks left, but the proof shows that he only suffered a loss of 50% of the use of the remaining part of the arm. He would, therefore, be entitled to one-half of 50% of his average weekly wage for 55 weeks, or $210.38, less the $37.99, which he was overpaid, or the sum of $172.39.

We, therefore, make an award in favor of the claimant in the sum of $172.39.

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," (Illinois Revised Statutes, 1939, Bar Assn. Edition, Chapter 127, Pars. 180-181), and

being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 3451—Claimant awarded $553.70.)

ROBERT HOGUE, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1940.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION ACT—when award may be mads under for temporary total disability and loss of finger—computed on average weekly wage during forty weeks—Sec. 8 (e) 2 of Act.* Where employee of State sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and loss of finger, an award for compensation may be made therefor, and where employee was not in the service of the State for one whole year preceding such accident and at the time thereof was employed on an hourly basis in a department operated less than two hundred working days a year, same will be computed in accordance with Sec. 8 (e) 2 of Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Robert Hogue filed his claim Pro Se on February 6. 1940 asking for balance due on temporary total disability of $19.53, and a further award of $524.00 for the loss of the index finger of the left hand.

A stipulation has been filed whereby a report by M. K. Lingle, State Engineer of Claims, is accepted as a statement of the facts herein, Such report states that Robert Hogue is tmenty-five years of age, resides at Metropolis, Illinois and was first employed by the Division of Highways of Illinois on July 19,1939 as a common laborer at the rate of fifty (50) cents per hour. Prom said date until November 4, 1939 he was paid wages in the total sum of $33.00. On the latter date

while engaged in cutting and burning brush along the right-of-way of U. S. Route 45 north of Mermet, Illinois, he lost his footing and fell, and the axe which he was holding in his right hand struck the index finger of his left hand, severing same. He was placed under the care of Dr. J. A. Fisher at Metropolis and the latter, on December 26th, reported as follows: "Completed amputation of first and part of second phalanx of first finger of right hand. Permanent disability. Loss of first and part of second phalanx of first finger of right hand. Able to return to work December 14, 1939." The reference to the *right* hand in the above report is an error, as the disability was actually to the index finger of the left hand as recited by claimant and as reported by his Foreman William Fox. Claimant was paid compensation for temporary disability in the total sum of $45.97 for the period from November 5th to December 13,1939.

At the time of the accident claimant had two children under the age of sixteen years and a wife, dependent upon him for support. The Highway Division paid the hospital at Metropolis $42.00 for services rendered and these are all the expenses which arose out of the accident. Employees engaged in similar activities in which the claimant was engaged work less than two hundred (200) days a year.

From the foregoing statement it appears that temporary total disability for a period of 5 3/7 weeks was suffered. His compensation rate under Section 8 of the Workmen's Compensation Act would be $13.20 per week, by virtue of the dependency shown. Temporary total disability would amount to $71.67 less a credit of $45.97, or a balance of $25.70 remaining due the claimant. In addition thereto, he is entitled to compensation for the loss of the first or index finger of the left hand in an amount equal to fifty (50) per cent of the average weekly wage during forty (40) weeks, or forty times $13.20, or $528.00. (Sec. 8 (e) 2 Workmen's Compensation Act..)

An award is therefore hereby made in favor of claimant as follows:

For balance due for temporary total disability.	$ 25.70
For specific loss	528.00
Total	$553.70

Claimant was paid for 5 3/7 weeks temporary total disability.

He is now entitled to payment of accrued compensation for 16 4/7 weeks to April 6, 1940 at $13.20 per week or $218.74. The balance of the award or $334.96 is payable at the rate of $13.20 per week commencing April 13, 1940. Award accordingly.

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 3, 1937 (Session Laws 1937, page 83), and being subject further to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly (S. B. 123 as amended) approved July 1, 1939;—and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided for by the foregoing Acts.

(No. 2584—Claimant awarded $375.00.)

JOHN W. GRAPES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1940.

KAYWIN KENNEDY and L. C. SIEBERNS, for claimant.

JOHN E. CASSIDY, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SALARY—*when award may be made for.* Where it is shown that employee was hired by State Department at a stipulated salary and rendered the services for which employed, an award for such salary may be made for the period of such employment.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein alleges that, on December 1, 1920, claimant was employed by the Secretary of State of the State of Illinois and assumed the duties of an assistant to a clerk; that in 1922 he was promoted to the duties of a clerk in the Secretary of State's office and handled all correspondence of the Secretary of State in such capacity for a long period of time thereafter; that he received $150.00 per month, which was raised from time to time until he was receiving $200.00 per month.

That on February 1,1931, he was informed by the Secretary of State that there was a shortage of money in said office, and that he would have to be relieved from duty, and that he was thereupon relieved from duty; that on March 15, 1931, he was reinstated in the same position at the same salary, and continued to work in said position from March 16, 1931, until July 1, 1931, at the said salary of $200.00 per month; that during said period from March 16, 1931, to July 1, 1931, he received only $150.00 upon the total amount due of $700.00. That he made frequent demands upon the Secretary of State for the payment of the salary of $200.00 per month for said period, but that there remains due therefrom the sum of $550.00 and interest at the rate of five (5) per cent per annum from July 1, 1931. Claimant further states that following July 1, 1931, he continued as clerk aforesaid up to September 16, 1933, during which time he received his full salary of $200.00 per month.

Claim was filed January 24, 1935, and seeks an award of $550.00 and interest of $98.54, or a total of $648.54.

Evidence has been introduced from time to time from the 24th day of April, 1935, to February 27, 1940.

A Departmental Report signed by A. C. Millspaugh, Chief Clerk in the Secretary of State's office, filed January 9, 1940, and identified as Claimant's "Exhibit 2," states that claimant's wages or salary began at $125.00 per month in 1921 and was increased from year to year until in 1929 when it mas fixed at $200.00 per month.

That claimant was taken off the payroll February 1,1931, on account of shortage of funds; that on May 15,1931, he mas paid $75.00, and again on June 15, 1931, $75.00; thus making a total of $150.00 paid between March 15 and June 30, 1931. Mr. Millspaugh's Report further states that there is no record in the Secretary of State's office showing when or upon what basis claimant was reinstated, but that the records show that he was paid as follows: For May 1st to 15th, $75.00; June 1st to the 15th, $75.00, making a total of $150.00 paid between March 16th and June 30, 1931. Mr. Millspaugh's Report further states that claimant continued to work from soon after his layoff up to July 1, 1931, when he was again restored to the payroll in the sum of $200.00 per month.

Claimant contends that when Mr. Stratton, who was then Secretary of State, laid him off, he prevailed upon Gordon

W. Childers, who was then a member of the Legislature from the 26th Senatorial District, to go with him to talk to the Secretary of State's office to obtain his re-employment. That following such call he received a letter identified as claimant's "Exhibit 1," signed by William J. Stratton, Secretary of State, dated February 20, 1931, which stated: "After you called at the office yesterday I checked up and find that it will be impossible for me to reinstate Mr. Grapes until March 16th. I have advised him to report for duty on that date."

There is some confusion in the record as to just what Mr. Grapes' position was. The complaint, as heretofore noted, alleges that at the time he was relieved of duty on February 1, 1931, he was "a clerk in the Secretary of State's office, handling all correspondence of said Secretary of State." Albert C. Larson, A. R. Millard, and Cora Lewis, witnesses produced by claimant, each testified that they and Mr. Grapes were all clerks in the Automobile Department of the Secretary of State's office; that they worked under the supervision of Mr. Hickey, who was superintendent of that department, Mr. Larson being chief clerk.

Representative Childers testified that he had seen claimant in the performance of his duties many times and that claimant was a file clerk in the Automobile Department.

Miss Lewis stated that claimant had charge of the Index Cards in the Filing Department.

Mr. Grapes, in his testimony on February 27, 1940, in answer to the question, "What was your work in the office at that time (i.e., January, February and June, 1931)?" answered: "I was the head of the department, looked after all the mail and after the information, about complaints and all that."

It becomes important to consider the status of his employment because the record further discloses that in response to a request from the Attorney General's office, Hon. Edward J. Barrett, Auditor of Public Accounts, looked up the payroll records in his office for the Automobile Department for the period from March 16, 1931, to July 1, 1931, to see upon what, if any, payroll claimant was carried during that time, and as to whether such payrolls indicated why payment was *not* made to him regularly. A statement from the Auditor of Public Accounts appears in the record as Respondent's "Exhibit 1," and is as follows:

"We have referred to pay-roll records and find from the pay-rolls on file covering the Secretary of State, that Dwight Anderson was in the specified position held previously by John W. Grapes from February 1, 1931 to March 31, 1931. B. H. Kunkler was then transferred to this particular position and was paid from this appropriation from April 1, 1931 to June 30, 1931.

"We do not find that John W. Grapes was paid from any other appropriation during that time, except the $150.00 paid to him for two periods in the amount of $75.00 each time. After July 1, 1931 we find that John W. Grapes was reinstated to his former position at the rate of $200.00 per month."

The appropriation to which reference was above made was that found on page 155 of the Session Laws of 1929, wherein appears the item, "Making an Appropriation for One Clerk at $2,400.00 per annum."

After claimant went back to work he accepted the two $75.00 Warrants without any apparent objections, and he states that the dates appearing at the bottom of said Warrants, i. e. May 1-15, 1931 and June 1-15, 1931 were not on the Warrants when he received them. The other evidence in the record indicates that he is mistaken in his recollection as to same. Claimant further testified that he never requested any additional pay from Mr. Stratton, the then Secretary of State, until just before the latter went out of office in January, 1933, at which time Mr. Stratton stated he had no funds with which to pay him. Claimant states that he frequently asked Mr. Millspaugh for "the checks," but nothing appears as to any statement by Mr. Millspaugh in regards thereto.

It does not appear from the record that Mr. Grapes was in the classified Civil Service. Neither does there appear to be any question from the record as to his having been employed during the period for which he seeks additional wages, i. e. from March 15, 1931 to July 1, 1931. It further appears however, that the then Secretary of State Stratton discontinued John W. Grapes' service in February, 1931 and proceeded to place Dwight Anderson and B. H. Kunkler successively on the pay-roll instead of Grapes, and that the appropriation for the clerkship previously held by Grapes was used during such period to pay the other two employees. No set duties appear to be prescribed for such clerkship, and for the purposes of this record it is immaterial whether the employees Anderson and Kunkler performed the same identical tasks previously performed by Grapes or were assigned to other clerical work. The claimants acceptance of the two $75.00 Warrants indicates that he was reinstated on a temporary basis or capacity until the first of July, 1931, and was

placed on a less schedule of pay during such period; that he was again restored to his former clerical position on the payroll in Mr. Stratton's office on July 1, 1931. This is further borne out by the fact that no complaint was made by him in regard to any shortage in his pay, when the $75.00 payments were made to him, and in fact raised no question as to the reduction in rate of wages from the time he left the service of the State on September 15, 1933 until January 24, 1935. Whether claimant's superior treated him fairly or not in temporarily laying him off and putting someone else on the payroll in his place and later again employing him at a decreased rate of pay, is not for the court to comment upon. There is nothing in the record to show that the Secretary of State did not have authority to so do.'

Claimant was rehired March 16, 1931. The proof shows he worked until July 1, 1931 and that his scale of pay during that period was on the basis of $150.00 per month; that said period covered a term of 3½ months for which he should have received $525.00. He was paid $150.00 and is entitled to an award of $375.00 for unpaid time.

If the two $75.00 warrants delivered to him in May and June 1931, did not bear the dates showing periods for which they were given, we might consider such warrants as having been payment in full for the entire period of employment from March 16th to July 1, 1931, but the warrants do show the dates covered, and we find claimant is entitled to the balance of $375.00.

"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.*

The court finds that a sufficient legal basis for the allowance of an award has been shown, and an award is hereby allowed in favor of claimant in the sum of $375.00.

(No. 2035—Claim denied.)

MARTIN PETRI, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed May 14, 1940.

JOSEPH B. MCGLYNN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when employee is paid full compensation for injury in accordance with provisions of Act no further award can be made therefor.* Where is clearly appears that an employee of the State who sustained accidental injuries, arising out of and in the course of his employment while engaged in extra-hazardous employment, was paid full compensation therefor, in accordance with the provisions of the Workmen's Compensation Act no further award for compensation for such injuries can be made.

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

Prior to and on July 24, 1931, the claimant was in the employ of the respondent as a State highway policeman. On the last mentioned date, while patroling his route, and while driving in a westerly direction on Route 15, at a point about five miles east of Nashville, in Washington County, the motorcycle which he was operating was struck by a Chevrolet sedan which was then and there being driven by one Nettie Hamilton in an easterly direction on said highway. The accident happened at, a time when the driver of the sedan was trying to pass a truck proceeding in the same direction in which she was traveling.

As the result of the accident claimant sustained a compound fracture of his left leg, and also claims to have sustained certain injuries to his left knee and shoulder. He was removed to St. Mary's Hospital at Centralia, where he remained about seven weeks. Thereafter he was confined to his home under the care of his doctor until he was able to return to work about ten months after the accident.

During the time of his temporary disability as aforesaid he was paid his regular salary of $175.00 per month, which, being for unproductive time, must be considered as compensation.

The respondent paid doctor and hospital bills aggregating the sum of $668.50.

The accident in question resulted solely from the negligence of said Nettie Hamilton, and thereafter claimant made

a settlement of his claim against her and received the sum of $1,400.00, which was in addition to the sum of $600.00 paid to his attorney for his services in that behalf.

Upon consideration of the facts in the record we find as follows:

That on July 24, 1931, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of such accident was given to respondent and claim for compensation on account thereof was made within the time required by the provisions of the Workmen's Compensation Act:

That the necessary first aid medical, surgical and hospital services were provided by respondent, except an item of $6.00 which claimant paid for an X-ray.

That at the time of the accident in question claimant was forty-one years of age and had four children under the age of sixteen years.

That the earnings of the claimant during the year next preceding his injury were Twenty-one Hundred Dollars ($2,100.00), and his average weekly wage was Forty Dollars and Thirty-eight Cents ($40.38).

That claimant was temporarily totally disabled from July 24, 1931, to May 20, 1932, to wit, forty-three (43) weeks; that he sustained the permanent loss of thirty per cent (30%) of the use of his left leg; that under the provisions of Section Eight (8), paragraphs B and J-2 of the Compensation Act, the claimant is entitled to have and recover from the respondent the sum of Twenty Dollars ($20.00) per week for the period of forty-three (43) weeks, that being the period of his temporary total incapacity for work; that under the provisions of Section Eight (8), paragraphs E and J-2 of such Act claimant is entitled to have and recover from respondent the sum of Twenty Dollars ($20.00) per week for a further period of fifty-seven (57) weeks for the reason that the injuries sustained by him resulted in the permanent loss of thirty per cent (30%) of the use of his left leg; that under the provisions of Section Eight (8), paragraph A of such Act, the claimant is entitled to have and recover from respondent the further sum of Six Dollars ($6.00), being the amount paid and advanced by him

for X-ray pictures; making a total of Two Thousand Six Dollars ($2,006.00).

That the sum of Seventeen Hundred Fifty Dollars ($1,750.00) has been paid by respondent to claimant to apply on the compensation due him; that under the provisions of Section 29 of the Compensation Act, the respondent is entitled to set off against the amount due claimant from it as aforesaid, the amount which he received from the said Nettie Hamilton, to wit, the sum of Two Thousand Dollars ($2,000.00); making a total credit to the respondent of Thirty-seven Hundred Fifty Dollars ($3,750.00).

We further find that the aggregate of the compensation paid by the respondent to the claimant as above, and the amount received by claimant from said Nettie Hamilton as above, is in excess of the amount of compensation to which the claimant is entitled under the terms and provisions of the Workmen's Compensation Act of this State, and that therefore claimant is not entitled to recover anything whatsoever from the respondent in this proceeding.

Award is therefore denied.

(No. 2868—Claimant awarded $1,856.95.)

ANNIE L. WELLER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinzon filed May 14, 1940.

A. C. and BEN F. ANDERSON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim by teacher at Eastern Illinois State Teachers College—when award under may be made.* Where it appears that teacher employed by Eastern Illinois State Teachers College sustains accidental injuries, arising out of and in the course of her employment, said college at the time being engaged in extra-hazardous enterprises, an award for compensation may be made therefor, in accordance with the provisions of the Act, said employee having complied with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case mas filed on March 25, 1936, and alleges that on the 28th day of September, 1935, the claimant was employed as a geography teacher by the Eastern Illinois State Teachers College at Charleston, being a

body politic and municipal corporation organized under an Act of the Legislature of the State of Illinois, entitled "An Act to establish and maintain the Eastern Illinois State Normal School," in force May 22, 1895; and all amendments thereto; that the said Teachers College under the Acts of the Legislature was and now is a municipal corporation, with power to sue and be sued, and was wholly supported and maintained from revenues received from the State of Illinois, the respondent herein.

It is further alleged that on the said 28th day of September, 1935, claimant was accidentally injured while in the performance of her duties, in the following manner: On that day she was conducting her class enrolled in said Teachers College on a field trip, and while so engaged she took her class to a place located about six miles south of Paris, Illinois, to examine the topography of that place for purposes of instruction of her students; that at said time and place aiid while so engaged she slipped and fell on a clay bank, and as a result of the fall she received a fracture of the joint of her left knee; that she was removed to the Oakwood Hospital in Charleston, Illinois, for treatment, and from that date until the 10th day of March, 1936, she was totally incapacitated from performing any duties pertaining to her employment, and during that time she was unable to teach her classes, and expended large sums of money to cure herself of her injuries.

It is also charged that said school is a political subdivision of the State of Illinois and has no income or revenue except that received from tuitions and that which is appropriated by the Legislature.

It is further charged that said Teachers College is engaged and was engaged at the time of the injury to the claimant in extra hazardous enterprises and businesses as a part of the operation. of said school, in that sharp-edged cutting tools were used by said school in maintaining its said enterprise, and that the said school also maintains a power plant at said college wherein heavy machinery and boilers are used, and is also engaged in such a business and enterprise which are regulated by statutory regulations by the State of Illinois providing certain means and modes of the operation of the said machinery and appliances so used by the college.

Notice was alleged to have been given on the day of the accident or the next day following.

It is also charged that claimant has expended the sum of $1,054.45 on account of medical care, hospital care and attendance necessarily incurred for her cure, which amount has been paid by her.

It is further charged that claimant was permanently and completely disabled for a period of twenty-three weeks, being from the date she sustained her said injury until the 11th day of March, 1936, at which last date she resumed her employment with said Teachers College, but that her fractured knee had not completely recovered and she did not know whether or not it would be a complete recovery.

It is further charged that she was receiving the sum of $87.50 per week, and had been receiving a like sum during the preceding year, and that her annual earnings for one year prior to the accident exceeded $3,600.00.

Claimant charges that she never received any moneys for payment of her doctor and hospital bills paid by her, and that the only moneys that she received from the Teachers College is the sum of $262.50.

Claimant also alleges that she was advised by her counsel to file her claim before the Industrial Commission of the State of Illinois against the Eastern Illinois State Teachers College at Charleston, her employer, which claim was filed prior to the filing of this claim in this court.

Claimant further alleges that she is a single woman and has no dependents and that she is sixty-two years of age.

The undisputed facts are that she is a school teacher employed by the Eastern Illinois State Teachers College at Charleston, Illinois, and that she is the head of the geography department of that college and has been for many years last past. That the Eastern Illinois State Teachers College in Charleston, Illinois, is a school for the training of teachers and is supported and maintained by the State of Illinois, and that the claimant's salary is paid by the State of Illinois from an appropriation of the Legislature and is paid by the State Auditor. That the claimant's annual earnings for the year preceding the injury were $3,850.00. That on the 28th day of September, 1935, the claimant was employed as a teacher of the college, and that on that day, with the consent and approval of Robert G. Buzzard, President of the College, she

took her class on a field trip to a place south of Paris, Illinois, that being a part of her regular work as a part of the course which she was teaching. That on the trip two of her teachers were with her; the purpose of the trip being to observe the geological phenomena of the region. That they went to the place where the accident occurred in automobiles, and three of the students with Miss Ruby Harris, one of the teachers, went with the claimant in her car. That at the time of the accident the class was under the supervision of claimant. That at the time of the injury they were observing the rock areas and fossils, and the claimant was proceeding down a hill and slipped and received the injury. An X-ray was taken and claimant was taken to the Oakwood Hospital and remained there ten days, and was then taken to the Billings Hospital in Chicago. She was treated by Dr. N. C. Iknayan, her family physician, while in Charleston, and while in Chicago she was treated by Dr. Dragstadt, who is a bone specialist and bone surgeon. An operation was performed in Chicago upon her knee. She had a fracture of the left knee and the knee was cut open about nine inches, near the joint. Part of the cartilage was broken and it had gone in between the parts of the fracture and had to be removed. The bone was wired in place to hold it in position, and she was confined to her bed eight weeks in the Billings Hospital. Treatments were given her knee while at the hospital, under the advice and approval of her physician. She was in the hospital until the second week in January, 1936, approximately three and one-half months. She went back to Charleston the second week of January, 1936, in an automobile. Her knee at that time could not be bent more than ten degrees. She was under the care of her physician, Dr. N. C. Iknayan, upon her return. She used crutches, and used them after she resumed teaching at the school, her knee being then stiff and accompanied with pain. She used crutches until the last of May, 1936. She then used a cane, but could not walk a great distance. Claimant received pay for two full weeks and half pay for two weeks from the college, but has received no other compensation. She filed a claim with the Industrial Commission against the college, but the Attorney General ruled that the college was not liable for the claim. That on the trip she had with her a geological hammer (which was introduced in evidence), which is a sharp-edged tool; that it

is standard equipment for teaching geography and used in all geological work. She makes a claim for 25 per cent loss of the use of her leg for 47½ weeks compensation and $15.00 a week for 71% weeks, making **24** weeks temporary total incapacity and 47½ weeks for 25 per cent use of her left leg, less the amount of $262.50 that she has been paid on account of the injury, the total amount claimed being $1,864.70. An award was allowed her before the Commission for this amount, less $19.75.

No dispute arises as to the nature and extent of claimant's injury. Dr. N. C. Iknayan testified that she had sustained a loss of 25 per cent of the use of her left leg, and no dispute arises as to that.

After reviewing all the evidence, the court finds that the accident arose out of and in the course of her employment. This court has jurisdiction of the subject matter and the parties. Due notice was given under the law and no question arises as to that. We hold the payments made *to* her constitute a waiver of the statutory notice.

The amount of compensation which shall be paid to an employee for an injury not resulting in death shall be: (a) The employer shall provide the necessary first aid, medical and surgical services, and all 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 statute also provides that if the period of temporary total incapacity for work lasts more than six working days, compensation equal to fifty per centum of the earnings but not less than $7.50 nor more than $15.00 per week, beginning on the eighth day of such temporary total incapacity and continuing as long as the temporary total incapacity lasts, but not after the amount of compensation paid equals the amount which would have been payable as a death benefit under paragraph (a), Section 7, if the employee had died as a result of the injury at the time thereof, leaving heirs surviving as provided in said paragraph (a), Section 7: *Provided,* that in the case where the temporary total incapacity for work continues for a period of more than thirty days from the day of the injury, then compensation shall commence on the day after the injury.

Paragraph (e), 15, Section 8, provides that for the loss

of a leg, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and ninety weeks shall be paid.

The statute further provides: "For the permanent partial loss of use of a member or sight of an eye, but not including the hearing of an ear, fifty per centum of the average weekly wage during that proportion of the number of weeks in the foregoing schedule provided for the loss of such member or sight of an eye which the partial loss of use thereof bears to the total loss of use of such member or sight of eye."

Compensation shall be computed on the basis of the annual earnings which the injured person received as a salary, wages or earnings if in the employment of the same employer continuously during the year next preceding the injury. (Par. (a), Section 10, Workmen's Compensation Act.)

As a matter of precaution the claimant filed a claim for her injury both in the Court of Claims and with the Industrial Commission. The statute is plain that the Court of Claims is the proper forum for the adjudication of the claims of State employees under the Workmen's Compensation Act, and under the facts in this case we hold that the Eastern Illinois Teachers' College at Charleston, Illinois, is subject to the Workmen's Compensation Act.

Dr. Robert G. Buzzard, the president of the Eastern Illinois State Teachers' College, where the claimant was employed; and who was the immediate superior of the claimant, had notice of her accident the day following the same, as shown by the testimony and according to his report the claimant was paid for four weeks non-productive time, two at the full rate and two weeks at one-half the weekly rate, which payment constitutes a waiver of a demand for compensation within six months, but the claimant did, in addition thereto, make a demand within six months at the office of the Attorney General. The claim was filed within a year, so no question of jurisdiction arises in this case.

Under the statute, Fifteen Dollars ($15.00) per week is the maximum amount of compensation that she can be allowed. The period of temporary total disability was twenty-three and one-half weeks. In the original complaint twenty-three weeks was averred, and in Claimant's Statement, Brief and Argument it is claimed that twenty-four weeks was the amount of time. One Hundred and Ninety weeks (190) is the

period of time during which compensation is paid for the total and permanent loss of use of a leg. The evidence shows that she has suffered a twenty-five per cent loss of the use of her left leg. On the basis of Fifteen Dollars ($15.00) per week, which is the maximum for an employee having the status of this claimant for one-fourth of one hundred and ninety weeks (190), or forty-seven and live-tenths (47.5/10), the compensation would amount to Seven Hundred Twelve Dollars and Fifty Cents ($712.50). The record also shows that "she may be better or she may be worse, but she will probably be better." This statement was made by her physician. The arbitrator did find a twenty-five per cent (25%) disability of the claimant's left leg. As to the doctor and hospital bills, there seems to be no question but that claimant is entitled to One Thousand Fifty-four Dollars and Forty-five Cents **($1,054.45).**

We, therefore, fix the amount of the award to be made as follows: Seventy-one **(71)** weeks compensation at Fifteen Dollars ($15.00) per week, to wit: One Thousand Sixty-five Dollars ($1,065.00) plus medical and hospital services, One Thousand Fifty-four Dollars and Forty-five Cents **($1,054.45)** less Two Hundred Sixty-two Dollars and Fifty Cents ($262.50) heretofore paid, or a net award of One Thousand Eight Hundred Fifty-six Dollars and Ninety-five Cents ($1,856.95), all of which has accrued and. is now 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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act, entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarer after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the (General Fund in the manner provided by the foregoing Acts.

(No. 3425—Claimant awarded $4,000.00.)

AMY BROKMYER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion pled May 15, 1940.
Supplemental opinion filed December 10, 1940.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for death. of employee.* Where employee of State 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 may be made for compensation therefor, to those legally entitled, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claimant in this case, Amy Brokmyer, resides at Shawneetown, Illinois, and is the widow of Cecil Brokmyer.

The latter was first employed by the State of Illinois, Division of Highways, as a highway maintenance police officer on March 17, 1933. His salary after January 1, 1936, was $175.00 a month, the latter being his rate of pay at the time of his death. Throughout his employment he was assigned to District 13 of the Bureau of Police, with headquarters at DuQuoin.

On the night of November 15, 1939, Officer Brokmyer and Officer Fred Holper were on duty and received information from the city police of Harrisburg that a robbery had been committed by Willard Shockley in Harrisburg. Immediately they began a search for Shockley.

The officers learned that Shockley was inside a gas station at the north limit of Carrier Mills, Illinois, with his automobile awaiting repairs. Officer Brokmyer opened the large garage door, entered the garage, approached Shockley, and Shockley shot him.

Officer Brokmyer was transported to the Lightner Hospital at Harrisburg, where he was attended by Drs. N. A. Herrmann and G. R. Johnson of Harrisburg. Officer Brokmyer died November 19, 1939.

At the time Cecil Brokmyer was shot the claimant was dependent upon him for support. At the time of the accident he had a son, William, 22 years of age, who had suffered in-

fantile paralysis during his infancy, which affected him physically and has left him at the present time a mental incompetent, and who was totally and permanently dependent on the claimant. The affliction and deficiency of the young man are obvious to a casual observer.

Cecil Brokmyer was paid full salary at the rate of $175.00 a month from the time of the accident on November 15 until the time of his death on November 19, and all hospital and medical expense in connection with this case in the sum of Two Hundred Forty-six Dollars and Eleven Cents ($246.11) has been paid by the Highway Division.

Upon consideration of the facts in the record we find the following:

That on November 15, 1939, claimant's intestate and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date Cecil Brokmyer sustained accidental injuries which arose out of and in the course of his employment from which he died November 19, 1939; that notice of such accident was given to respondent and claim for compensation on account thereof was made within the time required by the provisions of the Workmen's Compensation Act.

That the necessary first aid medical, surgical and hospital services were provided by respondent and wages in full paid to date of death.

That at the time of the accident in question claimant was forty-eight years of age and that his wife, the claimant herein, and their son, William Brokmyer, were both totally dependent upon him for support.

That the earnings of the claimant during the year next preceding his injury were Twenty-one Hundred Dollars ($2,100.00) and his average weekly wage was Forty Dollars and Thirty-eight Cents ($40.38).

That under the provisions of Section 7 (a) of the Workmen's Compensation Act claimant is entitled to receive from respondent payment of a sum equal to four times the annual wages of her husband, but not to exceed $4,000.00; that payment thereof shall be made in weekly installments which are increased, under the provisions of Section 8, Sub-section 1, of the Act (as amended) to a maximum of Sixteen Dollars and Fifty Cents ($16.50) per week. That Twenty-six (26) weeks have elapsed between November 19, 1939, and May 13,

1940, and the sum of Four Hundred Twenty-nine Dollars ($429.00) has accrued therefore, to which claimant is entitled at this time.

An award is therefore made in favor of claimant, Amy Brokmyer, by reason of the dependency of herself and adult dependent son, William Brokmyer, in the sum of Four Thousand Dollars ($4,000.00), of which Four Hundred Twenty-nine Dollars ($429.00) is payable instanter and the balance of Three Thousand Five Hundred Seventy-one Dollars ($3,571.00) is payable in 'weekly installments of $16.50 per week, commencing as of May 20, 1940.

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

SUPPLEMENTAL OPINION.

By MR. JUSTICE YANTIS:

This matter now again comes before the court upon the petition of Ella May Phillips, Conservator of William Brokmyer, incompetent, and it appearing to the court that an award in the sum of $4,000.00 was hereinbefore entered in this cause on May 15, 1940, in favor of Amy Brokmyer, by reason of the dependency of herself and adult son, William Brokmyer. And it further appearing that of said award $429.00 was payable instanter and the balance of $3,571.00 was payable in weekly installments of $16.50 per week, commencing as of May 20, 1940, and further that the aforementioned claimant, Amy Brokmyer, subsequently on September 10, 1940, died, leaving said physically and mentally incompe-

tent son, William Brokmyer, surviving. And it further appearing that said petitioner herein, Ella May Phillips, has been duly appointed Conservator of said William Brokmyer by the County Court of Gallatin County, Illinois.

And it further appearing that said award originally entered herein was granted for the benefit of both the surviving widow and incompetent and dependent child of Cecil Brokmyer, the court now finds that said payments of $16.50 per week should be continued for the benefit of said William Brokmyer under the provisions 'of Section 7 (a) of the Workmen's Compensation Act of Illinois.

IT IS THEREFORE HEREBY ORDERED that the payment of $16.50 per week heretofore payable for the use of Amy Brokmyer and William Brokmyer, be resumed and continued to Ella May Phillips as Conservator for the said William Brokmyer, for the use of the said William Brokmyer.

(No. 3469—Claimant awarded $4,800.00.)

EDITH ROBERTS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 15, 1940.

JOSEPH SAM PERRY, for clsimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for compensation for death of employee under.* Where employee of State 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 may be made therefor to those entitled, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Mrs. Edith Roberts, claimant in this case, resides at 504 Kenilworth Street, Villa Park, Illinois. She is the widow of Eugene R. Roberts, who died February 18, 1940. At the time of his death, Mr. Roberts had the claimant and three children dependent on him for support. One of the children at that time Eugene Roberts, Junior, was 16 years of age. The two other children, Joyce Roberts and Russell Roberts, were 10 years and 14 years of age, respectively, at the time of Mr. Roberts death.

Eugene Roberts was first employed by the Division of Highways as an Illinois State highway maintenance police officer on August 5, 1937. He was employed in that capacity from that date until the date of his death at a salary of $175.00 a month.

February 17, 1940, Police Officers Eugene Roberts and Joseph K. Baker were engaged in weighing trucks at a scale station of the Division located on U. S. Route 34 two miles east of S. B. I. Route 47 about 6:55 p. m. The officers found a truck as over weight. While Officer Baker was preparing a ticket in the scale house, a west bound truck stopped near the scale house on the west bound lane and Officer Roberts stood at the south side of the truck oh the inside of the pavement adjacent to the east bound lane and conversed with the driver of the truck. As the truck drove away, Officer Roberts walked on to the east bound lane, where he was struck by an automobile being driven by Mr. Alexander Certik, who resides at the Y. M. C. A. in Galesburg, Illinois. Mr. Certik stated that he reduced speed from about 50 miles an hour to about 40 miles an hour immediately before his automobile struck the officer.

Officer Roberts was transported by ambulance to St. Joseph Hospital in Aurora, where he remained under the care of Dr. Purvey. February 20, Dr. Purvey reported to the Division:

> "Skull fracture probably in frontal or temporal regions. Fractures of both bones of lower right leg—comminuted. Compound fracture of both bones of left lower leg. Treated for shock and cerebral edema. Never regained consciousness. Expired 3:16 A. M., February 18."

From the record we find: that on February 17th, 1940 claimant's intestate and respondent were operating under the provisions of the Ilinois Workmen's Compensation Act; that on said date said Eugene Roberts sustained accidental injuries which arose out of and in the course of his employment, from which he died February 18, 1940.

That necessary first aid and hospital care were given by respondent and the latter has paid all wages due to date of death.

That at the time of said accident, said employee was the father of Joyce Roberts, 10 years of age; Russel Roberts, 14 years of age, and Eugene Roberts Jr., 16 years of age, all of whom, together with his wife Edith Roberts were dependent

upon said employe, Eugene Roberts. That his earnings for the year imediately preceding said accident were Twenty One Hundred Dollars ($2100.00) and his average weekly wage was Forty Dollars and Thirty-eight Cents ($40.38).

That under the provisions of Section 7 (a) of the Workmen's Compensation Act claimant is entitled to receive from respondent payment of a sum equal to four times the annual wages of her husband but not to exceed Forty Eight Hundred Dollars ($4800.00) as per section 7 (h) 3 of the Act, there being two dependent children under 16 years of age; that payment thereof shall be made in weekly installments which are increased under the provisions of Section 8 subsection 1 of the Act as amended and under Section 8 (j) 3 to a maximum of Seventeen Dollars and Sixty Cents ($17.60) per week.

That Twelve weeks have elapsed between February 18, 1940 and May 13, 1940, and the sum of Two Hundred Eleven Dollars and Twenty Cents ($211.20) has accrued to the latter date, to which claimant is entitled at this time.

An award is therefore made in favor. of claimant, Edith Roberts by reason of the dependency of herself and her three children above named, in the sum of Forty Eight Hundred Dollars ($4800.00), of which Two Hundred Eleven Dollars and Twenty Cents ($211.20) is payable instanter and the balance of Four Thousand Five Hundred Eighty-eight Dollars and Eighty Cents ($4588.80) is payable in weekly installments of Seventeen Dollars and Sixty Cents ($17.60) per week commencing as of May 20, 1940.

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", (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181,) and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Moneys Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly", approved July 1st, 1939 (Session Laws 1339, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 2472—Claim denied.)

ORCHARD THEATRE CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1940.

JOHN L. SMITH, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid in advance—corporation dissolved before commencement of period for which paid—as voluntary payment and cannot be recovered.* Where corporation paid franchise tax, without compulsion or duress on May 21, 1934, although same was not due until July 1, 1934 and thereafter on June 27, 1934 voluntarily surrendered its charter and was issued a certificate of dissolution, such payment is a voluntary one and no award for a refund can be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant alleges that on or about May 21, 1934 it paid to the Secretary of the State of Illinois the sum of $10.00 in payment of Franchise Tax for the period beginning July 1, 1934. It also alleges that it was duly incorporated under the laws of the State of Illinois; and that on June 27, 1934 the Secretary of State issued a certificate of voluntary dissolution of this corporation. It is also charged that all taxes legally levied against it have been fully paid and claims the sum of $10.00 paid to the Secretary of State for its Franchise Tax which is payable in advance and was not due until July 1,1934. Payment was made on May 21,1934 and on June 27 following, it voluntarily surrendered its charter and the Secretary,of State issued a voluntary dissolution certificate. In a former opinion we held with the claimant and thereafter granted the State of Illinois petition for rehearing. We find we are in error in the former opinion. The claim is predicated on the theory that where a person natural or artificial, pays a license fee, franchise or privilege tax during the time payable but before the period during which such license runs and thereafter and prior to the actual license period shall change its mind and decides not to avail itself of the privilege or right granted, that a refund is legally due such person. We have been unable to find any statute authorizing such payment and none is cited by claimant and neither is any authority cited by claimant. We have heretofore frequently

held that taxes voluntarily paid cannot be recovered back unless there is a statute providing for such recovery. For this reason claim will be denied.

(No. 2036—Claim denied.)

MAURICE RIECHMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1940.

JOS. B. MCGLYNN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when employee is paid full compensation for injury in accordance with provisions of Act no further award can be made therefor.* Where it clearly appears that an employee of the State, who sustained accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, was paid full compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, no further award for compensation for such injuries can be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant in this case seeks damages for injuries sustained by him while in the performance of his duties as a State Highway Patrolman for the State of Illinois.

It appears from the complaint that on August 21, 1931, claimant was riding a motorcycle north on State Route No. 112 near the junction of that route with State Route No. 160 near Edwardsville, Illinois, being on his way to Springfield, Illinois, under orders to perform his duties as patrolman at the State Fair. Claimant alleges that he was traveling between twenty and twenty-five miles per hour while making a turn off of Route No. 112 onto Route No. 160; that a Buick Sedan being driven south on Route No. 160 approached the intersection with Route No. 112 as claimant made the turn; that the claimant swerved to the left side of the road; that in an attempt to avoid a collision with the automobile, which was being driven by a man named Meyer, claimant swung his motorcycle sharply to the right, and in doing that, his right foot-board struck the concrete, tipping claimant back to the left and throwing his motorcycle directly in the path of Meyer's car.

It further appears from the complaint that the Buick car struck the rear part of claimant's motoi-cycle turning the

motorcycle over on claimant's left leg, causing claimant to sustain a compound fracture of his left leg, causing both pelvic bones to be broken and the left hip and sacrum to be fractured. Claimant charges that as the result of the injury he was totally and permanently prevented from following his former occupation of shoe-worker, and that he is permanently and partially disabled from following any other occupation for life.

Claimant states that no other claim on account of said injuries has been made to any State Department or State Officer or to any person, corporation or tribunal; that he has not received any payment from any person, firm or corporation of any sum whatsoever for or on account of said injuries so sustained; that no person, firm or corporation other'than claimant has any interest whatsoever in this claim. Claimant claims damages in the sum of Five Thousand Dollars ($5,000.00).

This court has repeatedly held that State patrolmen, such as claimant, come under the Compensation Act.

This claim was filed on December 28, 1932, and it is alleged that the injuries were received on August 21, 1931. Testimony was taken at various times on up to 1937. The State, by and through the Attorney General filed its Brief and Argument on November 15, 1939. This court has entered an order requiring claimant to file a brief, but he has seen fit to ignore the order.

From the depositions taken, and the State records, it is apparent that claimant's injuries arose out of, and in the course of his employment, and that this court has jurisdiction, and it appears that the State had notice of the accident. It also appears from a report of the Division of Highways dated January 11,1933 that claimant was paid his salary during his temporary total disability. It appears from the evidence that claimant received $175.00 per month as compensation for his services. The claimant himself testified (Trans. of Jan. 7, 1933, Page 8 and Trans. of July 9, 1933, Page 4) that he had been paid his salary in the amount of $175.00 per month from the date of his injury to the date when he was able to return to his work, about October 1, 1932. We have heretofore held that such payments for non-productive time should be 'considered as payments of compensation, and payments of compensation constitute a waiver of claim within six months, so

it appears that the jurisdictional requirement of Section 24 of the Compensation Act is complied with. The accident occurred on August 21, 1931 and the claimant's temporary total disability continued until approximately October 1, 1932. The claim was, therefore, filed within one year after the last payment of compensation, having been filed December 28, 1932.

This court has held that highway maintenance patrolmen or policemen are entitled to the benefits of the Workmen's Compensation Act. See *Church, et al.* vs. *State,* 7 C. C. R. 256; *Lightner* vs. *State,* 8 C. C. R. 354 and *Ferguson* vs. *State,* 8 C. C. R. 589.

It is admitted that claimant was paid at the rate of $175.00 per month during the entire period of his disability, and after he was able to return to work. The evidence shows that the claimant had been employed in the same capacity and at the same rate of pay for more than a year immediately prior to the time of his accident; and that he had one child under the age of sixteen years at the time of the accident. (Trans. of testimony dated Jan. 7, 1933, Page 5.) The proper compensation rate to the claimant would be $15.00 per week. From August 21, 1931, the date of the claimant's accident, to October 1, 1932, which was about the date that claimant returned to work, is a period of 58 weeks. Compensation for temporary total disability for a period of 58 weeks on a basis of $15.00 per week amounts to $870.00, which is the sum which should have been paid to the claimant. From August 21, 1931, the date of the injury, until he returned to work on October 1, 1932, a period of 13¼ months elapsed, for which claimant received $2,318.75. Deducting the sum of $870.00, which is the proper amount of compensation payment for the period, from the sum of $2,318.75, leaves a balance of $1,448.75 over-payment to the claimant for temporary total disability.

This court has also held that the amount of over-payment for temporary total disability is allowable as a credit to the employer when called upon to pay specific loss or partial or total permanent disability. *Blanton* vs. *State,* 10 C. C. R. 302, and *Johnson* vs. *State,* 10 C. C. R. 87. In *Wetherby* vs. *State,* opinion rendered September 13, 1939, we held that the overpayment for non-productive time is allowable as a credit both as against specific loss and medical bills paid by the employee.

It also appears from the record (Page 6, Trans. of Jan. 7, 1933) that the State has paid the hospital bills necessitated by the claimant's injury; that it paid the sum of $268.30 to the hospital located in Granite City, and the sum of $284.25 to the hospital located in Belleville. It also appears that the State paid Dr. Berry the sum of $95.00 and Dr. Furguson the sum of $125.00 for services rendered to the claimant resulting from the accident in question. The claimant testified that the bill of Dr. Klinefelter and Dr. McKelvey in the amounts of $200.00 and $100.00 respectively had not been paid to his knowledge and Dr. McKelvey verified such non-payment, but. it now appears that this detail has been taken care of as shown by the claimant's testimony (Tran. Page 6, dated July 9, 1935). In this regard, the State paid out the sum of $1072.55, for hospital and doctors' bills.

The law in effect at the time of claimant's injury provided: for the loss of a leg or the permanent and complete loss of its use, 50 per centum of the average weekly wage (or $15.00, which is the maximum,) during 190 weeks. In this case the weekly payments would amount to $15.00 per week, and the total compensation for the loss of use of the leg would amount to $2850.00. The claimant was, therefore, over-paid slightly more than 50% of the amount payable for permanent and complete loss of the use of his leg. Dr. S. W. McKelvey testified that he had suffered a 33-1/3 per cent disability, and thought that this disability would be lessened 10 per cent, with the resulting disability **23** per cent. Dr. John Patrick Murphy testified to a 30 to 35 per cent disability in claimant's left leg, with a 10 to 15 per cent disability in his back, based principally on the limitations of flexion in the back. Any disability in the back is not payable on a basis of specific loss but is payable on a basis of partial permanent disability, which is computed within the statutory limits, as 50 per cent of the difference in the injured employee's earning power before and after the injury.

We do not find sufficient evidence upon which to base any award for partial permanent disability.

From the testimony of the doctors, it is obvious that claimant did not receive a 50 per cent disability to his leg, and the testimony of Dr. Murphy in regard to claimant's back, should be disregarded. The claimant has actually received an over-payment which would equal more than 50 per cent

disability to his leg. Even if the 15 per cent disability of the claimant's back would be computed on the same basis as the leg, and were added to the disability of the claimant's left leg, still the 15 per cent plus the 35 per cent would only amount to 50 per cent. It would appear that the claimant has received all the benefits to which he would be entitled.

For the foregoing reason, an award will be denied.

(No. 3490—Claimant awarded $63.95.)

HELEN R. MESSENGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed July 17, 1940.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

EXPENSES—*lapse of appropriation out of which could be paid—when award may be made for.* Where claimant incurred expenses, for which she is clearly entitled to reimbursement and payment is recommended by the head of the department for which same were incurred, an award may be made for the amount thereof, where appropriation lapsed out of which same could have been paid, on claim filed within a reasonable time.

Per Curiam:

Claimant herein is a professor of education in the Northern Illinois State Teachers' College at DeKalb, Illinois. During the fiscal year July 1, 1938 to June 30, 1939, she taught classes in Extension under the direction of the College, at Arlington Heights, and in Geneva,. At that time she owned and operated a 1938 Studebaker coupe, which she drove to and from her class work. In addition to her pay as a teacher, she was allowed compensation in accordance with the "Revised Instruction to Travelers of Ihe State of Illinois, effective June 1, 1933" but for some reason her expense statement for her trips for the following: dates: December 5, 12, and 19, 1938, and January 2, 9, 16, and 23, 1939 to Arlington Heights, Illinois and for December 1, 8, and 15, 1938 and January 5, 12, and 19, 1939 to Geneva, Illinois was not approved and vouchered for payment.

Claimant seeks an award for the total sum of $63.95. In addition to her sworn statement of claim the record contains a report by John J. Hallihan, Director of the Department of

Registration & Education, which confirms claimant's statement and approves payment thereof; also a statement by E. C. O. Beatty, Director of Extension of the College at DeKalb, approving the account.

Dr. Messenger legally incurred the expenses as stated, in the course of the performance by her of her duties as an employee of respondent, and has not been paid for same.

No opposition is made to the payment of the claim and the latter seems to be within the rule that where the facts are undisputed that the State has received services or supplies lawfully contracted for by it, and payment not having been made before the lapse of the appropriation out of which it could have been paid, an award is proper. (*"The Kerber Packing Compmy, a Corporation,* vs. *State,* 9 *C.* C. R. 109.")

The claim is hereby allowed and an award made in the sum of $63.95, in favor of claimant, Helen R. Messenger.

(No. 3483—Claimant awarded $43.35.)

EVERETT K. BROKER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***August 21, 1940.***

SMITH & ARNOLD, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could* ***be*** *paid–hefore* ***presentment*** *of bill—when award may* ***be*** *made for price of.* Where it appears that State received merchandise, as ordered by it, and that bill therefor, in correct amount was not presented before lapse of appropriation out of which it could be paid, due to no negligence on part of claimant, an award may be made for amount due on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

During the calendar year 1937, claimant was sole proprietor of a service station in Mt. Pulaski, Illinois. At the request of the Department of Public Works and Buildings, Highway Division of Illinois, he made various sales and deliveries of gasoline and oil to that Department through its representative and agents. Duplicate invoices of the several sales are attached to the original bill of claimant, and amount to $43.35.

Claimant represents that his account has never been paid and that there is now due him from the State of Illinois the said sum of **$43.35.** A report from the Division of Highways recites that, "Through a lack of understanding by the claimant of the procedure prescribed and required by the division of highways for payment of bills, his bills were not paid from money then available in the 60th bennium appropriation. The quantities are correct, the prices are as agreed upon, and the supplies were furnished as claimed."

No objection is made by respondent to the allowance of the claim as submitted.

We have held in numerous cases that where materials or supplies have been furnished to the State 'but the bill therefor was not approved and vouchered for payment before the lapse of the appropriation from which it was payable, without negligence on the part of the claimant, an award will be made, if, at the time the expense was incurred there were sufficient funds remaining unexpended in the appropriation to pay for same. This claim is within the requirements, and an award is therefore entered in favor of claimant for the sum of **$43.35.**

(No. 2934—Claim denied.)

WILSON F. CHOATE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM E. BAUER, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 21, 1940.

MCCARTHY & MCCARTHY, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*death of employee after award for compensation, but before full payment thereof—alleged to have resulted from injury—claim by collateral heirs for balance of compensation and additional compensation for death—award denied when no proof of dependency as required in paragraph D of Section 7 of Act.* Under the provisions of paragraph D of Section 7 of the Workmen's Compensation Act, no award can be made for compensation for accidental injuries sustained by an employee, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in his death, to his collateral heirs, unless such heirs prove by a preponderance of the evidence that they were dependent, at the

time of such injuries, upon the earnings of such employee to the extent of fifty per cent or more of total dependency.

SAME—*Paragraph G of Section 7 of—does not create class of beneficiaries —-merely specifies manner of payment when there are beneficiaries.* Beneficiaries entitled to compensation for an injury to an employee, resulting in his death are specified in Paragraphs a, b, c, d and e of Section 7 of the Act and paragraph g thereof does not create a new or different class of beneficiaries but merely specified manner of payment, provided there are beneficiaries entitled thereto under said paragraphs A, B, C or D.

SAME—*death of employee—compensation for not payable to executor.* Under the provisions of Section 7 of the Act, compensation for death of employee resulting from accidental death, are not payable to his executor or administrator, but must be paid directly to the beneficiaries, if any, specified therein.

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

At the May Term, 1938 of this court an award mas entered in favor of William E. Bauer for the sum of $1,829.93, payable as follows: $1,107.89 at the time of the entry of the order, and the balance of $722.04 in seventy-seven weekly payments of $9.31 each, commencing May 18th, 1938, and one final payment of $5.17. Such award was made under the provisions of the Workmen's Compensation Act of this State for disability resulting from accidental injuries sustained by said William E. Bauer which arose out of and in the course of his employment by the respondent, and embraced the following items, to-wit: temporary total incapacity for thirteen weeks, and 190 weeks' compensation for the permanent and complete loss of the use of claimant's left leg.

The said William E. Bauer died June 21, 1938, and on August 23, 1938 Wilson F. Choate was appointed Executor of the Last Will and Testament of William E. Bauer, deceased, by the Probate Court of Kane County, Illinois.

On October 8,1938 said William F. Choate as Executor of the Last Will and Testament of William E. Bauer, deceased, filed his petition in this court setting forth that the death of said William E. Bauer occurred as the result of the injury for which compensation had theretofore been allowed as above set forth; that said William E. Bauer left him surviving John A. Sterling, his brother; Elizabeth Parsell, his sister; Mrs. Charles Tallmadge, his sister; and certain nephews and nieces, as his only heirs at law; that such heirs at law were entitled to compensation under Section 7 of the Workmen's

Compensation Act of this State; that there had been paid on the aforementioned award at the time of the filing of said petition the sum of $1,163.75; and asking that said petitioner be substituted as claimant herein, and that said petitioner be awarded additional compensation in accordance with Paragraph (g) of Section 7 of the Workmen's Compensation Act of this State.

It was stipulated by and between the parties hereto by their respective counsel that the claim of said Executor for an additional award be submitted upon the evidence as to dependency already in the record.

Section 7 of the Workmen's Compensation Act specifies the amount of compensation which should be paid for an injury resulting in death, and provides for the payment of compensation to specified beneficiaries as follows:

"a) If the employee leaves any widow, child or children, whom he was under legal obligations to support at the time of his injury," then a specified sum.

"b) If no amount is payable under paragraph (a) of this section, and the employee leaves any parent, husband, child or children who at the time of injury were totally dependent upon the earnings of the employee," then a specified sum.

"c) 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 a specified sum.

"d) If no amount is payable under paragraphs (a), (b) or (c) of this section, and the employee leaves any grand-parent, grand-child or grand-children, 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 a specified sum.

"e) If no amount is payable under paragraphs (a), (b), (c), or (d) of this section, a sum not to exceed $150.00 for burial expenses," etc.

The rights of the petitioner, if any, arise under and must be determined by the provisions of the Workmen's Compensation Act of this State. Section 7 of such Act is the section which provides for the amount of compensation to be paid for an injury resulting in death, and the beneficiaries entitled to compensation must be determined in accordance with the aforementioned provisions of Paragraphs (a), (b), (c), (d) and (e) of said section.

Under the facts set forth in the petition, the said William E. Bauer left only collateral heirs, and consequently petitioner's right to an award must be determined in accordance with the provisions of Paragraph (d) of said Section 7. Such

paragraph, however, provides for compensation only when such collateral heirs are "dependent at the time of the injury to the employee upon his earnings to the extent of fifty per-centum or more of total dependency".

The only evidence in the record referring to the question of dependency is the testimony of William E. Bauer who, at a hearing held on March 1, 1938, stated that he had lived at the Elgin State Hospital ever since the accident in question, and who in reply to questions asked him, answered as follows:

"Q. You have made this your home ever since employed here?

"A. It is the only home I've got.

"Q. You had no children under the age of 16 years at the time of the injury?

"A. No, no family."

There is no testimony whatsoever as to any contributions having been made by said William E. Bauer to any of his relatives or with reference to dependency of any such relatives upon him. Under the provisions of said Paragraph (d), no award can be made unless the collateral heirs of said William E. Bauer were dependent at the time of his injury upon his earnings to the extent of fifty per cent or more of total dependency, and the burden is upon the petitioner, or such heirs, to show such dependency. Upon the record before us we have no authority to allow an award under said paragraph, and there is nothing in such record which mould authorize an award under any other paragraph of said section.

The petitioner in his petition bases his right of recovery on Paragraph (g) of said Section 7, which provides as follows:

"(g). The compensation to be paid for injury which results in death, as provided in this section, shall be paid to the persons who form the basis for determining the amount of compensation to be paid by the employer, the respective shares to be in the proportion of their respective dependency at the time of the injury on the earnings of the deceased: Provided," etc., etc.

This paragraph merely specifies the manner of payment, provided there are beneficiaries entitled to payment under the provisions of Paragraphs (a), (b), (c) or (d).

In considering this section, Angerstein in "The Employer and the Workmen's Compensation Act of Illinois," page 464, section 247, says:

"It is to be noted particularly that under the provisions of Paragraph (g) of Section 7, that compensation shall be paid to the persons who formed the basis for determining the amount of compensation to be paid by the employer. In other words, compensation is to be paid direct to the bene-

ficiaries or to such persons as the Commission orders or awards, and payments should be made in accordance therewith. * * * As the law is now effective, the Act requires payment to be made to the beneficiaries, except that upon order of the Commission a child's compensation may be paid to the parent or grand-parent. A payment to the personal representative, that is, to the administrator or executor of the deceased employee, is not provided for or contemplated except where the persons entitled to compensation live outside of the United States."

Under the provisions of said paragraph, if any compensation were payable it would have to be paid directly to the beneficiaries specified in said Section 7, and no award could be made to the Executor. However, under the record before us, and as previously stated, we have no authority to enter an award even if the heirs of the deceased employee and not his executor had made application therefor.

For the reasons above set forth, the prayer of the petition must be denied. Award denied. Petition dismissed.

Inasmuch as the original claimant has departed this life, and the record discloses no right either on the part of the executor of his estate, or on the part of the heirs of said original claimant, to the unpaid balance of the original award, It Is Further Ordered that no further payments be made pursuant to the award so made to said William E. Bauer at the May Term, 1938, of this court, as aforesaid.

(No. 3468—Claim denied.)

LEONIA J. CRAM, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 21, 1940.

WOLF & LOVE, for claimant.

JOHN E. CASSIDY, Attorney General; MAURICE J. WALSH, Assistant Attorney General, for respondent.

STATE'S ATTORNEY—*not State officer—State not liable for moneys advanced to for return of fugitive.* The State's Attorney of Cook County is not a State officer, and where a party deposits money with him to defray expenses of having a fugitive returned from a sister state for trial on a criminal charge, upon his promise for return of same, if claimant duly prosecuted such charge, no cause of action arises against the State on his failure or refusal so to do.

PLEADING—*complaint failing to set forth cause of action—will be dismissed.* Where complaint on its face fails to state a cause of action against the State, motion to dismiss must be sustained.

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

From the complaint filed herein on March 14th, 1940, it appears that in November, 1938, claimant filed her information for a fugitive warrant in the Municipal Court of Chicago for one Henry Kinsey Brown who then resided in Detroit, Michigan; that it became and was necessary to cause a messenger representing the State of Illinois to go to Detroit for the purpose of bringing said Henry Kinsey Brown back' to this State; that for that purpose one Stephen Leddy, a police sergeant of the City of Chicago assigned to the office of Thomas J. Courtney, State's Attorney of Cook County, was sent to Detroit as a messenger with the fugitive warrant issued by the Governor of this State; that said Thomas J. Courtney, State's Attorney, required the claimant to deposit $150.00 for the expense involved in sending such messenger to Detroit; that such monies were advanced by the claimant upon the promise of the office of said Thomas J. Courtney that if said Henry Kinsey Brown was duly prosecuted by the claimant in the Criminal Court of Cook County, said sum of $150.00 would be returned to her; that thereafter said Leddy made several trips to Detroit in connection with the extradition of said Henry Kinsey Brown; that the latter ultimately waived extradition and returned to Cook County; that upon such return he was indicted in the Criminal Court of Cook County and was arraigned upon such indictment; that claimant has requested the refund of said sum of $150.00 so advanced by her as aforesaid, but was informed by the office of said Thomas J. Courtney that such office is without funds out of which to make reimbursement to the claimant;—wherefore she requests payment of said sum to her by the State of Illinois.

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

It is impossible to determine from the complaint or from any of the other papers filed in the case, whether claimant bases her claim upon the provisions of "An Act to Revise the Law in Relation to Fugitives from Justice," approved February 16th, 1874, as amended (Illinois Revised Statutes, 1939, Bar Assn. Ed. Chap. 69), or whether she bases the same upon the promise of the State's Attorney, independent of the Fugitive from Justice Act; hence we will consider the claim from both angles.

Section 11 of said Fugitive from Justice Act deals with the matter of expenses in extradition cases, and provides as follows:

"When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the State treasury, on the certificate of the Governor and warrant of Ihe auditor; in all other cases they shall be paid out of the county treasury of the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose Governor the requisition is made, and not exceeding twelve cents per mile for all necessary travel in returning such fugitives. Before such accounts shall be certified by the Governor, or paid by the county, they shall be verified by affidavit, and certified to by the judge of the county court wherein the crime is alleged to have been committed."

Under the provisions of such section the expenses therein specified will be paid out of the State Treasury when the punishment for the crime is confinement in the penitentiary, and in all other cases such expenses shall be paid out of the county treasury wherein the crime was alleged to have been committed.

In all cases based upon the provisions of such section, it is therefore necessary for the claimant to allege and prove that the crime in question was punishable by confinement in the penitentiary. The complaint makes no allegation whatsoever with reference to the nature of the crime, or the punishment provided therefor. It is to be noted also that the expenses provided for by statute are specifically enumerated, and before the same shall be certified by the Governor or paid by the county, they are required to be verified by affidavit and certified to by the Judge of the County Court of the county wherein the crime is alleged to have been committed. The complaint does not set forth the fees paid to the officers of the State of Michigan, or the mileage of the messenger, which are the only expenses provided by the statute, nor is there any certification by the Judge of the County Court of the county wherein the crime was committed, as required by the statute. For the reasons above set forth, the complaint does not state a cause of action against the State under the provisions of the aforementioned statute.

The right of the claimant to recover from the State money advanced to the State's Attorney of any county pursuant to an agreement made with him in connection with a pending case, presents an entirely different question.

Although the State's Attorney represents the People of the State of Illinois in all criminal proceedings in his county, yet he is not considered a State officer. In the case of *Cook County* vs. *Healy, 222* Ill. 310, the court, on page 316, in considering the status of the State's Attorney of **Cook** County, said:

"The State's attorney is **a** county officer, and his status, as such, is fixed by the Constitution which creates his office. He is elected for and within a county to perform his duties therein and is not distinguished in any manner from the clerks of the courts, the sheriff, coroner, and other officers connected with the administration of justice within the county."

The Healy case was quoted with approval in the case of *The People* vs. *Newcomer,* 284 Ill. 315, where the court, on page **324,** citing the Healy case, said:

"The State's attorney is a county officer elected for and within a county **to** perform his duties therein and is by statute charged with certain duties."

The State's Attorney being a county officer, the mere fact that money was advanced to him for expenses in a criminal case, even under a promise to return the same, does not give a right of action against the State. If any right of action exists, it is against the officer who received the money and promised to return the same.

The complaint does not state a cause of action against the State and the motion of the respondent must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3456—Claimant awarded $90.15.)

MUNTZ & LEA COMPANY, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 21, 1940.

CHARLES D. PAGE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid—before presentment of bill therefor—when award may be made for.* Where it appears that State received merchandise, as ordered by it, and that bill therefor in correct amount was not presented before lapse of appropriation out of which it could be paid, due to no negligence on part of claimant, an award may be made for amount due, on claim filed within a reasonable time.

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

Between August 8, 1938 and June 20, 1939, claimant sold to the respondent through the Division of Highways .at Elgin, Illinois, nine invoices of merchandise, amounting in all to $90.15. Invoices therefor were forwarded. to the Division of Highways of the respondent on February 1, 1940, and thereupon claimant was advised that the Department could not pass same for payment for the reason that the appropriation out of which payment should have been made lapsed on September 30, 1939, and was further advised that its only recourse was to file its claim in this court.

It is admitted that the merchandise was received by respondent on the dates claimed; that same was as represented by claimant, and that the prices charged therefor are the prices agreed upon when the merchandise was received. Claimant did not delay unreasonably in presenting its claim, and in numerous similar cases we have held that claimant is entitled to an award. *Bock Island Sand and Gravel* Co. vs. *State*, 8 C. C. R. 165; *Indian Motorcycle* Co. vs. *State*, 9 C. C. R. 526; *Metropolitam Electrical Supply* Co. vs. *State*, 10 C. C. R. 346.

Award is therefore entered in favor of the claimant for the sum of Ninety Dollars and Fifteen Cents ($90.15).

(No. 2771—Claimant awarded $345.43.)

MYRTLE PHILLIPS, Claimant. vs. STATE OF ILLINOIS, Respondent.

Opinion *filed* August *21, 1940.*

CHARLES G. SEIDEL, for claimant.

JOHN E. CASSIDY, 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 her employment, while engaged in extra-hazardous employment, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

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

For more than six years continuously prior to December 21, 1934, claimant was in the employ of respondent as an attendant at Elgin State Hospital, Elgin, Illinois. On the last mentioned date, while in the course of her employment and in the performance of her duties, she slipped on a wet floor and sustained a wedge-shaped fracture of the right leg at the junction of the middle and lower third of the tibia. She was immediately removed to the institution hospital and remained there under the care of the physicians on the staff of such hospital until September 14, 1935. Callus formation was very slow in developing, and claimant was given vitamins, calcium, other medication, and physiotherapy to aid new bone formation, and repeated X-ray examinations were made. She was sent to the Illinois Research Hospital on five occasions for consultation and advice as to further treatment. Her condition gradually improved and an examination of the injured leg on November 5th, 1935 by Dr. George A. Wiltraikis of the Elgin State Hospital revealed a good union, but also showed some lateral angulation and some persistent edema of the right ankle.

Claimant returned to hey regular work as an attendant on November 7th, 1935 and performed all of the duties of her employment regularly thereafter, being still engaged in the same employment at the time of the hearing herein on July 27th, 1937. Although there is testimony that the injured leg still bothers her some, yet there is no testimony in the record which will sustain an award for partial permanent disability.

Claimant seeks an award for temporary total disability from the date of her injury to the date she returned to her duties as aforesaid; for the amount expended by her for certain medication, and for the expenses incurred by her in connection with the five visits to the Illinois Research Hospital at Chicago. However, there is nothing in the record to indicate the amount of the last mentioned expense, and consequently no allowance can be made therefor.

Upon a consideration of all of the facts in the record, we find as follows:

1. That on December 21, 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 an accidental injury which arose out of and in the course of her employment.

3. That notice of the accident mas given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act.

4. That claimant's annual earnings during the year next preceding the injury were $936.00, and her average weekly wages were $18.00.

5. That claimant at the time of the injury was forty-seven years of age, was married, and had no children under the age of sixteen years at the time of her injury.

6. That all necessary first aid, medical, surgical and hospital services have been provided by the respondent except for certain cod liver oil tablets and a plaster cast which were provided by the claimant at a cost of $6.00.

7. That claimant was temporarily totally disabled from December 21, 1934 to November 7, 1935.

8. That the sum of $72.00 has been paid the claimant to apply on the compensation due her.

9. That claimant is entitled to have and receive from respondent the sum of $9.00 per week for 45 5J7 weeks, that being the period of temporary total incapacity as aforesaid, together with $6.00 to reimburse her for the amount paid for cod liver oil tablets and plaster cast as aforesaid, in all, the sum of $417.43, less the sum of $72.00 heretofore paid to her as above set forth; making a net amount due claimant of $345.43; which amount is payable in weekly payments of $9.00 per week commencing December 22, 1934.

The total amount of compensation payable as above has accrued at this time, and claimant is therefore entitled to the payment thereof in a lump sum.

Award is therefore entered in favor of the claimant for the sum of Three Hundred Forty-five Dollars and Forty-three Cents ($345.43).

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," (Illinois Revised Statutes, 1939, Bar Assn. Ed., Chap. 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public: Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July

1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3403—Claimant awarded $253.88.)

DOMINIC PIANFETTI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed August 21, 1940.

JOSEF T. SKINNER, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION *ACT—When award may be made for partaal loss of use of finger to employee under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in partial loss of use of Anger, an award for compensation may be made therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant states in his petition that he was a common laborer employed by the State Highway Department of Illinois on State Route No. 71 near Hennepin, Illinois; that on May 8, 1939, he was engaged with other men in loading a six hundred pound mixer skip on a truck, and while so employed, the glove which he was wearing on his right hand, caught and became entangled between the skip and the truck; that the index finger on his right hand was caught and crushed to the middle phalangeal joint of such finger.

He was immediately taken to Dr. Philip V. Hall at Bureau, Illinois by the foreman in charge of the work, and his hand was dressed by Dr. Hall, who continued to treat him from May 8,1939 until May 22,1939, when he was discharged by the physician. He was also treated by Dr. Horace Dunn at Granville, Illinois on July 17, 1939. X-ray pictures were taken and appear in the record.

Claimant suffered his accident on May 8 and returned to work on May 11. As there were less than 8 days loss of time, no temporary disability was paid to him. He was paid

his regular wages and continued to be employed until about August 15, during which period he received wages in the total amount of $319.53.

Dr. P. V. Hall reported that there was no permanent disability, but Dr. Dunn, who apparently has had extensive experience, testified that the finger is definitely enlarged throughout its entire length, and its circumference is 40% more than the corresponding finger on the left hand; that there is a lateral angulation of 20%. The distal phalange has lost the ability to be extended fully and claimant has an immobile phalange, due to the total loss of the extensor tendon at the base of the distal phalange. He cannot completely flex the finger down on the palm of the hand. The tip of the finger can be flexed only to within 1½ or 2 inches from the palm in passive motion. The doctor testified that the condition described is permanent, and that in his opinion claimant has suffered 55 or 60% loss of use of his finger as a result of the accident in question.

Claimant was receiving pay at the rate of 75c an hour for 8 hours a day, and the labor division in which he was classified was employed less than 200 days a year. For the total loss of use of an index finger an employee would be entitled to 50% of the average weekly wage during 40 weeks, and for the permanent partial loss of use, that proportion of 40 weeks which the partial loss of use bears to the total loss.

While Dr. Hall's report shows that when claimant was discharged from Dr. Hall's care, there was no permanent disability, Dr. Dunn's testimony definitely establishes that some partial disability did result. This is supported by an examination of the X-ray pictures that mere submitted in evidence.

From an examination of the record the court finds that claimant has suffered a permanent partial disability of 55% loss of use of the index finger on his right hand; that his average weekly wage was $11.54, and that he is therefore entitled to an award in the sum of $253.88.

An award is therefore hereby made in favor of claimant, Dominic Pianfetti, in the sum of $253.88.

As the entire amount due has heretofore accrued, such award is payable in full at the present time.

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'' (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter **127,** Pars. 180-181); and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly,'' approved July **1,** 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3334—Claimant awarded $3,550.00.)

CATHERINE BLAZWICH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1940.

THOMAS A. MURPHY and **FRANK** R. EAGLETON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries resulting in death of employee within provisions of—when award may Be made tinder.* Where employee of State 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 therefor may be made to those entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

SAME — employee on hourly basas—not employed continuously for one year preceding injury — annual earnings determined on basis of 200 working days in year. Where it appears that claimant, who was paid on hourly basis had not been in employ of State **for** one whole year, preceding injury, was employed in a department of the State, the work of some divisions of which continued throughout the year, but that the work that claimant was engaged in at the time of such injury, was operated for less than two hundred **working** days in each year, his annual earnings will be computed upon the basis of two hundred times his average daily earnings for the purpose of determining compensation.

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

On June 29,1938 one Joseph Blazwich was in the employ **of** the respondent as a laborer in the Division of Highways,

Department of Public Works and Buildings. His wages were fifty cents (50c) per hour for an eight-hour day and for not to exceed forty-eight (48) hours per week:. On the last mentioned date said Joseph Blazwich, together with three other men, constituted a maintenance crew whose work for the day was cutting weeds on U. S. Route 51 and S. B. I. Route 179. They had completed the work cutting weeds on Route 51 near Wenona, about eight-thirty A. M. and were driving in the Division truck to the point on Route 179 where they were to continue their work. After they had proceeded about a mile, said Blazwich fell off the truck onto the pavement and was seriously injured. He was immediately taken to the office of Dr. G. T. Love in Wenona. The doctor found the patient in a critical condition, in deep shock, bruised on the right side of the skull, and paralyzed on the right side. The doctor ordered supportive treatment and had the patient removed to his home as his condition was too critical at that time to move him to the nearest hospital. The doctor called to see him twice again on that date and on the second day had him removed to St. Mary's Hospital at Streator, Illinois, where he grew progressively worse and died on July 3, 1938.

The only medical testimony in the case is that of the attending physician, Dr. Love, who stated that in his opinion that there was a direct causal connection between the injury and the death.

Said Joseph Blazwieh left him surviving the claimant Catherine Blazwich, his widow, and six children, two of whom are minors, to-wit, Margaret who was born December 31, 1921 and Agnes who was born September 28, 1923.

The principal question in dispute :relates to the basis upon which compensation is to be computed. The claimant contends that compensation is to be computed in accordance with paragraph (d) of section 10 of the Workmen's Compensation Act, which provides as follows, to-wit:

> "As to employees in employments 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 300 times the average daily earnings in such computation;"

and that inasmuch as the annual earnings are not determinable from the evidence, the computation must be made upon the basis of 300 times the average daily earnings.

Respondent contends that the compensation must be computed in accordance with the provisions of Paragraph (e) of said Section 10, which provides as follows, to-wit:

"As to employees in employments 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 300 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 200;"

and that the annual earnings must be computed upon the basis of 200 times the average daily earnings.

The determination of the question at issue involves the construction of the aforementioned Section 10 of the Compensation Act. Blazwich was in the employ of the respondent for less than one year prior to the date of his injury, and although the work of maintenance of highways is one in which it is the custom to operate throughout the working days of the year, yet the particular employment in which Blazwich was engaged at the time of his injury, to-wit, the cutting of weeds, is an employment in which it is the custom to operate for a part of the whole number of working days in each year.

In the case of *Stellwagom* vs. *Imd. Corn.*, 359 Ill. 557, the employer was engaged in the real estate business and although such business apparently operated all of the working days of the year, yet the employee who did odd jobs and repair work for his employer, was engaged only in part-time work. In that case the court said:

"The employment of defendant in error was such that it would customarily engage him only a part of the whole number of working days, depending upon the weather and circumstances. In such case Section 10-e applies, and the award was properly based on a daily wage of $8.00 multiplied by the two hundred day minimum to determine the average annual earnings."

The identical question here involved was before this court in the case of *Kehoe* vs. *State*, No. **3203,** decided at the November Term, **1939,** of this court. In that case the deceased employee was also employed as a laborer in the maintenance department of the Division of Highways and on the date of his injury was engaged in painting a bridge on the highway. In that case, as in this, the work of painting in which the employee was engaged at the time of the accident, was an employment in which it is the custom to operate for a part of the whole number of working days in each year, although the work of maintenance continued throughout the

working days of the year. The question involved mas carefully considered in that case and the decisions of our Supreme Court on the question were reviewed. After a review of the authorities, we said:

"Although the work of some of the divisions of the Highway Department continues throughout the working days of the year, yet the work in which claimant's intestate was engaged at the time of his death operated less than 200 working days during the year.

"Claimant's intestate was not engaged in the 'employment of the State for the full year immediately preceding the accident, and the annual earnings during such period, of persons of the same class, in the same employment and same location, does not appear from the record.

"Considering said Section 10 as *a* whole, and considering also the aforementioned decisions of our Supreme Court construing the meaning of such section, and considering the facts in the record, we conclude that the annual earnings of the claimant's intestate must be ascertained by multiplying his daily wage, to-wit, Four Dollars ($4.00), by the two hundred (200) day minimum."

The law as laid down in the Kehoe case is decisive of the question here involved.

Upon a consideration of the facts in the record, we find as follows:

1. That said Joseph Blazwich and the respondent were on June 29,1938, operating under the provisions of the Workmen's Compensation Act of this State; that on said date said Joseph Blazwicli sustained accidental injuries which arose out of and in the course of his employment and which resulted in his death on July 3, 1938; that notice of said accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of said Joseph Blazwicli during the year next preceding. the injury were Eight Hundred Dollars ($800.00), and his average weekly wage was Fifteen Dollars and Thirty-eight Cents ($15.38); that the necessary first aid, medical, surgical and hospital services were provided by respondent; that said Joseph Blazwich left him surviving Catherine Blazwich, his widow, and six children; that said widow and two of said children, to mit, Agnes, who was born September 28, 1923 and who mas fourteen years of age at the time of the death of her father, and Margaret, who mas born December 31, 1921 and mho mas sixteen years of age at the time of the death of her father, mere each totally and equally dependent upon the earnings of said Joseph Blazwich €or their support and maintenance.

2. That under tlie provisions of Section 7-a and Section 7-H-2 of the Workmen's Compensation Act, the amount of compensation to be paid by respondent on account of the death of said Joseph Blazwich is Thirty-five Hundred Fifty Dollars ($3,550.00), subject, however, to reduction when the said Agnes Blazwich arrives at the age of eighteen years, to wit, on September 28, 1941, provided she is then physically and mentally competent;—in accordance with the provisions of Section 7-a of tlie Workmen's Compensation Act; that said compensation is payable in weekly installments of Eleven Dollars ($11.00) commenbing on July 4, 1938.

3. That the share of such compensation which otherwise would be payable to said Agnes Blazwich should be paid to her mother, Catherine Blazwich, for the support of said child.

4. That said Catherine Blaxwich is entitled to have and receive from the respondent the sum of Twelve Hundred Fifty-four Dollars ($1,254.00), being the amount of compensation which has accrued from July 4, 1938 to September 9, 1940.

IT IS THEREFORE ORDERED that the share of such compensation which otherwise would be payable to said Agnes Blazwich shall be paid to her mother, Catherine Blazwich, for the support of said Agnes Blazwich.

IT IS FURTHER ORDERED that an award be entered in favor of the claimant, Catherine Blazwicli, for the sum of Thirty-five Hundred Fifty Dollars ($3,550.00); subject, however, to reduction when said Agnes Blazwich arrives at the age of eighteen years, to wit, September 28, 1941, provided she is then physically and mentally competent;—in accordance with the provisions of Section 7-a of the Workmen's Compensation Act.

IT IS FURTHER ORDERED that such award be payable as follows: tlie sum of Twelve Hundred Fifty-four Dollars ($1,254.00), being the amount of Compensation which has accrued from July 4, 1938 to September 9, 1940, shall be paid forthwith; and the balance of such compensation shall be payable in weekly installments of Eleven Dollars ($11.00) per week commencing September 16, 1940.

IT IS FURTHER ORDERED that this cause be continued until the first session of this court to be held after the said Agnes Blazwich arrives at the age of eighteen years, to wit, after September 28, 1941, for the entry of such further orders with

reference to the amount of the aforementioned award, or the reduction thereof, as may be in accordance with the provisions of the Workmen's Compensation Act; and that in the meantime compensation be paid by the respondent as hereinbefore provided.

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the first Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3431—Claimant awarded $1,980.00.)

JOE PERONA, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 10, 1940.

PAUL D. PERONA, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation for total loss of use of eye may be made under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in total loss of use of eye, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

SAME—*employer includes State in Section 8 ('e) 20 of.* The term employer as used in Section 8 (e) 20 of Act includes tha State of Illinois, as defined in Section 4 thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein was first employed! by the Division of Highways of Illinois in 1934. On September 5, 1939 he was working with a gang of laborers of the Division, placing

plank on the guard rail on U. S. Route No. 51 at Rochelle, Illinois. In attempting to fit a plank to a post, claimant struck a steel chisel with a hammer and a piece of steel from the hammer struck him in the left eye. He was taken to St. Mary's Hospital in LaSalle and was then moved to the Silver Cross Hospital in Joliet, where Dr. H. W. Woodruff of Joliet removed the piece of steel by the use of a giant magnet. Claimant left the hospital September 10, 1939 and was taken to his home in Standard, Illinois. Thirteen trips thereafter were made from his home to LaSalle, claimant being attended by Dr. Sellett, and the expense being borne by the State. On October 10, 1939 and February 10, 1940 claimant went to Joliet and to Chicago where he was examined by Dr. Woodruff and Dr. E. K. Findlay, Professor of Ophthalmology at the University of Illinois, College of Medicine. Dr. Findlay's report shows normal vision 20/20 of the right eye and vision of the left eye 20/200. There was a dense opacity about 4 mm. in length and 1 mm. in width near the center of the lens of the left eye. Such opacity or traumatic cataract may remain unchanged for years or the entire lens may become opaque and an operation on the cataract necessary. Dr. Findlay further stated it would not be advisable to attempt any operation at present and nothing can be done to improve the sight of the left eye. The Doctor further reported that the claimant could return to his work at any time. Dr. Findlay further reported on February 15, 1940 that "The opacity on the capsule of the lens is just in front of the pupil—when the pupil is dilated the vision is increased to nearly 20/70, but only when a proper glass or lens was placed before the eye—even if an operation were performed his vision would not be improved unless a good strong glass or lens was placed before the eye."

On February 10, 1940 Dr. Woodruff reported to the Division. He stated that an operation was not advisable. That the vision in the left eye is 10/200 and with a lens such vision is improved to 20/60, due to the fact that there is only a partial cataract. Dr. Woodruff further stated that claimant would have no more vision if an operation was performed and that glasses are not advisable.

From the findings of Dr. Findlay and Dr. Woodruff and the Highway Departmental Report, we find that claimant has suffered a total loss of use of his left eye. If the use of cor-

recting glasses or lens was recommended we might conclude that claimant could have some slight restoration of vision in his left eye, but neither of the medical men recommend either an operation or the use-of glasses at this time.

At the time of the accident claimant was married but had no child dependent upon him for support. He was being paid a salary of $30.00 per week. Under Section 8 (1) of the Workmen's Compensation Act, where an accidental injury occurs on or after July 1,1939 compensation due the employee shall be computed according to the provisions of said paragraph, and after being so computed shall be increased ten per centum.

Claimant was paid compensation for temporary disability at the rate of $16.50 per week for the period from September 6, 1939 to October 18, 1939, amounting to $101.36. Medical and hospital bills were also paid by the Highway Division in a total amount of $280.23.

Under the provisions of Section 10, Subsection (a) and (i) and Section 8, Subsection (1) and (e) 16, claimant is entitled to an award for the specific total loss of use of his left eye in the amount of $1,980.00 payable in weekly installments of $16.50 per week. Payment for fifty-three *(53)* weeks has matured to the 13th day of September, 1940, making $874.50 payable as of September 13, 1940. The balance of the award or $1,105.50 is payable in weekly installments at the rate of $16.50 per week commencing September 20, 1940. In accordance with the above findings an award is hereby made in favor of claimant Joe Perona for the specific total loss of use of the left eye, in the sum of $1,980.00 payable as follows: $874.50 as of September 13, 1940 and the balance, i. e. $1,105.50 payable in weekly installments of $16.50 commenting September 20, 1940.

In view of the report by Dr. Findlay of September 12, 1940 wherein he stated, "Through time there may be a still greater improvement in claimant's vision and I advise that he be examined again in about three months to note what further changes take place," It Is Ordered that this award is made subject to any modification that may hereafter be made in accordance with the provisions of the Workmen's Compensation Act.

This award being subject to the provisions of an Act entitled "An Act Making an Appropriation to Pay Compen-

sation Claims of State Employees and Providing for the Method of Payment Thereof,'' (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Sess. Laws 1939, Page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

SUPPLEMENTAL OPINION.

PER CURIAM:

This cause again coming before the court for further consideration upon its own motion, and it appearing that an award was herein entered in favor of claimant, Joe Perona, for the total loss of use of claimant's left eye, as the result of an accident arising out of and in the course of his duties as an employee of respondent; and it further appearing that such accident occurred on September 5, 1939, and that the *Workmen's Compensation Act* of Illinois effective as of that date, contains the following proviso, i.e.—

"In every case of loss of, or permanent and complete loss of use of one eye, one foot, one leg, one arm, or one hand, the employer in addition to the compensation as provided for in this section shall pay into the special fund provided for in Section 7, Paragraph (e), the sum of Two Hundred Twenty-five Dollars, if the accidental injury occurs between July 1, 1939, and July 1, 1941, both dates inclusive."

(Sec. 8 (e) 20.)

And it further appearing that under the provisions of said Section 7 (e) above noted, that the State Treasurer of the State of Illinois is made custodian of moneys paid by reason of the foregoing provisions, the disbnrsement thereof being under the further terms of said Act;

And it further appearing to the court that the term "employer" as used in said Section 8 (e) 20 includes the State of Illinois as defined under Section 4 of the Workmen's Compensation .Act;

IT IS THEREFORE ORDERED that a supplemental and additional award be entered herein in the sum of Two Hundred

Twenty-five ($225.00) Dollars, to be paid by respondent to the State Treasurer of the State of Illinois as Ex-officio Custodian of the Workmen's Compensation Special Fund, to be disbursed in accordance with the provisions of said Workmen's Compensation Act.

This supplemental 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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Nest Regular Session of the General Assembly,', approved July 1,1939 (Sess. Lams 1939, page 117); and being, by the terms of the first.mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3484—Claim denied.)

HARDWARE MUTUAL CASUALTY COMPANY, A CORPORATION, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 8, 1940.

DILLEY, BJORK, BLAIR & MUNNECKE, €or claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

CHARITABLE INSTITUTIONS—*conduct of governmental function.* In the conduct of its charitable institutions the State exercises a governmental function.

NEGLIGENCE—*officers, agents or employees of State Charitable Institutions —State not liable for—doctrine of respondeat superior not applzcable.* The Illinois State Hospital is a State Charitable Institution and the State in the maintenance thereof is engaged in a governmental function and is not liable to respond in damages for personal injuries or damages to property occasioned by the malfeasance, misfeasance or negligence of the officers, agents, employees or inmates thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant corporation is an Insurance Company licensed to transact business in the State of Illinois and engaged in writing Workmen's Compensation Insurance.

The firm of Klein & Heckman, Inc., was a plumbing and heating contractor, and had received a sub-contract for the plumbing work on certain construction at the Illinois State Hospital for the Insane, owned and operated by respondent at Manteno, Illinois. Claimant herein, on September 17, 1938 and September 17, 1939, had entered into written contracts with Klein & Heckman to insure the latter from claims by the latter's employees arising under the Workmen's Compensation Act of Illinois.

Klein & Heckman and various employees, including Eddie Allen, a laborer, and Urban P. Zoph, a plumber's apprentice, commenced work on its Manteno plumbing project during the month of July, 1939. Claimant herein alleges that it was the duty of respondent to supply good pure and wholesome water upon the hospital premises for the use of all persons thereon, including the Klein & Heckman employees working there; but that notwithstanding such duty, "said respondent and its agents, servants, superintendents, and State Welfare Director A. L. Bowen, carelessly and negligently permitted typhus germs from the sewage disposal system to contaminate the water supply system in said hospital, resulting in an epidemic of typhoid fever. That while so employed on said project the said Eddie Allen and Urban P. Zoph drank water from said system and thereby contracted typhoid fever.,, The complaint further avers that respondent impliedly warranted to Eddie Allen and Urban P. Zoph that the water from the regular supply system of the hospital was at all times pure, free from germs and contamination and fit for human consumption, but that on the contrary such water contained typhus germs. Complainant further states that the two employees, Allen and Zoph, drank from the regular drinking supply in the kitchen of the hospital and thereby contracted typhoid fever; that Eddie Allen, as a direct result thereof, died on September 19, 1939, leaving his widow, Mrs. Garnet Allen, surviving him. That during his illness he incurred hospital and medical expense of Two Hundred Eighty-five and 40/100 ($285.40) Dollars, which claimant paid under its contract of insurance; that in addition Mrs.

Garnet Allen filed claim with the Illinois Industrial Commission, being Case No. 273023, which resulted in a settlement between this claimant and Mrs. Garnet Allen for the sum of Four Thousand ($4,000.00) Dollars.

Claimant further states that Urban P. Zoph, as a result of his illness, incurred medical, hospital and nursing bills amounting to One Thousand Ninety-seven and 20/100 ($1,097.20) Dollars, which claimant by reason of its contract of insurance was obliged to pay, and that it has in addition paid to Zoph under the terms of the Workmen's Compensation Act, the sum of Sixteen and 50/100 ($16.50) Dollars per week for the period of nineteen (19) weeks from September 20, 1939, through January 30, 1940, in a total sum of Three Hundred Thirteen and 50/100 ($313.50) Dollars.

Claimant states that it was legally liable under the terms of the Workmen's Compensation Law of Illinois to make the foregoing payments, under its contract of insurance, and that by reason thereof it has been subrogated to the rights of said employees Eddie Allen and Urban P. Zoph, and of Klein & Heckman, Inc., as the insured, against the State of Illinois to recover said items above set forth.

Claimant contends that "it acquired such rights by subrogation, by contract, and by operation of law," and seeks an award in the sum of Five Thousand Six Hundred Ninety-six and 10/100 ($5,696.10) Dollars.

The Attorney General, on behalf of the respondent, has filed a motion to dismiss the claim, on the grounds that same does not set forth a demand which the State as a sovereign commonwealth should discharge and pay; that no obligation by subrogation, contract or operation of law is set forth upon which the State could be legally held to respond in damages.

In its Brief, claimant contends that the supplying of water by the State of Illinois at the State hospital was a private and corporate duty and not a governmental function, and that the Doctrine of Respondeat Superior therefore applies; also that the respondent negligently failed to comply with the statutes of the State of Illinois, thereby directly causing damage to claimant herein. We cannot agree with these contentions. 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 govern-

mental 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 furnishing of water at the State Hospital at Manteno was an integral part of the maintenance of such institution. There is no existing law in Illinois making the State liable for the negligence, malfeasance or misfeasance of its officers or employees in the management or maintenance of its institutions.

Petitioner's claim is based upon such alleged negligence.

As there is no statute making the State liable under the facts alleged in this case, and no contract is shown by which any implied warranty could attach to the State for the benefit of claimant as herein contended, an award could not be legally granted herein. This ruling is recognized and applied in the cases of—

Herman Perry vs. *State*, 10 *C. C.* R. *503*;
Lillian Pelli vs. *State*, *8 C. C.* R. 324;
Tollefson vs. *City of Ottawa*, 228 Ill. 134; and
Minear vs. *State Board of Agr.*, 259 Ill. 549.

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

(No. 3523—Claimant awarded $4,030.00.)

FLORA E. MADDOX, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 8, 1940

STANLEY L. POGUE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for injuries resulting in death under.* Where employee of State 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 may be made for

compensation therefor to those legally entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant herein is the widow of Cress Maddox. An original complaint was filed June 20, 1940, rind an amendment thereto was filed August 13,1940, whereby an award of Four Thousand Thirty ($4,030.00) Dollars is sought by claimant under the terms of the Workmen's Compensation Act of Illinois, because of the death of the said Crese Maddox resulting from the accidental injuries suffered while in the employ of respondent.

Under a stipulation of facts and reports submitted by the Secretary of State, the following facts are agreed upon:

That Cress Maddox was, on August 23, 1939, employed as a licensed investigator in the Automobile Department of the Office of the Secretary of State of Illinois at a salary of Two Thousand One Hundred ($2,100.00) Dollars per annum; that he resided in Springfield, Illinois, and worked out of the Office of the Secretary of State, and his duties consisted of driving an automobile owned by the State over the various highways therein where investigation might be in order by him; also in driving various officials and employees of said office to various points in Illinois in connection with the work of said office; also to carry and transport auto license plates and other supplies from the storehouse in the Capitol to the branch offices in the State. He was further charged with the duties of investigating and reporting violations of the Motor Vehicle and Traffic Laws of Illinois, under the immediate direction of the Chief Automobile Investigator and other ranking employees in said office.

On said date Cress Maddox drove to Chicago to deliver such supplies, and while on his return to Springfield was struck by another automobile on U. S. Highway No. 66, a short distance north of Joliet, Illinois, thereby receiving injuries from which he died an hour or so later in St. Joseph's Hospital in Joliet.

Immediate notice of the accident was given that night to the Secretary of State, and on September 1,1939, claimant as the widow of said employee, made claim in person from the Secretary of State for compensation under the Workmen's Compensation Act of the death of her husband. The latter

left surviving his widow, the claimant, but no child or children under the age of sixteen years at the time of said accident. Claimant expended Thirty ($30.00) Dollars in payment of first-aid and hospital fees at the time of said accident, for which she has not been reimbursed. As said employee died within a few hours after said accident, no question of temporary disability compensation arises. If an award is made herein, the rate of salary of the deceased employee would justify the maximum weekly payment of compensation of Fifteen ($15.00) Dollars per week, which would be increased under Section 8 (1) of the Illinois Workmen's Compensation Act as now amended, to the amount of Sixteen and 50/100 ($16.50) Dollars per week. The total award would be a sum equal to four times the average annual earnings of such employee but not less in any event than Four Thousand ($4,000.00) Dollars (Section 7, Workmen's Compensation Act). A detailed statement by the Secretary of State appears in the record, showing that the latter supervises, operates and maintains the State Capitol Building, the Centennial Building, Archives Building and Power Plant at Springfield. That under his direction are operated steam boilers, generators, passenger and freight elevators and steam heating plants; that for the purpose of servicing such equipment respondent maintains an electrical shop, plumbing shop, carpenter shop, and machine shop, in which are used tools incident to such trades, such as saws, hammers, hatchets, knives, chisels and other sharp-edged instruments. Said official is also charged with the administration of the Motor Vehicle Laws of Illinois, and in connection therewith has paper-cutting machines at his Springfield office, with blades approximately eighteen (18) inches in length, which are hand-operated. The deceased employee, husband of claimant, was employed as Investigator and was supplied by respondent with an automobile and had the power of a constable and police officer in the enforcement of the Automobile Law of the State. We have held that such duties bring the employee within the terms of the Workmen's Compensation Act of Illinois.

The record does not disclose any fact as to the nature of the accident other than that claimant was struck by another automobile. No facts appear as to what, if any, recovery is being sought against third parties or as to their liability.

The record does disclose, however, that said Cress Maddox was on the 23rd day of August, A. I). 1939, an employee of respondent; that he was injured in an accident which arose out of and in the course of his employment on the 23rd day of August, A. D. 1939; that he was married and that claimant herein survives him as his widow; that he had no child or children under the age of sixteen (16) years at the time of said accident; that immediate notice of the accident was given to his employer; notice of claim for compensation was made and application for award filed within the time prescribed by the Workmen's Compensation Act of Illinois; that claimant's wages during the year preceding said accident amounted to Two Thousand One Hundred ($2,100.00) Dollars; that his average meekly wage was in excess of Sixteen and 50/100 ($16.50) Dollars, and that four times the average annual earnings would be in excess of Four Thousand ($4,000.00) Dollars.

AN AWARD IS THEREFORE HEREBY MADE in favor of claimant, Flora E. Maddox, as the surviving widow of Cress Maddox, deceased, for the sum of Four Thousand ($4,000.00) Dollars, payable at the rate of Sixteen and 50/100 ($16.50) Dollars per week from the 23rd day of August, A. D. 1939. Of said sum, Nine Hundred Fifty-seven ($957.00) Dollars has accrued to the 4th day of October, A. D. 1940, and is payable at the present time. The balance of Three Thousand Forty-three ($3,043.00) Dollars is payable in one hundred eighty-three (183) weekly payments of Sixteen and 50/100 ($16.50) Dollars each and one final payment of Twenty-three and 50/100 ($23.50) Dollars. In addition to the foregoing, a further award is hereby made to claimant of the sum of Thirty ($30.00) Dollars in payment of first aid and hospital services rendered to said injured employee.

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" (Ill. Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the nest Regular Session of the General Assembly," approved July 1,

1939 (Sess. Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 2844—Claimant awarded $153.09.)

ZELMA RUBY PARISH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 8, 1940.

CHARLES G. SEIDEL, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim by employee of Elgin State Hospital under—when award for temporary total disability may be made.* Where employee of Elgin State Hospital sustains accidental injuries, arising out of and in the course of her employment, resulting in temporary total disability an award may be made for compensation therefor in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant's Statement, Brief and Argument in this cause was not filed until August 29, 1940, but the claim was filed February 15, 1936. It is represented therein that claimant was employed at the Elgin State Hospital as an attendant; that in the course of her employment on or about January 31, 1935, while attempting to prevent one Edith Woods, a patient at such institution, from escaping, claimant had her left knee pushed against a door jamb, thereby spraining her knee and dislocating the knee cap. The evidence discloses that Mrs. Kerley, a supervisor at the institution, was called. The latter sent claimant to the hospital at the institution, where her knee was examined by Dr. Wiltrakis of the institution staff. The patient's knee was bandaged and she was sent back to work. She received infra red light treatments for two and one-half weeks and her knee was bandaged for about ten weeks, under the care of Dr. Wiltrakis, after which the patient was given an elastic bandage to wear. The patient continued in her regular occupation. On October 28, 1935, she was employed in evening duty in a ward on the first floor of the building known as B-1 North. Claimant testifies that,

"After we had completed our work we were supposed to amuse the patients. I was dancing with a patient named Ruby Donald. I started to turn around when my knee cap slipped and I fell. I told the supervisor and Dr. 'Wiltrakis. The next day I reported to the hospital and the doctor put a splint on my knee, which I kept on until the 2nd of December, 1935. I continued to attend to all my duties until December 29,1935. Three times during the morning of that day my leg just folded up. As soon as I got off duty I reported to Dr. Wiltrakis and remained in bed for two weeks from December 29th to January 12, 1936."

Claimant stated that she was put on the sick list for about two weeks, and then she and her husband left on their vacation. She received her pay for December and twenty-eight (28) days in January, then she was paid for twelve (12) days in February and for two (2) days in March, all on the basis of Fifty-four ($54.00) Dollars per month. She further received her maintenance allowance at the institution until April 18th. She reported back for duty on March 2nd or 3rd, but was not accepted for work because of her statement that she would be unable to climb stairs. She was requested by Dr. Reed of the institution staff, on or about March 10, 1936, to sign a six months' leave of absence. She stated she was ready to go back to work if she didn't have to climb stairs. She declined to sign the leave of absence blank and has not been employed at the institution since that time.

Claimant testified that in March, 1936, she could have gone back to work if they had assigned her to duties on the ground floor so she would not have to climb stairs any more than necessary; that she was able to work from and after July, 1936 (Tr. p. 7).

Claimant further testified that, "In July, 1936, Miss Leonard (of the institution staff) again sent the leave of absence blank to me to sign. I told her I was ready to go back to work." When asked, ('Were you ready for unqualified service?" claimant replied: "Outside of the violent wards I could have gone ahead. The greater part of my work had been on the first floor in the main building." She found new employment from January 4, 1937, at a garment factory. At the time of the accident claimant was married, but had no children. Claimant was first employed at the institution December 16, 1934. Her first accident occurred January 31,

1935. Those similarly employed received pay covering the first year of their employment at the rate of Forty-five ($45.00) Dollars for six months and Fifty-two ($52.00) Dollars the following six months, plus maintenance, as in her case, of Eighteen ($18.00) Dollars per month (Tr. p. 10), which would make Seven Hundred Ninety-eight ($798.00) Dollars annual earnings, or an average weekly wage of Fifteen and 35/100 ($15.35) Dollars, or a weekly compensation rate of Seven and 67/100 ($7.67) Dollars.

We have previously held that temporary total disability need not follow immediately after the accident in order to justify an award for later disability. In this case the first accident occurred January 31, 1935. She lost no time from her regular occupation until after October 28, 1935, when she had a further accident. Claimant was not off active duty until December 29,1935, a period of two months. The record shows she was then absent from work and remained in the hospital infirmary for a period of two weeks until January 12, 1936. She was paid for the balance of December and for twenty-eight (28) days in January for non-productive time and further for twelve (12) days in February and two (2) days in March for non-productive time; all of such non-productive time payments being on the basis of Fifty-four ($54.00) Dollars per month. According to claimant's testimony, she could have returned to work and performed all the duties required of her in the ward where she was accustomed to work, after January 1, 1936. It further appears (Tr. p. 18) that from her own statements she would have been able to return to unqualified service except in a violent ward on July 18, 1936. At another time, as above noted, she testified that she could have performed her duties in general after the first of January, 1937.

From a consideration of the entire record the court finds: That claimant herein and respondent are shown to be within the purview of the Workmen's Compensation Act; that claimant suffered an accident which arose out of and in the course of her employment and thereby sustained accidental injuries, resulting in temporary total disability; that such temporary total disability extended from December 29, 1935, to July 18, 1936. From such period is to be deducted the two weeks in the latter part of February and the forepart of March for which claimant received her regular wages dur-

ing a vacation period. This leaves a balance of twenty-seven (27) weeks for which temporary total disability is due at the rate of Seven and 67/100 ($7.67) Dollars per week, or Two Hundred Seven and 09/100 ($207.09) Dollars. There should be deducted, however, from the latter amount the over payment made to her for non-productive time for the period from December 28th to January 28, 1935, or thirty (30) days, during which she received pay at the rate of Fifty-four ($54.00) Dollars per month. Such computation leaves as the amount due claimant for an award herein the sum of One Hundred Fifty-three arid 09/100 ($153.09) Dollars.

An award is therefore hereby made in favor of claimant, Zelma Ruby Parish, for temporary total disability in the sum of One Hundred Fifty-three and 09/100 ($153.09) Dollars. As the full amount has heretofore accrued, same is payable instanter.

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" (Ill. Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 2537—Claimant awarded **$2,538.16.**)

JULIUS J. GROSS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed ***October 9,*** *1940.*

SNAPP, HEISE & SNAPP, for claimant.

JOHN E. CASSIDP, 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 injui-ies, arising out of and in

the course of his employment, while engaged in extra-hazardous employment, an award may be made for compensation therefor, upon his compliance with the terms of the Act in the amount as provided therein.

SAME—*disability resulting from. traumatic neurosis—when compensable.* Where employee suffers disability, as the result of accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, it is immaterial whether such disability was caused entirely from the physical blow struck or from a mental condition arising out of the injury therefrom.

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

For more than a year prior to July 13, 1934, claimant was' employed by the respondent as superintendent of the tailor shop at the Illinois State Penitentiary at Joliet, Illinois. While engaged in the duties of his employment, on the last mentioned date, claimant was brutally assaulted by certain inmates of the institution. He was struck in the jaw with a heavy iron object, knocked down, and rendered unconscious; was kicked, beaten and stabbed; he sustained a compound comminuted fracture of the lower left jaw, and all of his lower teeth were loosened. He also sustained a concussion of the brain, was bruised about the body and legs, sustained an injury to the sciatic nerve of the right leg, and was so badly beaten about the head, face, neck and chest that he was unrecognizable.

Dr. Frank J. Chmelik, the prison physician, rendered first aid within twenty minutes after the occurrence and had the patient removed to St. Joseph's Hospital at Joliet, where he remained about three weeks. While in the hospital and afterwards, claimant remained under the care of Dr. Chmelik. He was also treated by Dr. Joseph D. Talbot, a practicing dentist, who treated him for the trouble with his teeth, mouth and jaw. X-ray pictures of the jaw were taken on the day after the injury, but the swelling was so extensive and the physical condition of the claimant was so bad that it was impossible to do any irrigating of the jaw at that time. On July 17th arch bars were placed on the upper and lower jaws and wired to the teeth, and a head cast placed on the patient. On August 12th, on account of a severe attack of hay fever and asthma, the jaws were pulled loose and had to be'rewired, and a new head cast placed, which remained in position until September 12th, when it was removed. Upon the suggestion of his doctors, claimant went to Arizona about October 1,

1934 and remained there for three or four months. On February 15, 1935 he returned to his regular work and worked four days. On March 12, 1936 he again resumed his former employment and continued therein until August 2, 1937. In March, 1937 his teeth were extracted and thereafter temporary and permanent dentures were prepared and fitted by Dr. I. Goldberg, at a cost of $265.00. In the fall of 1937 claimant went to the Mayo Clinic in Rochester, Minnesota for examination, and was advised that his disability was the result of a displaced inter-vertebral disc which produced pressure upon the nerve, and thereby caused the neurotic condition from which claimant suffered, and that an operation for the removal of such disc should be performed. In preparing him for such operation, the action of t'he gall bladder was paralyzed, and a preliminary operation on the bladder was required. By reason of such preliminary operation the claimant was not in condition for the operation for the removal of the inter-vertebral disc until March, 1938, when the same was performed.

The operation was a success, the pressure against the nerve was released, and the pain caused by such pressure was eliminated. Claimant's condition continued to improve, and by July 1, 1938 he was able to perform such work as was usually incident to his previous employment, although at the time of the last hearing herein, to wit, on April 23, 1940, he still had some disability and was required to wear a body brace.

Claimant's employment was as a superintendent of the tailor shop and his duties were mostly of a supervisory nature. During the two periods, after the accident in which he resumed his previous employment, that is, during the four days in February, 1935, and between March 12, 1936 and August 2, 1937, although he performed such duties as were required of him, yet he continued to be disabled as a matter of fact and was finally given a discharge notice on October 7, 1937 for continued absence on account of illness.

Claimant was paid his regular salary of $135.00 per month from the date of his injury to October 1, 1934, and was also paid for the four days' work performed by him in February, 1935, and for the time he worked between March 12th, 1936 and August 2, 1937.

Claimant seeks to recover compensation for the following items to wit: temporary total incapacity for three separate periods; $265.00 for money paid to Dr. I. Goldberg for dental treatment and dentures; $882.52 for medical, surgical and hospital expenses incurred at the Mayo Clinic; and compensation for serious and permanent disfigurement to the head and face resulting from the permanent loss of teeth.

So far as appears from the record, all medical, surgical and hospital bills other than the bills incurred at the Mayo Clinic as aforesaid, and the aforementioned bill of Dr. Goldberg, have been paid by the respondent.

Although claimant performed the duties required of him during the two periods he worked after his injury, to wit, from February 15th, to February 19, 1935, and from March 12th, 1936 to August 2, 1937, yet the testimony shows that during all of the time from the date his injury to July 1, 1938, his nervous condition was bad; he developed a nervous twitching of the facial muscles around the lips; also a sciatic scoliosis of the right side; it was an effort for him to concentrate; his mind did not react quickly; he was restless and did not sleep well at night, and appeared to suffer a large part of the time; in short, he developed a traumatic neurosis. His condition finally became so bad that on October 7, 1937, as previously stated, he mas discharged on account of continued absence from duty on account of illness.

In considering a disability resulting from traumatic neurosis, our Supreme Court in the case of *Postal Telegraph* Co. vs. *Ind. Corn.*, 345 Ill. 349, said:

> "Whether his disability was caused entirely from the physical blow struck or from a mental condition arising out of the injury makes no difference."

The same rule was applied in the case of *U. S. Fuel Co.* vs. *Imd. Corn.*, 31 Ill. 590, and in the case of *Armour Grain* Co. vs. *Ind. Corn.*, 323 Ill. 80.

The fact that claimant worked four days in February, 1935, and also worked from March 12, 1936 to October 8, 1937, makes it questionable whether his disability is properly classified as temporary total or permanent.

However, claimant's disability during the time he was unemployed as aforesaid was total, and it therefore can make no difference under the facts in this case whether the same be classified as temporary or permanent.

From a consideration of all of the facts in the record, we find as follows:

1. That on July 13, 1934 the claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to respondent and claim €or compensation on account thereof was made within the time required by the provisions of such Act; that claimant's annual earnings were $1,620.00, and his average weekly wages were $31.15; that claimant at the time of the injury was fifty-four years of age, was married, and had no children under the age of sixteen years; that all necessary first aid, medical, surgical and hospital services have been provided by the respondent, except the services rendered at the Mayo Clinic as aforesaid, and the dental services of Dr. Goldberg as aforesaid.

2. That claimant was totally disabled from the date of his injury, to wit, July 13th, 1934, to February 15, 1935; also from February 19th, 1935 to March 12, 1936; also from August 3rd, 1937 to July 1, 1938; a total of One Hundred Thirty-three and one-seventh (133 1/7) weeks.

3. That claimant was paid his regular salary of $135.00 per month for the months of July, August and September, 1934. Such payment for that portion of the month of July subsequent to the date of claimant's injury, to wit, July 13th, as well as for August and September, was for non-productive time and must therefore be considered as .payment of compensation, making a total of compensation paid by respondent as aforesaid in the amount of Three Hundred Forty-six Dollars and Fifty Cents ($346.50).

4. That a personal examination of the claimant by the court shows that he has sustained no serious and permanent disfigurement to the head face, within the meaning of those words as used in the Compensation Act.

5. That claimant is entitled to have and receive from respondent under the provisions of the Workmen's Compensation Act the following amounts, to wit:

a) For total disability, 133 1/7 weeks, at $15.00 per week, less $346.50 heretofore paid by respondent as aforesaid, to wit, Sixteen Hundred Fifty Dollars and Sixty-four Cents ($1,650.64).

b) For money paid to Dr. I. Goldberg, for dental services and dentures, the sum of Two Hundred Sixty-five Dollars ($265.00).

c) For expenses incurred for medical, surgical and hospital services at the Mayo Clinic, the sum of Eight Hundred Eighty-two Dollars and Fifty-two Cents ($882.52);—in all, the sum of Twenty Seven Hundred Ninety-eight Dollars and Sixteen Cents ($2,798.16).

We further find that all of the expenses incurred at the Mayo Clinic as aforesaid have been paid by the claimant except the sum of Two Hundred Sixty Dollars ($260.00), and that said sum of $260.00 remains due and unpaid to said Mayo Clinic.

We further find that the compensation for total disability as aforesaid is payable in weekly installments of $15.00 per week commencing on July 14, 1934, and excluding the time during which claimant was employed as hereinbefore set forth; that all of the compensation to which claimant is entitled as above has accrued at this time, and he is therefore entitled to an award in a lump sum for the total amount due him as herein set forth.

Award is therefore entered in favor of the claimant for the sum of Tmenty-seven Hundred Ninety-eight Dollars and Sixteen Cents ($2,798.16), payable as follows, to wit: To the claimant, Julius J. Gross, the sum of Twenty-five Hundred Thirty-eight Dollars and Sixteen Cents ($2,538.16); and to the claimant, Julius J. Gross, for Mayo Clinic, the sum of Two Hundred Sixty Dollars ($260.00).

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," (Illinois Revised Statutes, 1939, Bar Assn. Ed., Chap. 127, Pars. 180-181), and being subject also to tlie terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of tlie General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 2833—Claim denied.)

H. CLAUDE STEININGER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed October 9, *1940.*

STONE & WRIGHT, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*burden* of ***proof on*** claimant. 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, and where claimant has not so proven his claim no award can be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant filed his bill of complaint on February 5, 1936, and alleged that he was a resident of Chenoa, Illinois, and was employed by the State of Illinois as a maintenance patrolman in the Department of Public **Works** and Buildings of the State of Illinois at the time of the accident; that the accident occurred while he was engaged in his work and that his injuries arose out of and in the course of his employment.

Claimant further charges that on the 18th day of August, 1934, while he was engaged in his employment, a quantity of hot asphalt or coal tar was accidentally poured upon his right hand, arm and fingers; that the tar was so hot that it caused third degree burns on the back of claimant's right hand and fingers.

Claimant further alleges that a report was made to his superior at Ottawa, Illinois, and that the claimant obtained medical treatment from Dr. F. M. Bryan of Chenoa, Illinois. Claimant also averred that in spite of proper medical treatment being administered, claimant was poisoned as a result of the burns, and that on August 31,1934, the burns and their consequent poisoning totally disabled claimant for a period of several weeks; that thereafter he had a general breaking out of skin eruptions over all parts of his body, which greatly hindered him from doing any physical labor; that ever since he received the injuries he has been unable to sustain the exertions of ordinary labor.

Claimant also charged that for several months succeeding his injuries and until the time of the filing of the complaint, the general poisoning of claimant's system had pre-

vented him from engaging in any gainful employment; that upon information given him by his physician, the general systemic poisoning in his body settled in his right groin; that he now suffers from general skin eruptions and general weakness, ,and that the general weakness and skin eruptions will continue and are permanent injuries resulting from the burns.

Claimant also alleges that he received payments for compensation or salary; that on September 3, 1934, he received his August, 1934, salary of $100.00, and that he received $100.00 per month for each month thereafter for eight months—$900.00 in all. Claimant also avers that he spent **$22.50** for medical treatment.

There is no contention or proof that claimant was ever confined to a hospital.

At the time the last deposition was taken, claimant was working a farm consisting of one hundred twenty acres in Indiana, and employed a farm-hand at the rate of $35.00 per month to do the work. He also admits that he had 1,500 bushels of corn, sold some sheep and during one year sold milk and eggs aggregating $189.00. It is also admitted that he raised other crops since the injury, but no attempt was made to show his earnings as a farmer, probably on the theory that it would be incompetent.

His testimony is that he is unable to do any heavy manual labor; that he tried it, but had to give it up; that since the accident he can only work one or two hours, but not at heavy manual labor, and after that period of exercise he can not work any more that day.

Much incompetent evidence was offered.

Claimant had two children under the age of sixteen years at the time of the accident. The oldest girl became sixteen on September 18, 1938. Claimant's wife is living and the youngest girl, Claudia Ruth, was about four years old at the time of the injury.

Claimant testified to questions put to him by his counsel, as follows:

"Q. What would your average annual earnings be—do you know, Mr. Steininger?

A. Yes. I copied that down. Last year the milk receipts was Eighty-one ($81.00) dollars. And the eggs was One Hundred Eight ($108.00) dollars.

Q. Those were produced through your efforts?

A. That is right."

Aside from that, he testified that he was unable to earn from his own labor. Claimant testified that prior to the time he received the burns he was able to work all day at hard labor.

Merle Monks testified for the claimant as to how much he was paid as a farm laborer.

Claimant went to work for the State on February 1, 1933, at $100.00 per month, and he continued in this position until he was released on May 1, 1935. On August 18, 1934, he received asphalt burns on his upper wrist. He applied first aid dressings to the burn and continued working until August 27, 1934. On that date he showed symptoms of a general toxemia from the asphalt and consulted Dr. Fred M. Bryan of Chenoa, Illinois. On August 29, 1934, he submitted a report of personal injury. From the record it appears that he was absent from work as follows:

August 27 to September 17, 1934	17 working days
October 27 to October 29, 1934	2 working days
January 25 to January 29, 1935	4 working days
February 26 to February 28, 1935	2 working days
March 5, 1935	1 working day
April 15, 20, 24 and 26, 1935	4 working days

The total loss of time from August 27, 1934, to May 1, 1935, was 30 working days.

On January 3, 1935, Dr. Bryan submitted a report of the case in which he stated: "The patient feels and appears to be well. There is still a transverse groove in each nail on both hands."

Claimant received his salary of $100.00 per month for the nine months of August, 1934, to April, 1935, inclusive. Bills of Dr. Bryan amounting to $22.50 have been paid.

We do not see how the groove in each nail on both hands is compensable. He was only burned on the back of one hand. From all that appears in the record he received the moneys hereinabove referred to of $900.00 for services performed, and there is no evidence in the record that such payments were for any other purpose.

Claimant asks damages in the sum of $7,500.00.

Doctors I. L. Turow, H. B. Knowles and Milton Levine all testified and were of the opinion that the injuries now

claimed by claimant were not caused by the burns he referred to.

Under the facts in this case, we are of the opinion that the respondent is not liable to the claimant. Before the evidence was heard, the respondent made a motion to dismiss. The motion was overruled at the time for the reason that the question raised was a factual matter. After all the proof was in, the State made another motion to dismiss on the ground that the claimant had not proven his case, and that motion must be sustained.

(No. 2995—Claim denied.)

BESSIE EVELYN BISHOP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1940.

Petition for rehearing denied November 12, 1940.

WILLIAM JOHN GRANATA, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Elgin State Hospital—claim for compensation on ground of having been infected wath tuberculosis as result of being attacked and spat on by tubercular patzent—when not prove% to be accidental injury with meaning of* ***Act.*** The question presented here is the same as that in *Crum* vs. *State,* No. 3023, post, this volume, and the opinion in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant, Bessie Evelyn Bishop, claims compensation from the State of Illinois on the following grounds: That on the 21st day of October, 1935, she was employed by the State of Illinois, Department of Public Welfare, at the Elgin State Hospital, Elgin, Illinois, as an attendant; that her earnings for the preceding year were Six Hundred Twelve Dollars ($612.00) plus maintenance; that on that date she was taking care of a patient at that institution, and while acting in her capacity as an attendant she was attacked by her patient, one Rosalie Coleman; that said attack consisted of said patient jumping out of bed, on the radiator, and while the claimant and another nurse attempted to take her down she fought with them, hitting, struggling and spitting at this claimant, and that the patient was infected with tuberculosis;

that as a direct and proximate result thereof the claimant became infected with said disease and was forced to be confined to bed on the 12th day of December, 1935, and still had to be confined to bed for an indefinite known period, possibly several years; that her lungs will be permanently impaired, and that she will not be able to again perform the duties of an attendant.

Claimant also alleged that immediately after the occurrence of the above act, she reported the incident to Dr. D. L. Steinberg, her superior officer;that the State of Illinois supplied her with complete hospitalization and medical care and attendance; that she has not received any salary since January 12,1936; that at the present time she is convalescing and being treated for her disease at Springbrook Sanitarium, Aurora, Illinois; that she is the mother of two minor children under the age of sixteen years, whom she supports; that at the time of the injury, she was twenty-five years of age.

Claimant's husband was also employed at the Elgin State Hospital.

In addition to her own testimony, which in part at least bears out the allegations of her complaint, two doctors testified, one being Dr. George A. Wiltrakis, a duly licensed physician, who had been employed by the State of Illinois, Department of Public Welfare, at the Elgin State Hospital since September, 1930. He testified that he had full charge of the hospital service at the Elgin State Hospital, which meant taking care of the acute mental and surgical cases and also the employees when they were physically ill; that he knew claimant; that he came in contact with her December 14, 1935, when she entered the hospital service at the Elgin State Hospital; that he examined her at that time and found that she was suffering from pulmonary tuberculosis. Dr. Wiltrakis further testified that the claimant said she had a chronic cough; had had it for a period of six weeks, and expectoration of thick yellowish material; complained of spitting blood; had had a tired feeling for six weeks prior thereto; had some pain present underneath the right breast and right underneath the shoulder which re-occurred at times, and that she had been working in the tubercular ward for a period of about one year caring for insane tubercular patients. The doctor further testified that the claimant was put to bed and given proper diets. On a hypothetical ques-

tion put to this doctor, he stated that it was his opinion that the spitting, etc., may be contributory but not an actual primary logical factor for pulmonary tuberculosis. It was his opinion that pulmonary tuberculosis is not produced by a single or two or three contacts, but by repeated contacts with a patient who had pumonary tuberculosis.

Dr. Kenneth C. Bulley also testified. He was a duly licensed physician and surgeon and a tuberculosis expert. At the time of his testimony he was superintendent and medical director at Kane County Springbrook Sanitarium at Aurora, Illinois, and since October, 1931, had treated only pulmonary tuberculosis cases. He first treated claimant in July, 1936. She was admitted to the Springbrook Sanitarium as a regular patient on August 24,1936. The first X-ray that he had taken was on December 12, 1935, which is claimant's Exhibit: One, and which is an X-ray film of the chest of claimant. This physician is eminently qualified to treat pulmonary tuberculosis. To a hypothetical question he said it was his opinion that the attack and altercation and exposure resulting from constant daily contact with tuberculosis patients who were insane was the contributing cause to the development of tuberculosis in claimant. On cross-examination he said that in his opinion the combination of the two facts would cause pulmonary tuberculosis, and the altercation described might well in itself have caused the development of the pulmonary tuberculosis in claimant.

The same question is presented here as was presented in the case of *Margaret Crum* vs. *State* of *Illinois*, No. **3023,** and the reasoning set forth in that opinion is adopted here, and for such reasons the claim will be denied.

(No. **3023—Claim** denied.)

MARGARET CRUM, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

Opinion *filed October 9, 1940.*

*Rehearing denied November **12**, 1940.*

WILLIAM JOHN GRANATA, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant* at Elgin State Hospital—claim *for compensation* for *disability* on ground of having been infected *with.* tuberculosis—result of being *spat* upon by tubercular *patient—when* not proven *to* be accidental injury within meaning of *Act—when* award must be denied. In order that disability be by reason of an accidental injury or the result of an accident, it must be traceable to a definite time and place, and where claimant makes claim for compensation for disability from tuberculosis alleged to have been contracted on December 7, 1935, as result of having been spat upon by alleged tubercular patient, and the only medical testimony before the Court is that claimant was afflicted with moderately advanced tuberculosis in January 1936, there is not sufficient proof that claimant became infected on the date so alleged and an award must be denied.

SAME—*same—same—making* claim *for compensation* within six months after accident—condition precedent to jurisdiction of *court.* Where no compensation has been paid under Act and no claim made therefor within six months after the accident alleged to have caused the disability for which sought the court is without jurisdiction to proceed with hearing.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Margaret Crum, the claimant, filed her complaint in this court on the 5th day of November, 1936, and alleged that on the 7th day of December, 1935, she was employed by the State of Illinois, Department of Public Welfare at the Elgin State Hospital, Elgin, Illinois, as a nurse; that. her earnings for the preceeding year were One Thousand Sixty-eight Dollars ($1,068.00), plus maintenance; that on that date, she was attempting to feed one Rosalie Coleman, a1 insane patient, who was infected with tuberculosis; that said patient was very resistive and the claimant had to resort to force feeding, and while she was attempting to feed this patient, and was holding the patient's nose at the time, the patient coughed, and the milk, which was the food that claimant was attempting do have the patient take, combined with purulent sputum was spit all over claimant's face, hair and uniform.

It is further charged that as a direct and proximate result thereof, the claimant became infected with tuberculosis, and was confined to her bed on the 8th day of January, 1936, and had to be confined to her bed for. a period of several years; that her lungs will be permanently impaired and that she will not be able to again perform the duties of a nurse.

It was also charged that immediately after the occurrence of the above'act the claimant reported the incident to Dr. D. L. Steinberg, her superior officer.

It was also averred that the State of Illinois has supplied the claimant with complete hospitalization and medical care

and attendance, and that the claimant has not received any salary since February, 1936; that she is now convalescing and is being treated for her disease at her home.

The claimant further averred that she has consulted physicians and tuberculosis specialists and the record shows that many x-rays were taken.

Claimant asked for Sixteen and 25/100ths Dollars ($16.25) per week for one hundred (100) weeks, temporary total disability; and Sixteen and 25/100ths Dollars ($16.25) per week for one hundred (100) weeks for total partial disability.

It was also averred that at the time of the injury complained of she was twenty-six (26) years of age.

Both counsel for claimant and also the Attorney General, who represents the State, have furnished exhaustive briefs, and given much time to this case. The testimony of several doctors who treated the claimant, is in the record. The complaint attempts to allege facts and circumstances that would bring this case under the Compensation Act. It will, therefore, be unnecessary to discuss the common law liability or liability under the Occupational Diseases Act.

The title of the Compensation Act insofar as this question is concerned, provides as follows: "An Act to promote the general welfare of the people of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State * * * *" Section 3 of the Act provides that "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 business" * *"

The claimant was a graduate nurse and an attendant at the Elgin State Hospital. In other cases we have heretofore held that employees of the Elgin State Hospital come within the Compensation Act.

The question for this Court to determine is whether or not this claimant suffered an accidental injury within the meaning of the Compensation Act.

Counsel for claimant puts it this way: "We next are confronted with the question of whether there is a causal

relation between the coughing and expectoration in claimants face and her contracting of tuberculosis."

It is a matter of common knowledge that tuberculosis is a germ disease. The evidence shows conclusively that claimant is infected with tuberculosis, and the evidence shows that the reprehensible act of the insane patient, that claimant was feeding did occur. The evidence shows that there are many patients at this institution infected with tuberculosis, and it seems to be a matter of common knowledge that germs of this disease may be inhaled from the air as one walks on the street or attends any meeting where there are a large number of people. The disease may be contracted in innumerable ways. The claimant first entered the services of the Elgin State Hospital in May, 1931, and so far as she knows, she was then in a healthy condition and so remained until January, 1936, although it does not appear that she was ever examined especially for tuberculosis. She testified that she came in daily contact with tubercular patients. From the whole record, it is possible that she contracted this disease during the course of her employment at the Elgin State Hospital. The patient that claimant was taking care of on the 7th day of December, 1935 was an active tubercular insane person, very resistive and had positive tubercular sputum. She did not eat and force feeding was necessary. While claimant was performing her duties, she 'was of necessity very close to this patient. About a month after the incident occurred and the spitting had taken place, claimant was taken down with pleurisy arid had to go to the hospital, and when she went there, she mas running a temperature of 99 to 100, and she was put to bed. Pleurisy, as we understand it, is an inflammation of the pleura; and it is accompanied with fever, pain, difficult respiration, cough, and exudation. When a person has this ailment, the resistance of the human body to all kinds of germs is greatly lowered.

The evidence shows that this claimant had the best of medical care and attention, both from her husband and other doctors and specialists in this particular ailment. Claimant went to bed on January 7, 1936, just thirty days after the spitting incident.

Dr. McShane testified that the claimant, his wife, has had pulmonary tuberculosis since January, 1936. He was asked if he knew how that condition came to be brought

about and his answer was that she worked at the Burr Cottage and was taking care of the tuberculosis patients and she came in contact with the tuberculosis patients constantly and in one particular case the patient expectorated in her face; that this latter incident took place sometime in December, **1935.** Dr. McShane was asked a hypothetical question as to the cause of this ailment. He stated that he had an opinion and in his opinion there is a causal relation as that is the way tuberculosis is spread by the expectoration of positive tubercular germs in the sputum in and about the face of the hypothetical person.

Dr. Kenneth G. Bulley, a duly licensed physician and surgeon and a specialist in tuberculosis, also testified. At that time he was superintendent and medical director of Kane County Springbrook Sanitarium at Aurora, Illinois. He testified that he had treated claimant, examined many x-rays and was familiar with her ailment. He was shown claimant's exhibit one, that being an x-ray that was taken of claimant. ,He testified that that x-ray was taken on December 19, 1935 at the Elgin State Hospital. He was asked what pathology was found in that picture, and he stated that it was an x-ray picture of the chest and portrayed the lungs of the claimant and showed an active pulmonary tuberculosis and minimal lesion in the right upper lobe; that the picture shows the markings about the root of the lung on the left to be heavy and suggested some tubercular disturbance. A hypothetical question was put to this witness in which all the facts were apparently included and he stated that it was his opinion that daily contact with insane tubercular patients and the spitting incident described, were sufficient to cause her to break down with active pulmonary tuberculosis.

There is no evidence in the record to show that any fluids or sputum coughed in the face of claimant ever entered her body through the nose, mouth or abrasion of the skin, or in any other way. The above named doctors were the only ones who testified in the case. There is nothing in the record to show at what time any of the tuberculosis germs became active and infected claimant. Et is possible that such proof can never be produced in tubercular patients. The record does show that after claimant was put to bed she began to improve, and that the improvement has been gradual, but certain.

As said above, the problem for this court to determine is: Is this an accidental injury within the law?

It is the view of this court, as expressed in numerous cases, that the word "accident" is not a technical legal term. No legal definition has been given or can be given which is both exact and comprehensive as applied to all circumstances. Those things which happen without design are commonly called an accident,—at least in the popular acceptance of the word. Any event unforseen, not expected by the person to whom it happened, is included in the term. In *Matthiesserz & Hegeler Zinc Co.* vs. *Industrial Board,* **284** Ill. **378,** the court defined the term "accident" as follows: "The words 'accident' and 'accidental injury' imply, and the provisions for notice to the employer within thirty days after an accident and his report to the Industrial Board of accidental injuries show, that an injury, to be accidental or the result of an accident, must be traceable to a definite time, place and cause, but if there is such a definite time, place and *cause* and the injury occurs in the course of the employment the injury is accidental within the meaning of the act and the obligation to provide and pay compensation arises. While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee." The Compensation Act of Illinois does use the words "accident" and "accidental injury."

In the case of *Renkel* vs. *Industrial Commission,* 109 Ohio State, **152** the court held that pulmonary tuberculosis contracted in the course of employment was not compensable under the Workmen's Compensation Act, but the State of Ohio has a different statute and constitution and their statute does not use the words "accident" or "accidental injury."

The-Supreme Court of Illinois, in the case of *Peru Plow* Co. vs. *Industrial Corn.,* **311** Ill. **216,** at page **220** held that the words "accident" and "accidental injury," as used in the Compensation Act, were meant to include every injury suffered in the course of employment for which there was an existing right of action at the time the act was passed, and to extend the liability of the employer to make compensation for injuries for which he was not previously liable and to **fix the**

limit of such compensation, and quoted *Matthiessen & Hegeler Zinc* Co. vs. *Ifidustrial Corn.*, supra. The same court held that occupational diseases are not covered by the Compensation Act, although not all diseases are to be excluded from the purview of the Compensation Law.

It is the settled law of Illinois that the burden is upon claimant to prove his case by a greater weight or preponderance of the evidence. There is nothing in the record to show that claimant contracted tuberculosis on December 7, 1935. It does however, show that she was exposed on that date. She was likewise exposed all during the time of her employment.

It was held in the case of *Byram* vs. *Industrial Corn.*, 333 Ill. 152, that liability under the Compensation Act cannot rest upon imagination, speculation or conjecture or upon a choice between two views equally compatible with the evidence but must be based upon facts established by a preponderance of the evidence, and where there is no positive evidence as to exactly how an accidental death occurred but the greater weight of the evidence indicates that the deceased employee committed suicide by jumping from his employer's office window early in the morning before other employees came to work, an award of compensation must be set aside where it is based only upon conjecture that the deceased might have accidentally fallen out of the window.

The record does not disclose how long tubercular germs might remain dormant in the human body.

Section 24 of the Compensation Act requires that notice be given within thirty days, and demand for compensation be made and requires that the claim must be filed within one year, all of which this court has held to be jurisdictional.

In the *Peru Plow* Co. case, supra, it was held that in order that the disability be by reason of an accidental injury or the result of an accident it must be traceable to a definite time and place of origin. There must be some definite thing happen which can be pointed to as the immediate'cause of the breakdown, although the employee may have been able to work in similar conditions for a considerable period of time prior to the happening of the event which was the immediate cause of his breakdown. That this must be considered the intention of the legislature in passing the act is shown by the provisions of the act limiting the time in which notice may

be given to the employer. If a definite time cannot be ascertained it is impossible to give the notice required by the act.

The medical testimony is before the court. The tuberculosis existed in January, 1936, and at that time it was a case of moderately advanced pulmonary tuberculosis. It was not within our law connected with the incident of December 7, 1935, and the record is silent as to how'long it would take to develop moderately advanced pulmonary tuberculosis.

There is nothing in the record to show that claim for compensation was ever made within six (6) months after the accident as provided by Section 24 of the Workmen's Compensation Act.

For the reasons herein set forth, the claim must be denied.

(No. 3029—Claim denied.)

MARJORIE LEMING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed October 9, 1940.

Rehearing denied November 12, 1940.

WILLIAM JOHN GRANATA, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Elgin State Hospital—claim for compensation for disability—on ground of having been infected with tuberculosis—result of being attacked and spat on by tubercular patient—when not proven to be accidental injury within meaning of Act.* The question presented here is the same as that in *Crum* vs. *State,* No. 3023, ante, this volume, and the opinion in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant, Marjorie Leming, claims compensation from the State of Illinois, on the following grounds: That on the 7th day of December, 1935, she was employed by the State of Illinois, Department of Public Welfare at the Elgin State Hospital, as an attendant; that her earnings for the preceeding year were Six Hundred Forty-eight Dollars ($648.00), plus maintenance; that on said date, while treating a patient at that institution, and while acting in her capacity as an attendant, she was attacked by her patient, one Albert Long; that said attack consisted of the patient struggling, hitting

and spitting at the claimant; that said patient was infected with tuberculosis; that as a direct and proximate result thereof, the claimant became infected with that disease, and was forced to be confined to bed on the 19th day of January, 1936, and still had to be confined to bed for an indefinite known period, possibly several years; that her lungs will be permanently impaired, and that she will not be able to again perform the duties of an attendant.

Claimant also alleged that immediately after the occurrence of the above act, she reported the incident to Dr. M. A. Schiller, her superior officer; that the State of Illinois supplied her with complete hospitalization and medical care and attendance; that she has not received any salary since February, 1936; that. at the time of the injury she was twenty-three years of age.

The claimant testified in this case and Dr. George A. Wiltrakis also testified. He said that he had checked claimant over physically including laboratory work-up for impressions of tuberculosis; that he took an X-ray of her chest in January, 1936; and that he found her to be acutely ill. He further testified that her pulse was around eighty; that she was running a temperature, and that her blood pressure was one hundred twenty-four over eighty. Dr. Wiltrakis described her condition quite completely. Claimant was given a bed rest, and had continued and frequent sputum examinations made. The first positive sputum examination was February 4th, in which tubercular baccilli demonstrated itself in the sputum. On the 17th of February, she was sent to Springbrook Sanatarium in North Aurora, Illinois, for pneumo thoraz therapy. Claimant remained in the hospital service until November 12,1936. The doctor further testified that if the contact is with one tubercular patient in one day the person could not get tuberculosis; that tuberculosis, in his opinion, is a disease due to repeated contacts with tubercular infected patients. He also stated that tuberculosis might or could be caused from a connection between spitting on that date, connected with contacts of tubercular patients previous to that time and after that time up until the time symptoms of pulmonary tuberculosis became evident. The doctor further stated that in his opinion one exposure itself would not have been sufficient to cause contraction of tuberculosis; that continued contact immediately preceding and

following that occurrence with a person suffering from tuberculosis possible could cause the development. He could dot say how close to December 7th, this condition could have existed; that the coughing and spitting might have aggravated a condition already present and ;slightly active; that the X-ray showed a definite involvement of the lung, which might have been present over a month, the exact length of time he was unable to state.

Dr. Kenneth G. Bulley, a, tuberculosis expert, also testified. He testified that he had treated the claimant professionally and had seen her at regular intervals since the early part of July, 1936. In July, 1936 his diagnosis was pulmonary tuberculosis involving the upper part of the upper lobe of the left lung, and he prescribed a treatment.

During claimant's training at the Elgin State Hospital she worked in tuberculosis wards for about five months, doing general nursing. During this time she made beds and handled patients, handled sputum boxes and did servicing in these wards where tubercular patients were during those five months and following that she did hospital work, which included assisting the doctors in medical and surgical cases, and most of those patients were tubercular. She had been in bed since January 19,1936 and had a cough extending over a period of three weeks' duration; she lost fifteen pounds in January, **1936,** and positive sputum containing tuberculosis germs was found in February, **1936.**

In answer to a hypothetical question, Dr. Bulley stated it was his opinion from the facts given and circumstances described that the claimant developed tuberculosis from her work, and from an altercation with Albert Long, a patient at the Elgin State Hospital, Elgin, Illinois. He also stated that it was not possible to estimate with accuracy how long the tubercular condition would prevail. On cross examination he stated that it was his opinion that the combined exposure by the claimant to tuberculosis and the incident of the altercation with a tubercular patient produced the pulmonary tuberculosis found in the claimant; that the altercation and the spitting in the face of the claimant in itself is sufficient to produce pulmonary tuberculosis, although it is not possible to prove from a medical standpoint that this particular incident did or did not cause the tuberculosis.

The same question is presented here as was presented in the case of *Margaret Crum* vs. *State* of *Illinois,* No. 3023, and the reasoning set forth in that opinion is adopted here and for such reasons, the claim will be denied.

(No. 3165—Claim denied.)

LEON SHIBOVITCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 12, 1940.

CHAS. P. KANE, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application. therefor within time fixed in Section 24 of Act—condition precedent to jurisdiction of Court—furnishing medical services is not payment of compensation under.* Where no compensation has been paid under Act, and no application for same is filed within time fixed in Section 24 thereof, Court is without jurisdiction to proceed with hearing on claim filed thereafter. Furnishing of medical services to employee by employer is not payment of compensation.

MR. JUSTICE YANTIS delivered the opinion of the court:

Plaintiff's application for an award was filed Pro Se on December 16, 1937, alleging that during the month of *January, 1934* he was employed at the Illinois Soldiers' and Sailors' Children's School, Normal, Illinois as a laborer moving coal by means of a push cart; that the handle of such push cart was metal, and that during the severely cold weather he found that grasping the cold metal hindered circulation through the small finger of his left hand; that he was finally unable to grip and hold the metal handles because of such poor circulation caused by the cold bar during the severely cold weather. The application further recites that he reported to the Managing Officer of the School and was advised to visit the Illinois Research and Educational Hospital at Chicago; that he visited same December 8, 1936, and that an incision was made extending from the wrist to the little finger of the left hand, requiring fourteen stitches. Further, that he was dismissed from the Hospital January 4, 1937 and immediately returned to work where he was still employed at the time he filed his application, i. e. December 16, 1937.

Petitioner prayed an award of **$4.59** expense for railroad fare and $75.00 for partial loss of use of the little finger of the left hand.

On January **3, 1940** claimant, having apparently employed Counsel, the latter filed a motion, to increase the Ad Damnum to $150.00, to conform to the purported proof in the record.

As above stated, the Complaint shows that Plaintiff's difficulty arose during the month of *January, 1934,* but in his testimony Plaintiff states that his trouble arose on or about *December 7,2936.* From such evidence it appears that the latter date was extremely cold; that Plaintiff was working that night pushing his coal cart about seventy-five to eighty feet from the coal-bins to the power house; that the temperature was below zero. Plaintiff testified, "I got cold in my hands and my little finger on the left hand got kind of stiff." In answer to a direct question, "How did it happen?" he replied "Well I couldn't tell you—it did not become stiff all at once, but I felt that something was wrong with it while I was shoveling coal into the cart.—I told the engineer—'See my finger got stiff'. I met Mr. Russell my Manager and said, 'See Mr. Russell my finger got stiff this cold weather.'"

At the suggestion of the Managing Officer claimant went to Chicago to the Illinois Research Hospital. An incision was made about a half an inch from the tip of the little finger down the side of the finger and palm of the hand, following the muscle of the little finger. Fourteen stitches were used to close the wound and Plaintiff was laid off from **work** two months without pay. His salary was Fifty-six ($56.00) Dollars (Tr. p. 17) per month at the time, and in addition thereto, board, room and laundry service on the basis of Twenty-four ($24.00) Dollars per month. Plaintiff testified that at the time he went to the hospital the little finger was drawn down at right angles to the palm of the hand; that after the operation it was not straight but that he could bend it back within approximately half an inch of 'being on a straight line with the other fingers.

Plaintiff testified that he made three trips to Chicago in connection with his operation, each at a cost of **$4.59** for railroad fare, which he himself paid.

. Plaintiff further testified that he has not been compensated for the two months time lost or reimbursed for money expended. He states that his application or claim was prepared for him in the office of Mr. Russell, the Managing Officer of the Institution, and that a Mr. Bentley who was employed in the Department of Public Welfare and who was present at Mr. Russell's office, consented to file a claim for Plaintiff at Springfield. Claimant stated that he delivered the claim to Mr. Bentley on November 26, 1937. The claim was not filed with the Court of Claims until December 16, 1937, and Plaintiff testified he did not know there had been any delay on the part of Mr. Bentley; that he wrote to Mr. Bentley and the latter reported he had forgotten to file it. Plaintiff further testified that the only trouble with his hand now is the disfigurement, and that he can use the hand as well as before the operation was had. Plaintiff further testified that he first talked to his Managing Officer, Mr. Russell, about making application for an award about four months prior to the day Mr. Bentley was at the Institution, i. e. November 26, 1937.

Mr. G. M. Wells who was employed as an Engineer at the Plant, testified that on the night of December 7, 1936 claimant was employed at the Plant as a coal passer, and that a little before midnight claimant showed witness the little finger on his left hand; that it was drawn down about half closed, and would apparently not straighten out; that the other fingers were all right, and that there was no crack, cut or bruise on the little finger but just wouldn't straighten out. This witness further testified that he looked at claimant's finger a few nights later, and that the finger continued to draw down or close more all the time, and claimant stated he was going to see a Doctor about it. Witness did not make any report in regard to the matter and testified that claimant never talked to him concerning the injury thereafter until on September 27,1939 when he was called as a witness.

Mr. Wells further testified that claimant was wearing gloves on the night in question, and from time to time, between wheeling loads of coal, would go into the Power House and wheel ashes, Plaintiff being permitted to go into the Power House at any time to get warm.

Cousel for Plaintiff in his Brief and Argument makes no contention for compensation for disfigurement, but claims actual damages for loss of wages and expenses amounting to

a total of One Hundred Seventy-three anti 77/ 100 ($173.77) Dollars.

The Attorney General contends that the court has no jurisdiction to make an award under the terms of the Workmen, Compensation Act, for the reason that the injury complained of is alleged to have occurred on December 7, 1936, and the claim was not filed with this court until December 16, 1937, i. e. more than one year after the alleged injury complained of. Claimant contends that he entrusted his claim to a fellow-employee of the Department of Public Welfare, i. e. Mr. Bentley; that it was the latter's negligence which caused the claim not to be filed within the limitation of one year, and that the Doctrine Estoppel in Pais should apply to the State, inasmuch as the delay and omission was an act of an employee of respondent.

When claimant notified his superior officer Mr. Russell of his intention to seek redress from the State, he was complying with the requirements of the Compensation Act in giving notice to his employer of such intention, but when he advised with Mr. Bentley as to his legal rights, rind selected him as his emissary to help draft and file his claim in the Court of Claims, he made Mr. Bentley his own agent for such purpose, and whatever Mr. Bentley did or failed to do in filing plaintiff's claim was done by him not as an officer or employee of the State, but as agent for plaintiff. The date of the alleged injury is stated as December 7, 1936 (presuming the allegation in the complaint of January, 1934 to be an error), and the claim was not filed until December 16, 1937. The right to an award herein is claimed by virtue of the terms of the Workmen's Compensation Act. Under such Act the claim must be filed within one year from the date of accident, and this court has no legal right or authority to extend or broaden such limitation of time.

As the claim will be dismissed for lack of jurisdiction, no further consideration will be given the question as to whether the evidence would or would not support an award on the merits.

(No. 3510—Claimant awarded $1,197.77.)

AUGUST BILLEK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed November 13, 1940.

Claimant, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for total temporary disability and loss of fingers under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in total temporary disability and loss of two fingers, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

For more than one year prior to March 27, 1940, claimant was employed as an automobile mechanic by the Division of Highways, Bureau of Machinery, at its central garage in the City of Springfield. On the last mentioned date, while engaged in operating a milling machine in the performance of his duties, claimant's left hand was drawn into the machine, whereby he sustained injuries to the first and second fingers of the left hand, which thereafter required the amputation of the first finger at the middle joint, and the amputation of the second finger at the middle of the middle phalanx. The third finger of the left hand was lacerated but no permanent disability resulted therefrom. Claimant was immediately taken to St. John's Hospital in Springfield, where he remained until April 1, 1940. On May 1st, 1940 he returned to his work with the Division of Highways, and now asks for compensation for the injuries sustained by him as aforesaid.

Upon consideration of the record the court finds:

That on March 27, 1940 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of said Act; that the earnings of the claimant during the year

preceeding the accident were $2,118.27:,—and his average weekly wage was '$40.73; that claimant. at the time of the injury was forty-two years of age and had one child under the age of sixteen years; that necessary first aid, medical, surgical and hospital services were provided by the respondent; that claimant was temporarily totally disabled from the date of his injury as aforesaid, to May 1st, 1940, to-wit, for a period of four and six-sevenths weeks; that he also suffered the loss of more than one phalange of the first and second fingers of his left hand, which, under Paragraph E-7 of Section 8 of the Compensation Act is considered the loss of the entire fingers.

We further find that the claimant is entitled to have and receive from the respondent the sum of $16.50 per week for four and six-sevenths weeks for total temporary disability, in accordance with the provisions of Paragraph (b) of Section 8 of the Compensation Act, and the further sum **of** $16.50 per week for a period of seventy-five (75) weeks for the loss of the first and second fingers of his left hand, in accordance with the provisions of Paragraphs E-2 and E-3 of Section 8 of the Compensation Act.

We further find that the claimant has been paid the sum of $119.87 for non-productive time, which must be considered as payment of compensation and deducted from the amount which he is entitled to have and receive as above set forth.

We further find that thirty-three (33) weeks' compensation has accrued to November 13, 1940, and that the amount due on account thereof, namely, Five Hundred Forty-four Dollars and Fifty Cents ($544.50), less the sum of One Hundred Nineteen Dollars and Eighty-seven Cents ($119.87) heretofore paid to claimant as aforesaid, to-wit, the net amount of Four Hundred Twenty-four :Dollars and Sixty-three Cents ($424.63), is payable forthwith, and the balance of said compensation, to-wit, the sum of Seven Hundred Seventy-three Dollars and Fourteen Cents ($773.14), is payable in weekly installments of Sixteen Dollars and Fifty Cents ($16.50) commencing November 20, 1940.

Award is therefore entered in favor of the claimant August Billek for the sum of Eleven Hundred Ninety-seven Dollars and Seventy-seven Cents ($1,197.77), payable as follows, to-wit :

a) The sum of Four Hundred Twenty-four Dollars and Sixty-three Cents ($424.63) is payable forthwith, being the amount of compensation which has accrued to November 13, 1940, less the amount heretofore paid as above set forth.

b) The balance of Seven Hundred Seventy-three Dollars and Fourteen Cents ($773.14) is payable in forty-six (46) weekly installments of Sixteen Dollars and Fifty Cents ($16.50), commencing November 20, 1940, and one final installment of Fourteen Dollars and Fourteen Cents **($14.14).**

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1st, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3544—Claimant awarded **$324.81.)**

GLENN DUCEY, Claimant, vs. **STATE** OF **ILLINOIS,** Respondent.

Opinion filed December 10, 1940.

C. E. CORBETT, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION *ACT—when award may be made for partial* ***loss of*** *finger under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in loss of part of finger, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

For more than a year prior to May 17, 1940, claimant was in the employ of respondent, first as a highway patrolmans' helper, and subsequent to March 1, 1940 as maintenance patrolman. On the morning of May 17, 1940 claimant was working on S. B. I. Route 47 near Bement, in Piatt County, and while unhitching the road grader from the maintenance truck in his charge, the stand upon which the grader was resting swung down and caught the first finger of claimant's left hand between the grader tongue and the stand, crushing such finger so that the terminal phalanx thereof had to be amputated. Claimant's injuries were sustained on a Friday and he was absent froin work until the next Monday when he resumed his former employment. No deduction was made from his regular wages for the time he was absent from his work as aforesaid.

Upon a consideration of the facts in the record, we find as follows:

That on May 17,1940 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that claimant was in the employ of the respondent in the grade in which he was employed at the time of the accident 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 prior to May 17, 1940, was $1,620.00; that claimant's annual earnings, within the meaning of those words as used in the Workmen's Compensation Act were $1,620.00; that his average weekly wage was $31.15; that claimant at the time of the accident was thirty-three (33) years of age, and had no children under the age of sixteen (16) years; that necessary first aid, medical, surgical and hospital services were provided by respondent; that claimant was temporarily totally disabled from the date of his injury as aforesaid to May 20, 1940; that he suffered the loss of the first phalange of the first finger of the left hand which, under Paragraph E-6 of Section 8 of the Compensation Act is considered to be equal to the loss of one-half of such finger.

We further find that the period of claimant's temporary total incapacity for work was not more than six working days, and that therefore he is not entitled to receive from respondent any compensation for such temporary total incapacity.

We further find that claimant is entitled 'to have and receive from the respondent for the loss of one-half of the first finger of his left hand, the sum of Sixteen Dollars and Fifty Cents ($16.50) per week for a period of twenty (20) weeks, commencing May 18, 1940, pursuant to the provisions of Paragraphs E-2, E-6 and L of Section Eight (8) of the Workmen's Compensation Act.

We further find that the claimant has been paid the sum of Five Dollars and Nineteen Cents ($5.19) for non-productive time which must be considered as payment of compensation, and deducted from the amount which he is entitled to have and receive as above set forth.

We further find that all of the compensation due to claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Glenn Ducey, for the sum of Three Hundred Twenty-four Dollars and Eighty-one Cents ($324.81).

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3408—Claimant awarded $747.20.)

TERESA GAGEL, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1940.

JOSEPH W. KOUCKY, for claimant.

JOHN E. CASSIDY, Attorney General; MAURICE J. WALSH, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for temporary total disability and permanent partaal loss of use of hand to employee under.* Where employee of State sustains accidental injuries arising out of and in the course of her employment, while engaged in extra-hazardous employment, resulting in temporary total disability and permanent partial loss of use of hand, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

On December 29, 1938, and for several years prior thereto, the claimant, Teresa Gagel, mas in the employ of the respondent as an attendant at Chicago State Hospital. On the last mentioned date, while in the discharge of her duties, she slipped and fell and sustained a colles fracture of the right wrist. She was taken to the institution hospital and treated by Dr. Sankstone and Dr. Scheffler of the hospital staff. X-rays were taken, the fracture reduced, and a cast placed. The X-ray showed a typical colles fracture in which the lower end of the radius, the smaller fragment, was displaced somewhat upward and backward; and also showed a small chip fracture of the styloid process of the ulna. Thereafter claimant was given physiotherapy and heat treatments in conjunction with massage. Her arm was kept in a sling for a month, and four weeks after the date of the accident she returned to her usual employment. She received her full pay during the time she was incapacitated as above set forth.

The only medical testimony in the record is the testimony of Dr. Milton Scheffler who at the time of the accident was one of the physicians on the staff of the institution, and Dr. Albert C. Field who testified as an expert. Both doctors are substantially in accord as to their findings.

Upon consideration of the facts in the record we find as follows:

That on December 29,1938 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on such date claimant sustained accidental injuries which arose out of and in the course of her employment; that notice of the accident was given to said respondent, and claim for compensation on account thereof mas made within the time required by the provisions of such Act; that the earnings of the claimant during the year preceding the accident were $972.00, and her average weekly wage was $18.70; that claimant at the time of the injury was fifty-nine (59) years of age; that all necessary first aid, medical, surgical and hospital services were provided by the respondent; that claimant was temporarily totally disabled from from the date of her injury as aforesaid to January 27, 1939, to wit, for a period of four (4) weeks; that she also suffered the permanent loss of fifty per cent (50%) of the use of the right hand.

We further find that claimant is entitled to have and receive from the respondent the sum of Nine Dollars and Thirty-five Cents ($9.35) per week for three (3) weeks for temporary total disability, in accordance with the provisions of Paragraph (b) of Section eight (8) of the Compensation Act, and the further sum of Nine Dollars and Thirty-five Cents ($9.35) per week for a period of eighty-five (85) weeks for the permanent loss of fifty per cent (50%) of the use of the right hand, in accordance with the provisions of Paragraph E-12 of Section Eight (8) of such Act.

We further find that the claimant has been paid the sum of Seventy-five Dollars and Sixty Cents ($75.60) for non-productive time which must be considered as payment of compensation and deducted from the amount which she is entitled to have and receive as above set forth.

We further find that all of the compensation due to claimant as aforesaid has accrued at this'time.

Award is therefore entered in favor of the claimant, Teresa Gagel, for the sum of Seven Hundred Forty-seven Dollars and Twenty Cents ($747.20).

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181),

and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Qovernor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3476—Claimant awarded $504.48.)

MARY LEAVITT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 10, 1940.

JOSEPH W. KOUCKY, for claimant.

JOHN E. CASSIDY, Attorney General; MAURICE J. WALSH, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for temporary total disability and permanent partial loss of use of hand.* Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in extra-hazardous employment, resulting in temporary total disability and permanent partial loss of use of hand, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

On April 12, 1939, and for several years prior thereto, the claimant mas in the employ of respondent at the Chicago State Hospital as a laundry worker. On the last mentioned date, while in the performance of her duties, her left hand was caught in a shirt press, whereby the dorsal surface of the left hand and the fingers thereof were burned.

Claimant was immediately taken to the institution hospital and treated by Dr. Scheffler, a member of the medical staff of the institution. She remained in the hospital from April 12th to May 9th, and returned to her regular duties on May 22d. She was paid her regular wages during the time she was incapacitated as aforesaid.

The medical testimony consists of the testimony of Dr. Albert C. Field who testified on behalf of the claimant, and Dr. Milton Scheffler who was called on behalf of respondent.

Upon a consideration of the facts in the record, we find as follows:

That on April 12, 1939 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on such date claimant sustained accidental injuries which arose out of and in the course of her employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of the claimant during the year preceding the accident were $972.00, and her average weekly wage was $18.70; that claimant at the time of the injury was fifty-nine (59) years of age; that all necessary first aid, medical, surgical and hospital services were provided by the respondent; that claimant was temporarily totally disabled from the date of her injury as aforesaid to May 22, 1939, to wit, for a period of five and three-sevenths weeks; that she also suffered the permanent loss of thirty-five per cent (35%) of the use of her left hand.

We further find that claimant is entitled to have and receive from the respondent the sum of Nine Dollars and Thirty-five Cents ($9.35) per week for a period of five and three-sevenths weeks for temporary total disability, in accordance with the provisions of Paragraph (b) of Section eight (8) of the Compensation Act, and the further sum of Nine Dollars and Thirty-five Cents ($9.35) per week for a period of fifty-nine and one-half (59½) weeks for the permanent loss of thirty-five per cent (35%) of the use of the left hand, in accordance with the provisions of Paragraph E-12 of Section eight (8) of such Act.

We further find that claimant has been paid the sum of One Hundred Two Dollars and Sixty Cents ($102.60) for nonproductive time which must be considered as the payment of compensation and deducted from the amount which she is entitled to have and receive as above set forth.

We further find that all of the compensation due to claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Mary Leavitt, for the sum of Five Hundred Dollars and Forty-eight Cents ($504.48).

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly,'" approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3058—Claimant awarded $3,660.40 and pension.)

LEE ARNOLD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion. filed December *12, 1940.*

JACOB BASKIN and LEONARD J. GROSSMAN, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee* under *rendered wholly and* permanently incapable of *work* as result of *accident* under—when award *for* such disability, including pension *may be* made. Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in total permanent disability, an award for compensation for such disability may be made, including pension, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

An opinion was filed in this cause on September 10th, 1940. Thereafter, upon petition of the respondent, rehearing was allowed. Upon rehearing the following opinion is substituted for the original opinion herein:

The claimant, Lee Arnold, filed his complaint in this court seeking an award in the sum of $10,000.00 for disabilities alleged to have been sustained as the result of injuries received while in the employ of the State of Illinois.

We find the facts to be that on February 18, 1936, the claimant, Lee Arnold, was in the employ of the State of Illinois as a truck driver for the Division of Highways, Department of Public Works and Buildings; that he was then married and had five children under sixteen years of age. It was stipulated that claimant's employment was seasonal, and that his earnings for the purpose of computing compensation amounted to $5.20 per day on the basis of 200 days employment per year. Claimant had worked for the State but nine days prior to February 18, 1936, and on that date he was operating a truck and snow plow, clearing the highway of snow. The nose of the plow struck an expansion plate on a bridge floor and the plow overturned. The claimant and his helper got out of the overturned truck, and claimant then attempted to cut the hose leading to the radiator in an effort to drain the radiator to prevent it from freezing, the temperature at that time being about 24 degrees below zero. While the claimant was endeavoring to cut this hose a barrel of tar, which the evidence showed weighed from 300 to 600 pounds, struck the claimant in the back in the lower part of the spine. Help was obtained and claimant was taken to a neighboring farm-house and Dr. Edgecomb of Ottawa was summoned. Claimant was then removed in an ambulance to a hospital at Ottawa, where he was confined for five weeks. Dr. Christian was called into the case and claimant was placed in a plaster cast. About two weeks later claimant was transferred to the care of Dr. H. B. Thomas, a noted physician and surgeon, and was taken and confined to St. Luke's Hospital in Chicago, where another plaster cast was applied. It appears from the evidence that claimant remained in this hospital for a week and was taken home. He made periodical trips to the hospital in Chicago at two week intervals until November 28, 1936, for the purpose of receiving treatments and care from Dr. Thomas.

The respondent furnished all the hospitalization and medical care received by the claimant prior to November 28, 1936, and the claimant was paid $499.60 compensation during the period between February 18th and November 28, 1936.

Claimant testified that since the latter date he purchased a heat lamp machine for $222.00, but there is nothing in the record to indicate that he was instructed to purchase such lamp by the respondent, nor that the purchase thereof was

necessary or was advised by any of his physicians; nor is there anything in the record to indicate that the price paid therefor was the fair and reasonable value thereof, or what it is fairly and reasonably worth at the present time. Claimant also testified that since November, 1936, he has visited his family physician on approximately ten occasions at a cost of $2.00 for each visit; also that since November 30, 1937, he earned approximately $20.00 or $25.00 over a period of three or four months acting as business agent for the Retailers Clerks' Union. The amount paid by claimant for medical services is offset by the amount earned by him as aforesaid, and the evidence in the record does not justify an award for the amount paid by claimant for the lamp in question.

The claimant testified on January 26, 1939, that his condition had not improved since the time he originally testified in November, 1937; that since the last mentioned date he had attempted to drive his father-in-law's truck on several different occasions, and had attempted to do other work. He testified that he could drive a truck for fifteen or twenty minutes ahd then the pain would become so severe that it would be necessary for him to quit.

The medical testimony is not in harmony. Eminent physicians have given conflicting opinions—one to the effect that since November 28, 1936, claimant has been cured; others of equal renown, experience and training deny this.

This court had Dr. Magnuson of the Passavant Hospital in Chicago examine the claimant and report direct to the court, and considering the testimony of the doctors and the testimony of the claimant, we find that claimant is now incapacitated from performing the duties of his previous employment; that he cannot do any work which involves stooping or lifting for any considerable length of time, without completely incapacitating himself. We find that there is a direct causal connection between the injury he received at the time the heavy barrel rolled upon him and his present condition. In the opinion of Dr. Paul B. Magnuson, claimant's condition is permanent, but he felt there was something that could be done to improve it, and possibly take him out of the permanent disability class; that is, permanent immobilization of the lumbo-sacral joint, by fusion or bone graft, or both, as may be indicated upon exposure of the bone and its joints. Dr. Magnuson is of the opinion that claimant is wholly inca-

pable of performing the work he was doing prior to the injury, but states that probably he could do desk work, checking goods in and out, or the like, where he would be on his feet part time and sitting down part of the time, without bearing any weight over a number of consecutive hours. Dr. Magnuson also found that the claimant had a constant spot of tenderness and pain, which was localized on successive examinations repeated twice on two successive days by Dr. Stinchfield, his associate, and himself; that this spot does not vary; and connected with this spot of tenderness the claimant gives signs and symptoms which check up with injury to the joints in the lumbo-sacral region; that he had paralysis following the injury, with incontinence of urine and feces; that in other words, he had an actual concussion of the cord at the point which involved the cauda equina at the point where he now complains of pain; that he has muscle spasm which limits the whole motion of the spine, and in repeatedly putting him through motions of the spine, including the confusion tests with him in various positions where he could not realize what the physician was actually doing with his back, the pain occurred on the application of pressure on these joints. The evidence shows that the claimant is still wearing a steel brace. Dr. Magnuson concluded that the claimant has a loose lumbo-sacral joint, in all probability due to rupture of the ligaments at the time of the injury; that it is only the bones that show in the X-ray, and rupture of the ligaments in this region is more serious than a fracture, provided the bone is not crushed, because ligaments do not heal as well as bone, and give longer disability and more permanent disability.

The claimant is now 32 years of age, weighs 145 pounds, and is five feet eleven and one-half inches tall. From the record it appears that he had always been engaged in manual labor, and that he only went through the eighth grade at school; and that he is now willing to submit to an operation.

As we understand it, Dr. Magnuson is of the opinion that after any operation there will still be a period of continued disability and pain, in which manual labor is impossible even though the operation were a success. This operation would call for a bone graft from Lee Arnold's thigh into his back, and after that claimant would be put in a plaster cast and a new brace would be necessary, as a brace is still needed, but

of a different type from the one originally prescribed by Dr. Thomas. The question of what the result of an operation suggested by Dr. Magnuson would be, is largely a matter of conjecture.

After considering all of the evidence in the case, we find that on February 18, 1936, claimant and respondent were operating under the provisions of the Workmen's Compensation Act; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that claimant's annual earnings, computed in accordance with paragraph (e) of Section 10 of the Workmen's Compensation Act, were $1,040.00, and his average weekly wage was $20.00; that claimant at the time of the injury was 28 years of age and had five children under the age of 16 years, to wit: Gertrude Ann, 8; Mary Lou, 5; Eileen, 6; **Jackie** Lee, 2; and John Robert, 8 months; that all medical, surgical and hospital services were provided by the respondent.

We further find 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 8, paragraph (f) of the Compensation Act, as construed by our Supreme Court in the case of *Moweaqua Coal* Co. vs. *Ind. Com.,* 360 Ill. 194, and in the case of *Truax-Traer Coal* Co. vs. *Ind. Com.*, 362 Ill. 75, the claimant is entitled to the sum of Forty-one Hundred Sixty Dollars ($4,160.00), less the sum of Four Hundred Ninety-nine Dollars and Sixty Cents ($499.60) heretofore paid by respondent, to wit, the net amount of Thirty-six Hundred Sixty Dollars and Forty Cents ($3,660.40), for complete and permanent disability, payable in weekly installments of Fourteen Dollars ($14.00) per week, and thereafter a pension during life annually in the amount of Three Hundred Thirty-two Dollars and Eighty Cents ($332.80), payable monthly.

We further find that the sum of $499.60 has been paid to claimant as aforesaid; that Two Hundred Fifty-one **(251)** weeks' compensation, amounting to Thirty-five Hundred Fourteen Dollars ($3,514.00), has accrued to December **11,** 1940, and that said sum, less $499.60 heretofore paid to the claimant as aforesaid, to wit, the sum of Three Thousand

Fourteen Dollars and Fourteen Cents ($3,014.14), is payable at this time; and the balance of Six Hundred Forty-six Dollars ($646.00), payable in forty-six (46) weekly installments of Fourteen Dollars ($14.00), and one final installment of Two Dollars ($2.00). After such final installment is paid claimant is entitled to an annual pension of Three Hundred Thirty-two Dollars and Eighty Cents ($332.80), payable in monthly installments of Twenty-seven Dollars and Seventy-three Cents ($27.73) during the term of his natural life.

Award is therefore entered in favor of the claimant, Lee Arnold, for the total sum of Thirty-six Hundred Sixty Dollars and Forty Cents ($3,660.40) and a pension for life, payable as follows:

a) The sum of $3,014.40 is payable forthwith, for compensation which has accrued. from February 19, **1936,** to December **11,** 1940, less the sum of $499.60 heretofore paid to claimant as aforesaid.

b) The sum of $646.00 payable in 46 weekly installments of $14.00 per week, commencing December 18, 1940, and one final installment of $2.00.

After the last installment of such compensation has been paid as aforesaid, the claimant, Lee Arnold, shall be paid an annual pension for and during his natural life in the sum of $332.80, payable in monthly installments of $27.73, commencing one week after the payment of the aforementioned final installment of $2.00.

It is further ordered that if the said Lee Arnold hereafter returns to work, or is able to do so, and earns, or is able to earn, as much as before the injury, payments under this award shall cease; and if said Lee Arnold returns to work, or is able to do so, and earns, or is able to earn, part but not as much as before the injury, this award shall be modified so as to conform to an award under paragraph (d) of Section eight (8) of the Compensation Act.

It is further ordered that this court retain jurisdiction of this cause for the making of such other and further orders herein as may be in accordance with the provisions of the Workmen's Compensation Act of this State.

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'' (Illinois Revised Statutes,

1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3418—Claimant awarded $1,314.26.)

DELIA CHOATE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed December 12, 1940.

JOSEPH W. KOUCKY, for claimant.

JOHN E. CASSIDY, Attorney General; MAURICE J. WALSH, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injury sustained on premises of employer —while on way to wash room—when accident arising out of and in the course of employment——when award may be made for compensation for temporary total disability and permanent partial loss of use of leg.* Where employee of State, engaged in extra-hazardous employment, sustains accidental injury on premises of employer, before completion of her work for the day and while on way to wash room, resulting in temporary total disability and permanent partial loss of use of leg, such accident arises out of and in the course of her employment and an award for compensation may be made therefor, in accordance with the provisions of the Act, upon her compliance with the requirements thereof.

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

For about eleven years prior to October 20, 1938, claimant was in the employ of respondent as a cook at Chicago State Hospital.

At such institution the interior entrance to the dining room, the bathroom, and the stairway to the basement, is from the main hall. The door to the bathroom and the door to the basement stairway are about two or three feet apart, the bathroom door being closest to the dining room.

Claimant's duties for the day ended at 6:30 P. M. About 6:10 or 6:15 P. M., on said 20th day of October, A. D. 1938, she was ready to go home and was proceeding from the dining room down the hallway, with the intention of going to the bathroom, but inadvertently passed the bathroom door and opened the door leading to the basement steps. The basement light was not burning at the time. Thinking that she was at the bathroom, claimant stepped forward, and fell down the steps, and thereby sustained injuries to her back, as well as to both legs.

She was immediately taken to the institution hospital where she was examined by Dr. Sinai. The next day she was examined by Dr. Scheffler, a member of the institution staff, who bandaged her side and placed a hot pack on her right leg, which was continued for about two or three weeks. Claimant left the hospital on November 25th and returned to her work on December 1, 1938. During all of the time she was incapacitated for work as aforesaid, she was under the care of Dr. Scheffler, and received her regular pay.

Claimant asks compensation for temporary total disability during the time she was incapacitated for work as aforesaid, and also for the permanent loss of fifty per cent (50%) of the use of her right leg, and for the permanent loss of twenty-five per cent (25%) of the use of her left leg.

The Attorney General contends that the accident did not arise out of and in the course of claimant's employment, and that the medical testimony does not show a causal connection between the accident in question and the present condition of the claimant.

With reference to accidents arising out of and in the course of the employment of the employee, Angerstein in his work "The Employer and the Workmen's Compensation Act of Illinois," Section 111, page 240, said:

"Although the Compensation Act provides compensation to employees only for accidental injuries arising out of and in the course of their employment, yet it is not necessary that the employee be in the actual performance of his work. 'It is well recognized that there are intervals or periods when the employee is not in the actual performance of work, and yet he is in the course of employment, as for example when the employee is ministering to such personal wants as getting a drink, eating his lunch, particularly upon the employer's premises, or resting at proper intervals, or going to a toilet, etc., subject of course to the usual limitations that he does not *go* to forbidden or improper places upon the premises, or unnecessarily increase the hazard or danger.

It is the general rule that all such acts by the employee while on the employer's premises as are reasonably necessary to his health and comfort, are incidental to his employment and are contemplated by the employer and the employee as a part of their contractual relation. It is, therefore, the rule that such acts by the employee as eating lunch during the lunch period on the employer's premises, or getting a drink, going to a toilet, protecting himself from excessive cold when at a place provided by the employer, or which the employees customarily use, are incidents of the employment and when accidental injuries occur during such time, the employer is liable for compensation."

The rule announced by Angerstein is supported by numerous decisions of our Supreme Court. *Humphrey* vs. *Ind. Corn.*, 285 Ill. 372; *Mt. Olive Coal* Co. vs. *Ind. Corn.*, **355** Ill. 222; *Wabash Ry. Co.* vs. *Ind. Com.*, 360 Ill. 192.

In speaking of the same question, our Supreme Court in the case of *Union Starch* Co. vs. *Ind. Corn.*, 344 Ill. 77, said:

"Where an employee is injured at a place where he reasonably may be and while he reasonably is fulfilling the duties of his employment or is engaged in doing something incidental to it, he is injured in the course of his employment."

This rule was also recognized and applied in the case of *Wabash Ry.* Co. vs. *Ind. Com.*, 360 Ill. 192.

In the present case the accident in question occurred in the building where claimant was employed, about fifteen or twenty minutes before the end of the day's work; claimant mas just getting ready to leave the institution, had left the dining room, and intended to go to the bathroom but inadvertently opened the wrong door and fell down the basement stairway.

We feel that the case clearly comes within the rule as stated by Angerstein, and the aforementioned decisions of our Supreme Court, and that the injury in question arose out of and in the course of claimant's employment.

With reference to the causal connection between the claimant's present condition and the accident in question, it appears from the evidence that claimant is fifty-seven years of age, and weighs 195 pounds; that she is now partially disabled in both legs, and that such disability is permanent; that prior to the accident in question she never sustained an injury to either leg, never had any pain therein or any swelling thereof; and that she satisfactorily performed all of the duties of her position for about eleven years.

The evidence further shows that since the accident she has had pain in her legs, particularly the right leg; that she

has a phlebitis of the right leg; that. she has a limitation of motion in both legs; that her legs are swollen most,of the time, particularly the right leg; that she feels very stiff and has difficulty in moving about.

In our judgment, the evidence in the record satisfactorily shows a causal connection between the claimant's present condition and the accident of October 20, 1938.

The only testimony in the record as to the extent of claimant's disability, other than that of the claimant, is the testimony of Dr. Field. From his testimony it satisfactorily appears that claimant has sustained the permanent loss of fifty per cent (50%) of the use of the right leg, and the permanent loss of twenty per cent (20%) of the use of the left leg.

Upon consideration of the testimony in the record we find as follows:

That on October 20, 1938 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on such date claimant sustained accidental injuries which arose out of and in the course of her employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of the claimant during the year next preceding the injury in accordance with the stipulation of the parties hereto, were $1,065.00 and her average weekly wage was $20.48; that claimant at the time of the injury was fifty-seven years of age; that all necessary first aid, medical, surgical and hospital services were provided by the respondent; that claimant was temporarily totally disabled from the date of her injury as aforesaid to December 1, 1938, to wit, for a period of five and six-sevenths (5 6/7) weeks; that she also suffered the permanent loss of fifty per cent (50%) of the use of her right leg and the permanent loss of twenty per cent (20%) of the use of her left leg.

We further find that claimant is entitled to have and receive from the respondent the sum of $10.24 per week for a period of five and six-sevenths (5 6/7) weeks for temporary total disability, in accordance with the provisions of Paragraph (b) of Section eight (8) of the Compensation Act, and the further sum of $10.24 per week for a period of ninety-five (95) weeks for the permanent loss of fifty per cent (50%) of

the use of her right leg, and the further sum of $10.24 per week for a period of thirty-eight (38) weeks for the permanent loss of twenty per cent (20%) of the use of her left leg;—in accordance with the provisions of Paragraph E-15 of Section eight (8) of such Act.

We further find that claimant has been paid the sum of One Hundred Seven Dollars and Sixty-three Cents ($107.63) for non-productive time, which must be considered as the payment of compensation and deducted from the amount which she is entitled to have and receive as above set forth.

We further find that One Hundred Twelve (112) weeks' compensation, amounting to Eleven Hundred Forty-six Dollars and Eighty-eight Cents ($1,146.88), has accrued to December 12, 1940, and that said sum, less $107.63 heretofore paid to claimant as aforesaid, to wit, the sum of Ten Hundred Thirty-nine Dollars and Twenty-five Cents ($1,039.25), is payable at this time; and the balance of Two Hundred Seventy-five Dollars and One Cent ($275.01) is payable in twenty-six (26) weekly payments of $10.24 each, commencing December 19, 1940, and one final installment of $8.77.

Award is therefore entered in favor of the claimant, Delia Choate, for the sum of Thirteen Hundred Fourteen Dollars and Twenty-six Cents ($1,314.26), payable as follows:

a) The sum of $1,039.25 is payable forthwith (being the amount of compensation which has accrued from October 21, 1938 to December 12, 1940, less the sum of $107.63 heretofore paid to claimant as aforesaid).

b) The sum of $275.01 is payable in twenty-six (26) weekly installments of $10.24 per week commencing December 19, 1940, and one final installment of $8.77.

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the

approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3279—Claimant awarded $1,187.80.)

NETTIE SCHLUP, ADMINISTRATRIX OF THE ESTATE OF BARNEY W. LEE, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed December 12, 1940.*

DAVIDSON & DAVIDSON and BROWS, HAY & STEPHENS, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee of Division of Highways entitled to benefits of-when award may be made under—including medical and funeral expenses.* Where employee of State sustains accidental injuries arising out of and in the course of his employment, while engaged in extra-hazardous employment, from which death subsequently results, an award for compensation may be made therefor, including medical, surgical and hospital expense; and where employee left no children or other dependents, for expenses of his burial, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

SAME—*compensation under accrued and unpaid at time of death of employee—payable to personal representative.* Where compensation for disability is due to employee, at time of his death, and such employee leaves no children or other dependents, the amount may be paid to the personal representative of said employee.

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

On August 14, 1937, one Barney W. Lee was in the employ of the respondent as a laborer in the maintenance department of the Division of Highways, and was engaged in cutting vegetation on the right-of-way of S. B. I. Route No. 127, about seven (7) miles south of the Village of Greenville, in Bond County. The crew foreman had made arrangements with one of the adjoining property owners to provide a hay rack and team to move the vegetation off the right-of-way, provided the respondent would furnish the help to load and unload same. Lee was assigned to the work of assisting with the loading and unloading, and was riding on a load while the same was being taken from the highway. In turn-

ing off the highway the wagon overturned and Lee was thrown onto the concrete pavement, sustaining a contusion of the left forehead and temple, as well as an abrasion of the face, sprain and torn ligaments of the left wrist, and a sprain of the great toe of the right foot. He was removed to his home in Greenville, where he was attended by Dr. William L. Hall, who continued to treat him until September 1, 1937, and mho reported on September 6, 1937, that there was no permanent injury.

Lee returned to work for respondent on October 5th, 1937, and continued to work until October 16, 1937, although he subsequently testified that he never did feel right after the accident.

He continued to receive his regular salary from October 17, 1937, to April 29, 1938, to wit, the sum of $228.20, which being for non-productive time, must be considered as compensation and deducted from any award made herein.

On October 17, 1937, Lee's sister called Dr. William T. Easley, who examined Lee and found him insane. On October 20, 1937, Dr. H. D. Cartmell of Greenville was also called to attend Lee and advised hospitalization and treatment by specialists in St. Louis. On October 21st Lee was taken to the Evangelical Deaconess Home and Hospital in St. Louis, where he remained until November 19, 1937, under the care of Dr. L. H. Hempelmann. Dr. Hempelmann called into consultation Dr. Roland W. Klemme, a specialist in brain surgery. At such consultation it was determined. to operate on Mr. Lee's head for the purpose of making a ventriculogram, which was done. Thereafter claimant began to improve and the operating doctors were of the opinion that he might have a complete recovery if he did not return to work too soon.

Lee returned to his home from the hospital on November 19, 1937, and continued under the care of Dr. Cartmell until March 2, 1938. On the last mentioned date, with the acquiescence of the Division of Highways, Lee was taken to Chicago for examination by Dr. H. B. Thomas, head of the Department of Orthopedics, College of Medicine, University of Illinois, and Dr. H. Douglas Singer, head of the Department of Neuropsychiatry, College of Medicine, University of Illinois, and remained in Chicago until the evening of March 7, 1938. Thereafter Dr. Singer reported to Dr. Thomas that in his opinion the injury sustained by claimant was the actual

cause of his disability, and thereafter Dr. Thomas reported to the Division that "the disability of which the claimant complains is due to his cardio-vascular disease, contributed by the accident."

After his examination in Chicago, Lee returned to his home, and was examined by Dr. Cartmell on several occasions. On May 9, 1938, Dr. Cartmell submitted a report to the Division of Highways in which he stated:

> "I do not think he will ever be fit to work;
> Prognosis — Permanent disability."

On June 18, 1938, said Barney W. Lee filed his claim for compensation in this court.

On or about February 15, 1939, Lee was taken to the Mark Greer Hospital at Vandalia, Illinois, and died there on February 22, 1939.

On May 15, 1939, Nettie Schlup was appointed administratrix of the estate of said Barney W. Lee, deceased, and thereafter as such administratrix was substituted as claimant herein.

The present claimant seeks to recover an award for the compensation due Barney W. Lee at the time of his death, the unpaid hospital and medical bills, and for funeral expenses as provided for by the Compensation Act.

It appears from the evidence that all medical, surgical and hospital bills have been paid by the respondent, except the bill of Dr. H. D. Cartmell in the amount of $42.50 and the bill of Mark Greer Hospital in the amount of $38.50.

It also appears that said Barney W. Lee was not regularly employed by respondent for one year prior to the accident in question; that the work in which he was engaged at the time of such accident mas work in which it was the custom to operate for a part of the whole number of working days in each year; that he was paid forty cents (40c) per hour for an eight-hour day, and his annual earnings, in accordance with the provisions of paragraph (e) of Section Ten (10) of the Workmen's Compensation Act must therefore be taken to be Six Hundred Forty Dollars ($640.00) and his average weekly wage Twelve Dollars and Thirty Cents ($12.30). All compensation payments, therefore, must be at the minimum rate of Seven Dollars and Fifty Cents ($7.50) per week.

The said Barney W. Lee was fifty-seven (57) years of age at the time of the accident in question, had no children and no dependents.

The medical testimony in the record is quite voluminous and from such testimony it satisfactorily appears that Lee mas completely and permanently disabled as the result of the injuries sustained by him on August 14, 1937, and therefore the administrator of his estate is entitled to have and receive from the respondent compensation at the rate of $7.50 per week for seventy-eight (78) weeks, being Erom the date of his injury to the date of his death as aforesaid, less the period from October 5,1937, to October 16,1937, (duringwhich period he worked for the respondent, and less the sum of $228.20 heretofore paid to him as aforesaid.; and that all of such compensation has accrued at this time.

Under the provisions of paragraph (a), Section eight (8) of the Workmen's Compensation Act, the respondent is required to furnish all necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter which are reasonably required to cure or relieve from the effects of the injury. All of such medical, surgical and hospital .services have been furnished by the respondent except the aforementioned bill of Dr. Cartmell in the amount of $42.50 and the aforementioned bill of Mark Greer Hospital in the amount of $38.50, for which bills the respondent is liable under the terms of the Workmen's Compensation Act.

Under the provisions of paragraph (e) of Section Seven (7) of the Compensation Act in force at the time of the accident, the respondent is also liable for burial expenses of the decedent in an amount not to exceed One Hundred Fifty Dollars ($150.00), same to be paid to the person incurring the expense of burial. The evidence discloses that Lena Cook, a sister of the decedent, paid the funeral expenses and that the same exceeded $150.00. She is therefore entitled to be reimbursed therefor by the respondent to the extent of $150.00.

Pursuant to the further provisions of said paragraph (e) of Section Seven (7) of said Workmen's Compensation Act, in force August 14, 1937, the respondent is also required to pay into a special fund of which the State Treasurer is ex-officio custodian the sum of Six Hundred Dollars ($600.00).

Award is therefore hereby entered as follows :

1) In favor of Nettie Schlup, Administrator of the estate of Barney W. Lee, deceased, the sum of Three Hundred Fifty-six Dollars and Eighty Cents ($356.80).

2) In favor of Nettie Schlup, Administrator of the estate of Barney W. Lee, deceased, for the use of Dr. H. D. Cartmell, the sum of Forty-two Dollars and Fifty Cents ($42.50).

3) In favor of Nettie Schlup, Administrator of the estate of Barney W. Lee, deceased, for the use of Mark Greer Hospital, the sum of Thirty-eight Dollars and Fifty Cents ($38.50).

4) To Lena Cook, in repayment for funeral expenses advanced by her, the sum of One Hundred Fifty Dollars ($150.00).

5) To the State Treasurer of the State of Illinois, as ex-officio custodian of the Workmen's Compensation Special Fund, the sum of Six Hundred Dollars ($600.00), said sum to be held and disbursed by said State Treasurer in accordance with the provisions of the Workmen's Compensation Act of this State.

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of An Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 2759—Claim denied.)

MILTON GARDENER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 13, 1941.

GEORGE M. SCHATZ, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees* of *State*—*State never liable for.* The State is not liable for the negligence of its officers, agents or employees, the doctrine of respondeat superior not being applicable to it.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that the respondent on January 11, 1935, was possessed of a 1926 model, Reo motor truck, and that by its duly authorized agent and servant, one Floyd Smith, an inmate of the Illinois State Penitentiary of Joliet, Illinois, mas operating this truck along and upon a certain public street of the said city, namely 16th Street, at or near the Illinois highway commonly known as Route No. 66; that the truck was proceeding in a westerly direction on the north side of said 16th Street. The complaint further alleges that the claimant was then and there the owner of an automobile and was operating the same in a southerly direction on the west side of said Route No. 66, near the intersection of 16th Street, and was exercising due care and caution for his own safety and the safety of others, and that tlie agent of the State was negligently operating the State truck, and drove across and upon said Route No. 66 without giving claimant any warning of his intention to so do, and came into a violent collision with claimant's automobile and as the result of this collision, the claimant's automobile was damaged in the sum of $508.30, as shown by the bill of particulars attached to the complaint.

Attached to the complaint is a statement from the General Exchange Insurance Corporation that it has an interest in the claim to the amount of $445.30 by reason of a subrogation and assignment agreement entered into by claimant on January 12,1935; that no part of the claim has been paid.

Counsel for the State has made a motion to dismiss this complaint.

The rule is universal that the State is never liable for tlie negligence of its agents and employees unless there is a statute making it so liable. This rule has been so often announced by this and other courts that it would seem it should now be well known. 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 C. C. R. 266;
Johnson vs. *State*, 2 C. C. R. 165;

Schroeder vs. *State*, 3 C. C. R. 36;
Wunderlick Granite Co. vs. *State*, 4 C. C. R. 143.

There are many cases much more recent than the above, the citation of which is unnecessary.

The motion of the Attorney General must, therefore, be sustained and claim denied.

(No. 2752—Claim denied.)

THE KANSAS FLOUR MILLS CORPORATION, A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 13, 1941.

CECIL H. HAAS, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney' General, for respondent.

FEDERAL PROCESS TAX—*not passed on to consumer—payer has remedy in United States Court* of *Clams— when State not liable for amount* of. The facts in this case and the issues involved are similar to those in McCampbell & Company, 10 Court of Claims Reports, 42 and what was said in that case applies herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that claimant, a corporation. was engaged in the milling business with its principal office at 1000 New York Life Building, Kansas City, Missouri; that during the first part of March, 1935, the State of Illinois through its State Purchasing Agent, invited the claimant to submit bids on certain purchases to be made by the respondent, said bids to be received until 10:00 A. M. March 19, 1935, by sending to claimant a notice, together with specifications of the articles to be bought, said notice in part stating that the bids for certain institutions including the one at St. Charles, Illinois, would be made net excluding in the price thereof the amount of processing taxes; that pursuant to said invitation to bid, the claimant submitted to the respondent, a certain bid! and together with said bid, the claimant sent a letter dated March 15, 1935, to the effect that where prices on wheat flour have been quoted excluding the wheat processing tax, it would be understood that the buyer agrees to furnish seller affidavitsrequired to support claim for refund, and

if such affidavits are not furnished, and/or if the Federal Government refuses to allow refund of the claim, the buyer shall pay the amount of such processing taxes to the seller. The complaint further alleges that on March 20, 1935, the Purchasing Agent for the State advised claimant that it had been awarded items 2, 3 and 9 for the St. Charles School for Boys as set out in its proposal, and also sent the claimant a purchase order dated March 20, 1935 for items of flour. It is contended that these items were duly shipped and received by the State.

The complaint further alleges that a "Monthly ,Return of Processor of Wheat" mas duly made by claimant and filed in the office of the Collector of Internal Revenue of the United States at Kansas City, Missouri, by Valier & Spies Milling Corporation, an affiliated corporation of the claimant herein, in which return were specified certain of the items listed in the purchase order made by the State of Illinois; that an exemption mas asked from the payment of the tax on the ground that the St. Charles School for Boys was a charitable institution; that on or about September 10, 1935, the Internal Revenue Bureau of the Treasury Department of the United States notified said Valier & Spies Milling Corporation that said claim for credit of said taxes had been rejected on the ground that. the St. Charles School for Boys was not a charitable institution within the meaning of the law.

It is charged in the complaint that Valier & Spies milling Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and that it and the claimant herein are affiliated subsidiary corporations wholly owned by the Flour Mills of America, Inc., a Maryland corporation; that the items which the State bought were processed by Valier & Spies Milling Corporation, and that any liability accruing because of said processing taxes was and is that of the claimant herein.

Counsel for the State has made a motion to dismiss this claim.

The Agricultural Adjustment Act was held to be unconstitutional by the Supreme Court of the United States, in the case of *U. S.* vs. *Butler*, 287 U. S. 1.

Later on the United States Supreme Court in the case of *Anniston Mfg. Co.* vs. *Davis*, 301 U. S. 337, held that where

the processor has not passed the tax on to the consumer he may, under Sections 901 to 917 of Title VII of the Revenue Act of 1936 recover the taxes from the Federal government, and if the commission refuses a refund under the above seetions the processor may prosecute his claim in the United States Court of Claims.

In the case of *McCampbell* Co. vs. *State,* 10 C. C. R. **42,** this court held that where the processor has not passed the tax on to the consumer he may under the Federal law, recover the tax from the Federal Government, and if the Commissioner refuses a refund, the processor may prosecute his claim in the United States Court of Claims, and we held in that case that inasmuch as the tax was not passed on to the consumer, the claimant had an adequate remedy in presenting its claim to the Federal Government.

For the same reason, an award in this case will be denied and the motion to dismiss sustained.

(No. 2755—Claim denied.)

LOWELL LIEUBANCE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion pled *January 13, 1941.*

HARDY, HARDY, HARDY & WITHERELL, for claimant.

JOHN E. CASSLDY, Attorney General; GLENN **A.** TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees* of *State—State* ***not*** *liable* ***for.*** The State is not liable for the negligence of its officers, agents or employees, the doctrine **of** respondeat superior not being applicable to it.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant avers that on December 6, 1934, at about 8:00 o'clock a. m., claimant was in a certain public garage in the City of Abingdon, Illinois, known as Spurgeon's Chevrolet Sales; that he had stored an International truck in said garage, and on that morning he went there to procure the same; that he went to the front of the truck for the purpose of cranking the same preparatory to moving it from the garage; that this truck was so placed that it was facing one of the walls of said garage building, the front of said truck being approximately three feet distant from the wall; that at this time and place there was another truck owned and

operated by the Department of Public Works and Buildings, Division of Highways of the State of Illinois, in this garage, a short distance from claimant's truck and headed toward the claimant's truck, and while the claimant was between the wall and his truck and endeavoring to crank the same, the driver of the State truck started his engine and it ran against claimant's truck because it had been negligently and carelessly left in gear, and by means of this carelessness and negligence claimant was pushed against the wall of the garage building and was severely injured. Claimant asks for damages in the sum of $6,000.00.

The Attorney General has made a motion to dismiss.

This court has on numerous occasions held that the State of Illinois is not liable for the negligence and carelessness of its officers and agents.

In the case of *Minear* vs. *State Board* of *Agriculture,* **259** Ill. **549,** it was held that such board is not subject to the liabilities of a private or quasi-public corporation, and the same rule is applicable to other agencies of the State.

The motion of the Attorney General must, therefore, be sustained and award denied.

(No. 2761—Claim denied.)

KARL LISSAH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed January 13, 1941.*

LLOYD H. MELTON, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State — State never liable* ***for,*** The State **is** never liable for the negligence of its officers, agents or employees, the doctrine of respondeat superior not being applicable to the State in the exercise of its governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant seeks to recover damages to his automobile occasioned by a collision thereof with a truck driven by a man named Pat Slayden, four miles west of the Village of Nashville, Illinois. Claimant alleges that a construction crew of the State Highway Department was doing work on the road and as the claimant was driving very slowly, a watchman

signaled for him to proceed and he did proceed and attempted to pass the construction crew, and while passing a large truck that was in the act of receiving a load, the driver of the truck, Pat Slayden, suddenly and without any warning drove his truck forward in such manner that it collided with claimant's car, and damaged claimant's car to the extent of Fifty Dollars ($50.00). An itemized statement of account is attached to the complaint filed herein.

Counsel for the State has made a motion to dismiss and this motion must be sustained, first, on the grounds that there is no averment that the driver of the truck was an agent of the State; and second, because, as we have often said, 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.

Morrissey vs. *State of Illinois*, **2** *C.* C. R. **454;**
Minear vs. *State Board of Agriculture*, **259** Ill. **549;**
Bucholz, Admx. vs. *State*, **7** C. C. R. **241.**

For these reasons an award will be denied.

(No. 3025—Claimant awarded $13,715.95 and pension.)

ELVA JENNINGS PENWELL, Claimant, *vs.* **STATE OF ILLINOIS,** Respondent.

Opinion filed January 13, 1941.

JOHN W. PREIHS, for claimant.

JOHN E. **CASSIDY,** Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION* **ACT**—*when award may be made under.* Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in extra-hazardous employment, resulting in total permanent disability, an award for compensation for such injuries may be .made and for expenses of necessary medical, surgical and hospital services incurred and that may be incurred as are reasonably required to cure **or** relieve **from the** effects **of** such injuries, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

SAME—*injury accelerating or aggravating possible dormant disease, resulting in total permanent disability—accidental within meaning* of. Where injuries accelerate or aggravate a dormant disease, that employee might have been afflicted with, at and prior to the time thereof, or cause it to flare up,

so that disability results, such disability is the result of such accidental injuries and employer is liable for compensation therefor.

SAME—*medical, surgical and hospital services—procured by employee—when State liable for expense of.* Where the evidence discloses that injured employee required specialized care or treatment, and that State made no offer to furnish same and made no objection to the hospitalization and treatment which employee procured, in an effort to be cured or relieved of the effects of the injuries, it is liable for the expense thereof, provided the same were necessary and the charges therfor reasonable, and an award for the amount thereof may be made to such employee.

MR. JUSTICE YANTIS delivered the opinion of the court:

Elva Jennings Penwell filed her claim herein on November 12, 1936, alleging that on February 2, 1936 while employed as a Supervisor at the Illinois Soldiers' and Sailors' Children School at Normal, Illinois, a charitable institution operated, controlled and managed by the State of Illinois, she was injured in an accident arising out of and in the course of her employment, for which an award is sought under the terms of the Workmen's Compensation Act. In addition to the transcript of evidence, filed November 13, 1940, oral appearances have been made by Counsel and written Statements, Briefs and Arguments are filed herein.

The respondent, by the Attorney General, concedes that the Court has jurisdiction of the parties and of the subject matter under the terms of the Illinois Workmen's Compensation Act, and further that the record supports a finding that the accident arose out of and in the course of claimant's employment.

The Attorney General submits that the questions of primary importance at issue are:

First, whether or not the claimant's condition is the result of the accidental injury.

Second, whether or not the respondent is liable for the Doctor bills shown to have been incurred by claimant.

Third, whether such medical bills are reasonable and proper.

The record shows that claimant had been employed at the institution in question for more than a year prior to February 2, 1936, and that at the time of her accident on said latter date she was receiving wages in the amount of $100.00 per month with a further allowance for maintenance on the basis of $24.00 per month, or a total of $1,488.00 per year.

Claimant's duties required her to exercise supervision over children and employees in the institution, and to make frequent inspection of the several buildings connected therewith. Claimant is a single woman having been granted a divorce from her husband in 1931. At the time of the accident she was the mother of three children, Bruce V. Penwell, Jr., thirteen years of age, Carolyn Penwell, aged twelve years, and Janey Penwell, aged nine years, all of whom were under her care and supported by her. On February 2, 1936 about four o'clock P. M. she left the main building of the institution to inspect another building. It was cold weather and ice and snow had frozen on the steps of the building. Her foot slipped on one of the upper steps, and she was thrown backwards and down the stairs. She struck on her head and back, and was found and picked up at the bottom of the steps. She was taken to her room and placed under the care of Dr. L. Shafton, the School physician. Her body was bruised and blood was coming from her ears and nose. The evidence discloses that prior to the accident, claimant had enjoyed good health and passed a satisfactory medical examination at the time she became employed at the institution. At that time her eyes tested 20/20. After the fall she was confined to her room until Saturday, February 14, 1936. Pains had developed in her abdomen and side, in her shoulder and in the right side of her head with some fever. Severe pain developed in the left eye and the sight of that eye gradually faded out during the next three days. On February 20th complete loss of vision had resulted in the left eye. At that time Dr. Hartenbomer, an eye specialist, was called, and suggested that the claimant should go to Mayo Brothers Clinic. Claimant was taken to the Clinic at Mayos, and entered Worrall Hospital February 22, 1936. The left optic nerve was swollen and the edema spread to the spinal cord causing transverse myelitis. While at Mayos the sight of the right eye was lost and a general paralysis condition ensued. She stayed at the Clinic until April 3, 1936, by which time the paralysis had receded to the sixth Dorsal Vertebrae below the collar bone. Her arms were still useless and she was completely paralyzed below that point. The treatment at Mayos consisted of serum injections to reduce the edema of the optic nerve, and spinal punctures, intravenous glucose, special diets, etc. On April 4, 1936 claimant entered the B.

J. Palmer Chiropractic Clinic at Davenport, where she remained until June 1,1936, under the care of Dr. B. J. Palmer. There was intermittent improvement in her eyesight, but at the time she left the Palmer Clinic she was still practically blind, having approximately one-eight (1/8) vision in one eye with veiy slight use of her hands and arms, and the rest of her body in a state of placid paralysis.

Claimant enter Johns Hopkins Hospital at Baltimore on June 5, 1936 and remained there until June 17, 1937. She there received massage and ultra-violet ray treatments. Her eyesight improved until she could read with one eye. The paralysis receded almost to her waist and she regained the use of her arms and hands. From Baltimore she was taken to her home at Beeclier City, Illinois, under the care of a registered nurse who continued the massage and sun-bath treatments.

On February 10, 1938 she entered the Laughlin Hospital at Kirksville, Missouri, where she remained until June 27, 1938. During her stay there, a lessening of the spasticity of her limbs resulted. During the previous year, this spasticity had increased until it was with difficulty that the legs could be straightened or moved. After leaving Kirksville on June 27, 1933 she returned to her home at Beecher City and remained until August 25, 1938, when she returned to Kirksville, residing outside the Hospital, but receiving treatments prescribed by the Hospital staff. She returned to Beecher City June 1, 1939, back to Kirksville September 1, 1939, and back to Beecher City June 1, 1940 where she now remains. At the present time she has paralysis of the motor and sensory nerves below the Sixth Dorsal Vertebrae, incontinence of urine and faeces. There is a tendency of contraction and spacticity of limbs, and because of constant confinement to bed, she suffers bed sores which require medical care and dressings two or three times a day. Claimant has purchased an ultra-violet-ray lamp so as to receive the light treatments at her home, and is occasionally removed from her bed to a wheel chair. Claimant testified that judging from her condition during the past four years and the result of treatments received at the various hospitals, she will require the services of a practical nurse and a Doctor so long as she lives, because of the tendency of her muscles to contract and the continued

existence of bed sores as a result of her rather constant confinement to her bed.

Reports from the several institutions where Mrs. Penwell received treatment, appear in the record. The court, desiring further information as to her immediate condition, of its own accord, requested an examination of claimant at the Herndon Clinic in Springfield, Illinois, and a report of such examination by Dr. R. F. Herndon appears in the record. Claimant's condition seems to be one which the medical profession has been unable to greatly relieve. Dr. Herndon made a complete study of the reports from the several hospitals, and made a thorough examination of claimant. Without reviewing all of the medical testimony, and for brevity we quote from the conclusion of Dr. Herndon's report as follows:

"Examination shows a well-developed and nourished, healthy appearing woman of about 40, lying quietly in bed. She is cheerful, alert and very cooperative. Neurological examination reveals a sharply defined area of anesthesia extending about the body as a girdle at the level of the costal margins and the spinous process of the first lumbar vertebra. Below this level there is a complete absence of all forms of sensation. There is a complete spastic paralysis of the lower extremities with increased tendon reflexes. unsustained clonus, and positive Babinski and related toe signs. The legs are extremely spastic and stimulation produces involuntary contractions. There is only moderate general atrophy of the lower extremities and despite their spasticity they can be completely straightened. Above the costal margins there are no neurological abnormalities. Examination of her head and neck, heart and lungs and spine reveal nothing abnormal. Blood pressure 122/80.

"At the present time she has almost normal vision in her right eye and useful eccentric vision in her left eye, but the left eye has a large central blind spot that prevents reading, etc. She regards herself as normal to the rib margins. Below this she is completely paralyzed.

"From the above it is my opinion that following her fall Mrs. Penwell developed a diffuse, acute myeloencephalitis which, after a few exacerbation, gradually subsided leaving the residuals described. The ultimate cause of such condition is unknown, but there is some reason to believe they are virus disease (that is due to ultramiscropic organisms). While her accident was not the real cause of her trouble, I believe that it must be regarded as the precipitating factor, and that if it had not occurred she might never have had the illness which followed. It is possible, though very improbable that she may improve in the future but there is no reason to believe that she will ever be self-supporting. In short, it is my opinion that she is totally and permanently disabled and that her disability arose as the result of her accident.

"From the negative standpoint there is absolutely no evidence of a syphilitic factor in this case nor do I believe that she had an ordinary bacterial infection such as might have resulted from a skull fracture."

If it can reasonably appear that there is a causal connection between the accident and the resulting injury or death of the workman, an award is justified under the provisions of the Compensation Act. If a dormant condition which might not cause disability is accelerated by reason of an accident so that disability results, such disability is compensable. If death or disability is fairly chargeable to an accident suffered in the course of employment as an efficient cause, compensation may be awarded even though, as in a sarcoma case, such sarcoma previously existed and was aggravated or accelerated by the injury.

In *Railroad Water and Coal Handling Company* vs. *Industrial Commission,* 334 Ill. 52, the employee mas injured in the chest while helping dig a ditch. Four months after the accident an examination disclosed tuberculosis in the right lung, which apparently had existed for some time, but which had not previously evidenced itself. The medical testimony was that the accident had caused the latent tuberculosis to "light up." The court, in sustaining an award, said:

"The finding of the Industrial Commission that the disability of defendant in error is due to the injury, and that the tuberculosis is not an independent intervening cause, is not manifestly against the weight of the evidence. Under the decisions of this court—the judgment of the lower court should be and is affirmed."

The medical reports, as considered and summarized in the report of Dr. Herndon, is that claimant is totally and permanently disabled, and that her disability arose as the result of her accident. The court feels impelled to accept this proof as determinative of the issue as to whether claimant's condition is the result of the accidental injuries, and we find that claimant, while an employee of respondent, suffered an accidental injury which arose out of and in the course of her employment, and which has resulted in the total permanent disability of the claimant.

As claimant was receiving wages of $100.00 per month plus a maintenance allowance of $24.00 per month, her annual wage scale at the time of such accident was $1,488.00, or an average weekly wage of $28.61. The dependence of three children upon claimant authorizes a weekly wage percentage of sixty-five (65) per cent for compensation payments, which would be $18.60, but under the limitation of Section 8 (j) 3 of the Act, the maximum amount payable is $18.00 per week. The record discloses that claimant received $100.00 for non-

productive time subsequent to her injury and in excess of all payments due her for wages at the time of her injury, and such sum should be deducted from any award made herein. In view of claimant's earnings and the three dependent children, she is entitled to an award herein of four times the average annual earnings, subject to a maximum limitation of $5,500.00. In view of her continued disability she is further entitled to a pension of $660.00 per year, such pension being payable at the rate of $55.00 per month.

As to the further issue of whether the respondent is liable for the doctor bills under the evidence contained in the record, the court finds:

That respondent had immediate notice of claimant's accident and of her increasing disability that immediately followed, and of her need for specialized treatment incidental to the blindness and paralysis that resulted therefrom.

J. H. Russell, Managing Officer of the institution where she was employed, reported: "Mrs. Penwell was going between buildings occasioned by her duties. The concrete steps were slippery due to the snow and ice, and she slipped and fell down the steps. Dr. Shafton, Institutional Pediatrician, who examined her, reported bruises and a severely shaken up condition; in a few days the eyesight was completely gone in one eye, and she determined to go to the Mayo Clinic for observation, advice and treatment. I saw her once thereafter at her hotel in Davenport, Iowa, at which time she had regained partial' sight and some control of her head and arms, although she was still confined to bed. Since Mrs. Penwell consulted the local eye specialist and left for Rochester our institution has not since been solicited by her for medical aid."

The consensus of the decisions of Illinois law upon the question of furnishing medical aid is that, "If there has been a request of the employer to furnish such services, or if the employer has knowledge of the accident and the need of such services, and fails or refuses to furnish them, then the employee clearly has a right to secure such services and to hold the employer liable for them. If there is such a request by the employee, or such knowledge on the part of the employer, the services should be promptly provided, and in such case the employer is liable, unless there is a definite record that

the employer had tendered such services from other sources and the employee had refused to accept them."

In the case of *Old Ben Coal Corporation* vs. *Industrial Commission,* 311 Ill. 35, the employer took the injured employee to a hospital at Christopher, and the next day he was taken by his friends and family to a different hospital, where he remained about a year. The employee testified that he demanded medical and hospital treatment after being moved, but that none was tendered. The employer claimed it had its own staff of physicians at Christopher: and would have furnished such services if the employee had not selected his own. In sustaining an award, the court said: "The employer is not given the right, simply because the employee leaves the hospital to which the employer took him, to avoid all liability for hospital and medical treatment without tendering other services of like character, unless the facts show that the employee, by leaving the hospital, elected to secure a physician and hospital at his own expense.''

If the employee has already gone to a hospital or secured his own physician, the employer should make a definite offer to provide such services, and in the absence of such offer the employee is justified in attempting to gain such medical care and hospitalization as will cure or relieve him of his disability. The evidence herein discloses no offer by respondent to give any specialized care or treatment which was apparently required by claimant's condition, and no objection appears to have been made at any time by respondent as to the hospitalization and treatment which claimant was procuring. The testimony shows that such services were reasonable and were furnished by some of the best known medical institutions in America. The testimony is further that the items of expense, and charges made by those institutions and the moneys expended by claimant in obtaining such services were reasonable and necessary. Same is true in regard to the local medical and nursing services rendered to her at her home in Beecher City. The total amount of such expenditures, all of which claimant has paid or obligated herself to pay from her own funds or from moneys borrowed by her, amounts to $8,188.95, with an additional sum of $27.00 for ultra-violet-ray lamp, used to relieve the skin condition, expended or incurred up to and including October 22, 1940.

The testimony further shows that claimant still requires the attendance of a practical nurse and medical services; that her paralysis extends from the waist down and is of the spastic type; that she has no control over her lower limbs nor over urine or faeces; that the treatment now being given her consists of osteopathic manipulation, massage, and light treatments to release the spastic condition to prevent deformity and stimulate circulation, and medical treatment for the relief of bed sores; that such treatments are given her once or twice daily and the light treatments three times a week.

The court therefore further finds that claimant is entitled to such further care as is reasonably required to relieve her from the effects of the injury, as provided in Section 8, Par. (a) of the Workmen's Compensation Act.

In accordance with the foregoing findings, an award is, hereby made in favor of claimant, Elva Jennings Penwell, as follows:

For total permanent disability. $5,500.00

As the disability began February 2, 1936 and is compensable at the rate of $18.00 per week, $4,626.00 of said award will have accrued by January 16, 1941. The sum of $100.00 heretofore paid for non-productive time is to be deducted, leaving $4,526.00 due and payable as of January 16, 1941. The balance of said sum of $5,500.00, i. e. $874.00, is payable in forty-seven (47) weekly installments of $18.00 per week, and one payment of $28.00.

Thereafter and in addition to said sum of $5,500.00 there shall be due and payable to claimant in accordance with Section 8-20 (f) of the Workmen's Compensation Act of Illinois, a pension during her life annually, in the sum of $660.00, being twelve (12) per cent of said sum of $5,500.00, payable in monthly installments of $55.00 per month, commencing after the final payment of said award of $5,500.00 has been paid.

In addition to the foregoing, a further award is made in favor of claimant for necessary medical, surgical and hospital services heretofore expended or incurred by her to cure or relieve from the effects of her injury, in the sum of $8,215.95, which said sum is due and payable to her at the present time.

This court is powerless to place a definite limitation upon the time such medical, surgical and hospital services could be or shall be rendered to claimant. The only authority for such payment, and the only limitation thereon, is that such expenditure shall be that which may be "reasonably required to cure or relieve from the effects of the injury." (*Newman* Co. vs. *Ind. Com.*, 353 Ill. 190.)

As above stated, the proof here shows that medical and nursing services are still necessary to relieve claimant from the effects of her injury, and that such services are now be-

ing and can be rendered in her home. There is no proof indicating any malingering or other circumstance which would enable us to say that further services are not reasonably necessary to relieve Mrs. Penwell from the effects of her injury. In the same manner that we are powerless to place a definite limitation upon the time and amount of such services, so do we regard it as improper for us to attempt to anticipate what such requirements may amount to, although there is some evidence as to the cost of the present treatment. We therefore find that claimant is entitled to such further care as is reasonably required to relieve her from the effects of her injury.

No award is made at this time for the payment of problematical and anticipated expenses that may be incurred by claimant in attempting to further cure or relieve her disability, the propriety and the amount of any such future payments being considered to be a matter for the discretion and action of the court if and when such expense has been incurred.

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" (Ill. Revised Statutes, 1939, Bar Association Edition, Ch. 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Sess. Laws 1939, p. 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 2715—Claim denied.)

AQUILLA T. SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 13, 1941.

A. MORRIS WILLIAMS, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SALARY—*when claim for* ***must*** *be denied.* Where person is hired at a certain, definite salary and is paid and receives same without objection, no award can be had for additional compensation, as same is prohibited by Section 19, Article IV of the Constitution of the State of Illinois.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim is presented on the theory that because claimant was employed and paid as a janitor at $35.00 per month at the Bloomington Free Employment Office, and because there was an appropriation to that office of $600.00 per year, or $50.00 per month for janitor services, therefore the $15.00 per month representing the difference between the $35.00 and the $50.00 per month should be paid to claimant.

The Attorney General has made a motion to dismiss this case and argues that the appropriation of $600.00 annually for janitor services for said office for the bienniums in question were modified by the provisions in Section 1 of the Appropriation Acts, which limited the amount of the appropriation to "so much thereof as may be necessary." If only $35.00 per month was necessary for such services then it could not be said that more than that amount was in fact appropriated. Six Hundred Dollars ($600.00) per year was the appropriation, but the complaint does not aver that the claimant was the only person doing that work and being paid from the appropriation. It appears that the claimant was hired at the rate of $35.00 per month and accepted that amount month after month without objection.

Section 19, Article IV of the Constitution provides, in part as follows:

> The General Assembly shall never grant or authorize extra compensation, fee or allowance, to any public officer, agent, servant or contractor, after service has been rendered or a contract made.

The motion of the Attorney General will, therefore, be sustained, and said claim denied.

(No. 3078—Claimant awarded $1,847.57.)

ELMIRA HEINE, AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR HEINE, Deceased, AND ELMIRA HEINE, INDIVIDUALLY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1941.

MILLER & SHAPIRO, for claimants.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S *COMPENSATION ACT—when uward may be made tinder.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, an award for compensation for same may be made, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

SAME—*medical, surgical and hospital services—procured by employee—when State liable for expense of.* Where the evidence discloses that injured employee required medical, surgical and hospital services, and that he procured same himself, without any objection on the part of the State or any demand by it that he return to a State institution for same, the State is liable for the expense thereof, providing such services were necessary and the charges therefor are reasonable, and an award €or the amount thereof may be made.

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

For several years prior to September 4th, 1936 Arthur Heine was employed as a butcher at the Manteno State Hospital, Manteno, Illinois. On the last mentioned date, while in the line of his employment and while cleaning fish, he ran a fin into the thumb of his right hand. He applied iodine on the wound and continued to work that day and the next day, which was Saturday. He was off work Sunday, and on Monday (Labor Day) the hand began to bother him and he returned from his home in Kankakee to the Manteno State Hospital in order to have the same dressed by the institution physician. Hot applications were applied and Heine was placed in bed at the institution hospital and remained there until Thursday of that week. Not being satisfied with the condition of his hand, 'he then consulted Dr. George Irwin of Kankakee who continued to treat him from September 10th to September 23. From September 23d until October 7 he continued with the treatments prescribed by Dr. Irwin. On October 7th he went to see Dr. John Goodwin of Kanka-

kee, and continued under his care until March 30th, 1937. On October 8th, 1936 he went to St. Mary's Hospital in Kankakee where an operation was performed on his hand on October loth, and where he remained 'until November 12th. By February lst, 1937 his hand had im'proved to such an extent that he could return to work, and on that day he went back to work at the Manteno State Hospital at the same wages that he was receiving prior to the time of his injury.

He paid Dr. Irwin the sum of $35.00 for medical services, and also paid St. Mary's Hospital of Kankakee the sum of $173.30 for hospital services. The bill of Dr. Goodwin for medical and surgical services rendered to Heine was $276.00, which bill has not yet been paid.

Arthur Heine filed his Complaint in this court on April 6th, 1937 and on May 2nd, 1939 he departed this life from other causes than such injury, leaving him surviving the claimant Elmira Heine, his widow, and no children.

Thereafter Elmira Heine was appointed Administrator of the estate of said Arthur Heine, deceased, by the County Court of Kankakee County, and subsequently, pursuant to leave of court theretofore had and obtained, the Complaint herein was amended by substituting Elmira Heine as Administrator of the estate of Arthur Heine, deceased, and Elmira Heine individually as claimants herein.

There is no conflict in the evidence either as to the period of temporary disability, or the extent of the specific loss sustained by said Arthur Heine. Claimant's physician and the attending physician at Manteno State Hospital both agreed that Heine sustained the permanent loss of seventy-five per cent (75%) of the use of his right hand.

A question has been raised as to whether the respondent should be required to pay the medical and surgical bills incurred by Heine. The evidence bearing on this phase of the case is somewhat meagre, but from such evidence and the inferences which may fairly and reasonably be drawn therefrom, it satisfactorily appears that Heine did not reside at the institution; that he went to the institution hospital of his own volition, and mas treated there by the institution physician from Monday, September 7th, until Thursday of that week; that he left the institution of his own accord and consulted Dr. Irwin and thereafter Dr. Goodwin; that the officers at the institution knew of Heine's condition and apparently

knew that he was under the care and treatment of doctors outside the institution; that no complaint was ever made by any of such officers with reference thereto, and no request was ever made by any such officers that Heine return to the State Institution either for hospitalization or for medical treatment.

In discussing a somewhat similar question, our Supreme Court in the case of *Old Ben Coal Corporation* vs. *Ind. Com.*, 311 Ill. 35, said:

"In other words, the employer is not given the right, simply because the employee leaves the hospital to which the employer took him, to avoid all liability for hospital and medical treatment without tendering other services of like character, unless the facts show that the employee, by leaving the hospital, elected to Secure a physician and hospital at his own expense. Whether the plaintiff in error had it tendered competent service of that character after demand for assistance, would have had a right to have the employee treated by the means tendered is not decided, for no such tender was made."

In speaking on the same subject, Angerstein, in his work "The Employer and the Workmen's Compensation Act of Illinois," page 478, says:

"Where request for medical and hospital services is made or the employer knows that they are needed, he should promptly furnish the best services available and the employee should accept them. If the employee has already gone to a hospital or secured his own physician the employer should make a definite and unmistakable tender or offer to provide such services and if the employee refuses to accept them the employer should advise the employee that if he does not accept the servics offered but selects his own the employer will not be liable and that the employee will have to stand the expense. In other words, the employer upon such knowledge or request is required to provide the services and is liable therefor unless the employee elects to select his own services and refuses to accept those offered by the employer. In any such case the employer should make a definite and positive record of offer and refusal"

Under the evidence in this case me are of the opinion that the respondent is liable for the medical and hospital expenses incurred by said Heine as hereinbefore set forth.

From a consideration of the record in this case, we find as follows:

That on September 4th, 1936 said Arthur Heine and respondent were operating under the provisions of the Workmen's Compensation Act of this State.

That on said date said Arthur Heine sustained accidental injuries which arose out of and in the course of his employment.

That notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act.

That the earnings of said employee during the year preceding the accident were $1,137.94, and his average weekly wage was $21.88.

That said employee at the time of the injury was married, and had no children under the age of sixteen years,

That all medical and hospital services from the date of the injury to October 10, 1936 were furnished by respondent, and all medical, surgical and hospital services on and after October 10th, were procured by said employee at his own expense, and that the amount incurred therefor is as follows:

St. Mary's Hospital, Kankakee, Illinois.	$173.30
Dr. George Irwin, Kankakee, Illinois..	35.00
Dr. John Goodwin, Kankakee, Illinois..	276.00

that the bills of St. Mary's Hospital and Dr. Irwin were paid by said employee, and the bill of Dr. Goodwin remains unpaid.

That as the result of such accident said Arthur Heine was temporarily totally disabled from September 7th, 1936 to February 1, 1937, to wit, for the period of twenty-one (21) weeks, and also sustained the permanent loss of seventy-five per cent (75%) of the use of his right hand.

That the sum of Two Hundred Sixty-one Dollars and Thirty-two Cents ($261.32) has been paid to apply on the compensation due as aforesaid.

That the claimants are entitled to have and recover from the respondent the following sums (less the sum of $261.32 heretofore paid as aforesaid), to wit:

a) The sum of Four Hundred Eighty-four Dollars and Thirty Cents ($484.30) for medical, surgical and hospital expenses as aforesaid.

b) The sum of Ten Dollars and Ninety-four Cents ($10.94) per week for twenty-one (21) weeks, to wit, the sum of Two Hundred Twenty-nine Dollars and Seventy-four Cents ($229.74), for temporary total incapacity of said Arthur Heine as aforesaid.

c) The sum of Ten Dollars and Ninety-four Cents ($10.94) per week for One Hundred Twenty-seven and one-half (127½) weeks, to wit, the sum of Thirteen Hundred Ninety-four Dollars and Eighty-five Cents ($1,394.85), for the permanent loss of seventy-five per cent (75%) of the

use of his right hand, pursuant to the provisions of paragraph (e) of Section eight (8) of the Compensation Act.

That all of such compensation has accrued at this time.

That pursuant to the provisions of the Workmen's Compensation Act, the claimant Elmira Heine as Administrator of the estate of Arthur Heine, deceased, is entitled to receive the compensation which has accrued prior to the death of said Arthur Heine, to wit, the medical, surgical and hospital expenses as aforesaid, the compensation for temporary total disability as aforesaid, and the compensation for 117 1/7 weeks specific loss as aforesaid;—less the sum of $261.32 heretofore paid by respondent as aforesaid; and the claimant Elmira Heine individually is entitled to have and receive the compensation which has accrued subsequent to the death of said Arthur Heine, to wit, the compensation for ten and five-fourteenths weeks specific loss as aforesaid.

Award is therefore entered herein as follows:

To Elmira Heine, Administrator of the estate of Arthur Heine, deceased, the sum of Fourteen Hundred Fifty-eight Dollars and Twenty-six Cents ($1,458.26).

To Elmira Heine, Administrator of the estate of Arthur Heine, deceased, for the use of Dr. John Goodwin, the sum of Two Hundred Seventy-six Dollars ($276.00).

To Elmira Heine, individually, the sum of One Hundred Thirteen Dollars and Thirty-one Cents ($113.31).

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,'' (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of art Act entitled ''An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3571—Claimant awarded *$778.00.)*

HAROLD J. RIEFLER, D/B/A STATE CAPITAL INFORMATION SERVICE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opznion filed January 14, 1941.

CLAIMANT, pro se.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SERVICES—*appropriation existing out of which payment could be made—lapse of before payment—when award may be made for value of.* Where it clearly appears that claimant rendered services to the State at the request of its duly authorized officers and on the written approval of its acting governor, which were accepted by it, and for which an appropriation existed out of which payment could be made therefor, an award may be made for compensation for such services, in an amount not in excess of that agreed upon, where such appropriation lapsed before payment was made for same, on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion. of the court:

Claimant Harold J. Riefler operating under the trade name of State Capital Information Service of 404 Leland Annex Building, Springfield, Illinois, claims an award from respondent based upon the following grounds.

That on March 14, 1939 an oral contract was entered into between claimant and respondent by and through' Milburn P. Akers, then Superintendent of the Division of Departmental Reports, to supply elective State officers 'and appointive Division and Departmental heads thereof with a legislative bulletin service; that said contract was entered into at the request and suggestion of Honorable John Stelle then Acting Governor, Lyndon Smith then Director of the Department of Public Works and Buildings, S. L. Nudelman then Director of the Department of Finance and Charles K. Schwartz then Chairman of the Illinois Tax Commission. That under such contract claimant was to be paid $50.00 per week from March 14, 1939 until the close of the regular session of the 61st General Assembly, which in this instance was June 30, 1939.

The claim further recites that claimant faithfully performed all of the provisions of the contract and supplied the elective State officers and Division and Departmental heads with 160 legislative bulletins between the above dates at a total charge of Seven Hundred Seventy-eight ($778.00) Dol-

lars; further that through no fault or negligence of claimant said bill remains unpaid, and that the appropriation out of which same was payable lapsed on September 30, 1939. A Bill of Particulars attached to the claim is duly sworn to by claimant Harold J. Riefler.

In a Statement, Brief and Argument filed by the Attorney General in behalf of respondent counsel submits that in order to justify the allowance of an award in payment of said claim it must appear from the record that there was an appropriation out of which the payments provided for by the contract could be made; that there was a balance remaining in said appropriation out of which such payment might have been made, at the time such appropriation lapsed, and that if such payment was to be made from the contingent fund for reserves provided for by the appropriation contained in an Act making appropriations to the Department of Finance, etc., appearing on page 95 Session Laws 1937, and that compliance with Section 4 of such Act found on page 105 of said Session Laws is shown.

The Appropriation Act above mentioned contains the following proviso: "Reserves—for audits, examinations and investigations, the necessity for which may develop during the biennium—$50,000.00."

Section 4 of the Appropriation Act above referred to provides as follows: "See. 4. No contract shall be entered into or obligation incurred for any expenditure from the appropriation herein made for contingencies and for reserves until after the purpose and amount of such expenditure have been approved in writing by the Governor."

The record herein discloses (Claimant's Exhibit "A") a report by Milburn P. Akers former Superintendent of the Division of Departmental Reports from which it appears that while the Honorable John Stelle was Acting Governor of the State of Illinois claimant was called into conference with the latter and with the then Director of Finance, the then Director of the Department of Public Works and Buildings, and the then Chairman of the Illinois Tax Commission, on March 14, 1939 at which time a discussion as to the need of an up-to-the-minute information service for the Governor and Departmental heads was had, and at which time the services of claimant were engaged and contracted for whereby claimant was to examine and investigate the reports, bills and other

legislative matters transacted by the General Assembly of the State of Illinois from day to day and to prepare and deliver to the Division of Departmental Reports a report thereof which would be upon the desks of the several officers each morning. Claimant's Exhibit "A" further shows that such reports were prepared and were distributed through the Department of Finance to all elective, executive and administrative officers, and appointed Departmental heads located in the city of Springfield. Claimant's Exhibit "A" further shows that the contract price agreed upon was $50.00 per week, to start as of the date of such contract, i. e. March 14, 1939 and to continue until the close of the regular legislative session of the 61st General Assembly, i. e. June 30, 1939; further that there lapsed in the contingent fund of the Department of Finance out of which this contract was payable the sum of $43,373.58.

A further report appearing herein, signed by A. M. Carter, Director of Finance under date of January 2, 1941 discloses that there is contained in the office of the Superintendent of the Division of Reports, a branch of the Division of Finance, a complete file of the bulletins furnished under the foregoing contract, the first of such bulletins showing date of March 14, 1939 and the last i. e. No. 160 being dated June 30,1939.

A further report signed by Alexander Wilson, Administrative Assistant during the Administration of His Excellency Henry Horner and of His Excellency John Stelle as Governors of Illinois, states that Mr. Wilson had personal knowledge of the nature of the service rendered by claimant and that such service permitted the Governor's office to keep advised at all times of the progress of bills in the various committees and on the calendars of the 61st General Assembly, and that such service was timely and accurate.

Compliance with the requirement prescribed by Section 4 of the Appropriation Act above quoted appears in the record as Exhibit "B" in words and figures as follows, i. e.:

"SPRINGFIELD, ILLINOIS
March 14, 1939

EXHIBIT "B"

For the purpose of examining pending legislative matters and obtaining prompt reports thereon and making same available to the Governor's office and various departmental heads, approval is hereby given for retaining the services of the State Capital Information Service or such similar agency as

may be available for reporting of such matters, such service to be delivered from this date, March 14, 1939, until the end of this regular session of the legislature at a cost not to exceed Fifty ($50.00) Dollars per week.

(Signed) JOHN STELLE, *Acting Governor.*"

From a consideration of the entire record the court finds that due authority for contracting the services rendered by claimant existed; that the services for which payment is requested were in fact rendered by claimant to the State of Illinois; that due approval for incurring the expenses of such service was obtained in writing from the then Acting Governor of Illinois, the Honorable John Stelle; that an appropriation out of which such expenses might be paid existed, and that at the time such contract was entered into and at the time such appropriation lapsed, a balance remained therein sufficient out of which such payment could be made. The court further finds that payment for said services has not been made and that claimant is entitled to payment therefor.

Wherefore an award is hereby made in favor of claimant Harold J. Riefler operating under the trade name of State Capital Information Service for the sum of Seven Hundred Seventy-eight ($778.00) Dollars.

(No. 3280—$1,307.35.)

MARIE SMITH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 14, 1941.

MCMILLEN, MCMILLEN & GARMAN, for claimant.

JOHN E. CASSIDY, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award for compensation under may Be made.* 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 for compensation may be made therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

For some months prior to November. 4, 1937, claimant was employed by respondent as an attendant at the Elgin State Hospital, Elgin, Illinois. During the time she was so employed she lived in the employees' hall and took her meals

in the employees' dining room, both located on the hospital grounds. On the last mentioned date, about 5:35 p. m., she went to the employees' dining room for her evening meal. After the meal she left the dining room by the regular exit on the east side of the building.

Immediately outside such exit is a platform which ordinarily is lighted by an electric light. On the evening in question, however, no light was burning, and when claimant stepped outside she inadvertently stepped over the edge of the platform and fell to the ground. She was taken to the institution hospital, where a roentgenological examination revealed a comminuted fracture of the upper end of the right humerus involving the head and shaft, associated with displacement. On account of the severity of the fracture claimant was sent to the Illinois Research Hospital on November 6, 1937, where the fracture was reduced and a cast placed on the arm. On November 8, 1937, she returned to the Elgin State Hospital, where she remained until June 4, 1938.

During that period she received considerable physiotherapy and other treatments, and went to the Illinois Research Hospital for further examination and treatment about every two weeks. The cast was removed from the body and arm on March 11, 1938, and on June 30, 1938, claimant was reexamined by Dr. George A. Wiltrakis of the institution staff.

Claimant personally appeared before the court for examination. From the testimony in the record and the examination in open court, it appears that she has a limitation of abduction and extension of the right arm; some impairment of power of supination of right forearm; some limitation of power flexion of the right fingers and thumb, and a general diminished motor power of the right hand.

From a consideration of the evidence in the record we find as follows:

That on November 4, 1937, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on such date claimant sustained accidental injuries which arose out of and in the course of her employment; that notice of the accident was given to said respondent, and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of the claimant during the year preceding the accident were Nine Hundred Sixty-eight Dol-

lars and Forty Cents ($968.40), and her average weekly wage was Eighteen Dollars and Sixty-two Cents ($18.62); that claimant at the time of the injury was .fifty-six (56) years of age; that all necessary first aid, medical, surgical and hospital services were provided by the respondent; that claimant was temporarily totally disabled from the date of her injury as aforesaid to July 1, 1938, to wit, for a period of thirty-four (34) weeks; that she also suffered the permanent loss of fifty per cent (50%) of the use of her right arm; that the sum of Fifty-six Dollars and Fifty-six Cents ($56.56) has been paid by respondent to apply on the compensation due the claimant as aforesaid.

We further find that claimant is entitled to have and receive from the respondent the sum of Nine Dollars and Thirty-one Cents ($9.31) per week for thirty-four (34) weeks' temporary total disability, in accordance with the provisions of paragraph (b) of Section eight (8) of the Compensation Act, and the further sum of Nine Dollars and Thirty-one ($9.31) per week for a period of One Hundred Twelve and One-half (112½) weeks for the permanent loss of fifty per cent (50%) of the use of the right arm, in accordance with the provisions of paragraph E-13 of Section eight (8) of such Act, less the sum of Fifty-six Dollars and Fifty-six Cents ($56.56) heretofore paid by the respondent.

We further find that all of the compensation due to claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Marie Smith, for the sum of Thirteen Hundred Seven Dollars and Thirty-five Cents ($1,307.35).

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable

from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3560—Claimant awarded $4,000.00.)

FRANCES CURE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for death of employee under.* Where employee of State 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 may be made for compensation therefor, to those legally entitled, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

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

On September 27,1940, Edmund Cure was in the employ of the respondent in the Division of Highways, and in the course of his employment was mowing weeds with his team and mower along the right-of-way of U. S. Route 54, between 127th Street and Ridgeland Avenue in the City of Chicago. For some unknown reason the team ran away and Cure was thrown to the ground and thereby sustained injuries from which he died on the same day.

From a consideration of the facts in the record we find as follows:

1. That on the 27th day of September, 1940, the said Edmund Cure and the respondent were operating under the provisions of the Workmen's Compensation Act; that on said date said Edmund Cure sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent, and claim for compensation on account thereof was made within the time required by the provisions of said Act; that all necessary first aid, medical and hospital services were furnished by the respondent.

2. That the said Edmund Cure was in the employ of the respondent for less than one year prior to the 27th day of September, A. D. 1940; was working eight (8) hours a day,

and was paid sixty-two and one-half cents (62½c) an hour; that in the employment in which he was engaged it was the custom to operate for a part of the whole number of working days in each year; that Cure's annual earnings, computed in accordance with the provisions of Section 10 of the Workmen's Compensation Act, were One Thousand Dollars ($1,000.00) a year, and his average weekly wage was Nineteen Dollars and Twenty-three Cents ($19.23).

3. That said Edmund Cure left him surviving the claimant, Frances Cure, his widow, and no child or children under the age of sixteen (16) years.

4. That under the provisions of Section 7 of the Workmen's Compensation Act, the amount of compensation to be paid by the respondent on account of the death of said Edmund Cure is Four Thousand Dollars ($4,000.00); that under the provisions of Sections 7 and 8 of such Act, such compensation is payable in weekly installments of Ten Dollars and Fifty-eight Cents ($10.58), commencing September 28, 1940.

5. That compensation in the amount of Two Hundred One Dollars and Two Cents ($201.02) has accrued from September 28th, 1940, to February 8, 1941.

Award is therefore hereby entered in favor of the claimant, Frances Cure, for the sum of Four Thousand Dollars ($4,000.00), payable as follows:

a) The sum of $201.02, being the amount of compensation which has accrued from September 28,1940, to February 8, 1941, shall be paid forthwith.

b) The balance of such compensation, to wit, the sum of Thirty-seven Hundred Ninety-eight Dollars and Ninety-eight Cents ($3,798.98), shall be paid in three hundred fifty-nine (359) consecutive weekly payments of Ten Dollars and Fifty-eight Cents ($10.58) commencing 'February 15, 1941, and one final payment of Seventy-six Cents (76c).

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 327, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of

the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(*No.* 3549—Claim denied.)

NEVA J. DUGGER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

EDWARD PREE and HAROLD WARNER, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State—pelsonal injury resulting from—State not liable for—award for damages on grounds of equity and good conscience cannot be made.* In the exercise of its governmental functions the State is not liable for damages occasioned by the negligence of its officers, agents or employees. Regardless of the merits of a claim for damages, for personal injuries, or damages to property, sustained as the result of such negligence, or the extent of such damages or seriousness of such injuries, or the degree of negligence, or the absence of contributory negligence, no award can be made on the grounds of equity and good conscience.

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

The complaint herein alleges in substance that on the 24th day of July, A. D. 1940 the claimant slipped and fell while walking near the west entrance on the first floor of the Capitol Building in the City of Springfield; that it was the duty of the respondent to keep said premises in a safe condition; that the servants, agents and employees of the respondent carelessly and negligently placed upon the floor of said building a certain substance which caused the floor to become very slippery; that by reason thereof the claimant slipped and fell as aforesaid, and thereby sustained injuries to her knee and ankle; that in consequence of said injuries she was compelled to and did incur expenses for doctor bills, medicine, etc., and she therefore asks an award in the amount of One-Thousand Dollars ($1,000.00).

The Attorney General has filed a motion to dismiss for the reason that the claim is predicated upon an alleged liability of the respondent for the negligent and wrongful acts of its officers, agents or employees while engaged in a governmental function, and therefore does not set forth a claim which the State as a sovereign commonwealth should discharge and pay.

The State Capitol is the seat of the legislative and executive branches of the State Government and each of the several departments of the State Government created by the Civil Administrative Code is required to maintain a central office in such building, of which the Secretary of State is made custodian.

There can be no question but what the State in the maintenance of the State Capitol is engaged in a governmental function. It is a rule of very general application in this and other States that in the exercise of its governmental functions, the State is not liable for the negligence of its servants and agents. *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. App. 102; *Gebhardt* vs. *Village of LaGrange Park,* 354 Ill. 235; *LePetre* vs. *Chicago Park District,* 374 Ill. 184.

Claimant admits that the general rule is as above set forth, but contends that there is an exception to the general rule in cases where the injuries sustained by the claimant are directly attributable to the gross negligence or wanton misconduct of *an* agent of the State and are not the result of contributory negligence on the part of the claimant, and takes the position that in such cases the State in equity and good conscience should make payment for the damages sustained.

There is nothing in the record to indicate any gross negligence or wanton misconduct on the part of any agents of the State, but even if such gross negligence or wanton misconduct were shown, there would be no liability on the part of the State.

It is true that this court in some earlier cases recognized an exception to the general rule as contended for by claimant, but the cases .recognizing such exception have been over-

ruled and this court has repeatedly held that in all cases where the State is in the exercise of a governmental function, there is no liability on its part for the negligence of its servants and agents.

The question, was squarely raised upon the petition for rehearing in the case of *Garbutt* vs. *State*, reported in 10 C. C. R. 37. In that case the same contention was made as in the present case, and upon consideration thereof we said, page 41:

"Even if it be conceded that the facts in the record do show that the servants and agents of the respondent were guilty of gross and wanton negligence, and that the claimant's intestate was free from contributory negligence, still under the repeated decisions of the court, the claimant is not entitled to an award.

"As stated in the original opinion, during a certain period in the history of this court, awards were made in certain cases in which there was no legal liability on the part of the State. In the earlier cases so decided, the facts appealed very strongly to the sympathies of the court, and the awards there made were attempted to be justified on the grounds of "equity and good conscience."

"Thereafter the court apparently recognized the dangerous tendency of such decisions, and the extent to which they were being carried, and gradually began to get back to the earlier decisions of the court, to the effect that 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.

"In the course of such transition, awards were allowed in certain cases where the claimant was free from contributory negligence, and the servants and agents of the respondent were guilty of gross and wanton negligence, and such awards were attempted to be justified on the ground that such cases constituted an exception to the general rule that the State is not liable for the acts of its servants and agents under the doctrine of respondeat superior.

"If the State is not liable for the ordinary negligence of its servants and agents, there is no principle of law under which it can be held liable for the gross or wanton negligence of such servants and agents, in the absence of a statute making it so liable. The purported exception has no basis in law, and is ne longer recognized by this court."

The rule above set forth has been adhered to in the following cases since decided, to wit: *Durkiewiecz* vs. *State*, 10 *C. C.* R. 61; *Stanley, Admr.* vs. *State*, 10 *C.* C. R. 146; *Sale, Admx.* vs. *State*, 10 *C. C.* R. 379; *Bishop, et al.* vs. *State*, 10 C. C. R. 664.

Under the law as applied by this court in the cases above cited, the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3563—Claimant awarded $3,200.00.)

FLORENCE CARNAHAN DUNCAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for compensation. for death of employee under.* Where employee of State 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 may be made therefor, to those legally entitled thereto, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

SAME—*same—lump sum settlement—not authorized where beneficiary is widow without children.* Provision of Workmen's Compensation Act for payment of compensation in a lump sum is not applicable where award is to widow without children.

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

On the 8th day of November, A. D. 1940, Joseph Duncan was in the employ of the Bureau of Maintenance, Division of Highways of the respondent, and mas working at a gravel pit located near S. B. I. Route No. 1, about a half mile northwest of Oliver, Illinois. On that day, while working at the pit, he was caught in a slide of the gravel bank and completely covered thereby. By the time the gravel was removed from the body, said employee mas dead.

From a consideration of the facts in the record, we find as follows:

1. That on the 8th day of November, A. D. 1940 the said Joseph Duncan and the respondent were operating under the provisions of the Workmen's Compensation Act; that on said date Joseph Duncan sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent, and claim for compensation on account thereof was made within the time required by the provisions of said Act.

2. That the said Joseph Duncan was in the employ of the respondent for less than one year prior to November 8, 1940, was working eight (8) hours a day, and was paid fifty

cents (50c) per hour; that, in the, employment in which he was engaged, it was the custom to operate for a part of the whole number of working days in each year; that Duncan's annual earnings, computed in accordance with the provisions of Section 10 of the Workmen's Compensation Act were Eight Hundred Dollars ($800.00) and his average weekly wage was Fifteen Dollars and Thirty-eight Cents ($15.38).

3. That said Joseph Duncan left him surviving the claimant, Florence Carnahan Duncan, his widow, and no child or children under the age of sixteen (16) years.

4. That under the provisions of Section 7 of the Workmen's Compensation Act, the amount of compensation to be paid by the respondent on account of the death of said Joseph Duncan is Thirty-two Hundred Dollars ($3,200.00); that under the provisions of Sections 7 and 8 of such Act, such compensation is payable in weekly installments of Eight Dollars and Forty-six Cents ($8.46) commencing November 9, 1940.

5. That compensation in the amount 'of One Hundred Nine Dollars and Ninety-eight Cents ($109.98) has accrued from November 9, 1940 to February 8, 1941.

Award is therefore hereby entered in favor of the claimant, Florence Carnahan Duncan, for the sum of Thirty-two Hundred Dollars ($3,200.00), payable as follows:

a) The sum of One Hundred Nine Dollars and Ninety-eight Cents ($109.98), being the amount of compensation which has accrued from November 9, 1940 to February 8, 1941, shall be paid forthwith.

b) The balance of such compensation, to wit, the sum of Three Thousand Ninety Dollars and Two Cents ($3,090.02), shall be paid in Three Hundred Sixty-five **(365)** consecutive weekly payments of Eight Dollars and Forty-six Cents **($8.46)** commencing February 15, 1941, and one final payment of Two Dollars and Twelve Cents ($2.12).

Claimant has asked that this award, or a portion thereof, be paid in a lump sum, in order that she may make payment of her husband's funeral expenses and a mortgage on the homestead. However, our Supreme Court has held that in cases where there is **a** surviving widow and no child or children, there is no authority under the Workmen's Compensation Act for the commutation of the award to an equivalent lump sum.

Illinois Zinc Co. vs. Ind. Com., 366 Ill. 480.

The rule there announced was followed by this Court in the case of *Anna Tull* vs. *State*, 10 C. C. R. 713.

The petition for the payment of the award in a lump sum must therefore be denied.

The award herein made being subject to the provisicns of an Act entitled "An Act Making an Appropriation to Pay Compensation Claims of State Employees and Providing for the Method of Payment Thereof," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3415—Claimant awarded $150.00.)

HAROLD LESCH, SON OF CHARLES H. LESCH, DECEASED AND SAMUEL H. SHAPIRO, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF CHARLES H. LESCH, DECEASED, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

MILLER & SHAPIRO, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*injuries resulting in death of employee under—leaving no dependents—award may be made for funeral expenses and to State Treasurer for Workmen's Special Fund.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in his death and left him surviving no widow, no child or children under sixteen years of age, no parent, no grand parent, grand child or grand-children, collateral heirs or others dependent upon him in whole or in part for their support, an award may be made for an amount not to exceed $150.00 for the expense of his burial to one incurring the expense thereof, and to the State Treasurer the sum of $600.00 in accordance with Paragraph (e) of Section 7 of the Act, upon compliance with the requirements thereof.

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

On April 7, 1939, and for a long time prior thereto, Charles H. Lesch was in the employ of the respondent as a skilled laborer, his duties being to operate an auto patrol grader for maintaining gravel shoulders adjoining the concrete pavement on U. S. Route 52, from Kankakee northwest. On the last mentioned date he took the grader to the division garage in Ottawa for minor repairs, and was returning same to the regular station in Kankakee pursuant to instructions of his assistant maintenance foreman, and while crossing the tracks of the C. R. I. & P. Railroad at Morris, Illinois, was struck by the train known as the Golden State Limited and was instantly killed.

Thereafter Samuel H. Shapiro was duly appointed Administrator with the Will Annexed of the estate of said Charles H. Lesch, deceased, and said Administrator and Harold Lesch, son of decedent, have filed their joint complaint herein asking for an award under the provisions of the Workmen's Compensation Act of this State on account of the death of said decedent.

From a consideration of the facts in the record we find as follows:

1. That on the 7th day of April, A. D. 1939, the said Charles H. Lesch and the respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date said Charles H. Lesch sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent, and claim for compensation on account thereof was made within the time required by the provisions of said Act.

2. That the annual earnings of said Charles H. Lesch during the year next preceding the accident were Eight Hundred Seventy-three Dollars and Fifty Cents ($873.50) and his average weekly wage was Sixteen Dollars and Eighty Cents ($16.80).

3. That said Charles H. Lesch left him surviving no widow, no child or children under sixteen (16) years of age; no parent; no grand-parent, grand-child or grand-children, collateral heirs or others dependent upon him in whole or in part for their support.

We further find that under the provisions of paragraph (e) of Section Seven (7) of the Workmen's Compensation Act in force at the time of the accident, the respondent is liable for funeral expenses of the decedent in an amount not to exceed One Hundred Fifty Dollars ($150.00), which amount is to be paid to the person incurring the expense of burial. The evidence discloses that the claimant, Samuel H. Shapiro, as Administrator with the Will Annexed of the estate of said decedent, paid such funeral expenses and that the same exceed One Hundred Fifty Dollars ($150.00). He is therefore entitled to be reimbursed therefor by the respondent to the extent of $150.00.

We further find that pursuant to the further provisions of said paragraph (e) of Section Seven (7) of the Workmen's Compensation Act, in force at the time of the accident, the respondent is also required to pay into a special fund, of which the State Treasurer is ex-officio custodian, the sum of Six Hundred Dollars ($600.00).

Award is therefore hereby made as follows:

a) To Samuel H. Shapiro, as Administrator with the Will Annexed of the estate of said decedent, in re-payment for funeral expenses advanced by him, the sum of One Hundred Fifty Dollars ($150.00).

b) To the State Treasurer of the State of Illinois as ex-bfficio custodian of the Workmen's Compensation Special Fund, the sum of Six Hundred Dollars ($600.00), said sum to be held and disbursed by said State Treasurer in accordance with the provisions of the Workmen's Compensation Act of this State.

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July **1,** 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable

from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3077—Claims denied.)

EVELYN MATHIEU, ADMINISTRATRIX OF THE ESTATE OF FLOYD MATHIEU, DECEASED AND GEORGE GARDNER, ADMINISTRATOR OF THE ESTATE OF TOMMIE GARDNER, DECEASED, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

GEORGE W. DOWELL and CARL PREIHS, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State Highway Department—death alleged to have resulted therefrom—State not liable for damages.* In the construction and maintenance of its public highways, the State is acting in a governmental capacity, and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition, or any malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith.

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

The complaint herein alleges in substance as follows:

That for a long time prior to and on the 4th day of August, A. D. 1935, the respondent was the owner of and possessed of a certain bridge known as North Fork Bridge which was a part of S. B. I. Route No. 2 and was located about one and one-half (1½) miles north of the Village of Patoka; that the respondent through its Department of Public Works and Buildings and its Chief Highway Engineer carelessly and negligently constructed such bridge of a width of sixteen (16) feet, eight (8) inches, being one (1) foot, four (4) inches less than the concrete pavement on either side thereof; that such condition was dangerous to automobiles and trucks meeting or passing on such bridge; that on said 4th day of August, A. D. 1935, about eleven o'clock P. M. one Ross White mas driving his truck in a southerly direction on said S. B. I. Route No. 2 over said bridge; that Floyd Mathieu and Tommie Gardner, as well as a number of other persons, were riding as passengers in said truck; that when said truck was near the south end of said bridge, another truck drove upon

said bridge from the south and collided with the truck in which the said Floyd Mathieu and Tommie Gardner were riding as passengers; that as a result thereof the said Floyd Mathieu and Tommie Gardner were killed; that thereafter Evelyn Mathieu was duly appointed Administratrix of the estate of said Floyd Mathieu, deceased, and George Gardner was duly appointed Administrator of the estate of said Tommie Gardner, deceased; that the said Floyd Mathieu and Tommie Gardner at the time of the accident were in the exercise of all due care and caution, and that said accident occurred as the result of the carelessness and negligence of the respondent in constructing and maintaining said bridge of the width of one (1) foot, four (4) inches less than the concrete pavement at either end of said bridge; and that each of said claimants seeks an award in the amount of Ten Thousand Dollars ($10,000.00).

The respondent has filed a motion to dismiss the complaint for the reason that it does not set forth a claim which the State of Illinois as a sovereign commonwealth should discharge and pay.

We have repeatedly held that in the construction and maintenance of its system of State highways the State is acting in a governmental capacity. *Spurrell* vs. State, 10 C. C. R. 74; *Tivnan* vs. State, 9 C. C. R. 495; *McGready* vs. State, 9 C. C. R. 63; *Baumgart* vs. State, 8 C. C. R. 220; *Bucholz* vs. State, 7 C. C. R. 241; Braun vs. State, 6 C. C. R. 104.

It has been uniformly held in this State that in the exercise of its governmental functions, the State is not liable for the negligence of its agents or employees, in the absence of a statute making it so liable. *Minear* vs. State Board of Agriculture, 259 Ill. 549; *Gebhardt* vs. Village of *LaGrange Park*, 354 Ill. 234; City of Chicago vs. Williams, 182 Ill. 135; Royal vs. State, 9 C. C. R. 67; Ryan vs. State, 8 C. C. R. 361; *Wilson* vs. *State*, 8 C. C. R. 72; *James H.* Wolfe, et *al.* vs. State, 10 C. C. R. 324; 25 R. C. L. p. 407, sec. 43.

Under the law as above set forth, the motion of the respondent must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3063—Claimant awarded $334.65.)

LLOYD OWENS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed. February 11, 1941.

JOHN W. FRIBLEY, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for permanent loss of use of arm—injured employee not working steadily in employment—based on 200 day year.* Where employee of State, not steadily employed, sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in permanent loss of use of his right arm, an award for compensation for such injuries and loss may be made, based on the earnings of such employee on a 200 day year, in such employment, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Lloyd Owens, claimant, twenty-seven years of age, married, but having no children under sixteen years of age, was employed by Mrs. Dorothy Kay, in her capacity as Assistant Director of the Department of Public Welfare of the State of Illinois, at the rate of Six Dollars ($6.00) per day, and on the 13th day of August, 1936, while engaged in preparing a booth for an exhibit of the Department of Public Welfare of the State of Illinois, for exhibition to the visitors at the Illinois State Fair, Dorothy Kay and the claimant and another helper, were engaged in removing a lattice fence adjacent to an 18 foot stage. The other worker was underneath the stage with a crow-bar in an attempt to remove the stage, and claimant was assisting in attempting to push the fence and stage. It suddenly came loose and claimant's wrist and right hand were caught between the fence and the stage. Dorothy Kay was present. Claimant's wrist was sprained and twisted, and the back of his hand was cut. Dorothy Kay directed him to receive first aid from the Fair Grounds. Claimant went back to work the next day with his wrist bandaged and continued to work for some two or three weeks, but finally called upon Dr. John J. Donovan of Springfield, Illinois.

Claimant claims that he suffered much pain and had a lack of strength in his hand, wrist and fingers. Dr. Donovan made a cast to fit his hand and wrist which went part way up

the arm, from which a brace was made. The State paid for that.

It was Dr. Donovan's opinion that there was a permanent injury and that there was a twenty-five to fifty per cent disability of the use of his right wrist. No bones were broken, and from Dr. Donovan's examination some two or three meeks after the injury, he determined that the pain and weakness in the wrist and hand was caused by the annular ligament of the wrist having been partially torn causing an abnormal amount of motion between the ulna and radius, with crepitus of the two bones when the wrist was rotated. Dr. Donovan found that no bones had been fractured.

Sometime after that, Dr. Paul H. Harmon examined claimant's wrist. Dr. Harmon is a surgeon, duly licensed to practice medicine and surgery in the State of Illinois, and specializes in surgery, being employed in the Department of Public Welfare of the State of Illinois, and being director of the crippled childrens' services in the State of Illinois, which includes supervision of the surgeons who carry out this type of work. The field in which Dr. Harmon is engaged concerns itself with the diseases of the bones and joints, muscles and tendons, especially all diseases of the extremities. Dr. Harmon is also engaged in the practice of orthopaedic surgery.

It would thus appear that the claimant had the benefit of examination by two competent medical men. Claimant's principal injury seems to have been in the wrist joint and the compensation act dces not make any specific provision for loss of motion in the wrist joint. From the testimony of Dr. John J. Donovan, it would appear that claimant's wrist joint was twenty-five to fifty per cent less useful. From the testimony of Dr. Harmon it would appear that there is a twenty-five per cent limitation of the motions of flexion, extension, hyper-extension, ulnar deviation and radial deviation, but that there was practically no limitation of motion to claimant's right wrist as to pronation and suppination. It would also appear from Dr. Harmon's testimony that at the time of claimant's examination, claimant had a disability of about thirty-five per cent of the entire use of his right hand, but that in his opinion if the claimant ceased to use the brace which he customarily wore, that additional motion would be gained by the claimant in the injured wrist.

It appears that the claimant was not working steadily at this job, and therefore, under the Compensation Act, his weekly compensation must be determined on a 200 day year. His annual wages, therefore, must be $1,200.00, and his weekly wage would be 1/52 of that, or $23.08. This would make his compensation rate $11.54 per week since claimant did not have any children under sixteen years of age at the time of the injury.

We, therefore, find that claimant's injury arose out of and in the course of his employment; that his superior officer was present at the time of his injury and had notice thereof; that claim was filed within a year.

Considering the testimony of both doctors and harmonizing that testimony, me are of the opinion that the claimant has suffered a ten per cent permanent loss of his whole right arm, and is entitled to the sum of $259.65, being 10% of 225 weeks at $11.54 per week. We also find that Dr. John J. Donovan is entitled to the sum of $75.00 for medical care and attention.

An award, therefore, is recommended to Lloyd Owens, claimant, for the purpose herein mentioned, in the sum of $259.65, and an award is recommended for Dr. John J. Donovan, in the sum of $75.00

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Lams 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3570—Claimant awarded **$35.50.)**

PROTHERO & WILLIS, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

CLAIMANTS, pro *se.*

GEORGE F. BARRETT, Attorney General; GLENN **A. TREVOR,** Assistant Attorney General, for respondent.

SUPPLIES, *SERVICES—lapse of appropriation out of which could be paid—before presentment of bill—when award may be made for amount due.* Where it clearly appears that State used equipment and accepted services of claimants in furnishing same, and that bill therefor **was** not presented before lapse of appropriation out of which it could be paid, due to no negligence on their part, an award may be made for the reasonable value thereof, on claim filed within a reasonable time.

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

Claimants ask for an award in the amount of Thirty-five Dollars and Fifty Cents ($35.50) for eight and one-half hours' use of tractor at Three Dollars ($3.00) per hour, and five hours' use of truck at Two Dollars ($2.00) per hour, in connection with the removal to the grounds of the Illinois Soldiers & Sailors' Children's School at Normal, Illinois, of certain shrubbery and nursery stock which had been donated to the institution. The tractor was used on May 6, 1939 and the truck on May 12, 1939, but the bill for the use thereof was not presented to the institution until a year later, at which time payment could not be made by the institution authorities for the reason that the appropriation out of which the same was payable lapsed September 30, 1939.

The record does not indicate who ordered the hiring of the tractor and truck, but apparently the same were used with the approval of the Managing Officer of the institution.

There is no question but what the services were rendered as claimed; that the same were approved by the Managing Officer of the institution; that the amount of the claim is reasonable; and that there has been no unreasonable delay on the part of the claimant in presenting its claim.

We have held in numerous cases that under such circumstances the claimant is entitled to an award. *Rock Island Sand and Gravel* Co. vs. *State,* 8 C. **C.** R. **165;** *Indian Motor-*

cycle Co. vs. *State*, 9 C. *C*. R. 526; *Wabash Telephone* Co. vs. *State*, 10 C. C. R. 211.

Award is therefore entered in favor' of the claimant, Prothero and Willis, for the sum of Thirty-five Dollars and Fifty Cents ($35.50).

(No. 3564—Claimant awarded $4,450.00.)

JOSEPHINE VONHATTEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed February 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made tinder for death of employee.* Where employee of State 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 may be made for compensation therefor, to those legally entitled, in accordance with the provisions of the Act, upon compliance with the requirements thereof.

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

Between August 16,1940, and October 4, 1940, Alvin Von Hatten was employed as a patrolman's first helper in the maintenance branch of the Division of Highways of the respondent. On the last mentioned date, while assisting in resurfacing the floor of a bridge known as the Sweigler Bridge, located on U. S. Route No. 50 near Shattuck, Illinois, a kettle of heated asphalt tipped forward and covered the body of said Alvin VonHatten below the chest, inflicting burns from which he died the same day.

Said Alvin VonHatten left him surviving the claimant, Josephine VonHatten, his widow, and James VonHatten, aged five years, his only child, both of whom were totally dependent upon him for their support.

Although Alvin VonHatten had been in the employ of the respondent as patrolman's first helper but forty-two (42) days, the evidence shows that persons of the same class in the same employment and same location worked more than three hundred (300) days a year, on an average of eight (8) hours a day, and were paid sixty cents (60c) per hour.

Upon a consideration of the facts in the record we find as follows:

1. That said Alvin VonHatten and the respondent were on the 4th day of October, A. D. 1940, operating under the provisions of the Workmen's Compensation Act of this State; that on said date said Alvin VonHatten sustained accidental injuries which arose out of and in the course of his employment and which resulted in his death on the same date; that notice of said accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of said Alvin VonHatten during the year next preceding the injury, computed in accordance with the provisions of Section Ten (10) of the Workmen's Compensation Act, were Fourteen Hundred Forty Dollars ($1,440.00), and his average weekly wage was Twenty-seven Dollars and Sixty-nine Cents ($27.69); that the necessary first aid, medical and hospital services were provided by the respondent.

2. That said Alvin VonHatten left him surviving the claimant, Josephine VonHatten, his widow, and James VonHatten, his only child, aged five years, both of whom were totally and equally dependent upon the earnings of said Alvin VonHatten for their support and maintenance.

3. That under the provisions of Section 7-a and Section 7-h-3 of the Workmen's Compensation Act, the amount of compensation to be paid by the respondent on account of the death of said Alvin VonHatten is Forty-four Hundred Fifty Dollars ($4,450.00); that under the provisions of Sections 7 and 8, such compensation is payable in weekly installments of Sixteen Dollars and Fifty Cents ($16.50) per week, commenting October 5, 1940.

4. That the share of such compensation which otherwise would be payable to said James VonHatten should be paid to his mother, Josephine VonHatten, for the support of said child.

5. That the amount of compensation which has accrued from October 5, 1940, to February 8, 1941, to wit, eighteen (18) weeks at $16.50 per week, is Two Hundred Ninety-seven Dollars ($297.00).

It is therefore hereby ordered as follows:

A) That the share of such compensation which would otherwise would be payable to said James VonHatten shall

be paid to his mother, Josephine VonHatten, for the support of said child.

B) That an award be and the same is hereby entered in favor of the claimant, Josephine VonHatten, for the sum of Forty-four Hundred Fifty Dollars ($4,450.00), payable as follows, to wit :

The sum of Two Hundred Ninety-seven Dollars ($297.00), being the amount of compensation which has accrued from October 5,1940, to February 8,1941, shall be paid forthwith.

The balance of such compensation, to wit, the sum of Forty-one Hundred Fifty-three Dollars ($4,153.00), shall be paid in Two Hundred Fifty-one '(251) weekly payments of Sixteen Dollars and Fifty Cents ($16.50), commencing February 15, 1941, and one final payment of Eleven Dollars and Fifty Cents ($11.50).

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the nest Regular Session of the General Assembly,'' approved July **1,** 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. **3076—Claim denied.)**

ROSS WHITE, ANDY FRIS, TED DOCKERTY, BEN JANCHEWSKI, JOHN SAIZ AND STANLEY BLAKEY, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion filed February **11, 1941.***

GEORGE W. DOWELL and CARL PREIHS, for claimants.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State Highway Department—resulting in personal injury and damage to property—State not liable for.* In the construction and maintenance of its public highways the State is acting in a governmental capacity and is not liable for damages caused by either a defect in the construction or failure to maintain same in a safe condition or any malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith.

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

The claimants, Ross White, Andy Fris, Ted Dockerty, Ben Janchewski, John Saiz and Stanley Blakey, filed their joint complaint in this court on the 5th day of April, A. D. 1937, and allege therein in substance that for a long time prior to and on the 4th day of August, A. D. 1935, the respondent was the owner of and possessed of a certain bridge known as North Fork Bridge, which was a part of S. B. I. Route No. 2 and was located about one and one-half (1½) miles north of the Village of Patoka; that the respondent through its Department of Public Works and Buildings and its Chief Highway Engineer carelessly and negligently constructed such bridge of a width of sixteen (16) feet eight (8) inches, being one (1) foot four (4) inches less than the concrete pavement on either side thereof; that such condition was dangerous to automobiles and trucks meeting or passing on such bridge; that on said 4th day of August, A. D. 1935, about eleven o'clock p. m., the claimant, Ross White, was driving his truck in a southerly direction on said S. B. I. Route No. 2 over said bridge; that the other claimants in this proceeding were riding as passengers in said truck; that when said truck was near the south end of said bridge, another truck drove upon said bridge from the south and sideswiped the truck in which the claimants were riding, whereby said last mentioned truck was damaged and each of the claimants sustained personal injuries; that the claimants were in the exercise of all due care and caution, and that said accident occurred as the result of the carelessness and negligence of the respondent in constructing and maintaining said bridge of the width of one (1) foot four (4) inches less than the concrete pavement at either end of said bridge; and that each of said claimants asks for an award in the amount of Two Thousand Dollars ($2,000.00).

The respondent has filed a motion to dismiss the complaint for the reason that it does not set forth a claim which

the State of Illinois as a sovereign commonwealth should discharge and pay.

We have repeatedly held that in the construction and maintenance of its system of State highways the State is acting in a governmental capacity. *Spurrell* vs. *State*, 10 C. C. R. 74; *Tivnan* vs. *State*, 9 C. C. R. 495; *McGready* vs. *State*, 9 C. C. R. 63; *Baumgart* vs. *State*, 8 C. C. R. 220; *Bucholz* vs. *State*, 7 C. C. R. 241; *Braun* vs. *State*, 6 C. C. R. 104.

It has been uniformly held in this State that in the exercise of its governmental functions the State is not liable for the negligence of its agents or employees, in the absence of a statute making it so liable. *Minear* vs. *State Board of Agriculture*, 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park*, 354 Ill. 234; *City of* Chicago vs. *Williams*, 182 Ill. 135; *Royal* vs. *State*, 9 C. C. R. 67; Ryan vs. *State*, 8 C. C. R. 361; *Wilson* vs. *State*, 8 C. C. R. 72; *James H. Wolfe, et al.* vs. *State*, 10 C. C. R. 324; 25 R. C. L. p. 407, sec. 43.

Under the authorities above cited the motion of the respondent must be allowed.

Motion to dismiss allowed. Case dismissed.

(No. 2957—Claim denied.)

L. BALKIN BUILDER, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1939.

Rehearing denied February 13, 1941.

D'ANCONA, PFLAUM & KOHLSAAT, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

CONTRACTS—*extra work—alleged to be not within terms of—plans and specifications forming part of, providing for—claim for compensation for—must be denied.* Where the evidence shows that work, for which additional compensation is sought, on the grounds that same was not within the terms of a written contract, is included in the plans and specifications forming part of such contract, and contemplated therein, no award can be made therefor.

SAME—*oral testimony inadmissible to vary terms of.* In the absence of any fraud, parole testimony cannot be received to change, vary or alter the terms of a written contract.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant filed its complaint with the Clerk of this court on August 26, 1936, and alleged that on or about the 8th day of October, 1935, the respondent, through its proper officers awarded to the claimant, a certain written contract for the construction of a public improvement known as State Bond Issue, Route 50, Section 101—SB—NRH 1, which contract was duly accepted by the claimant, a copy thereof being attached to the complaint; that in pursuance of said contract, the claimant performed and completed all of the work as was required to be done by said contract and the plans, specifications and amendments thereto; that the respondent, acting through its proper officers, on or about the 15th day of April, 1936, requested and directed the claimant to perform and complete additional and extra work for the public improvement as aforesaid, which extra and additional work was not required to be performed according to the terms of the contract, plans, specifications and amendments; that said extra and additional work consisted of excavating and backfilling a crib wall, and the furnishing of an asphalt plank together with the pumping and drainage of water from said public improvement; that thereafter, pursuant to the authorization, direction and in accordance with the special instance and request of the respondent, through its proper officers, the claimant excavated and backfilled the said crib wall, furnished and completed the asphalt plank, and pumped and drained the water from said public improvement; that the fair, reasonable and customary charge for said additional and extra work mas the sum of $6,022.57.

The common counts are attached under Paragraph 4.

Claimant further charges that there is due and owing to the claimant from the respondent the said sum of $6,022.57, which claim has been presented to the Department of Public Works and Buildings, Division of Highways of the State of Illinois, but the State has failed and refused to pay that sum.

An affidavit is attached to the complaint, signed by L. Balkin, president of L. Balkin Builders, Inc. In this affidavit he says he has full and complete knowledge of all the facts and that the facts contained in the complaint are true to the best of his knowledge and that the State of Illinois is indebted to the claimant in the sum hereinabove mentioned.

A copy of the contract attached to the complaint is as follows::

"CONTRACT

1. THIS AGREEMENT, made and concluded this 8th day of October, 1934, between the State of Illinois, acting by and through the Department of Public Works and Buildings, known as the party of the first part, and L. Balkin, Bldr. Inc. his/their executors, administrators, successors or assigns, known as the party of the second part.

2. WITNESSETH: That for and in consideration of the payments and agreements mentioned in the Proposal hereto attached, to be made and performed by the party of the first part, and according to the terms expressed in the Bond referring to these presents, the party of the second part agrees with said party of the first part at his/their own proper cost and expense to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all of the terms of this agreement and the requirements of the Engineer under it.

3. And it is also understood and agreed that the Notice to Contractors, Special Provisions, Proposal, and Contract Bond, hereto attached, and the Plans for State Bond Issue Route No. 50 Federal Aid Project No. 141D-NRH, Section 101SBNRH-1, in Cook County, dated March 22, 1934, and the "Standard Specifications for Road and Bridge Construction," adopted by said Department January 2, 1932, are all essential documents of this contract and are a part hereof.

4. IN WITNESS WHEKEOF, The said parties have executed these presents on the date above mentioned.

THE STATE OF ILLINOIS,
By the Department of Public Works and Buildings
By ROBERT KINGERY, *Director.*

ATTEST:
ERNEST LIEBERMAN,
Acting Superintendent of *Highways.*

Party of the First Part.
(If a corporation)

Corporate
Name L. BALKIN BUILDER, INC.
By L. BALKIN, *President.*

ATTEST:
H. B. BALKIN, *Secretary.*

Party of the Second Part.
(If a co-partnership)

.....(SEAL)

.....(SEAL)

..... (SEAL)

(Corporate Seal)

.Partners doing business under the firm name of

.....(SEAL)"

The above, consisting of four pages and the signatures thereto, is all that is attached to the complaint, but it is obvious that there are other writings, consisting of plans, speci-

fications and special provisions that are made a part of the contract by special reference, but not copied therein.

The respondent made a motion to dismiss and filed this motion on December 6, 1938. The evidence was filed in this case on November 3, 1938. As grounds for the motion to dismiss it is contended that the claimant has no claim against the State of Illinois arising under the contract referred to in the complaint for reasons not appearing upon the face of claimant's complaint but appearing from an affidavit attached to the motion to dismiss in support of said motion; that it appears that on October 1, 1934, the claimant made and executed an assignment to the Duffin Iron Company of all its riglit, title and interest to the sum of $33,986.94, and in and to any and all monies owing, payable and thereafter becoming due or payable to the claimant from the State of Illinois under the contract referred to in the complaint. The affidavit attached to the motion to dismiss mas made by M. K. Lingle, Engineer of Claims, Division of Highways, Department of Public Works and Buildings, State of Illinois, and he states that there is attached to his affidavit, a true and correct copy of an instrument executed by L. Balkin Builder, Inc., under date of October 1, 1934, and that the contract mentioned and referred to therein is the same contract mentioned and referred to in the complaint filed in the Court of Claims in this case; that said instrument is in words and figures as folloms, to wit:

"ASSIGNMENT

"For and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to the undersigned in hand paid, receipt whereof is hereby acknowledged, the undersigned, L. BALKIN BUILDER, INC., does hereby assign, transfer, set over and convey unto 'Duffin Iron Company, an Illinois corporation, all of its right, title and interest in and to the sum of Thirty-three Thousand Nine Hundred Eighty-six and 94/100 Dollars ($33,986.94), and in and to any and all moneys owing, payable or hereafter becoming due or payable to the undersigned, L. Balkin Builder, Inc. from the State of Illinois, Department of Public Works and Buildings, Division of Highways, under the contract, State No. 5710, entered into by the State of Illinois, acting through the Department of Public Works and Buildings, with the undersigned L. Balkin Builder, Inc. for the construction of the work designated as State Bond Issue Route 50, Project 141D-NRH, Section 101-SB-NRH-1, Cook County, Illinois, including the construction of one plate girder railroad subway structure, one span, at 70' 9", near the intersection of Cicero Avenue and 158th Street in Oak Forest, reference to which con-

"The undersigned does hereby expressly authorize and empower the said Duffin Iron Company to collect and receipt upon said contract from the said State of Illinois in the place and stead of the undersigned the said sum of Thirty-three Thousand Nine Hundred Eighty-six and 94/100 Dollars ($33,986.94) and any other moneys owing, payable or hereafter becoming due or payable to the undersigned under said contract, and to take all necessary proceedings for the collection thereof, and to execute and deliver all proper receipts and vouchers therefor the same as the undersigned might or could do were this assignment not made. The undersigned hereby expressly represents that it has full power and authority to execute this assignment; that the said sum of money is to become due the undersigned from the said State of Illinois by reason of the said contract; that no assignment or transfer of the moneys to become due upon said contract other than the assignment embodied in this instrument has been executed by the undersigned; and the said State of Illinois, Department of Public Works and Buildings, Division of Highways, and each and every of them are hereby authorized and directed to pay to the said Duffin Iron Company the said sums of money above mentioned.

IN WITNESS WHEREOF the undersigned has caused these presents to be signed at Chicago, Illinois, by its corporate officers, and its corporate seal to be affixed thereto, both being duly authorized so to do pursuant to resolutions unanimously adopted by the Board of Directors of the undersigned, this first day of October, 1934.

L. BALKIN BUILDER, INC.,

(SEAL) By (Signed) L. BALKIN, *Pres.*

ATTEST:

(Signed) H. B. BALKIN, *Sec.*

STATE OF ILLINOIS, }
} ss.
COUNTY OF COOK }

I, Joseph Harrow, a Notary Public in and for the County and State aforesaid, do hereby certify that Louis Balkin, personally known to me to be the President, and H. B. Balkin personally known to me to be the Secretary of L. Balkin Builder, Inc., an Illinois corporation, personally known to me to be the President and Secretary respectively of said L. Balkin Builder, Inc., appeared before me this day in person and severally acknowledged that they signed the said instrument and caused the corporate seal of said corporation to be affixed thereto, as their free and voluntary act individually and as such President and Secretary respectively, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth, and that the execution and delivery of said instrument was duly authorized by them as such President and Secretary respectively, and duly authorized by the unanimous resolution of the Board of Directors of said L. Balkin Building, Inc.

Given under my hand and Notarial seal, this 1st day of October, 1934.

(SEAL)

(Signed) JOSEPH HARROW, *Notary Public.*"

In paragraph 5 of the complaint it is alleged that "no other persons, firm or corporation has any title or interest in and to the said claim or any part thereof, and that

the claimant is still the sole owner and claimer of said claim.'' Claimant argues that this motion comes too late to be given consideration by this court because it was not filed for more than two years after the filing of the claim herein. While this court has no such rule governing the same, the rules of this court do make the Illinois Practice Act a part of the rules. The claimant says that no contention is being made that the claimant did not assign to the Duffin Iron Company the sum of **$33,986.94,** together with any and all other moneys owing, payable or thereafter become due or payable to the claimant under the contract, but claimant points out and argues that the amount now being claimed by the claimant is not for moneys due and payable under the contract, but for moneys due and payable for extra work, labor and material furnished and performed by the claimant, not under the contract. Claimant argues that the motion should not be considered by the court because it was not presented in due time and therefore the motion should be stricken from the records. Another ground urged by the claimant is that the motion is not well founded, either in point of fact or in point of law; that while it is true that the claimant did under date of October **1, 1934,** execute and deliver an assignment to the Duffin Iron Company, it did not assign this particular claim which arose out of special work.

As we view this matter, the only real contention between the parties hereto is whether or not the work, labor and material which the claimant admittedly furnished, was included in the orginal contract between the parties, or was, strictly speaking, extra work, the claimant taking the position that it was strictly extra work, whereas the respondent claims that the original contract required the claimant to do the work.

Under the view that we take of the case, it will be unnecessary to pass upon the motion of the State to dismiss on the grounds that an assignment of claimant's interest had been made. All the time the claimant knew that the claim had been assigned, and secondly, it charged in its complaint that no other person, firm or corporation had any right, title or interest in and to this claim, because it necessarily goes back as to what constituted the extra work herein.

This project was located in the general vicinity of 158th Street and Cicero Avenue in the Village of Oak Forest. It appears from the files that the structure was designed by the

Chicago, Rock Island and Pacific Railway; that the letting, award, engineering supervision, estimates and payments thereof and final payments were made by the State of Illinois, Department of Public Works and Buildings, Division of Highways. The letting of said project was held on April 18, 1934, and the claimant was determined the low bidder. The contract was awarded on August 15, 1934, at the bid price of $33,986.94, and according to that part of the complaint referred to as the contract and attached to the complaint the claimant agreed at its "own proper cost and expense to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications hereinafter described, and in full compliance with all of the terms of this agreement and the requirements of the Engineer under it. And it also understood and agreed that the Notice to Contractors, Special Provisions, Proposal, and contract Bond, hereto attached, and the plans for State Bond Issue Route No. 50 Federal Aid Project No. 141D-NRH, Section 101SBNRH-1, in Cook County, dated March 22, 1934, and the "Standard Specifications for Road and Bridge Construction," adopted by said Department January 2, 1932, are all essential documents of this contract and are a part hereof."

It is contended that the additional or extra work performed by the claimant and the additional or extra materials furnished by the claimant may generally be classified under the three following classifications:

1. Drainage and pumping		$3,852.91
2. Excavating and backfilling behind crib walls:		
Excavating	$312.05	
Backfilling	550.69	
		862.74
3. Asphalt planking		1,308.92
or a total of		$6,024.57

and an award is sought upon the basis that the three items above mentioned constitute extra **work.**

The Standard Specifications for Road and Bridge Construction, adopted January 2, 1932, the revisions of and additions to the Standard Specifications, adopted March **27, 1934,** Special Provisions, General Plans for Proposed Undergrade Crossing, and the Notice to Contractors, etc. were all made a part of the contract. The contract is quite lengthy,

consisting of some thiry-five pages, and we find therein, the following:

"4. The undersigned further declares that he has carefully examined the proposal, plans, specifications, form of contract, and contract bond, and special provisions (if any), and that he has inspected in detail the site of the proposed work, and that he has familiarized himself with all of the local conditions affecting the contract and the detailed requirements of construction, and understands that in making this proposal he waives all right to plead any misunderstanding regarding the same.

5. The undersigned further understands and agrees that if this proposal is accepted he is to furnish and provide all necessary machinery, tools, apparatus and other means of construction, and to do all of the work, and to furnish all of the materials specified in the contract, except such materials as are to be furnished by the Department, in the manner and at the time therein prescribed, and in accordance with the requirements therein set forth.

6. The undersigned declares that he understands that the quantities mentioned are approximate only and that they are subject to increase or decrease; that he will take in full payment therefor the amount of the summation of the actual quantities, as finally determined, multiplied by the unit prices shown in the schedule of prices contained herein."

The first claim for extra work is classified as "Drainage and pumping" and the amount asked for is $3852.91. Section 21 of Claimant's Exhibit "1B" provides as follows:

"The Contractor shall provide and maintain proper drainage for the excavation as the work progresses so that all rain water and surface drainage may be diverted, thus permitting the excavation to be carried on in dry material. Whenever water is encountered the same shall be removed by bailing or pumping, great care being taken at all times that the surrounding soil is not disturbed or moved."

This provision clearly provides for the bailing or pumping of water and proper drainage for the excavation of any work, and under the provisions of Section 4 of the Standard Specifications for Road and Bridge Construction hereinabove quoted, we fail to see how there could have been any misapprehension in this regard.

The next item claimed is for excavating and backfilling behind crib walls. The charge for excavating is fixed at $312.05 and the charge for backfilling at $550.69. Section 22 of Claimant's Exhibit "1B" provides as follows:

"All excavations shall be made to the full dimensions and depths shown on the plans or as directed by the Engineer. If the foundation is rock it shall be cleaned of all shale and loose stone, leveled and finished as may be directed by the Engineer."

No contention is made that the Engineer directed any excavations not provided under the Plans and Specifications.

Sections 27, 28 and 29 of Claimant's Exhibit "1B" are as follows:

"27. Excavation around all retaining walls, abutments and wings shall be backfilled to the surface of the ground adjoining with material which in the opinion of the Engineer is suitable for that purpose. When required by the Engineer, the backfill shall be deposited in layers not more than eight (8) inches deep and each layer thoroughly tamped and wetted down.

"28. The area of excavation shall be kept free from water, if practicable, until the concrete or masonry has been carried above the water level.

"29. The Railway Company shall furnish the material for the backfill behind the abutments and shall place the said material in position."

Then follows a provision concerning the part to be excavated by the Railway Company, under Section 30 of this same exhibit, which is as follows:

"30. The Railway Company shall excavate only sufficient material from the Railway Company's embankment to permit the deck of the temporary trestles to be placed."

Under the terms of the Plans and Specifications as outlined in Claimant's Exhibit "1B" it was claimant's job to construct a complete permanent bridge structure, including the concrete cribbing. It had nothing to do with the grading of the roadway, including the excavation of the railway embankment, the paving of the roadway, and the installation of the roadway drainage system, as that work was to be performed under another contract as set out under said Claimant's Exhibit "1B".

The president of the claimant company testified that the State had let a contract for the excavating work, the general excavation, and that claimant assumed that all of the excavation because of its nature requiring heavy equipment, would be entirely done by the State Highway Department. It appears that this was not the case; that they did not excavate enough to permit the cribbing to be installed. While this is not all of that part of his testimony, it is sufficient to show that his assumption was erroneous. This witness also stated that the specifications provided that the claimant was to do the excavating for the abutment and wing wall foundations. Having quoted from the Plans and Specifications, the proposal and the contract, we cannot agree that the excavating and backfilling, which is the subject of this particular part of the claim, is in no way inserted or intimated in the contract or specifications.

It is claimed that there were errors not only in the specifications, but likewise in the plans, regarding the requirements of the waterproofing, and the attention of the District Engineer's office was called thereto, and Mr. Dillon, one of the Engineers, told claimant to take the plans and specifications to the Rock Island Railroad and find out what they actually wanted.

There was also a claim for extra compensation, which covers the furnishing and installing of the asphalt plank. Mr. Balkin the president of the claimant was not present at a conference with Mr. Dillon, possibly Mr. Walters and others, but he testified as to what the various people who were present at this conference had said, At that time Mr. Corre, manager of the Rock Island Railroad explained that their specification "membrane waterproofing" mas a misnomer and that an error had been made in calling that "membrane waterproofing" specification, and what they really intended was the "bridge deck" specification, and the witness said that the difference mould be that the inch and a half Creosote plank and the asphalt plank would be out.

On the very first page of the plans for this job, under the heading of summary of quantities, we find the work to be contracted by the State included 23,341 BM Deck Timber Creosoted in 3,900 sq. ft. of waterproofing (membrane). On sheet No. 25 we find the same proportions. These are on the blue prints. In the "Schedule of Prices'' in the contract signed by claimant there appears the item "Deck Timber (Creosoted), "23,341 ft. B. M. amounting to $2380.78 and 3,900 sq. ft. of Waterproofing (Membrane). This item is filled in at $585.00. The witness testified that their bid covered membrane waterproofing only. The witness also testified that at this conference they were asked to proceed and the State Highway Department under date of April 20, 1935 addressed a letter to claimant which is in evidence as Claimant's Exhibit 10, and we quote therefrom:

"In answer to your letters of March 19 and March 26 regarding discrepancies in waterproofing items in connection with the above mentioned project, I wish to state to you that we are passing the information regarding the membrance waterproofing and the asphalt plank items, together with the deck timber items to our Springfield office for a proper interpretation of the specifications and plans.

"I hope to hear from them in the near future.

"It is my thought that you should be paid for the asphalt plank and the deck timbers. However, we must wait until Springfield gives us the proper interpretation in regard to these items." * * *

This letter was signed by Kendrick Harger, District Engineer. In his testimony, the witness, Balkin, said "We have a letter under date of April 20, 1935, in which the Disttrict Engineer's office says definitely that in their judgment we should be paid for the asphalt plank." This probably was the opinion of Kendrick Harger, the District Engineer, but very definitely he did not undertake and did not commit the State Highway Engineer's office to that sentiment.

Final payment in the sum of $4,470.60 was made to the Duffin Iron Company, assignee of claimant on December 26, 1935, by warrant number 334902, and was mailed to said assignee on December 29, 1935, and on December 30, 1935, deposited in the First National Bank of Chicago by its president, John J. Duffin, and mas marked paid by the State Auditor on December 31, 1935.

While an attempt has been made by experts to show that said work was not within the provisions of the contract, we must follow the universal rule that in the absence of any fraud, parole testimony cannot be received to change, vary or alter the terms of a written contract.

We are of the opinion that the contract contemplated this work which is classified as extra. While it may have been more work than the claimant expected, yet it appears that it was all within the terms of the contract and all duly paid for. Consequently, there is nothing due and owing, and with this view of the facts, it is unnecessary to pass upon the motion made by the State to dismiss.

An award, therefore, will be denied.

(No. 2966—Claim denied.)

CENTRAL STATES DISTRIBUTORS, INC., VINCENT M. BONDI, HILLMAN'S JOE GREIN AND J. PAHLS, INC., E. G. LYONS AND RAAS CO., FRUIT INDUSTRIES, LTD., A. M. WEST, DOING BUSINESS AS GREYSTONE WINES, MEYER FRANK, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 11, 1939.

Petition for rehearing denied February 14, 1941.

ALLEN H. SCHULTZ, for claimants.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLNOIS LIQUOR CONTROL ACT—*claim for refund of license fee paid under—statute affording remedy to claimant—failure to avail self of bars award.* Where Illinois Liquor Control Commission made an oral and verbal ruling under which claimants were obliged to procure license, alleged by them as not being lawfully required, and pay the fee therefor, from which ruling no appeal was taken by them, as provided by Illinois Liquor Control Act, no award for refund of such fees can be made, even though such license was not required, the court being without jurisdiction to order same, where claimants failed to avail themselves of the said right to appeal from such ruling.

SAME—license fee—voluntarily paid—even though illegal cannot be recovered. License fees voluntarily paid, without compulsion or duress cannot be recovered by the payer even though the said fees be illegal.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimants allege that they were engaged in the bottling of bulk wines for resale, at their respective plants located in the City of Chicago and State of Illinois, and as bottlers of wines, they purchased wines in bulk from licensees in Illinois, and other states, and then bottled the same for resale to licensed dealers and licensed distributors in the State of Illinois, and in other states; that the annual fee for an importing distributor under the Illinois Liquor Control Law is $250.00; and for a Class B. Manufacturer's license, that is, a manufacturer of wines, the license fee is $500.00; that prior to the amendment to the Illinois Liquor Control Law effective July 1, 1935, the fiscal license period commenced on May 1st of each year.

Claimants further allege that the Illinois Liquor Control Commission made an oral and verbal ruling to the effect that one who purchased bulk wines and bottled the same for resale is a manufacturer of wine, and must obtain a Class B. License and pay a license fee of $500.00, as provided for in the Illinois Liquor Control Law, and claimants should be required to obtain a license fee and pay the sum of $500.00 therefor.

Claimants contend further that they should only be required to obtain an Importing Distributor's License, and pay therefor, the sum of $250.00, but that they were required to pay $500.00 commencing on May 1, 1934, or go out of business. It is also averred that the Illinois Liquor Control Commission stated to the claimants that the Illinois Liquor Control

Commission would grant claimants a refund, of $250.00 each if the regulation was changed, and it would not be necessary for the claimants to go through any legal proceedings to obtain said fund, and as a result of this promise made by the Commission, the claimants did not file suit for a temporary injunction as they had planned to do.

It is also averred that the Commission did not rescind its verbal regulation, and did not recommend that a refund be granted to claimants in the sum of $250.00 each, or in any other sum, but passed Regulation 6A of the Joint Rules and Regulations of the Illinois Liquor Control Commission and the Department of Finance, which reads as follows:

"Any person who acquires any alcoholic liquors in bulk and bottles or changes the container of such alcoholic liquors 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."

This regulation was rescinded on May 31, 1935, and the Illinois Liquor Control Commission suggested to elaimants that if they desired to obtain the refund of $250.00, it would be necessary for them to file their claim with the Court of Claims.

It appears that the claimants paid the sum of $50030 under protest in time to do business commencing the fiscal year May 1, 1934, and that they paid the same for the year commencing May 1, 1934 and ending April 30, 1935.

The Attorney General has moved to dismiss this suit for the reason that during this time the Illinois Liquor Control Commission required claimants to pay $500.00 per year, and that the claimants had a remedy at law which was complete and adequate.

Claimants contend that no refund was made. The rules were not changed for the full period of one year for which they paid their license fee, and what they did was to pay double the license fee required by law, but it is plain, that whatever the merits of this controversy be, this court has no jurisdiction in the case for the reason that the Statute provides in Section 8a of Article VII of the Liquor Control Act of Illinois, as follows:

"When no appeal is taken from a rule, regulation, order or decision of said State commission, as herein provided, parties affected by such rule, regulation, order or decision shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be

no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court or in any other judicial proceeding."

The Act provides for an appeal in such case.

In view of this statute, this court does not have any jurisdiction because no appeal was taken in the manner provided by law, and the case relied upon by claimants, that of *Lombardo, et al.* vs. *State* of *Illinois,* 9 C. C. R. page 271 is not in point. Because that question did not arise in that case, another reason exists barring an award in this case. It does not appear that the Illinois Liquor Control Commission had any power under the statute to grant a refund in this case. Therefore, it was without power to make a promise to refund taxes voluntarily paid. In the case of *LeFevre* vs. *County* of *Lee,* 353 Ill. page 30, it was held that taxes paid voluntarily and not under duress cannot be recovered by the tax-payer even though the tax be illegal, and it was also held that a board of supervisors had no authority to refund taxes except that given it by the revenue act.

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

(No. 2696—Claim denied.)

MAUDE ALLISON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

ANDREWS & YOUNG, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

HIGHWAYS—*maintenance of, governmental function—negligence of employees of State, in construction or maintenance of—State not liable for—personal injury sustained as the result of—award for on grounds of equity and good conscience cannot be made.* The facts in this case and the contentions of claimant herein are similar to those in *Oarbutt* vs. *State,* 10 Court of Claims Reports, 37 and what was said by the court in that case applies with equal force herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint was filed in this cause on July 3, 1935, alleging that on November 30, 1934, the State of Illinois, was in possession and control of a certain public highway lying

immediately south of the City of Kewanee, Illinois, and known as U. S. Route No. 34 and being Route No. 78 of the State of Illinois; that at that time, and for several days prior thereto, the State was engaged in paving and repairing certain portions of this highway, and had caused certain large holes, depressions, and excavations to be made in the highway at a point where the highway crossed a certain creek or a ditch.

Claimant further charged that at the place where the State was repairing the road, it had prior to the time of the happening of the injuries complained of, negligently piled certain sand, gravel, broken concrete and other materials on the east half of the paved surface of the road where the public was accustomed to travel and where the State had made an excavation in the road for some 200 feet and upwards; that it was the duty of the State, by it servants and agents, to exercise all due care and caution in making said repairs and excavations and in piling said concrete upon said road, and in barricading the same, for the purpose of protecting the traveling public and those riding in automobiles along said road, from injury, danger or hazard; but notwithstanding its duty in that behalf, the respondent on the said 30th day of November, 1934, negligently left and permitted to remain on said road, the said obstructions, without signal lights and guards, but had placed two kerosene flares at the north end of the excavation and piles of broken concrete in such a manner that the kerosene flares appeared to indicate certain dangers near the point in the public highway where the flares were located; that this was done contrary to Section 151 of the law in "Relation to Road and Bridges."

The claimant further avers that she was riding in the rear seat of an automobile and was using and exercising all due care for her own safety, but had no control over the automobile, and because of the respondent's act, the driver of the automobile in which the claimant was riding was caused to believe that the only obstruction in the highway near that point was at, or near, the two signal lights, which were the only signal lights in view at or immediately prior to the time of the accident.

Claimant also avers very substantial injuries and damages in the sum of $10,000.00 by reason of the negligent acts of the agents of the State.

A Bill of Particulars was filed showing permanent injuries, physical and mental pain and suffering in the sum of $9,900.00.

The Attorney General has filed a motion to dismiss on the ground that it is sought to recover for injuries received by the claimant while riding in the back seat of an automobile which was alleged to have run into broken concrete negligently piled upon the highway by the servants of the State.

Another question of fact is raised on the motion which will not be considered.

The Attorney General contends that the claimant does not present a cause of action against the State and refers to many decisions of this court.

On November 19, 1914, in the case of *Morrissey* vs. *Xtate of Illinois,* 2 C. C. R. 254, the Court of Claims of the State of Illinois held that the doctrine of respondent superior was not applicable to the State. In that case many authorities were cited by both the State and the claimant, and the court very carefully analyzed the whole situation. Since that time there has been many similiar holdings by the court and the rule has not been changed .

This complaint is drawn on the theory that the State is liable for injuries caused by the negligent conduct of its employees. The whole case of claimant is presented on the assumption that the same principles ofi law apply to the State as are applicable to individuals and corporations, but claimant has set forth suggestions in opposition to the motion to dismiss. The claimant admits the law as stated by the respondent but states that this proposition is irrelevant for the State is never liable for any torts of its agents.

The Supreme Court of Illinois in the case of *Minear* vs. *State Board of Agriculture,* 259 Ill. 549, held that the provision of the statute providing that the State Board of Agriculture may sue and be sued has reference only to obligations incurred by contract in the management of the department of agriculture, and does not refer to an action of tort.

Claimant says that Paragraph 4, under Section 6 of the Court of Claims Act requires this court to hear and determine all claims, legal, unliquidated and ex delicto, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay, and that this court has jurisdiction of this case.

In the case of *Crabtree* vs. *State of Illinois,* 7 C. C. R. 207, this court held that the provisions of paragraph 4 of Section 6 of Court of Claims Act with reference to equity and good conscience merely defines the jurisdiction of the court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of court to claims under which State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one.

The State of Illinois is not suable in this kind of a case under our constitution. The motion of the Attorney General will, therefore, be sustained and cause dismissed.

(No.2560—Claimant awarded $23,092.09)

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

Opinion filed January 14, 1941.

Rehaaring deniad March 11, 1941.

SIDNEY LEVY, JAMES J. LAWRENCE, HENRY BLUMBERG and HOWARD J. DOYLE, for claimant.

JOHN E. CASSIDY, Attorney General; JOHN KASSERMAN and MAURICE J. WALSH, Assistant Attorneys General, for respondent.

CONTRACTS—*plans and specifications for—prepared by State and forming part of—one undertaking contract entitled to rely on and State bound by representations in.* Where the State prepares plans and specifications, which form part of contract for the erection of a public improvement, purporting to clearly represent conditions existing, and as will be met on the premises to one who has entered into a contract with it for such erection and who relies thereon, the State is bound by such representations.

SANE—same—same—material misrepresentation in—necessitating extra work in performing contract—award may be made for value of. Where plans and specifications, forming part of contract for erection of a public improvement are prepared by State and relied on by party contracting with it for such erection, contain material misrepresentations, and such party is misled thereby, and as result thereof-is obliged, in performance of contract to do extra work, State is liable in damages for value thereof.

SAME—*same—same—same—same—same—when award made is not extra compensation.* Where it becomes necessary for party who has contracted

with State for erection of a public improvement to do extra work in the performance of same, due to material misrepreseniations in the plans and specifications, which were prepared by State and formed part of contract and were relied on by such party, an award for such extra work is not extra compensation within the meaning of Section 19 of Article 4 of the Constitution of Illinois.

STIPULATION—*entered into by Attorney General—State may be bound by.* The Attorney General is the sole representative of the People in litigation in which the State is a party and has the sole power and right to control and conduct such litigation for the State, and if during the conduct of same, he as such representative enters into a stipulation, not prohibited by Statute, the State is bound thereby.

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

On or about December 14, 1933, respondent, through its Department of Public Works and Buildings, Division of Highways, mailed to claimant and other contractors a certain "Notice to Contractors," soliciting bids or proposals for the reconstruction of the pavement on Roosevelt Road in the City of Chicago, from Ashland Avenue to Canal Street, a distance of 1.3972 miles.

In and by such notice prospective bidders were advised that plans for said work prepared by the Department of Public Works and Buildings were available at the office of the District Engineer, and could be purchased at the office of the Division of Highways at Springfield, Illinois.

Claimant purchased a copy of such plans; examined and studied the same, and inspected the site of the proposed improvement before submitting its bid for the doing of the work. In and-by its bid the claimant proposed to furnish all labor and materials necessary to complete said improvement according to said plans and specifications for the sum of $164,272.75, and at the unit prices therein specified.

Claimant was the low bidder on the project and was awarded the contract. On January 30, 1934 the respondent entered into a written agreement with claimant whereby the claimant agreed to do all the work, furnish all materials and all labor necessary to complete the work in accordance with the plans and specifications therein described, which plans and specifications were by said contract made essential documents and a part of said contract. Respondent agreed to pay the claimant for the work performed on a unit basis at the prices specified in claimant's proposal or bid.

The plans showed, among other items, a cross section of the proposed 9-inch Portland cement concrete pavement and a "Typical Cross Section for Existing Granite Block pavement."

The description of the improvement, as shown by the special provisions of the plans and specifications is as follows:

"This improvement consists of constructing a P. C. C. pavement between the existing curbs exclusive of the portion occupied by the Chicago Surface Lines, in accordance with the typical cross section as shown in the plans."

The aforementioned "Typical Cross Section for Existing Granite Block Pavement" (the pavement then in place) shows, among other things, a granite block pavement with an 8-inch Portland cement concrete base course. The evidence also shows that there was a two-inch sand cushion between said granite block pavement and said base course. The proposed improvement contemplated the removal of the existing pavement and base course to at least three inches below the sub-grade of the proposed pavement and the construction of a new pavement in accordance with the plans and specifications.

Claimant commenced work under its contract about March 30, **1934,** and started operations with a steam shovel on the north side of the street in order to remove the granite block pavement, and followed shortly thereafter with other steam shovels to remove the 8-inch Portland cement concrete base course. Claimant then discovered that on the north side of the street extending through the entire length of the proposed improvement, there was an abandoned street car track foundation of very tough Portland cement concrete, which had imbedded in it the wooden ties formerly part of the street car track construction. This street car track foundation was approximately eighteen (18) feet in width and had a thickness of from sixteen to twenty inches and was bonded to the eight-inch concrete described in the "typical cross section" above referred to. The requirement of the specifications for excavation to at least three inches below the subgrade of the proposed pavement necessitated the removal of the top three inches of the old street car track foundation. Such foundation was of very tough material and could not be removed in the same manner as the eight-inch Portland

cement concrete base, to wit, by steam shovels, but had to be cut and chipped off by compressed air methods.

Upon the discovery of the old street car track foundation claimant notified the officials of the Highway Department and a meeting with such officials was held on the site of the work. Claimant demonstrated to the representatives of respondent that said street car track foundation, or so much of it as was required to be removed, could not be removed by the usual and ordinary means employed. In an effort to solve the problem it was suggested that the grade of the proposed pavement be raised to such an extent that it would be unnecessary to interfere with the street car track foundation, but on account of drainage plans on the job, such suggestion was found to be impracticable. Several other suggestions were made, but on account of the refusal of the Federal Bureau of Highways to consent to a base of less than nine inches in thickness on the proposed improvement, it was impossible to change the plans, and the claimant proceeded with the work in accordance with the plans and specifications. Thereafter claimant completed the work required to be done under the contract, and the same was accepted and approved by the proper authorities of, the respondent.

On December 26, 1934, claimant filed its complaint herein "for damages accruing to it in the sum of $24,944.85 for the cost of equipment, wages and other expenditures caused by being compelled to cut out and break loose the old concrete paving base on said project from the old street car track foundation and chipping and cutting the old street car track foundation to the sub-grade of the new pavement," and based its claim upon the following contentions, to wit:

A) That the plans and specifications for the improvement prepared by the respondent did not truly, accurately and correctly set forth the nature, character and amount of work to be performed by the claimant in the construction of the improvement.

B) That thereby the claimant was deceived and misled in making its proposal, and in entering into said contract.

C) That as a result thereof claimant was put to an expense of $24,944.85, which it would not have been required to expend had the conditions as to the sub-grade been as represented by the respondent in the plans and specifications.

Final payment estimate under the contract was scheduled for payment on January 14, 1935, and supplemental final payment estimate was scheduled for payment on June 28, 1935, and actual payments were made shortly after said respective dates.

On the hearing of the case it was stipulated by counsel for claimant and respondent that the claimant, in order to complete the improvement in accordance with its contract, broke loose the then existing concrete pavement base from the old street car track foundation; that such cutting and chipping was required to be done by compressed air methods in order to bring the old car track foundation to the proper sub-grade; that the Department of Public Works and Buildings checked the salaries, labor, equipment rental, rates and costs in connection with said work of cutting and breaking loose said existing concrete pavement base from said old and abandoned concrete street car track foundation, and that the reasonable cost of said work was $23,092.09, and that it cost the claimant to complete said improvement the sum of $23,092.09 over and above the amount it would have cost had it not been necessary to cut and chip said old concrete street car track foundation to the depth of the sub-grade of the new pavement.

It was also stipulated by counsel on the hearing that the provisions of Division One oil Section 9.7 of the standard specifications be waived. Such provisions are to the effect that the acceptance of the last payment by the contractor shall operate as a release to the Department from all claims or liability under the contract.

Claimant takes the position that there was a material misrepresentation in the specifications as to the nature of the subgrade; that the specifications showed only an 8-inch Poriland cement concrete base beneath the granite block pavement, whereas in fact, for the length of the entire improvement and for a width of eighteen feet, the Portland cement concrete base was from twenty-four to twenty-eight inches in thickness; that it had a right to rely upon said specifications; that it was deceived and misled thereby, and consequently bid less than it would have bid had it not been so misled; that it is therefore entitled to recover the loss sustained by it

on account of such misrepresentation, and that the amount of such loss is $23,092.09.

The respondent contends that claimant was not deceived or misled by any action of the respondent; that it was the duty of the claimant to inform itself of the nature of the sub-grade under the existing pavement, and having failed to do so it is not entitled to recover the cost and expense resulting from conditions which it did not anticipate; also that claimant is now seeking to obtain additional compensation for an expense incurred in performing the contract, and ,that a payment to the claimant therefor would be in violation of Section 19 of Article 4 of the Constitution of Illinois, which provides as follows:

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreement or contracts shall be null and void; *Provided,* the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion."

Respondent also contends that the action of the claimant in accepting the last payment. under the contract without objection or reservation constitutes a release of all liability under said contract; that such release is a substantial defense to this proceeding, and that the Attorney General had no authority to enter into a stipulation waiving same; also that the action of the claimant sounds in tort and is an action *ex delicto,* and that the State is not liable for the torts of its officers or agents.

The first question for consideration, therefore, is whether there was a material misrepresentation in the plans and specifications as to the nature of the sub-grade; if so, was the claimant misled thereby, and did he sustain damage by reason thereof?

The claimant, in support of its contention, relies upon the aforementioned "Typical Cross Section for Existing Granite Block Pavement," which shows an existing eight-inch Portland cement concrete base course underlying the existing granite block pavement, and the testimony of witnesses as to the proper meaning, construction and application thereof.

The respondent, in support of its contention, relies upon the following provisions of the proposal, plans and specifications, and the testimony of witnesses as to the proper meaning, construction and application thereof :

"The undersigned further declares that he has carefully examined the proposal, plans, specifications, form of contract and contract bond and special provisions (if any), and that he has inspected in detail the site of the proposed work and that he has familiarized himself with all of the local conditions affecting the contract and the detailed requirement of construction and understands that in making this proposal he waives all right to plead any misunderstanding regarding the same."

Description of Improvement. This improvement consists of constructing a P. C. C. Pavement between the existing curbs exclusive of the portion occupied by the Chicago Surface Lines in accordance with the typical crossing section as shown in the plans."

"Pavement Cross-section. On this section, bids for Portland cement Concrete Pavement shall be based on a pavement cross-section with an interior thickness of nine (9) inches as shown by Special Cross-Section on Sheet 6 of the plans."

"Cross-Section of Existing Pavement. The dimensions shown on the typical cross-section of the existing pavement are approximate. This cross-section is shown to give the Contractor the approximate relationship between the existing cross-section and the proposed cross-section.

"Examination of Plans, Specifications, Special Provisions, and Site of Work. The bidder shall before submitting his bid or bids, carefully examine the proposal, plans, specifications, special provisions, and form of contract and bond. He shall inspect in detail the site of the proposed work and familiarize himself with all the local conditions affecting the contract and the detailed requirements of construction. If his bid is accepted, he will be responsible for all errors in his proposal resulting from his failure or neglect to comply with these instructions. The Department will, in no case, be responsible for any change in anticipated profits resulting from such failure or neglect."

"Special Excavation. All excavation shall be classified as "Special Excavation," and no other classification will be allowed. . . .

The removal of all types of pavement (including base course and wearing surface) curbs, sidewalks, driveways and structures shall be classified as 'Special Excavation.' Existing pavement, existing base course of any existing structure shall be removed to at least three inches below sub-grade of the proposed pavement or curb. . . ."

"The volume of special excavation for which payment shall be made includes only the cubic yardage between the surface of the ground pavement, curb, sidewalks or driveway as it existed at the time of starting the work on the improvement, and the ground pavement, sub-grade curb, sub-grade sidewalk, sub-grade or driveway sub-grade of the finished improvement. This volume shall be computed by the average and area method of corn-

puting earth work. This volume may include any or all of the following materials: excavation of any nature, borrow, all types of pavement, (including wearing surface and base course) curbs, sidewalks, driveways and structures of any nature."

"Basis of payment. This work shall be paid for in the contract unit price per cubic yard for 'Special Excavation,' which price shall be payment in full for all excavation, furnishing and placing of all borrow which may be required, removal of all pavement (including base course and wearing surface), curbs, sidewalks, driveways and structures, and disposal of all material as specified herein, and for work specified under the general heading of 'Earth Work' in the standard specifications, for which no separate unit prices are included in the contract. Such payment shall include full compensation for all equipment, tools, labor and incidentals necessary to complete the work."

In support of its contention the claimant placed in evidence a blue-print entitled "Cross Section of Existing Pavement, S. B. I. Route 50," etc., which constituted a part of the plans prepared by the respondent on a certain Cicero Avenue project in Chicago, upon which bids were received at the same time they were received on the project involved in this case, on which project the claimant was also the successful bidder. Such blue print shows a brick surface course, a one-inch sand cushion, a six-inch Portland cement concrete base course, and underneath that an old five-inch Portland cement concrete pavement, eleven feet and five inches wide on each side of the street immediately adjoining the street car right-of-way which runs down the center of the street.

The improvement involved in the present proceeding, as originally contemplated by the respondent, provided for the removal of the old granite blocks and the sand cushion, patching the old concrete base where it was in bad condition, and then relaying the granite blocks on a new sand cushion. Claimant was the low bidder on that project, but upon taking a number of core drills, the respondent found that the concrete was so poor that it crumbled under the core machine, and therefore decided that it would be a waste of money to try to patch it; whereupon all bids were rejected, the project was abandoned and the project involved in this case was substituted therefor. Claimant knew of the core tests taken by the respondent and knew what was shown thereby, and based its bid in part upon the information in its possession as to the result of such core tests.

Claimant called as witnesses four other contractors who had bid upon this project, also a consulting engineer who

specialized in municipal improvement work and who had many years' experience in such work. Each of such four contractors testified in substance that he had no knowledge of the old street car track foundation before he submitted his bid; that he had no knowledge of the core tests made by the respondent; that before making his bid he made an examination of the site of the work by walking over the entire length thereof; that it was not customary for any contractor to make core tests on any job; that if there was a street car track foundation immediately underneath the existing pavement, he would expect the plans and specifications to show it; that from an examination of the plans and specifications involved in this project he would expect to find under the eight-inch concrete base of the old pavement just ordinary excavation, that is to say, such excavation as would ordinarily be found under a Chicago street.

The consulting engineer testified as an expert and stated in substance that in ordinary engineering practice the purpose of observing a Typical Cross Section is to give the contractor accurate information regarding existing conditions, and to show the relationship between the existing improvement and the proposed improvement; that its purpose also is to show the contractor what he may expect to find underneath the existing pavement, not only the relationship in dimensions but also the nature. and quality of the material to be removed; that from an examination of claimant's Exhibits 2 and 3, contractors proposing to bid on the project would reasonably expect to find, first, the existing granite block and then a cushion from one inch to two inches in thickness, then an eight-inch concrete base, and then the materials ordinarily found in a city street under existing pavement; that a street car track foundation would not ordinarily be considered ordinary material to be found under the concrete base.

The respondent produced two witnesses connected with the water pipe extension department of the City of Chicago, who testified that between December 14th and December 30, 1933, at least four or five openings were made in Roosevelt Road for the purpose of installing test pipes ; that such openings were about four or five feet long and the same width and

about eight feet in depth; and that they remained open for several days.

Respondent also offered in evidence the testimony of four contractors who bid on the job, each of whom had previous knowledge of the existence of the old street car track foundation. They testified in effect that the object of the Typical Cross Section of existing improvement offered in evidence was simply to show the relationship between the existing improvement and the proposed improvement; that the contractor was required to be governed by the specifications; that under the provisions of the specifications relative to special excavations it was necessary for the contractor to remove the sub-grade beneath the proposed pavement for the required distance regardless of the nature or character thereof; that it was incumbent upon the contractor to make such examination and such tests as were necessary to disclose the nature and character of the sub-grade to be excavated.

From a consideration of all of the matters in the record we are of the opinion that the proposal, the plans and specifications, the contract and everything included therein, must be considered together for the purpose of ascertaining and determining the meaning of such contract; also that the statement in the specifications to the effect that the Typical Cross, Section is shown "to give the contractor the approximate relationship between the existing cross section and the proposed cross section," must be construed to include, among other relationships, the relationship in dimensions.

The uncontradicted evidence discloses that the old street car track foundation was firmly bonded to and an integral part of the eight-inch Portland cement concrete base. The Typical Cross Section in evidence as Claimant's Exhibit 2 showed that the Portland cement base underlying the existing granite' pavement was eight inches in thickness. The, uncontradicted evidence also shows that throughout the entire length of the entire improvement and for a width of eighteen feet such Portland cement concrete base varied from twenty-four to twenty-eight inches in thickness. The showing in the Typical Cross Section to the effect that underlying the granite block pavement was an eight-inch Portland cement concrete base therefore was not in accordance with the facts.

Apparently the claimant and the respondent were both unaware of the existence of such street car track foundation.

That such foundation would have been shown in the plans, if the existence thereof was known to the respondent, is clearly indicated by the fact that in the plans for the Cicero Avenue project hereinbefore referred to, where a similar situation existed, the blue prints specifically showed the existence of the underlying pavement.

We conclude, therefore, that there was a misrepresentation on the part of the respondent, and that such misrepresentation was material.

There remains for consideration the question as to the effect of a material misrepresentation in a case of this kind.

The rule seems to be well settled that where the plans and specifications are prepared by the owner, and there is a material misrepresentation therein, and as the result **of** 'such misrepresentation the contractor is misled to his damage, he is entitled to recover the damage so sustained. The difficulty in cases of this kind lies in the application of this rule to the particular case.

The case of *Hollerbach* vs. *United States*, **233** U. *S*. 165, is one of the leading cases in this country on the questions here involved. In that case the plaintiff contracted with the United States for the repair of Dam No. 1 at Green River, Kentucky. After completion of the work plaintiff claimed that there was a material misrepresentation in the specifications prepared by the United States; that by reason thereof the cost of the work required to be done was substantially in excess of what ,it otherwise would have been, and sued to recover the damages sustained by reason of such misrepresentation.

The following paragraphs of the specifications were material to the issues involved in the case, to wit:

Paragraph 33—"The dam is now backed for about fifty feet with broken stone, sawdust, and sediment to a height of within two or three feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of **1** horizontal to 1.2 vertical will give ample room."

Paragraph 20—"It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, includ-

ing local conditions, uncertainty of weather, and all other contingencies."

Paragraph 70—"Investigation. It is expected that each bidder will visit the site of this work, the office of the lock master, and the office of the local engineer, and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

As they proceeded with the work plaintiffs found that the dam was not backed with broken stone, sawdust and sediment, as stated in paragraph 33 of the specifications, and below seven feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet of sound logs filled with stone. As the result thereof the work was made much more expensive than if the representations inserted in the specifications had been true and only the character of the materials had been found which the specifications asserted was there.

Plaintiff in that case urged the same contentions which are presented in the case at bar, and in disposing of such contentions the court said:

"A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument. In Paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True, the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material,—a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity."

The case of *United States* vs. *Atlantic Dredging* Co., 253 U. S. 1, was a case in which the facts were somewhat similar to the case at bar. After stating the facts, the court said:

"The case is, therefore, within the ruling of *United States* vs. *Spearin*, 248 U. S. 132, 136, 64 L. ed. 166, 169, 39 *Sup.* Ct. Rep. 59, where it is stated

that the direction to contractors to visit the site and inform themselves of the actual conditions of a proposed undertaking will not relieve from defects in the plans and specifications, citing *Christie* vs. *United States,* 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565; *Hollerbach* vs. *United States,* 233 U. S. 165, 58 L. ed. 898, 34 Sup. Ct. Rep. 553, and *United States* vs. *Utah,* N. & C. Stage Co., 199 U. S. 424, 50 L. ed. 255, 26 Sup Ct. Rep. 69. It is held in those cases 'that the contractor ought to be relieved, if he was misled by erroneous statements in the specifications.' The' present case is certainly within the principle expressed."

The case of *United States* vs. *Smith* involved a contract for the excavation of a ship channel in the Detroit River approximately twenty-one feet deep, and provided that "the material to be removed consists of sand, gravel and boulders, all in unknown quantities.'' It was subsequently discovered that there was a natural bed of limestone rock within the boundaries of the excavatidn called for by the contract which was not provided for by the contract. The officers of the defendant in charge of the work insisted upon the performance of the contract in accordance with its terms, including the removal of the limestone. The contractor was thereby put to considerable expense in addition to what he would have been required to pay had the material which was required to be removed consisted of sand, gravel and boulders as stated in the specifications, and proceedings were commenced in the Court of Claims to recover the damages sustained by the contractor. The Court of Claims held with the contractor and upon appeal to the Supreme Court of the United States, that court said:

"We think the case is within the principle of *Hollerbach* vs. *United States,* 233 U. S. 165. * * * We concur, therefore, with the declaration of the Court of Claims that the right of appellees to recover for the work done by them is indisputable."

The contentions involved in the cases heretofore cited were similar to those in the case at bar, and under the authority of such cases the provisions of the plans and specifications relied upon by respondent do not constitute a defense to the plaintiff's claim.

Respondent's contention that the claimant is seeking to obtain additional compensation for work performed under the contract, and that the payment of such compensation would be in violation of Section 19 of Article 4 of the Constitution is equally without merit. The plaintiff is not seeking to recover compensation for work done under the provisions

of the contract, but seeks to recover damages resulting from the misrepresentation of the respondent.

A somewhat similar state of facts was involved in the case of *Pitt Construction Co.* vs. *City of Alliance, Ohio,* 12 Fed. 2d, 28. In considering the questions there involved, the court said:

"The suit is not brought to recover anything earned under the contract or for extra work of the character contemplated by the contract; it is brought to recover damages for the misrepresentation by which the contract was induced."

To the same effect see *Horgan* vs. *New York,* **160** N. Y. 518. As stated in the last case, "the unforseen obstruction that was encountered and that subjected this plaintiff to a large amount of extra work was entirely outside of the contract and stands unaffected by this provision."

Respondent also contends that under the provisions of the specifications, the action of the claimant in accepting the last payment under the contract without objection or reservation constitutes a release of all liability under said contract, and that the action of the Attorney General in waiving such provisions of the specifications was without authority and therefore not binding upon the respondent. The provisions of the specifications involved in this contention are as follows:

"The acceptance by the contractor of the last payment as aforesaid, shall operate as and shall be a release to the Department from all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act of neglect of said Department relating to or connected with this contract."

It will be noted that these provisions purport to release the Department "from all claims or liability *under this contract.*" As previously stated, the liability of the respondent is not under the contract, but wholly outside of the contract, and consequently the provisions of the specifications relied upon do not constitute a defense under the facts of this case.

Furthermore, under the facts here involved, we are of the opinion that the Attorney General had authority to make the stipulation in question.

In considering the authority of the Attorney General, our Supreme Court, in the case of *People* vs. *Spring Lake District,* **253** Ill. **479,** 504, where a similar question was involved, said:

"Appellees contend that the stipulation was one that the Attorney General had no power to enter into. Upon this branch of the case but little need be said. The Attorney General, under the law, is the sole representative of the people and the canal commissioners and has the power to file informations such as the one filed against appellees, and has power, both under the common law and under the statute, to make any disposition of such causes that he deems best to the interest of the State. (*Hunt* vs. *Chicago Horse & Dummy Railway Co.*, 121 Ill. 638; *Canal Comrs.* vs. *Village of East Peoria*, 179 id. **214).** No serious question can be raised in respect to the power of the Attorney General to dismiss a suit brought by him, either with or without any stipulation, upon behalf of the opposite party."

The case of *Keithley* vs. *County of Clark*, **206** Ill. App. 500, and the cases there cited, support the right of the Attorney General to enter into the stipulation involved in this case.

It must also be borne in mind that the stipulation in question was admitted into the record on February **27,** 1935, at the first hearing of this cause, by the Assistant Attorney General then in charge of the case, and that no question as to the right or authority of the Attorney General to enter into such stipulation was raised until after all of the evidence on both sides had been introduced, and the respondent's Statement, Brief and Argument was filed herein on March **27,** 1940, by the Assistant Attorney General then in charge of the case.

If the respondent intended to raise the question as to the authority of the Attorney General to enter into the stipulation, it should have been done before the proofs were closed, so that the claimant would have been in position to take such steps as it considered necessary for the protection of its rights in the matter.

The final contention of the respondent is that the action of the claimant sounds in tort, and the State is not liable for the torts of its officers or agents.

This action is not based upon the negligence of any officer or agent of the respondent, and consequently the rule sought to be invoked by respondent has no application in this case.

In the case of *U. S.* vs. *Atlantic Dredging* Co., **253** U. S. **1,** hereinbefore cited, the court said:

"The government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the government, and the Court of Claims regarded the representation of

the character of the material as in the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the government got the benefit."

Furthermore, the last mentioned case originated in the United States Court of Claims, which court has no jurisdiction of tort actions. Under the Court of Claims law of this State, however, this court is expressly given jurisdiction of actions *ex; delicto*. The contention of the respondent is not well taken.

Under the evidence and the law as set forth in the foregoing cases, the claimant is entitled to an award herein. The amount to which the claimant is entitled is not in dispute. The representatives of the respondent checked the work involved in this claim as it proceeded, and under the evidence it is clear that the amount to which the claimant is entitled is $23,092.09.

Award is therefore entered in favor of the claimant, Arcole Construction Company, for the sum of Twenty-three Thousand Ninety-two Dollars and Nine Cents ($23,092.09).

(No. 2870 — Intervening petitioner awarded $34.00.)

ROBERT BISHOP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion Pled March 11, 1941.

DOVE & DOVE, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

HOSPITAL SERVICES—*when award may be made for value of.* Where hospital renders necessary services to a person injured while working on a State project, who is brought to said hospital for treatment by one lawfully employed by State on said project, an award for the value of such services may be made even though said injured person was not lawfully hired to perform work by State, where hospital had no notice or knowledge of the fact that injured person was not a lawful employee of State.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case was filed on March 25, 1936, and alleges that claimant, on the 3rd day of June, 1935, was in the employ of the State of Illinois under the Department of Public Works and Buildings, Division of Highways, and was engaged in the gravelling of the Okaw Trail near Shelbyville, Shelby County, Illinois, the said Okaw Trail being one

truck, and who was working on this job of hauling gravel, made one trip that morning. The gravel was obtained on the

him if he wanted a job. Claimant said he did and Van Meter told him to jump in the truck. The truck at that time was loaded with gravel. Van Meter told claimant to dump the load and go out to the pit and finish the job. Claimant got on the truck and drove to the gravel pit. While dumping the truck, claimant's foot became injured by the body of the truck in some way pinching it with another part of the truck. Claimant had never driven this truck or any other truck belonging to Van Meter prior to this day, and never had been in the employ of the Division of Highways before this time.

The foreman on the job for the State was at the gravel pit, and the claimant saw him there, according to the evidence, but there was no conversation between them. There were six or eight trucks at the pit at that time, but the claimant did not know any of the people who were doing the hauling, according to his testimony, which was taken on March 11, 1937. Claimant further testified that he had no conversation with the foreman about wages or compensation and had not discussed it with Van Meter; that he did not know how much he was going to get or how long he would be on the job, and that he had never talked to anyone connected with the Division of Highways for the State of Illinois about driving Van Meter's truck and hauling. Claimant further testified that Van Meter had not made him an offer; that claimant was out of employment at the time and was glad to get anything; that he did not know Clay Hoskins personally and prior to his injury he had had no conversation with him; that he did not know whether Hoskins knew him or not; that he just saw Hoskins at the gravel pit that day, but had had no conversation with him; that he just drove the truck up and loaded it; that nobody said anything to him and Van Meter did not tell him to see anyone, foreman or otherwise, about the work he was doing. Claimant further testified that prior to the time of his injury he had not talked to any foreman or superintendent or engineer about driving Van Meter's truck; that he had known Van Meter for some time, and Van Meter knew he was out of work; that Van Meter just happened to meet him on the street that morning as he drove through. Claimant further testified that he had never talked to any member of the Division of Highways or Public Works and Buildings to see that his name was on the pay roll.

. Claimant further testified that after the accident Clay Hoskins came to see him while he was at the doctor's office and told him that he would do what he could for him, and that he would get compensation for him if he could, and did approve the doctor's and hospital bills.

An intervening petition has been filed in this case by both Dr. Mauzey and the Shelby County Memorial Hospital. Within a day or two after the accident in question the doctor received notification that Bishop was not an employee of the State, but nowhere in the record does it appear that the hospital ever was so advised and the hospital did render all necessary services. We, therefore, feel that their bill should be allowed. An award therefore is made upon the intervening petition to this hospital for the full amount of their bill, which is the sum of Thirty-four **($34.00)** Dollars. We feel the bill is reasonable, the services were rendered, and therefore make an award to the Shelby County Memorial Hospital in said sum of Thirty-four ($34.00) Dollars. An award to Robert Bishop and Dr. Mauzey is denied.

This award being subject to the provisions of an Act entitled "An Act making an Appropriation to Pay Compensation Claims to State Employees and providing for the Method of Payment Thereof" (Illinois Revised Statutes, 1939, State Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3388—Claim denied.)

PAUL BOYKE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed March 11, 1941.*

M. G. KAUFMAN, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of state Highway Department—State not liable for-award cannot be made for damages resulting from on grounds of equity and good conscience.* The State is not liable for damages to property caused by the negligent operation of one of its motor vehicles, by one of its employees, the doctrine of respondeat superior not being applicable to the State and no award can be made under any theory of law or equity.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint alleges that the claimant was the owner of a Ford sedan, which was parked facing in an easterly direction on the south side of Montrose Avenue entirely beyond the southernmost limit of the pavement of Montrose Avenue, at a point about 200 feet west of Narragansett Avenue, in the City of Chicago; that while his automobile was so parked, a motor vehicle of the State of Illinois belonging to the Highway Department was driven in such a manner that it ran into and against this parked car, causing property damage of $140.00.

A bill of particulars is attached to the complaint, showing damages suffered by the claimant in the sum of $96.35 for necessary repairs.

A motion to dismiss has been made on the ground that the complaint does not set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay for the reason that the claimant seeks an award predicated upon the liability occasioned by the negligent acts of the agents of the State.

Many times this court has held that the State, in the construction and maintenance of its highway system, is engaged in a governmental function, and in the absence of a statute expressly so providing it is not liable for damages to property occasioned by the negligence or wrongful operation of motor vehicles operated by the Division of Highways.

Bower vs. *State*, 9 C. C. R. 55;
Royal vs. *State*, 9 C. C. R. 67;
Morgan vs. *State*, 9 C. C. R. 109;
Waterstreet vs. *State*, 9 C. C. R. 111;
Clark vs. *State*, 9 C. C. R. 137;
Youngblut vs. *State*, 10 C. C. R. 52;
Duncan vs. *State*, 10 C. C. R. 154.

This court has further held that it has jurisdiction to make an award only in cases where the State would be liable

in law or equity if it could be sued in a court of general jurisdiction.

Crabtree vs. *State*, 7 C. C. R. 207;
Royal vs. *State*, 9 C. C. R. 67.

The motion to dismiss will, therefore, be sustained and an award denied.

(No. 3409—Claim denied.)

EDWARD M. BUCHNESS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*based on information submitted by payer—claim for refund of overpayment—when must be denied.* When the amount of a motor vehicle license fee is correctly computed and assessed, in accordance with law, based on information submitted by payer, and payment made thereof, such payment is a voluntary one, not made under mistake of fact, and if excess of that rightfully due no award can be made for refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant in his complaint alleges that for the half year of 1937 and the full year 1938 he paid to the Secretary of State a license fee for his 1928 Buick sedan in excess of the amount which he legally should have been required to pay; and therefore asks for a refund in the amount of such overpayment, to wit, the sum of Six Dollars ($6.00).

The Attorney General has moved to dismiss the claim on the ground that the complaint does not allege that the amount sought to be recovered was paid under protest, involuntarily, or under duress or compulsion, nor that the same was not correctly assessed on the basis of information supplied in the application made by claimant.

It is well settled that where a tax or license fee is paid voluntarily, without duress or compulsion, and not under protest, the same cannot be recovered. Where, however, such tax or license fee is paid under a mistake of fact, it is considered to have been paid involuntarily and may be recovered. However, where the tax is correctly computed by the taxing officer on the basis of an application or return filed by the appli-

cant, and the overpayment is the result of inadvertence or mistake on the part of the taxpayer himself, and not on the part of the taxing officer, the payment is not made under a mistake of fact within the legal meaning of those words, and cannot be recovered. (*Western Dairy Co.* vs. *State,* 9 C. C. R. 498; *James B. Emerick* vs. *State,* 9 C. C. R. 510; *Stotlar-Herrin Lumber Company* vs. *State,* 9 C. C. R. 517; *Fried Bell Paper Co.* vs. *State,* 9 C. C. R. 531; *Monarch Fire Insurance Co.* vs. *State,* 9 C. C. R. 538; *Oppenheimer Casing Co.* vs. *State,* 10 C. C. R. 9.)

The complaint does not set forth a state of facts under which we have authority to allow an award, and the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3169—Claim denied.)

LUCY C. F. CHETLAIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion Pled March 11, 1941.

CHETLAIN & CHETLAIN, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*amount of fixed from information submitted by payer—claim for refund where overpayment made—under no compulsion or duress—is voluntary payment—made under mistake of law—award for refund denied.* Where the amount of motor vehicle license fee is correctly computed in accordance with law, based on information furnished by payer, and payment of same made without any compulsion or duress, such payment is voluntary, and if amount is in excess of that rightfully due, is made under mistake of law, and no award can be made for refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges in substance that in making application for a license for her Packard automobile for the year 1936 the claimant correctly stated that the horsepower of the automobile was 32.5; that in making remittance therefor, claimant sent a check for $17.00, which was the license fee required for automobiles with a horsepower of 35 or over; that the license fee for claimant's automobile for the year 1936 was $10.50, and that she is entitled to a refund of the amount overpaid, to wit, $6.50.

The Attorney General has entered a motion to dismiss the claim for the reason that the complaint does not allege that the excess fee paid was paid under protest, duress or compulsion, or that there is a statute authorizing such refund.

It is a well settled rule of law in this State that where a tax or license fee is paid voluntarily and not under protest, compulsion or duress, it may not be recovered; also that where such tax or license fee is paid under a mistake of fact, it is considered as having been involuntarily paid and therefore may be recovered.

It is also well settled that where a tax or license fee is paid under a mistake of law, no recovery may be had. (*Alton Light & Traction Co.* vs. *Rose,* 117 Ill. App. 83; *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. *Kinaey,* 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.)

Under the facts set forth in the Complaint, it is clear that the license fee in question was paid voluntarily, and not under protest, compulsion or duress. It is also clear that the same was not paid under a mistake of fact, as the application correctly set forth the horse power of the automobile. The most that can be said from the standpoint of the claimant is that the mistake in remitting more than the amount which was required by the provisions of the Motor Vehicle Law was a mistake of law. In any such event, under the authorities above cited we have no authority to allow an award.

The motion of the Attorney General must therefore be sustained. Motion to dismiss allowed. Case dismissed.

(No. 3015—Claim denied.)

MELVIN COLLINS, BY MARY COLLINS HIS MOTHER AND NEXT FRIEND,

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

Opinion pled March 11, 1941.

FREDERICK & FREDERICK, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

CHARITABLE INSTITUTIONS—*conduct of, governmental function.* In the conduct of State charitable institutions the State exercises a governmental function.

SAME—*negligence of officers or employees of—State not legally or equitably liable for.* The State is not legally or equitably liable for injuries to an inmate of one of its State charitable institutions, resulting from the malfeasance, misfeasance or negligence of its officers, agents or employees, as in conducting such institution it is exercising a governmental function.

SAME—anmate of—not within provisions of Workmen's Compensation ***Act.*** An inmate of a State charitable institution, even though assigned to work therein is not an employee of the State, and does riot come under the provisions of the Workmen's Compensation Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This complaint was filed on October 21, 1936, and alleged that Melvin Collins, age twenty years, was an inmate of Lincoln State School and Colony, an institution under and in charge of the Department of Public Welfare of the State of Illinois; that on or about October 25, 1935, he was working at or with laundry and cleaning equipment under orders of the respondent, through its agents and servants. The complaint further avers that he was inexperienced in the use of machinery of its kind, and that it was dangerous machinery, and in obeying the orders of his superior., could not foresee said dangers, and was not warned or instructed by those under whose direction he mas working; that in commanding claimant to work with or at said machinery and equipment, it became and was the duty of the respondent to instruct claimant in the use of said'machinery and equipment and to warn him of the dangers thereof, but respondent failed and neglected its duty in this behalf, and the claimant, while in the exercise of due care and caution for his own safety caught his left arm in the machinery and was thrown violently in or upon said machinery and equipment, and his left arm was crushed and mutilated and divers bones in said arm were fractured and broken, causing permanent and lasting injuries, and that by reason of the injuries it became necessary to amputate the arm, to the damage of the claimant in the sum of $2,500.00.

The complaint avers notice to the respondent and that claimant has received nothing for his injury.

The Attorney General has made a motion to dismiss this case. For the purpose of considering this motion, we will assume that all allegations of fact are true. We have repeatedly held that such a statement of fact does not give rise to a legal claim against the State of Illinois. Claimant was confined in this institution, and in conducting an institution of this kind the State is engaged in a governmental function.

The records of this department, however, show that Melvin Collins was experienced in the use, operation and management of laundry or like machinery; that he had been instructed as to the operation and management of laundry machinery; that claimant had informed the officials at this institution that he had had six months training in the operation and management of the same type of laundry machinery as used at Lincoln State School and Colony while he was a charge of the Glenwood Manual Training School at Glenwood, Illinois. It also appears from the records that all hospital and doctor bills were paid by the State.

We have on numerous occasions held that the State is not legally or equitably liable to an inmate who receives an injury while confined in one of its institutions, and does not come under the provisions of the Workmen's Compensation Act.

Hagelwood vs. *State*, 6 C. C. R. 259;
Fitzmaurice vs. *State*, 6 C. C. R. 247;
Heiss vs. *State*, 6 C. C. R. 267;
Derby vs. *State*, 7 C. C. R. 145;
Butler, et al. vs. *State*, 8 C. C. R. 102;
Rutledge, et al. vs. *State*, 8 C. C. R. 206;
Pelli, et al. vs. *State*, 8 C. C. R. 324;
Parks, et al. vs. *State*, 8 C. C. R. 535;
William R. *Schaeffer*, No. 1968.

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

(No. 2713—Claim denied.)

CHESTER E. COULTAS, ADMINISTRATOR OF THE ESTATE OF LECILLE MILDRED COULTAS, DECEASED, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

A. M. FITZGERALD, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*respondeat superior—doctrine of not applzcable to State.* In the exercise of its governmental functions, the State is not liable for the negligence of its officers, agents or employees, in the absence of a Statute making it *so* liable, and in the State of Illinois 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 a defect in construction or failure to maintain same in a safe condition for travel.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant alleges that his intestate, on the 11th day of August, **1934,** was in an automobile driven by another, over U. S. Route No. **36,** which road had been built and maintained by the State of Illinois; that about **11**:30 p. m., approximately three hundred yards west of the point known as the "Wilson Corner," the car in which the deceased was riding struck **a** large limb of a tree which had been blown across the highway by a storm which occurred a couple of hours before claimant's intestate approached in the automobile, and was not seen by the driver of the automobile until the automobile was practically at the place where the limb of the tree had fallen upon the highway.

The usual averments of due care and caution for her own safety are contained in the complaint.

Plaintiff's intestate, Lucille Mildred Coultas, died as the result of her injuries.

The complaint charges that the State had employed a *watchman or a maintenance man located at Winchester, Illinois, whose duty it was to inspect and patrol the highways and to see that they remain in a safe condition.

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

The Attorney General has made a motion to dismiss this claim on the ground that the State is not liable for the carelessness and negligence of its servants and agents.

Both this court and the Supreme Court of Illinois and other courts have held that in the construction and maintenance of its roads, the State acts in a governmental capacity and in the exercise of such governmentitl functions it does not become liable in actions of tort by reason of the malfeasance, misfeasance or negligence of its officers or agents in the absence **of** a statute creating such liability.

Morrissey vs. *State*, 2 C. C. R. 454;
Minear vs. *State Board of Agriculture*, 259 Ill. 549.

Many times, since the adoption of the opinion in the *Morrissey* case, this court has followed the doctrines therein announced. Therefore, the motion to dismiss will be sustained and cause dismissed.

(No. 3087—Claimant awarded $431.40.)

ALFRED W. EVANS, ADMINISTRATOR OF THE ESTATE OF WILLIAM B. EVANS, DECEASED, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

Rehenrang allowed February 13, 1941.

HOMER D. MCLAREN, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

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

MR. JUSTICE LINSCOTT delivered the opinion of the court:

A rehearing was granted in this case, the case having been formerly decided by a divided court.

Claimant's intestate filed a complaint in this court seeking an award in compensation for injuries alleged to have been sustained in the course of his employment as a janitor-custodian in the office of the Attorney General.

The facts have been stipulated.

At the time of the injury claimant's intestate had no children under sixteen years of age, and for more than one year preceding the date of the injury had been employed as a janitor-custodian in the Attorney General's office at a wage of $112.50 per month. On October 16, 1936, while engaged in his usual work of cleaning up the office quarters he reached over a chair to turn off an electric fan and in so doing he tripped on the chair and his left hand was thrust into the fan, breaking the bones of the first joint of the third finger, bruising the bones of the second and third fingers, tearing the ligaments of both fingers and lacerating them.

The Attorney General had immediate notice of the injury, and in the treatment of this injury claimant's intestate incurred and paid medical and hospital bills in the total sum of $42.00. Claimant paid Dr. J. E. Reisch the sum of $37.00 and paid St. John's Hospital the sum of $5.00. The respondent did not pay any of either bill.

The stipulation further stated that if Dr. J. E. Reisch, the attending physician and surgeon, was called as a witness he would testify that as a result of said injuries there is a ten per cent limitation of flexion in the second joint of the second finger of the left hand and a twenty-five per cent limitation of flexion in the first joint of the third finger of said hand, and a tendon shortening in the palmer surface of the first joint of the third finger of said hand. The stipulation went further and stated that claimant's intestate had suffered a fifty per cent permanent disability or loss of use of both the second and third fingers of the left hand. No claim was made for temporary incapacity. Apparently he lost no time from work and was paid his regular salary after the injury.

The Attorney General's office quarters, where claimant worked and where he was injured, are located in the Supreme Court Building, Springfield, Illinois. These office quarters occupy the east portion of the ground floor and basement of the building. There is an electrically powered elevator in the building for the general use of all who have business in the building, but it was not operated by claimant's intestate. There is another electrically powered elevator located in the east end of the building in the quarters of the Attorney General, which is operated by anyone having occasion to use that elevator, and the office quarters were equipped with the usual fans for use during the warm months, and electric water coolers.

Claimant's intestate operated the last mentioned elevator in transporting supplies from the basement to the Attorney General's office, and otherwise in the performance of his duties, and upon consideration of all of the facts in the record we are of the opinion that at the time of the accident in question claimant's intestate and the respondent were both operating under and bound by the provisions of the Workmen's Compensation Act.

We therefore hold that claimant's intestate received an injury that arose out of and in the course of his employment,

and make an award to the claimant, Alfred W. Evans, Administrator of the Estate of William B. Evans, deceased, as follows:

For the specific loss of 50% use of second finger..	$227.15
For the specific loss of 50% use of third finger..	162.25
For medical and hospital bills..	42.00,

or a total sum of $431.40.

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Fund in the manner provided by the foregoing Acts.

(No. 3043—Claim denied.)

H. D. HILEMAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

GEORGE E. MARTIN, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*assessed on information submitted by payer — claim for refund of overpayment—when award for denied.* Where the amount of a motor vehicle license fee is correctly computed and assessed in accordance with law, based on information submitted by payer, such payment is a voluntary payment, and if amount is in excess of that rightfully due, no award can be made for refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant filed his complaint herein on January 4, 1937, and alleges therein in substance that for the last half of 1925 and for the years 1926 to 1936, inclusive, he paid a motor

vehicle license tax on his Buick automobile in excess of the amount which he was really required to pay; that in each of his applications for motor vehicle license he set forth that the horsepower of said motor vehicle was 30, whereas in fact it was 23.4; that by reason of his error in that behalf he made an over-payment of $4.00 per year, or a total over-payment of $46.00 for the period above set forth, and therefore asks for a refund of that amount.

The Attorney General has moved to dismiss the case upon the following grounds:

1. That the registration fees were correctly assessed on the basis of the applications filed by claimant and were paid voluntarily, and therefore claimant is not entitled to a refund of any part thereof.

2. That the claim for the years 1925 to 1936, inclusive, is barred by the Statute of Limitations.

The rule is well established in this State that where an excessive tax or fee is paid voluntarily with a full knowledge 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* a? *Traction* Co. vs. *Rose*, 117 Ill. App. 83; *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; *Hettler Lumber* Co. vs. *Cook County*, 336 Ill. 645; *Cooper, Kanaley* a? Co. vs. *Gill*, 363 Ill. 418; *American Can* Co. vs. *Gill*, 364 Ill. 254.)

Under the facts set forth in the complaint, it appears that the fee was correctly computed by the Secretary of State on the basis of the application made by claimant, and that the only error or mistake was the error of the claimant in setting forth the correct horsepower of his motor vehicle.

This court has held in numerous cases 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. (*Western Dairy* Co. vs. *State*, 9 C. C. R. 498; *James B. Emerick* vs. *State*, 9 C. C. R. 510; *Stotlar-Herrin Lumber Co.* vs. *State*, 9 C. C. R. 517; *Fried* a? *Bell Paper* Co. vs. *State*, 9 C. C. R. 531; *Monarch Fire Insurance* Co. vs. *State*,

9 C. C. R. 538; *Oppenheimer Casing* Co. vs. *State*, 10 C. C. R. 9; *Kansas* City *Fire & Marine Insurance* Co. vs. *State*, 10 C. C. R. **443;** *St. Louis Fire & Marine Insurance* Co. vs. *State*, No. 3413, decided January Term, 1940.)

For the reason that none of the payments in question were made under a mistake of fact within the legal meaning of those words, we have no authority to allow an award, and it therefore becomes unnecessary to consider the second point raised by the Attorney General. For the reasons above stated the motion of the Attorney General to dismiss must be allowed.

Motion to dismiss allowed. Case dismissed.

(No. 2914—Claim denied.)

A. R. HORTON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion** filed March **11, 1941.

HODGES & TRAGETHON, for claimant.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State—Rate never liable* for. The State is never liable for injuries sustained, or damage to property, caused by reason **of** the malfeasance, misfeasance or negligence of its officers, agents or employees in the exercise of its governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant seeks damages in the sum of Sixty Dollars and Twenty-five Cents ($60.25), and charges that on October 15, 1935, about 11:00 p. m., he was driving his Ford truck south on Fifth Street in the City of Springfield, and at the intersection of Fifth Street and Capitol Avenue, traffic lights regulated the traffic. Claimant avers that he had the right-of-way, and while in the exercise of due care and caution for his own safety, a truck driven by Norman R. Stanton, a member of the National Guard, carelessly and negligently struck him. The negligence averred is that of running the traffic light.

This again raises the question of the liability of the State for the negligent acts of its agents.

This court, the Supreme Court of the United States and the Supreme Court of Illinois have repeatedly held that the State is not liable for the injuries complained of by reason

of the malfeasance, misfeasance or negligence of its officers or agents in the exercise of its governmental functions.

Petersen. vs. *State, 8* C. C. R. 9;
Shumway vs. *State, 8* C. C. R. *43* ;
Sullivan vs. *State, 8* C. C. R. 140;
Childress vs. *State, 8 C.* C. R. 223.

The motion to dismiss filed by the Attorney General will, therefore, be sustained, and the award denied.

(No. 3261—Claim denied.)

HARRY J. KOPP, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General ; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*amount of fixed from information submitted by payer—claim for refund of excess where overpayment made—must be dented.* Where the amount of motor vehicle license fee is correctly computed, in accordance with law, based on information submitted by payer, and payment of same made without any compulsion or duress, such payment is voluntary and not made under mistake of fact, and if amount is in excess of that rightfully due, no award can be made for refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein sets forth that the claimant in making application for a 1937 license for his Ford truck incorrectly stated the weight thereof, and that by reason of such error, he was required to and did pay a license fee of $24.00 whereas the proper fee based upon the correct weight of such truck was but $12.00, and he therefore asks for a refund of the amount so overpaid, to wit, the sum of Twelve Dollars ($12.00).

The Attorney General has moved to dismiss the case for the reason that the fee paid by claimant was correctly assessed by the Secretary of State upon the basis of the application filed by claimant, and was paid by the claimant voluntarily without protest, and consequently he is not entitled to refund of any part thereof.

It is well settled that where a tax or license fee is paid voluntarily, without duress or compulsion, and not under pro-

test, the same cannot be recovered. Where, however, such tax or license fee is paid under a mistake of fact, it is considered to have been paid involuntarily and may be recovered. However, where the tax is correctly computed by the taxing officer on the basis of an application or return filed by the applicant, and the over payment is the result of inadvertence or mistake on the part of the taxpayer himself, and not on the part of the taxing officer,the payment is not made under a mistake of fact within the legal meaning of those words, and cannot be recovered. (*Western Dairy* Co. vs. *State,* 9 C. C. R. 498; *James* B. *Emerick* vs. *State,* 9 C. C. R. 510; *Stotlar-Herrin Lumber Compmy* vs. *State,* **9** C. C. R. 517; *Fried-Bell Paper* Co. vs. *State,* 9 C. *C.* R. 531; *Monarch* **Fire** *Insurance* Co. vs. *State,* 9 **C.** C. R. *538; Oppenheimer Casing* Co. vs. *State,* 10 C. *C.* R. 9.)

Under the facts set forth in the complaint we have no authority to allow an award and therefore the motion of the Attorney General must be sustained and the claim dismissed.

Motion to dismiss allowed. Case dismissed.

(No. 3444—Claimant awarded **$2.20.**)

LITCHFIELD AND MADISON RAILWAY COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed March **11,** 1941.*

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney. General; GLENN **A.** TREVOR, Assistant Attorney General, for respondent.

SERVICES—*freight charges—when award may be made for.* Where it clearly appears that claimant is entitled to demurrage on a freight car owing to failure **of** State to unload same within given time, and that bill therefor was not presented before lapse of appropriation out of which it could be paid, an award may be made, on claim filed within reasonable time for the amount thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant asks for an award in the amount of Two Dollars and Twenty Cents **($2.20)** for demurrage on a car of stone consigned to the Division of Highways at Mt. Olive, Illinois. The car in question was spotted on Saturday night, June 3d, 1939, at 10:05 P. M. The free ,unloadingperiod expired Tues-

day night, June 6, 1939, but the Division was unable to complete the unloading of the same until the afternoon of June 7th, whereby the claimant became entitled to one day's demurrage.

The claim was presented for payment on October 6, 1939, and was approved by Mr. Walter Donaldson, Transportation Expert of the Division of Highways, but payment thereof could not be made on account of the fact that the appropriation out of which the same was properly payable lapsed on September 30, 1939.

We have held in numerous cases that where services have been properly rendered to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable and customary value of the services will be made, where at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *(Rock Island Sand & Gravel Co.* vs. *State,* 8 *C. C.* R. 165; *Indian Motorcycle* Co. vs. *State,* 9 C. C. R. 526; *Wabash Telephone* Co. vs. *State,* 10 C. C. R. 211.)

This claim comes within the requirements above set forth, and an award is therefore entered in favor of the claimant for the sum of Two Dollars and Twenty Cents ($2.20).

(No. 2865—Claim denied.)

E. LLOYD, DOING BUSINESS AS MERCHANTS FREIGHT LINES, FOR USE OF JAMES O'DONNELL TEAMING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

STERNBERG & STERNBERG, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

GARNISHMENT—*State or instrumentality of not subject to—Illinois Emergency Relief Commission instrumentality of State Government.* The Illinois Emergency Relief Commission is an instrumentality of the State Government and is not subject to garnishment directly and cannot be subjected to such proceedings indirectly.

JURISDICTION—*when court without.* The Court of Claims has no jurisdiction to order payment of moneys to claimant, due him from another, even though instrumentality of State Government is indebted to such other, as there is nothing in the Statute creating the Court authorizing such order.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges in substance that during the months of August and September, 1935, the claimant, James O'Donnell Teaming Company, as a sub-contractor of E. Lloyd doing business as Merchants Freight Lines, did certain hauling for the Illinois Emergency Relief Commission, for which there became due and owing to said James O'Donnell Teaming Company the sum of $76.54; that the said E. Lloyd has left the jurisdiction without paying claimant; that there is enough money on hand at the Illinois Emergency Relief Commission to the credit of E. Lloyd doing business as Merchants Freight Lines, to pay for the services of the claimant, but that the Illinois Emergency Relief Commission has refused to pay said claim without the approval of a proper court; that an attachment suit was commenced in the Municipal Court of Chicago and dismissed, and that claimant's only remedy is in this court.

The Attorney General has entered a motion to dismiss the claim for the following reasons:

1. The court has no jurisdiction of such claim.
2. That claimant seeks in effect to make the respondent a garnishee.
3. That the claimant has a complete and adequate remedy at law.

It is not clear from the complaint why the garnishment proceeding in the Municipal Court was dismissed, nor is it clear from the complaint whether the claimant seeks an order of this court directing the Illinois Emergency Relief Commission to pay the amount alleged to be due the beneficial claimant, or whether said claimant seeks an award by this court to be paid by an appropriation made by the Legislature in the usual course of procedure.

The services rendered by the beneficial claimant were not pursuant to any contract between it and the Illinois Emergency Relief Commission, but were rendered by said claimant as a sub-contractor for Lloyd, who had a contract with the Illinois Emergency Relief Commission, and the beneficial claimant herein seeks to subject the funds in the hands of the Illinois Emergency Relief Commission to the payment of its claim against Lloyd. It follows therefore, that regardless

of the form of this proceeding, it is in effect an attempt to hold the Illinois Emergency Relief Commission as garnishee.

The general rule in cases of this kind is set forth in 28 Corpus Juris, page 64, section 80, as follows:

"In the absence of express provision to the contrary, no sovereign government will be deemed to be included in the provisions of statutes prescribing who may be made garnishee. Accordingly, as a general rule, garnishee process can reach neither the Federal Government, nor a State, nor a territory. This exemption is sustained also by considerations of public policy."

In the case of *Home Owners Loan. Corporation.* vs. *Hardie and Caudle*, 100 S. W. (2d) **238,** the Supreme Court of Tennessee held that the Home Owners Loan Corporation was an instrumentality of the federal government and therefore not subject to garnishment. There can be no question but what the Illinois Emergency Relief Commission is an instrumentality of the State Government and therefore exempt from garnishment. If **an** instrumentality of the State Government such as the Illinois Emergency Relief Commission is not subject to garnishment directly, it cannot be subjected to such proceedings indirectly, as is sought to be done in this case.

This court has oniy such jurisdiction as is given to it by the Legislature, and there is nothing in the Court of Claims Act which authorizes this court to grant the relief sought in this proceeding.

The remedy of the claimant is against the person with whom it contracted, to wit, E. Lloyd, doing business as Merchants Freight Lines.

The motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2901—Claim denied.)

GERTRUDE LOHN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of Hate—State never liable for.* The State is not liable for injuries caused by reason of the malfeasance, misfeasance or negligence of its officers, agents or employees in the exercise of its governmental functions.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant appears for herself in this suit and alleges damages in the sum of $2,000.00. She basis her claim on the fact that on September 16, 1935, she was standing in the parkway or safety zone located at the northwest corner of Irving Park Boulevard and Narragansett Avenue in the City of Chicago when an automobile owned by the State and carelessly and negligently driven by Homer D. Catt struck her and severely injured her. She avers that Catt was an employee of the State Highway Department at the time and in parenthesis avers "and so acting at said time and place."

The Attorney General has made a motion to dismiss on the ground that the State is not liable for the careless and negligent acts of its employees, and has ignored the insufficiency of the pleading, but stands on the proposition that the State is not liable for injuries complained of by reason of the malfeasance, misfeasance or negligence of its officers or agents in the exercise of its governmental functions, as this court held in the case of *Childress* vs. *State, 8* C. C. R. 223, and *Crabtree* vs. *State,* 7 C. C. R. 207.

For these reasons the motion to dismiss must be sustained and an award denied.

(*No.* 3049—Claim denied.)

EDGAR G. MERWIN AND CARRIE MERWIN, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

FREDERICE L. HABBEGGEB, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employee of State Highway Department—State never liable for.* In the construction and maintenance of its hard-surfaced highways the State is engaged in a governmental function and is not liable for the malfeasance, misfeasance or negligence of its officers, agents or employees in connection therewith.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case is before the court on a motion to dismiss the complaint which consisted of two counts.

The first count alleges that Edgar G. Merwin was the owner of a Packard automobile, which he was driving in a northerly direction over State Highway No. 3, also known as United States Highway No. 67, between Jerseyville and Carrollton, Illinois, and that his wife, Carrie Merwin, was riding as a passenger with him; that they were in the exercise of due care and caution for their own safety and that of the property of the claimant, Edgar G. Merwin; that at the time the State owned and operated an automobile, and was operating the same by its servants; that as the claimants were traveling on the highway, without any warning, the servant of the State backed his car rapidly upon the highway at such lime and in such a manner that the claimants could not avoid running into him, and both claimants suffered severe injuries.

Count I alleged damages in the sum of $5,000.00 and Count II alleged damages in the sum of $1,000.00.

A motion to dismiss was made by the Attorney General. We will consider that motion.

The facts set forth in the complaint are sufficient to show negligence on behalf of the servant of the State, a resulting injury and damages, and to show that the agent of the State was an employee of the Highway Department and that the State was engaged in a work that comes fairly within its governmental powers.

Many times this court has 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;
Bucholx 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;

Rym 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.

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.

We must, therefore, sustain the motion to dismiss made by the Attorney General and deny an award.

(No. 2797—Claim denied.)

HUGO McCORD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of State—State not liable for.* The State is never liable for the negligence of its officers, agents or employees, while in the performance of governmental functions, the doctrine of respondeat superior not being applicable to it.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant has filed a sworn statement of his claim. It does not conform to the strict rule of pleading but it is sufficient to advise the respondent of the facts.

It appears from the statement that he was driving an automobile on December 26, 1935, on State Route 1 north of Danville, Illinois, when he struck a snow plow belonging to the State, which was not on the proper side of the road and which mas being towed. The statement sets forth that hecause claimant was a minister he was able to get repairs made to his automobile for less than what the State would have to pay because members of his congregation did the work for less money. He submitted a Bill of Particulars showing damages in the sum of $37.42 which would have been tha regular cost. but which actually cost him $24.91. Claimant's attitude in this regard is commendable, but owing to the fact that the

State is not liable for the negligent acts of its agents or its servants while in the performance of a governmental function, the State is not liable. This has been the holding of this court in many instances, and is also the doctrine established by the Supreme Court of United States and the Supreme Court of Illinois.

The motion of the Attorney General to dismiss must, therefore, be snstained, and award denied.

(No. 3228—Claim denied.)

THEODORE H. REUTER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*amount of fixed from information submztted by payer—claim for refund of excess where overpayment made—must be denied.* Where the amount of motor vehicle license fee is correctly computed in accordance with law, based on information submitted by payer, and payment of same made without any compulsion or duress, such payment is voluntary, not made under mistake of fact, and if amount is in excess of that rightfully due, no award can be made for refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant seeks a refund of Twelve Dollars ($12.00), which amount he claims he overpaid for automobile registration fees for the years 1934,1935 and 1936;—in each of which years he paid the sum of Ten Dollars and Fifty Cents ($10.50) instead of Six Dollars and Fifty Cents ($6.50) which he was legally required to pay.

The Attorney General has moved to dismiss the claim for the reason that the complaint does not allege that the excess fees were paid under protest or under duress or compulsion, or that there is a statute authorizing such refund.

Claimant apparently bases his right to recover upon the contention that the excess payments so made by him as aforesaid were made under a mistake of fact.

It is generally recognized that where an illegal or excessive tax is paid voluntarily, with a full knowledge of all the facts, it cannot be recovered. It is equally well recognized

that where such tax is paid under a mistake of fact, it may be recovered. However this court has held in numerous cases that where a license fee is correctly assessed by the Secretary of State on the basis of the application filed by the owner of the automobile and he is thereby required to pay a fee in excess of what he legally should have paid, the payment can not be considered as having been made under a mistake of fact within the legal meaning of those words, and consequently he is not entitled to a refund of the amount so paid. (*James B. Emerick* vs. *State,* 9 C. C. R. 510; *Western Dairy Co.* vs. *State,* 9 C. C. R. 498; *Stotlar-Herrin Lumber Co.* vs. *State,* 9 C. C. R. 517; *Fried & Bell Paper* Co. vs. *State,* 9 C. C. R. 531; *Oppenheimer Casing Co.* vs. *State,* 10 C. C. R. 9; *Kansas City Fire & Marine Insurance Co.* vs. *State,* 10 C. C. R. 443.)

Under the facts set forth in the complaint we have no authority to allow an award, and therefore the motion of the Attorney General must be sustained and the claim dismissed.

Motion to dismiss allowed. Case dismissed.

(No. 2767—Claim denied.)

HARRIET S. TAYLOR AND FRANK M. TAYLOR, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CHARLES R. TAYLOR, for claimants.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

HIGHWAYS—*cutting and burning grass and weeds along in maintaining of — damage to property — caused by fire started by highway maintenance policeman, in burning grass and weeds growing along — State not liable for.* The facts in this case are almost identical with those in *Unverheit* vs. *State,* 8 Court of Claims Reports, 577 and the decision in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

In this complaint it is charged that Harriet S. Taylor and Frank M. Taylor were the owners of eight acres of wheat and five rows of corn forty-eight rods long which were destroyed by the employees of the Highway Department of the State of Illinois in the burning of grass and weeds along the

highway known as U. S. 36; that the wheat loss was $147.20 and the corn loss was $9.00.

The Attorney General made a motion to dismiss because the State was engaged in a governmental function and is, therefore, not liable for the negligence of its employees.

We must assume that the facts stated in the complaint are true. The motion raises only an issue of law.

The court has uniformly held that the maintenance by the State of its State bond issue routes is a governmental function, and has also held in numerous cases that the State is not liable for the negligence of its servants or agents in the performance of governmental functions.

Hinchcliff vs. *State*, 2 C. C. R. 159;
Derby vs. *State*, 7 C. C. R. 145;
Hollenback Admrx. vs. *Winnebago County*, 95 Ill. 148;
Minear vs. *State Board of Agr.*, 259 Ill. 549; 25 R. C. L., p. 407, Sec. 43;
Loges vs. *State*, No. 1946; Opinion filed Feb. 7, 1934.

It is a rule of almost universal application that no government is liable for the negligence or misfeasance of its officers and agents, in the absence of a statute making it liable.

Gibbons vs. *U. S.*, 8 Wal. 269;
U. S. vs. *Kirkpatrick*, 9 Wheaton 720;
Jorgensen vs. *State*, 2 C. C. R. 134;
Reliable Coal Mining Co. vs. *State*, 7 C. C. R. 56;
Crawford vs. *State*, No. 2360, Opinion filed Dec. 11, 1934.

The General Assembly has never enacted a law making the State liable for damages caused by the negligent construction or maintenance of a public road, and this court has no power to make an award for such damages, in the absence of such a statute.

Churnbler vs. *State*, 6 C. C. R. 138;
Bucholz vs. *State*, 7 C. C. R. 243.

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 held not liable.

Symonds vs. *Clay County*, 71 Ill. 355.

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

(No. 2845—Claim denied.)

ELLSWORTH H. VALENTINE, Claimant, *us.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

WIRT HERRICK, for claimant.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of Depai-tment of Highways — Rate never liable for.* In the construction and maintenance of its public highways, the State exercises a governmental function and is never liable for the negligence or carelessness of its officers, agents or employees in connection therewith regardless of the degree of such negligence.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This case comes before us on a motion to dismiss the complaint.

The complaint alleges that the claimant, while in the exercise of due care and caution for his own safety, mas engaged on his land in repairing a floodgate across Camp Creek in Monticello Township, Piatt County, Illinois, where the track of the Illinois Central Railroad crosses said Camp Creek, and while he was so engaged two employees of the Department of Highways of the State of Illinois, were engaged in the execution of orders given them by the Department in loosening gravel for use on the highways of the State of Illinois, from a pit located on the opposite side of and directly across said railroad track and embankment which divided claimant's land where claimant was working, and that without any notice to the claimant, the agents of the State, on the opposite side of the railroad embankment and in close proximity to where the claimant was engaged, were using dynamite or other high explosives at the gravel pit; that the agents of the State knew or should have known the force of the explosives that they were using, and that it would cause missiles of frozen earth and gravel to be thrown with great force and violence over the embankment where the tracks of the railroad were and onto the property of the claimant, and that they knew or should have known that such missiles would be of such a nature and would be thrown by said explosives in such a way as to endanger the life and limb of claimant or anyone within the range of said missiles; that

without warning of any kind the agents of the State carelessly and negligently exploded a high explosive and that the claimant was injured thereby. Claimant asks damages in the sum of Nine Hundred Eighty-six Dollars and Eighty-one Cents ($986.81). An itemized statement of the damages was filed with the complaint.

The motion to dismiss admits that the State in the preparation of gravel to be used upon its highway mas engaged in a governmental capacity, and, therefore, ,the State was not liable.

The Supreme Court of the United States and the Supreme Court of Illinois, and this court have repeatedly held that when a State is engaged in the exercise of a governmental function it is not liable for damages caused by the negligence of its servants or agents employed to do the same.

Counsel for claimant argues that the negligence in this case amounts to wilfullness and wantonness. The general rule above announced has been held many times to be the law, and this court has held that there are no exceptions to it.

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

(No. 3250—Claim denied.)

VIKING AUTOMATIC SPRINKLER COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 11, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*claim for refund where vehicle not used during period for which issued—must be denied.* The Statute providing for the licensing of motor vehicles contains no provision for refund of a license fee, paid thereunder where licensee fails to use vehicle for which issued during term of license.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant paid Thirty-five Dollars ($35.00) for a motor truck license for the year 1938. The license was issued December 22, 1937 and was not used any time during the year 1938, and claimant has asked for the refund of the license fee

so paid by him, and has indicated that the license plates issued to him will be returned.

This court has held in numerous cases that where a license fee is paid under a mistake of fact, it may be recovered. However, in this case payment was not made under circumstances constituting a mistake of fact, nor was it made under protest, or under fraud or compulsion. Payment was made voluntarily with a full knowledge of the facts, and the mere fact that the claimant failed to take advantage of the license issued to it does not entitle it to a refund of the amount paid.

Application for refund under similar circumstances has been denied by this court in the following cases: *Phillips* vs. *State*, 10 C. C. R. 53; *Eaid* vs. *State*, 10 C. C. R. 244; and *Frank J. Tierman* vs. *State*, No. 3236, decided at the present term of this court.

Motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3056—Claim denied.)

ILLINOIS LUMBER COMPANY, INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

BUCKLEY & BUCKLEY, for claimant.

GEORGE F. BARRETT Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*computed and assessed on basis of information furnished by payer—amount in excess of that rightfully due—paid without compulsion or duress—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 payer, and it pays such amount without compulsion or duress, such payment is voluntary, not made as the result of mistake in fact, and no award can be made for refund of same or any part thereof, alleged to be in excess of that rightfully due.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint herein alleges in substance that in making its annual reports to the Secretary of State for the year 1933 and 1934, it erroneously reported a paid-in surplus of $204,339.00, whereas in fact the surplus of the claimant as shown by such reports was an "earned surplus" and was therefore

not properly taxable under the laws of this State; that by reason thereof, the claimant paid a franchise tax in the amount of $102.17 for each of such years 1933 and 1934, in excess of the amount it was legally required to pay, and claimant therefore asks for a refund of the excess tax so paid by it as aforesaid, together with interest froin the date of payment at the rate of 5% per annum.

The Attorney General has filed a motion to dismiss the claim for the reason that the tax was correctly assessed on the basis of the annual reports filed by the claimant, and the payment in question was not made under protest.

A similar question was presented to this court in the case of *Western Dairy* Co. vs. *State*, 9 C. C. R. 498. In considering the question there involved, we said, page 499:

"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 thitt where an illegal of excessive tax is paid voluntarily, with full knowledge 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.

* * * * * * * * * *

"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 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."

To the same effect, see *Stotlar-Herrin Lumber* Co. vs. *State*, 9 C. C. R. 517; *Fried & Bell Paper* Co. vs. *State*, 9 C. C. R. 531; *Monarch Fire Insurance Co.* vs. *State*, 9 C. C. R. *538; Kansas City Fire & Marine Insurance Co.* vs. *State*, No. 3413, decided February 14, 1940.

Under the law as set forth in the cases cited, we have no authority to allow an award, and the motion of the Attorney General will therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3111—Claim denied.)

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

Opinion filed March 12, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE *FEE—assessed on information submitted by payer—claim for refund of overpayment—when award for denied.* Where the amount of a motor vehicle license fee is correctly computed and assessed in accordance with law, based on information submitted by payer, and payment made therefor without compulsion or duress, such payment is voluntary, and if amount is in excess of that rightfully due no award can be made for a refund of such excess.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant asks for a refund in the amount of Four Dollars ($4.00) which he claims to have overpaid to the Secretary of State as an automobile license fee for 1936.

The Attorney General has moved to dismiss the claim for the reason that the complaint does not allege that the excess payment was made under protest, involuntarily or under duress or compulsion.

It is well settled that where a tax or license fee is paid voluntarily, without duress or compulsion, and not under protest, the same cannot be recovered., Where, however, such tax or license fee is paid under a mistake of fact, it is considered to have been paid involuntarily and may be recovered. However, where the tax is correctly computed by the taxing officer on the basis of an application or return filed by the applicant and the over payment is the result of inadvertence or mistake on the part of the taxpayer himself, and not on the part of the computing officer, the payment is not made under a mistake of fact within the legal meaning of: those words and cannot be recovered. (*Western Dairy* Co. vs. *State,* 9 C. C. R. 498; *James B. Emerick* vs. *State,* 9 C. C. R. 510; *Stotlar-Herrin Lumber Company* vs. *State,* 9 *C. C.* R. 517; *Fried Bell Paper Co.* vs. *State,* 9 C. *C.* R. 531; *Monarch Fire Insurance* Co. vs. *State,* 9 C. *C.* R. *538; Oppenheimer Casing Co.* vs. *State,* 10 *C. C.* R. 9.)

The complaint does not set forth a state of facts under which we have any authority to allow the award, and the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2923—Claim denied.)

MONA MATHESON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opanzon filed March 12, 1941.

GEORGE C. BOTH, for claimant.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent,

MOTOR VEHICLE LICENSE FEE—*amount of based on information submitted by payer—claim for refund of overpayment—when award for denied.* The **facts** in this case are almost identical with those in *Oppenheimer Casing Company* vs. *Xtate,* 10 Court **of** Claims Reports, 10 and what was said by the court therein is applicable here.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant in her complaint alleges that she is the owner of a 1928 Buick coach; that during the years 1932, 1933 and **1934,** in making application to the Secretary of State for the issuance of license plates for such automobile, through inadvertence she made an over-payment of Four Dollars ($4.00) for each of such years;— and she therefore asks for a refund of such over-payment, to wit, Twelve Dollars ($12.00).

It is a rule of general application that where taxes or license fees are paid voluntarily, with a knowledge of the facts, and not under protest or compulsion, the same cannot be recovered back. It is also well settled that where license fees are paid under a mistake of fact, such payment is considered as not having been voluntarily made and therefore may be recovered.

However, where the tax is correctly computed by the taxing officer on the basis of an application or return filed by the applicant, and the over payment is the result of inadvertence or mistake on the part of the taxpayer himself, and not on the part of the taxing officer, the payment is not made under a mistake of fact within the legal meaning of those words and cannot be recovered. (*Western Dairy* Co. vs. *State,* 9 C. C. R. 498; *James B. Emerick* vs. *State,* 9 C. C. R. 510; *Stotlar-Herrin Lumber Co.* vs. *State,* 9 C. C. R. **517;** *Fried Bell Paper* Co. vs. *State,* 9 C. C. R. **531;** *Monarch Fire Insurance* Co. vs. *State,* 9 C. C. R. *538*; *Oppenheimer Casing Co.* vs. *State,* 10 C. C. **R.** 9.)

Upon the facts set forth in the complaint, we have no authority to allow an award, and the claim must therefore be dismissed.

Award denied. Case dismissed.

(No. 3522—Claim denied.)

MERCHANTS FIRE INSURANCE COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*privilege tax— amount of based* ***on*** *information supplied* ***by*** *payer— when payment of deemed voluntary—not* ***under*** *mistake of fact— when. award for refund of amount alleged to* ***be in excess*** *of that rightfully due must* ***be*** *denied.* Where amount of privilege or franchise tax is correctly computed by State Department, in accordance with law, based on information submitted by payer and payment thereof made, without any compulsion or duress, with **full** knowledge of facts or opportunity to obtain same, such payment is voluntary, 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 LINSCOTT delivered the opinion of the court:

On February 23, 1940, pursuant to the provisions of Section 410 of the Illinois Insurance Code of 1937, claimant filed with the Department of Insurance of the State of Illinois, its insurance privilege tax statement showing not taxable premiums of $32,387.82 for direct business transacted during the calendar year 1939.

The tax was computed in accordance with the statement so filed, claimant was duly notified of the amount thereof, and thereafter, to wit, on May 20, 1940, it paid the sum of $444.03 for premium taxes.

It subsequently developed that in presenting its statement as aforesaid, claimant had failed to include therein and take credit for the sum of $105.45 paid to the City of Chicago, and the sum of $15.81 paid to the City of East St. Louis, during the calendar year 1939 as a tax on premiums for the benefit of the organized fire departments of said cities.

Under the provisions of the Insurance Code, the amounts

paid to the City of Chicago and to the City of East St. Louis for fire department taxes as above set forth, could have been deducted in computing the annual privilege tax, and claimant therefore asks for a refund in the amount of $166.26 to cover the amount which it should have deducted in its privilege tax statement as aforesaid.

The Attorney General has moved to dismiss the claim for the reason that the complaint does not set forth a claim which the State of Illinois as a sovereign commonwealth should discharge and pay.

It is a rule of general application that where a tax is paid voluntarily and with a full knowledge of the facts, and not under protest, compulsion or duress, it may not be recovered back. It is also a rule of general application that where the tax is paid under a mistake of fact, it is not considered to have been paid voluntarily. It has also been held in numerous cases that where an illegal or excessive tax is imposed by reason of the negligence or inadvertence of the taxpayer, and the same is thereafter paid by him, such payment is not made under a mistake of fact and cannot be recovered. (*Monarch Fire Insurance Co.* vs. *State*, 9 C. C. R. 538; *Kansas City Fire and Marine Insurance* Co. vs. *State*, 10 C. C. R. 443; *St. Louis Fire and Marine Insurance* Co. vs. *State*. No. 3413, decided February 14, 1940; *Western Dairy* Co. vs. *State*, 9 C. C. R. 498; *Fried-Bell Paper Co.* vs. *State*, 9 C. C. R. 531; *Stotlar-Herrin Lumber Co.* vs. *State*, 9 C. C. R. 517.)

Under the law as laid down in the cases cited, we have no authority to allow an award and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3367—Claimant awarded $245.67.)

LOUIS NELTNOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

JOSEPH SAM PERRY, for claimant.

GEORGE F. BARRETT, Attorney General; MAURICE J. WALSH, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for permanent partial loss of use of leg.* Where employee of State sustains accidental injuries arising out of and in the course of his employment, while

engaged in extra-hazardous employment, resulting in permanent partial loss of use of leg, an award for may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

Prior to and on the 1st day of April, A. D. 1938 the claimant was employed by the Division of Highways of the respondent as a laborer. On the last last mentioned date, while engaged in removing loose sod along Wilson Avenue, about four miles east of Batavia in Kane County, he twisted his leg and thereby sustained a dislocation of the left kneecap. He was immediately taken to the office of Dr. G. A. McGuinness in West Chicago for treatment. He returned to his work on April 5th, and worked that day and the next, but was off work from April 7th to April 11, inclusive. On April 12th he returned to his work and thereafter continued to work on those days on which his services were required, although he remained under the care of Dr. McGuinness until July 10th. Thereafter he continued with his work, but complained of pain in his leg, and on August 18th he was sent by the respondent to Dr. H. B. Thomas, Professor of Orthopedics at the University of Illinois Medical College, (under whose direction he received physiotherapy treatments until December 2nd.

On March 24, 1939 claimant again complained of pain in his leg, and was returned by the respondent to Dr. Thomas who provided physiotherapy treatments until May 23d. During all of the time subsequent to August 18, 1938, claimant continued in the employment of the respondent and reported for treatment on the days on which he was not required to work.

On March 30, 1939 he filed his claim in this court asking for an award for partial permanent loss of use of his left leg. During June, 1939 claimant again complained of pain in his leg, and on June 21, 1939 the Division of Highways of the respondent offered him an operation at the expense of the respondent, same to be performed by Dr. Thomas, for the purpose of exploring the knee and determining whether or not the claimant had a damaged cartilage in his knee.

If damage to the cartilage was disclosed, the offer included treatment therefor, confinement in St. Luke's Hos-

pital in Chicago, and payment of compensation during the consequent period of temporary total disability;—which offer was refused by the claimant.

Dr. George A. McGuinness who testified on behalf of the claimant stated that when he examined claimant on October 18, 1939, claimant had a certain limitation of flexion in his left knee, probably ten to fifteen or twenty per cent, and that such condition was permanent. He also stated that there was a definite thickening around the left patella, that the lateral ligaments are definitely stretched, that on motion claimant does have pain, and further stated, without objection, that claimant would have a loss of approximately twenty per cent (20%) of the use of his leg.

Dr. Thomas examined the claimant on September 30, 1940 and found a heaviness or thickness in the tissues around the patella, and some atrophy of the muscles above the left knee on the left side, as the only objective symptoms. At that time the left knee at a point four inches above the upper borders of the patella was three-quarters of an inch smaller than the right knee at the same point. Dr. Thomas found that claimant had normal movement in both knees and stated, without objection, that in his opinion there was ten per cent (10%) disability of the knee.

Prom a consideration of the record before us, we find that on April 1, 1938, the claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the annual earnings of the claimant during the year preceding the injury were Twelve Hundred Twenty-two Dollars ($1,222.00), and his average weekly wage was Twenty-three Dollars and Fifty Cents ($23.50); that claimant at the time of his injury had one child under the age of sixteen (16) years; that all necessary first aid, medical, surgical and hospital services were provided by the respondent; that the claimant makes no claim for any temporary disability; that claimant has sustained the permanent loss of ten per cent (10%) of the use of his left leg.

We further find that claimant is entitled to have and receive from the respondent the sum of Twelve Dollars and Ninety-three Cents ($12.93) per week for nineteen (19) weeks for the permanent loss of ten per cent (10%) of the use of his left leg, in accordance with the provisions of paragraph E-15 of Section Eight (8) of the Compensation Act, to wit, the sum of Two Hundred Forty-five Dollars and Sixty-seven Cents ($245.67).

We further find that all of the compensation due to claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Louis Neltnor, for the sum of Two Hundred Forty-five Dollars and Sixty-seven Cents ($245.67).

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 2932—Claim denied.)

VALERIA SADOWSKI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

M. A. ROTHSTEIN and MERWIN M. HART, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, 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—when award for denied.* The same question involved herein was before this court in *Beals, etc.* vs. *State,* 9 Court of Claims Reports, 456 and what was said in that case applies with equal force herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The amended complaint herein alleges in substance that on June 6, 1936, the Illinois Liquor Control Commission issued to the claimant a retailer's license for the sale of alcoholic liquor for the premises located at 1053 North Rockwell Street, Chicago, Illinois, which license covered the period from the date thereof to June 30, 1937; that the claimant paid the State of Illinois therefor the sum of $58.33; that at the time she obtained said retailer's license she had a local liquor license from the City of Chicago which expired June 30, 1936; that under Article 3, Section 13, of the Illinois Liquor Control Law, the Liquor Control Commission had no right to issue a State liquor license to the claimant beyond the period for which she had secured a local liquor license; that therefore the above described State liquor license was void as of June 30th, 1936; that by reason of her ill health claimant was forced to discontinue her business, was unable to use her said State liquor license, and sold her tavern to one Jacob Niemotka who had applied for and received a license for the same premises; wherefore claimant, requests a refund in the sum of $50.00 for the unexpired period of said license, to wit, from July 1st, 1936 to June 30, 1937.

The Attorney General has entered a motion to dismiss the case.

Claimant contends that the State Commission had no authority to issue a license for the period longer than that covered by her local liquor license which expired June 30th, 1936, and that therefore the license issued to her by the Liquor Control Commission was void as of June 30, 1936. We cannot agree with the contention of the elaimant in this behalf, but even if she were correct in such contention and the license as issued was void, nevertheless the license fee paid by the claimant was paid voluntarily, with a knowledge of the facts, and not under protest, fraud or compulsion, and therefore cannot be recovered.

As stated in *The People* vs. *Lindheimer*, 371 Ill. 367-371:

> "In the absence of an authoritative statute, taxes, voluntarily, though erroneously paid, cannot be recovered, nor even voluntarily refunded by a county, although there may be justice in the claim."

To the same effect, *LeFevre* vs. *County of Lee*, 353 Ill. 30; *American Cam* Co. vs. *Gill*, 364 Ill. 254; *Richardson* vs.

Kinney, 337 Ill. 122; *Board* of *Education* vs. *Toenniigs,* 297 Ill. 469.

Claimant also contends that she was not advised of the amendment to the Liquor Control Act in force July 1st, 1935, pursuant to which she could have obtained a short-term license for the period ending June 30th, 1936. This contention is of no avail to her in this proceeding. The mistake, if any, was a mistake of law and not a mistake of fact, and it is well recognized in this State that money paid under a mistake of law cannot be recovered.

Under the facts set forth in the Complaint, we have no authority to allow an award, and the motion of the Attorney General must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 2983—Claim denied.)

JULIUS STONE, DOING BUSINESS AS MIDWEST LIQUOR COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

J. H. JOHSTON, for claimant.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL ACT—*license issued under—claim for refund of fee paid for—where licensee newer engaged in business for which issued—award for must be denied.* The same question involved herein was before the **court** in *Robb* vs. *State,* 9 Court **of** Claims Reports, 156, and the decision in that case is controlling herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The Complaint herein alleges in substance that on or about August 1st, 1936, claimant intended to engage in the liquor business as an importing distributor at 1330 Broadway, Rockford, Illinois, and to that end paid a license fee in the amount of $229.17 and received in return a license issued by the Illinois Liquor Commission under date of August 3rd, 1936, which license expires June 30th, 1937; that immediately after the receipt of such license the claimant abandoned his intention of engaging in business as an importing distributor of alcoholic liquors in this State and never in fact at any time became engaged in said business, nor is he now engaged

ment 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 OR 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."

A similar conclusion was reached in the following cases: *Samuel Block* vs. *State*, 9 C. C. R. 453; *Emil Kellner & Co.* vs. *State*, 9 C. C. R. 465; and S. A. Beals doing business as *Wilson-Hazel Drug Co.* vs. *State*, 9 C. C. R. 456.

Under the rule as set forth in the cases cited, we have no authority to allow an award, and the motion of the Attorney General must therefore be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3236—Claim denied.)

FRANK J. TIERNAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion *filed March 12, 1941.*

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MOTOR VEHICLE LICENSE FEE—*claim for refund where use of vehicle for which issued discontinued during period for which issued—must be denied.* The identical question presented here was before this Court and decided in *Phillips* vs. *Btute*, 10 Court of Claims Reports, 53 and what was said in that case applies with equal force herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On January 18th, 1938 claimant made application to the Secretary of State for a license for his Chevrolet town sedan, and remitted the sum of $10.50 therefor, and license plates were duly issued by the Secretary of State. On January 25th, 1938 claimant moved to Bay City, Michigan, and became a resident of that State. Shortly after his removal to Bay City, he traded his Chevrolet town sedan for a 1938 Oldsmobile and was required to purchase Michigan license plates therefor.

The license plates issued by the Secretary of State of the State of Illinois were never used by the claimant, and he asks to be permitted to return same and to have refunded to him the sum of $10.50 which he paid therefor.

The Attorney General has entered a motion to dismiss the case for the reason that the Complaint does not set forth a claim which the State of Illinois as a sovereign commonwealth should discharge and pay.

The identical question here involved was presented to this court in the case of *Phillips* vs. *State*, 10 C. C. R. 53. In disposing of the question there involved, this court said:

"There is no provision of the Motor Vehicle Act, or any other Act, which authorizes a return of a license fee under the facts set forth in the complaint. Had the legislature intended that licensees should be entitled to a return of the license fees paid by them, in the event of a sale of the licensed car, they would undoubtedly have made provision to that effect.

It is not contended that the license fee was paid under duress or under a mistake of fact, and the rule is well settled that where a tax is paid voluntarily and without duress or compulsion, and with a full knowledge of the facts, it cannot be recovered back, in the absence of a statute authorizing such recovery. *Yatcs* vs. *Royal Insurance Co.*, 200 Ill. 202; *Board of Education* vs. *Toennigs*, 297 Ill. 469; *Richardson Lubricating* Co. vs. *Kinney*, 337 Ill. 122; *American Can* Co. vs. *Gill*, 364 Ill. 254.

"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. *Crabtree* vs. *State*, 7 C. C. R. 207; *Kramer* vs. *State*, 8 C. C. R. 31; *Shumway* vs. *State*, 8 C. C. R. 43; *Titone* vs. *State*, No. 2475, decided at the January Term, 1937, of this court."

"Under the facts set forth in the complaint, claimant could not maintain an action against the State if it were suable, and therefore we have no authority to allow an award."

To the same effect see *Eaid* vs. *State*, 10 C. C. R. 244.

What was said in the Phillips case and in the Eaid case applies with equal force to the case at bar, and therefore the motion of the Attorney General to dismiss must be sustained.

Motion to dismiss allowed. Case dismissed.

(No. 3365—Claimant awarded $497.60.)

MINNIE WILSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

FRANK C. SMITH, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in extra-hazardous employment, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks redress under the Workmen's Compensation Act because of injuries sustained by a fall while employed as a Cottage Mother at the Ilinois Soldiers' and Sailors' Children's Home at Normal, Illinois. Claimant entered the employment of the State July 11, 1938. On August 2, 1938 claimant and her husband, who was also employed at the Institution, left the Administration Building on the school grounds to proceed to their duties at one of the Cottages. The stone stairs going into the building were slippery, and claimant fell all the way down the steps receiving a sprained and broken right wrist. Her husband witnessed the accident, and she immediately saw the School Physician, Dr. Jacob E. Klein who, after examining her wrist, stated that the injury was only a sprain and for her to continue at work and to actively use the hand. Claimant attempted to do this, but the pain in her hand and arm increased and several days later she again consulted Dr. Klein who again informed her, according to her testimony, that there was nothing wrong with her arm. The intensity of her pain became such that she was forced to give up her work. Upon return to her home in East St. Louis she consulted Dr. Charles F. Alderson. X-ray examinations revealed an impacted fracture of the right wrist, and the entire hand and wrist were greatly swollen. The patient was hospitalized and the fracture was reduced under anesthesia. Thereafter diathermy treatments were given, and the wrist was put in a cast for approximately six weeks. Claimant was unable to return to employment until June 1, 1939, at which time she was restored to her Civil Service rating and was given a position as House Mother at St. Charles School for Boys.

Dr. Charles F. Alderson testified in this cause on June 18, 1940, and at that time stated that there was probably a ten per cent disability of the fingers, but that she should have complete recovery functionally of the fingers, and that she would have about ten per cent anatomical disability of the

wrist. He further testified in answer to a question. "In how much longer time do you expect the fingers will be completely restored and regain function of the thumb and right hand?" "From the present rate of improvement I would say in six months she should be able to make a tight fist." He further testified that at the time of the hearing she had within ten per cent of all the normal movements of the wrist joint, that is, rotary, lateral, anterior flexion and posterior flexion, with no disability to any other part of her right hand.

A further question is raised in the record as to whether a demand for compensation was technically made within six months after the accident as required by the Workmen's Compensation Act, or whether such demand as claimant may have expressed within that time was only for payment of medical bills. On August 18, 1938, Mrs. Wilson wrote to her superior at the institution, "Am I not entitled to medical care?" On September 22, 1938, she wrote to Mr. Russell, Managing Officer of the institution, "I ani wondering if there isn't a Workmen's Compensation that would partly pay me for time, etc."

Dr. Klein, the attending physician at the institution, had given conflicting accounts, first denying that he even had knowledge of the accident. Managing Officer Russell, in a report to Director Bowen on October 6, 1938, referred to Dr. Klein's service and said, "After investigation I feel reasonably sure Mrs. Wilson's story is correct." From the reports made to him, Director Bowen on October 27, 1938, stated to Managing Officer Russell, "I 'understand from Mrs. Wilson's letter that she is asking for disability compensation; and the whole matter is one for the Court of Claims." It is apparent that in however uncertain terms Mrs. Wilson may have expressed her desire and intention to ask for relief under the Workmen's Compensation Act, the Department head, Mr. Bowen, under whom she was employed, reached the conclusion that she desired redress under the Act. The evidence shows sufficient compliance with the requirements of Section 24 of the Workmen's Compensation Act in regard to notice, knowledge and demand, and the court finds that claimant is entitled to relief under the Workmen's Compensation Act.

Although her hand was still somewhat disabled, claimant was able to return to her employment on June 1, 1939, and

thereafter received wages, so that the period of temporary total disability is terminated as of that date. Such fucther claim as she might have would be for specific loss, and while the testimony of Dr. Alderson is that there was at that time ten per cent anatomical disability of the wrist, he further testified that specifically the claimant's disability consisted at the time of the hearing on September 12, 1940, in a lack; of flexion in the fingers of the right hand; that she has complete extension in all the fingers, but cannot quite touch all the fingers and thumb to the palm of the hand. The doctor further testified that there is a probable ten per cent disability present in the use of the fingers and of the wrist, but that at the present rate of improvement claimant should then be able to close her hand into a tight fist. The conclusion, from the doctor's testimony, is that there is no permanent functional loss of use of claimant's fingers or hand.

Claimant's rate of pay in her employment at the time of her injury was $52.50 per month, plus maintenance of $24.00 per month, or a total of $76.50 per month, making an annual wage of $918.00, or an average weekly wage of $17.65 and a compensation base of $8.88 per week.

From the record the court finds that claimant herein, Minnie Wilson, suffered an accidental injury while an employee of the State of Illinois, which accident arose out of and in the course of her employment, and which resulted in accidental injuries for which she is entitled to compensation under the Workmen's Compensation Act.

That due notice of accident, notice of claim, and application for payment were made within the time limits prescribed by law. That claimant is entitled to temporary total disability for forty-three (43) weeks and one (1) day, being for the period from August 2d, 1938, to June 1, 1939, at $8.88 per week, or $383.10. That no permanent total disability or specific loss payments are due. That claimant has expended and incurred obligations in connection with her accidental injuries which should be paid by respondent, as follows:

To Dr. Charles F. Alderson $75.00, of which $20.00 has been paid by Mrs. Wilson.

To St. Mary's Hospital $15.90, heretofore paid by Mrs. Wilson.

To Dr. J. C. Soucy $10.00.

Expense in connection with hospitalization $9.60.

To Dr. Charles E. Ball, X-ray examination, $4.00.

The bill of $25.00 paid to Lucille Engel by claimant for housework does not come within the provisions of the Workmen's Compensation Act, and no award will be made therefor.

An award is hereby entered pursuant, to the foregoing in favor of claimant, Minnie Wilson, for temporary total disability in the sum of $383.10.

To Minnie Wilson for medical, hospital and traveling expense incurred in connection therewith because of said accident in the total sum of $114.50. Such parts of the above mentioned medical bills as have not been paid by claimant shall be paid by her out of the said award of $114.50 here allowed.

As the full amount **of** the award has accrued, same is payable to claimant in full at the present time, i.e., $383.10 for temporary total disability and $114.50 for medical, hospital bills, etc.

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" (Ill. Revised Statutes, 1939; Bar Association Edition, Chapter **127,** Pars. 180-181); and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July **1,** 1939 (Sess. Laws 1939, **p.** 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 3450—Claimant awarded $237.27.)

MELVIN COOK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

*Opinion **pled March 13, 1941.***

GRAHAM & GRAHAM, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for temporary* total disability *and* permanent partaal **loss** of *use* of ***leg.*** Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and permanent partial loss of use **of** leg, an award may be made for compensation therefor, in accordance with the provisions of the ***Act,*** upon compliance by employee with the requirements thereof.

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

Prior to and on the 1st day of July, A. D. 1939, the claimant was in the employ of respondent as a bridge painter in the Division of Highways. On the last mentioned date, while in the course of his employment, and while pulling up a staging on a bridge on S. B. I. Route No. **24,** about two miles north of Green Valley, he twisted his knee and thereby injured his right knee joint. He immediately reported the accident to his superior, consulted a local doctor the same day, and was advised by such doctor to consult a bone specialist. He reported for work on July 8th, but was unable to work, and was taken to another doctor that day. On July 10th he was sent to Chicago by the respondent and placed under the care of Dr. H. B. Thomas, professor of orthopedics, University of Illinois Medical College. Dr. Thomas found a fracture of the right patella and internal derangement of the knee joint. On July 23d claimant entered St. Luke's Hospital, where Dr. Thomas operated on his knee. He remained under the care of Dr. Thomas until August 16, 1939, when he returned to his home in Pittsfield. Several abscesses developed shortly thereafter, and he was returned to Chicago by the respondent and treated by Dr. Thomas until September 2d, when he again returned to his home. On October 2d and 3d he returned to his work as a painter, but was unable to continue with the work on account of the pain in his knee. On October 31st he was again returned to Chicago by the respondent, was examined by Dr. Thomas, and returned to his home on November 2d.

Dr. Thomas, in his final report of November **1,** 1939, stated that everything about the knee was satisfactory; that claimant had complete extension and flexion to 95 degrees. He further stated that in his opinion this motion could be increased with more physiotherapy, and advised that claimant

be given lighter work until the tissues could adjust themselves and give more stability to the knee.

Dr. Martin A. Reichman, who was called as a witness on behalf of the claimant, stated that the normal range of flexion of claimant's left leg was about 170 degrees; that when he examined claimant on January 3, 1940, he had about 150 degrees flexion in the right knee; that ordinarily a person has the same range of flexion in both knees; that at the time of the hearing, to wit, on May 21,1940, claimant had complete extension, but had a loss of flexion, which he estimated to be between ten and fifteen degrees.

From a consideration of the record before us we find as follows:

That on July 1,1939, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on such date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the claimant's wages were ninety cents (90c) per hour, limited to forty (40) hours per week; that the earnings of the claimant during the year preceding the accident, computed in accordance with the provisions of Section Ten (10) of the Workmen's Compensation Act, as construed by our Supreme Court in the case of *Ruda* vs. *Ind. Corn.*, 283 Ill. 550, were two hundred (200) times his daily wage, to wit, Fourteen Hundred Forty Dollars ($1,440.00), and his average weekly wage was Twenty-seven Dollars and Sixty-nine Cents ($27.69); that claimant at the time of the injury had one child under the age of sixteen (16) years; that all necessary' first aid, medical, surgical, and hospital services were provided by respondent; that claimant was temporarily totally disabled from the date of his injury as aforesaid to December 4, 1939, to wit, for a period of twenty-two and two-sevenths (22 2/7) weeks; that he also suffered the permanent loss of ten per cent (10%) of the use of his right leg; that the sum of Four Hundred Forty-three Dollars and Ninety-four Cents ($443.94) has been paid by respondent for non-productive time, and such sum must therefore be held to apply on the compensation due the claimant as aforesaid.

We further find that the claimant is entitled to have and receive from respondent the sum of Sixteen Dollars and Fifty Cents ($16.50) per week for 22-2J7 weeks temporary total disability, in accordance with the provisions of paragraph (b) of Section eight (8) of the Workmen's Compensation Act, and the further sum of $16.50 per week for the period of Nineteen (19) weeks for the permanent loss of ten per cent (10%) of the use of his right leg in accordance with the provisions of paragraph E-15 and paragraph L of Section eight (8) of such Act, less the sum of $443.94 heretofore paid by the respondent, making a net amount of Two Hundred Thirty-seven Dollars and Twenty-seven Cents ($237.27).

We further find that all of the compensation due to claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Melvin Cook, for the sum of Two Hundred Thirty-seven Dollars and Twenty-seven Cents ($237.27).

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" (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies until the Expiration of the First Fiscal Quarter after the Adjournment of the next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 2665—Claimant awarded $29.00.)

MICHAEL W. BERGEN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 8, 1941

CLAIMANT, pro se.

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

WORKMEN'S COMPENSATION ACT—*when award may be made for medical expenses incurred by employee 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 procures medical treatment therefor, the State is liable for the reasonable value thereof and an award may be made to such employee for same.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim is submitted upon an original and an amended complaint; the facts being that on April 9, 1935, claimant was employed under a classification as vault clerk for respondent in the office of the Secretary of State in the State Capitol Building, Springfield, Illinois. The duties were more that of a messenger or helper than as a clerk, in that claimant's work was to remove and replace the corporate files in the several vaults operated by the Corporation Department. One vault is about twenty-five *(25)* feet high, with a subfloor about fifteen (15) feet above the first. The second floor is reached by climbing an iron stairway that runs from first to second floor at an angle of about seventy (70) degrees. The upper vault is nine (9) by fourteen **(14)** feet, and in addition to the stairway is reached with four twelve **(12)** foot ladders used in taking or replacing files from that vault. The latter is so small that it is impossible to fasten the ladders in such a way that they will not wobble when being used. In descending one of these ladders while removing a file, claimant's foot slipped and he fell, striking his leg near the crotch on the corner of a chair, by reason of which his leg was torn to such an extent that four stitches were required, and by reason thereof claimant was forced to be absent from his work for two weeks and to procure medical assistance, for which he expended the sum of Twenty-nine ($29.00) Dollars.

No claim is made for disability, but claimant seeks an award in reimbursement of the expense occasioned by him in said sum of Twenty-nine ($29.00) Dollars.

The Secretary of State has charge of the State House and the operation of same, and therein causes to be operated several elevators necessary for the handling of traffic. We have heretofore held that where the particular work done by the individual employee who suffers injuries while so employed by the Secretary of State, was in fact hazardous, such employee would be entitled to compensation under the provisions of the Workmen's Compensation Act. This case is

somewhat analogous to the case of *Alfred W. Evans* vs. *State*, C. C. R. No. 3087, wherein an award was granted March 12, 1941, for injuries and medical expense incurred by Claimant Evans while employed as a janitor custodian in the Attorney General's office. In the course of his duties he tripped on a chair and his left hand was thrust into a moving fan, breaking the bones and tearing the ligaments of his fingers. An award was allowed therein for such accidental injuries and medical care.

Another analogous case is that of *Dorothy* C. *Lynch*, 9 C. C. R. 290, in which claimant while employed as a file clerk in the Automobile License Department of the Secretary of State's office, was injured by a fall from an iron stairway leading from the main floor to a balcony in the office where she was employed. Because of the use of sharp-edged cutting tools employed in that office and of municipal regulations applying thereto, the court there held 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 3 of the Workmen's Compensation Act. In the *Lynch* case application for compensation not having been filed within the time required by Section 24 of the Act, no award for disability was allowed, but it appearing therein that claimant had incurred medical, surgical and hospital bills to a large amount in being cured of the effects of the injury, an award was entered under Section 8 of the Workmen's Compensation Act in payment of such medical and hospital bills, the court there holding that "Inasmuch as Section 8 of the Compensation Act provides that 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 claims within the Act for medical, surgical or hospital services as distinguished from claims for compensation for injuries."

The court finds that claimant, Michael W. Bergen, suffered accidental injuries arising out of and in the course of his employment while employed by respondent; that due notice of the accident and claim for medical aid and the application for payment thereof were all made within the statutory period prescribed by the Illinois Workmen's Compensation Act, and that claimant is entitled to an award in reimbursement of the moneys expended or payable by him for

medical aid in recovering from the effects thereof in the sum of Twenty-nine ($29.00) Dollars.

An award is therefore allowed in favor of claimant in reimbursement of the expenses incurred by him as aforesaid in the sum of Twenty-nine ($29.00) Dollars for injuries arising out of and in the course of his employment.

(No. 3132—Claim denied.)

JESSE MILLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion ***filed April*** *8, 1941.*

HERRICK & TWENTE, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

LIMITATIONS—*plea of-when sustained.* Where it appears on face of claim that same mas not filed until after five years after same accrued, the same is forever barred under the provisions **of** Section 10 of the Court of Claims Act, the court is without jurisdiction *to* make award and a plea of the Statute of Limitations will be sustained.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

On October 21, 1937, the claimant, Jesse E. Miller, filed his complaint with the clerk of this court, and alleged that for more than ten years prior thereto he had been the owner, in fee, of three different tracts of land, and set forth their descriptions, totalling approximately seventy-seven acres. It is also claimed that at the time of and for many years prior to the acts of the State of Illinois in the year 1931 which are complained of, these lands were fit for general agricultural purposes. It is very apparent from the complaint that the 'wrongful acts of the State were committed several years prior to the year 1931. It is also charged that for more than one hundred years prior to the acts complained of there was located about a mile east of these lands a body of water or lake, commonly known as Horse Shoe Lake, the normal water line or level of which was lower than the level or surface of the tracts of land described in the complaint, and these lands drained into this body of water.

It is also charged that the State of Illinois, in the year of 1931, through its Department of Conservation, constructed a dam across the natural outlet of this lake and has main-

tained a game reserve in said lake; that this raised the level of the water of the lake, and did thereby wrongfully and illegally flood and wholly submerge these lands, and the lands have been rendered of much less value than what they were prior to the building of this dam.

A bill of particulars was filed, showing damages amounting to the sum of $1,495.00.

The Attorney General filed a motion to dismiss this complaint on the ground that it is apparent from the complaint that the Statute of Limitations has run, for the reason that the alleged wrongful acts complained of occurred several years prior to the year of 1931 and during the year of 1931.

It is a part of the statute creating the Court of Claims 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, with certain exceptions, including infants, idiots, lunatics, insane persons, etc. (See Par. 436, Chapter 37, Illinois Revised Statutes, 1937.)

This court has held that where it appears from the face of the claim that same is barred by Statute of Limitations, a plea thereof will be sustained. See *Ragains* vs. *State*, 8 C. C. R. 21; *Wiskirchen* vs. *State*, 7 C. C. R. 17; *Crawford* vs. *State*, 7 C. C. R. 113, and other similar cases.

For this reason the motion of the Attorney General must be sustained and cause dismissed. Award denied.

(No. 3142—Claim denied.)

GEORGE C. MOORE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 8, 1941.

MAX J. BECKER, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

SALARY—*claim for by one not lawfully appointed or employed—no award can be made for.* Where claim is made for salary for services alleged to have been rendered by one in a position to which he was not lawfully appointed or employed, there is no legal basis for an award for same and claim must be denied.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case avers that claimant on March 15, 1936, was hired by George Scully, the then Supervisor of Paroles, as Field Parole Agent, for which he was to receive Ninety-eight Dollars ($98.00) per month ; that he worked one month in that capacity, from March 15th, 1936, to April 15, 1936, and that without fault on his part he was discharged; that he has received no moneys therefor. Claimant asks that he be paid a salary for that month in the amount of Ninety-eight Dollars ($98.00).

This complaint was filed on November 10, 1937, and on November 18, 1937, the Attorney General filed a motion to dismiss, and as grounds for said motion set forth:

1. If the State was liable to the claimant for salary and wages for services rendered from March 15 to April 15, 1936, he had an adequate remedy in a court of general jurisdiction which he has failed to pursue.

2. The complaint does not contain allegations which establish that claimant was legally appointed to the position of field parole agent.

In view of the position we take in this matter, it will not be necessary to consider the first point raised by the Attorney General.

The position of field parole agent is a position within the classified civil service in the State of Illinoiis.

Paragraph 3, chapter 24½, Illinois Revised Statutes, 1937.

The Director of the Department of Public Welfare is the only person who has authority to hire a field parole agent.

Paragraphs 2, 3 and 4, chapter 127, Illinois Revised Statutes, 1937.

The complaint does not contain allegations which establish the legal appointment of the claimant, and the motion of the Attorney General must be sustained arid an award denied.

(No. 3168—Claim denied.)

LAURA MORGAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 8, 1941.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND (ALBERT E. JENNER, JR., of Counsel), for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

COURT REPORTER—*term of office—death of judge appointing terminates—salary—earned after death of judge appointing—no award can be made for.* The question presented here was before the court in *Cox* vs. *Btate,* 10 Court of Claims Reports, 381 and the decision in that case applies with equal force herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint in this case avers that Laura Morgan, the claimant, is a citizen and resident of the County of Cook and State of Illinois; that on the month of September, 1933, she was appointed by the Honorable J. Paul Califf, now deceased, then Circuit Court Judge in the 14th Judicial Circuit of the State of Illinois, comprising the counties of Rock Island, Mercer, Whiteside and Henry, as an official court reporter for said judge and said circuit; that pursuant to statute, her compensation was fixed at the sum of Two Hundred Seventy Dollars ($270.00) per month ; that immediately after the appointment she qualified, and from thenceforward acted as an official court reporter for the Honorable J. Paul Califf, deceased, in said circuit, until the death of the said judge in the month of August, 1935. It is further averred that she received her check covering services for the month of August, although it is not averred on what date Judge Califf died.

It is further averred that claimant continued to act as an official court reporter in the 14th circuit, and at the end of September received her check for services in the sum of Two Hundred Sixteen Dollars ($216.00).

It is also averred that after the death of Judge Califf the Honorable Albert M. Crampton, Judge of the City Court of Moline, Illinois, pursuant to authority vested in him by statute, was called in the month of September, 1935, to sit as a judge of such 14th circuit pending an election to fill the vacancy caused by the death of Judge Califf; that claimant continued to act as an official court reporter during the months of October, November and December, 1935, and the month of January, 1936, but did not receive any salary during the said months of October, November and December, 1935, and January, 1936.

The Attorney General has made a motion to dismiss this case, and by this motion admits all the facts properly pleaded to be true, but denies their sufficiency in law. The Attorney General has relied upon the case of *People* vs. *Barrett,* 365

Ill. 73. Counsel for claimant has filed a brief on her behalf and it is ably and strenuously argued that there is a difference between the facts in the *Barrett* case and in the case at bar, and that difference is that the court .reporter there had not performed any services, while in the case at bar she had performed four months' services at the request of sitting ,judges for which she received no compensation. It must be admitted that there is a difference in the facts, but there is no difference in the rule applying to both cases.

The Supreme Court of this State in. the *Barrett* case, *supra,* devoted some twelve or thirteen pages to a discussion of the principles therein involved. This was probably done because of the eminence of counsel in the *Barrett* case. Many questions before the court in that case are not involved herein. The court referred to the statute authorizing the appointment of court reporters, and the amendments thereto. The court referred to the Act of **1927,** which provided that each judge should appoint one court reporter, and which made provision for the appointment of court reporters by circuit, superior and city courts in this State. The Act also provided that such appointment should be made in writing and filed in the office of the Auditor of Public Accounts, and continue in force until revoked by the judge making the appointment, and specifically provided that the reporter so appointed should hold his position during the pleasure of the judge so appointing him, not, however, to extend beyond the time the judge making such appointment shall be elected for. **A** proviso was attached to the effect that in case of the absence or disability of said reporter so appointed, the presiding judge may appoint any other competent reporter to act in his place during such absence or disability, which said substitute shall be paid by said official reporter for his said services, etc. (State Bar Stat. **1935,** chap. **37,** par. **156.)** The court also made reference to Section **12** of Article **6** of the Constitution, but that constitutional question is in no way involved in the case at bar.

In the case before us the appointing judge died. The *Barrett* case is authority that the statute cannot be construed without noticing that each and every judge of the circuit and superior courts has his personal court reporter. **In** the .*Barrett* case, the court continuing said: "If it should be held that when a judge resigns his court reporter continues in

office, it would be with nothing to do except to draw the salary, because any other judge called in to do the **work** of the court would have his own duly appointed court reporter to **work** for him and with him, and he might not wish to work with some other reporter.' So, it is true in this case. The statute provides that the judge of a city court may appoint his **own** court reporter. In the *Barrett* case the court also said: "It is urged that the words 'not, however, to extend beyond the time the judge making such appointment shall be elected for,' must be given effect in construing the statute, and that these words are in some manner and to some extent descriptive of the term for which the appointment is made." We find no difficulty in giving the same effect to the words, and like the Supreme Court, we cannot construe them as counsel for claimant insists they should be construed.

Claimant contends that this court has passed upon this question in the case of *Shell* vs. *State of Illinois, 8* **C. C.** R. 235, decided November 13,1934. That case was decided upon the authority in the case of *The People ex rel. Kelley,* **134** Ill. App. **642.** Since that time the Supreme Court passed upon this question in the *Barrett* case. In the *Shell* case the court reporter continued with his work and duties as official court reporter and rendered services at the request of the circuit judges. In the case of *Cox* vs. *State of Illinois,* 10 C. C. R. 381, in **a** per curiam opinion, this court overruled the holdings in the *Shell* case on the authority of the *Barrett* case, and in the case at bar we must hold that there is no distinction between the *Barrett* case and this one.

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

(No. 2660—Claimant awarded $112.68.)

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

Opinion filed ***April 8, 1941.***

CLAIMANT, pro se.

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

WORKMEN'S *COMPENSATION* ACT—*when* ***award*** *for* ***compensation under may be*** *made.* Where employee sustains accidental injuries, arising out of and in the course **of** his employment, while engaged in extra-hazardous employ-

ment, an award for compensation therefor may be made, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

This claim mas filed by claimant for the sum of One Hundred Fifty-nine and 48/100 ($159.48) Dollars for medical and hospital services furnished to him, and which he has paid or obligated himself to pay in connection with injuries suffered by him as an employee of respondent.

As a clerk in the, store room of the Corporation Department of the Secretary of State's office in the Capitol Building at Springfield, among other duties required of him was the opening of packages, boxes and crates containing supplies for such Department. These packages, boxes and crates weighed up to six hundred (600) pounds, and in opening them it was necessary that he use various carpenter's tools, to wit: Chisels, knives, saws, crow-bars, hammers, hatchets and scissors. On January 18, **1935,** a large box containing annual reports slipped and fell, crushing his left foot, and making it necessary for him to go to the hospital to receive medical attention. He was off duty for twenty (20) days, after which time he returned to his place of employment. Claimant was compelled *to* pay out and become liable for the payment of Seventy-four and 48/100 ($74.48) Dollars to St. John's Hospital, and for Eighty-five ($85.00) Dollars medical bill to Dr. Charles H. Delano, or a total of One Hundred Fifty-nine and 48/100 ($159.48) Dollars. No claim is made for temporary or permanent disability, but claimant seeks an award in reimbursement of the medical and hospital expense incurred by him because of such accidental injury.

The Attorney General contends that inasmuch as claimant was paid his regular salary during the twenty days he was absent from his duties, such payment was for non-productive time, and that he was only entitled, under the terms of the Workmen's Compensation Act, during such time to one-half his average weekly pay; that he would not be entitled to compensation or pay the first eight of' such twenty days, and that he would only be entitled to one-half of his regular pay for the remaining twelve days he was absent from his duties; that the amount of his full pay for eight days and one-half for twelve days should be set off against any award for doctor and hospital bills which might. be allowed to him.

At the time of his injury he was receiving One Hundred ($100.00) Dollars per month, or an average of Twenty-three and 11/100 ($23.11) Dollars per week. Fifty (50) per cent thereof would be Eleven and 55/100 ($11.55) Dollars. Under the decisions of our courts we believe the contention of the Attorney General to be correct. Claimant received Sixty-six and 60/100 ($66.60) Dollars for non-productive time during the twenty days he was absent from duty. He would have been entitled during said period to Nineteen and 80/100 ($19.80) Dollars temporary total disability. The difference or over payment is Forty-six and 80/100 ($48.80) Dollars. Claimant's duties were such as to bring the accident within the provisions of the Workmen's Compensation Act, and he is entitled to reimbursement for hospitalization and medical care required as first aid and to relieve him from the effects of such accidental injuries. The case is somewhat analogous to the case of *Alfred W. Evans* vs. *State,* C. C. *R.* No. 3087, wherein an award was granted March, 12, 1941, for injuries and medical expense incurred by claimant Evans while employed as a janitor custodian in the Attorney General's office. In the course of his duties he tripped on a chair and,his left hand mas thrust into a moving fan, breaking the bones and tearing the ligaments of his fingers. An award was allowed therein for such accidental injuries and medical care.

Another analogous case is that of *Dorothy* C. *Lynch,* **9** C. **C.** R. 290, in which claimant while employed as a file clerk in the Automobile License Department of the Secretary of Slate's office, was injured by a fall from an iron stairway leading from the main floor to a balcony in the office where she was employed. Because of tlie use of sharp-edged cutting tools employed in that office and of municipal regulations applying thereto, the court there held that the enterprise in which claimant was employed a.t the time of the accident in question was an extra hazardous enterprise within the meaning of those words as used in Section **3** of the Workmen's Compensation Act. In the *Lynch* case application for compensation not having been filed within the time required by Section 24 of the Act, no award for disability was allowed, but it appearing therein that claimant had incurred medical, surgical and hospital bills to a large amount in being cured of the effects of the injury, an award was entered under Section 8 of the Workmen's Compensation Act in payment of

such medical and hospital bills, the court there holding that "Inasmuch as Section 8 of the compensation Act provides that 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 claims within the Act for medical, surgical or hospital services as distinguished from claims for compensation for injuries."

From the record we find that claimant suffered an accidental injury while an employee of respondent which arose out of and in the course of his employment,; that he is entitled, under the terms of the Illinois Workmen's Compensation Act, to reimbursement for moneys expended for hospitalization and medical care in the total sum of One Hundred Fifty-nine and 48/100 ($159.48) Dollars; that there should be deducted, however, from said amount the sum of F'orty-six and 80/100 ($46.80) Dollars over payment heretofore paid to him by respondent for non-productive time, and that he should have an award for the balance remaining in the sum of One Hundred Twelve and 68/100 ($112.68) Dollars.

An award is therefore made in favor of claimant, Joseph Rider, for medical and hospital expense incurred, in the sum of One Hundred Twelve and 68/100 ($112.68) Dollars.

(No. 2796—Claim denied.)

JOSEPH ARGENTO, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed ***April 9, 1941.***

CLAIRE I. ROSEN, for claimant.

OTTO KERNER, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim* for *compensation under insufficient.* Where complaint for compensation for injuries under Workmen's Compensation Act contains no averment as to what injuries were sustained by claimant, what medical expense was incurred or what, if any time he lost as result of accident and no bill of particulars is attached to complaint as required by rules of court, such complaint is wholly insufficient and on motion will be dismissed.

MR. JUSTICE YANTIS delivered the opinion of the court:

The claim filed by claimant, Joseph Argento, recites that on January 16, 1935, while employed by the State of Illinois

as an oil inspector in the Department of Finance, he was driving his automobile on Lake Shore Drive in Chicago; that he was struck by another automobile and he suffered injuries thereby; that his duties were to go from one concern to another taking samples of gasoline and kerosene therefrom to the State office for proper tests.

Claimant states that his earnings were One Hundred Fifty ($150.00) Dollars per month; that he is married and had two children at the time of the accident under sixteen years of age; that he has received no compensation on account of his accidental injuries, and that medical services incurred as a result thereof were not paid for by the State, but were paid by claimant.

The complaint contains no averment as to what injuries were suffered by claimant, what medical expense was incurred or what, if any, time he lost as a result of the accident. No bill of particulars is attached to the complaint, as required by Court of Claims Rule 6 (a), and the claim is insufficient under the requirements of Rule 4 (a) for the determination of any award.

The Attorney General has filed a motion to dismiss the claim, and the motion is hereby allowed and the claim dismissed.

(No. 3233—Claimant awarded $53,958.04)

CHICAGO PARK DISTRICT, A BODY POLITIC AND CORPORATE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed ***April*** *9, 1941.*

JOHN O. REES, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MUNICIPAL CORPORATIONS—*tax levied to pay bonds of—collected by State for—deductions from amount by State Treasurer and Btate Auditor—when unauthorized by Statute—award may be made for refzind.* Where it appears that State through its Treasurer and Auditor collected moneys levied as a tax for the payment of bonds issued by Chicago Park District, and made deductions therefrom, not authorized by law, an award for the refund of such deductions may be made.

SAME—same—same—same—same—limitations in claim for. In claim for refund of moneys alleged to have been wrongfully deducted by State officers from funds collected by them for payment of bonds issued by Municipal Cor-

poration, claimant is limited in its recovery to such deductions made during the period of five years prior to the filing of complaint, under Section 10 of the Court of Claims Act.

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

The facts in this case have been stipulated by the parties hereto and are substantially as follows:

The claimant, Chicago Park District, is a body politic and corporate organized and existing pursuant .to the provisions of an Act entitled "An Act in relation to the Creation, Maintenance, Operation and Improvement of the Chicago Park District," approved July 10, 1933, in force May 1, 1934, hereinafter referred to as the "Park Act."

Prior to May 1, 1934, The Commissioners of Lincoln Park was a park district existing Within the territory now included within the Chicago Park District, and is one of the park districts superseded by the Chicago Park District. The title to all lands, property and funds of every description of the superseded The Commissioners of Lincoln Park is now vested in the Chicago Park District.

Pursuant to the provisions of Paragraphs 232 to 250.9 inclusive, Chapter 105, Illinois Revised Statutes, 1939, The Commissioners of Lincoln Park issued bonds which, prior to their delivery to purchasers, were registered in the office of the Auditor of Public Accounts of the State of Illinois.

Subsequent to the issuance and registration of such bonds, the Auditor of Public Accounts annually levied and collected a direct ad valorem tax upon all. the tangible property within the district known as The Cornmissioners of Lincoln Park sufficient in amount to pay the bonds and interest maturing during each next ensuing year thereafter.

The State Treasurer, between April 13, 1912, and July 30, 1937, received a total of $13,828,310.47 in such taxes so levied and collected by the Auditor of Public Accounts, and during said aforementioned period the Auditor of Public Accounts and the State Treasurer deducted from said tax monies the total sum of $70,412.14, said deductions being shown on the books of the Auditor of Public Accounts and State Treasurer as fees for the collection of said tax monies.

Attached to and made a part of the complaint is an itemized statement showing (a) the amount of tax monies received by the State Treasurer between the specified dates and the

total amount of such receipts; (b) the amounts deducted from such receipts by the Auditor of Public Accounts and the State Treasurer, the date of said deductions and the total amount thereof; (c) the distribution of the amounts deducted by the Auditor of Public Accounts and the State Treasurer except with respect to the deductions made on November 10, 1915, September 27, 1917, September 28, 1918, October 22, 1919, and June 25, 1920, on which, information concerning said distribution, if any, is not ascertainable.

In each and every instance the aforementioned amounts of monies deducted were taken from surplus proceeds of such annual levies over and above the amount required in each instance to pay the bonds and interest which had matured.

Said monies so deducted from the taxes collected were ordered and paid on the dates of said deductions into the General Revenue Fund of the State of Illinois.

Neither The Commissioners of Lincoln Park nor the Chicago Park District has ever received said sums so deducted by the Auditor of Public Accounts or the State Treasurer, or any part thereof.

On June 26,1937, the Chicago Park District presented its claim for the return of said monies deducted by the Auditor of Public Accounts and said State Treasurer to said Auditor of Public Accounts and said State Treasurer, and claimant was advised by said State Treasurer to file its claim with the Court of Claims of the State of Illinois.

The claimant contends that there was no authority either under the statutes of this State or under the common law for the deductions so made by the Auditor of Public Accounts and the State Treasurer, and that therefore it is entitled to a, refund of the several amounts so deducted.

None of the Acts authorizing the issuance of the bonds in question by The Commissioners of Lincoln Park contained any provision whatsoever authorizing the Auditor of Public Accounts or the State Treasurer to collect any fees whatsoever, other than the registration fee required to be paid to the State Auditor at the time of the registration of the bonds, which registration fee is not involved in this case.

The only legislative enactments in this State of a nature similar to those authorizing the issuance of bonds by The Commissioners of Lincoln Park, to which our attention has been called, are the following, to wit:

1. An Act entitled "An Act to Enable Counties, Cities, Towns, Townships, School Districts and other Municipal Corporations to Fund, Retire and Purchase their outstanding Bonds and other Evidences of Indebtedness, and to provide for the Registration of New Bonds or other Evidences of Indebtedness in the office of the Auditor of Public Accounts," approved and in force February 13, 1865.

2. An Act entitled "An Act to provide for the Drainage for Agricultural and Sanitary Purposes, and to Repeal Certain Acts therein named," approved June 27, 1885, in force July 1, 1885.

3. An Act entitled "An Act authorizing all Drainage Districts to Issue Bonds, and providing for the Registration and Payment thereof," approved and in force July 15, 1895.

The Act first above referred to provides for the payment of a registration fee of twenty-five cents, and also contains the following provision, to wit:

> "When the bonds * * * shall be so registered, the Auditor of Public Accounts shall annually ascertain the amount of principal and interest due and accrued and to accrue, for the current year, on all said bonds and evidences of indebtedness so registered in his office and shall upon the basis of the certificate of valuation of the property to be transmitted to him * * * estimate and determine the rate per centum upon the valuation of said property requisite to meet and satisfy the said interest, or the interest and principal, as the case may be, together with the ordinary cost to the State, of the collection and disbursement of the same to be estimated by the Auditor and State Treasurer. * * *."
>
> (Ill. State Bar Stat. 1935, c. 113, par. 5).

The other Acts above referred to contain substantially similar provisions.

It will be noted that in each of the Acts above referred to the Legislature specifically provided for the ordinary costs of the collection and disbursement of the tax money, and that no provision of a similar import is found in any of the Acts authorizing the issuance of bonds by The Commissioners of Lincoln Park.

We must therefore assume that the Legislature did not intend that the State Treasurer or the State Auditor should have authority to make any deduction for the collection and disbursement of such monies;—otherwise they would have made specific provision therefor, as they did in the other Acts hereinbefore mentioned.

The Attorney General contends, however, that the claimant is not entitled to an award for any deduction made more than five years prior to the filing of the Complaint herein.

Section 10 of the Court of Claims Act (Ill. Rev. Stat. 1939, Chap. 37, Par. 436) 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 accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrues two years from the time the disability is removed."

The Complaint herein was filed March 26th, 1938, and the claimant therefore is limited in its recovery to the deductions made as aforesaid by the State Treasurer and State Auditor during the period of five years prior to the filing of the Complaint herein as aforesaid.

A computation shows that the amount of the deductions made by the State Treasurer and the State Auditor as aforesaid during the period of five years prior to the filing of the Complaint herein is Fifty-Three Thousand Nine Hundred Fifty-eight Dollars and Four Cents ($53,958.04), and an award is hereby entered in favor of the claimant for such amount.

(No. 3053—Claimant awarded **$97,889.00.**)

THE COUNTY OF COOK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1941.

THOMAS J. COURTNEY, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

MONEYS—paid by county for relief and mothers' pensions—lapse of appropriation out of which could be paid—before payment—when award for amount of will be made.' Where it appears that county in accordance with provisions of Statute paid out moneys for relief and mothers' pensions, for which an appropriation had been made by the Legislature, but before payment thereof, same lapsed, an award for such sum may be made where State does not dispute or deny claim and it is clearly shown that it was through no fault of anyone that payment was not made before such lapse of appropriation.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

In its complaint, the County of Cook, through its State's Attorney, claims the sum of $97,889.00 from the State on the

grounds that it is a county by virtue of "An Act to revise the law in relation to counties," approved and in force March 31, 1874, Revised Statutes of 1874, page 302, and that under the law of Illinois, it was claimant's duty to furnish relief to mothers residing therein in the nature of mothers' pensions, in accordance with Sections 350 to 369, both inclusive, of Chapter 23, "Charities" of the Illinois State Bar Statutes for 1935; that Cook County furnished relief and paid out to various persons entitled thereto as and for mothers' pensions for a period from January 1st, 1933 to June 30, 1933, the moneys in question. It is further alleged that in accordance with Section 366 (1) of Chapter 23 of the Illinois State Bar Statutes for 1935, it became and was the obligation of the General Assembly of the State of Illinois to appropriate to the Department of Public Welfare money to be paid to counties giving relief under the provisions of the Act; that money was appropriated by the legislature to the respondent for that purpose. The complaint further alleges that of said sum of money so appropriated by the General Assembly, the County of Cook became and was entitled to an amount of $48,139.00 from the equalization fund and $49,750.00 from the general fund appropriated to Public Welfare, making a total of $97,889.00. It is further charged that this last sum of money, under and by virtue of the provisions of the Act, became and was payable to the claimant for relief given by the claimant for the period from January 1st, 1933 to June 30, 1933, on the ground that claimant had met the standards of administration set out by the Department of Public Welfare, and that each and every thing necessary to be done by the claimant to entitle it to said fund had been done, except that during the period above set out, the claimant was operating under financial stress due to an unprecedented failure of tax collections; that the payrolls of the employees of the claimant and bills for services rendered and materials furnished to claimant were not met or paid promptly and in many instances were delayed for a period of as much as eight months.

It is further charged that during that period mothers' pension checks payable to pensioners from that fund were likewise delayed, and in some cases were not given out until several months after the period for which the pension check was payable; that the checks were distributed and paid out

for that period after that period, in accordance with payrolls submitted by the claimant to the Department of Public Welfare, to which payrolls the claimant asked the State of Illinois to look for verification.

It is also charged that due to this delay the amount of money appropriated by the General Assembly as to the proportionate share of the claimant of said total appropriation was not claimed by the claimant herein until such a time as the above proportionate share was transferred back by the respondent from the fund for mothers' relief pension to the general fund of the respondent. Claimant further states that it was informed by the respondent, through its Department of Public Welfare, that this claim must be filed with this court.

A stipulation of facts was entered into which provided as follows:

"The 57th General Assembly of the State of Illinois appropriated to the Department of Public Welfare of the State of Illinois the sum of $1,000,000.00 for the 1931-1933 biennial to be paid to counties giving relief to mothers under the provisions of an Act entitled "An Act to provide for the partial support of mothers, and for the probationary visitation, care and supervision of the family for whose benefit such support is provided," approved June 30, 1913, as amended. (Stipulation, pages 1 and 2.

"Thereafter, pursuant to said statute, the Department of Public Welfare, from said appropriation, apportioned and allocated to the County of Cook, claimant, for the period between January 1, 1933 and June 30, 1933, the sum of $97,889.00. ($48,139.00 from the Equalization Fund and $49,750.00 from the General Fund.) (Stipulation, page 2, paragraph 3.)

"In conformity with the standards of administration set by the Department of Public Welfare, the County of Cook gave relief to mothers under the said statute for the period from January 1, 1933 to June 30, 1933, in the sum of $485,697.50, but did not make such payments until after September 30, 1933, due to the inability of the County of Cook to collect taxes due it. (Stipulation, page 2, paragraphs 4 and 5.)

"In December, 1933, itemized statements of the moneys paid out by the County of Cook under said statute were certified to the State Department of Public Welfare for the quarter commencing January 1, 1933 and ending March 30, 1933, and for the quarter commencing April 1, 1933, and ending June 30, 1933; said statements show a total expenditure of $485,697.50 by the County of Cook. for the period from January 1, 1933 to June 30, 1933; the said statements meet all the requirements of the State Department of Public Welfare. (Stipulation, page 2, paragraph 6.)

"On September 30, 1933, the appropriation to the State Department of Public Welfare lapsed, and on that date there was remaining in the said appropriation an unexpended balance of $166,001.09. (Stipulation, page 3, paragraph 7.)

"The amounts allocated to the claimant under the provisions of the above statute for the quarters ending March 30, 1933, and June 30, 1933, (i. e., the period from June 1, 1933, to June 30, 1933) did not exceed fifty

per cent. of the expenditures of the County of Cook for each quarter respectively; and the total amount allocated to the County of Cook for the period from January 1, 1933, to June 30, 1933, did riot exceed fifty per cent. of the total amount expended by the County of Cook for said period. (Stipulation, page 3, paragraph 8.)

"No warrant was, or has been, issued to the County of Cook, and no payment has been made to the County of Cook of the said sum of $97,889.00, or of any part thereof. (Stipulation, page 3, paragraph 9.)

The pertinent provisions in the Act of 1913, as amended, found in Section 16a thereof (Chap. 23, Sec. 338a, Illinois Revised Statutes, are as follows:

"The County Treasurer * * * shall certify to the Department of Public Welfare an itemized statement * * * of the money paid out in accordance with the provisions of this act during each quarter" etc.

We construe the word "during" as used in this connection, to mean "for". From the stipulation of facts it would appear that the County of Cook had done all that it was required to do, and but for the financial stress prevailing, the County of Cook would have collected its taxes, paid the mothers' pensions in the normal course, and applied for and received contributions from the State before the lapse of the appropriation; that pursuant to the statute, the State Department of Public Welfare allocated to the county of Cook the sum of $97,889.00, and it was through no fault of anyone that the payment was not made prior to the lapse of the appropriation.

The Attorney General does not dispute nor deny this claim, and pursuant to the stipulation entered herein, and because the County of Cook had done all that it was required to do, an award is recommended to the Legislature in the sum of Ninety-seven Thousand Eight Hundred Eighty-nine Dollars ($97,889.00) in favor of the County of Cook, to repay to it a sum it was justly entitled to.

(No. 3565—Claim denied.)

HARRY J. LAUGHLIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1941.

KARNS & BANDY, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION *Am — making claim for compensation within time fixed in Section 24* of, *condition precedent to jurisdiction of court an claim under.* Making claim for compensation and filing application for same within time fixed in Section 24 of Workmen's Compensation Act, is a condition precedent, without which the court is without jurisdiction to proceed with hearing on claim.

SAME—*only remedy of employee for compensation for personal injuries—must bring himself within terms* of. There is no provision of law under which court can make an award for compensation for personal injuries suffered by employee of State while in performance of his duties, except the Workmen's Compensation Act, and unless such employee can bring himself within the terms of such Act he is without remedy therefor.

MR. JUSTICE YANTIS delivered the opinion of the court:

The complaint herein represents that claimant while he was employed by respondent as an Illinois State Highway Maintenance Policeman on December 11, 1938, was called to the scene of an accident on U. S. Route No. 40 between East St. Louis and Collinsville; that while engaged with others in the task of removing a wrecked automobile, he was struck by another car driven along the highway at an excessive rate of speed by one Henry Paoli. The complaint further recites that claimant sustained a fractured left thumb, cuts upon the face and head and a fractured left knee and leg resulting in an almost total impairment in the use of such leg; that hospitalization and medical treatment have been furnished by respondent; that claimant has made investigation and has found that Henry Paoli is financially insolvent and carried no liability insurance at the time of the accident in question.

Claimant does not attempt to conform to the recitals necessary to afford redress under the terms of the Workmen's Compensation Act of Illinois, but asks for an award of Seven Thousand Five Hundred ($7,500.00) Dollars from respondent, in equity and good conscience. No Bill of Particulars is attached to the complaint.

The complaint was filed December 9, 1940.

The Attorney General has filed a motion on behalf of respondent to dismiss the complaint and supports such motion with an affidavit signed by Mr. M. K. Lingle, Engineer of Claims, of the Department of Public Works and Buildings. The affidavit discloses that following claimant's accident on December 11, 1938, claimant was paid full salary during his periods of temporary total disability, the payment for the tenth and last period being made on August 15, 1939, being

for the period ending August 6, 1939; that claimant returiied to work on August 7, 1939 and was not absent from duty as a result of such injury at any time during the succeeding year following August 7, 1939.

There is no provision of law under which the Court of Claims could justify an award to claimant except under the terms of the Workmen's Compensation Act. Claimant fails to bring himself within the terms of the latter act, and there is therefore no basis upon which an award in his favor can be made for the injuries of which he complains. Recovery for injuries suffered by one while actively engaged in the performance of his duties as an employee of the State, is provided for under Section 6 (6) of the Act creating the Court of Claims **(Laws** 1917, page **325).** Awards made under such authority are to be made in accordance with the rules prescribed in the Workmen's Compensation Act. Section **24** of that Act provides that notice of claim for damages must be given to the employer within six months, and that application for compensation or award must be filed within one year after the accident complained of or within one year after the last payment of compensation that has been made by the employer for injuries sustained in such accident.

The complaint herein filed is insufficient on its face, and the recitals therein and the date of filing such complaint show no award could be made under the terms of the Workmen's Compensation Act.

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

(No. 3435—Claimant awarded $379.95.)

W. E. SNYDER, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion filed ***April*** *9, 1941.*

SUMNER & LEWIS, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S **COMPENSATION** ACT—*when award may be made under for temporary total disability, permanent partial loss of use of finger and serious and permanent disfigurement* ***to*** *hand, head, face and neck.* **Where employee of State sustain accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in**

temporary total disability, permanent partial loss of use of finger and serious and permanent disfigurement to his hand, head, face and neck, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

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

On September 20th, 1939 and for several weeks prior thereto, the claimant W. E. Snyder, was employed by the respondent as a laborer in Unit C of the day labor organization of the Bureau .of Construction, Department of Public Works and Buildings, Division of Highways.

On the last mentioned date, while in the course of his employment, the claimant went to the repair shop of Unit C in the city of Lawrenceville for the purpose of grinding a chisel with which he had been working. There was a box of dynamite caps either on a work bench in the shop, or on a shelf above the bench. Claimant plugged in an electric cord leading to the grinder, and as soon as the grinder began operating, touched the chisel to the grinder. At that instant the dynamite caps exploded through some unknown cause, and the elaimant sustained the injuries for which he seeks compensation in this case.

He was immediately taken to the office of Dr. Kirkwood in Lawrenceville who administered first aid, and mas then taken in an ambulance to the Olney Sanitarium Clinic at Olney, where he was attended by Dr. Lawrence F. Weber and Dr. H. N. Fisher, both of Olney. He remained in the Sanitarium until September 28th, when he returned to his home in Lawrenceville but remained under the care of the Sanitarium doctors until November 27th, on which date he was discharged.

Claimant's wages were fifty cents (50c) per hour for not to exceed forty (40) hours per week. In the employment in which lie was engaged it was customary to operate for a part of the whole number of working days in each year.

As the result of the explosion, the claimant sustained numerous small puncture and burn wounds of the entire face, arms and hands, the right side of his body, and the right thigh. Both eyes had small pieces of foreign bodies in them. There were several lacerations about one-fourth inch long on the right side of the face and neck, with pieces of metal from the exploding caps protruding. There was also a laceration

of the right forearm and pieces of metal were protruding from many of the wounds.

On November 30th Dr. Weber reported as follows:

"All pieces of foreign bodies removed that were found. Wounds cleansed with soap and water. Larger lacerations bandaged. 1500 units antitoxin serum with perfringene given and another in 24 hours. Put to bed under tent with lights. Dr. Fisher called to see eyes. Each day and at subsequent office visits as further foreign bodies were found they were removed. On some it was necessary to use local anaesthetic. There still remain some buried foreign bodies of the hands and arms, but in my opinion they cause little further trouble. He also has some limitation of flexion of the index finger of the right hand. There will be some permanent scars of the hands and face, but do not believe there will be any permanent disability."

Although claimant originally contended that as the result of the accident in question, he had sustained a loss of the sight of the right eye, he now admits that there is no evidence in the record to sustain such contention, and concedes that he is not entitled to any compensation for the partial loss of the sight of the right eye, and limits his claim to compensation for temporary total incapacity, permanent partial loss of the use of the index finger, compensation for disfigurement, and reimbursement for expenses ,necessarily incurred in going to and returning from the hospital at Olney, Illinois for medical attention.

Claimant personally appeased in court for examination relative to the nature and extent of the disfigurement sustained by him.

Upon consideration of all of the evidence in the record, we find as follows:

That on September 20th, 1939 claimant and respondent mere operating under the provisions of the Workmen's Compensation Act of this State, that on said date claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of the claimant for the year preceding the accident, computed in accordance with the provisions of Section 10 of such Act, were $800.00, and his average weekly wage was $15.38; that claimant at the time of the injury was 43 years of age, and had no children under the age of sixteen years; that all necessary first aid, medical, surgical and hospital services were provided by the respondent ; that claimant was temporarily totally disabled from the date

of his injury as aforesaid to and including November 27th, 1939, to wit, for a period of nine and five-sevenths weeks; that he also suffered the permanent loss of five per cent (5%) of the use of the index finger of his right hand; that he has also sustained serious and permanent disfigurement to the hand, head, face and neck; that he was compelled to and did expend the sum of Eleven Dollars ($11.00) for traveling expenses in going to and returning from the hospital at Olney for medical attention; that the sum of Eighty Dollars and Fifteen Cents ($80.15) has been paid by the respondent to apply on the compensation due the claimant as aforesaid.

We further find that the claimant is entitled to have and receive from the respondent the sum of Eight Dollars and Forty-six Cents ($8.46) per week for nine and five-sevenths (9 5/7) weeks' temporary total disability, in accordance with the provisions of paragraphs (b) and (L) of Section eight (8) of the Workmen's Compensation Act; also the further sum of $8.46 per week for a period of two weeks for the permanent loss of five per cent (5%) of the use of the index finger of the right hand, in accordance with the provisions of paragraph E-2 of Section eight (8) of such Act; also the further sum of Three Hundred Fifty Dollars ($350.00) for serious and permanent disfigurement to the hand, head, face and neck; also the sum of $11.00 in repayment of the amount expended by him for traveling expenses as aforesaid—making in all the sum of Four Hundred Sixty and 10/100 ($460.10) Dollars, from which must be deducted the sum of $80.15 heretofore paid by the respondent as aforesaid, making a net amount remaining due the claimant of Three Hundred Seventy-nine and 95/100 ($379.95) Dollars.

We further find that all compensation due to the claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, W. E. Snyder, for the sum of Three Hundred Seventy-nine and 95/100 ($379.95) 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", (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Dis-

bursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly", approved July 1st, 1939 (Session Laws 1939, page 117); and being, by the the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 3332—Claimant awarded $58.55.)

CATHERINE BURZYCH, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 8, 1941.

Rehearing denied May 12, 1941.

MAX J. BECKER, for claimant.

GEORGE F. BARRETT, Attorney General: MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under for temporary total disability.* Where employee of State sustains accidental injuries, arising out of and in the course of her employment, while engaged in extra-hazardous employment, resulting in temporary total disability, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the terms thereof.

SAME—*injury for which compensation sought for partial loss of use of feet must be result of accident under—when. medical testimony insufficient to base award for.* Where compensation is sought for partial loss of use of feet, alleged to have resulted from surgical operation, it must be proven that such operation was made necessary because of accidental injuries sustained, and where medical testimony is that cause for which same was performed existed prior to accident and mas not occasioned thereby, evidence is insufficient to sustain award.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant alleges that on the 13th day of April, 1938, and for some six or seven years prior thereto, she was employed as an attendant at the Chicago State Hospital, and on that date, while taking care of a patient, she was kicked in the abdomen resulting in an operation by which a fibroid tumor and a Group 3 cancer of the cervix were removed and subsequent x-ray treatments were given her for the cancerous condition, and she finally returned to work on July 11, 1938. She also complained of burns on her legs received in the

course of treatment which caused certain injuries described in claimant's statement. The testimony showed that she was employed in an occupation which comes under the Workmen's Compensation Act. The claimant contends that she reported the accident to her immediate superior, Miss Stell Oxford, but Miss Oxford's testimony was very vague and indefinite. Claimant went to her home the day after the accident and for some time thereafter was treated by a physician not connected with the Chicago State Hospital, and to whom she paid $18.00 for six visits. It was reported to the hospital on April 19, 1938 that claimant was ill from uterine bleeding. She did not return to work until May 23, 1938, but was paid her regular monthly salary of $52.92 for the month of April, and it was agreed by counsel on the taking of the testimony that of this sum $23.92 was paid her for that part of April during which she did not work. Claimant returned to work on May 23, 1938, and worked until June 15, 1938, when she was admitted to the employees' hospital at the Chicago State Hospital on her complaint of vaginal bleeding and abdominal pain of several months' duration and her statement that she had been kicked on April 13, 1938.

Claimant was paid for the period during which she worked from May 23rd to the time of her admission to the hospital.

Claimant's contention is that on the day she was injured she went to take care of a patient, and was kicked in the abdomen by the patient who was lying on a bed; that said kick sent claimant reeling backward for twenty feet.

Dr. Arthur H. Schoenwetter testified that he examined the claimant on January 24, 1939. Dr. Scheffler also testified.

Claimant is asking for compensation for 25% loss of use of each of her feet, which is equivalent to $621.68 plus $530.22, which represents compensation during the 402 days that she did not work because of her incapacity, plus $18.00 for ointments, or a total of $1,169.00. Of this sum $23.92 has been paid, leaving a balance of $1,145.08.

Considering the record in its entirety, we are of the opinion that the State had due notice and proper demand for compensation has been made. The medical testimony as to the tumor and cancer is not at all satisfactory.

A lengthy hypothetical question was propounded to each of the doctors. Dr. Schoenwetter in response to the hypo-

thetical question as to whether he had an opinion concerning the facts presented on the question, testified that he did have such an opinion based upon a reasonable degree of medical certainty. He testified and said: "Well, an injury to a tumor causes hemorrhage into that tumor; hemorrhage and swelling of any part. As the hemorrhage and swelling aggravate it, it becomes enlarged, and becomes larger, because there is hemorrhage into the tumor from bleeding:. Immediate pain, and immediate vaginal hemorrhages will also aggravate the cancer of the cervix, due to the fact that bleeding, intra-uterine bleeding comes into the cervix. The cancerous cells cause more destruction to the part from time to time, and in that region, trauma, plus a factor of a weakened condition, and hemorrhage would make it more susceptible.'' This doctor also stated that the trauma described in the hypotlietical question might or could aggravate the fibroid tumor, and this physician was of the opinion that this fibroid tumor and cancer were in existence on April 13, 1938.

The claimant sustained injuries because of burns received while she was in the hospital after she had been operated on for the removal of the cancer and the tumor, and compensation is sought for this reason. It is a well known fact that' a tumor and a cancer are ailments which are progressive in their nature.

Dr. Scheffller also testified and he positively stated that her illness after April **13,** 1938 was the result of the fibroid of the uterus and the carcinoma of the cervix and not due to the kick. The lesion which was found in the operation had evidently been there for a period of at least months or a year. The kick was purely incidental in bringing attention to the presence of such lesion, and the bleeding was caused by a fibroid tumor in the uterus.

The medical testimony is not sufficient upon which an award could be based.

In addition to this, there is a certificate of Dr. Edward F. Dombrowski, Managing Officer of the Chicago State Hospital, given under date of December 22,1938. He quoted from the history obtained from the claimant herself at the time of her first admittance to the hospital, and said that she had stated that about three months prior to the admittance she was struck in the abdomen by an inmate of the institution, but there is no record of any injury report having been made

at that time. Following this injury she went off duty and was under the care of a private physician for a period of time not known to this doctor and until the bleeding stopped. Without any further injury, the bleeding commenced again in May. This report states that at the time of the admission of the claimant to the hospital, an examination revealed the presence of a large fibroid uterus and a lesion of the cervix of the uterus, suggesting the possibility of a cancer; that there was no visible evidence of trauma to the abdominal wall. On August 6,1938, the operation was performed, and a tumor of the uterus mas removed, and a Group 3 cancer of the cervix was found, and because of the patient's weakened condition, she was given several transfusions, and was discharged from the hospital on October 24, 1938.

The medical testimony in this case on the question of cancer and tumor is not sufficient upon which we can base an award. Therefore, nothing can be allowed for the ointment that she purchased and nothing can be allowed for the burns to her legs, which were caused by the treatment of the tumor and the cancer. We feel, however, that the State did have sufficient notice for claim for compensation for the seven weeks that elapsed following the time that she went to her home and left her employment. We, therefore, make an award for seven weeks at $9.21 per week, being one-half of her weekly wage of $18.42, or $64.47, plus the sum of $18.00, being the amount she paid to a private physician, or a total award of $82.47, less $23.92, an overpayment, or $58.55.

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", (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly", approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(No. 3293—Claim denied.)

TILLMAN BRADDY, BY AMANDA ANGELMIRE, HIS MOTHER AND NEXT FRIEND, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 9, 1941.

Rehearing denied May 13, 1941.

LEE ENSIL, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*respondeat superior.* The doctrine of respondeat superior is not applicable to the State in the exercise of its governmental functions, and it is not liable for injuries to the person or damage to property caused by the negligent or wrongful acts of its officers, agents or employees.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant, a minor, thirteen years of age, by Amanda Angelmire, his mother, and next friend, filed his complaint in this court asking for the sum of $10,000.00 in damages for personal injuries.

In brief, the complaint charges that on January 30, 1938, the claimant, was on U. S. Highway 30 near Joliet, Illinois; that he was standing on the right-hand side of an automobile and was about to enter the same; that his mother was at the steering-wheel; that a car owned by the State of Illinois, Department of Conservation, was negligently and carelessly operated so as to strike the claimant, bruising him severely. The claimant suffered a fracture of his right leg. He was taken to a hospital and remained in a cast for six weeks. He also charges a permanent injury to this leg, and that he has expended the sum of $131.04 in hospital and doctor bills on account of this injury.

The claim is predicated upon the theory that the State of Illinois is liable for the negligent acts of its agents.

This court has repeatedly held that the doctrine of respondeat superior does not apply to the State and the State is not liable for injuries to the person caused by the negligent or wrongful acts of its officers, agents or employees.

Harmon vs. *State,* 9 C. C. R. 26;
Curry vs. *State,* 9 C. C. R. 6;
Boyd vs. *State,* 9 C. C. R. 79;
Cavatio vs. *State,* 9 C. C. R. 249;
Powell vs. *State,* 9 C. C. R. 314;

Jenkins vs. *State*, 9 C. C. R. 439;
England vs. *State*, 9 C. C. R. 59.

This court has also held that it has jurisdiction to recommend an award only where the State would be liable in law or in equity in a court of general jurisdiction, if it were suable.

Crabtree vs. *State*, 7 C. C. R. 207.

The Attorney General has filed a motion to dismiss and for the reasons herein announced that motion must be sustained. Cause dismissed and award denied.

(No. 2568—Claimant awarded $775.33.)

ALVIN G. CAESAR AND STELLA CAESAR, AS JOINT TENANTS AND NOT AS TENANTS IN COMMON, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1941.

F. J. TECKLENBURG, for claimants.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY, NOT TAKEN FOR PUBLIC USE—*caused by construction of public improvement—what constitutes—measure of—proper elements of.* The issues involved herein are the same as those in *Rule* vs. STATE, No. 2570, post, this volume, and what was said therein is equally applicable and controlling herein.

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

Since September 30, 1929, the claimants, Alvin G. Caesar and Stella Caesar, have been the owners as joint tenants of the following described property, to wit: Lot Six (6) in Block Six (6) in "Twelve Oaks", in the City of Belleville, County of St. Clair and State of Illinois, according to the plat thereof recorded in the Recorder's Office of said St. Clair County (except a small triangular tract along the south side thereof).

On December 4, 1926, the Board of Supervisors of St. Clair County adopted a resolution selecting a system of State-Aid roads in said County, which said resolution was approved by the Department of Public Works and Buildings of the respondent on January 7, 1927.

Thereafter said Board of Supervisors selected as a part of said State-Aid system, a certain highway which extended

in an easterly and westerly direction along the south property line of the claimants' property, and which was laid out over a tract of land which had been previously owned by the Southern Traction Company, but was not being used for right-of-way purposes.

On December 20, **1933,** the said Department of Public Works and Buildings awarded a contract for the construction of that part of said State-Aid Road which extended along the south line of claimants' lot, which said road thereafter was known as S. B. I. Route No. **13.**

Said S. B. I. Route No. 13 was constructed in **1934,** and in the construction thereof, there was a grade separation over the tracks of the Illinois Central Railroad Company. In connection with such grade separation, a viaduct was constructed over such tracks, with an embankment leading thereto, which started at grade near the center of Fifteenth Street and rose gradually to meet the west end of the viaduct, at which point the elevation was 22 feet above the level of the natural ground. At the east end of the claimants' lot the elevation was 11.3 feet above the level of the natural ground.

The highway right-of-way is 50 feet in width and the surface of the embankment consists of a concrete slab 20 feet in width together with clay shoulders approximately four feet in width adjoining the concrete slab. The embankment slopes at a steep angle to the southerly line of the claimants' lot.

Claimants' loti has a frontage of 50 feet on Fifteenth Street, which street extends in a northerly and southerly direction. Such lot is 130 feet in length and there is an alley at the rear thereof. The lot is improved by a five-room frame bungalow with bath, basement and furnace, with a garage near the rear of the lot.

Prior to the construction of the improvement in question, the garage was reached by way of the alley at the rear of the premises, but access to the alley was cut off by the embankment and at the the time of the construction of the highway improvement, the garage was turned around and raised approximately two feet, doors were cut in the west side thereof and a driveway constructed from the front of claimants' property along the southerly line thereof to such garage. The cost and expense of raising and turning the

garage as aforesaid amounted to $259.45 and was paid by the respondent.

The paved portion of the highway is approximately thirty feet from claimants' house. Claimants contend that the fair cash market value of the property has been depreciated by reason of interference with the access thereto, by reason of the discharge of water, debris and mud from the highway thereon, by reason of the vibration resulting from the traffic, which caused the cracking of the walls of the house ; by reason of noise and dust; and by shutting off the light, air and view from their premises ;—and also contended that they had been put to additional expense in filling up their lot and digging up various fiowers and shrubs, and had also suffered the loss of certain grape vines and fruit trees.

The case of Jesse L. Rule, et al, No. 2570, decided at the present term of this court, involved damages to property in the same vicinity, and damaged by the same improvement. The facts in that case are much the same as in the case at bar and what we said in that case with reference to the legal questions' involved, applies with equal force to the present case. In the consideration of that case, we said:

"Claimants' right of recovery is and must be based upon the provisions of Section 13 of Article 2 of the Constitution of this State which provides that private property shall not be taken or damaged for public use without just compensation.

"It is well settled that in cases of this kind, that is, in cases where private property is not taken, but is damaged for public use, the proper measure of damages is the difference between the fair cash market value of the property unaffected by the improvement and the fair cash market value thereof as affected by it. *Brand* vs. *Union Elevator Co.*, 258 Ill. 133; *Dept. of Public Works* vs. *Caldwell*, 301 Ill. 342; *Dept. of Public Works* vs. *McBride*, 338 Ill. 347.

"It is also well settled that the aforementioned constitutional provision was not intended to reach every possible injury that might be occasioned by a public improvement, and that to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. *Rigney* vs. *City of Chicago*, 102 Ill. 64; I. *C. R. R. Co.* vs. *Trustees of Schools*, 212 Ill. 406; *Illinois Power and Light Corporation* vs. *Talbott*, 321 Ill. 538.

"Also, in order to warrant a recovery, the damage must be different in kind from that sustained by the people of the whole neighborhood. If it differs only in degree from that suffered in common by the people of the whole

neighborhood, the injury is not within the provisions of the Constitution. *City of Winchester* vs. *Ring*, 312 Ill. 544.

"Also, that the opinions of witnesses must be based on such elements as form a proper basis for the establishment of a depreciation in the fair cash market value of the property, and remote speculative or contingent injuries cannot be considered, as such elements are not recognized by the law as elements entering into the damages which may be allowed. That is to say, depreciation in market value will not sustain a claim for damages to land not taken unless such depreciation results from a cause which the law regards as a basis for damages. *Illinois Power & Light Corporation* vs. *Talbott*, 321 Ill. 538; *Rockford Electric Co.* vs. *Browman*, 339 Ill. 212.

"Also, that in cases involving damage to land not taken the burden of proof is upon the property owner to prove the damages claimed.

Illinois Power & Light Corp. vs. *Barnett*, 338 Ill. 499;
East St. Louis Light Co. vs. *Cohen*, 333 Ill. 218;
Illinois Power & Light Corp. vs. *Talbott*, 321 Ill. 538.

"In this case there is no question but what the property of the claimant has been depreciated in value as the result of the construction of the improvement, and the only question for our determination is the extent to which the property has been depreciated as the result of elements which the law recognizes as proper elements in cases of this kind.

"The following have been recognized as proper elements of damage, to wit:

1. Interference With the Right of Access.
   Rigney vs. *City of Chicago*, 102 Ill. 64;
   Barnard vs. *City of Chicago*, 270 Ill. 27;
   Lydy vs. *City of Chicago*, 356 Ill. 230.
2. Interference With the Natural Drainage, and Casting Mud and Water Upon the Premises.
   Nevins vs. *City of Peoria*, 41 Ill. 502;
   City of Bloomington vs. *Brokaw*, 77 Ill. 194;
   City of Bloonzington vs. *Pollock*, 141 Ill. 346;
   Fleming vs. *E. J. & E.* Ry. *Co.*, 275 Ill. 486.
3. Interference With the Right to Have Light and Air From the Public Highway Unobstructed By Any Encroachment.
   Field, et al. vs. *Barling*, 149 Ill. 556;
   Barnard vs. *City of Chicago*, 270 Ill. 27;
   Gerstley vs. *Globe Wernecke Co.*, 340 Ill. 270.

"In a number of railroad cases our Supreme Court has held that as to abutting property owners, the noise and vibration of passing trains; and the casting of smoke, dust, ashes and cinders upon the premises in a considerable amount, are proper elements of damage.

Nix vs. *C. P. & St. L. Ry. Co.*, 137 Ill. 141;
C. M. & St. P. Ry. Co. vs. *Darke*, 148 Ill. 226;
C. P. & St. L. Ry. Co. vs. *Leah*, 152 Ill. 249;
I. C. R. R. Co. vs *Turner*, 194 Ill. 575;
Calumet, etc. Dock Co. vs. *Morawitz*, 195 Ill. 398;
I. C. R. R. Co. vs. *Trustees of Schools*, 212 Ill. 406.

"In the case of *Aldrich* vs. *Metropolitan, etc., Elevated Railway Co.*, 195 Ill. 456, the railroad did not abut upon the plaintiffs property, and although some of the counts of the declaration stated a good cause of action, the court

held that the evidence failed to show any direct physical disturbance of any right, public or private, which the plaintiff enjoyed in connection with her property, and that the damages which she sustained were of the same kind as those sustained by the general public, and that therefore she was not entitled to recover therefor.

"Our attention has not been called to any case in which noise, fumes or dust arising from the usual automobile traffic upon a State Bond Issue Route have been considered proper elements of damage;—and under the evidence in this case we do not consider them such."

Three witnesses testified as experts on behalf of the claimants, and stated that in their opinion the fair cash market value of the claimants' property prior to the construction of the improvement was $4,275.33; that the fair cash value of the property after the construction of the improvement was $3,500.00; and that the property depreciated in value as the result of the construction of the improvement in question, to the extent of $775.33. No testimony was offered by the respondent on the question of the extent of the damage to claimants' property.

The court viewed the premises and we believe that the evidence in the record supports the opinions of the claimants' witnesses that the property was depreciated in value as the result of the construction of the improvement in the amount of $775.33.

The evidence shows that the property in question is encumbered by a mortgage to Belleville Savings Bank, Trustee, dated September 30, 1929, securing one note in the principal sum of $3,500.00; that on September 30, 1939, there was due the full amount of the principal of such mortgage, and interest in the amount of $105.00; that said mortgage on November 19, 1929, was assigned to Eleanor N. Gundlach, R. F. D., Belleville, Illinois, and that she is now the legal holder and owner of said note and the mortgage securing the same.

Award is therefore entered in the amount of Seven Hundred Seventy-five Dollars and Thirty-three Cents ($775.33), payable to Alvin G. Caesar, Stella Caesar, and Eleanor M. Gundlach.

(No. 3370—Claim denied.)

WILLIAM J. HOWARD, INC., A CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 12, 1941.

Petition for rehearing denied May 13, 1941.

FRANCIS C. BLAIR, for claimant.

GEORGE F. BARRETT, Attorney General; MAURICE J. WALSH and MURRAY F. MILNE, Assistant Attorneys General, for respondent.

CONTRACTS—*performance of delayed by failure of other contractor to complete preceding work—claim for damages resultzng--award dented where no provision in contract for.* Parties to a written contract are bound by the terms thereof and where it is provided therein that party shall not commence performance until another contractor employed to perform preceding work has completed same, there is no breach of contract where such preceding contractor delays in the performance of such work, where the State was not responsible for such delay, and if damage results therefrom the State is not liable therefor in the absence of any provision in the contract for payment.

MR. JUSTICE YANTIS delivered the opinion of the court:

William J. Howard, Inc., an Illinois corporation with principal offices in Chicago, filed its claim April 8, 1939 seeking an award of Seven Hundred Sixty-six and 12/100 ($766.12) Dollars for alleged loss and damages due to delayed performance in the painting of bridges alleged to have resulted through the fault of respondent.

The claim represents that on February 2, 1937 it entered into a contract with the Department of Public Works and Buildings of Illinois for the painting of four bridges; that the contract contained the following provision under the heading of "Special Provisions", "Order of Work. No bridge shall be painted until the contractor for Section 2-D has completed the concrete floor slab."

That the said floor slab so specified in Section 2-D was officially completed by the contractor on August 3, 1938; that prior to the official completion of such floor slab, claimant was informed by letter on July 9, 1938 that the contractor had completed the floor slab on three of the bridges of said project and expected to finish concreting the fourth bridge on July 16, 1938, and that claimant might start its paint crew any time thereafter.

That subsequent to the execution of its contract and after receiving the above letter, claimant began its work on July 25, 1938 and complied with all the terms thereof, and that all the work called for under the contract was completed by it on October 5, 1938; that it thereupon submitted its bill to respondent for Two Thousand Three Hundred Forty-four and 73/100 ($2,344.73) Dollars; that respondent has paid the sum of Two Thousand One Hundred Ten and 26/100 ($2,110.26) Dollars, leaving a balance of Two Hundred Thirty-four and 47/100 ($234.47) Dollars, which has been tendered to claimant, but which the latter has rejected until its claim for damages and loss under the contract has been determined by the court. The admitted balance of Two Hundred Thirty-four and 47/100 ($234.47) Dollars is not involved in this claim.

Claimant further contends that although its contract provided for no certain date upon which the preliminary work or concrete slab work on bridges should be completed," that nevertheless on October 2, 1936, at which time bids for the several types of work including the painting were submitted and opened, said bids for said sections each contained a stated number of days during which time work covered by each section was to have been completed, to-wit: Section 2-B, 150 days, Section 2-E, 70 days, and Section 2-D, 95 days, or a total of 215 days (approximately seven months); that based upon these statements of time so specified by respondent within which the work to be done prior to the painting was to be completed, claimant was led to believe that respondent proposed to and would accept such bids and would see that such preliminary work prior to the painting was started and progressed in accordance with stipulated time periods, so that all slab structure and concrete slab work would be completed in ample time for claimant to begin its work under Section 2-P not later than October 1, 1937 and might thus complete its painting work during that year.

Claimant further contends that at the time of the execution of the contract and claimant's completion' thereof, the union scale of Journeymen Painters in the Springfield District was $1.25 per hour, and that claimant's contract price was figured on that basis; that at the same time the rate in the Chicago District was $1.66 2J3 per hour; that during the month of January, 1938, a new rule was adopted by such

union that regardless of local affiliation, no journeyman painter would be permitted to work in excess of thirty (30) hours per week and in accordance with the rules adopted by the union to work within the United States, and that contractors mould have to pay the highest scale provided by the local union nearest the site of the work or within whose jurisdiction the contractor's main office was located. That on November 27, 1936 respondent rejected the bids previously submitted on substructure work (Section 2-B), and that new bids on such substructures were not received by respondent until January 8th, 1937, and the contract therefor was not executed until January 18, 1937, thereby causing a delay of over three and one-half (3½) months in the commencement of such substructure work; that claimant did not know of such new bids and the resultant delay, until long after its contract for painting had been accepted by respondent; that such substructure work was not actually begun until March 8,1937 and was not completed until November 15, 1937, being a period of two hundred fifty-three (253) days from the commencement of the work and ninety-eight (98) days after the time granted by extension; that such delay was caused by respondent's failure to secure the necessary right-af-way for the completion of such, work.

The claim further recites that claimant is informed and believes that the instructions given by respondent to the contractor for substructure work specifically provided that the respondent should not be liable in damages to the contractor for any delay or failure to secure proper right-of-way necessary for the commencement or completion of his section of the work, but that no such instructions or reservation was given or made by respondent in accepting the bid of claimant or others on other sections of such project; that because of the delay to secure right-of-way, your claimant although at all times ready and willing during the year 1937, could not commence its work under Section 2-P of said project until July 25, 1938, being a period of six hundred sixty-one (661) days (1yr. 10 months) after the opening of the bids on said project, and a year and six months after such contract was awarded to claimant; that such lapse of time was unnecessary, and unreasonable and not intended or contemplated by claimant or respondent at the time its contract mas entered into, and that such delay resulted in the damages stated; that

the delay which prevented claimant from commencing its work until July 25, 1938, compelled it to pay $1.66 2/3 per hour for Union labor employed instead of $1.25 per hour; that in addition, it was allowed to work its men only six hours per day instead of eight hours as had been the rule of the Union prior to January, 1938; that the delay in time also compelled claimant to employ men from the Springfield District, who, because of their lack of training, had to be trained by claimant on the job.

The Bill of Particulars recites the specific damage as the difference between $1.66 2/3 per hour and $1.25 per hour for 1,527 man hours—$636.25. Insurance and Social Security on $636.25 increased wages—$129.87—total amount of claim, $766.12.

Respondent's position is that there was no undue or unreasonable delay in the prior construction work; such delays as took place were provided for by the contract and that there is no proof in the record establishing that the greater expenses incurred by claimant were caused by any delay which did take place; and further that claimant should have protected himself against such damage as now complained of by insisting on a provision in the contract to protect it.

Before claimant could perform the painting work, required under its contract, it was necessary that all construction and concrete work should be finished. The preliminary contracts for the latter work had protecting provisions, therein against delays in obtaining right-of-way. No commencement or final date was fixed for the commence of work by claimant under its contract, other than the following provision: "*Order* of *work*. No bridge shall be painted until the contractor for Section 2-D has completed the concrete floor slab."

It appears from the record that claimant was notified when the preliminary work was out of the way and the time had arrived at which claimant could begin his work. There was no provision in the contract by which he could anticipate protection against the raise in wage incident to a change of union scale of pay or union change in working hours. Any damage which claimant suffered resulted directly from such changes, and not from any violation of the terms of the contract by the State.

"Where a contract provides that certain contract work shall not commence until a preceding contractor has progressed to a certain point in construction, the subsequent contractor cannot claim damages caused by delay in erection where the State did not cause the delay."

O'Keefe vs. *The Btate*, 10 *C. C.* 480.

An award is denied and the claim is hereby dismissed.

(No. 3584—Claimant awarded $66.78.)

INSURANCE EXCHANGE BUILDING CORPORATION, AN ILLINOIS CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1941.

PAM, HURD & REICHMANN, for claimant.

GEORGE F. BARRETT, Attorney General; JAMES W. BREEN, Assistant Attorney General, for respondeat.

SUPPLIES—*service—lapse of appropriation out of which could be paid—when. award may be made for amount due therefor.* 'Where it is undisputed that claimant furnished service to the State, as contracted for by it, and that appropriation out of which amount thereof could be paid lapsed before payment was made, an award may be made for the reasonable value of such service, on claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant filed its claim herein on February 7, 1941, alleging that under date of July 1, 1937 claimant and respondent, through the office of Hon. C. E. Black, then Adjutant General of Illinois, entered into a written lease for certain premises known as 1560 Insurance Exchange Building, Chicago, for a term of two years from date, at an annual rental of Seven Hundred Nine and 50/100 ($709.50) Dollars, payable monthly, with option for renewal and privilege of cancellation by respondent on thirty days' notice. The Lease was renewed for two years beginning July 1, 1939 and was cancelled as of December 16, 1940. In the final settlement of accounts, it appears from a report by Hon. Leo M. Boyle, now Adjutant General of Illinois, that the monthly rental for the period of July, 1937 in the sum of Fifty-nine and 13/100 ($59.13) Dollars was not paid, and that a bill of Seven and 65/100 ($7.65) Dollars for electricity furnished said quarters at the latter's expense, also remains nnpaid; that the appropriation out of which said payments might have

been made has lapsed; that the State of Illinois received the benefit thereof under duly authorized contracts and that the claimant is entitled to payment therefor.

An award is therefore hereby made in favor of Insurance Exchange Building Corporation, claimant herein, in the sum of Sixty-six and 78/100 ($66.78) Dollars.

(No. 2569—Claim denied.)

ALFRED H. OETTING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 13, 1941.

F. J. TECKLENBURG, for claimant.

GEORGE F. **BARRETT**, Attorney General; GLENN **A. TREVOR**, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY—*alleged to have resulted from construction of public improvement—what must be proven to justify award.* 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, and if no difference in value is proven no award can be made.

SAME—*same—burden of proof on claimant to sustain. Claimant must* prove by a preponderance of the evidence the decrease of the value of his property as the result of the public improvement.

SAME—*interference with access to property, proper element of—not conclusive of right to award.* While interference with access to private property, resulting from construction of public improvement, is a proper element of damages, it is not conclusive of the right to an award, and if notwithstanding such interference, the fair, cash market value of the property is as great just after completion of improvement as it was just prior thereto, no damage has been proven and no award can be made.

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

From the complaint and the amended complaint herein, it appears that claimant is the owner in fee of Lot Sixty-six (66) in Abend's South Belleville Subdivision in and adjoining the City of Belleville, St. Clair County, Illinois; that said lot is just outside of the city limits of said City of Belleville-that pursuant to a resolution adopted by the Board of Supervisors of St. Clair County at the December, 1926 meeting of said Board, the public highway adjoining the aforementioned

lot on the south was designated as a part of the system of State Aid Roads in said County; that thereafter said route was duly accepted by the Department of Public Works and Buildings of the respondent and was known as S. B. I. Route No. 13; that on, to wit, December 20, 1933, the respondent entered into a contract with certain contractors for the grading of said highway and the construction of a hard-surfaced roadway thereon, as a Federal Aid Project; that in the construction of said highway, the grade thereof along the south side of claimant's lot was lowered seven (7) feet, and the soil was removed to within one foot of the south property line of said lot; that prior to the time of the grading of said street, same was on a level with the surface of said lot, and that as the result of such grading, the said lot became inaccessible from said street; that the respondent after lowering the grade of the street along the south line of claimant's property, also lowered the grade and surface of the street on the east side of said lot;— as a result of which the usual means of ingress and egress to and from said lot is obstructed; that the embankment along the north line of said S. B. I. Route No. 13 is being gradually washed away by the rains, and claimant's property will be further damaged unless a retaining wall is constructed without delay;—all to the damage of the plaintiff in the sum of Two Thousand Dollars ($2,000.00).

The evidence shows that the aforementioned lot of the claimant is located at the northwest corner of the intersection of two highways, one originally known as Eleventh Street, but now known as S. B. I. Route No. 13 (and sometimes as the South Belt Line), and the other known as Charles Street; that said S. B. I. Route No. 13 (Eleventh Street) extends in an easterly and westerly direction along the south side of claimant's lot; that Charles Street extends in a northerly and southerly direction along the east side of said lot; that there is an alley along the west side of said lot; that claimant purchased said lot in 1928; that such lot is improved by a two-story brick dwelling house which was built over sixty-five years ago and is situated on a hill or knoll; that along claimant's south property line, at a point fifteen feet west of the house, there are two coal sheds, and at a point twenty feet west of said coal sheds there are four frame garages which extend in a westerly direction to the alley which constitutes' the west boundary line of the property.

The residence of the clainiant fronts on Charles Street, but the entrance to the coal sheds and garages is from Eleventh Street.

The buildings are so constructed that the south side of the house, as well as the south side of the coal sheds and garages, are immediately adjoining the property line, that is to say, the house, coal sheds and garages are so constructed that the south side thereof is right up to the north line of S. B. I. Route No. 13.

The evidence relative to the grade of said street prior to the construction of the hard-surfaced roadway thereon, and the extent of the lowering of the grade of such street does not substantiate the allegations of the complaint, but shows that in the construction of said S. B. I. Route the grade of the center line of said street mas made one and two-tenths feet lower than it previously had been; that the travelled portion of the roadway was widened, however, and the embankment was extended to within a point four feet south of the claimant's house, being eight to ten feet closer than it previously had been, so that it appeared that the grade had been lowered considerably more than it actually had been.

The evidence also shows that the grade of Charles Street was lowered to the extent necessary for it to meet the lower grade of said S. B. I. Route.

There is no question but what the construction of said S. B. I. Route interfered to a certain extent with the access to claimant's property.

The evidence also shows that prior to the construction of said State Bond Issue Route, the claimant received approximately $25.00 per month rent for the residence, whereas subsequent to the construction of said route he received but $18.00 per month; also that prior to the construction of said improvement, each of said garages rented for $2.00 per month, and that subsequent thereto claimant was unable to rent the same.

There was some testimony to the effect that the vibration resulting from the heavy trafficon such State Bond Issue Route caused some damage to the 'dwelling, and rendered it less desirable for renting purposes.

Claimant's right to an award is based upon the provisions of Section 13 of Article 2 of the Constitution, which provides that private property shall not be taken or damaged

for public use without just compensation. Our courts have held in numerous cases that where property is not taken but is damaged for public use, the correct measure of damages is the difference between the fair cash market value of the property unaffected by the improvement and the fair cash market value thereof as affected by it. *(Departmerzt* of *Public Works* vs. *McBride, 338* Ill. 347; *Departmerzt of Public Works* vs. *Caldwell,* 301 Ill. 242; *Brand* vs. *Union Elevator* Co., 258 Ill. 133.)

Also that depreciation in market value will not sustain a claim for damages to land not taken, unless it is from a cause which the law regards as a basis for damages. *(Illirzois Power and Light Corporation* vs. *Talbott,* 321 Ill. 538; *Rockford Electric* Co. vs. *Browman,* 339 Ill. 212.)

There is no question but what interference with the means of access to the property, and a decrease in the income derived from the property are elements to be considered in determining whether there has been a decrease in the fair cash market value thereof. However, the existence of such elements is not conclusive of the right of the claimant to an award, for the reason that notwithstanding the existence of such elements, there may have been no reduction in the fair cash market value of the property. If the construction of the improvement in question has resulted in an increase of the market value of said property, or if the niarket value thereof remains the same, the plaintiff is not entitled to an award for the reason that the property has not been damaged within the meaning of that word as used in the constitutional provision.

Prior to the construction of the improvement in question, claimant's property was used for residence purposes only, and it requires no stretch of the imagination to envision a condition where the property as the result of the improvement might produce less income for residence purposes, but become more valuable for business purposes;—and the controlling factor in this case is whether there has been a decrease in the fair cash market value thereof as the result of the construction of the improvement.

Claimant produced two witnesses who testified as experts on the question of damages. One witness gave it as his opinion that the property was worth $2,300.00 prior to the construction of the highway, and $1,000.00 after the construc-

tion thereof. Such witness, however, stated that the principal reason for such depreciation in value was the necessity of constructing a retaining wall and fence on the south side of the premises and the moving of the garages and sheds so that access could be had thereto, and stated also that he did not take into consideration the rental value of the residence subsequent to the construction of the highway, as he did not consider that a material point.

The other witness testified that in his opinion the property was of the value of $1,800.00 prior to the construction of the improvements and $1,000.00 subsequent to the construction thereof, and apparently based his opinion largely upon the necessity of constructing a retaining wall.

The respondent produced three witnesses who testified as experts on the question of the valuation of the property prior to and immediately after the construction of the improvement in question. Each of such witnesses gave it as his opinion that prior to the construction of the improvement in question, the property was worth $1,600.00, and that immediately after the construction of such improvement, it was of the same value, that is, that there had been no depreciation in the market value of the property as the result of the construction of such improvement. One of such witnesses had at one time owned the property, and testified that he purchased it and sold it for $1,600.00.

The court viewed the premises, and considering all of the evidence in the record, the testimony of the several witnesses as to values, and the several elements considered by them in arriving at their respective opinions, we cannot say that the claimant has sustained the burden of proof that his property has been damaged as the result of the construction of the highway in question, and award must therefore be denied.

(No. **2570—Claimant awarded** $700.00.)

JESSE L. RULE AND FRANCIS M. RULE, AS JOINT TENANTS AND NOT AS TENANTS IN COMMON, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion** filed May 13,* ***1941.

F. J. TECKLENBURG, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE—*to 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, compensation may be had therefor and 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 value, as affected by it.

Sam— same— same— interferencewzth access to property, proper element of. A change in the grade of a street, in the construction of a public improvement, which results in interference with access to private property, is damage to property not taken for public use, within the meaning of the Constitution and compensation may be had therefor.

Sam— same— same— same. The questions before the court in this case were before this court in the case of *Moore, et al.* vs. *Btute, 8* Court of Claims Reports, *686* and fully discussed therein.

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

At the time of the filing of the complaint herein, the claimants, Jesse L. Rule and Frances M. Rule, his wife, were the owners, as joint tenants, of the following described property, to wit: Lot numbered four (4) of block numbered six (6) of "Twelve Oaks," in the City of Belleville, County of St. Clair and State of Illinois, according to the plat thereof recorded in the Recorder's Office of said St. Clair County. Such lot has a frontage of fifty (50) feet on Fifteenth Street (which extends in a northerly and southerly direction), is One Hundred Thirty (130) feet in length, and has an alley at the rear thereof.

On August 2, 1939 the claimants conveyed the above described property by warranty deed to Elizabeth Roedesheimer, but in the deed of conveyance the claimants specically reserved their claim against the State of Illinois for damage to said premises on account of the construction of the highway and embankment described in the complaint herein. Consequently, any award which may be made herein must be made to the claimants, notwithstanding the aforementioned conveyance to Elizabeth Roedesheimer.

On December 4, 1926 the Board of Supervisors of St. Clair County adopted a resolution selecting a system of State-aid roads in said County, which said resolution was approved by the Department of Public Works and Buildings of the respondent on January 7, 1927. Thereafter said Board of Supervisors selected, as a part of said State-aid system, a certain highway which extended in an easterly and westerly direction along the north property line of the claimants' prop-

erty, and which was laid out over a tract of land which had been previously owned by the Southern Traction Company but was not being used for right-of-way purposes.

On December 20, 1933 the said Department of Public Works and Buildings awarded a contract for the construction of that part of said State-aid road which extends along the north line of claimants' lot, which said road thereafter was known as S. B. I. Route No. 13.

Said S. B. I. Route No. 13 was constructed in 1934, and in the construction thereof, there was a grade separation over the tracks of the Illinois Central Railroad Company. In connection with such grade separation, a viaduct was constructed over such tracks, with an embankment leading thereto, which started at grade near the center of Fifteenth Street and rose gradually to meet the west end of the viaduct, at which point the elevation was twenty-two (22) feet above the level of the natural ground. At the east end of the claimants' lot the elevation was 11.3 feet above the level of the natural ground.

At a point on the highway about fifty-six (56) feet east of the east line of Fifteenth Street a concrete retaining wall was constructed by the respondent. Such retaining wail was approximately fourteen (14) inches in height at the west end thereof and increased in height to eight (8) feet at the east line of the claimants' lot extended in a northerly direction.

The foundation for the retaining wall approximately coincides with the north property line of claimants' lot. The main body of such retaining wall is from twenty-two (22) to twenty-four (24) inches north of claimants' north property line, and extends in an easterly direction to a point twenty (20) feet east of the east lot line, being to the east side of the alley at the rear of claimants' property, as a result of which access through the alley is entirely obstructed.

Claimants' lot is improved by a frame five-room-and-basement bungalow, having a bathroom, but no fixtures therein. At the rear of the lot there is a chicken house and outdoor toilet. The dwelling house was constructed in 1924, is located about 8.3 feet south of the north property line; is 38 feet long and 28 feet wide, and has a 7½-foot porch which extends across the entire front of the house. The house is in good condition and is equipped with furnace, electricity, gas and water, and is situated about 24 feet from the concrete pavement.

Claimants contend that by reason of the construction of the improvement in question, access to their premises has been interfered with, the foundation walls of the house have been cracked, whereby the water seeps through; the walls of the house have become cracked as the result of vibration from the traffic; water, slush and mud wash onto the claimants' premises in wet weather; and in dry weather dust from the highway blows onto the premises and requires them to keep the windows closed, and that by reason thereof, the fair cash market value of their property has decreased Fifteen Hundred Dollars ($1,500.00).

There is little dispute about the facts in the case, and the principles of lam covering such facts have been quite well established by repeated decisions of our courts. Claimants' right of recovery is and must be based upon the provisions of Section **13** of Article 2 of the Constitution of this State which provides that private property shall not be taken or damaged for public use without just compensation.

It is well settled that in cases of this kind, that is, in cases where private property is not taken, but is damaged for public use, the proper measure of damages is the difference between the fair cash market value of the property unaffected by the improvement and the fair cash market value thereof as affected by it. (*Brand* vs. *Union Elevator Co.,* 258 Ill. 133; *Department of Public Works* vs. *Caldwell,* 301 Ill. 342; *Department of Public Works* vs. *McBride,* 338 Ill. 347.)

It is also well settled that the aforementioned constitutional provision was not intended to reach every possible injury that might be occasioned by a public improvement, and that to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. (*Rigney* vs. *City of Chicago,* 102 Ill. 64; I. C. *R. R.* Co. vs. *Trustees* of *Schools,* 212 Ill. 406; *Illinois Power and Light Corporation* vs. *Talbott,* 321 Ill. 538.)

Also, in order to warrant a recovery, the damage must be different in kind from that sustained by the people of the whole neighborhood. If it differs only in degree from that suffered in common by the people of the whole neighborhood,

the injury is not within the provisions of the Constitution. (*City* of *Winchester* vs. *Ring,* 312 Ill. 544.)

Also, that the opinions of witnesses must be based on such elements as form a proper basis for the establishment of a depreciation in the fair cash market value of the property, and remote speculative or contingent injuries cannot be considered, as such elements are not recognized by the law as elements entering into the damages which may be allowed. That is to say, depreciation in market value will not sustain a claim for damages to land not taken unless such depreciation results from a cause which the law regards as a basis for damages. (*Illimois Power & Light Corporation* vs. *Talbott,* 321 Ill. 538; *Rockford Electric* Co. vs. *Browman,* 339 Ill. 212.)

Also, that in cases involving damages to land not taken the burden of proof is upon the property owner to prove the damages claimed. (*Illinois Power & Light Corporation* vs. *Barnett,* 338 Ill. 499; *East St. Louis Light* Co. vs. *Cohen,* 333 Ill. 218; *Illinois Power & Light Corporation* vs *Talbott,* 321 Ill. 538.)

In this case there is no question but what the property of the claimant has been depreciated in value as the result of the construction of the improvement, and the only question for our determination is the extent to which the property has been depreciated as the result of elements which the law recognizes as proper elements in cases of this kind.

The following have been recognized as proper elements of damage, to wit:

1. Interference With the Right of Access.
   Rigney vs. *Czty of Chicago,* 102 Ill. 64;
   Barnard vs. *City of Chicago,* 270 Ill. 27;
   Lydy vs. *City of Chicagd,* 356 Ill. 230.
2. Interference With the Natural Drainage, and Casting Mud and Water Upon the Premises.
   Nevins vs. *City* of *Peoria,* 41 Ill. 502;
   City of *Bloomington* vs. *Brokaw, 77* Ill. 194;
   City of *Bloomington* vs. *Pollock,* 141 Ill. 346;
   Fleming vs. E. *J. & E. Ry. Co.,* 275 Ill. 486.
3. Interference With the Right to Have Light and Air From the Public Highway Unobstructed By Any Encroachment.
   Field, et al. vs. *Barling,* 149 Ill. 556;
   Barnard vs. *City of Chicago,* 270 Ill. 27;
   Gerstley vs. *Globe Wernecke Co.,* 340 Ill. *270.*

In a number of railroad cases our Supreme Court has held that as to abutting property owners, the noise and vibra-

tion of passing trains and the casting of smoke, dust, ashes and cinders upon the premises in a considerable amount, are all proper elements of damage.

Nix vs. *C. P. & St. L. Ry. Co.*, **137** Ill. **141;**
C. *M. & St. P. Ry.* Co. vs. *Darke*, **148** Ill. **226;**
C. P. & St. L. Ry. Co. vs. *Leah*, 152 Ill. **249;**
I. C. ***R.*** *R.* Co. vs. *Turner*, **194** Ill. *575;*
Calumet, etc. Dock Co. vs. *Morawitx*, **195** Ill. **398;**
I. C. R. R. Co. vs. *Trustees of Schools*, **212** Ill. **406.**

In the case of *Aldrich* vs. *Metropolitan, etc. Elevated Ry.* **Co., 195** Ill. **456,** the railroad did not abut upon the plaintiff's property, and although some of the counts of the declaration stated a good cause of action, the court held that the evidence failed to show any direct physical disturbance of any right, public or private, which the plaintiff enjoyed in connection with her property, and that the damages which she sustained were of the same kind as those sustained by the general public, and that therefore she was not entitled to recover therefor.

Our attention has not been called to any case in which noise, fumes or dust arising from the usual automobile traffic upon a State Bond Issue Route have been considered proper elements of damage;—and under the evidence in this case we do not consider them such.

Three witnesses testified as experts on behalf of the claimants and stated that in their opinion the claimants' property was damaged as the result of the construction of the improvement in the amount of $1,206.59. Three witnesses also testified as experts on behalf of the respondent and gave their opinion that the property had depreciated as the result of the construction of the improvement in the amount of $700.00.

The court viewed the premises, and considering such view and the testimony of all the witnesses, and the elements considered by them in arriving at their several opinions, we believe that the property of the claimants was depreciated in value as the result of the construction of the improvement in the amount of Seven Hundred Dollars ($700.00), and an award is therefore entered in favor of the claimants for such amount.

(No. 3337—Claimant awarded $658.51.)

HARRY E. JONES, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1941.

GEORGE W. DOWELL, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for temporary total disability and serious and permanent disfigurement.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in temporary total disability and serious and permanent disfigurement to the head and face, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

SAME—*no provision in for partial loss of hearing or partial paralysis of the face.* The only disabilities for which compensation can be paid under the Workmen's Compensation Act are those specified therein and there being no provision in the Act authorizing payment for partial loss of hearing or partial paralysis of the face, no award can be made for compensation therefor.

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

For some time prior to and on October 28, 1938 claimant was in the employ of the State of Illinois as a guard at Security Hospital, Menard, Illinois, an institution for the incarceration and treatment of the criminal insane, and was working in the ward known as the violent ward. For more than a year prior to the last mentioned date he was paid $118.75 per month, and in addition thereto was furnished room and board which are considered of the value of $24.00 per month.

On the last mentioned date, about 8:30 o'clock A. M., while the claimant was taking a patient to his cell, the patient turned and struck him forcibly in the face and knocked him against the bars of a cell. The patient was about thirty years of age, over six feet tall, and of powerful build, and the claimant was struck so hard that he was rendered unconscious for about an hour and a half. He was taken to the doctor's office and mas first treated by Dr. Goldstein, a patient at the institution. Thereafter Dr. Dick and Dr. McManus, institution doctors, took over the case. About 11:30 o'clock A. M. claimant was taken to the prison for an X-ray examination. Claimant

was then permitted to go home, and upon his arrival at home, his wife took him to Dr. S. I. Wald who (examined him and sent him home to bed, where he remained for five days. He was then taken to see Dr. McManus relative to an operation, but Dr. McManus refused to consent to the operation and said that it was dangerous and might result in more trouble.

Claimant was off duty three months arid then went back to work and was given outside work at his former pay. He was paid in full during the time that he was off duty as aforesaid. On March 25th he was taken sick with the flu and went home and remained in bed until May 2. He was then transferred to Joliet, but his physical condition mas such that he was unable to do the work. He gave out on the second day and had to quit. On September 12, 1939 he started work for the WPA at $42.00 per month.

From a report filed by Rodney H. Brandon on March 28, 1941 it appears, homever, that during January, 1940 claimant again began work at Menard and continued to work and receive his full pay of $118.75 per month for all of the time up to and including February, 1941; except that he only worked twenty-two days during the month of April, 1940. From claimant's statement in open court it appears that he is still in the employ of the respondent.

Claimant complains of pain, dizziness in the head, headaches, nervousness and a numb feeling about the point or place of injury to the face, and claims that lifting or stooping over bothers him, and that he is unable to do the work he was able to do prior to the injury.

Claimant filed his complaint herein on December 27, 1938 and an amended complaint on February 7, 1939. In such amended complaint he asks for compensation under the provisions of the Workmen's Compensation Act. for the following, among other items, to wit: fifty per cent (50%) loss of hearing of the left ear; fifty per cent (50%) loss of sight of the left eye; partial paralysis of the left side of the face; and serious and permanent disfigurement to the head and face.

Claimant's only right to recover in this case is under the terms and provisions of the Workmen's Compensation Act, and the only disabilities for which compensation can be paid are those specified in the Act. The evidence fails to show that claimant has sustained the loss of 50% of the hearing of his left ear, but even if the evidence did disclose such fact, there

is nothing in the Compensation Act which authorizes an award for such disability, nor does such Act authorize the payment of compensation solely for a partial paralysis of the face.

The Compensation Act does provide for compensation for the loss of the whole or any part of the sight of an eye, but the evidence in this case does not show any loss of vision and consequently no allowance can be made to claimant on that account.

Claimant was temporarily totally disabled for three months, but during that time he received payments of salary aggregating the sum of $260.49, which was in excess of the amount he was entitled to receive under the provisions of the Compensation Act.

Aside from the temporary total disability as aforesaid, and for serious and permanent disfigurement to the face, the only disability for which claimant can claim compensation is for permanent disability, either total or partial. There is no claim for permanent total disability, and there is no evidence in the record upon which we can base an award for permanent partial disability.

Section eight (8), Paragraph (d) of the Compensation Act provides as follows:

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

From the record it appears that for approximately a year prior to March 1, 1941 claimant has earned the same amount which he was earning prior to the accident. The record does not disclose his physical condition during such period, and consequently there is nothing in the record upon which we can base an award for permanent partial incapacity.

Claimant testified in open court and appeared for examination as to the nature and extent of the disfigurement to his face.

Such examination disclosed a sunken left cheek bone, known in medical parlance as a Zygomatic arch, resulting in

a marked flatness or depression of that portion of the face; also a scar approximately two inches in length extending across the left eye brow diagonally down to the left cheek bone.

The aforementioned injury has resulted in an intermittent twitching of claimant's left eye lid and the muscles of the left side of his mouth, which accentuate the disfigurement.

Upon consideration of all of the facts in the case, we find as follows:

That on October 28, 1938 claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; that on said date claimant sustained accidental injuries which arose out of anal in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of such Act; that the earnings of the claimant for the year preceding the accident were $1,713.00, and his average weekly wage was $32.94; that claimant at the time of the injury was forty-eight years of age; and had one child under the age of sixteen years; that all necessary first aid, medical, surgical and hospital services were provided by the respondent, except as to the services furnished by Dr. S. I. Wald; that claimant was temporarily totally disabled from the date of his injury as aforesaid to January 28, 1939, to wit, for a period of thirteen (13) weeks; that he has also sustained a serious and permanent disfigurement of the head and face; that he was compelled to and did incur expenses in the amount of $56.50 for medical services; that the sum of $260.49 has been paid by the respondent to apply on the compensation due the claimant as aforesaid.

We further find that the claimant is entitled to have and receive from the respondent the sum of Fifteen Dollars ($15.00) per week for thirteen (13) weeks' temporary total disability, in accordance with the provisions of Paragraph (b) of Section eight (8) of the Workmen's Compensation Act; also the further sum of Six Hundred Sixty-seven and 50/100 Dollars for serious and permanent disfigurement to the head and face, payable in weekly installments of $15.00; also the sum of fifty-six Dollars and Fifty Cents ($56.50) for medical services of Dr. S. I. Wald as aforesaid, making in all the sum of Nine Hundred Nineteen ($919.00) Dollars;—from

which must be deducted the sum of Two Hundred Sixty Dollars and Forty-nine Cents ($260.49) heretofore paid by the respondent as aforesaid, making a net amount remaining due the claimant of Six Hundred Fifty-eight and 51/100 ($658.51).

We further find that all compensation due to the claimant as aforesaid has accrued at this time.

Award is therefore entered in favor of the claimant, Harry E. Jones, for the sum of Six Hundred Fifty-eight and 51/100 ($658.51) Dollars, payable as follows:

To the claimant, Harry E. Jones, the sum of Six Hundred Two and 01/100 ($602.01) Dollars.

To the claimant, Harry E. Jones, for the use of Dr. S. I. Wald, the sum of Fifty-six and 50/100 ($56.50) Dollars.

Total, Six Hundred Fifty-eight and 51/100 ($658.51) 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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181) and being subject also to the terms of an Act entitled "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

(Nos. 3504, 3291, 3486, 3297, 3324, 3333, 3509, 3485, 3288, 3295, 3292, 3325, 3296, 3374, 3507, 3505, 3481, 3508, 3378, consolidated. No. 3504—Claimant awarded $1,500.00; No. 3291—Claimant awarded $10,000.00; No. 3486—Claimant awarded $1,750.00; No. 3297—Claimant awarded $711.05; No. 3324—Claimant awarded $1,600.00; No. 3333—Claimant awarded $2,300.00; No. 3288—Claimant awarded $3,000.00; No. 3295—Claimant awarded $3,000.00; No. 3292—Claimant awarded $8,000.00; No. 3296—Claimant awarded $3,500.00; No. 3374—Claimant awarded $4,200.00; No. 3507—Claimant awarded $12,000.00; No. 3481—Claimant awarded $9,000.00; No. 3508—Claimant awarded $25,000.00.)

AGGIE NAUYOKS, No. 3504, EARL POLLOCK, ET AL., No. 3291, GEORGE R. JANNER, No. 3486, MARK WEDEL, ET AL., No. 3297, LOUISE C. LAWRENCE, ET AL., NO. 3324, ROSE SOKOLOWSKI, No. 3333, RITE PRICE GASOLINE CO., No. 3509, SPUR DISTRIBUTING CO., INC., No. 3485, MARTIN ANDRUSHAT, ET AL., No. 3288, MARY LANGVIN, No. 3295, NINA BRATTON WATKINS, ET AL., No. 3292, E. W. MATHIS, ET AL., No. 3325, ANNA ZELVIS, No. 3296, ROSE HALLORAN, No. 3374, LOUIS GOLDBERG, No. 3507, JOSEPH C. EFFINGER, ET AL., No. 3505, NELLIE RODGERS, No. 3481, CLAUDE H. OZIER, ET AL., No. 3508, THEISS BROS. FEED COMPANY, No. 3378, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 14, 1941.

Supplemental opinion, No. 3324, pled June 10, 1941.

Petitions for rehearing, Nos. 3229, 8325, 8505, 5509, denied June 10, 1941.

Petition for rehearing, No. 3378, denied June 13, 1941.

Petition for rehearing, No. 3485, allowed June 13, 1941.

H. GRADY VIEN, RALPH L. COOK, WILMER L. VOGT, F. E. MERRILLS, FRANK E. LICKHALTER, POPE & DRIEMEYER, BEASLEY & ZULLEY, KRAMER, CAMPBELL, COSTELLO & WIECHERT, THOS. L. FEKETE, P. K. JOHNSON, for claimants.

OTTO KERNER and GEORGE F. BARRETT, Attorneys General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE TO PROPERTY—*not taken for public use—caused by construction of public improvement—award may be made for—meamre* of. Where private property is not taken for public use, but is damaged by reason of the construction of a public improvement, an award may be made for such damage, and the proper measure thereof 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 such improvement.

SAME—*same—same—what constitutes.* Where private property is not taken for public use, but it is claimed that same is damaged by reason of

the construction of a public improvement, it is not essential to the right of recovery that there must be proof of a direct physical injury to the corpus or subject of the property, but it is sufficient under the present Constitution of the State of Illinois, if it be proven that there is a direct physical obstruction or injury to the right of user, or enjoyment, as the result of which the owner sustains some special pecuniary damage in excess of that sustained by the public generally.

SAME—same—same—interference with ingress and egress proper element of. Where the construction of a public improvement results in the destruction of or interference with the right of access of an owner of private property, not taken for public use, to same, such destruction or interference is a proper element of damages, where value of property is depreciated by reason thereof.

SAME—*same—same—same—what constitutes.* An obstruction or ,interference with a public street, resulting from the construction of a public improvement and which affects access to private property, not taken for public use need not necessarily be in front of or contiguous to such property in order to constitute damage to property but an award may be justified where it is proven that such obstruction or interference directly produces a diminution in the value of such property and not merely personal inconvenience to the owner thereof.

SAME—*same—same—loss of or inconvenience to business—not damage to property—not proper element of damages.* Inconvenience to or loss of business suffered by owners or lessees of abutting or other private property, not taken for public use, 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 therefor arises against the State.

MR. JUSTICE YANTIS delivered the opinion of the court:

The above designated claimants have heretofore filed their individual claims in this court, seeking awards for damages alleged to have been suffered by them on the properties described in the respective complaints, by reason of the construction of two underpasses on that part of St. Clair Avenue in East St. Louis, Illinois, which forms a part of U. S. Highway No. 66. The alleged damages claimed in the foregoing cases total *$382,565.26.*

As the several causes of action all arise out of the same construction work, and as the same legal questions are primarily involved, counsel for the several claimants and for respondent have agreed to a consolidation of the cases for general consideration by the court.

It is not contended by either claimant that any of their property was taken by the improvement in question, but they are asking consequential damages on account of the change in grade, the interference with direct access to their proper-

ties from St. Clair Avenue and the closing off of direct traffic past their respective properties. Action on these claims has been delayed because of legislative changes in the law applicable to the hearing of property damage claims and by the subsequent decision of our Supreme Court that such change in legislation was unconstitutional.

The facts herein, so far as applicable to all of said properties, are as follows:

The St. Clair highway improvement consists of two subways, one under the tracks of the Louisville and Nashville Railroad and of the Baltimore and Ohio Railroad and the other under the Pennsylvania Railroad tracks. The pavement under the subways is 44 feet in width, has retaining walls surmounted by concrete hand-rails 3 feet 11 inches high and ornamental lights, and service-drives 20 feet in width outside and adjacent to the head walls. An opening 80 feet in width extending between the ends of the hand-rails on both the north and south sides of the highway between the subways, has been left for access to the service drives. Pedestrian-subways and approach-steps have been provided at the north and south sides of each subway. The service-drives are all essentially the same grade as the previous surface of St. Clair Avenue. The latter is 104 feet 7 inches in width within the limits of construction, and the Division of Highways of Illinois confined all its construction, with the exception of that done on the railroad right-of-way to the existing street. St. Clair Avenue in East St. Louis runs in a northwesterly and southeasterly direction, but is generally considered and referred to as running in an easterly and westerly direction. Accordingly, throughout the record the properties in question are referred to as being on the south side or on the north side of St. Clair Avenue, as the case may be. A plat filed as Claimants' Exhibit No. 1 shows that claims have not been filed for all the properties facing St. Clair Avenue affected by the subways; of the nineteen claims considered herein, fifteen are for damages to the freehold and four are for damages claimed by those holding a leasehold interest.

All of this property is located in what is generally known as the Stock Yards District of East St. Louis. A large volume of traffic goes into and out of the yards each day. A Highway Department survey in 1933 showed an estimated traffic of 13,200 vehicles per day along St. Clair Avenue,

where these properties are located. Another survey in August, 1940, showed a total of 14,627 vehicles in a 24-hour day. At the nearby Stock Yards there is a Live Stock Exchange Building, in which there are about one hundred offices in all; also a United States Post Office, National Stock Yards National Bank, which is the largest bank in Illinois outside of Chicago. Approximately 7,500 to 10,000 people are employed at the Stock Yards each day. Approximately 300,000 trucks per year enter the Stock Yards, which are open twenty-four hours a day, and truckers arrive at all times. The National Hotel located at the Stock Yards contains one hundred twenty-five rooms and a patronage last year of 23,000 persons. According to the record, 81 per cent of the shipping to the yards is done by truck.

In considering the several claims, for the sake of uniformity, the date of May 15, 1937, is used as the time of commencement of the construction of the subways, and December 15,1938, is used as the time of the completion thereof. Before the improvement the central part of St. Clair Avenue was a cobblestone block pavement with street car tracks traversing same, crossing several sets of railroad tracks protected by signal gates. The section as now improved is a concrete roadway without car tracks, and the vehicular traffic passes beneath the railroad tracks through the two subways. Access to all of the properties involved in the complaints may be had, but in some instances only by driving down the narrow lane between the subway balustrade and the curb. In many instances this would necessitate backing out, because of the lack of space in which to turn. The properties will be considered in the order in which they appear upon the blue print identified as Claimants' "Exhibit 1."

TRACT No. 1—AGGIE NAUYOKS.
(C. of C. No. 3504.)

This property is farthest to the east of the several claims herein, is on the south side of St. Clair Avenue, and is owned by Aggie Nauyoks. There is a mortgage on the property of $600.00 in favor of Pete Antonovich, Trustee. The retaining wall on the south side of the street starts 65 feet east of the northwest corner of this lot. The wall is 3 feet 11 inches in height and the balustrade is 12 inches wide. The driveway runs between the balustrade and the curb, 20 feet wide, and on the same level as the original street. None of the balus-

trade extends in front of this property. It starts 5.32 feet west of the west side of the property. The 20-foot wide roadway extends in a westerly direction from the beginning of the balustrade. A service-drive on the south side of St. Clair Avenue extends to Third Street, which is unimproved and not greatly traveled. Claimant has lived in the property since 1926. The improvements consist of a two-story frame building containing a store-room and two rooms downstairs, three rooms upstairs and a bath and lavatory. In May, 1937, a portion of the downstairs was rented for a tavern at $25.00 per month. On December 15,1938, it was rented for the same rental, and at the present time claimant receives $35.00 per month for the entire downstairs, but now pays for gas, electricity and water, leaving the net rental approximately $22.00 per month. The rental of two additional rooms now contributes to the gross rental received. Besides the damage to ingress and egress, claimant contends that cracks in the plaster, settling of the house, sagging of the doors, etc., were occasioned through the construction of the subway. Claimant bought the property in 1926 for $4,200.00 and had made substantial repairs thereafter. She seeks an award of $8,000.00 for damages occasioned by the subway construction. The rule under which the damages, if any, are to be determined is the difference in the value of the property prior to the construction of the subways and the value of such premises immediately after such construction and as affected thereby. Three principal witnesses were called by claimant and three by respondent. Their testimony as to the amount of damages varied from $3,436.00 to $780.00, being respectively as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss	$4,678.00	$1,242.00	$3,436.00
Philip Cohn	5,057.50	2,250.00	2,807.50
C. E. Rogers	5,000.00	2,500.00	2,500.00
For Respondent:			
Forrest Beckwith	$4,008.65	$3,006.49	$1,002.16
Frank E. Abell	3,150.00	1,750.00	1,400.00
M. L. Harris	3,650.00	2,870.00	780.00

These same witnesses testified as to the damages in fifteen of the claims. Some of them, together with other witnesses, testified as to the other four claims, and their testimony will be again referred to.

TRACT No. 2—EARL POLLOCK.
(C. of C. No. 3291.)

This property is owned by claimants, Earl C. Pollock and Victoria Pollock, his wife, as joint tenants and not as tenants in common, and is subject to a real estate mortgage of $2,000.00 in favor of Stephen D. Sexton, Trustee, on Lots 16 and 17 described in the complaint. Two other lots are included in the claim. The first three lots have a frontage of 25 feet each on St. Clair Avenue and Lot 17 has a frontage of approximately 43 feet 5 inches. The balustrade extends along the entire front of this property. The depth of the subway at the northeast corner of the property is approximately .8 feet below the original elevation of St. Clair Avenue, and at the northwest corner is approximately 6½ feet below the original elevation of the street. The service-drive extends along the full length of the property. On May 15, 1937, claimants lived in one of the upstairs apartments in the two-story brick building thereon and operated a tire company on the first floor. He also had a gas filling station and a tire retreading plant in a corrugated iron building at the rear of the lot, and a corrugated iron shed partitioned into nine individual garages, and a small frame shed or building on the rear that he rented out for living quarters. As an indication of the extent of his business, the record shows he paid a sales tax on gross sales in 1936 of $42,388.31. He estimated that the business he did with truckers in and out of the Stock Yards amounted to about 50 per cent of his total business.

The proof shows that on December 15, 1938, the small framg building was producing $3.00 per week rent, instead of $4.00, as produced prior to the construction; the upstairs rooms in the two-story building now rent for $4.50 per week, instead of $6.00, as previously. Since the construction of the subways claimant has been unable to rent the store room and only occasionally one of the garages. Claimant discontinued his tire repair business at this location because of difficulty of ingress and egress, and moved to a location about three blocks away. Claimant in this case avers damages of $42,000.00. The testimony of the several witnesses as to the valuations prior and after construction and the resultant damage is as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss..	$19,830.33	$3,834.33	$15,996.00
Philip Cohn	30,820.00	2,082.00	28,738.00
C. E. Rogers	18,000.00	5,000.00	13,000.00
For Respondent:			
Forrest Beckwith	$11,278.00	$5,414.00	$5,864.00
Frank E. Abell..	9,136.66	2,834.15	6,302.51
M. L. Harris..	10,180.00	4,790.00	5,390.00

TRACT NO. 3—GEORGE R. JANNER.
(C. of C. No. 3486.)

This is a rectangular lot, 120 feet in length, with a frontage of 25 feet on the south side of St. Clair Avenue, owned by George R. Janner. On May 15, 1937, the premises were improved by a one-story frame building covered on one side and the front with imitation brick shingles and. presents a rather dilapidated appearance from one side. There is one large store room, with two living rooms in the rear. The property was rented at $40.00 per month. Since the construction the building has been empty most of the time, having produced but $55.00 rental from May 15, 1937, to the present time. The 20-foot service-drive and balustrade extend across the entire frontage. At a point opposite the northeast corner of the property the depth of the subway is 6½ feet below the level of the property and at a point opposite the northwest corner the depth is approximately 8.8 feet. Claimant seeks damage of $6,500.00. Testimony of the several witnesses as to values is as follows:

For Claimant:	Prior to Construction Value	After Ccinstruction Value	Damages
Wesley C. Moss..	$4,012.00	$ 649.00	$3,363.00
Philip Cohn	3,737.50	550.00	3,187.50
C. E. Rogers	3,750.00	1,000.00	2,750.00
For Respondent:			
Forrest Beckwith	$2,284.25	$1,142.13	$1,142.12
Frank E. Abell..	1,875.00	700.00	1,175.00
M. L. Harris.	2,300.00	1,300.00	1,000.00

TRACT NO. 4—MARK WEDEL AND WILLIAM CASEY.
(C. of C. No. 3297.)

The two above claimants derived their title through their grandmother, Hannah Byrd, who died July 10, 1923. A question arises from the record as to whether claimants are the

owners of the entire fee or whether there is an outstanding undivided one-ninth (1/9th) interest in an unknown heir. At the time construction work on the subways began the property was improved with an eight-room two-story frame residence. The lot is rectangular and has a frontage of 25 feet on St. Clair Avenue and a depth of 120 feet to the alley. The house consisted of basement, four rooms downstairs and four rooms upstairs with bath. On July 4, 1937, a fire partially destroyed the roof and the following February the owners wrecked the property, so that at present the lot is vacant. At a point opposite the northeast corner of the property the subway part of St. Clair Avenue is 8.8 feet below the original level of the street, and at the northwest corner it is approximately 10 feet below the old elevation. The balustrade and 20-foot service-drive extend along the entire frontage of the property. Claimants seek damages of $10,000.00. The property adjoins the Janner property and immediately beyond same is the Lawrence property, next under consideration. The testimony as to the value and damage to the property by the several witnesses is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss..	$3,501.66	$312.50	$3,189.16
Philip Cohn	3,380.00	250.00	3,130.00
C. E. Rogers.	3,000.00	250.00	2,750.00
For Respondent:			
Forrest Beckwith	$1,250.00	$625.00	$625.00
Frank E. Abell..	750.00	175.00	575.00
M. L. Harris.....	1,000.00	500.00	500.00

TRACT NO. 5—LOUISE C. LAWRENCE.
(C. of C. No. 3324.)

This tract lies immediately beyond the Wedel and Casey property and next to the railroad. There is a dirt or cinder drive running along the side of the property. The tract covers two lots. No. 10 is owned by Louise C. Lawrence, is irregular in shape and has a frontage of 25 feet on St. Clair Avenue and a depth of 120 feet to an alley in the rear. Lot No. 11 is owned by A. C. Fritz, and it is stipulated that if an award is made on account of this claim, the voucher as to Lot No. 10 is to be made payable to Louise C. Lawrence and the voucher as to Lot No. 11 is to be made payable to both Louise C. Lawrence and A. C. Fritz. Lot No. 10 has a frontage of 25 feet

and a rear width of 48 feet with a depth of 120 feet. Third Street, lying between it and the railroad, is seldom traveled. The balustrade and 20-foot service-drive extend along the entire frontage of the property. At a point opposite the northeast corner the subway portion of the street is 10 feet below the original elevation and at a point opposite the northwest corner of the property the depression is 12.7 feet. Claimants seek an award of $10,000.00 for damage to the two properties. The testimony of the several witnesses as to values and damage is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss	$3,650.00	$365.00	$3,285.00
Philip Cohn	3,650.00	365.00	3,285.00
C. E. Rogers	2,500.00	250.00	2,250.00
For Respondent:			
Forrest Beckwith	$3,187.50	$1,593.75	$1,593.75
Frank E. Abell	1,835.00	485.00	1,350.00
M. L. Harris	2,000.00	1,000.00	1,000.00

TRACT No. 6—ROSE SOKOLOWSKI.
(C. of C. No. 3333.)

Rose Sokolowski is the owner of the property involved in this claim. At the time of the construction of the subway a large two-story building of lumber and sheet metal was on the premises extending across the front of the lot, being approximately 75 feet in depth. For many years this property was known as the "Tin-top." There was a driveway running directly through the middle of the building and a store room on either side of the drive. There was a lunch room and living quarters downstairs and about twelve rooms upstairs. A car-washing stand was on the rear of the lot. The latter has a frontage of 50 feet on St. Clair Avenue and the two sides of the lot extend diagonally from the street to the alley, giving a depth of from 50 feet to 120 feet. It is located on the west side of the first subway and the 20-foot service-drive extends along the entire frontage of the property. At a point opposite the northeast corner of the property the subway of St. Clair Avenue is approximately 11 feet lower than the remaining surface of the street. At a point opposite the northwest corner it is approximately 7.7 feet lower. The service drive has an outlet on Freeman Avenue running along the side of this property. This street is seldom

used and is covered with dirt and cinders. The building was demolished prior to December 15, 1938. This tract and the Lawrence land on the opposite side of the railroad appear to be relatively similar in location and value. Claimant seeks damages of $8,000.00 by reason of the subway construction and the several witnesses testified as follows in regard thereto:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss	$11,792.00	$1,000.00	$10.792.00
Philip Cohn	10,000.00	5,000.00	5,000.00
C. E. Rogers	7,500.00	1,000.00	6,500.00
For Respondent:			
Forrest Beckwith	$2,500.00	$1,250.00	$2,000.00
Frank E. Abell	2,000.00	600.00	1,400.00
M. L. Harris	2,500.00	1,250.00	1,250.00

TRACT No. 9—MARTIN ANDRUSHAT.
(C. of C. No. 3288.)

It has been stiplated that the fee simple title to this property is in the names of Martin Andrushat and Susanna Andrushat, his wife, as joint tenants and not as tenants in common. It is an old two-story frame building covered with shingles and located at the commencement of one of the subway entrances. The owners reside on the second floor and operate a hardware store on the lower floor. In addition to the downstairs storeroom, there is a storage or warehouse room in the rear forming a one-story part of such building, and the upstairs consists of seven rooms with bath. There is also a frame garage in the rear, accommodating two cars. The testimony shows that a volume of business was done with truckers who stopped at the store before the subway was built, but that such business has stopped since the subway was completed. At a point opposite the northeast corner of the property the subway is depressed approximately one foot and at a point opposite the northwest corner the depression is approximately 1.8 feet below the level surface of St. Clair Avenue. Claimants seek damages of $20,000.00 and the testimony of the several witnesses as to the valuations prior and after construction and the resultant damage is as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss	$8,093.33	$2,173.33	$5,920.00
Philip Cohn	7,780.00	1,640.00	6,140.00
C. E. Rogers	7,500.00	2,000.00	5,500.00
For Respondent:			
Forrest Beckwith	$4,441.00	$2,674.56	$1,766.50
Frank E. Abell	4,625.00	1,900.00	2,725.00
M. L. Harris	4,750.00	2,375.00	2,375.00

TRACT No. 10—MARY LANGVIN.
(C. of C. No. 3295.)

This property is owned by Mary Langvin and is located immediately adjoining the Andrushat building. It is a two-story brick building and, from appearances, was in good condition when work on the subways began. While the title to this property is shown to be in the name of Mary Langvin, as Trustee, the testimony shows that she owns it individually. There is a mortgage of $1,200.00 against the premises owned by Florence Meredith, with interest paid to February 23, 1940. The building was vacant in May, 193'7, but prior to that time the two floors had been renting for $100.00 per month. For three months prior to the hearing of evidence in this case the building had been rented for $20.00 per month. The testimony shows that there has been some water in the basement since the time the subway was completed, which did not exist previously; the plaster was cracked and checked during the construction of the subway. At a point opposite the northeast corner of the property the depth of the subway is 1.8 feet below the original level of the street, and at a point opposite the northwest corner the depth is 2.6 feet. The balustrade and service-drive extend across the entire frontage of the property which is about 20 feet. Claimant asks damages of $15,000.00, and the testimony of the several witnesses is as folloms:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss	$7,733.33	$1,833.33	$5,900.00
Philip Cohn	6,700.00	1,550.00	5,150.00
C. E. Rogers	7,000.00	1,800.00	5,200.00
For Respondent:			
Forrest Beckwith	$3,668.00	$2,018.00	$1,650.00
Frank E. Abell	4,900.00	2,200.00	2,700.00
M. L. Harris	4,000.00	2,000.00	2,000.00

TRACT No. 11—NINA B. WATKINS.
(C. of C. No. 3292.)

This property is owned by Nina Bratton Watkins and Edgar Bratton as heirs of J. B. Bratton, deceased, who died June 27, 1936, intestate. It is stipulated that they are owners as tenants in common and that there are no outstanding interests or claims. The property is improved by a substantial two-story brick mercantile building with two mercantile rooms on the first floor and two five-room apartments above. The building had been virtually vacated in May, 1937, in anticipation of the subway construction, and on December 15, 1938, the entire property was unoccupied except one apartment, the occupant of which was not paying rent but was staying as a caretaker. Prior to the subways the stores were renting for $50.00 each per month. At the time of the hearing one was renting for $15.00 per month and the other at $11.00. The balustrade and 20-foot dead-end service-drive extend along the entire frontage of the property. At the northeast corner the street is 2.6 feet below the original grade and at the opposite corner the subway is approximately 5.4 feet below the previous level. The sidewalk and 20-foot service-drive are at approximately the original street grade line. The husband of claimant, Nina B. Watkins, testified that he is an employee at the Stock Yards, and that 75 per cent to 90 per cent of the business there is done by trucks, and that the business houses along St. Clair Avenue derive a large part of their trade from the truck drivers; the greater part of which is now lost because of the inability of truckers to gain ready access to the front of such properties. Claimant seeks an award of $28,000.00, and the testimony of the several witnesses is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss	$17,047.00	$4,700.33	$12,346.67
Philip Cohn	17,141.00	4,340.00	12,801.00
C. E. Rogers	15,000.00	4,500.00	10,500.00
For Respondent:			
Forrest Beckwith	$ 7,824.00	$3,912.00	$3,912.00
Frank E. Abell	8,615.00	3,423.00	5,192.00
M. L. Harris	12,350.00	6,175.00	6,175.00

TRACT No. 13—ANNA ZELVIS.
(C. of C. No. 3296.)

At the time the complaint was filed this property was owned by Anna Zelvis, who died testate on March 4,1940, and by Anna Ford. Anna Zelvis had previously shared her interest in the property with John Zelvis under joint tenancy, and upon the latter's death she became owner of such interest. It is stipulated that if an award is made for damage to this property, it can be made in favor of Anna Ford individually, Anna Ford, Executrix of the Last Will and Testament of Anna Zelvis, deceased, and Anna Ford, Administratrix of the Estate of John Zelvis, deceased. There are no liens of record. The improvements consist of a two-story frame building with asbestos shingle siding, with a store room and living quarters in the rear on the ground floor and four rooms and a bath upstairs. Considerable repairs had been made to the building between 1933 and 1937. In May of that year the property was occupied by John and Anna Zelvis. The testimony shows that a number of cracks occurred as a result of the driving of piling during the construction of the subway and that the walls became warped, the floors sagged and the doors stuck. At a point opposite the northeast corner of the property the subway is 7.7 feet below the level of the service-drive, and at the northwest corner it is 8.2 feet below the drive level. Beyond the Weiss property, which is immediately beyond the Zelvis property, there is a subway entrance with steps leading down from the service-drive so that a pedestrian may walk past the Zelvis and other properties down the steps, under the subway and up the other side, the subway being approximately 11 feet deep. Claimant seeks damages of $18,000.00 and the testimony of the several witnesses is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss	$8,566.66	$1,580.00	$6,986.66
Philip Cohn	8,700.00	945.00	7,755.00
C. E. Rogers	7,000.00	2,000.00	5,000.00
For Respondent:			
Forrest Beckwith	$4,538.00	$2,269.00	$2,269.00
Frank E. Abell	4,925.00	1,845.00	3,080.00
M. L. Harris	4.425.00	2,212.50	2,212.50

TRACT NO. 14—ROSE HALLORAN.
(C. of C. No. 3374.)

Claimant Rose Halloran is the owner of this property. The improvements consist of two old frame buildings, both: in a bad state of repair, one being a one-story single front and the other a two-story double store-room front. The two-story building contained fourteen rooms upstairs. In May, 1937, the large building was not rented, claimant contending that prospective tenants were scared away by the proposed construction work. The last tenant had paid $35.00 per month for several years for the entire lower floor of the two-story building. In May, 1937, the small building was rented for $20.00 per month, and now produces $15.00 per month rental. The second floor of the other building when last rented produced $50.00 per month rental. The testimony shows that the traffic was formerly heavy, but does not now attempt to turn back and stop at these properties and that there are few pedestrians along the sidewalks. The balustrade and the service-drive extend along the entire frontage of this property and run into a dead end at the railroad tracks, the latter being directly beyond the line of 'this property. At a point opposite the northeast corner the depth of the subway is 9.9 feet, and at a point opposite the northwest corner it is approximately 6.9 feet below the original level of St. Clair Avenue. Claimant seeks an award of $20,000.00. The testimony of the several witnesses is as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss..	$13,743.00	$1,623.00	$12,120.00
Philip Cohn	18,099.40	1,240.00	16,859.40
C. E. Rogers..	15,000.00	2,000.00	13,000.00
For Respondent:			
Forrest Beckwith	$5,085.00	$3,051.00	$2,034.00
Frank E. Abell..	3,852.50	1,032.50	2,820.00
M. L. Harris.	6,900.00	2,795.00	4,105.00

TRACT No. 15—LOUIS GOLDBERG.
(C. of C. No. 3507.)

It is stipulated by the parties that title to this tract is in Louis Goldberg and Flora Goldberg as joint tenants and not as tenants in common, and that the tract is free and clear of encumbrances. The property is a good two-story brick mercantile building, with a double store room below divided

into several rooms, and apartments above. Before the subways were built, one store room was used for a hotel entrance and barber shop and the other for a restaurant, with saloon and kitchen attached, and twenty-eight hotel rooms above. Mr. Scovil still operates the restaurant and hotel, the saloon is closed and the building shows a marked appearance of neglect. Claimant has owned the property for about thirty years. He paid $20,000.00 for it and about five years later added four more rooms. The lot is 125 feet deep and the building 75 feet. The building has steam heat and immediately prior to the subway construction the entire building was producing a revenue of $280.00 per month. The testimony shows that entrance can no longer be had to the barber shop, which was located in the basement below the store room and he now receives $100.00 rental for the upstairs and the east room on the first floor. The restaurant rents for $25.00 per month.

The depression of the subway is 6.9 feet at the northeast corner of this property and the depth at the northwest corner is approximately 3.3 feet. The balustrade extends along the entire front of the property and the service-drive in front of same runs into a dead end at the Halloran property immediately adjoining these premises. While access can be had to the premises, it would be necessary for trucks that attempt to park in front of same to back out, as the service-drive is not wide enough to permit turning. The testimony of the several witnesses is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss	$29,500.00	$10,758.00	$18,742.00
T. J. Humphries	43,500.00	15,940.00	27,560.00
R. Vernon Clark	27,350.33	9,144.00	18,206.33
For Respondent:			
Forrest Beckwith	$18,370.00	$11,022.00	$ 7,348.00
Frank E. Abell	22,000.00	10,272.00	11,728.00
M. L. Harris	19,830.00	9,330.00	10,500.00

TRACT No. 16—JOSEPH C. EFFINGER.
(C. of C. No. 3505.)

It is stipulated that the property in this tract is owned by Claimant Joseph C. Effinger and Marguerite Effinger, his wife, as joint tenants and not as tenants in common, and that no other interests are involved. This property is 30 feet be-

yond the end of the nearest approach to either subway. There is no balustrade in front of the property and St. Clair Avenue widens out on a level drive the full width of the street in front of same. Cars may and do park directly in front of this property at the curb in a free and open manner. The building is a two-story brick, with two store rooms below and apartments above, as can be readily. seen from the photo identified as Claimant's Exhibit No. 32. Four garages are on the rear of the lot. For many years claimants had run a confectionery in one of the store rooms and occupied the apartment above. They discontinued this business on August 15, 1940, as the business had dropped from annual sales of $14,000.00 in 1936 to $9,000.00. A large volume of their business was from night pedestrians and this traffic has been reduced, due apparently to the fact that people do not like to pass down through the subways at night. The other store room was occupied in 1937 by a harness shop at a rental of $70.00 per month and the upstairs apartment was rented for $37.50 per month. On December 15, 1938, the latter apartment was rented for $25.00 and the store room beneath is rented at $40.00 per month. When the subways were built the street in front of this property was all repaved up to First Street on the west and the sidewalks partially rebuilt, all without any expense to the property owners. Claimant seeks an award of $18.000.00 for alleged damages. Claimant does not contend that the value of the Effinger building has been affected, but contends that the value of the land has been, and that the property is not as good a business location as it formerly was. The testimony of the several witnesses shows a wide divergence of opinion; one showing no loss in value and another an actual increase in the value of the property due to elimination of traffic hazard at the railroad crossings and the improved pavement, etc. Their respective valuations are as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss	$16,693.00	$13,026.00	$3,667.00
Philip Cohn	20,935.00	15,935.00	5,000.00
C. E. Rogers	15,000.00	7,500.00	7,500.00
For Respondent:			
Forrest Beckwith	$12,372.80	$14,847.20	*$2,474.40
Frank E. Abell	17,500.00	15,000.00	2,500.00
M. L Harris	15,250.00	15,250.00	.....

* Increase.

TRACT NO. 17—NELLIE RODGERS.
(C. of C. No. 3481)

Title to this Tract is, by stipulation, shown to be in Nellie Rodgers with no liens or claims against same. This property is located at the northwest corner of Second Street and St. Clair Avenue with a frontage of 69½ feet on the north side of the avenue and with a depth of 128 feet on the west side of Second Street. There is a two-story brick building with 65½ feet frontage on St. Clair Avenue and about 65 feet along Second Street; the building being 40 or 45 years old. On the first floor is a large storeroom. The second floor has four three-room flats. There is a part basement but no furnace-heat in the building. The testimony shows that the location at the corner of St. Clair and First Street was regarded as one of the best in the neighborhood. Other than First Street and Second Street, there was no other cross street from St. Clair Avenue toward the north as such other streets had been vacated long prior to the construction of the subways. Entrance to Second Street may be freely had from St. Clair Avenue by using the twenty-foot service-drive for the approximate distance of the frontage of the Rodgers property. The balustrade of the subway extends from the Pennsylvania Railroad tracks in a westerly direction, a distance of 203 feet. The subway drive is depressed approximately two feet at the southwest corner of Tract No. 17. The last rental returns shown from the property prior to the improvement was from October, 1930 to September, 1935 when it was rented at $75.00 per month for the storeroom (Exhibit 68); from November 1,1938 to November 1,1940 the premises were leased at $30.00 per month (Exhibit 69.) Claimant seeks $26,650.00 damages. The testimony of the several witness is as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Mr. Sexton	$32,900.00	$ 3,751.00	$29,149.00
T. J. Humphries	35,237.50	11,792.50	23,445.00
For Respondent:			
Forrest Beckwith	$12,116.40	$4,846.40	$7,270.00
Frank E. Abell	6,865.00	2,737.50	4,127.50
M. L. Harris	9,460.00	4,730.00	4,730.00

TRACT NO. 18 – C. H. OZIER.
(C. of C. No. 3508)

Counsel have stipulated that title to the property involved in this claim is in Claude H. Ozier free and clear of encumbrance, and that any award made is to be made payable to him and to Elizabeth L. Ozier, jointly. The property is located on the north side of St. Clair Avenue and on the east side of Second Street, extending from that corner to the wall which marks the dead-end of the service-drive at the Pennsylvania Railroad tracks. The improvements at the time the subway was begun consisted of two brick store buildings, extending across the entire frontage of the property; the one along Second Street being a one-story full plate glass front with stone trimming, occupied as a grocery store, and the other being a two-story brick building, the lower floor divided into two storerooms, one occupied as a drug store and the other being vacant. The upstairs rooms were also vacant at that time. Claimant paid $28,000.00 for the west fifty feet with an old frame building and $12,000.00 for the 35 feet of ground east of same which was then improved with a one-story brick building. The buildings burned down in 1917. He thereafter put up the one-story brick building next to Second Street at a cost of $25,000.00; also a brick and concrete two-story garage in the rear, at a cost of about $2,800.00. Mr. Ozier conducted the Tri-City Grocery Company on the premises until 1924 when he sold out his business, the purchasers taking a ten-year lease on the premises. In 1934 the tenants took a month to month lease, for which they were paying $150.00 per month in 1937 when the construction of the subway was begun. At that time the two-story building was occupied by a drug store and a small dry goods store. The drug store was paying $50.00 per month rent and the upstairs $30.00 per month. Both are still occupied at a nominal rental. The Tri-City Packing Company vacated the one-story building about May, 1938, because of a lack of business. Access can be had to the premises from the 20-foot service-drive, but no traffic other than that which desires to reach these promises will use such drive, as it comes to a dead-end at the east line of claimant's property. Traffic can also reach one property along the full depth of same on Second Street. Claimant testified as to unsuccessful efforts made to rent the premises since the subway construction. Prior to the con-

struction the total rent being received for the buildings on Tract No. 18 was $250.00 per month. Thereafter the rental income was $30.00 to $35.00 per month. Claimant testified that the best use for the premises prior to the subway construction was for 'retail or wholesale mercantile business on the ground floor and a rooming house on the upper floor, the value of the property being primarily based on its proximity to the Stock Yards and the amount of traffic. Claimant testified that the best use for the premises since the subway construction would be some small manufacturing business or storage, the damage being primarily because of the taking away of vehicular and pedestrian traffic. The balustrade dividing the service-drive and the subway, extends from the Pennsylvania Railroad tracks at the East edge of claimant's property for 203 feet in a westerly direction to the end of the balustrade, at which point there is a sign erected by the Division of Public Highways, facing the east which reads, "No Right Turn.'' The depth of the depression of the subway at the southwest corner of Tract No. 18 is 8.9 feet and the depth at the southeast corner of Tract No. 18 is approximately 10.6 feet. Claimant seeks an award of $46,000.00 for damages sustained, and the testimony of the several witnesses is as follows:

	Prior to Construction Value	After Construction Value	Damages
For Claimant:			
Wesley C. Moss..	$44,675.00	$ 5,384.00	$39,291.00
T. J. Humphries..	51,000.00	16,360.00	34,641.00
R. Vernon Clark..	40,508.66	7,811.00	32,697.66
For Respondent:			
Forrest Beckwith	$41,047.00	$16,419.00	$24,628.00
Frank E. Abell..	34,440.00	12,240.00	22,200.00
M. L. Harris..	34,000.00	16,200.00	17,800.00

The foregoing completes the list of all claims, except those based upon leasehold rights; the latter will be considered as a separate group. As shown by the foregoing, there is a wide divergence of opinion as to values and damages between the several witnesses. The members of the court, in order to better understand the testimony and the exhibits, have made two personal inspections of the property. Many similar claims have come before the court in connection with the construction of public highways and safety subways throughout the State.

Where private property is not taken, but is damaged for public use, the property owner is entitled to recover the damages which his property has sustained, and the proper measure of damages in such case is the difference between the fair cash market value of the property unaffected by the improvement and its fair cash market value as affected by it. *(Dept.* of *Public Works* vs. *McBride, 338* Ill. **347;** *Dept.* of *Public Works* vs. *Caldwell,* 301 Ill. 242; *Brand* vs. *Union Elevated* Co., 258 Ill. 133.)

Damages must be direct and proximate, and not such as are merely speculative and remotely contingent. *(Dept.* of *Public Works* vs. *McBride, supra.)*

The Constitution of 1848 made no provision for payment of property damaged but not taken. To remedy this, Section **13** of Article *2* of the Constitution of 1870 of Illinois was made to read:

"Private property shall not be taken or damaged for public use without just compensation."

It is sufficient (for recovery of damages) if there is a direct physical obstruction or injury to the right of user, or enjoyment by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action.

The above has been approved in numerous cases, including *Rockford Electric* Co. vs. *Bowman,* **339** Ill. 212. In the *City of Winchester* vs. *Ring,* **312** Ill. 544, the court, in considering a similar situation, said:

"The provision of the Constitution that private property shall not be damaged for public use was not intended **to** reach every possible injury that may be occasioned by a public improvement. If an obstruction or improvement does not practically affect the enjoyment or use of property not taken, and thereby impair its value, no action will lie. To sustain an action, for such damages the damage must be to property and not a mere personal inconvenience or injury, such as damage to trade or business. **If** the injury amounts only to an inconvenience or discomfort to the occupants of the property but does not affect the value of the property, it is not within the provisions of the Constitution even though a personal action would lie therefor. The injury complained of must also be actual, susceptible of proof and capable of being approximately measured, and must not be speculative, remote, prospective or contingent. To warrant a recovery the damage must be different in kind from that sustained by the people of the whole neighborhood. If it differs only in degree from that suffered in common by the people of the neighborhood the injury is not within the provisions of the

Constitution. (*Illinois Central Railroad Co.* vs. *Trustees* of *Schools,* **212** Ill. 406; *Hohmann* vs. *City* of *Chicago,* 140 id. **226**)."

Could the entire section of St. Clair Avenue that was included in the elimination of traffic hazards by construction of these subways be considered as one neighborhood, all of which suffered equally some inconvenience, but no one property to the exclusion of the others, and therefore no damages be recovered by any? While the improvement was extensive and took in a considerable extent of St. Clair Avenue, and while it is also true that the owners of some of the properties along the line of such construction have refrained from asking damages, yet the court does not believe it can properly hold that the damage to the property of claimants is not such as was contemplated in the constitutional provision above quoted.

The Supreme Court of Illinois has frequently held that where a property owner's right of access to his property has been destroyed or interfered with, he is entitled to compensation for the damage sustained. In *Hacker* vs. *City of Joliet, et al.,* 196 Ill. App. **415,** the court said:

"The difficulty lies in exactly defining this right of access; that it cannot be confined to the immediate access from street on which the premises abut is clear on the authority of *Rigney* vs. *City* of *Chicago,* 102 Ill. **64** * * * That it cannot be extended to interference with an abutting owner's access to his property by vacating or obstructing a street two **or** three blocks **away** is equally clear from the authority **of** *City of Chicago* vs. *Union Bldg. Assn.,* **102** Ill. **379.**"

The rules governing the assessment of damages and the law fixing the measure of damages are plain, but the particular valuations of properties in different localities for the purpose of determining damages as herein alleged, is not a simple matter. The owner of property has no guaranteed assurance against diversion of traffic away from his place of business. The elimination of a curve in a highway may leave it possible for traffic to find its way to a filling station operated on a particular property, and yet the newer route may be so attractive that the main body of traffic will journey the new way. In such event no successful claim for damages could be urged by the owner of such filling station. One of the claimants herein is definitely, in the opinion of the court, in such position. The J. C. Effinger property has, to all appearances, a better street in front of it now than it had before the subways were built. No portion of either subway is in

front of this property; no balustrade interferes with access thereto, cars can pull up in front of the building, out of the main stream of traffic and freely park, and the chief complaint as to loss of trade of the business operated in the premises, is that pedestrians no longer seem to frequent the street at night because they dislike to walk down the stairs that leads through the subway. One witness, Mr. Harris, has stated that in his opinion there was no damage to the property, and one, Mr. Beckwith, was of the opinion that this property had been increased in value by reason of the improvement to St. Clair Avenue. 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 enjoyed in connection with the property and causing damage thereto in excess of that sustained by the public generally.

The, several attorneys representing the various claimants, and the Assistant Attorney General appearing for respondent, as shown by the record, have given most diligent service in presenting such record. The latter'is voluminous but the court has attempted to study it in all its details and to come to a conclusion from a consideration of all such evidence and the inspection by the court of the premises in question. It is not expedient for us to quote in greater detail the extensive testimony of the witnesses.

LEASEHOLD CLAIMS.

There are four other claims arising out of this construction, in which leaseholds are involved and where the claimants were not the owners of the fee. Those claims are as follows:

TRACT NO. 7—RITE-PRICE GASOLINE CO.

(C. of C. No. 3509.)

The Rite-Price Gasoline Company leased these premises from the Wiggins Ferry Company for a term of five years commencing August 1, 1934 and on May 15, 1937 was in possession of the property. The monthly rental was $55.00. Claimants had constructed certain improvements on the premises at a cost of $5,543.35 covering the equipment necessary to conduct a gasoline filling station. The total gross sales of all supplies up to May 20, 1937 was $92,923.70 after deducting Motor Fuel Tax. The testimony shows that the

total net profit to lessee from the commencement of the lease to May 20, 1937 was in excess of $25,000.00. When the subway was built the improvements were removed, as the depth of the subway at a point opposite the northeast corner of the property is 7.7 ft. and at the northwest corner of the property is approximately 1 foot below the original elevation of St. Clair Avenue and the balustrade arid service-drive extend the full length of the property. The proof shows that much of the business of the claimants came from truckers bringing shipments of cattle to the Stock Yards, and that such trucks could only reach these premises with difficulty after the construction of the subway. Approximately thirty-four months of the lease had run when the construction work began and twenty-six months of the lease remained. The construction work ended December 15, 1938 leaving seven and one-half months of the lease unexpired. The claimant is an Illinois corporation and the president, Mr. Sam Bensinger, testified that they closed down their business when St. Clair Avenue was closed for the construction of the subways.

With reference to this item, it has been repeatedly held by our Supreme Court that inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement, do not constitute damage to property not taken, within the meaning of the Constitution, but are merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made and therefore give no cause of action against a municipality therefor. (*Osgood* vs. *City of Chicago,* **154** Ill. 194; *Lefkovitz* vs. *City of Chicago,* 238 Ill. 23; *Chicago Flour* Co. vs. *City of Chicago,* 243 Ill. 218; *Peck* vs. *Chicago Railway Co.,* 270 Ill. 35, 40.)

. If such rule applies to a municipality, it must comply with equal force and effect to the State.

Applying the foregoing to the instant case no award could properly be made to the Rite-Price Gasoline Company for the 18½ months during which the construction work was in progress. The witness Cohn testified that the value of the leasehold at the end of the construction period, i. e. December 15, 1938, would be on the basis of $750.00 per month less 40 per cent for miscellaneous depreciation less 75 per cent further depreciation in view of the short term remaining, i. *e.*

sei-en and one-half months. According to his computation the 'leasehold would have a value of **$112.50** per month for the seven and one-half remaining months, or a total of **$843.75** (Tr. P. **460).**

The Attorney General contends that the one item of profit derived by the person conducting a business at the location in dispute, is not a correct basis for determining the amount of damages to be allowed in a case of this kind. In *Louisiana R. & N. Company* vs. *Baton Rouge Brick Yard,* **136** La. **833, 67** So. **922,** L. R. **A. 1917 A402,** the court said:

"The value of the tract for 'town lot' purposes may be one of the factors to be considered, but what the owner or purchaser might realize by a subsequent subdivision of the property and sale of lots partakes too much of the character of the speculation to serve as a basis of valuation."

In *West Chicago Park Comrs.* vs. ***Boal,*** **232** Ill. **248,** the court said:

"The amount of business transacted or the profits of a saloon which could be carried on anywhere is not an element to be considered in determining the value of property taken by condemnation proceedings."

In *Caskey, et al.* vs. *State,* 10 C. C. R. **576,** this court said:

"We, therefore, hold that the profits derived from the sale of gasoline in *a* filling station and of liquors and luncheons at a lunchroom and saloon are too vague, indefinite and uncertain to be received in evidence."

In *Jacksolzville & S. E. Ry. Co.* vs. *Michael Walsh,* **106** Ill. **253,** the court said:

"One person can do a greatly larger business in the same calling, at the same place, and under the same circumstances, than another. It may be that appellee could do double the amount of business that any other person could do. Such considerations are purely contingent, and altogether speculative, and cannot form the basis for fixing the market value of the property which the jury were required to find. * * * The true question was, what was the value of the property as it was then—not what it cost, but for how much would it sell?"

The record does not disclose what the fair cash market value of the entire property, i. e. ground and improvements, were worth before the construction of the subways and unaffected thereby, and the value of such premises immediately after the completion of such subways; nor is it possible to determine what proportionate part of such resultant damage, if any, should be apportioned to the leasehold interest of the claimant herein, as compared with the total damage to the freehold. The testimony shows that the claimant was renting the premises from the owners of the land for $55.00 per month, and that claimants had placed upon such premises

filling station equipment of a permanent character at a cost of $5,543.35. The testimony herein shows that since the construction it is practically impossible for a large truck to make a turn from the main portion of the avenue onto the service-drive or from the latter onto the highway, as the end of the balustrade would prevent such sharp turn being accomplished, and that egress and ingress to such premises is definitely interfered with. Mr. Bensinger also testified that they operate another station near the Stock Yards at which they are at present obtaining about one-half the amount of business they did at the same location in 1936. Claimants seek damages of $14,500.00 for interference with their business due to the subway construction.

TRACT NO. 8 — SPUR DIST. CO. INC.
(C. of C. No. 3485.)

The next leasehold claim is that of the Spur Distributing Company, Inc. Mr. A. E. Peterson of Nashville, Tennessee, Assistant Treasurer and Secretary of this company, testified that they leased this property from the Wiggins Ferry Company in 1933 at a rental of $60.00 per month; that such rental was reduced in July, 1937 to $30.00 per month and continued at that figure until December 1, 1939 when the lease was terminated. This property is immediately west of the Rite-Price Gasoline Company's leasehold on the south side of St. Clair Avenue. The station was closed from June 27, 1937 to December 18, 1938 because of the construction work then being done on the subway. The sales of gasoline during the years the station was operated varied, for '1936 being 266,875 gallons and for the portion of 1937 operated, 111,520 gallons. For the last half of the month of December, 1938 they sold 2,961 gallons and during 1939, 142,000 gallons.

The figures on profits appear in the record and are given in considerable detail. St. Clair Avenue levels off in front of this property, it being located between the two subways. There is a wide space between the ends of the two balustrades permitting free access to the premises of the Spur Distributing Company for trucks entering or leaving such premises, the street at such point being on a level grade with the premises of claimant. Damages are sought in the sum of $19,915.26. The same comments and questions of law, as commented on in regard to Tract No. 7—the Rite-Price Gasoline Company are involved in and apply to consideration of this claim.

TRACT No. 12—E. W. MATHIS.
(C. of C. No. 3325.)

E. W. Mathis, claimant herein, was not the owner of the premises involved in this claim, but was a tenant thereof from month to month and was the owner of the improvements, same consisting of a rather dilapidated looking one-story frame building located between the Watkins and Zelvis properties above described. He valued the improvements as of May 15, 1937 at $976.50 and as of December 15, 1938 at $97.65. The testimony of other witnesses will be summarized later. Claimant contends that his damages, although on a leasehold, should consist of the depreciated value of his property by virtue of the subway construction and that the above figure represents such damage. The ground is owned by the Terminal Railroad and claimant pays $6.00 per month rent. He bought the building that was on the land in 1929 for $375.00 and has added a room from time to time since then. Claimant was occupying the buildings from May, 1937 to January, 1939. The buildings were vacant about a month and he now receives $15.00 per month rental, out of which he pays the water rent. The premises were used for a restaurant and beer parlor, and are about midway of the subway, the depth of which at the northeast corner of the property is approximately 5.6 feet and at the northwest corner of the property the depth of the subway is approximately 7.7 feet. The 20-foot service-drive and balustrade extend the full length of claimant's property and several doors beyond to the dead-end of the street at the railroad retaining wall at which point a stairway leads down under the viaduct. The property encroaches 2.58 feet at the east end of the building and 2.4 feet at the west end, on St. Clair Avenue. Similar encroachment exists by all the properties involved in these claims except Tracts No. 17, No. 18 and No. 19. The testimony of claimant's other witnesses as to values and damage is as follows:

For Claimant:	Prior to Construction Value	After Construction Value	Damages
Wesley C. Moss	$ 976.50	$ 97.65	$878.85
Philip Cohn	1,600.00	800.00	800.00
C. E. Rogers	1,000.00	500.00	500.00

TRACT No. 19—THEISS BROS. CO.
(C. of C. No. 3378.)

Claimant is a corporation engaged in the wholesale and retail feed business. Mr. Harry Theiss is president of the corporation and testified in this case. Their business is located at 217 St. Clair Avenue and claimant owns the elevator and storage buildings and other improvements located on the property. The ground is owned by the Pennsylvania Railroad Company and claimants have macle successive leases since they first took possession of the premises about 1911. Claimant is a licensed Federal Warehouse and they store large quantities of grain for other individuals and also buy and sell flour and feed out over the State, claimant hiring trucks for the delivery of such supplies. The lease under which claimant was operating when the subway was begun was dated May 31, 1933 and expired November 15, 1937. A written extension was made December 20, 1937 extending the lease for a five-year period (Claimant's Exhibits 44 and 45). Both contain a clause giving a right of cancellation upon thirty days' written notice. Claimants invested about $14,000.00 in buildings and $5,000.00 in machinery on the premises, relying upon verbal assurance from the railroad authorities that they never cancelled a lease as long as the parties complied therewith. Prior to the building of the subways all trucks had easy access to the premises and the loading platform on the north side of St. Clair Avenue. After the subways were constructed the surface of the main highway is about 9 feet below the property line at the southwest corner and approximately 2 feet below at the southeast corner. The balustrade extends along the entire front and there is a service-drive 21 feet in width in front of the property of St. Clair Avenue. As there is some open space west of the building, and this is the last property at the end of the subway, trucks and other cars can still load at the loading platform along the north edge of the service-drive and turn at the west end of such drive. Trucks and other vehicles that are passing through, of course, are separated from claimant's property by the balustrade at the top of the subway. Claimants testified to a loss of 60 per cent of their retail business since the construction of the subway. They also claim damage for the expense of $500.00 incurred in lowering their driveway and scales, made necessary on the property by the

change in grade, and seek damages of $15,000.00 for loss in value of its improvements and occupancy and $500.00 for the above item of expense.

Three parcels of land are described in the lease held by claimant, but by stipulation no claim or proof for damage to the small tract 8' x 10' is made. Claimants rely upon the language in the case of *People* vs. *Kelly,* 361 Ill. **54,** wherein the court says:

"Changing the grade of a street in such a way as to obstruct ingress and egress to or from the private property of a citizen is damaging property for public use within the meaning of Section **13** of Article **2** of the Constitution of 1870."

The record and examination of the premises disclose that while entrance can still be had thereto, the traffic cannot have access to the premises in the same free manner as before the subway and balustrade were built. However, St. Clair Avenue was always an extremely busy tlioroughfare, and trucks and cars which now drive in on the service-drive are removed from the congestion and hazard of the through traffic to which they were previously subjected, and in some respects and for the purposes for which the premises are used, the service-drive would appear to be a distinct benefit to the property.

Claimants contend the fact that the lease under which they held the premises expired November 15, **1937,** does not affect the validity of its claim. The record shows that the practice of the Railway Company in renewing leases of this type was to all intents the equivalent of an option to the lessee to renew such lease, subject only to the reservation of cancellation on thirty days' notice, and in support of their continuing rights in the premises claimant cites the case of *Adelman* vs. *Carson, etc.,* **247** Ill. App. 574, 578, as follows:

"It will not be questioned that where a term for a fixed period is created by a lease a provision for its termination upon an event which may or may not happen before the expiration of the period specified, or a provision for its termination before the expiration of such period at the option of the lessor or lessee, will not prevent it from creating a valid term of years. (35 C. N. 972; **18** Am. & Eng. Encyc. 209; *Goodright* vs. *Richardson,* **3** Burnford & East Term Rep. **462;** *Kenny* vs. ***Knight,*** 119 Fed. **475.)** But it is urged that where, as here, the lease gives either party the right to terminate it at a certain period less than the full term of the demise it must be deemed a demise for only such period and is not binding upon either party beyond that time; that such a lease must be differentiated from one giving an option to terminate to one party only and remaining absolutely binding on the other if the option is not exercised. Cases of the latter character are *Foreman* vs.

Hilton Co., **280** Fed. *608*, and *Bartkowski* vs. *Hoefeld*, **226** Ill. App. **198.** No case, however, has been cited on either side where the option was mutual. But discussing a like contention made in *Kenny* vs. *Knight, supra,* the court said that even if it was of the opinion that the contract before it was terminable at the will of either party, or upon reasonable notice, 'it would not follow that the agreements therein contained would not be obligatory upon the parties so long as they continued to act under such contact before revoking or terminating it.' It is seemingly irrelevant, therefore, in determining the character of the lease, that either party may terminate it, if, neither electing so to do, they may continue to act under its other provisions for its full term."

The Attorney General on behalf of the respondent contends, that as to all of the claims filed herein both of freeholds and leaseholds, no damages can be legally demanded for interference with the respective business enterprises or for annoyance and loss of business suffered by the respective claimants during the period of construction. The court is in accord with this contention, for—

"It is well settled that inconvenience, expense or loss of business occasioned to abutting owners **by** the temporary obstruction of a public street, and the consequent interference with their right of access to their property, made necessary by the construction of a public improvement, gives no cause of action against the municipality. The Constitution provides no remedy for the property owner under such circumstances. Such claim is not damage to property not taken, within the meaning of the Constitution. Cases cited.

Chicago Flour Co. vs. *Chioago,* **243** Ill. **268, 271.**

Glenbard ***Golf Club,*** *Inc.* vs. *State, 8* C. C. R. 65.

Stein, et al. vs. *State, 8* C. C. R. **251."**

"Annotated Cases 1918B P. 876. Note.

"In case of such an injury the measure of damages is the diminution of the value of the property which is injuriously affected by the public improvement. In arriving at that damage, neither the profits **of** the business conducted on the premises nor the cost to the tenant of fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of such fixtures, improvements or articles as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate. In such a case the profits of the business are not recoverable by way of damages, but evidence that the business is profitable is admissible to illustrate and throw light on the value of the premises for rent. *Pause* vs. *Atlanta,* **98** Ga. **92, 26** S. E. **489, 58,** Am. St. Rep. **290.**

To the same effect see the following cases:

Cook, etc. Co. vs. *Chicago Sanitary Dist.,* **177** Ill. **599; 52** NE. **870;** *Marshall* vs. *Chicago,* **77** Ill. App. **351;** *Chicago Sanitary Dist.* vs. *McQuirk,* **86** Ill. App. **392;** *Chicago* vs. *McShane, 102* Ill. App. **239;** *New York, etc. R. Co.* vs. *Blacker,* **178** Mass. **386; 59** N. E. **1020;** *Voigt* vs. *Milwaukee County,* **158**

Wis. 666, 149 N. W. 392; See also, *St. Louis, etc.* R. *Co.* vs. *Capp,* 72 Ill. 188, affirmed in 67 Ill. 607; *Leach* vs. *Philadelphia;, etc. Co.,* 258 Pa. St. 522, 102 Atl. 175. Compare *Hohmann* vs. *Chicago,* 140 Ill. 226, 29 N. E. 671, 41 Ill. App. 41."

The Attorney General further contends that any lessee who took the premises with notice of the existing conditions, accepted the premises subject to such conditions with all the impairment of use that existed at such'time.

The consideration of damages to the Rite-Price Gasoline Company is therefore restricted-to the last seven and one-half months of their lease, but this period is affected by a cancellation of such lease as follows:

"CLAIMANT'S EXHIBIT 7-A

St. Louis, Missouri
July 16, 1937.

"Lease Agreement dated the Erst day of August, 1934, between The Wiggins Ferry Company, lessor, and Rite Price Gasoline Company, lessee, is hereby cancelled and terminated, effective July 31, 1937, with the understanding that the improvements belonging to the lessee will be permitted to remain upon the leased premises at the sole cost and risk of the lessee. The lessor to have the right to occupy and use and to permit others to occupy and use said premises and the improvements thereon free of rental or other charges during the construction of the St. Clair Avenue subways adjacent to said premises, and with the further understanding that upon the completion of said subways the lessor shall have the right of a renewal of said lease; however, should said lessee elect not to renew said lease it shall have the right at any time after July 31st, 1937, upon giving to the lessor 60 days' prior written notice, to remove its said improvements.

"The Wiggins Ferry Company
"By H. W. Cox,
Real Estate Agent."

"Approved and Accepted:
"RITE PRICE GASOLINE COMPANY
"By Saml. ———— Pres.
"'Dated this 27th day of July, 1937."

The Spur Distributing Company was leasing Tract No. 8 from The Wiggins Ferry Company on a five-year lease from February 1, 1935. The lease provided that at the end of the five-year period, the lease was to continue for successive three-month periods, with a ninety-day notice clause. The company closed its station during the construction period, reopened it on December 15, 1938, and sold out to Harold C. Dunkel on December 18, 1939, at a net loss on its improvements, attributable by it to the construction work in question of $272.29.

E. W. Mathis, claimant in No. 3325—Tract No. 12, was a tenant from month to month. Counsel for claimant recog-

nixes that under the record it is difficult to determine the actual basis upon which damages should be ascertained (Brief P. 112). No damage can be awarded for the temporary period, during construction, and thereafter claimant, holding said premises on a month to month basis, held the premises, after December 15, 1938 with notice of their condition and impairment, and is not entitled to damages for such subsequent time.

Theiss Brothers Company, claimant in No. 3378—Tract No. 19, held possession under a lease expiring November 15, 1937. A written extension for five years was made December 20, 1937. Only six months of their lease remained when the construction work began, and as that was during the temporary construction period no award for such period can be made. (See *Chicago Flour Co.* vs. *Chicago*, supra).

From a consideration of the entire record, and of the law pertaining to the facts disclosed, and from the court's inspection of the several properties, we find that no award should be made to the plaintiffs in either of the leasehold claims, i. e. Rite-Price Gasoline Co., No. 3509; Spur Distributing Company, No. 3485; E. W. Mathis, et al., No. 3325; or Theiss Brothers Feed Co., No. 3378.

Awards are recommended in favor of the several claimants hereafter named as follows:

Tract No. 1—Aggie Nauyoks and Pete Antonovich, Trustee, (C. of C. No. 3504)	$ 1,500.00
Tract No. 2—Earl Pollock and Victoria Pollock and Stephen D. Sexton, Trustee, (C. of C. No. 3291)	10,000.00
Tract No. 3—George R. Janner, (C. of C. No. 3486)	1,750.00
Tract No. 4—Mark Wedel and Wm. Casey, (C. of C. No. 3297)	711.05
Because of unknown ownership to an undivided 1/9th interest in these premises, the above award represents only the undivided 8/9ths share or interest of Messrs. Wedel and Casey in the amount of damages found to have resulted to these premises from the construction in question.	
Tract No. 5—Louise C. Lawrence and A. C. Fritz, (C. of C. No. 3324)	1,600.00
Tract No. 6—Rose Sokolowski, (C. of C. No. 3333)	2,300.00
Tract No. 9—Martin Andrushat and Susanna Andrushat (C. of C. No. 3288)	3,000.00
Tract No. 10—Mary Langvin and Florence Meredith (C. of C. No. 3295)	3,000.00
Tract No. 11—Nina B. Watkins and Edgar Bratton (C. of C. No. 3292)	8,000.00

Tract No. 13—Anna Ford; Anna Ford, Executrix of the Last Will and Testament of Anna Zelvis, Dec'd; Anna Ford, Administratrix of the Estate of John Zelvis, Dec'd), (C. of C. No. 3296)	3,500.00
Tract No. 14—Rose Halloran, (C. of C. No. 3374)	4,200.00
Tract No. 15—Louis Goldberg and Flora Goldberg, (C. of C. No. 3507)	12,000.00
Tract No. 16—Joseph C. Effinger and Marguerite Effinger, (C. of C. No. 3505). Claim denied. No award	
Tract No. 17—Nellie Rodgers, (C. of C. No. 3481)	9,000.00
Tract No. 18—Claude H. Ozier and Elizabeth L. Ozier, (C. of C. No. 3508)	25,000.00

SUPPLEMENTAL OPINION.

No. 3324.

Per Curiam:

This cause again being before the court on its own motion, and it appearing that an award was heretofore recommended in this cause on the 14th day of May, A. D. 1941 for the payment of $1,600.00 to Louise C. Lawrence and A. C. Fritz, and it appearing from a stipulation filed in said cause that this claim consists of alleged damages to two individual lots, i. e. Nos. 10 and 11, the former being at the corner of Third Street and St. Clair Avenue in East St. Louis, Illinois, and Lot No. 11 immediately adjoining said Lot No. 10, and it appearing from the evidence that each of said lots has a frontage of twenty-five (25) feet on St. Clair Avenue, but that Lot No. 10 is forty-eight (48) feet wide at the rear and has a greater area than Lot No. 11, and it further appearing from the stipulation on file that it is the desire of the parties that any award made as to Lot No. 10 should be made payable to Louise C. Lawrence and any award made for Lot No. 11 should be payable to Louise C. Lawrence and A. C. Fritz, and it appearing that a legal and equitable division of said award of $1,600.00 would be $885.67 for Lot No. 10 and $714.33 for Lot No. 11;

It Is Therefore Hereby Ordered that said award of $1,600.00 heretofore made in this cause shall be divided as follows:

To Louise C. Lawrence, for damages to Lot No. 10 as described in the complaint herein	$885.67
To Louise C. Lawrence and A. C. Fritz, for damages to Lot 11 as described in the complaint herein	714.33

(No. 3590—Claim denied.)

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

Opinion Pled June 10, 1941.

JOSEPH SAM PERRY, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant ,Attorney General, for respondent,

NEGLIGENCE—*officers, agents or employees of State—State not liable* ***for***—*rule of respondeat superior not applicable to State--award cannot be made for damages resulting under any theory* ***of*** *law or equity.* The State is not liable for damages for personal injuries ***or*** damages to property occasioned by the negligence of its officers, agents or employees, the doctrine of respondeat superior not being applicable to the State, and no award can be made therefor under any theory of law or equity.

MR. JUSTICE YANTIS delivered the opinion of the court:

Damages of $1,000.00 are sought by claimant Bertha Collins for injuries alleged to have been received by her while walking along a plank sidewalk at the east end of Lake Zurich near the village of Lake Zurich in Lake County, Illinois. Claimant contends that the seawall along the edge of the lake and the board sidewalk adjoining same were under the control of the State of Illinois, and are held out to the public as a recreational place; further, that respondent permitted the sills beneath the sidewalk to become rotten and decayed and the boards loosened, so that when claimant stepped on a certain plank it crashed through and she was thrown forward and struck by the rear end of the plank injuring her leg and knee, causing her to pay out medical bills of $54.80 and preventing her for a period of time from following her regular occupation as clerk and typist. In her complaint she further states that the bad condition of the sidewalk was not recognizable on the surface, and that claimant could not have known of such decayed and dangerous condition before the accident actually occurred.

The Attorney General has filed a motion to dismiss the claim as predicated on alleged liability of respondent for negligence and wrongful acts of its agents or employees, for which as a sovereign commonwealth, respondent could not be held liable. While claims of this character are not uncommon, our records are replete with decisions holding that—

"The State, in the exercise of a governmental function, is not liable for injuries to persons resulting from the alleged negligence of its officers, agents

or employees, in the absence of a statute making it liable therefor." (*Minear* vs. *Btate Board of Agr.*, 259 Ill. 549; *Barica, Admx. etc.* vs. *State*, 10 C. C. R. 47).

In the case of *Kramer* vs. *State*, 8 C. C. R. 31, claimant sought to recover damages suffered in a fall on State-owned property, upon the theory that it was the duty of the State to maintain and keep the floor in question in proper and safe condition; and that even though the State were not liable for the negligence of its servants and agents, nevertheless an award should be made as an act of social justice and equity.

The court there said:

"It is a well established principal of law in the courts of this and other States that the State is not liable for the negligence of its officers, servants or agents in the performance of governmental functions; neither can this court allow an award as a matter of social justice and equity in any case where the State would not be liable at law or in equity if the State were suable."

The latter proposition is considered at length in the case of *Crabtree* vs. *State*, 7 C. C. R. 207.

The Attorney General in his brief has reviewed a number of similar cases, but further space will not be taken in referring thereto.

The motion of respondent to dismiss is allowed and the claim dismissed.

(*No.* 3573—Claim denied.)

JOE GOLDSTEIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

opinion filed June 10, 1941.

SELTZER, LEW & SPIEGEL, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*employee of State—State not liable for—rule of respondeat superior not applicable to State—award cannot be made for damages resulting from under any theory of law or equity.* The State is not liable for damages for personal injuries or damages to property caused by the negligence of its officers, agents or employees, the doctrine of respondeat superior not being applicable to the State, and no award can be made therefor under any theory of law or equity.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant avers that on the 26th day of October, 1939, he was the owner and operating an automobile in a southeasterly

direction on Higgens Road, near Elk Grove, Illinois, and was in the exercise of due care and caution for his own safety and for the safety of others; that at that time and place Frank S. Brown, employed by the State of Illinois, was engaged in some act or acts on behalf of the State of Illinois, and operating an automobile traveling in the same direction claimant was traveling; that Brown negligently and carelessly operated his automobile, and in attempting to pass the car of claimant on the left hand side of the road, drove off on the left hand side of the highway, and in attempting to regain control of his automobile and return to the pavement, he swerved into the automobile driven by the claimant, damaging the claimant's car and injuring the claimant, and claimant asks that he be awarded damages on account of injury to his automobile and injuries to himself and for loss of his wages.

The Attorney General has made a motion to dismiss this case on the ground that the claimant does not set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay, because these damages are alleged to have been sustained on account of the negligence of an employee of the State of Illinois.

The damages sought amount to the sum of **$340.35.** For the sake of the motion, the Attorney General admits that Brown was an employee of the State of Illinois and was operating an automobile at the time and place in question, and that claimant suffered damages in the manner which he alleges to have suffered damages.

This present Court of Claims has passed upon similar questions many times. It has been the holding of this court and the Supreme Court of Illinois, that the State acts in a sovereign capacity and does not submit its action to the judgment of courts and is not liable for the torts or negligence of its agents. See

Kinmore vs. *City of Chicago, 171* Ill. **332-335;**
Markham vs. *State of Illinois, 8* **C.** C. R. **230;**
McDonald vs. *State of Illinois, 8* C. C. R. **84.**

Therefore the motion of the Attorney General will be sustained and the cause dismissed.

(No. 3372—Claimant awarded $200.28.)

OMER C. KING, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opznion filed June 10, 1941.

KENNETH E. Moss, for claimant.

GEORGE F. BARRETT, Attorney, General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SERVICES—*materials—when award may be made* for *value* of. Where it clearly appears that claimant rendered services and furnished materials to the State in performing work on its property, at the request of those in charge of said premises and that same were essential to the efficient operation of said property and duly accepted, an award may be made for the reasonable value thereof.

SAME—*same—same—lapse of appropriation out of whzch could be paid—no bar to award.* Where it is shown that claimant has rendered services and furnished materials which were accepted and used by State, and that bill therefor was not presented before lapse of appropriation out of which same could be paid, an award may be made for the reasonable value thereof on claim filed within a reasonable time,

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant is an electrician, residing in Paris, Illinois. His complaint recites that on October 5, 1936 he was employed by respondent to do certain electrical wiring in Illinois State Highway Garage No. 5 at Paris, Illinois, according to certain plans and specifications furnished by the State; that he completed such work in strict conformity to the plans and specifications, and that thereupon it was found that the balance of the wiring in such garage was in such condition that the machinery, lights and equipment in the garage were put out of working order and made useless; that at the request of Mr. Kenneth Sizemore and Mr. Joseph Connery, foremen at such State garage, claimant thereupon installed additional wiring whereby the equipment could again be put into service and all of the electrical devices both old and new theretofore installed in such garage could be utilized.

An itemized Bill of Particulars attached to the claim shows the cost of materials furnished as a part of such extra work amount to $80.28, and the additional labor involved in such extra work amounts to $120.00, making a total claim for extra material and labor of $200.28. The work originally performed by claimant under the plans and specifications previously furnished to him, was all completed and paid for.

Two reports from the Division of Highways appear in the record, one by M. K. Lingle, Engineer of Claims, and the other by C. S. Ward, former District Maintenance Engineer for the State of Illinois. Mr. Lingle's report shows that the lack of efficiencyand uselessness of equipment in the Highway Garage, following claimant's work under his contract, was not caused by improper installation of wiring by claimant under such contract, and that in order to effectively remedy the faulty lines and fixtures, it was necessary that additional wiring and fixtures were installed. Mr. Lingle's report further shows that the additional labor and materials were requested and approved by Mr. Sizemore and Mr. Connery, the garage foremen. The report of District Engineer Ward states that after claimant had completed the work called for in his contract and had begun the removal of old wiring, he, Ward, was called to the garage by the foreman, Mr. Sizemore, and was told by the latter of extra work that was necessary; that he told Sizemore if claimant would do this additional work on the same price basis as his original contract, to have him do it. King agreed to this, and was told to do the work immediately. District Engineer Ward further states in his report that he checked the work after it was all completed and found that claimant's statements as to same were correct, and that the additional wiring was of considerable benefit to the operation of both the shop and the garage; that the cost was reasonable and in line with prices in the original contract under which claimant had previously been employed. Ward further stated that his failure to get a confirmatory authorization from the Division of Highways' Springfield Office, was due to the fact that he left the employ of the State in a few days after this matter came up and did not have time to make a report thereon.

Mr. Sizemore testified that the extra work and materials were required as an emergency service; that the plans for the contract work failed to include a number of essential things, and that the apparatus and lights in the garage were made useless until the extra work was performed; that it was due to faulty plans that the extra work *had tu be* performed, and that it was necessary to have such service immediately as the air compressor and other equipment in the garage were cut off from service. It appears that there was a departmental ruling in the Highway Department that if more than

$25.00 expense was involved, the work would be let by contract, and only on items of less amount that emergency orders were allowed. It further appears however, that this rule was liberalized in practice by breaking the total charge down into various items so as to keep same within the $25.00 limit. Claimant is not chargeable with notice of such practice. From the record it appears that the service and material covered by plaintiff's claim were furnished to the State of Illinois at the request of those in charge of the premises where such work was done; that such labor and materials were useful and in fact necessary to the efficient operation of respondent's property; that claimant through its proper and duly constituted employees, accepted the benefit of such labor and material, and that the use thereof is now being availed of by respondent; that the cost thereof was reasonable and in keeping with the price of such labor and material usually charged.

We have previously held that where erroneous statements are contained in specifications which form a part of a construction contract, and the contractor is misled thereby and is obliged to perform extra work as a result thereof, the respondent is liable. (*Peter J. Crowley & Co. etc.* vs. *State*, 10 C. C. R. 108.)

In *L. E. Myers Co. etc.* vs. *State*, 10 C. C. R. 219 this court held, that—

"Where it appears from the evidence that claimant did extra work in the performance of a contract, such work not being within the terms of the contract, but which was authorized by a proper State Department, an award may be made for the value of same—as extra work."

We have also held in many cases, that—

"Where claimant has rendered services or furnished supplies to the State on the order of an official authorized to contract for it, and submits a bill therefor within a reasonable time, and due to no fault or negligence on the part of claimant, such bill is not approved before the lapse of the appropriation from which it is payable, an award for the reasonable value thereof may be made, if at the time the expenditure was contracted for, there were sufficient funds remaining in the appropriation to pay for same." (*Horst & Strieter Co.* vs. *Btute*, 10 C. C. R. 338.)

It is conceded that there were ample funds in the appropriation covering the present claim, and that claimant has been guilty of no negligence in presenting his demand.

An award is therefore recommended in favor of claimant, Omer C. King, for the sum of $200.28.

(Nos. 3353, 3354, 3355, 3356, 3357, 3358, 3359, consolidated—No. 3353, claimant awarded $562.50, No. 3354, claimant awarded $120.00, No. 3355, claimant awarded $486.00, No. 3356, claimant awarded $1,881.00, No. 3357, claimant awarded $652.50, No. 3358, claimant awarded $732.50, No. 3359, claimant awarded $936.00.)

JOE McCOMB AND JAMES McCOMB, NO. 3353, ALBERT JACOBS AND FAYE JACOBS, No. 3354, ED. P. SMITH, No. 3355, OSCAR LAMORE AND ZEPHYR LAMORE, No. 3356, ARTHUR BENOIT, No. 3357, ALFRED GIROUX AND LEONARD GIROUX, No. 3358, HENRY P. WRIGHT, E. BELLE WRIGHT, EDWARD WRIGHT AND MILTON WRIGHT, No. 3359, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1941.

JOHN H. BECKERS, for claimants.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

PRIVATE PROPERTY—*only liability of Xtate for damaging for public use is under Section 13 of Article 2 of Constitution—provisions of self executing.* The only liability of the State for 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.

CONSTITUTION—*Article 13 of Section 2 of—words private property include personal property.* The words private property in Section 13 of Article 2 of the Constitution, providing that private property shall not be taken or damaged for public use without just compensation are words of general application and not confined to any species of property, either real or personal and such provision protects an individual in the ownership of all of his property.

NUISANCE—*discharge of mater and sewage from State institution comprising permanent structures into stream on lands of private parties—resulting in pollution of stream—when not a permanent nuisance.* A discharge of water and sewage from a State institution, comprising permanent structures, into a stream upon the lands of private parties, resulting in the pollution of such stream, does not constitute a permanent nuisance, as such structures do not of themselves constitute the nuisance, the same consisting of the discharge of the water and sewage therefrom.

SAME—same—same—damages therefro—— limited to those up to time of claim—depreciation in value of real estate not proper element of. Where private property is damaged from the discharge of water and sewage from a State institution, comprising permanent structures into a stream upon the lands of private persons, resulting in the pollution thereof, recovery for such damages is limited to those sustained prior to the filing of the claim therefor, and any depreciation in the fair, cash market value of such lands is not a proper element thereof.

SAME—*same—same—same—difficulty of exact ascertainment of amount of—does not Bar recouery.* Where claimants establish right to recover damages, which are the proximate result of the wrong complained of, State can-

not escape liability for payment thereof because of difficulty of ascertainment of exact amount, and the best competent evidence which the subject will admit is receivable to fix the amount.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The above entitled cases are all claims for damages caused by the pollution of a stream known as Rock Creek, by the Manteno State Hospital; all grew out of the same state of facts, and therefore, upon motion of the several claimants have been consolidated for the purposes of the hearing and consideration thereof.

The Manteno State Hospital is a charitable institution operated and maintained by the State of Illinois through its Department of Public Welfare. It is located on 1,220 acres of land owned by the State, located in Sections 22, 23, 25, 26, 27 and 35 in Township 32 North Range 12 East of the Third Principal Meridian in Kankakee County.

The institutional buildings are located on Section 26, and the remainder of the land is devoted to agriculture, orchards, nursery, etc. The original buildings and improvements were constructed in 1930, and then consisted principally of the following: eight two-story ward buildings; one administration building; one sewage disposal plant; one power house; two employees' dormitories; five doctors' cottages; one Managing Officer's residence; one farm house; one kitchen building; garages, etc.

In 1933 eight additional ward buildings, a dining room, and a hospital were erected.

In 1935 a kitchen building, a general stores building, and a laundry building were erected.

In 1936 and 1937 twelve ward buildings, one mechanical stores building, one building for tubercular patients, one diagnostic building, two employees' buildings, one assembly hall, seven doctors' cottages, one chief engineer's residence, and two hydro-therapy buildings were erected.

The number of patients and employees housed on the premises from 1935 to 1939 inclusive, were as follows: in 1935, 1,446; in 1936, 3,144; in 1937, 3,187; in 1938, 4,451; and in 1939, 6,093.

The sewage from the several buildings is carried through an 18-inch sanitary sewer which empties into Rock Creek approximately sixty or seventy feet east of the highway running north and south between Sections 22 and 23.

The property is also provided with a 48-inch sewer called a storm sewer, which empties into Rock Creek just west of the 18-inch sewer.

Rock Creek is a natural water course which traverses the northwest corner of Section 23 and continues in a southwesterly and westerly direction through the lands of the claimants, and finally empties into the Eankakee River about seven and one-half miles west and two miles south of Manteno; and the effluent from the sewage disposal plant and the storm sewer system of the institution empties into such creek. The creek is a winding and sluggish stream, twenty-five to thirty feet in width, with many holes in the bottom which catch and retain the sludge and solids from the institution. The fall is about ten feet in the first three and one-half miles, and an additional ten feet in the next mile.

The original sewage disposal plant constructed in 1930 as aforesaid consisted of a primary settling tank, six mechanical aerators; a secondary settling tank; a sludge digester and three sludge drying beds, which were able to take care of a population as follows: primary tank, 1,280; aerator tanks, 2,530; settling tank, 2,670; digester tank, 3,210; sludge beds, 3,760. From February, 1935 until July 20, 1937 the waste water from the institution laundry was discharged directly into the storm sewer system (and eventually into Rock Creek) without passing through the sewage disposal plant. Since July 20,1937 the waste water from the laundry has been run through the sewage disposal plant, and after treatment therein, is discharged into Rock Creek along with other effluent from the plant, through the sanitary sewer.

The original plant was put into operation in 1931, and thereafter no provisions were made for any alterations therein or additions thereto until December 29, 1938, when a contract was let for the installation of a new primary settling tank, sewage lift station and mechanical bar screen.

The several complaints herein were filed February 3, 1939, and on December 14, 1939 a contract was let for certain alterations and additions to the sewage treatment plant. The alterations and improvements above mentioned had not been completed at the time the taking of testimony herein was concluded, but one of the witnesses for the respondent testified, over objection by claimants, that after the completion of such alterations and improvements the capacity of the sewage dis-

posal plant would be sufficient to take care of a population of 10,000 people, and that with proper operation the effluent from the plant should not possess any offensive, odor and should not render the stream unfit for cattle to drink or to stand in. The witness admitted that such results would depend upon the proper construction of the plant, and the proper operation thereof, and that in any event, even with the new alterations and improvements the stream would not be in its natural state.

Alfred A. Brensley, a sanitary engineer called by the claimants, stated that in his opinion if the plant were constructed according to the plans in evidence, it would not furnish sufficient treatment to insure the original uses which were afforded by the creek waters before the original plant was constructed; and that the effluent discharged from the plant would reduce the extent of the available uses of the creek as to the riparian owners for general farming purposes and dairying.

No attempt is made by the respondent to deny or excuse the conditions as they existed prior to the filing of the several complaints herein. The sewage disposal plant in use prior to the filing of such complaints was wholly inadequate to treat the sewage and effluent from the institution, and all of such sewage and effluent was and continued to be discharged into the waters of Rock Creek.

In short, the respondent created and thereafter maintained a public nuisance of an aggravated nature. The supply of water in Rock Creek was not only increased in volume but polluted as well.

After the alterations and additions hereinbefore referred to are completed, the effluent from the entire institution will continue to be emptied into Rock Creek, and the evidence of Dr. Hinton, the Managing Officer of the hospital, was to the effect that from 1934 to the time of the hearing, from 150 to 200 gallons of water per person per day were consumed at the hospital. All of such water was eventually emptied into Rock Creek by the respondent, so that in 1939 there was from 900,000 to 1,200,000 gallons of water per day emptied into Rock Creek through the sewers of the institution.

The claimants, Joe McComb and James McComb, do not own the land they farm, but are tenants in possession thereof. In their complaint herein such claimants seek an award for

$1,405.00, for the following items of damages, to wit: decrease in milk production; the cost of extra feed for livestock; loss of livestock; and the cost of veterinary services.

The claimants, Albert Jacobs and Faye Jacobs, are the owners of the land involved in their claim, and the claimant, Ed P. Smith, is the tenant in possession of said land. In the original cornplaint filed by Albert Jacobs and Faye Jacobs, damages are claimed in the amount of $980.00 for the loss of rent, and for the cost of excavating and hauling away slime, sludge and sediment which had accumulated in the bottom of Rock Creek. By amendment thereafter made, such claimants added the item of depreciation in the fair cash market value of their property, for which they asked an additional award in the sum of $2,000.00.

The claimant, Ed P. Smith, in his complaint asks for damages in the sum of $915.00 for depreciation in the value of livestock, loss of livestock, decrease in milk production, cost of extra feed for livestock, and cost of veterinary services.

The claimants, Oscar LaMore and Zephyr LaMore, are the owners of the land involved in their claim, but Oscar Lamore alone farms the land, and he is the sole owner of the livestock thereon. In their original complaint Oscar LaMore and Zephyr LaMore, claim damages in the sum of $2,000.00 for loss of rent, and for the cost of excavating and hauling away slime, sludge and sediment which had accumulated in the bottom of Rock Creek, and the claimant, Oscar LaMore, personally claims damages in the total amount of $2,795.00 for loss of livestock, loss of use of livestock, decrease in milk production, cost of extra feed for livestock, and cost of veterinary services. By amendment thereafter made to their complaint, said claimants added the item of depreciation in the fair cash market value of their property for which they asked additional damages in the sum of $7,200.00.

The claimant, Arthur Benoit, does not own the land he farms, but is a tenant in possession under Carl Becker, the owner thereof, and claims damages in the sum of $1,102.50 for decrease in milk production; cost of extra feed for livestock, and cost of veterinary services.

The claimant, Alfred Giroux, is the owner of the land involved in Claim No. 3358, and the claimant, Leonard Giroux, is the tenant in possession thereof. In their original corn-

plaint the claimant, Alfred Giroux, claims damages in the sum of $1,325.00 for loss of rent and cost of excavating and hauling away slime, sludge and sediment which had accumulated in the bottom of Rock Creek, and the claimant, Leonard Giroux, claims damages in the sum of $1,392.50 for loss of livestock, depreciation in the value of other livestock, decrease in milk production, and cost of extra feed for livestock. By amendment thereafter made, the claimant, Alfred Giroux, added the item of depreciation in the fair cash market value of his property, for which he asked additional damages in the sum of $6,000.00.

The claimants, Henry P. Wright, E. Belle Wright, Edward Wright and Milton Wright, are the owners of and operate the land involved in their claim. In their original complaint they claim damages in the sum of $3,516.00 for loss of rent, cost of excavating and hauling away slime, sludge and sediment which had accumulated in the bottom of Rock Creek, decrease in milk production, and cost of extra feed for livestock. By amendment thereafter made, claimants added the item of depreciation in the fair cash market value of their property, for which they asked additional damages in the sum of $5,000.00.

The evidence produced on behalf of the several claimants shows that those portions of the farms in question traversed by the creek were devoted to pasture; that since the pollution of the stream commenced, such farm land has depreciated in value; that livestock standing in the creek, or drinking the water therefrom became diseased; that some of the stock died and that some of it depreciated in value because of the sores which developed on the animals; that by reason of the polluted condition of the stream it became necessary to remove the livestock from the pasture along the creek during the summer months of each year when the condition of such creek was most objectionable, and that during these months, and due to the inability to use these pastures, the occupying claimants were compelled to use or obtain extra feed for the livestock; that due to their removal from the pasture and the diseased condition of the livestock, the milk production of the occupying claimants fell off, and that they therefore lost the sale of certain quantities of milk that ordinarily would have been available for such purposes; and that it was necessary,

in some instances, to secure the services of veterinaries in efforts to relieve or cure the livestock.

The respondent contends:

1. That as a matter of law these claims present a situation in which the State is not liable to respond in damages for the reason that the State is not liable for the negligent acts or omissions of its officers, agents or employees; that if the officers, agents or employees of the State by their acts or omissions have polluted Rock Creek and have created a continuing nuisance, the remedy of the plaintiff is by injunction to restrain the continuance thereof; that the State is not liable in tort for damages arising from the creation or continuance of such nuisance; that no award can be made on the claims predicated upon tort liability.

2. That where the injury complained of constitutes a public nuisance, the provisions of Section 13 of Article 2 of the Constitution which provides that private property shall not be taken or damaged for public use without just compensation, has no application; that the Criminal Code makes the pollution of a stream a public nuisance, and that therefore the right to maintain and continue such public nuisance cannot be obtained by the payment of compensation or damages; that the constitutional provisions embrace only those cases in which the Act creating the damage is a lawful act and which by the payment of compensation, can therefore be lawfully maintained; that the aforementioned constitutional provision has no application to this case, and that the claimants cannot predicate their right of recovery thereunder; that their remedy was to abate the nuisance in its inception.

3. That even if a liability exists under the constitutional provision, claimants who are tenants have not offered any evidence to establish a proper measure of damages; that the evidence shows that the tenants occupied the land in question under leases which were renewed from year to year; that no evidence as to depreciation of the value of their leasehold was presented and that in any event it would be competent only as to the lease which was in existence when the injury arose; that subsequent leases or renewals after the creek was polluted were made with a knowledge of that fact and its effect on the land in question, and such facts were taken into consideration in the execution of subsequent leases or renewals.

4. That upon the completion of the improvements now in progress or contemplated, the creek will no longer be polluted by the sewage from the hospital, and that therefore the pollution of a stream is not a permanent condition, and that the claimants who are the owners of land are not entitled to recover permanent damages therefor.

It is clear that the State in the construction, maintenance and operation of Manteno State Hospital is engaged in a governmental function; also that the State in the exercise of its governmental functions is not liable for the negligence or misconduct of its officers, servants and agents under the doctrine of respondeat superior, in the absence of a statute making it liable. *Minear* vs. *State Board of Agriculture,* 259 Ill. 549; *Gebhardt* vs. *Village of LaGrange Park,* 453 Ill. 234; *LePitre* vs. *Chicago Park District,* 374 Ill. 184; *Finney* vs. *State,* 8 C. C. R. 327; *I. C. R. R. Co.* vs. *State,* 10 C. C. R. 410; Bishop, et *al.* vs. *State,* 10 C. C. R. 664.

In this case, however, the claimants are not relying upon any negligent acts or conduct on the part of the officers, agents or employees of the respondent. It is not claimed that the sewage disposal plant in question was improperly constructed, but it is claimed that although the facilities for disposal of sewage were sufficient at the time the institution was erected, and continued to be sufficient for some time thereafter, yet, the institution grew so rapidly both as to the number of buildings and the number of people quartered therein, that it was but a short time until the facilities for the disposal of sewage were inadequate and insufficient, and the several complaints are based upon the action of the State in casting additional waters into the stream, and in polluting the same, to the damage of the claimants as hereinbefore set forth.

Section 13, Article 2 of the Constitution ,provides that "private property shall not be taken or damaged for public use without just compensation.'' It seems elemental that the words "private property" are words of general application, and that they cannot be confined to any species of property, either real or personal. In the case of *Metropolitan City Railway* Co. vs. *Chicago City Railway Co., 87* Ill. 317, our Supreme Court, on page 324, said:

"Property, in its broadest and most comprehensive sense, includes all rights and interest, in real and personal property, and also in easements.

franchises, and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property."

So also, in the case of *I. C. R. R. Co.* vs. *Commissioner of Highways*, 161 Ill. 247, the Supreme Court, on page 250, said:

"'Property,' in the sense in which that word is thus used in the constitution, is that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others."

In Volume 6, Words and Phrases, page 5693, the law is set forth as follows:

"Property is nomen generallissimum, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments."

In Volume 3, Words and Phrases, 2d series, page 1275, the author cites the case of *I. C. R.* Co. vs. *State*, ex rel, **94** Miss. 579, in support of the following proposition, to wit:

"The term 'property,' as used in Const. **1906**, Art. **3**, Sec. 17, providing that an individual's property shall not be taken or damaged for public use, except on due compensation first made, includes every species **of** value, right or interest."

We are of the opinion, therefore, that the constitutional provision protects the individual in the ownership of all of its property whether the same be real or personal.

One of the earliest cases in this State bearing upon the questions here involved was the case of *Nevin* vs. *City of Peoria, 41* Ill. 502. In that case the City of Peoria in raising the grade of a street directed the flow of water from its natural channel to a new channel, and thereby the house and grounds of the plaintiff were flooded with mud and water and a stagnant pond was formed within a short distance from his house, rendering it unhealthy and ruining his business. The defendant contended, as in this case, that there was no liability on the part of the City of Peoria.

In disposing of such contention the court said, page 508:

"The city is the owner of the streets, and the legislature has given it power to grade them.. But it has no more power over them than a private individual has over his own land, and it cannot, under the specious plea of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without being responsible itself. Neither State nor municipal government can take private property for public use without due compensation, and this benign provision of our Constitution is to be applied by the courts whenever the property of the citizen is invaded, and without reference to the degree." Also, on page 515: "We are unable to see why the property of an individual should be sacrified for the public convenience

without compensation. We do not think it sufficient to call it damnum absque injuria. We know our Constitution was designed to prevent these wrongs. We are of the opinion, that, for injuries done to the property of the appellant in the case before us, by turning a stream of mud and water upon his premises, or by creating in the immediate neighborhood of his dwelling an offensive and unwholesome pond, if the jury find these things to have been done, the city of Peoria must respond in damages."

The case of *Holm* vs. *Cook County*, **213** Ill. App. **1**, was a case very similar on the facts to the case at bar. In that case the Oak Forest Infirmary, a county institution which furnished a home and refuge for about 3,000 inmates and employees, conducted its sewage through the farm tiling of the plaintiff and across his premises, causing damage similar to that complained of in this case. In that case the county of Cook took the same position as is being taken by the Attorney General in this case, and in disposing of such contention the court, on page **4**, said:

"It is insisted by plaintiff that the action here brought is one to recover compensation for the wrongful taking of and damage to his lands and tiling system for a public use without compensation. Defendant, on the other hand, argues that, being a municipality in the exercise of its governmental functions, an action in tort will not lie against it.

"So far as the *form* is concerned, if an action does lie against Cook County for the injuries complained of, trespass on the case is the appropriate one. *Bradbury* vs. *Vandalia Levee & Drainage Dist.*, **236** Ill. **36**; *Allen* vs. City *of Decatur*, **23** Ill. **332.**

"The paramount question here presented for determination is, whether any action will lie against Cook County under the facts hereinabove related.

"Section **13** of the Bill of Rights (Const. Ill. of 1870, Art. II) provides that 'private property shall not be taken or damaged for public use without just compensation'; that 'such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law.'"

"It will be seen, from an examination of the declaration, that when defendant constructed the said Oak Forest Infirmary, it contemplated that all sewerage was to be conducted from its lands into the Calumet Drainage District Ditch, by means of plaintiffs said tiling system, which was in fact done. Such action was tantamount to an appropriation not only of plaintiffs lands for this purpose, but also the tiling system which plaintiff had laid for purposes entirely foreign to the one to which defendant put it. While it is true, as argued by defendant, that the servient estate must yield to the dominant one in carrying off surface waters, etc., yet such right cannot be enlarged to permit the defendants herein to unlawfully appropriate plaintiff's said tiling system for the purpose of conducting the entire sewerage of the institution in question through plaintiff's lands. In our opinion, plaintiff's declaration sets up a state of facts from which it appears Chat his said property has been both taken and damaged for public use without compensation."

In the case of *Highland* vs. *Auer*, 235 Ill. App. 327, the plaintiff Auer sought an injunction to restrain the City of Highland from polluting certain waters whereby sewage was deposited upon the lands of said plaintiff. In considering the rights of the plaintiff under the Constitution, the court in that case said:

"Our Constitution guarantees to every citizen that his property shall not be taken or damaged for public use without just compensation. Art. 2, Sec. 13. It protects him against damages caused by a nuisance."

The case of *Cook* vs. *City* of *DuQuoin*, 256 Ill. App. 452, is another case which, on the facts, is almost identical with the case at bar. In disposing of the question there involved, the court said (page 455):

"It is the right of every owner of land over which a stream of water flows, to have it flow in its natural state, and with its quality unaffected. It is a part of the freehold of which the owner cannot be disseized except by due process of law, and the pollution of a stream constitutes the taking of property, which may not be done without compensation."

In considering the effect of the aforementioned constitutional provision, our Supreme Court in the case of *Roe* vs. *County* of *Cook*, 358 Ill. 568, 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 a 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." * * *

"The constitutional provision itself, without remedial legislation, is basic law, which not only confers a right but pre-supposes a remedy. Standing alone, Section 13 is self-executing and forms the basis for recovery at common law by an action on the case." * * *

"Counties may sue and be sued in Illinois, (Cahill's Stat. 1933, Chap. 34, Secs. 22, 31) 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." * * *

"It is now immaterial whether the declaration be considered as one in tort or in assumpsit, as the breach of duty relied upon is the same and it contains all the necessary averments of fact for an action in assumpsit."

The case of *Barrington Hills Club* vs. *Barrington,* 357 Ill. 11, mas another case in which the facts were very similar to those in the case at bar. In that case the plaintiffs were riparian owners of lands who sought an injunction against the village of Barrington to prevent such village from discharging sewage and the efflux from its sewage treatment plant, into the creek above their premises. In that case the court said, page 18:

"The claim cannot be sustained that the Village of Barrington had an inherent right to use the creek as the only available natural watercourse to carry off its sewage and waste water." * * *

Also, on page 19: "Here, in addition to the placing of an additional burden upon the servient estates of defendants in error, as lower riparian owners, through the drainage of water coming from the water system and deep wells supplying water to the village, another property right is invaded, viz., by pollution of the stream."

The Supreme Court of the United States has held in numerous cases that a claim for compensation for property taken for public use by the Federal Government is a claim founded upon an implied contract. *Phelps* vs. *U. S.,* 274 U. S. 341; *North American Transfer* Co. vs. *U. S.,* 253 U. S. 330; Temple, 248 U. S. 121.

The cases cited would seem to be conclusive of the right of the several claimants to recover, under the provisions of the Constitution, such damages as they have sustained, limited, however, to the allegations of their several complaints, the testimony in the record, and the law governing the proper measure of damages in cases of this kind.

The respondent, however, contends that the conditions complained of constitute a public nuisance in violation of the provisions of Section 221 of the Criminal Code of this State which provides that it is a public nuisance "to corrupt or

render .unwholesome or impure the water in a stream, river, pond or lake, to the injury or prejudice of others"; that inasmuch as the same constitute a public nuisance the State cannot obtain the right to continue such nuisance by paying damages to the plaintiffs and that therefore the plaintiffs are not entitled to recover in this case. If such contention were sound, it would follow as a necessary consequence that if the State causes pure water to flow upon the lands of the claimants which such lands would not ordinarily receive in the course of nature, and thereby adds to the burden upon such lands, the claimants would be entitled to maintain an action therefor, but if the waters so cast upon the lands of the claimants are of such a nature that the stream is polluted thereby and a public nuisance created, the claimants would have no remedy therefor.

We are not impressed either with the soundness of this contention or the justice thereof; nor are we impressed by the further contention of the respondent that the claimants are limited in their remedy, to the abatement of the nuisance. Our courts in numerous cases have held that in cases of this character, a suit for damages and the abatement of the nuisance by injunction are concurrent remedies.

In the case of *Barrington Hills* Club vs. *Barrington,* ante **(357** Ill. **11)** our Supreme Court said:

"The law in Illinois is, and has long been, settled upon the controlling questions involved in this case. **A** private nuisance may be enjoined by a suit in equity or the party suffering damage and injury may proceed at **law,** and the remedies are concurrent and not exclusive. *(Springer* vs. ***City*** of *Chicago,* **308** Ill. **356;** *Village* ***of*** *Dwight* vs. *Hayes,* 150 id. *273; City of Kewanee* vs. **OtZey 204** id. **402.)**

On the question of damages, Lewis on Eminent Domain, Second Edition, Volume 2, page 1416, Section 653b, lays down the following rule :

"Where **a** suit is brought for damages to property by the construction, use or operation of a work for public use, the question arises whether **all** damages, past, present and prospective, must be recovered in a single suit, or whether the damages must be limited to those sustained prior to the commencement of the suit, leaving future damages to be redressed by future suits, as such damages occur. If there can be but one suit and one recovery it necessarily follows; first, that the measure of damages is the diminution in the value of the property by reason of the permanent continuance of the construction or use which causes the damage;" etc. * * * "On the other hand if there may be successive actions then, first, the measure of damages is the injury sustained up to the commencement of the suit;" etc. * * * "and successive actions may be brought as often as damages are sustained or

injury done and a recovery had of all damages sustained subsequent to the prior suit."

It is well settled in this State that where the injury in question is of a permanent character, all damages arising on account thereof, past, present and prospective, must be recovered in one proceeding; but where the injury in question is not of a permanent character, but is continuing, damages may be recovered only up to the time of the commencement of the proceeding, and successive actions may be maintained from time to time as damages are inflicted. *City of Centralia* vs. *Wright*, 166 Ill. 561; *Suehr* vs. *Chicago Sanitary District*, 242 Ill. 496; *Strange* vs. *C. C. C. & St. L.* Ry. *Co.*, 245 111. 246; *Jones* vs. *Sanitary District of Chicago*, *252* Ill. 591.

It therefore becomes necessary to determine whether the injury involved in this case is of a permanent or a continuing character.

In the case of *Baker* vs. *Leka*, 48 Ill. App. 353, the court, in considering the question as to whether a certain ditch constituted a permanent invasion of the plaintiff's rights, said:

"This is not to be determined from a consideration alone of its enduring character, or that if not changed by the hand of man it would likely continue forever. To be permanent in a legal sense, a structure must, in addition to being permanent or enduring within itself, be such that its continuation is lawful; because if not lawful, it is subject to be removed or abated by a legal proceeding and therefore cannot be deemed permanent." * * * "A nuisance which may be abated by law is not regarded as a permanent source of injury but as a continuing nuisance. Successive actions for damages occasioned by it may be maintained from time to time as such damages arc inflicted." * * *

In the case of *City* of *Kewanee* vs. *Otley*, ante, the court, on page 412, said:

"The principle of law which contemplates that damages sustained for a permanent injury to land shall be recovered in one action is applicable only to those cases where the party or agent committing the injury acts within the authority of the law. In this case, when the sewage of the defendant city, or any part thereof, though combined with sewage or deleterious waters from other sources, was cast upon the lands of appellees or mingled with the waters of a stream running over the same, so that a nuisance was created as to appellees and they were injured thereby, such act of the defendant was unlawful and it could not be sanctified by time Nor could it be said that such a nuisance was a permanent one, for it would be the duty of its authors to have it abated."

The case of *Jones* vs. *Sanitary District* of Chicago, *252* Ill. 591, was a case in which the plaintiff sought to recover damages which he claimed had been done to his lands during

the period of five years prior to the commencement of his suit, as the result of the overflowing of such lands by the defendant. It appeared in that case that the damage to the plaintiff's lands was not the result of the construction of the Drainage Canal, but that such damage resulted from the use made of such canal, and the court there held that where the continuance and operation of a permanent structure are not necessarily injurious, but may or may not be so, that the injury is not considered a permanent injury, and only the damages sustained prior to the commencement of the suit may be compensated in that proceeding.

In Lewis on Eminent Domain, Volume 2, page 1422, the author says:

> "In suits for the pollution of a stream with sewerage, it was held that the recovery should be limited to damages up to the commencement of the suit."

We are of the opinion, that under the facts in this case the nuisance in question cannot be considered a permanent nuisance within the meaning of those words as used in cases of this kind. The buildings of the respondent which constitute the Manteno State Hospital, although permanent structures, do not, of themselves, constitute the nuisance complained of. Such nuisance consists of the discharge of the waters and sewage from such institution upon the lands of the claimants. The discharge of such sewage upon the lands of the claimants constitutes a public nuisance in violation of the Criminal Code of this State and being unlawful, cannot ripen into or form the basis of a right to continue or maintain such nuisance. Furthermore, the testimony offered on behalf of the respondent shows that a very substantial enlargement or addition to the sewage treatment plant is now under construction; and that upon the completion thereof the effluent from the Manteno State Hospital will be unobjectionable and will not constitute a public nuisance. Under the testimony in the record, we are of the opinion that the nuisance in question, being unlawful, cannot be considered as of a permanent character, but on the contrary, must be considered as a continuing nuisance.

There are some cases in this State in which the owners of land have treated a structure as a source of permanent injury and brought suit for and recovered both present and future damages, although such structure was unlawful and

subject to abatement by legal action. This was upon the theory that where the structure is in its nature permanent, the one damaged thereby may elect to treat it as permanent in law, though he may abate it as a nuisance and may sue for and recover damages present and prospective. If he does so, he is to be regarded as having consented to its continuation and is estopped from the recovery of further damages. *Baker* vs. *Leka*, 48 Ill. App. 353; *Strange* vs. *C. C. C. & St. L. Ry. Co.*, 245 Ill. 246; *Dowd* vs. *Drainage District*, 160 Ill. App. 476; *Bernhardt* vs. *B. & O. Ry. Co.*, 165 Ill. App. 408.

Such cases, however, are limited to cases involving structures which are in their nature permanent and in which it is apparent that the injury will continue indefinitely. In this case, as previously stated, the source of injury was not the hospital buildings, which are permanent structures, but the depositing of the sewage therefrom on the lands of the claimants. Furthermore, it is apparent that the pollution complained of will not continue indefinitely, as the evidence shows that a substantial enlargement of the sewage treatment plant is now in course of construction. Consequently, the cases last cited can have no application to the claims now under consideration.

In the recovery of the damages sustained by them, the claimants are therefore confined to the damages which they have sustained up to the time of the commencement of the present proceeding, and no recovery can be had in this proceeding for any permanent injury to the real estate, that is to say, the damage claimed for depreciation in the fair cash market value of the real estate is not a proper element of damage in this proceeding.

Some of the property owners claim as an element of damage the cost of removing the sediment from Rock Creek. Whether such cost is a proper element of damages it is not necessary to decide at this time, as the evidence offered is too indefinite, uncertain and speculative to form the basis of an award. The testimony shows that the creek is winding and of varying widths, and that there are holes in the bottom which are filled with such sediment, but there is no evidence to show the distance the creek traverses the several tracts, or the width of the creek on each of such tracts. There is some general testimony to the effect that the creek is from 25 to 30 feet in width, but there is nothing definite as to any par-

ticular piece of property, nor is there any definite testimony as to the thickness of the deposit of sediment on the several tracts, or the number or the size of the holes in the bed of the creek. Apparently the estimates of the owners with reference to the amount of such sediment and the cost of removal thereof were merely guesses, and not based upon any definite measurements or information either as to the amount of the sediment or the cost of removal.

There is some testimony to the effect that after the new addition to the sewage treatment plant is in operation, the effluent from the institution will be unobjectionable, and the flood waters will wash away all old sediments, and there is also testimony to the effect that the flood waters will have no effect upon the removal of such sediment. Even if such item were a proper element of damage, it would be necessary that the testimony disclose some definite basis upon which an award could be made, and in the present state of the record, we are of the opinion that no award can be made for such item.

The respondent also contends that the tenants who leased their property subsequent to the time Rock Creek was first polluted, are not entitled to recover any damages in this proceeding, for the reason that the nuisance was in existence at the time they went into possession of the property, and therefore they must be held to have leased the property subject to the conditions as they then existed.

This is the rule which applies in cases of a permanent injury, but such rule has no application in cases where the injury complained of is of a continuing rather than a permanent character. *Baker* vs. *Leka, 48* Ill. App. **353,** 360.

In the present claims the tenants had a right to assume that the nuisance, being unlawful, would be abated.

As to the damages claimed by the occupying claimants, the respondent contends that there is no competent evidence to support such claims. It goes without saying that in cases of this kind the exact amount of the damages sustained is difficult to ascertain, but that fact of itself does not deprive the claimants of their rights to recover therefor.

The case of *Johnson* vs. *City of Galva,* 316 Ill. 598, was a case very similar to the case at bar upon the facts. The plaintiff there sought to recover damages for the pollution of a natural watercourse which ran across his farm. The items

of damages claimed by him were similar to those sought by the claimants herein. In fact, it seems probable that the claimants in this case in preparing their claims for damages followed the authority of the Johnson case.

In that case, in considering the question of damages, the court said, page 603:

"It is further contended by the plaintiff in error that the items for (1) the cost of hay and grain fed to the cows of the defendant in error while confined to the barn lot because of the pollution of the waters of the creek, (2) the alleged resulting loss of milk, and (3) the cost of labor and the value of the defendant in error's time in driving his horses to and from water, were purely speculative and conjectural and for that reason are not proper elements of damage. If by reason of the wrongful acts of which the defendant in error complained he sustained these items of damage they were proper elements to be submitted to the jury. Damages must, however, be the proximate result of the wrong of which complaint is made. Where the right of recovery exists the defendant cannot escape liability because the damages are difficult of exact ascertainment. The nature of the inquiry in the instant case is such that it is difficult, if not impossible to ascertain with mathematical certainty the amount of the defendant in error's damages, but this difficulty affords no answer to a cause of action which results from a breach of duty imposed by law. The unliquidated damages growing out of the commission of a tort are seldom susceptible of exact measurement. The rule is, that while the law will not permit witnesses to speculate or conjecture as to possible or probable damages, still the best evidence which the subject will admit is receivable, and this evidence is often nothing better than the opinions of persons well informed upon the subject under investigation."

We now come to the consideration of the amount of damages to which the claimants are entitled under their several complaints, the proof in the record, and the law as hereinbefore set forth.

Claim No. 3353, Joe McComb and James McComb. These claimants are tenants on the farm described as the Southeast Quarter (SE¼) and the South Half (S½) of the Northeast Quarter (NE¼) of Section Twenty-nine (29), owned by Mrs. Grace Cooley. Claimants have lived on this farm for five years and have fourteen head of cattle. During the years 1936, 1937 and 1938 these claimants had to take their livestock out of the pasture during the months of June, July and August of each year on account of the pollution of Rock Creek, and had to buy additional feed for them. As the result of such pollution and the dry feeding of the livestock on account thereof, claimants' milk production was reduced two hundred (200) gallons per year. The evidence shows that fifteen cents (15c) per gallon was a fair price for such milk, and

that the cost to these claimants of such dry feeding was fifteen cents (15c) per day per animal. The evidence also shows that these claimants lost one horse and two cows during the month of August, 1939, and that at that time they paid Thirty Dollars ($30.00) in veterinary fees. The complaint in this case was filed February 3,1939 and consequently under the law as hereinbefore set forth, claimants are not entitled to recover anything in this proceeding for the horse and the cows which died, nor for the money paid to the veterinary, for the reason that all of such matters occurred subsequent to the filing of the complaint herein. The damages to which the claimants are entitled in this proceeding must be confined to the damages which accrued prior to the filing of the complaint. These claimants are therefore entitled to an award for the following items of damage, to wit: reduction in milk gallonage, 200 gallons a year for the years 1936, 1937 and 1938, at 15c per gallon, $90.00; extra feed for fourteen head of cattle for seventy-five days a year in each of said three years, at 15c per day, $472.50;—total, $562.50.

Claim No. 3354, Alfred Jacobs and Faye Jacobs. These claimants are the owners of Lots 1 and 3 of Tyson's Subdivision in the East Half (E½) of Section Twenty-two (22). This land adjoins the land owned by Oscar LaMore and Zephyr LaMore. Among other items of damage, claimants sought to recover for the permanent injury to their lands, but in accordance with the views hereinbefore expressed, they cannot recover such damages in this proceeding. Claimants' entire tract consists of approximately eighty-four acres, of which ten acres is leased to the claimant, Ed P. Smith. The testimony in the record shows that this land was rented to Ed P. Smith during the years 1937 and 1938 at a reduction of Sixty Dollars ($60.00) per annum on account of the pollution of the creek. Claimants are therefore entitled to recover this item of damages in the amount of One Hundred Twenty Dollars ($120.00).

Case No. 3355, Ed P. Smith. The testimony in the record confines the loss sustained by Mr. Smith to the year 1937 and to the months of June, July and August of that year. Such testimony warrants an award in favor of Mr. Smith for the following items of damages, to wit: loss on the sale of six head of cattle which ordinarily would have sold for $600.00, but which were sold for $190.00, on account of their condition,

making a loss of $410.00; money expended for medicine for such livestock, $40.00; extra feed for ten cattle for two months at twenty cents per day, $120.00; reduction in milk gallonage, thirty' days, eight gallons per day at fifteen cents per gallon, $36.00;—making a total of $606.00. From this amount there must be deducted the sum of $120.00, being the reduction in rent allowed to Smith by his landlord on account of the pollution of the creek.

Case No. 3356, Oscar LaMore and Zephyr LaMore. These claimants are the owners of the Northeast Quarter (NE¼) and the East Half (E½) of the Southeast Quarter (SE¼) of Section Twenty-two (22). This property lies immediately west of the lands occupied by the Manteno State Hospital, and is approximately eighty (80) feet distant from the outlet of the sewers in question. Evidence was offered to show the depreciation in the fair cash market value of this property as the result of the pollution of Rock Creek, but as previously stated, such depreciation does not constitute a proper element of damage in this proceeding. The testimony in the record, however, does warrant an award in favor of the claimant, Oscar LaMore, who operated the farm, for the following elements of damage, to wit: reduction in milk gallonage, 500 gallons a year for each of the years 1935, 1937 and 1938, at fifteen cents per gallon, $225.00; extra feed for twenty-three head of cattle for ninety days in each of the years 1935, 1936, 1937 and 1938, at twenty cents per day, $1,656.00;—making a total of $1,881.00.

There was some testimony to the effect that the claimant, Oscar LaMore, paid $39.00 for veterinary services; that one cow and one colt of said claimant died, and that the mother of such colt became sick and claimant lost the use of such mare. However, neither the testimony of the veterinary nor of the claimant himself shows that the sickness or death of any of such animals resulted approximately from the pollution of Rock Creek, and consequently no allowance can be made for any of such items.

Case No. 3357, Alfred Benoit. This claimant is a tenant in possession of the Southwest Quarter (SW¼) of Section Twenty-two (22), except the North 30.39 acres thereof, which farm is owned by Cark Becker and lies west of the LaMore property. The testimony in the record shows that the claimant is entitled to an award for the following items of damage,

to wit: for reduction of milk gallonage, 250 gallons a year for the years 1936, 1937 and 1938, at fifteen cents per gallon, $112.50; extra feed for ten cows for ninety days in each of the years 1935, 1936 and 1937, at twenty cents per day, $540.00; total, $652.50.

Case No. 3358, Alfred Giroux and Leonard Giroux. The claimant, Alfred Giroux, is the owner of the East Half (E½) of Section Twenty-eight (28) lying north of the Illinois Central Railroad, and Lots Six (6) to Ten (10), both inclusive, in Hilaire Giroux's Subdivision of the West Half (W½) of Section Twenty-eight (28), containing approximately 215 acres; all of which is farmed by the claimant, Leonard Giroux. There is testimony in the record which shows a depreciation in the fair cash market value of this property as the result of the pollution of Rock Creek, but as previously stated, such testimony is not competent in this proceeding. The testimony shows that the claimant, Leonard Giroux, is a tenant on a cash rent basis and pays a rent of $5.00 per acre for the entire farm. Alfred Giroux testified that if it were not for the present condition of the creek, the farm should rent for $8.50 per acre, but on account of the creek he rents it to his son for $5.00 per acre. However, other testimony in the record shows that Leonard Giroux has rented the property since 1934 for $5.00 per acre. No loss on account of the pollution of the creek is claimed prior to 1936, and under the evidence we fail bo see that the claimant, Alfred Giroux, up to the time of the commencement of this proceeding, has suffered any loss of rent, or any other damage for which he is entitled to an award in this proceeding. From the evidence in the record it appears that the claimant, Leonard Giroux, is entitled to an award for the following items, to wit: loss of $80.00 on the sale of two cattle which ordinarily would be worth $90.00 each, one of which was sold for $55.00 and the other for $45.00; reduction of milk gallonage, 250 gallons a year for the years 1936, 1937 and 1938 at fifteen cents per gallon, $112.50; extra feed for ten cows for ninety days in each year during the years 1936, 1937 and 1938 at twenty cents per cow, $540.00;—total, $732.50.

There was also some testimony to the effect that one of claimants' cows died and two others became sick, but there is nothing in the record to show that the death of the one cow or the sickness of the others was the proximate result

of the condition of the stream in question, and no allowance can be made for either of such items.

Claim No. 3359. The claimants, Henry P. Wright; E. Belle Wright, Edward Wright, and Milton Wright, are the owners and tenants in common of 134 acres in the Southeast Quarter (SE¼) (west of the railroad) of Section Twenty-one (21), and 44 acres in the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) of Section Twenty-eight (28), which farm is operated by them as partners. This land is approximately one and one-half miles west of the Manteno State Hospital and is traversed by Rock Creek for a distance of a little over one-half mile. There is testimony in the record as to the depreciation in the value of this farm, but as previously stated, such item of damages cannot be considered in this proceeding. The evidence shows, however, that the claimants have sustained damages and are entitled to an award for the following items, to wit: reduction in milk gallonage of 600 gallons a year during the years 1936 and 1937, at fifteen cents per gallon, $180.00; extra feed for cattle during the years 1936 and 1937, twenty-one cows for ninety days in each year, at twenty cents per day, $756.00;—total, $936.00.

An award is therefore entered in favor of the several claimants as follows:

Claim No. 3353, Joe McComb and James McComb, Five Hundred Sixty-two Dollars and Fifty Cents ($562.50).

Claim No. 3354, Alfred Jacobs and Faye Jacobs, One Hundred Twenty Dollars ($120.00).

Claim No. 3355, Ed P. Smith, Four Hundred Eighty Six Dollars ($486.00).

Claim No. 3356, Oscar LaMore, Eighteen Hundred Eighty-one Dollars ($1,881.00).

Claim No. 3357, Alfred Benoit, Six Hundred Fifty-two Dollars and Fifty Cents ($652.50).

Claim No. 3358, Leonard Giroux, Seven Hundred Thirty-two Dollars and Fifty Cents ($732.50).

Claim No. 3359, Henry P. Wright, E. Belle Wright, Edward Wright, and Milton Wright, Nine Hundred Thirty-six Dollars ($936.00).

(No. 3603—Claimant awarded **$27.00.)**

H. N. SHONKWILER, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion filed June 10, 1941.

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid—before presentment of bill therefor—when* ***award*** *may be made for price thereof.* Where it is indisputed that State received supplies, as ordered by it, and that bill therefor, in correct amount, was not presented before lapse of appropriation out of which it could be paid, due to no negligence on part of claimant, an award may be made for amount due, **on** claim filed within a reasonable time.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant, H. N. Shonkwiler, operates a news distributing agency in the City of Springfield, Illinois. On April 21, 1941 he filed his claim in this court asking payment of $27.00 for the delivery of newspapers to the Department of Registration and Education from January 1st, 1939 to July 1,,1939; the particular items being Chicago Tribune, $9.00; St. Louis Globe, $9.00; and the St. Louis Post, $9.00—total $27.00.

Claimant represents that the bill was not presented for payment due to claimant's illness. A report has been filed by the Department of Registration and Education which recites that the papers in question were ordered and were received by the Department in regular course of supplies; that a Voucher for a Warrant covering payment was not issued prior to September 30, 1939, when the appropriation from which the item could have been paid, had lapsed; that if a statement had been received in apt time, warrant for payment would have issued in due course; that the price charged is the usual and customary price; that at the time of delivery thereof there were sufficient funds in the appropriation from which such bill might have been paid, to have paid same; and that sufficient funds remained in the appropriation at the time of the lapsing thereof, for such payment. The report further states that the newspapers were supplied to the Department for its use in checking unlawful advertisements and other matters pertaining to the work of such Department. The claim comes before the court upon stipulation of the parties waiving Brief and Argument.

Where the facts are undisputed that the State has received supplies ordered by it in accordance with due authority, and, has received such supplies and used same, and that the bill therefor was not paid before the lapse of the appropriation out of which it could have been paid, an award for the amount will be made. (See *Shell Petroleum* Co. vs. *State*, 7. C. C. R. 224 and other cases).

An award is therefore allowed in favor of claimant in theh sum of $27.00.

(No. 3568—Claim denied.)

JAMES STRONG, A MINOR, BY KENNETH B. STRONG, HIS FATHER AND NEXT FRIEND, AND KENNETH B. STRONG, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 10, 1941.

HALL & HULSE, for claimants.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

NEGLIGENCE—*officers, agents or employees of Local Board of Education—personal injury resulting from — State not liable for.* There is no liability on the part of the State, upon any theory of law or equity to respond in damages for personal injuries suffered by student of public school maintained by local Board of Education, as the result of the negligence of the officers, agents or employees thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This complaint, consisting of two counts, alleges that James Strong, a minor, by Kenneth B. Strong, his father, and next friend, and Kenneth B. Strong, are claimants; that on the 21st day of December, 1938, James Strong, being then of the age of ten years, was enrolled in and attended Lincoln Grade School in the Village of Mundelein, County of Lake, and State of Illinois, a school being a free a public grade school conducted under the laws of the State of Illinois and located in School District No. 75 in the Village of Mundelein, and governed and supervised by the Board of Education of said School District No. 75.

That on that date and prior thereto there was situated upon the premises of the said school, for the use and recreation of the pupils attending the school, a devise or appliance commonly known as a slide, and James Strong attended the

school, and during recess on the afternoon of December 21, 1938, was using the slide. It is also charged that it was the duty of the Board of Education to use all due care, caution and diligence in the maintenance, control, management and operation of the slide so that it would be in a safe and proper condition, and free from any defects, having due and proper regard for the rights and safety of all persons lawfully and rightfully thereupon, and particularly the pupils of the school, so as to avoid or prevent any injury to any such person or persons, but notwithstanding this fact, and disregarding its duty in this behalf, the respondent, meaning the State of Illinois, carelessly and negligently and improperly failed to keep and maintain the slide in a safe and proper condition, and permitted it to become defective and in a dangerous and unsafe condition, and that by means of the premises and the negligence of the respondent, aforesaid, and as the direct and proximate result thereof, the said James Strong, while using this slide fell to the ground below with great force and violence, and was greatly hurt and bruised; and the usual averments contained in a common law complaint concerning his injuries are made therein.

The second count is largely repetition of the first count, and in addition thereto alleges that as a direct and proximate result, and in consequence of the fall, the claimant James Strong became inflicted with and is still suffering from an ailment known as Osteomyelitis.

The complaint is sworn to and a Bill of Particulars is filed showing hospital bills, nurses bills, medical bills, totaling $3939.16, and alleging that there are other and continuing expenses, and damage is asked sufficient to be an adequate allowance and compensation, so as to pay all bills and for such other and further relief as to the court should seem meet.

The Attorney General has made a motion to dismiss on the grounds that complaint does not set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay.

The claimants, claim is predicated on alleged liability of respondent while engaged in a governmental function because of the negligence and wrongful acts of its officers, agents or employees.

In the case of *Crabtree* vs. *State*, 7 C. C. R. 207, this court held that the Court of Claims has jurisdiction to recommend

an award only where the State would be liable in law or in equity in a court of general jurisdiction if it were suable, and we have many times held that in the exercise of its governmental function the State is not liable for the negligence of its servants or agents in the-absence of a statute making it so liable.

We have also held that the doctrine of respondeat superior does not apply to the State of Illinois.

In the case of *Gebhardt* vs. *Village of LaGrange Park,* 354 Ill. page 234, the Supreme Court of this State held that the principles on which freedom for liability for damages occasioned by servants of a municipality in performing governmental functions is based rests on the fact that the duty of the municipality is owed to the public.

The complaint in this case, however, does not charge the State of Illinois as a matter of law of having any control over the playgrounds of the school, In the Gebhardt case last above referred to, it was also held that in the absence of a statute imposing such liability a city or village maintaining a swimming pool for the public benefit under the Statute is not pecuniarily liable for the negligence of its officers or servants in the discharge of their duties relating to that particular function as the municipality in such case is engaged in a governmental and not proprietary function, and the fact that a fee is charged for the use of the pool does not destroy its character as a public place for recreation and health.

Other Supreme Court cases sustaining this doctrine are:

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.**

Therefore the motion of the Attorney General will be sustained and an award denied.

(No. 3229—Claimants awarded $12,500.00.)

FRANK WEISS AND EMMA WEISS, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 14, ***1941.***

Rehearing denied June ***10,*** *1941.*

FRANK E. LICKHALTER and H. GRADY VIEN, for claimants.

OTTO KERNER and GEORGE F. BARRETT, Attorneys General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

DAMAGE TO *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, an award may be made for such damage, and the proper measure thereof, is the difference between the fair, cash market value of the property unaffected by the improvement and its fair cash value as affected by the improvement.

SAME—*same—same—interference with ingress and egress proper element of.* Where the construction of a public improvement, results in interference with ingress to and egress from private property not taken for public use, such interference is a proper element of damages where value of such property is depreciated by reason thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

The original complaint was filed in this cause 'March 16, 1938. An amended complaint was thereafter filed on January 9, 1940. Such amended complaint having been filed because of an amendement to the Statutes of Illinois making procedural changes for the handling of claims of this nature. Due to such change in legislation and the decision of the Supreme Court of Illinois thereafter rendered, holding such legislation unconstitutional, certain delays have occurred in disposing of this claim. In the Bill of Particulars attached to the original claim, claimants ask damages as follows:

To damage to 'walls, ceilings, and buildings, caused by driving of piles and other construction work..	$ 3,000.00
To trespass on property..	2,000.00
To depreciation in value of property..	65,000.00
To loss due to liquidation of stock in trade, and sale of fixtures..	17,000.00
To loss of business..	10,000.00
Total	$97,000.00

The property involved herein is owned by Frank Weiss and Emma Weiss as joint tenants and same is unencumbered according to the record herein submitted.

The property is located on the south side of St. Clair Avenue immediately adjoining the Pennsylvania railway tracks in the city of East St. Louis, Illinois and the claim for damages grows out of the purported damage to the property resulting from the construction of a subway under the Pennsylvania railroad tracks, the depression of St. Clair Avenue immediately in front of claimants' property, and the erection

of a balustrade at the top of such subway, whereby ingress and egress to claimants' property was affected. The major facts involved herein and the law applicable thereto are the same as the facts and legal questions arising in the case of *Aggie Nauyoks* vs. *State* of *Illinois,* Court of Claims No. 3504, and 18 other consolidated cases decided this date by this court. To avoid repetition of those matters as affecting this claim, a reference to the opinion this day rendered in such other causes is hereby made and we confine the comments herein to matters which pertain only to this particular property. The property of these claimants is improved with a two story brick building, having a frontage of 63 feet on the south side of St. Clair Avenue and a width of 90 feet at the rear of the premises, with a depth of **123** feet. The second floor of such building does not extend to the extreme rear of the first floor. The latter consists of one large store room and the upper floor consists of two apartments, one of which was occupied by claimants for dwelling purposes and the other being rented to another 'party. The claimant Frank Weiss was operating a general clothing or mercantile business in the first floor store room when the construction of the subways was begun, and had operated such a store on these premises for some 18 years. Claimant bought the property about November 19,1928, paying $25,000.00 for same and thereafter expended approximately $7,500.00 in improvements. In 1937 one apartment was renting for $40.00 per month and a garage in the rear was rented for $5.00 per month. Claimant testified that after the construction of the improvement he rented his upstairs apartment for $50.00 per month and the garage for $10.00 per month. The store room has remained unrented since the subway work and the building shows a marked state of deterioration. On May 20, 1937 claimant sold his mercantile stock to a Mr. Hirsch for $5,700.00 and testified that an invoice of such merchandise at the time of the sale showed a value of $11,927.60; further that Hirsch thereafter held a sale in the course of which he made better than $5,000.00 profit from such merchandise. Claimant further testified (Tr. P. 22) that he acted as manager and clerk for Mr. Hirsch in conducting the sale of such mercantile stock following the purchase by Hirsch from him of same. The record is somewhat confusing as to just what the relationship between Mr. Weiss and Mr. Hirsch was, as the latter testified (Tr. P. 53) that

"after he bought the stock he had an opportunity to sell it in bulk but that Mr. Weiss would not let him sell.'' The latter's testimony shows an invoice of fixtures on May 15, 1937 at a valuation of $4,100.00 and that in disposing of same he took an estimated loss of $3,162.00. These fixtures were mostly second hand cabinets and shelving that he had bought from a St. Louis Department store and had had rebuilt to fit his own store room. The record does not show to what extent they had been attached to the building or what portion might be treated as personal property, but counsel for claimant has advanced the view that all of such fixtures were so placed as to be considered personal property. If the fixtures are treated as personal property, the court is of the opinion that same could have been salvaged, sold or removed without material damage, and in the absence of sufficient testimony whereby to determine what portion of the fixtures were in fact personal property, no award for damages thereto will be made, but same will be treated as forming a part of the value of the premises as a whole.

Claimants contend that the damages to their property, as outlined in their Bill of Particulars was caused by the interference with ingress and egress to the premises, injuries to the building by reason of cracks that resulted from pile driving and construction work on the railroad grant and subway, sagging of doors and frames, the raising of the railroad tracks whereby trains now pass on a level with apartment windows necessitating the drawing of blinds for privacy and a general trespass on property. Their contention as to the last item was apparently abandoned in the course of the hearings as no reference is made thereto except in Bill of Particulars.

As above suggested, this court has today considered the several questions of law relating to the various phases of this claim, including loss of business, loss due to liquidation of stock, depreciation in value and inconvenience during the period of construction. We desire to call attention, however, in addition to the matters therein stated to the fact that the record in the present case discloses that as to the claim for loss of value on merchandise, that the testimony shows that the mercantile stock was invoiced at $11,927.60 just prior to the construction of the subways and that if same was sold for $5,700.00 to Hirsch and the latter thereupon continued the sale

with Weiss as his manager and received a profit in excess of $5,000.00 on such mercantile stock that no apparent loss in value of such mercantile stock is shown whereby to justify an award.

The damage to walls, ceilings, etc., is regarded by the court as an element in determining the total damage to the property. The rule being that the measure of damage in a case of this kind is the difference between the fair cash market value of the property prior to the construction of the improvement and unaffected thereby, and the value of the property after the improvement as affected by same.

There is a wide variance of opinion between the several witnesses as to the value of these premises at the stated periods and the resultant damage. The several witnesses testified as follows:

For the Claimants	As of May 15,1937	As of Dec. 15,1938	Damages
Clarence G. Rogers..	$47,000.00	$5,000.00	$42,000.00
D. Leroy Morgan	38,878.00	7,000.00	31,878.00
R. W. Sikking	30,000.00	5,000.00	25,000.00
Philip H. Cohn.	50,000.00	6,000.00	44,000.00

It mill be noted that one of these witnesses was of the opinion that this property doubled in value after it was 35 to 40 years old, claimant having paid $25,000.00 for it originally.

For the Respondent			
M. L. Harris..	15,000.00	7,500.00	7,500.00
F. P. Beckwith	13,835.00	7,990.00	5,845.00

This property is located directly north of the Anna Zelvis property referred to in the consolidated cases above mentioned. The 20 foot service drive extends from the end of the subway 203 feet distant to the north line of claimants, property, and while ingress and egress is not entirely shut off from said premises, the building is seriously affected by the subway construction and is no longer available to the same extent for the conduct of a mercantile business that it was prior to the subway work.

From a consideration of all the testimony, the inspection made of the premises and a comparison of the property and its location and its value with surrounding properties, the court finds from such record that the property of claimant has been damaged by reason of the construction of such subway to the amount of Twelve Thousand Five Hundred ($12,500.00) Dollars.

An award is therefore recommended in favor of claimants, Frank Weiss and Emma Weiss in the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars.

(No. 3433—Claim denied.)

BAUM PACKING COMPANY, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion Pled June 23, 1941.

GEORGE H. WEBB, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*amount paid in, excess of that due—owing to error* of *Secretary of State—paid without protest and with full knowledge of facts—is voluntary payment—refund* of *amount paid, claimed in* excess *of that due—remedy available to claimant—failure to avail of—bars award.* The question presented here has been before this court many times and was fully discussed and decided, among other cases, in *Butler Company* vs. *State,* 9 Court' of Claims Reports, 503 and *Niles Center Mercantile Co.* vs. *Btate,* 10 Court of Claims Reports, 30 and what was said by the court in such cases is decisive herein.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant avers that it is a corporation organized under the laws of the State of Illinois, and for more than five years last past has been engaged in the manufacture and sale of meat products in Danville and vicinity; that it has an authorized capital stock of $60,000.00; that on May 15, 1937, the corporation received a notice from Edward J. Hughes, Secretary of State, requesting payment of $60.00 franchise tax, copy of which notice is attached and marked Exhibit "A," and pursuant to the notice the corporation sent its check payable to the Secretary of State in the sum of $60.00. Thereafter, on May 16, 1938, the corporation received notice from the Secretary of State that there was due the State of Illinois the sum of $60.00 franchise tax, and a copy of that notice was attached, and that same was duly paid by claimant. That in each of the notices it was stated that the capital stock of this corporation was $120,000.00, when in truth and in fact the capital stock of the corporation was only $60,000.00, and that the corporation relying upon the amounts stated in the secretary's notice paid a tax on the amount of capital stock stated

in said notice and that there was actually due the State of Illinois the sum of $30.00, for each of said years and not the sum of $60.00 for each of said years, and there is now due the claimant the sum of $60.00 as an overpayment.

It is also averred that on June 24, 1939 claimant called to the attention of the Secretary of State the fact of this overpayment for the years 1937 and 1938 and on June 27, 1939 claimant received acknowledgment of the letter to the Secretary of State in which he acknowledged the erroneous assessment, but stated he could not refund the amount of the overpayment because the amount had been paid to the State Treasury.

The Attorney General has made a motion to dismiss and as grounds of the motion he says that claimant does not set forth a claim which the State of Illinois could discharge and pay, in that claimant herein seeks a refund of franchise tax paid in 1937 and 1938, not under protest or with objection thereto, and without a request for a hearing thereon in accordance with the statute of the tax now alleged to have been erroneously assessed.

In view of the facts, this court, though reluctant to do so, must sustain the motion of the Attorney General.

It is not claimed that objection of any kind was made by the claimant. This court has had occasion to pass upon similar facts many times and now it is a settled doctrine of this court that 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, such payment consisted of voluntary payment within the legal meaning of these words.

Fried & Bell Paper Co. vs. *State, 8* **C. C. R. 531;**
Niles Cewter Mercantile Co. vs. *State,* No. 2608 and others.

These facts were well known to claimant. It certainly knew the amount of its capital stock, and it is presumptional law that its managing officers knew the statute providing for a hearing on this very question. The argument is made by counsel for claimant that common honesty and decency requires a refund of the amount *in* question, and he has ably presented in oral argument that question, and he likens it to an individual who has received money from someone for which

he is not justly entitled, but we think that this is not a fair comparison.

The Secretary of State has a multitude of duties, both in the corporation department, and for other things. Manifestly, he must rely upon others to perform those services. Manifestly, these duties must be performed with much dispatch. While it may be said that the claimant likewise has many duties to perform yet this is personal to the claimant and ever since its business was incorporated it has known the amount of its capital stock, yet, when the representative of the Secretary of State, in its notice demanded payment on the capital stock of $120,000.00, claimant must have known that this was in excess of the amount of its capital stock, and should have immediately advised the Secretary of State of its error. When such information did go to the Secretary of State, the error in amount of capital stock was promptly corrected, but inasmuch as the Secretary of State is required to promptly pay all funds he receives into the State Treasury, and that having been done, the Secretary could not, as a matter of law, return this money to claimant.

The only way that that money could now be paid to claimant would be by a Special Act and Appropriation of the Legislature, with the attendant confusion to other State business caused thereby.

This court, and the Supreme Court of Illinois, have repeatedly held that where an illegal or excessive tax is paid voluntarily, and with full knowledge of all the facts, it cannot be recovered, and where such tax is paid under a mistake of law, it may not be recovered.

For the reasons herein stated, the claim will be denied.

(No. 3095—Claim denied.)

OTTO J. BLAHA, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 23, 1941.

NASH, AHERN, MCDERMOTT, MCNALLY & KILEY AND MICHAEL M. PHILLIPS, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*giving notice of accident, making claim for and filing application for compensation within time fixed in Section 24 of,*

condition precedent to jurisdiction of court. Where no notice was given by employee to State of the accident, for which compensation is sought, and no claim made for, nor application filed for compensation, within time fixed in Section 24 of Act, court is without jurisdiction to proceed with hearing on claim filed thereafter.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The complaint charges that on the 1st day of June, 1936, claimant was in the employ of the State of Illinois, in the office of the Auditor of Public Accounts, in the Division of Building and Loan Association as a State Examiner, it being his duty to examine books and records of Building and Loan Associations and to travel through the State on behalf of the State in the counties of Cook, Kane and Lake, for the aforesaid purpose. That while so employed, it became necessary for the claimant to go upon an errand for and on behalf of his employer, which errand took him along and upon LaSalle Street in the City of Chicago, and that adjacent to the building, which is upon the aforesaid street, known and described as 100 North LaSalle Street, was a public sidewalk which was used by the general public. The building at 100 North LaSalle was owned and operated by the Reywall Building Corporation. That at all times both prior to and at the time of the occurrence of the accident, claimant was in the exercise of due care and caution for his own safety. That at the time mentioned claimant was on LaSalle Street it was the duty of the aforementioned owner of the building to equip, maintain, control, manage, operate and use the said public building so as not to injure one rightfully upon the sidewalk, but notwithstanding that duty, the owner of the building improperly equipped, maintained, controlled, and managed it so that a certain glass window was caused to and did actually fall from the sixth floor of the building and struck the claimant with great force and violence and caused severe injuries to claimant, and claimant has filed his claim against respondent for the sum of $25,000.00.

The facts set forth in the complaint are that of an action in common law, but the State is not liable under our Constitution for an action of that kind, and the claimant, being in the employ of the Auditor of Public Accounts, we have taken the complaint as that of a petition under the Workmen's Compensation Act. However, it does not appear from the complaint that notice of the accident was ever given to the respondent

or any claim for compensation made prior to the filing of the complaint herein. Under Section 24 of the Compensation Act notice of the accident should be given within 30 days after the accident. This was not done, and this court has no jurisdiction to entertain a claim for an award for compensation to an injured State employee unless it is shown that notice of the accident was given within thirty days after the accident, and claim for compensation made within six months from the time of the accident.

Inland Rubber Co. vs. *Industrial Comm.*, 309 Ill. 43; *Moustgaard* vs. *Industrial Comm.*, 332 Ill. 386.

and numerous other authorities.

No notice having been given, and no claim for compensation having been made within the time required by law, the motion to dismiss must be allowed and the claim dismissed.

(No. 3569—Claimant awarded $68.40.)

BUREAU OF WATER OF THE CITY OF CHICAGO, A MUNICIPAL CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion Pled June 23, 1941.

BARNET HODES, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation out of which could be paid-before presentment of bill—when award may be made for price of.* Where it clearly appears that State received supplies, as contracted for, and that bill there. for, in correct amount was not presented before lapse of appropriation out of which it could be paid, due to no negligence on part of claimant, an award may be made for amount due on claim filed within a reasonable time.

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

The parties hereto have stipulated that this claim may be considered upon the report of the Adjutant General and the report of the Auditor of Public Accounts of the respondent relative thereto.

From such reports it appears that the claimant furnished water for the Diversey Parkway Armory in Chicago from November 18, 1938 to September 30, 1940; that on December

7, 1939 a statement for water service to that date was ren-, dered to the custodian of the Armory who transmitted same to the Adjutant General's office; that thereupon the Adjutant General advised claimant that separate statements should be furnished for the period prior to June 30, 1939 and for the period subsequent thereto, and that inasmuch as the appropriation for the 60th biennium had lapsed, the statement for the service furnished prior to June 30, 1939 should be presented to the Court of Claims.

There is no question but what water service was furnished, as contended by claimant, and that pursuant to the terms of the lease under which the Armory was held the lessee is liable for such service. It also appears from the report of the Auditor of Public Accounts that on November 18, 1938 the unexpended balance in the Adjutant General's appropriation made by the 60th General Assembly under the heading of "Illinois National Guard and Naval Militia" for ordinary expenses, repairs and equipment was $325,143.79.

We have repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable, without any fault or neglect on the part of the claimant, an award for the reasonable value of such materials or supplies will be made, where, at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same. *Rock Island Sand & Gravel* Co. vs. *State*, *8 C.* C. R. 165; *Indian Mortorcycle* Co. vs. *State*, 9 C. *C.* R. 526; *Metropolitam Electrical Supply Co.* vs. *State*, 10 C. *C.* R. 346.

This case comes within the rule above set forth, and award is therefore entered in favor of the claimant for the sum of Sixty-eight Dollars and Forty Cents ($68.40).

(No. 3606—Claimant awarded $300.47.)

RUDOLPH GAYAN, Claimant, *vs.* **STATE** OF ILLINOIS, Respondent.

Opinion filed June 23, 1941.

THEODORE W. HINDS, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for loss of finger under.* Where employee of State sustains accidental injuries, arising out of and in the course of his employment, while engaged in extra-hazardous employment, resulting in loss of finger, an award may be made for compensation therefor, in accordance with the provisions of the Act, upon compliance by employee with the requirements thereof.

MR. JUSTICE YANTIS delivered the opinion of the court:

This is a Workmen's Compensation claim arising out of an injury to claimant, Rudolph Gayan, while employed by the Division of Highways. The record discloses that on November 26, 1940 claimant was working as a highway maintenance man for said Division of the Department of Works and Buildings in District No. 3; that he had worked in that capacity at a salary of $135.00 per month throughout the year next preceding such date; that he had no children under sixteen years of age dependent upon him at that time. The record further discloses that at about 7:15 P. M. on said date he was engaged in the course of his duties in uncoupling a snow plow from a truck owned by the Division of Highways, the work being done in a storage yard on land leased by the Division at Streator, Illinois, and the purpose thereof being to permit the repair of the plow-hoist. While so working, his right index finger was caught in the coupling and was crushed. Claimant was taken to St. Mary's Hospital in Streator, and the attending physician, Dr. Munson, later reported to the Division, regarding the injury as follows:

"Crushing injury to distal phalanx of finger. Treatment—amputated distal phalanx. Permanent disability—total loss of distal phalanx right index finger."

Claimant returned to work for the Division on January 6, 1941. He was paid compensation for temporary total disability in the total sum of $123.82 for the period from November 27, 1940 to January 5, 1941 inclusive. The Division also paid Dr. F. W. Munson $44.00 and St. Mary's Hospital $96.00, being all the medical and hospital expense incurred in connection with such accident.

Claimant seeks an award for the specific loss of the distal phalange of his right index finger, and in submitting his claim acknowledges that he has heretofore received an overpayment of $29.53 for temporary total disability heretofore paid him for time lost because of such accidental injury. This computation is correct as claimant would be entitled to such tem-

porary total disability from November 27, 1940, or a period of 5 5/7 weeks. His average weekly wage was $31.54. He would therefore be entitled to the maximum of $15.00 per week plus ten (10) per cent, or a rate of $16.50 per week, or a total of $94.29. He was paid $123.82, or an over-payment of $29.53.

Under the provisions of Section 8 (e) Subsections 2 and 6 of the Workmen's Compensation Act, he is entitled to a further award for specific injuries, i. e., the loss of the first phalange of the index finger of the right hand, fifty (50) per cent of his average weekly wage for the period of twenty (20) weeks, or $330.00. From this amount should be deducted the over-payment of $29.53 heretofore made for temporary total disability, leaving a net award of $300.47.

An award is therefore hereby made in favor of claimant, Rudolph Gayan, for specific injuries as above stated in the sum of $300.47.

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled, "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Quarter After the Adjournment of the Nest Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the Road Fund in the manner provided by the foregoing Acts.

(No. 2721—Claim denied.)

M. D. KNOWLTON CO., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion, filed June 23, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

FRANCHISE TAX—*paid without compulsion or duress—claim for refund of amount alleged to be in excess of that due—statute affording remedy to claimant—failure to avail of—bars award.* Where statute affords 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 pays tax without compulsion or duress, such payment is a voluntary one and no award can be made for refund of any such excess amount.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The following was received from petitioner :

"We have a letter dated the 2nd of August from the Secretary of State of Springfield, Illinois, stating that he can not refund to us the taxes erroneously collected unless we make a claim through your Court of Claims.

"The amount of the refunds is so small that all of it would be used up if we went through any legal procedure or red tape. We, therefore, ask that you communicate with the Secretary of State of Springfield, Illinois and confirm these items and request him to send us his check for this amount. The amounts to be refunded are as follows:

For the year 1932—$40.00 refund
For the year 1933—$40.00 refund
For the year 1934—$ 7.34 refund

making a total of $87.34.

"They have our certified copies of our annual reports for all of these Years and 'simply made the bills out incorrectly in sending them to us. Our annual statements are on file with the Secretary of State of Springfield, Illinois and they show the proper capital stock issued.

"We would appreciate your giving this your attention in carrying out the matter as outlined—that efficiency and saving of expense may be carried out.

"No'one else has any interest in this claim.

M. D. KNOWLTON COMPANY.
(Signed) F. K. KNOWLTON.
FREDERICK K. KNOWLTON, *Vice Pres.*

(SEAL)
(NOTARY PUBLIC)

Subscribed and sworn to before me this 20th day of August, 1935."

We have treated the above as a complaint. Apparently claimant did not consider it worth while to employ counsel. Apparently they are a foreign corporation. The claim was filed on August 23, 1935. The total amount of refund they are asking is $87.34.

The Attorney General puts up the facts, and it appears that claimant had its secretary's annual reports for the years mentioned, and made out the bills incorrectly in forwarding such bills to the Secretary of State.

This corporation formerly represented to the Secretary of State that it had a capital stock of $900,000.00, all of which

was issued under the general corporation act of 1919, as amended in 1927. The fees charged by the Secretary of State's office were based upon the issued stock, which issued stock would become the stated capital under the present Corporation Act of 1933. Nothing was filed with the Secretary of State showing a change of capital or a change in the issued stock until June 28, 1935.

Pursuant to Section 102, Chapter 32, of the General Corporation Act of 1919, a corporation must make a report in writing to the Secretary of State between February 1, and March 1st of each year, on forms to be furnished by the Secretary of State, and such report must disclose such facts as are necessary to enable the Secretary of; State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in the State of Illinois, and such other information as may be necessary or appropriate in order to assess the actual license fee or franchise tax.

Section 105 of the same chapter provides that each corporation shall pay the Secretary of State an annual license fee or franchise tax of five cents on each $100.00 or the proportion of its issued capital stock represented by business transacted and property located in this State, but in no event shall the amount be less than that required of corporations having no property or business in this State.

Section 115 of the 1933 Corporation Act made provision for the annual report to be filed by foreign corporations and requiring information in the report on numerous matters which included a statement expressed in dollars of the value of all the property owned by the corporation, wherever located, and the value of the property located within this State, and a statement expressed in dollars of the gross amount of business transacted by the corporation for the twelve months ended on the 31st of December preceding and the gross amount transacted by the corporation at or from places of business in this State.

Nothing appears in the record showing duress of any kind, or any facts which would justify this court in directing a refund by the way of recommending an award to the Legislature for the amount involved.

The question at issue in this claim seems to have arisen from the fact that a report made by the corporation of its out-

standing capitalization was $900,000.00, when, in fact, sometime in 1932 its capitalization was reduced to $300,000.00, and no formal report of such reduction was made to the Secretary of State until June 28, 1935. The annual report made by claimant for 1932 and on which assessment was made for that year, showed the capital stock as $900,000.00. Apparently the assessment for that year was correctly made. It was $50.00 based upon Section 107 of the Act above referred to, which fixed an arbitrary assessment of $50.00 on corporations having capital of more than $500,000.00 and not exceeding one million dollars, and diose business in Illinois was not sufficient to justify a higher assessment under Section. 105.

Other provisions of the statute make provision for correction of errors, if made in that time, and this must be strictly followed. It is a general rule in this State that taxes paid voluntarily and not under duress cannot be recovered by the taxpayer even though the tax be illegal.

Davis vs. *Board of Education,* 323 Ill. 281;
Yates vs. Royal *Insurance* Co., 200 id 102.

and reaffirmed the case of *LeFevre* vs. *County* of *Lee,* 353 111. 30.

This court has no power or jurisdiction to waive rules of law of this kind or character. The court is a creature of the statute and has no powers except those expressly conferred upon it by statute, or such powers as are necessary to carry out the powers so conferred. It has no power to appropriate, give away, or dispose of State funds or property for a purpose not authorized by law.

Without unduly discussing this proposition, me must hold that taxes paid under the circumstances in this case cannot be recovered and claim must be denied.

(No. 3350—Claim denied.)

RAYMOND C. LEFLER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 23, 19/11.

GLENN E. MILLER, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*compensation under- only authorized for accidental injuries— when disability resulting from appendectomy not within*

provisions of—award not justified. Under the Workmen's Compensation Act compensation is authorized only for accidental injuries, arising out of and in the course of employment, while engaged in extra-hazardous employment and where the evidence shows that disability for which compensation is sought was the result of an appendectomy, not caused by any injury but from an internal condition no award can be made.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant alleges he was employed as a prison guard by the penal institution of the Division of Public Welfare at the old Illinois State Penitentiary, at Joliet, Illinois, and on January 26, 1938, at two o'clock a. m. he was stricken with acute appendicitis and immediately rushed to St. Joseph's Hospital at Joliet, Illinois, where an emergency operation was performed by Dr. W. J. Roberts of Lockport, Illinois. That as a result of said operation pneumonia developed which left claimant bedridden for a period of seven weeks, and as a result thereof claimant was not able to return to work until April 1, 1938. He charges that although he was stricken while on duty and in the course of his employment with respondent, and while furthering the interests of respondent for which he was employed, yet he has never received any compensation, wages or salary or any other remuneration from respondent for the period in which he was out of employment. He claims to be entitled to the sum of $237.50, being for two months salary at $118.75 per month, and doctors bill amounting to $148.00, nurses bills totaling $50.61, and states that he presented his bill to John Stelle, Lt. Governor of the State of Illinois and in turn the Lt. Governor turned the same over to Edward J. Hughes as Secretary of State and ex-officio secretary of the Court of Claims; that the said Hughes, as Secretary of State and ex-officio secretary of the Court of Claims advised claimant by letter to file a claim with this court. The total amount asked for is $436.11.

There is nothing alleged in the complaint showing that claimant's ailment arose out of or in the course of the employment, and there is no evidence in the record to justify a holding that the claimant's condition was accidental or arose out of or in the course of his employment. His physician, Dr. Roberts, in answer to the following question:

"The operation that you performed was an appendectomy—no relation to hernia at all? This condition that you found in Mr. Lefler's case was from an internal condition?"

A. "Yes, internal, not occupational."

The physician stated that from the appendectomy there was a complete recovery and nothing to indicate claimant had any permanent disability. The doctor stated from his experience he would say that the appendicitis in this case was not the result of any occupational ailment.

Before there can be a recovery it would be necessary for claimant to show some law upon which the court could base an award. He has shown no legal basis for an award.

The claim will, therefore, be denied.

(No. 3244—Claimant awarded $148.65.)

PROGRESSIVE PRINTING & CALENDAR CO., INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June *23, 1941.*

MEYER B. WEISSMAN AND PHILIP N. SHAPIRO, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

RETAILERS' OCCUPATION TAX—*payment of* tax not *due under—when* award *for* refund of is authorized *under* Section *6* of Act. Where claimant paid retailers' occupation tax, which was not lawfully due or owing and is afterwards issued a credit memorandum by Department of Finance, for a part thereof, an award for the refund *of* the balance is justified, under the provisions *of* Section 6 of Retailers' Occupation Tax Act.

MR. JUSTICE YANTIS delivered the opinion of the court:

Claimant seeks an award of One Hundred Forty-eight and 65/100 ($148.65) Dollars for a refund of Retailer's Occupation Tax. The complaint alleges that cluring the period from July, 1933 to February, 1936, claimant paid Nine Hundred Ninety and 99/100 ($990.99) Dollars on special printed matter, which had no commercial value and was not subject to the occupation tax under the above statute. (Chapter 120, Illinois Revised Statutes, 1937.) On Marcb. 10, 1938 the Department of Finance issued claimant a credit memorandum for Eight Hundred Forty-two and 34/100 ($842.34) Dollars. Claimant contends that under Section 6 of the Retailer's Occupation Tax Act it was entitled to a refund of the full amount of Nine Hundred Ninety and 99/100 ($990.99) Dollars, and now seeks to recover the balance of One Hundred Forty-eight and 65/100 ($148.65) Dollars.

Nothing appears in the complaint as to why a portion and not all of such refund was made;

The Attorney General filed a motion to dismiss the claim on the ground that it shows upon its face that claimant has an adequate remedy at law in the courts' of general jurisdiction, and that therefore the Court of Claims should not take jurisdiction. This motion has been taken under advisement with the case. The cause is now submitted upon such motion, a report from the Department of Finance and Brief and Argument of the respective parties.

Section 6 of said Act (Par. 445, Chap. 120, Ill. Rev. Stat. 1937) provides as follows:

"If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the person who made the erroneous payment, or such amount shall be refunded to such person by the department."

It appears that under a rule promulgated by the Retailer's Occupation Tax Division of the Depastment of Finance, identified as Rule No. 36, claimant corporation paid taxes to the Department in the amount of Nine Hundred Ninety and 99/100 ($990.99) Dollars on receipts from sales of special printed matter, it being the ruling of the Department at that time that such sales were within the meaning of the Retailer's Occupation Tax Act. The Supreme Court of Illinois in the case of *Adair Printing Cornpamy, et al.* vs. *Arnes, et al.*, 364 Ill. 342, held that such ruling was in error and that the tax should not be applied to sales of special printed matter which was without commercial value, i. e., which has no use or value to any person other than the one for whom the printing is done, such as letterheads, circulars, attorneys' briefs, etc. The Department revised its rule on October 26, 1936 in accordance with the above decision, and proceeded to accept claims for credit by those who had been compelled to erroneously pay such tax. In an effort to then collect such tax from those who had supplied such printers with supplies, the Department arbitrarily fixed a figure of 15 per cent of such tax previously paid by the printer as a deduction to be withheld by the Department. In certain instances this 15 per cent was not withheld if the printer furnished a satisfactory list of his material men or supply houses.

Claimant entered into no agreement with the Finance Department and did not furnish the requested list, and the following notation was made in regard to the 15 per cent deduction of refund in his case, i. e., "Deduction of which is hereby protested but allowed under protest, and claim for which 15 per cent is to be made before the Court of Claims or other appropriate body."

The Attorney General contends that if the claimant is, as a matter of law, entitled to a refund under Section 6 above quoted, and if it is the duty of the department to make such a refund, that claimant could enforce its rights by a mandamus case in a court of general jurisdiction. Further, that where the claimant has an adequate remedy at law in a court of general jurisdiction, the Court of Claims will not take jurisdiction for the purpose of making an award. The cases cited by counsel in support of the latter proposition are all somewhat different from the present case, because of the special wording of the Act here in question. In the *Mohawk Carpet Mill* Case, *8* C. C. R. 37 and the *Silver Burdette Company* Case, *8* C. C. R. 539, a franchise tax refund was involved, under a statute which provided that an injunction must first be sought by plaintiffs as a preliminary to other rights. In the *Booth Fisheries Company* Case, *6* C. C. R. **262** and *Childs* Case, 6 C. C. R. 308, litigation had been had in both instances in the Civil Courts and the suits before the Court of Claims would in effect have been a review of the decision of the Civil Courts. This court there held that it had no appellate jurisdiction and would not review or set aside directly or indirectly orders and decrees of the Civil Courts.

Under the wording of Section 6 of the Retailer's Occupation Tax Act above quoted, it is the apparent intent of the Legislature that a refund should be made of such tax when erroneously paid and not due under the provisions of the Act. It was the apparent intention of the Legislature that such refunds should be determined and made with as little difficulty or expense to the taxpayer as possible.

We have repeatedly stated that this court was created by the Legislature and exists for the purpose of considering claims for which the claimant would be entitled to redress against the State either at law or in equity, if the State were suable.

The Retailer's Occupation Tax Act provides for refunds in proper cases. Under the provisions of said Act, if the State were suable in the Civil Courts the claimant would have a right of action. There is nothing in the wording thereof which makes the filing of an injunction or mandamus suit a necessary preliminary for consideration by this court of the merits of such claim. Neither can the failure or refusal of claimant to furnish to the Department a list of the material men or supply houses from mhom it received supplies, justify the court in refusing an award, in view of the wording of Section 6 above quoted. They may be subject to criticism for lack of cooperation and failure to aid the Department in carrying out the law relative to the collection of tax, but nothing appears in the Act which would justify penalizing them for so doing, or which mould authorize the Department of Finance to arbitrarily fix a figure of 15 per cent as a deduction rate in the making of refunds to which claimant was otherwise entitled.

The motion of the Attorney General to dismiss is denied and an award is hereby entered in favor of claimant in the sum of One Hundred Forty-eight and 65/100 ($148.65) Dollars.

(No. 2888—Claim denied.)

ERNEST R. AMICK. Claimant, *us.* STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1941.

EVAN L. SEARCY, for claimant.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

SALARY—*agreement to accept less than amount appropriated for position—receipt of less amount—bars right to award for difference.* An employee of the State who holds a position for which a specific amount has been appropriated as salary, or compensation, who continues in such position throughout the entire biennium for which the appropriation was made and receives and accepts a smaller amount payable semi-monthly than was so appropriated as such. salary or compensation, cannot at the conclusion of such biennium have an award for the difference between the amount appropriated and the amount received.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant avers that he was in the employ of the State from July 1907 until October 1, 1935, and from July 1, 1931 to

July 1,'1933, he held the position of Chief Clerk and Statistician in the Department of Public Welfare, and for that two years the salary for said position as fixed by the Legislature was $4,000.00 per annum, but claimant was paid on the basis of $3,600.00 per year only.

The Bill of Particulars sets out the following :

Provided by 57th General Assembly.		
2 years at $4,000.00 per annum.....	$8,000.00	
Less 10% by agreement 2/1/33 to 7/1/33, 5 months, being 5/12 of $400.00..	166.67	
		$7,833.33
Received by Claimant.		
2 years at $3,600.00 per annum.....	$7,200.00	
Less 10% by agreement 2/1/33 to 7/1/33, 5 months, being 5/12 of $360.00.....	150.00	
		$7,050.00
Balance due claimant, being.....		$ 783.33

Claimant is claiming a balance of $783.33.

It is stipulated by counsel that the claim is to be submitted to this court upon the complaint filed and a letter dated May 11, 1936 from Mr. A. L. Bowen, Director of the Departmenb of Public Welfare, to the Attorney General to be included in the statement filed by respondent and such briefs and arguments as may be filed on behalf of the respective parties. This stipulation was signed May 19, 1936. The claim was filed April 28, 1936.

Mr. Bowen's letter dated May 11, 1936, is as follows:

"This will acknowledge a copy of claim No. 2888, made in behalf of Ernest R. Amick against the State of Illinois, on account of alleged salary due. For your information, this claim is the first reference the department has had in this matter.

In checking back the records, we find that on page 88 of the laws of Illinois, 57th General Assembly, 1931, the salary of the Chief Clerk and Statistician is set out at the rate of $4,000.00 per annum. We also find that the payrolls show that Mr. Amick was paid at the rate of $300.00 per month for this biennium until by agreement on February 1, 1933, the salary of $300.00 per month was reduced by 10%.

We are returning, herewith, the copy of claim No. 2888.

We are also sending you this letter in duplicate as per your letter of April 30th."

From this letter it appears that Mr. Amick was paid at the rate of $300.00 per month for the biennium until by agreement on February 1, 1933 his salary was reduced 10%. We know of no law that Will prohibit parties accepting less money

than they had originally agreed upon. This is a claim for back compensation.

Section 19 of Article IV of the Constitution provides as follows:

> The General Assembly shall never grant or authorize extra compensation fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law.

It will be recalled that this cut of 10% was made at a time of a great depression and was agreed to by the claimant and all other officers or employees of the State who were receiving above a certain amount. This claim presents the proposition as to whether or not an employee of the State who holds a position for which a specific amount has been appropriated as salary, or compensation, may continue in such position throughout the entire biennium for which the appropriation was made' and receive a smaller amount payable semi-monthly than was so appropriated as such salary or compensation, and then when the biennium is ended bring suit for the difference between the amount appropriated and the amount received.

It is the general rule, however, that the legal right to the office carries with it the right of the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited. While this rule has been most frequently announced and applied in suits between de jure and de facto officers over the salary to an office, it is nevertheless a basic principle of law and one of general application.

Here, however, there was an agreement to accept less, an agreement no doubt actuated by financial status of the State and the Nation in general. If the claimant when in the service of: the State had been an officer and not an employee, there seems to be no question but what he would have been entitled to the salary as fixed by law, but he was an employee and not an officer. Had he been an officer his salary could not have been included in the general appropriation of the Department of Public Welfare, but the salary would have had to be included in the bill appropriating salaries to other State officers. The Constitution provides that the bills making appropriation for the salaries of the officers of the State Government shall contain no provision of any other subject. (Sec. 16, Art. 4).

Having been paid on the basis of $3,600.00 per annum, and having accepted the vouchers without protest, he is now estopped from insisting that he is entitled to payment on the basis of $4,000.00 per annum.

Item 3 of Section 9, Chapter 127b of the Statutes, seems to provide directly that where payment is made for personal services the same "shall be construed as full payment for all services rendered between the dates specified in the payroll or other voucher."

Claimant relies upon *Farley* vs. *State*, 6 C. C. R. 538. The claimant in that case was allowed a claim. We do not regard that case as being in point, because in the case at bar the claimant seems to have agreed to accept a 10% cut.

Claimant also cites *Brinkerhoff* vs. *State*, 5 C. C. R. 271. In this case it appears that the employing officer "does not care to oppose the above claim" and the court "as a matter of equity and good conscience allowed the claim."

In the case last referred to, apparently the State waived any defense, and in *Fogarty* vs. *State*, 5 C. C. R. 349, the court found the Legislature intended the occupant of this position should receive $175.00 per month, and allowed an award for the difference between amount appropriated and the amount paid. Here again, it does not appear that the claimant had agreed to the cut, as in the case at bar.

In the case of *Isham* vs. *State*, 8 C. C. R. page 50, this court found that no complaint was made as to the manner in which claimant in that case performed her duties and that she had been assured by the Assistant Director on several occasions that she would be paid her salary at the rate of $200.00 per month as agreed, and it had been stipulated that the State of Illinois appropriated the sum of $2,400.00 for manager of the Chicago Office of the Division of Registration. When claimant could not get the salary that had been agreed upon, she left the employ of the State for the reason that she was only being paid $125.00 a month when she should have received $200.00 per month. Here, again, there had been no agreement to accept less than what the employee or claimant had agreed to take.

Because of the agreement of claimant to accept a reduction of 10% as his compensation, an award will be denied and the cause dismissed.

(No. 2641—Claim denied.)

MARCELLA M. CALLAHAN, Claimant,' *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1941.

CALLAHAN & CALLAHAN, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—limitations in claims under—making claim for compensation and filing application therefor within time! fixed by Section 24 of Act, condition precedent to jurisdiction of court. where the record discloses that no claim for compensation was made by employee, within six months after date of accident, nor any application filed therefor within one year after date of injury, no compensation having been paid by employer therefor, the court is without jurisdiction to proceed with hearing on claim filed thereafter and same must be dismissed.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

This claim was filed with the Clerk of this court on the 23rd day of March, 1935, and alleges that claimant for some time before the 6th day of February, 1934, was employed by the Research and Educational Hospitals, Department of Public Welfare of the State of Illinois, as a manual worker, and alleges that on the 6th of February, 1934, while actually engaged in duties incident to her employment, she suffered an injury to the first finger of her right hand, and that while cleaning a sink, the property of respondent, into which sink she had first sprinkled a washing or scrubbing powder furnished her by respondent for that purpose, the first finger of her right hand became abraised, scratched, lacerated, sore and raw, and shortly thereafter became infected and swollen; that she suffered severe pains and discomfort and that as a result thereof she mas treated by the doctors of the Institution, who finally advised an amputation of said finger, the amputation was performed and the first finger of her right hand was ampntated at the third joint, thus removing the entire finger.

It is further alleged that on February 10, 1934, the claimant informed Miss Hamilton, one of her superiors, that she had a sore finger, and that Miss Hamilton then called Miss Day, also a superior in the same employment, and that the claimant was then and there given medical care and attention by physicians in the employ of the Institution.

Thereafter, on or about the 13th day of September, 1934, claimant filed her application for adjustment of her claim

before the Industrial Commission of the State of Illinois, but no action was taken thereon, and finally dismissed with the recommendation that her claim be filed in the Court of Claims.

Because of the view we take of this case, it will be unnecessary for us to go into further details except to say respondent has paid all hospital bills and doctor bills and to say further that no monies or compensation had been paid claimant on account of the injury.

The Attorney General has made a motion to dismiss. It appears from the complaint that notice was given in apt time, but a claim was not made for compensation within the time prescribed by statute. Under the Court of Claims Act, the Court of Claims must administer the Workmen's Compensation law in accordance with the terms and provisions of that law. No compensation was ever paid to claimant. Under the statute, no proceedings for compensation under this Act shall be maintained unless notice of the accident has been given to the employer within thirty days. This apparently was done and no proceedings for compensation under the 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 accident, or within one year after the date of the last payment of compensation, if any had been paid, then the right to file such application shall be barred.

It is, therefore, necessary to give this court jurisdiction to make an application for compensation within one year. This has been the holding of this court and the Supreme Court of Illinois in industrial cases many times. The motion of the Attorney General will, therefore, be sustained and the claim denied.

(No. 3190—Claim denied.)

HARRY GRUBER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

***Opinion** filed June 24, 1941.*

LEO L. HOFFMAN, for claimant.

GEORGE F. BARRETT, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

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

SAME—*negligence* of member *of—State* not laable ***for.*** The State is never liable to respond in damages for the negligence of the officers or members ***of*** the Illinois National Guard.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Complaint charges that on August 17, **1937** claimant was the owner of a certain automobile which was being driven in an easterly direction along a certain public highway in the city of Chicago, and that a National Guard Military vehicle loaned to the respondent, State of Illinois, by the Federal Government, was then and there being driven in a northerly direction by one Joseph Gerling, driver of the Government vehicle. That claimant was operating his car with due care and caution and the State by its agents, servants and employes unlawfully, negligently, carelessly and improperly managed and propelled the military vehicle so that it struck the car driven by claimant, with damage to the claimant of **$26.75.**

The Attorney General has made a motion to dismiss for the reason that the complaint does not set forth a claim which the State of Illinois, as a sovereign commonwealth, should discharge and pay, for the reason that claimant seeks an award predicated upon liability of the State for damages to claimant's motor vehicle alleged to have been caused and sustained by the negligent, unlawful, careless and improper operation of a motor truck by officers or members of the Illinois National Guard.

This court and the Supreme Court of Illinois have repeatedly held that the State in the organization, maintenance and operation of the Illinois National Guard, is engaged in a governmental function and is, therefore, not liable for personal injuries or property damage, occasioned by the negligence or wrongful conduct of officers or members of the Illinois National Guard, or officers, employes, servants or agents of the State charged with the organization, maintenance, operation or training of said National Guard.

See *Petersen* vs. *State, 8* **C.** C. R. 9.

The motion of the Attorney General will, therefore, be sustained and an award denied.

(No. 3364—Claim denied.)

MADERA WINERIES & DISTILLERIES, K. ARAKELIAN, INC.. Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opanzon filed June 24, 1941.

ALLEN H. SCHULTZ, for claimant.

JOHN E. CASSIDY, Attorney General; MURRAY F. MILNE, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL ACT—*claim for refund of license fee paid under—statute affordzng remedy to payer—failure to avail self of bars award. License fee—voltintartly paid—even though illegal cannot be recovered.* The question presented here was before this court in *Central States Distributors, Inc., et al.*, vs. *State*, No. 2966, ante, this volume, and the decision therein is controlling in the present case.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The claimant, a corporation, licensed to do business in the State of Illinois, avers that it is engaged in the bottling of bulk wines for resale and that it purchases wines in bulk from licensees in Illinois, and from licensees of other states, and then bottles the same for resale to licensed retailers or licensed distributors in Illinois.

It is charged that the annual fee for an importing distributor is $250.00, and for a Class B manufacturer's license, that is one who manufactures wine, is $500.00, and that the fiscal license period commenced May 1, 1935; that prior to May 1, 1935, the claimant called the attention of the Illinois Liquor Control Commission to a conflict in the law and regulation pertaining to license fee; that at that time the Chicago office of the Commission informed claimant that it was aware of a conflict in the law, and that there would be a meeting of the Commission to rule on the question.

It is charged that claimant was reluctant to pay $500.00 for a Class B manufacturer's license when it believed it should only be liable for an importing distributor's license for which the annual fee was $250.00, but finding it necessary to be licensed on May 1, 1935, claimant paid the $500.00 under protest.

It is further charged that the Chicago office of the Commission informed the claimant that it would not be necessary for it to file suit for a temporary injunction under the statute,

and relying upon this action of the Commission, the claimant did not pursue the statutory remedy but followed the advice of the Chicago officeof the Commission that it would rescind the regulation and refund to the claimant the sum of $250.00.

It is further charged that o,n May 31, 1935, the Commission met and rescinded the regulation as it promised to do and recommended a refund of $250.00 to the Department of Finance, which department controls all taxes collected by the Commission, but that the Department of Finance refused to grant the refund for the reason that the refund did not fall within one of the provisions for which a refund may be granted under the law, namely, death or insolvency of the licensee before the license period expired.

Claimant charges that in view of the facts, and because it relied upon tlie commission and did not file a suit for injunction because the Chicago office of the Commission promised that a refund would be granted, that this court recognize its claim and direct that an award be made to it in the sum of $250.00.

The Attorney General has made a motion to dismiss this case, and as grounds for the motion says that the claimant does not set forth a claim which the State of Illinois, as a sovereign commonwealth should discharge and pay for the reason that claimant seeks an award representing a refund of a portion of 'the fee paid by it for a license under the Illinois Liquor Control Act, and the complaint shows upon its face that the claimant did not avail itself of the statutory provisions.

The statute fully sets forth and describes the nature of claimant's business and the fees to be charged therefor. The printed rules and regulations of the Illinois Liquor Control Commission and the Department of Finance read as follows:

> "Any person who acquires any alcoholic liquors in bulk and bottles or changes the container of such alcoholic liquors 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."

The annual fee for an importing distributor is $250.00 and the annual fee for a manufacturer is $500.00, or was during the year complained of.

It is a rule well known under the law that dealing with any agent or business officialone is bound to know just what

powers such a public official has, and it appears from the complaint in this case that claimant did know of such powers that the Commission had and was fully advised in the statue, The statute provided a remedy in the courts for claimant but for some untenable reason, claimant did not see fit to take advantage of this remedy. As we view the matter, we have no jurisdiction, and for the lack of jurisdiction, we must decline to make an award.

Award declined.

Judge A. L. Yantis dissenting.

(No. 2501—Claim denied.)

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

Opinion filed June 24, 1941.

BROWN, HAY & STEPHENS, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

SALARY—*claim for by voluntary worker—no award can be made for.* There can be no recovery by a claimant for compensation for services performed for a department of the State where such services were rendered voluntarily.

SAME—*claim of employee not lawfully appointed—must be denied.* Where claim is made for salary for services rendered by one in a position to which he was not lawfully appointed there is no legal basis for an award for the same.

PRINCIPAL AND AGENT—*authority of agent of State—one rendering services to Btate at request of—bound to know extent of.* Where a person renders services to a department of the State at the request of an agent of the State he is bound to know the'extent of the authority of said agent, and if such agent has no authority to bind the State to pay for such services, State is not liable therefor.

SAME—acceptance of regular warrants for—bars claim for additional sum. No additional sum shall be paid to any employee of the State from any lump sum or other appropriation, where such employee received and accepted regular salary warrants for services during term of employment, for amounts appropriated therefor.

SAME—*claim for on grounds of equity and good conscience—when must be denied.* An award on the grounds of equity and good conscience is not justified: where claim is for salary for services rendered by one in a position to which he was not lawfully appointed.

Per Curiam

The complaint in this case alleges that on October 14, 1930, John R. Cranor was general superintendent of the Illi-

nois State Reformatory at Pontiac, Illinois, and the official of the State charged with the employment of teachers and other workers at this reformatory. That on or about that date, as General Superintendent, he requested the business manager of Local Union No. 122 of the International Brotherhood of Blacksmiths, Drop Forgers and Helpers to furnish him with a member of the Union who could teach the trade of blacksmithing to the inmates of the reformatory, and agreed to pay such an individual the sum of One Hundred Seventy-five Dollars per month, and in addition thereto to furnish him with his maintenance, then valued at Twenty-five Dollars per month. That pursuant to that request, the Union Business Agent sent the claimant John Schoenig to Cranor as an applicant for the job and he was employed as a teacher of the trade of blacksmithing at the Pontiac Reformatory, otherwise known as Illinois State Reformatory, at the compensation above mentioned. The claimant commenced work on about October 15, 1930, and continued to occupy such position until September 5, **1933,** and at all times performed all tasks assigned to him, and his work met with the approval of the General Superintendent and other officials of the Illinois State Reformatory. When the claimant took the position he had an understanding that he would do so only for the consideration of the agreed compensation and only on condition the hours and conditions of labor in that position should be subject to the rules and regulations then laid down by the Union, and that was agreed to by the General Superintendent, Cranor, but, notwithstanding, the agreement, from the date claimant commenced **work** until May 1, 1931, claimant was only paid one hundred fifty dollars per month instead of one hundred seventy-five dollars per month agreed upon. On this account, he objected to the General Superintendent and Superintendent Cranor to each objection stated he expected to pay the said $175.00 per month, but they had not been able to get that through the necessary appropriation, but convinced the claimant that he would have the necessary appropriation through subsequently and then would pay to claimant the additional $25.00 per month for each month claimant was employed. Claimant made frequent requests for this additional sum of $25.00 per month, which represented the difference in the salary of $175.00 per month agreed upon and the salary of $150.00 per month paid during the period from October 15th,

1930 to May 1,1931; and that amount never has been paid to claimant, and it is charged the State in equity and good conscience is obligated to pay this amount, which totals the sum of $162.50, to the claimant.

It is further charged that May 5, 1931, claimant was notified by the superintendent that effective May, 1931, his salary would be increased to $175.00 per month, and this sum was paid to claimant from that time until January 1, 1933.

When claimant commenced work, on or about October 15, 1930, and for some time subsequent thereto, he lived at the Reformatory, and his room and board were furnished free of charge to him, but prior to March 1, 1931, claimant found it impossible for him to reside in the Reformatory any longer and with the consent and approval of Superintendent Cranor moved to a residence in the city of Pontiac, located outside of the Reformatory, and pursuant to the agreement made when he was employed, claimant became entitled to the agreed reimbursement of $25.00 per month.

It is also charged that after January 1, 1933, claimant was notified that his salary would be cut from $175.00 to $157.50, effective January 1, 1933, and clainiant was paid the sum of $157.50 per month from February 1st, 1933 until September 3, 1933, but the agreed sum of $25.00 for maintenance was never paid to claimant, although often requested by him, and it is charged that in equity and good conscience the State of Illinois is obligated to pay claimant the sum of $775.00, representing the maintenance reimbursement to him from the period of March lst, 1931 until September 5, 1933, at the rate of $25.00 per month.

It is also charged that under the Union rules and regulations, which were the conditions of employment agreed upon by claimant and the said General. Superintendent Cranor, when claimant started to work, an employee could not be discharged without giving such employee thirty days notice in writing and that in opposition to these rules and regulations so agreed upon, claimant was discharged on September 5, 1933 without the thirty days notice, and by reason therefor the State became obligated in equity and good conscience to pay to claimant the sum of $118.11, representing salary which claimant would have earned during the remainder of September had the notice of discharge been given as agreed upon. This averment is in Paragraph 9 of the complaint.

It is also charged, in Paragraph 10 of the complaint, that the Union rules and regulations, which were the conditions of employment agreed upon by claimant and Superintendent Cranor, when claimant started to work, he was entitled each year to a vacation of two weeks with pay, but in 1933 the officials of the Reformatory refused to allow claimant to take said vacation and by reason thereof the State of Illinois became obligated in equity and good conscience to pay claimant the sum of $78.75, representing the salary to claimant €or two weeks work.

Under Paragraph 11, it is further charged that under said Union rules and regulations, which were the conditions of employment agreed upon by claimant and Superintendent Cranor, when claimant started to work, claimant was to work only 44 hours a week, and additional compensation was to be paid for all additional work which should be required from him at the regular rate per hour at which claimant was then employed, namely, the rate of $1.19 per hour; that during the reconstruction of the power house claimant was required and did work 114 hours in addition to his regular hours of labor for which he was entitled, under the agreement, to compensation at the rate of $1.19 per hour, that is, to total compensation in the sum of $135.66; and that on the fence job for the Governor's Mansion, the claimant worked 48 hours in addition to his regular hours of labor; that on the fence job for the Chicago Eye and Ear Institution he worked 112 hours in addition to his regular hours of labor; on the shop lay-out job 60 hours in addition to his regular hours, and on other work 80 hours in addition to his regular hours, making a total of 298 hours in addition to his regular hours of labor on jobs other than reconstruction of the power house previousip referred to, for which 298 hours claimant was entitled to compensation at the rate of $1.19 an hour, or a total of $354.62, and although claimant has often requested the officials of the Reformatory for payment of said sums to him for said overtime work, claimant has been refused, wherefore, in equity and good conscience the State of Illinois is obligated to pay claimant said sum of $135.66 and the further sum of **$354.62** for said overtime work, and for failure to pay these various obligations claimant says that the State of Illinois owes him the total sum of $1,624.64.

This court has repeatedly held that 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 some law giving him a right to an award he cannot invoke the principles of equity and good conscience to secure the award.

In other words, an award will not be made merely on the basis of equity and good conscience.

Crabtree vs. *State, 7* C. C. R. 207.

and numerous other cases as cited by this court.

The provisions of Paragraph **4** of Section 6 of the Court **of** Claims with reference to equity and good conscience merely define 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 suable.

Crabtree vs. *State,* Supra.

We have also held that where there was no legal liability equity cannot create one.

Watkins vs. *State,* **6** *C. C.* R. 172.

Crabtree vs. *State,* Supra.

Claimant does not point out under what authority he was first appointed. It was then a part of our statutory law that the Governor should, by and with advice and consent of the Senate, within 30 days after the Act shall become effective, appoint three persons as Civil Service Commissioners to hold office for the terms of two, four and six years respectively, from the first day of March, 1905, and until their respective successors are appointed and qualified, and they shall constitute the Civil Service Commission.

See Chapter 126, Par. 1, State Civil Service, Cahill's Revised Statutes, 1929.

Subsequent provisions of this statute make it the duty of the Commissioners to classify all the offices and places **of** employment in the State service except as provided in Section **11.** This classification shall include all offices and places **of** employment then in existence or which might hereafter be created in the State service.

From an examination of Section **11,** it makes no reference to the position that claimant held. We have not been referred to any statute authorizing claimant's appointment.

Statutes delegating powers to public officers must be strictly construed and all parties interested must **look** to the statute for the grant of power.

Diederich vs. *Rose, et al.,* 228 Ill. 610.

Courts cannot make contracts for the parties and where the meaning is plain another meaning cannot be added by implication or intendment. This rule has been extended so far that our Supreme Court has held that equity will not give relief to one who, under a mistaken belief as to the title of the property places permanent improvements thereon.

Williams vs. *Van der Bilt,* **145** Ill. 238.

And there can be no recovery by claimant who was **a** voluntary worker although the services were performed for **a** department of the State.

Sterrett vs. *State,* 5 C. **C.** R. **172.**

In the case of Green & Sons, a corporation, 9 C. C. R. 218, this court held that there can be no recovery of an 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 where an express contract is forbidden, and an award based on such claim will be denied.

In *Dement, et al.* vs. *Rokker, et al.,* 126 Ill. **174,** on page 199 of the opinion it is stated:

"The State is never estopped as an individual or private corporation **may** be on the ground that the agents acting under an apparent authority which is not real—the conclusive presumption that his powers are known rendering such a consequence impossible."

Every person is presumed to know the nature and extent of the powers of municipal officers and therefore cannot be deemed to have been deceived or mislead by acts done without legal authority.

Seegar vs. *Mueller, et al.,* 133 Ill. 86 (95).

It is a familiar principle of law that all persons who deal with municipalities and subordinate boards and agencies of the State and National government must at their peril inquire into the power of the officers or agents of such municipalities, boards or agencies to make the contract contemplated for acts of such officers can only bind in the manner and to the extent of authorized authority.

See Donnelly "Law of Public Contract," Chap. 5, p. 206.

We do not question the intent of the Superintendent of the Pontiac Reformatory, but claimant must have known, at least the law presumes that he knew that the superintendent could not fix salaries or make appropriations or assume the powers given by law to the legislature, or do other things unless authorized by statute. It is quite probable that the Superintendent of the Reformatory did do all that he could do under the circumstances to secure an appropriation along the lines contended by claimant, and it is not a sufficient answer to this to say that the claimant acted in good faith and performed the services set forth in the complaint, and we must hold that claimant knew that the superintendent had no power to fix claimant's salary or compensation in the manner set forth in the complaint.

These acts went on for a considerable period of time and it appears that the alleged promises made by the superintendent were broken the very first month that claimant worked.

It is averred in the complaint that claimant commenced work on or about October 15, 1930 and continued to occupy such position until September 5, 1933, approximately 35 months. It is charged that he was promised the sum of $175.00 per month, but from the time he commenced work until May 1st the following year, he only received $150.00 per month, and it is charged that he remonstrated with Superintendent Cranor several times, as also charged that to each objection the General Superintendent stated that he expected to pay $175.00 per month but that he had not been able to get through the necessary appropriation and said he would have the necessary appropriation through subsequently and then pay claimant the additional $25.00 per month.

The claimant then knew that the superintendent could not get the appropriation through and he must have known that the legislature is the only power in this State that can make appropriations and the amount of the appropriation is discretionary with the legislature.

Mr. Cranor testified he had been General Superintendent at the Illinois State Reformatory at Pontiac from January 13, 1930 to February 10, 1932. He remembered the claimant and said that he remembered that Mr. Schoenig and he had discussed this extra work several times. He said "I told him

repeatedly that it was necessary for the State to offer him a lower salary than he would ordinarily be entitled to at his trade on the outside, that it was necessary for him to make a sacrifice if he cared to stay with the Institution and that it was not always possible for the Institution to pay as much as the work was really worth due to the limited bndget. I promised to use my influence with the proper authorities with a view to having his salary increased and if possible a special compensation for the extra fine work and some of the extra hours which he put in on these two major projects.''

Section 19 of Article IV of the Illinois Constitution of 1870 provides that the General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void.

The Statute also provides that amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be construed as full payment for all services rendered between the dates specified in the payroll and 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.

Chap. 127b, Par. 9, Cahill's Revised Statutes 1929.

In *Broderic* vs. *State*, 9 C. C. R. **458,** this court held that 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 date 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 claimant to salary where such claimant received and accepted regular salary warrants for

such services during the term of employment for the amount appropriated therefor.

It has been held by this court on numerous occasions that the doctrine of "respondeat superior" does not apply to the State, and it is not liable for damages for the nonfeasance, misfeasance or malfeasance of its officers or agents.

For the reasons stated the claim will be denied.

(No. 2968—Claim denied.)

THE TOM COLLINS CORPORATION, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1941.

CLAIMANT, pro se.

GEORGE F. BARRETT, Attorney General; JOHN KASSERMAN, Assistant Attorney General, for respondent.

ILLINOIS LIQUOR CONTROL COMMISSION—*no power to make refunds.* The Illinois Liquor Control Commission has no power to make refunds of license fees paid under Illinois Liquor Control Act, once the moneys received therefrom are paid into the State treasury, its only powers in connection therewith being to make recommendations for such refunds, the sole legal power to refund such money being in the Legislature, and at its discretion.

SAME—*license issued by—claim for refund of unearned portion of fee upon cessation of 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, licenses issued thereunder are annual and expire on April 30th following issuance, and provision is made for refund of license fees paid thereunder only in the event of certain contingencies specifically enumerated therein and refunds are authorized only in such contingencies.

SAME—*same—same—when award for denied.* The fact that claimant surrendered license and 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 Act.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

The Tom Collins Corporation, now located at Covington, Kentucky, for its cause of action states that it was engaged in the manufacture and bottling of alcoholic and non-alcoholic beverages for resale; that said manufacturing and bottling were carried on at 411 North Paulina Street, Chicago, and that they manufactured the products known as "Tom Collins" and bottled the same for resale to licensed distributors

in Illinois and other states. That the annual fee for a rectifier under the Illinois Liquor Control Law is $2,500.00 and that the fiscal license period commences May 1st of each year.

A portion of the 'Federal law is set up and the claimant avers that it was engaged in the business of rectifying and bottling alcoholic and non-alcoholic beverages on the same premises and nsing the identical bottling units for their alcoholic and non-alcoholic products previous to the issuance of Regulation 15 of the Federal Treasury Department issued July **30,** 1934.

This Federal rule prohibited this and on April **30,** 1935 claimant was served with an ultimatum of the Internal Revenue Department to remove their rectifying operations from the premises known as 411 North Paulina Street, Chicago, Illinois, not later than July **31,** 1935, and desiring to so operate their premises and to do so in compliance with the laws of Illinois, claimants communicated with the Illinois Liquor Control Commission and asked for a ruling as to whether or not the Commission would permit claimant to operate upon payment of the regular rectifier's fee, and a refund for any unused portion of the time upon claimant's cessation of business in Illinois, and the Illinois Liquor Commission approved of such practice, and claimant, in accordance with the recommendation of the Illinois Liquor Control Commission notified the Illinois Liquor Control Commission of their cessation of operation in Illinois on August 15, 1935, but the State Department of Finance refused to grant the refund for the reason that the refund did not fall within any of the provisions for which refund may be granted under the Illinois Liquor Control law, namely, death or insolvency of the licensee before the license period expired, and that the Illinois Liquor Control Commission had sought to obtain the refund for the claimant from the State Department of Finance, because of its original promise that a refund would be granted, and that no refund has as yet been granted, but notwithstanding this rule of the State Department of Finance, they ask that this court recognize the claim in the sum of $1,666.64. Later the amount of the claim was amended to that of $1,780.88.

The only power that the Illinois Liquor Control Commission had to make refunds was that of a recommendation, which they did make. When money is once paid to the State Treasurer. the only authorized legal power to pay such money

out would be by virtue of an Act of the Illinois Legislature, and that is discretionary with the Legislature

> All licenses issued by the Department * * * shall be annual licenses and shall expire on April 30th following the issuance.
>
> Sec. 3, Art. 5, Chap. 43, Dram Shop Act and Special Session Laws of 1933-1934, p. 67.

and the license fee is fixed at the sum of $2,500.00.

The Statute provides for the appointment of the Illinois Liquor Control Commission and enumerates its powers, but does not give the Commission the power to make refunds.

It seems to be well settled that ordinarily a licensee does not, on voluntary surrender of his license, become entitled to a return of the license fee in proportion to the unexpired term, in the absence of a statutory enactment to the contrary.

15 R. C. L. 15 Sec. 76.

As we view the facts in this case, the refusal of the State Finance Department to pay the sum requested was within their power and in accordance with law.

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

(No. 3482—Claimant awarded $290.21.)

LAWRENCE WILLYARD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 24, 1941.

HARRY C. DANIELS, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Elgin State Hospital entitled to benefits of—when award may be made to.* Where attendant at Elgin State Hospital sustains accidental injuries, arising out of and in the course of his employment, an award may be made for compensation therefor, in accordance with provisions of the Act, upon compliance by him with the requirements thereof.

MR. JUSTICE LINSCOTT delivered the opinion of the court:

Claimant avers that on the 22nd day of January, 1939, he was continuously employed as an attendant at the Elgin State Hospital, Elgin, Illinois, and that in the performance of his duties he was required, on October 13, 1939, to assist Dr. A. Simon, one of the staff physicians of said hospital, in the tube feeding of a patient in the ward known as the

Veterans Hospital. That in the course of this feeding the patient severely scratched the attendant, this claimant, with his finger nails between the knuckles of the third and fourth fingers of the right hand, and five days later, on the 18th of October, swelling began to manifest itself in and around the scratch. He reported the circumstance to Dr. Simon, who treated the hand with hot boric soaps and icathol ointment; that the infected hand continued to grow worse, and about October 26th, claimant consulted Dr. Schreiner, surgeon at the Elgin Hospital, who cut open the hand and cleaned it with peroxide and disinfectants and applied dry dressings for a period of about four days; that thereafter treatment was continued with hot packs and epsom salts until about November 9th, with no improvement. Claimant then consulted Dr. Raymond F. Dowell, a private practicing physician of Elgin, who began a course of balsam-peru treatments, which continued until about November 15th, resulting in very slight improvement, and that on the latter date the condition of the injured member became worse and said Dr. Dowell then used hot boric packs and prescribed potassium iodide for internal use, and gave shots of eno-salverson, a treatment which continued until the following December 15th, when the condition appeared still worse.

Claimant further represents he then consulted Dr. Sumner L. Koch, a specialist of Chicago, Illinois, who committed the claimant to Passavant Memorial Hospital in Chicago for a period of seven days while he administered a course of treatments of zinc-peroxide applications daily; that on December 18th said Dr. Koch also resorted to surgery, removing the poisoned flesh around said wound; that thereafter improvement began and continued until January 15, 1940, when recovery became sufficient to permit claimant to be reassigned to duty at the Elgin State Hospital. He avers Dr. Koch diagnosed the injury to be anaerobic streptococcic infection of unusual rarity and undoubtedly caused by the nail scratch inflicted by a syphilitic patient of the Elgin State Hospital.

He submits bills from Passavant Memorial Hospital in Chicago for room, board, drugs, dressings, etc., in the sum of $57.40, a bill from Dr. Koch of Chicago, $75.00, a bill from Dr. Dowell of Elgin, $55.00, expenses incurred in transportation, etc., from Elgin to Passavant Memorial Hospital, Chicago, and return, 18 trips, $54.00.

It is averred in the complaint that from December 1, 1939 to January 15, 1940, he suffered total temporary incapacity by reason of the injury and as a consequence completely lost the usual wages paid to him in the amount of $54.60 per month, and in addition thereto he lost maintenance valued at $24.00 per month, making a total loss of income of $117.90.

He is asking for an award covering cash expenditures and expenses incurred in the amount of $241.40 and a loss of income amounting to $117.90, making a total claim of $359.30.

This court has heretofore held that the attendants at the Elgin State Hospital are under the Compensation Act. The case comes to us upon the original complaint, the report of the Department of Public Welfare, consisting of a report by Dr. Simon and Dr. Schreiner, both of Elgin State Hospital, who attended claimant, the transcript of evidence introduced on behalf of claimant on October 16, 1940, the report of the Department of Public Welfare dated November 23, 1940, signed by Assistant Director Blanche Fritz, and respondent's Statement, Brief and Argument, claimant having waived any brief or argument, and from all the above the court finds it has jurisdiction under the Workmen's Compensation Act of this claim. We further find the acts arose out of and in the course of his employment. Claimant's immediate superior was Dr. Simon, and from his statement it appears that he had immediate notice of the scratching of claimant's hand and administered some treatment.

From the record it conclusively appears to us that claimant's disability was the result of an accidental injury caused by the scratch heretofore mentioned while in respondent's employ, and that no other conclusion could be reasonably drawn from the evidence by this court.

Under the circumstances, it is the duty of the State to furnish the necessary doctor and hospital services. It is also true that an injured employee has the right to procure such services at his own expense, if he desires.

In the instant case, the claimant did undoubtedly receive a painful and distressing injury and it appears that further medical care and skill were reasonably required to cure or relieve him from the effects of such injury.

According to the testimony of the experts the claimant was suffering from a rare and severe ailment, brought about

by the scratch and the syphilitic condition of the patient that scratched him.

Dr. Koch is an infection specialist at Chicago, and after examining claimant he requested him to stay at the Passavant Memorial Hospital for a few days, which he did until December 22nd. Dr. Koch's treatment showed early results and undoubtedly gave claimant much confidence in his treatment. It appears from the record that the treatment being received by the patient from the State was not sufficient to relieve him from the effect of his injury. No objection is made by respondent to the additional medical and hospital expenses.

The claim of $57.40 for the Passavant Hospital, the sum of $55.00, the amount he owes to Dr. Dowell, and the $75.00 for services rendered by Dr. Sumner Koch, are therefore allowable.

The record shows claimant had not been in the employ of the State of Illinois for a year prior to the date of his injury, but it does show that for a year prior to the date claimant was injured it was customary for a person employed in the same capacity that claimant was employed, to receive as the first six months pay $52.50 per month, and for the second six months $54.60 per month, and in addition claimant received maintenance which was of the value of $24.00 per month. The total pay of such employee would amount to $642.60 for the year preceeding the date of claimant's injury, plus maintenance which was received in amount of $288.00, or a total of $930.60. Dividing this amount by 52, the number of weeks in the year, it gives an average weekly wage of $17.89, and dividing this by two, pursuant to statute, makes $9.95 a week, but since this claimant was injured subsequent to July 1, 1939, the compensation rate would be increased 10% under Section 8 (1), which in this case would be $.90, or a total compensation of $9.85 per week.

There is no claim for any permanent disability or specific loss. He stopped work on October 26, 1939 and returned to work January 15, 1940, making a period of 11 weeks, 4 days, and it appears he mas paid his salary in full for the balance of the month of October, or a period of six days out of 31, also in full for the entire month of November, being on the basis of $54.60 per month, which would make payment for period of non-productive time of $65.17. For the period from and including October 26, 1939 to January 15, 1940 is eleven

weeks and four days, at the rate of $9.85 per week, this would amount to $113.98, during which period of time claimant was paid $65.17, leaving a balance due him of $48.81.

We, therefore, make an award payable as follows:

To Lawrence Willyard for compensation due him and expenses paid by him as aforesaid	$102.81
To Lawrence Willyard for hospital bills paid by him as aforesaid	57.40
To Lawrence Willyard for the use of Dr. Dowell	55.00
To Lawrence Willyard for the use of Dr. Sumner Koch	75.00
Making a total sum of	$290.21

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," (Illinois Revised Statutes, 1939, Bar Association Edition, Chapter 127, Pars. 180-181), and being subject also to the terms of an Act entitled, "An Act Making Appropriations to the Auditor of Public Accounts for the Disbursement of Certain Monies Until the Expiration of the First Fiscal Qnarter After the Adjournment of the Next Regular Session of the General Assembly," approved July 1, 1939 (Session Laws 1939, page 117); and being, by the terms of the first mentioned .Act, subject to the approval of the Governor, is hereby, if and when approval is given, made payable from the appropriation from the General Revenue Fund in the manner provided by the foregoing Acts.

CASES IN WHICH ORDERS OF DISMISSAL WERE ENTERED WITHOUT OPINION

No. 1836. Nellie M. Nesbitt, Executrix, etc., vs. State,
No. 1889. L. A. Wilson and Company, vs. State,
No. 2283. Jacob H. Tutewiler, vs. State,
No. 2365. Stanley Jaicks, et al., etc., vs. State,
No. 2478. J. I. Ransom, Inc., vs. State,
No. 2562. George Brandle, vs. State,
No. 2672. White Paving Company, vs. State,
No. 2673. White Paving Company, vs. State,
No. 2695. Frank J. Taylor, vs. State,
No. 2725. Jennie Shannahan, et al., vs. State,
No. 2798. Ed Brown, vs. State,
No. 2803. A. J. Boley, vs. State,
No. 2823. Carter H. Harrison, Jr., Receiver, etc., vs. State,
No. 2846. A. B. Culhane, Receiver, etc., vs. State,
No. 2850. A. B. Culhane, Receiver, etc, vs. State,
No. 2854. E. T. Martin, Receiver, etc., vs. State,
No. 2857. Thomas C. Wright, Receiver, etc., vs. State,
No. 2874. F. J. Berg & Company, vs. State,
No. 2880. Ernest O. Reaugh, etc., vs. State,
No. 2887. William Heitman, et al., vs. State,
No. 2926. S. C. Sachs, Inc., etc., vs. State,
No. 2929. Melvin B. Erickson, Receiver, etc., vs. State,
No. 2931. Sam Howard, Trustee, etc., vs. State,
No. 2977. L. V. Bickers, vs. State,
No. 2991. Harry Joseph, Receiver, etc., vs. State,
No. 2997. L. B. Miller, vs. State,
No. 3044. Frank Dinwiddie, vs. State,
No. 3064. A. B. Culhane, Receiver, etc., vs. State,
No. 3065. Walter L. Delaney, vs. State,
No. 3079. H. G. Goelitz Company, vs. State,
No. 3081. H. G. Goelitz Company, vs. State,
No. 3082. James Higgins, vs. State,
No. 3088. William M. Knutson, Receiver, etc., vs. State,
No. 3119. Melvin B. Erickson, Receiver, etc., vs. State,
No. 3126. Hyland Electrical Supply Company, vs. State,
No. 3130. Joe G. Porter, vs. State,
No. 3160. Roy K. Adair, Receiver, etc., vs. State,
No. 3163. Western Union Telegraph Company, vs. State,.
No. 3178. Mrs. Sophia Parker, et al., etc., vs. State,
No. 3184. E. J. Boorde, et al., etc., vs. State,

No. 3211. R. W. Johnson, Receiver, etc., vs. State,
No. 3224. Herman Salmon, Jr., Receiver, etc., vs. State,
No. 3235. N. W. Polley, et al., vs. State,
No. 3243. J. L. Jacobs, vs. State,
No. 3289. Andrew Arntson, vs. State,
No. 3300. Edward A. Norman, et al., Executors, etc., vs. State,
No. 3307. Manie Schermer, vs. State,
No. 3318. R. W. Johnson, Receiver, etc., vs. State,
No. 3319. William H. Kaffer, Receiver, etc., vs. State,
No. 3320. Roy K. Adair, Receiver, etc., vs. State,
No. 3321. Roy K. Adair, Receiver, etc., vs. State,
No. 3323. Roy A. McKinney, Receiver, etc., vs. State,
No. 3362. Katherine Ryan, vs. State,
No. 3366. James Bryant, vs. State,
No. 3379. Bert Logan, et al., vs. State,
No. 3380. Michael Broha, et al., vs. State,
No. 3381. Joseph H. Davis, vs. State,
No. 3382. Herbert Wolfe, vs. State,
No. 3385. Mary Kiehn, vs. State,
No. 3414. Taylorville Record Publishing Company, vs. State,
No. 3420. Cornelius Smith, et al., vs. State,
No. 3421. Henry Bolt, et al., vs. State,
No. 3426. Cornelius Smith, et al., vs. State,
No. 3427. Henry Bolt, et al., vs. State,
No. 3445. Postage Meter Company, vs. State,
No. 3474. Rosman Uehling Kinzer Company, vs. State,
No. 3478. M. K. Schwartz, et al., etc., vs. State,
No. 3506. Spiros Scourtis, vs. State,
No. 3609. Velma Boismenue.

CASES IN WHICH AWARDS WERE HERETOFORE MADE BY THE COURT AND REPORTED IN PREVIOUS VOLUMES IN WHICH ORDERS WERE ENTERED.

No. 2474. Jennie Meyer, et al., vs. State,
No. 2762. Paul H. Boyers, vs. State,
No. 2935. Anna Tull, vs. State,
No. 2985. J. Binnie Wolfe, Admr., etc., (Charlie R. Miller, vs. State),
No. 3016. Leona Murray, vs. 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 on the facts submitted and set forth in each of the matters hereinafter set forth.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 36.

Award not found to be justified and denial of claim advised.

EDWIN R. PERRY, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed ***October 19, 1940.***

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commission:

A request for an Advisory Opinion has been submitted by the above respondent, based upon the following:

STATEMENT OF FACTS.

Edwin R. Perry of Chicago, Illinois was a clerical employee of the Central Certification Office of the Illinois Emergency Relief Commission, which was located at **1257** North Paulina Street, Chicago, Illinois. Perry's duties were to file and withdraw case records and to change positions of file drawers and cabinets. On the 28th day of December, 1939 claimant moved a table on which there were seven large file boxes of the approximate weight of three hundred pounds. His foot caught in a crack in the floor, throwing the entire weight on his right side. He twisted his right leg and at the same time felt a sharp biting pain in his lower right side. He was forced to sit down for a few minutes until the pain passed, after which he continued with the moving of the file

boxes from one section of the office to another. From that day on he noticed a peculiar gnawing pain in his abdominal region which at times was accompanied by nauseat. He did not seek medical assistance until the 9th day of January, 1940 when he visited Dr. M. Norman, 10658 S. Michigan Avenue, Chicago, Illinois, who informed him he had a hernia on his right side and advised him to remain in bed for as long a period as he could; that he remained in bed for ten days and did not return to work until the 22nd day of January, 1940. He was absent from work on January 5, 10, 11, 12, 15, 16, 17, 18, and one-half day on January 25, 1940.

An affidavit by Jack Neamy attached to said Statement states that the affiant resides at 4626 North Magnolia Avenue, Chicago, Illinois; has known Edwin Perry since the latter began to work for the Illinois Emergency Relief Commission, and has been continuously employed with Edwin Perry during the latter's employment; that in December, 1939 it was necessary to move the tables and file boxes in the office; that on the 2nd day of such work he returned to the office (from some outside work), and noticed that Edwin Perry was not assisting in the moving, that he asked Perry why, and the latter informed him that he had strained himself the day before while moving some of the articles; that Perry did not state whether it was a table or file boxes or other items that he was moving. This affiant further stated that about a week or two after the above conversation, Perry was absent and affiant telephoned Perry's home and was informed by Perry's wife that he was at the doctor's office, and the following day he again called the Perry home and was told by Mrs. Perry that the doctor had informed him he had a hernia.

Another affidavit attached to the Statement is signed by William H. Baldwin who resides at 172 W. Adams Street, Chicago. He also states he is an employee of the Illinois Emergency Relief Commission as a Supervisor of Files; that he has general supervision of the files and the filing clerks; that on a day in the late fall of 1939 he and Edwin Perry rearranged the files in their office; that Perry made no statement to him during the course of such work concerning any injury he may have suffered during the handling of the tables and files; that sometime later he noticed Perry was absent for several days; that he inquired of Mr. Neamy and was informed by the latter that he understood Perry had suffered a

rupture. Baldwin further stated in his affidavit that when Perry returned to work he informed affiant that in attempting to swing a table on the day they were rearranging the files, he stumbled and felt a severe sharp pain in his groin and was forced to rest for a while, that after he had so rested the pain subsided; that afterwards when he went to a doctor, the latter told him he was ruptured. In the sworn statement for adjustment of claim attached to the Statement of Facts submitted by your Commission, and identified as Exhibit 1, claimant shows the time of his injury as being 3:30 P. M. Thursday, December 28,1939; that his disability for work began January 10, 1940; that he was first able to resume his usual occupation on January 22, 1940.

OPINION.

Your Statement of Facts states that "The claimant is requesting that the Illinois Emergency Relief Commission provide the necessary medical, surgical and hospital services which may be reasonably required to cure or relieve claimant from the effects of his injury and to make payment therefor from the Compensation Insurance Reserve Fund. He does not ask for temporary total or permanent total disability."

In his application for adjustment of claim (line 17) claim is made for "compensation to the amount of any cost of having injnry repaired and salary for time lost." To authorize an award for hernia Section 8 (d-1) of the Illinois Workmen's Compensation Act requires that it must appear that—

1. The hernia was of recent origin;
2. Its appearance was accompanied by pain;
3. That it was immediately preceded by trauma arising out of and in the course of the employment; and
4. That the hernia did not exist prior to the injury.

Section 24 of the Act provides:

"No proceedings for compensation under this Act shall be maintained—unless notice of the accident has been given the employer as soon as practicable, but not later than thirty days after the accident, except in cases of hernia, in which cases notice shall be given the employer within fifteen days after the accident."

Hernias primarily and in the great majority of cases are due to diseased or weakened condition of the abdominal walls and relaxation of the inguinal rings. Sometimes an employee's physical condition is aggravated or accelerated and a strain will cause the hernia to appear. The mere fact that

a hernia occurs while an employee is at work is not sufficient to impose a compensation liability, and there must be actual proof of an accidental injury as in other cases. A sudden strain caused by lifting or slipping might constitute such an accident, but to impose liability under the Compensation Act, such accident must be proven under the rules of evidence. In the statement and supporting exhibits submitted by you, the only proof of an accidental strain to Edwin R. Perry in his affidavit where he says, that "in moving the table, he twisted his right leg and at the same time felt a sharp biting pain in his lower right side. That he was forced to sit down a few minutes until the pain passed, after which he continued with the moving work. That from that day on he noticed a peculiar gnawing pain in his abdominal region which at times was accompanied by nausea. That except giving word to Neamy and Baldwin he did not notify anyone connected with the Illinois Emergency Relief Commission of this injury until the 22nd day of January, 1940, at which time he notified Mrs. Wood, Supervisor of that office." Notice within 15 days is required. *(See.* **24,** W. C. **A.)**

From the employee's statement itself twenty-five days elapsed between the time Mr. Perry noticed the pain in his side until he notified his employer. Having failed to bring himself within the requirements of the Workmen's Compensation Act, no legal basis for allowing a claim for such alleged accident on a complaint for hernia, exists.

In addition, the statement and exhibits disclose only meager evidence in support of the other four requirements above enumerated.

The testimony of Mr. Baldwin (as shown by his affidavit) only purports to quote a narrative statement of the employee himself, which was not concurrent with the accident but was quoted to the Supervisor several days thereafter by a fellow-employee of Mr. Perry. As such that would not form a part of the res gestae and would not be competent proof. (See *Frederick* vs. *Ind. Comm.,* **329** 111. 490.)

The evidence submitted by Mr. Baldwin, the Supervisor, as indicated by his affidavit, is further that Perry made no statement to him on the day of the work in question, concerning any injury he may have suffered on that day, and that he received his first information regarding any complaint through Perry's fellow-employee Neamy several days there-

after; that when Perry returned to work (presumably the latter part of January) the latter told him of the purported accident and that a rupture had resulted. Perry's affidavit states that the alleged strain or accident occurred on December 28, 1939, but that he did not seek medical assistance until January 9,1940.

In our opinion the statement of facts and supporting affidavits submitted by you fail to disclose the essential elements necessary to justify an award in the case of an injury resulting in hernia, bearing in mind that the Workmen's Compensation Act requires adequate proof that—

1. The hernia was of recent origin;
2. Its appearance was accompanied by pain;
3. That it was immediately preceded by trauma arising out of and in the course of the employment; and
4. That the hernia did not exist prior to the injury.

ILLINOIS EMERGENCY RELIEF COMMISSION, No. 37.

Payment of $128.70 Advised.

SIGWALD R. JORGENSEN, Claimant, *vs.* ILLINOIS EMERGENCY RELIEF COMMISSION, Respondent.

Opinion filed December 10, 1940.

ADVISORY OPINION BY MR. JUSTICE YANTIS.

To the Illinois Emergency Relief Commissiolz:

A request for an Advisory Opinion has been submitted by the above respondent, based upon the following:

STATEMENT OF FACTS.

That Sigwald R. Jorgensen was, on September 4, 1940 and for some time prior thereto, employed as a County Director of Commodity Distribution for the Illinois Emergency Relief Commission. His duties included supervision of the activities of the county directors, employees, and instructs them in their duties, and investigates complaints made by relief recipients and supervises the distribution of commodities to relief clients. The Statement further shows that he manages the Distribution Depots in any county of the State during a vacancy in the position of County Director, until the appointment of such Director is made; that in such duties

he actively assists members of the depot staff in cutting up the foods, using sharp knives and electric saws and other sharp edged tools, loading the merchandise to and from the railroad cars, etc.

The record further discloses that'in the exercise of his duties, it is necessary that he travel to and from various points in the State. On August 31, 1940 he had been working in Tuscola, Illinois, was called to Chicago for a staff meeting, drove from there to Urbana, Illinois on September 4, 1940, and was proceeding from the latter town to Tuscola that evening. While driving west on Route No. 45 in Urbana, Illinois, Mr. Jorgensen's automobile struck a horse-drawn milk wagon and Jorgensen was injured as a result of the accident. He was immediately taken to Mercy Hospital in Champaign, where he remained until September 17, 1940. Medical and hospital bills have been incurred as follows:

Mercy Hospital, Champaign, Illinois	$58.70
Dr. John H. Gernon	70.00

These items are approved in your report as being reasonable and necessarily incurred by reason of such accident. It is further noted that the man in charge of the milk delivery wagon states that his horse was proceeding under its own guidance and without attention from him at the time of the accident.

Mr. Jorgensen's injuries consisted of bruises and lacerations to the lip, fracture of the right elevenbh and twelfth and the right sixth and seventh ribs, and other bruises as shown by the medical report submitted. The medical report also shows that the face injuries have healed with no traces of injury left, continuing soreness in the chest, with complete recovery ultimately predicted.

The Statement of Facts submitted by the Commission states that the accident arose out of and in the course of Mr. Jorgensen's employment, and that the Commission had notice of such accident within a few days after it occurred. No claim is made for temporary total or permanent total disability, but the injured employee desires payment of the doctor, hospital and medical bills.

Pursuant to the Commission's request, the following Opinion is rendered, based upon the aforementioned Statement of Facts:

OPINION.

We have heretofore held that case workers who have suffered accidental injuries in the course of the performancg of their duties for the Illinois Emergency Relief Commission, were engaged in the work of a hazardous nature, and that injuries sustained by them arising out of and in the course of their employment were compensable. While the claimant herein, Sigwald R. Jorgensen, was employed in a supervisory capacity, the actual services performed by him apparently necessitated the same contacts in many instances as those of case workers. From the Statement of Facts submitted, we do not believe a distinction can properly be drawn between those cases in which payment of compensation has been approved, and the present case.

Section 8 Sub-section (a) of the Workmen's Compensation Act 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 proof here shows that the following bills were incurred and are unpaid:

Mercy Hospital, Champaign, Illinois.	**$58.70**
Dr. **John** H. Gernon..	70.00

The record further discloses that said bills are reasonable.

We therefore find that claimant is entitled to payment of said items under the provisions of the Workmen's Compensation Act, and we are of the opinion that the Commission is properly justified in recognizing and paying said claim in the sum of $128.70. No question of compensation is raised for temporary or permanent disability. Payment of the claim in the sum of $128.70 is recommended, same to be made by the Illinois Emergency Relief Commission out of any funds held by it and allocated for such purpose.

INDEX

PAGE

ABUTTING OWNERS—See DAMAGES

ADVISORY OPINIONS

to Illinois Emergency Relief Commission. 651

APPROPRIATIONS—Lapse of—See SUPPLIES—SERVICES — EXPENSES — MONEYS ADVANCED

BURDEN OF PROOF—See EVIDENCE

CHARITABLE INSTITUTIONS—PENAL IIVSTITUTIONS —See GOVERNMENTAL FUNCTION — NEGLIGENCE

conduct of, governmental function. 128, 300, 446
inmate of, though assigned to work, not within provisions of Workmen's Compensation Act. 446
State not liable for negligence of officers, agents, employees or inmates of, under any theory of law or equity. 128, 300, 446

CONSTITUTION

Section 19 of Article IV of Constitution of Illinois prohibits payment of any compensation, after services are rendered, in excess of that lawfully provided therefor.. 374
compensation awarded for extra work necessary to performance of contract, due to material misrepresentations in plans and specifications, prepared by State and forming part of not in violation of Section 19 of Article IV of Constitution. 423
the only liability of the State for damaging private property for public use is under Section 13 of Article 2 of the Constitution and the provisions thereof are self-executing. 580
words, private property in Section 13 of Article 2 of Constitution include personal property. 580

CONTRACTS

no breach of contract is shown, where there is no proof of any violation of the terms thereof by the party charged and no award can be made for any loss alleged to have been suffered in performance thereof.. 61

PAGE

as a matter of public policy, the State, when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract, resulting from its public and general acts as *a* sovereign.. 64

State within its sovereign rights and not liable for damages for breach of contract, in failing to furnish cement to contractor in construction of public improvement, where manufacturers of same fix and demand of it exorbitant and unconscionable prices therefor. 64

party who cancels contract which has been partly performed by other party, who is ready, able and willing to complete same, without any legal justification or excuse therefor is guilty of a breach thereof and liable for damages.. 178

work done in the performance of a contract is not extra work for which additional compensation may be had where the plans and specifications, forming part thereof provide for same 407

one undertaking to perform contract for State entitled to rely on, and State bound by plans and specifications, prepared by it and forming part thereof.. 423

where extra work is made necessary in performance of contract, due to material misrepresentations in plans and specifications, prepared by State and relied on by contractor and forming part of such contract, an award may be made for the reasonable value thereof.. 423

performance of contract delayed by failure of other contractor to complete preceding work does not constitute breach of contract by State, in absence of provision in contract. 522

CORPORATIONS—See FRANCHISE TAX

COURT OF CLAIMS—See JURISDICTION

DAMAGES

to unimproved and unsettled real estate, alleged to have resulted from construction of public improvement are not shown, ,where there is no proof that as the result of such construction, the fair, cash market value thereof was less just after completion of improvement than just prior thereto 136, 527

to private property, not taken for public use, resulting from construction of public improvement entitles owner to award for damages 205, 532, 542, 606

measure of damages, where private property, not taken for public use is damaged by reason of construction of public improvement, is the difference, if any, between the fair, cash, market value thereof just after completion of improvement and just before such construction.. .205, 517, 527, 532, 542, 606

PAGE

permanent interference with access to private property, is a proper element of damages in claims for damages by owners of private property, not taken for public use, due to construction of public improvement.. .....527, 532, 542, 606

proof of permanent interference with access not conclusive to right to an award for damages, and where there is no legal proof of a decrease in the fair, cash, market value of the property as the result of improvement, there is no legal damage within the meaning of the Constitution.. 527

what constitutes damage to private property, not taken for public use, within meaning of Constitution. 542, 606

direct physical injury to the corpus or subject of property not essential if it be proven that there is a direct physical obstruction or injury to the right of user or enjoyment, as the result of which the owner sustains some special pecuniary damage in excess of that sustained by the public generally 542, 606

obstruction of public street, affecting access to private property, resulting from construction of public improvement, need not necessarily be in front of or contiguous to same in order to constitute damage *to* property, if same directly produces a diminution of the value thereof. 542, 606

loss of or inconvenience to business suffered by owners or lessees of private property, not taken for public use, during progress of construction of public improvement, not damage to property within meaning of Constitution.. 542

Section 13 of Article 2 of the Constitution of Illinois provides the only liability of the State for damage to private property, not taken for public use and the provisions thereof are self-executing 580

words, private property in Section 13 of Article 2 of the Constitution of Illinois, include personal property. 580

discharge of water and sewage from State institution into stream on lands of private parties, causing pollution thereof. and resulting in injury to property is damage to property, within meaning of constitution.. 580

in claim for damages for injury to property, resulting from pollution of stream caused by discharge of water and sewage from, State institution, recovery is limited to damages up to time of filing claim.. 580

depreciation in value of real estate not proper element of damages in claim for injury to property, resulting from pollution of stream caused by discharge of water and sewage from State Institution 580

difficulty of ascertainment of exact amount of damages, does not bar award where there is legal evidence to support award. 580

PAGE

EQUITY AND GOOD CONSCIENCE

public utility tax, voluntarily paid cannot be recovered on grounds of 92
motor vehicle license fee—discontinuance of use of vehicle for which paid before or during period for which issued—no refund on grounds of. 121
no award can be made on grounds of equity and good conscience, where claim is based on the negligence of officers, agents or employees of the State, or any of its departments 189, 231, 243, 389, 420
where claim is based on negligence of officers, agents or employees of State, the extent or seriousness of the injuries or damage, the degree of negligence, or freedom of contributory negligence on part of claimant, will not justify an award on the grounds of equity and good conscience.. .... 189, 231, 243, 389, 420
the doctrine of respondeat superior, not being applicable to the State, there is no legal basis for a claim against it for negligence of its officers, agents or employees, therefore there is no basis for an award for damages for same under any theory of law or doctrine of equity.. .....189, 231, 243, 389, 420

ESTOPPEL

State not estopped from denying liability for payment of reasonable value of services rendered by one not lawfully appointed or employed to render same.. 110

EVIDENCE

claim must prove allegations of complaint by preponderance of evidence to justify award.. 61
where there is no proof of the violation of any of the terms of a contract by a party charged with a breach thereof, the evidence is insufficient to sustain charge or justify award, even though it be shown that claimant suffered a loss in the performance of the contract.. 61
in claims for compensation under Workmen's Compensation Act, the burden of proof is on claimant to show accident, within the Act and injuries resulting therefrom. .102, 221, 316, 321, 512
when the only evidence as to an accident and injury in a claim for compensation under the Workmen's Compensation Act, is the testimony of claimant, without any showing of past or present objective symptoms, claimant has failed to sustain such burden 102
where it clearly appears from creditable evidence that the symptoms and reactions alleged to have resulted from an accident and injury are substantially the same as complained of long before accident, evidence is insufficient to sustain claim for compensation under Workmen's Compensation Act. 102

PAGE

where there is no proof of a decrease of the value of private property, not taken for public use, alleged to have resulted from the construction of a public improvement, the evidence is insufficient to justify an award for any alleged damage 136, 527

when insufficient to sustain claim by State employee for mileage of automobile, owned by him and used in the performance of his duties, cost of maintenance and operation thereof being paid by State..... 197

in claims under Workmen's Compensation Act, claimant is not limited to evidence of disability alleged in complaint..... 221

infection with tuberculosis, resulting in disability—when evidence insufficient to show that disability was caused by accidental injury, arising out of and in the course of employment in claim for compensation under Workmen's Compensation Act 321

in the absence of fraud, oral testimony is inadmissible to vary terms of written contract..... 407

where medical testimony in claim for compensation under Workmen's Compensation Act, for partial loss of feet, alleged to have resulted from surgical operation, is that cause for which operation was performed existed prior to accident and was not occasioned thereby, evidence is insufficient to sustain claim 512

of depreciation of value of real estate not admissible in claim for damages resulting from discharge of water and sewage from State institution into stream on lands of private parties, causing pollution thereof and injury to their property.... 580

best competent evidence which the subject will admit is receivable to fix amount of damages.. 580

FEDERAL PROCESS TAX

not passed on to consumer is not recoverable where payer has remedy for refund in United States Court of Claims.. 361

FEES AND SALARIES

one not lawfully appointed or employed by State cannot have award for salary, even though services were! rendered. 110, 491, 634

Court reporter not entitled to salary earned after death of judge appointing him, as his term of office terminates on death of such judge 187, 492

one lawfully employed by State at a stipulated salary and rendering services for which employed, entitled to said salary, during term of employment. ..... .202, 251

one hired by State at a definite salary and who receives same without objection, as to amount, is not entitled to award for further compensation for same services. 374

PAGE

where employee agreed to accept and was paid salary, throughout entire biennium, less than amount appropriated for position he cannot have award for the difference after end of biennium 625
voluntary worker, not entitled to salary.. 634

FRANCHISE TAX

paid under mistake of law, cannot be recovered.. 78
voluntarily paid, though in excess of amount due, cannot be recovered 78, 195, 467, 610, 618
paid without protest and with full knowledge of, or opportunity to learn facts, is voluntary payment, and if in excess of amount due, such excess cannot be recovered. ...78, 610, 618
where remedy is afforded for determination of amount, failure avail self of bars recovery of amount in excess of that lawfully due 78, 618
paid before commencement of period for which due, is voluntary payment and cannot be recovered, even though corporation for which paid is dissolved before commencement of such period 271

GARNISHMENT

State or instrumentality of not subject to.. 456

GOVERNMENTAL FUNCTION

construction and maintenance of public highway is. 45, 100, 185, 397, 420
organization, maintenance and control of Illinois National Guard is 631
conduct of Charitable Institution is. 128, 300, 446
establishment and maintenance of public park is. 228
maintaining public office in State Capitol is.. 389

HIGHWAYS

construction and maintenance of public highways is a governmental function and the State is not liable to respond in damages for the negligence of its officers, agents or employees in such construction or maintenance.. .....115, 172, 185, 397
cutting and burning weeds along highway is maintaining of. .. 463

ILLINOIS LIQUOR CONTROL ACT—See LICENSE FEES

ILLINOIS NATIONAL GUARD

in the organization and maintenance of the Illinois National Guard the State exercises a governmental function and is not liable for damages resulting from the negligence of the officers or members thereof. 631

PAGE

JURISDICTION

making claim and filing application for compensation under Workmen's Compensation Act within time fixed in Section 24 thereof is a condition precedent to jurisdiction of Court in claims thereunder. 33, 122, 321, 507, 612
court without jurisdiction to make awards where claimant has remedy in courts of general jurisdiction and fails to avail self of 418, 610, 618, 632
court without jurisdiction to order payment of money due a person, from instrumentality of State, to another to whom such person is indebted, as neither State nor any instrumentality thereof can be subjected to garnishment, directly or indirectly 456

LICENSE FEES

motor vehicle registration fees—voluntarily paid cannot be recovered 119, 149, 443, 451
paid under mistake of law—cannot be recovered. 119, 149
cannot be recovered, in whole or part, where use of vehicle, for which issued is discontinued before beginning of, or during period thereof 121, 466
no provision in law authorizing refund, in whole or part, where use of vehicle is discontinued before beginning of, or during period for which paid.. 121
discontinuance of use of vehicle before beginning of, or during period for which issued and paid, does not justify an award for refund of fee on grounds of equity and good conscience.. 121
computed in accordance with law, based on information submitted by applicant, cannot be recovered, even though in excess of amount rightfully due. 149, 443, 454
Illinois Liquor Control Act—license fee voluntarily paid under, even though illegal, cannot be recovered. 418, 475, 632
failure of claimant to appeal from ruling of Illinois Liquor Control Commission, requiring him to obtain license under Act and pay fee therefor, deprives Court of jurisdiction to award refund, even though fee illegally exacted. 438
paid under mistake of law, cannot be recovered.. 475
discontinuance of sale of liquor, before expiration of period for which license is issued does not authorize refund of fee paid therefor, in whole or part. 475, 642
refund of license fees paid under Illinois Liquor Control Act, only authorized in event of contingencies enumerated therein 477, 632, 642
never engaging in business of selling liquor after procuring license and payment of fee therefor does not authorize refund 477
where remedy is provided in Courts of general jurisdiction for recovery of license fees, illegally exacted, failure to pursue same, bars award 632

PAGE

Illinois Liquor Control Commission has no authority to make refunds of license fees, after same have been paid into Treasury, its only powers in connection therewith, being to make recommendations for such refunds. 642
after payment of license fees into Treasury, sole legal power to make refunds is in Legislature and at its discretion. 642

LIMITATIONS

time within which to make claim for and file application for compensation under Workmen's Compensation Act governed by Section 24 of Act. ..... .33, 122
Section 10 of Court of Claims Act has no application in claims for compensation under Workmen's Compensation Act. 33
claim not filed within five years after same first'accrues, barred by Section 10 of Court of Claims Act. 490, 499
claims of Municipal Corporations against State governed by Section 10 of Court of Claims Act.. 499

MOTOR VEHICLE ACT—See LICENSE FEES

MUNICIPAL CORPORATIONS

when State collects moneys levied as tax to pay bonds of Municipal Corporation and makes unlawful deductions therefrom, an award for amount of such deductions may be made. 499
limitation provided in Section 10 of Court of Claims Act applicable to 499

NEGLIGENCE—See EQUITY AND GOOD CONSCIENCE

State not liable to respond in damages for the negligence of its officers, agents or employees, while in the exercise of a governmental function, under any theory of law or doctrine of equity 99, 128, 189, 228, 243, 389, 631
of officers, agents or employees of State in construction of highway, or in failing to maintain same in a safe condition for travel—State not liable to respond in damages for. 108, 243, 397, 420
charitable institutions—State not liable to respond in damages for negligence of officers, agents, employees or inmates thereof 128, 300, 446
equity and good conscience—award for damages for'negligence of officers, agents or employees of State, on grounds of, cannot be made, regardless of degree of negligence, freedom from contributory negligence or seriousness of injury or extent of damage 189, 231, 243, 389, 420
Local Board of Education—State not liable to respond in damages for negligence of officers, members, employees of. 603
Illinoig National Guard—State not liable to respond in damages for negligence of officers or members of.. 631

PAGE

NUISANCE

discharge of water and sewage from permanent, structures, into stream on lands of private parties, causing pollution thereof is a continuing and not permanent nuisance, as discharge and not structures causes the evil.. 580
a suit for damages resulting from the maintenance of a continuing nuisance and the abatement thereof by injunction are concurrent remedies. 580
damages resulting from **a** continuing nuisance are limited to those sustained up to time of filing claim.. 580
depreciation in value of real estate, not proper element in suit for damages for maintenance of continuing nuisance. 580

OIL INSPECTION FEES

where Statute applicable to contains provisions for refund, recourse must be had thereto and failure so to do, bars award for refund 174

PERSONAL INJURY — See NEGLIGENCE—RESPONDEAT SUPERIOR — EQUITY and GOOD CONSCIENCE

PLEADING

allegations of claim must be sufficient to justify award. 61
is insufficient to justify award for damages for breach of contract when no allegation of said breach is set forth therein. . 61
res adjudicata — when plea of is sufficient and will be sustained 187
complaint that fails to set forth cause of action will be dismissed 282
Workmen's Compensation Act—claim for compensation under must contain averments as to injuries sustained, medical expense incurred and time lost, as result of accident. 498

PRINCIPAL AND AGENT

one dealing with purported agent of the State it; bound to ascertain the fact of such agency and the extent of his authority 110, 634
where it is shown that one who employed persons to render services to a Department of the State had no authority so to do, the State is not liable for payment for such services in any amount 634

PROPERTY DAMAGE — See DAMAGES

PROTEST — See PUBLIC UTILITY TAX

PUBLIC IMPROVEMENTS — See DAMAGES

PAGE

PUBLIC UTILITY TAX

voluntarily paid, cannot be recovered. 90, 92
when payment of deemed voluntary, despite protest accompanying 90, 92
payment of under law subsequently declared unconstitutional, does not of itself justify award for refund.. 92
refund on grounds of equity and good conscience not justified where payment made voluntarily or under mistake of law.. . 92

REMEDIES IN COURTS OF GENERAL JURISDICTION

failure to pursue remedies provided by law in courts of general jurisdiction will bar award. 418, 610, 618, 632

RES ADJUDICATA

where claim for services has been fully adjudicated, the filing of another claim by one of the parties thereto against the other in a greater amount for the same services will not defeat a plea of res adjudicata and same will be sustained.. 187

RESPONDEAT SUPERIOR

doctrine of respondeat superior is not applicable to the State while in the exercise of its governmental functions. 45, 172, 228, 397

RETAILERS OCCUPATION TAX

refund of entire amount of Retailers Occupation Tax is justified under Section 6 of Retailers Occupation Tax Act, where such tax was not due from payer and where Department of Finance issued a credit memorandum for a part thereof. . . . 622

STATE OFFICERS

State's Attorney of Cook County is not a State officer and State is not liable for moneys advanced to him for expenses of returning fugitive to answer criminal charge. 282

STIPULATION

State bound by stipulation, not prohibited by Statute, entered into by Attorney General in conduct of litigation in which it is a party 423

SUPPLIES — SERVICES — EXPENSES — MONEYS ADVANCED

furnished to or expended for State and bill not presented before lapse of appropriation out of which could be paid — when award for value or amount of may be made.. . . . . 219, 381, 455, 577, 602

PAGE

WORKMEN'S COMPENSATION ACT

employees sustaining accidental injuries, arising out of and in course of his employment, while engaged in extra hazardous employment, entitled to compensation provided in Act, on compliance with provisions thereof.. .....1, 30, 152, 258, 310
finger—partial loss of use of—award for compensation justified 1, 30, 289, 337, 365
finger—loss of use of and temporary total disability—award for compensation justified. 117, 249, 335
Chicago State Hospital—one employed as attendant in—when entitled to benefits of Act.. 8
no provision in Act for partial loss of hearing. 11, 537
expense of medical treatment incurred by employee—when award for amount of is justified.. 18
death resulting from injuries, sustained by employee under, justifies award to dependents.. .....21, 86, 191, 291, 387
leg—partial loss of use of—award for compensation justified. 24, 350, 472
making claim for compensation and filing application therefor within time fixed in Section 24 of Act is a condition precedent to jurisdiction of Court to hear claims under. 33, 176, 321, 507, 629
Section 10 of Court of Claims Act has no application to claims for compensation by employees of State for accidental injuries 33, 176
medical, surgical or hospital services furnished employee by employer, not payment of compensation, nor admission by him of any liability for payment thereof.. .....33, 176
total temporary incapacity—compensation for justified, even though same does not immediately follow accidental injury, when directly traceable thereto. 38
leg—loss of—award for compensation justified. 48, 159
leg—the loss of any substantial portion thereof constitutes loss of leg within meaning of the Act.. 159
Department of Conservation—when employee of entitled to benefits of Act and award for compensation for injuries resulting in death, justified under. 52
Manteno State Hospital—one employed as attendant in—when entitled to benefits of Act.. 56
pre-existing disease—if employee afflicted with a disease sustains accidental injuries which aggravate or accelerate such disease, causing death therefrom, such death results from injury by accident and compensation may be had therefor. .56, 152
claimants and Court, both bound by provisions of Act. 81, 256
on payment of full compensation for injuries in accordance with Act liability of State therefor is completely satisfied 81, 256, 272
seriousness of injury is no basis or authority for payment of . additional compensation where full compensation has been paid in accordance with provisions of Act.. .....81, 256

PAGE

act in violation of orders of superior—injury sustained while so engaged—award for compensation may be made notwithstanding, where employee in so doing does not put himself out of the sphere of his employment, as such act merely constitutes negligence 86
burden of proof in claims under Act is on claimants. 102, 316
when the only evidence, as to an accident and injury is the testimony of claimant, without any showing of past or present objective symptoms, same is insufficient to prove accidental injury 102
where symptoms and reactions, alleged to have resulted from alleged accident are shown by creditable evidence, as being substantially the same as complained of long before accident, no award for compensation can be made.. 102
arm—permanent partial loss of use of—award for compensation justified 125
arm—permanent loss of use of—award for compensation justified 399
average wage of employee—when determined on basis of 200 working days in year. 125, 165, 249, 291
Act not applicable to all employees of State, but only those engaged in extra-hazardous employment. 131
Department of Finance not engaged in extra-hazardous enterprise, within meaning of Act.. 131
when employee of Department of Finance not entitled to benefits of 131
total temporary disability—award for justified.. .143, 221, 384, 537
total permanent disability—award for justified. 344, 365
failure or refusal of injured employee to submit to medical examination, does not of itself forfeit right to compensation. 143
where failure or refusal of injured employee to submit to medical examination tends to either imperil or retard recovery, court has discretion to reduce or suspend compensation. 143
Elgin State Hospital—one employed as attendant in—when entitled to benefits of. ..... .152, 307, 644
when conclusion is justifiable that attendant at Elgin State Hospital sustained an accidental injury, and that same arose out of and in the course of her employment.. 152
State penal institution—one employed as guard in—when entitled to benefits of 159
farm work—excepted from provisions of Act.. 181
employee of Animal Husbandry Department of Agricultural Experimental Station of State is engaged in farm work and not within Act. 181
eye—loss of—award for compensation justified under Act. .183, 296
before commencing work—injury sustained, resulting in death and when not on premises of employer—not accident arising out of and in the course of employment.. 236

PAGE

compensation that would have been payable for loss of hand suffered in prior accident must be deducted from award for compensation for partial loss of use of remaining part of arm, resulting from subsequent accident. 245

Eastern State Teachers College—teacher employed at—when entitled to benefits of 258

collateral heirs not entitled to compensation under Act when no proof of their dependency on earnings of employee is shown, as required in paragraph d of Section 7 thereof. 278

paragraph g of Section 7 of Act does not create class of beneficiaries, merely specifies manner of payment when there are beneficiaries under the provisions of paragraphs a, b, c, or d of said section.. 278

executor not entitled to compensation for death of employee, same being payable to his beneficiaries, specified in Act, if any 278

traumatic neurosis — disability resulting from — when compensable 311

infection with tuberculosis, resulting in disability, not proven to be accidental injury arising out of and in the course of employment 322

hand—permanent partial loss of use of—award for compensation justified 340, 342

pension—employee rendered wholly and permanently incapable of work as result of accidental injury, arising out of and in the course of employment while engaged in extra-hazardous employment entitled to compensation, including pension. 344, 365

injury sustained on premises of employer, while on way to wash room, during working hours deemed accident arising out of and in the course of employment.. 350

personal representative of deceased employee entitled to compensation under Act, accrued and unpaid at time of death of such employee 355

possible dormant disease, aggravated or accelerated by injury, resulting in total permanent disability, deemed accidental injury within meaning of Act.. 365

medical, surgical and hospital services, procured by employee—when State may be liable for expense of.. .....366, 376

lump sum settlement of compensation for death of employee, not authorized under Act where award therefor is made to widow, without children. 392

funeral expenses of employee, leaving no dependents—when award for amount provided in Act may be made to one paying same 394

inmate of State Charitable institution, though assigned to work therein not employee of State, within meaning of Act.. 446

claim for compensation must contain averments as to injuries sustained, medical expense incurred and time lost, if any, as result of accident.. 498

PAGE

only remedy available to employee for compensation from employer for personal injuries sustained while engaged in the performance of his duties is the Workmen's Compensation Act, and in order to obtain same he must bring himself within the terms thereof. 507

disfigurement—award for serious and permanent disfigurement to the hand, head, face or neck justified.. .....508, 537'

injury for which compensation sought must be result of accident, within meaning of Act.. 512

where medical testimony in claim for partial loss of use of feet, alleged to have resulted from surgical operation made necessary by accidental injury, is that cause for which, same was performed existed prior to accident and was not occasioned thereby, no award can be made therefor.. 512

partial paralysis of the face—no provision in Act for compensation for ..... 537'

accidental injuries, only, are compensable, under the Act. 620

appendectomy-disability resulting from not compensable under Act, when not the result of an accidental injury, but from an internal condition. 620